TO: Standards Review Committee,
ABA Section of Legal Education and Admissions to the Bar

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DATE: July 14, 2010

RE: May 5th draft of Student Learning Outcomes Standards

We make some drafting suggestions, explain some of medicine's experience adopting similar standards, discuss the cost issue, provide some relevant statistics, and comment on draft Standard 304.

Drafting Suggestions

Standard 302(b)(2) — The word "competency" appears both in the intro language and in (b)(2). In (b)(2), the words "competency in" are redundant and can be deleted.

Standard 303(a) — The phrase "at least," tucked where it is now at the end of the intro language, will be overlooked by many readers. And it isn't intended to apply anyway to (a)(1) or the first part of (a)(2). The drafting intent would not have been to apply "at least" to (a)(1) because very few schools, if any, require more than one professional responsibility course, and there seems to be a consensus that one course is sufficient. The location of "at least" in (a)(2) suggests that it applies only *after* the first year, and placing the phrase in the intro language produces ambiguity about whether it applies *within* the first year as well. The only subsection to which the intro "at least" really applies is (a)(3), and that's where it ought to go. This can be accomplished with a single strike-out (at the end of the intro language) and a single insertion (at the beginning of (a)(3)):

> (a) A law school shall offer a curriculum that is designed to produce graduates who have attained competency in the learning outcomes identified in Standard 302 and which, in addition, requires every student to complete satisfactorily ~~at least~~:
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> (1) one course in professional responsibility;
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> (2) one faculty supervised, rigorous writing experience in the first year and at least one additional rigorous writing experience after the first year; and
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> (3) at least one appropriately supervised learning experience after the first year that engages students in performances of professional skills involving a type of case or problem that practitioners encounter. The learning experience shall be (i) a simulation course, (ii) a live client clinic, or (iii) a field placement complying with Standard 305(e).

Standard 303(a)(3) — Every skills teacher we know who has seen this language has been startled by it. The words invite schools to satisfy themselves with a single experience involving "a type of case or problem" even though one course could not possibly produce 302(b)(2)(iii)'s required competency in "a depth and breadth of other professional skills sufficient for effective, responsible and ethical participation in the legal profession." The 303(a)(3) wording thus undermines 302(b)(2)(iii) by implying that one experience can do what it can't. The only way students can acquire competence in "professional skills sufficient for effective, responsible and ethical participation in the legal profession" is through multiple supervised learning experiences.

Others also have argued strongly that the substance of (a)(3) should be changed. If our arguments and theirs fail to persuade the Committee, we think that (a)(3) should be deleted entirely to prevent its undermining 302(b)(2)(iii). If it stays in the next draft, the worst part of it — the phrase "involving a type of case or problem" — should be deleted.

As a pure drafting matter, unrelated to substance, the parenthetical enumerations — (i), (ii), (iii) — are unnecessary to clarify a simple list. The enumerations can be deleted.

Interpretation 303-2 — Almost everyone we know who has seen the May 5th draft is baffled by the phrase "qualified assessor." No one seems to know what it means. An ambiguity that attracts so much notice now is certain to cause enforcement problems later, when site teams and the Accreditation Committee have to scratch their heads over it. Does it mean "a faculty member qualified to do so"? If so, those words could be substituted for "qualified assessor."

Interpretation 303-4 — The word "should" here is ambiguous. There seems to be no reason why the contents of this Interp would be anything other than real requirements —

although "should" suggests that they are not. Because the Standards do not include a definition of "should," that word causes confusion wherever it appears because the degree of imperative is unclear. The medical school accreditation standards are precise about this, and their introduction notes that

> . . . the words "must" and "should" have been chosen with great care. The difference in terminology is slight, but significant. Use of the word "must" indicates that the LCME considers meeting the standard to be absolutely necessary for the achievement and maintenance of accreditation. Use of the word "should" indicates that compliance with the standard is expected in the absence of extraordinary and justifiable circumstances that preclude full compliance.[1]

The ABA Standards contain no such definition. The ambiguity can be avoided in 303-4 simply by deciding that its contents are real requirements and by substituting "shall" for "should."

Standard 304 — The changes in this draft standard are deeply troubling. We discuss them later in this memo.

Phase-In Schedule — Perhaps inadvertently, the last page of the current draft seems to imply that a phase-in schedule would be devised outside the Standards Review Committee and separately from proposed standards. Standards content and a phase-in schedule are necessarily part of the same package. In legislatures, committees report out bills with effective dates already in them. As these standards move closer to adoption, the people affected by them may worry needlessly if they don't know how much time they would have to come into compliance. We hope that the Committee proposes a timetable at the same time it reports out the standards.

History of the Medical School Learning Outcomes Accreditation Standards

Because of comments the Committee has received (and likely will continue to receive), it may be helpful to recount the history of learning outcomes standards in medical school accreditation. If medicine is the benchmark against which education in the other professions is measured, it might help to know whether legal education compares favorably.

This year's Carnegie report on medical schools notes that for a century (since the 1910 Flexner Report on medical education) "medicine has served as the 'model profession,' and

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1. *Functions and Structure of a Medical School: Standards for Accreditation of Medical EducationPrograms Leading to the M.D. Degree* at http://www.lcme.org/pubs.htm.

most other professions and forms of professional education have been interpreted through the lens of medicine."[2] The accrediting authority for medical schools is the Liaison Committee on Medical Education (LCME). The title and website location of the medical school standards appear in footnote 1. The medical school equivalent of our AALS is the Association of American Medical Colleges (AAMC).

In 1985 the LCME adopted a requirement that a medical school "must define its objectives and make them known to faculty and students."[3] In 1991, the LCME amplified that requirement by inserting this into the medical accreditation standards (our italics):

> Medical schools must evaluate education program effectiveness by documenting the achievements of students and graduates in verifiable and internally consistent ways that show the extent to which institutional and program purposes are met. Medical schools should use a variety of measures to evaluate program quality such as data on *student performance/achievement,* acceptance into residency programs, *postgraduate performance* and licensing . . . .[4]

In the medical school standards in effect today, this wording has been toughened and expanded.[5]

Rather than oppose requirements like these, medical schools — and their deans and their version of AALS — embraced them. Complying with the 1991 amendments required curricular revisions that many medical schools took years to accomplish.[6] But the AAMC and medical school deans endorsed these efforts and supported them.

In 1996, the AAMC began the Medical Schools Objectives Project (MSOP).[7] "During the initial phase of the MSOP, a consensus was reached among leaders of the medical education community on the attributes that physicians need to meet society's expectations

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2. Molly Cooke, David Irby & Bridget C. O'Brien, *Educating Physicians: A Call for Reform of Medical School and Residency* viii-ix (2010) (Carnegie Foundation for the Advancement of Teaching, Preparation for the Professions).

3. AAMC, *Report 1: Learning Objectives for Medical Student Education: Guidelines for Medical Schools* 2 (1998) (quoting the language inserted by the LCME into the 1985 accreditation standards).

4. Quoted in David G. Kassebaum, Ellen Cutler & Robert Eaglen, *The Influence on Accreditation on Educational Change in U.S. Medical Schools*, 72 Academic Medicine 1127, 1130 (1997).

5. *Functions and Structure of a Medical School, supra* note 1, ED-1, ED-1-A, ED-2, ED-3.

6. David G. Kassebaum & Robert Eaglen, *Shortcomings in the Evaluation of Students' Clinical Skills and Behaviors in Medical School,* 74 Academic Medicine 842 (1999).

7. AAMC, *Report 1, supra* note 3, at 1.

of them in the practice of medicine."[8] In 1998, the AAMC issued a consensus report[9] itemizing four categories totaling 30 learning outcomes needed to produce a competent doctor.

The AAMC took the lead in building that consensus. The AALS might end up playing a similar role in legal education. But compared with what the AAMC did, the AALS's June 1 letter to the Consultant is not a constructive beginning in this respect.

A 1997 survey of medical school deans and others in leadership positions in medical education, as well as some students, residents, and practicing physicians, found that the LCME's "44 accreditation standards applied to teaching, learning, and evaluation" "are believed to be important by those most affected by them," although those who must comply with the standards desired more precision in their wording.[10] (The LCME has since then redrafted many standards for clarity.) The 1997 survey did not report any other complaints by medical school deans about accreditation.

We have found no published claims by anybody that the medical school accreditation standards "micro-manage" or impose a "one-size-fits-all" template on medical schools. Among the professions with characteristics that require licensure, that rhetoric occurs only in legal education.

Even though medical school accreditation standards are far more demanding than any in effect or contemplated within the ABA, no article complaining that medical education is over-regulated by accreditation could be found through searches of the online archives of *Academic Medicine*, the *New England Journal of Medicine*, and *JAMA* (formerly the *Journal of the American Medical Association*). Nor could any evidence of similar complaints be found on the websites of organizations concerned with medical education.

In 2004, the AAMC's Ad Hoc Committee of Deans issued a report recommending costly improvements in medical clinical education.[11] The deans included this among their goals (our italics):

> To insure that learners have acquired and possess throughout their careers the knowledge, skills, attitudes, and values needed to be a competent

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8. *Id.* at 4.

9. *Id.*

10. David G. Kassebaum, Ellen Cutler & Robert Eaglen, *On the Importance and Validity of Medical Accreditation Standards,* 73 Academic Medicine 550, 556, 562 (1998).

11. AAMC Ad Hoc Committee of Deans, *Educating Doctors to Provide High Quality Medical Care: A Vision for Medical Education in the United States* (2004).

> physician . . . the system will [among other things]:
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> - *base graduation* from undergraduate [M.D.] and graduate [residency] programs *on learners' ability to demonstrate* that they have acquired the learning objectives set forth in their programs
>
> - *base accreditation* of undergraduate [M.D.] and graduate [residency] programs on the programs' *documentation that learners have acquired* in a developmentally appropriate manner the learning objectives set forth [12]

What would be the analog in legal education to this committee of deans, this report, and this recommendation?

The Cost Issue

Over the past six months, arguments have been made that the Subcommittee's draft standards should be watered down because otherwise they would raise the cost of legal education. The arguments that have been in public do not analyze the proposed requirements in dollar terms. No one in public has tried to demonstrate — with hard numbers in dollars — just exactly how a law school's budget would grow permanently.

The cost argument is based on at least two assumptions: that in the long run schools would have to expend many more resources than they do now, and that the extra effort would cost vast sums of money. Like many other unexamined assumptions, these don't survive scrutiny.

Assumptions About Money

The cost argument assumes that the draft standards can be satisfied only by doing something *extra* — something in addition to what faculties do now. Of course, there will be temporary transition costs, but once schools have adapted, the net effect could be that schools do not expend much more resources than they do now. They could spend the same resources, but differently.

The draft standards would require us as faculties to become more pedagogically efficient in the sense of improving the ratio of effort to results. It is axiomatic in business that where a work force that has been doing pretty much the same thing for decades, abundant opportunities for efficiency gains likely exist but are being ignored because the work force has settled into habits it does not want to change.

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12. *Id.* at 8 (italics added).

Teaching and exam practices in casebook courses are not significantly different now from what they were when we were students, and they have never been subjected to rigorous efficiency analysis (whether the ratio of effort to results can be improved). We don't even know whether our exams accurately measure what we assume they test. No published study has ever determined whether the typical law school exam is a valid and reliable method of measuring learning. Skills teaching has grown in legal education over the past few decades, but we have no empirical basis for believing that the most common forms of skills teaching are effort-to-results efficient.

In the face of this ignorance about our own efficiency and the extent to which it might be improved, the cost argument and the dollars assumption are perplexing — all the more so because they were *not* made in medicine when its accrediting authority adopted tougher standards than are being considered here.

The cost argument also assumes that schools are already allocating their resources in ways that best provide for student needs. That assumption ignores the elephant in the room.

The "Involuntary Fee"

The 2007 Accreditation Policy Task Force Report pointed out that

> Law schools are unusual among graduate and professional schools in that the majority of research and service in many law schools is funded by tuition. The tuition that is used to cover legal research is, for many students, the equivalent of an involuntary fee that they must pay in order to obtain law instruction and a law degree. . . .
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> . . . Assuming that there are benefits to society from this research, it is not clear what law students receive from their schools' research missions. Some believe that research contributes to better teaching , but the studies have not consistently demonstrated such a correlation.[13]

What does this fee amount to in dollar terms?

We can get an approximate idea by deriving numbers for three hypothetical schools from the 2009-2010 SALT Salary Survey.[14] In the table below, School A's salaries are the average of the ten highest-paying schools for which SALT has complete data. (Schools with any "N/A"s are excluded because SALT doesn't differentiate between "not applicable" and

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13. ABA Section of Legal Education and Admissions to the Bar, *Report of the Accreditation Policy Task Force* 7-9 (2007).

14. *SALT Equalizer,* June 2010.

"not available.") School C's salaries are the average of the ten lowest-paying schools for which SALT has complete data. School B's salaries are exactly halfway between School A's and School B's.

A typical estimate is that throughout legal education 30% to 50% of a faculty member's job is to write and publish scholarship. Using the high and low ends of that estimate (30% and 50%), here are the dollar amounts that could be considered the cost of faculty scholarship according to faculty rank.

	professor	***assoc. prof.***	***asst. prof.***
School A			
average salary	$ 176,517	$ 129,725	$ 117,422
research @ 50%	$ 88,259	$ 64,863	$ 58,711
research @ 30%	$ 52,955	$ 38,918	$ 35,227
School B			
average salary	$ 147,965	$ 112,465	$ 101,190
research @ 50%	$ 73,983	$ 56,233	$ 50,595
research @ 30%	$ 44,390	$ 33,740	$ 30,357
School C			
average salary	$ 119,413	$ 95,204	$ 84,958
research @ 50%	$ 59,707	$ 47,602	$ 42,479
research @ 30%	$ 35,824	$ 28,561	$ 25,487

In estimating the resources tied up in faculty scholarship, the meaningful numbers are in the full professor column. The overwhelming majority (84%) of tenure-track faculty nationally are full professors. Only 12% of tenure-track faculty are associate professors, and only 4% are assistant professors.[15]

15. *Computed from AALS Statistical Report on Law Faculty 2008-2009* at http://www.aals.org/statistics/2009dlt/security.html. When off-tenure-track faculty with professorial job titles are added to the statistics, the total proportions become 69%, 19%, and 12%. But faculty off the tenure track typically are not

If the average full professor at School A publishes one law review article per year, that article would cost somewhere between $ 52,955 and $ 88,259 in salary. That, however, understates the true cost. At many schools, that professor could have received additional pay, in the form of a research grant, to write the article. SALT has no data about research grants, and they aren't in the table above. Nor are fringe benefits. Although SALT has data about them, it doesn't separate those that are proportional to salary (retirement contributions) from those that aren't (insurance). If the missing numbers (retirement and the possibility of a research grant) were factored in, that article might cost over $ 100,000. And if the professor publishes less frequently — say, two articles in three years — each article costs even more money because more salary has been used to pay for it.

That's a lot more than the cost of an article by an assistant professor at School C. But even that article would represent a substantial expense: $ 25,487 to $ 42,479 plus fringes proportional to salary as well as a possible research grant. And that's the price for one article per year. At a slower rate of production, each article would cost more.

School A is not necessarily a resource-rich school. Of the ten schools that provided the highest complete numbers to SALT — and were averaged to produce School A — *none* are ranked in the top 25 by U.S. News. The wealthiest schools are missing from the numbers in the table because they tend not to respond to the SALT survey, and when they do, the published data usually includes at least one "N/A."

Thus, the numbers in the table are from schools that tend to have tuition-driven budgets. The dollar numbers in the table are being paid by students for those articles. Because students are not familiar with law school budgets — and the large role faculty salaries play in those budgets — students and graduates are not aware that part of their debt was incurred to pay faculty to write law review articles.

Students are also not aware of how little teaching gets done to free up faculty to write those articles. When we were students ourselves, typical teaching loads were four or five courses a year. Now many faculties have lobbied successfully to teach three courses a year — so they can write more articles.

Does this happen in other professions?

It certainly does not in the benchmark profession, medicine. In medical schools, tuition provides less than 4% of revenue. Here are the national revenue sources for fully

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required to publish scholarship.

accredited medical schools for FY 2007, 2008, and 2009:[16]

	FY 2007	*FY 2008*	*FY 2009*
tuition & fees	3.3	3.4	3.5
grants & contracts	29.4	28.8	28.5
faculty practice plans & hospital-related revenue	52.2	52.3	53.0
endowment & gifts	4.5	5.0	4.7
other	10.5	10.6	10.3

Medical faculty research costs (including salaries) are paid for through grants and contracts awarded by outside organizations that have been persuaded that the research is worth the expense in improving medical care. The leading grantor is the federal government's National Institutes of Health, and the contracts mostly come from corporations. Student tuition, a tiny part of a medical school's budget, pays for none of it.

Those whose interests are threatened by a comparison with medicine will object that "legal education is different from medical education." Medicine *is* different — but not in any way that would suggest that law shouldn't be compared with medicine's benchmark. Medicine, as we explained above, developed some time ago a broad and deep consensus that tough outcome assessment accreditation standards are essential for the public interest — and each of us who goes to a doctor is better off for that. No lobby in medicine complains about "micro-management" or "one-size-fits-all" accreditation standards. Medical students do not pay (and don't incur debt to pay) an involuntary fee for faculty research. Medical faculty research is instead paid for by outside organizations such as NIH — but only when medical faculty demonstrate to those organizations that the research would be worth the investment. And medical faculties produce research that directly assists the diagnosis and treatment of disease, and their ultimate consumer is the physician or surgeon who treats every one of us.

Law review articles, on the other hand, are read primarily by law faculties. No one other than students would pay for them. And students have no choice in the matter. Legislatures, courts, and the bar are not regular consumers of law review articles. Court citation rates to law review articles have nose-dived because, as Patricia Wald of the D.C.

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16. AAMC, *Revenue of U.S. Medical Schools by Source*, at http://www.aamc.org/data/finance/2009tables/fy2009msft.pdf.

Circuit long ago wrote, "My experience teaches . . . that too few law review articles prove helpful in appellate decision making. They tend to be too talky, too unselective in separating the relevant from the irrelevant, too exhaustive, too exhausting, too hedged [or] strive too hard for innovation or shock effect at the expense of feasibility or practicality."[17]

Like the 2007 Accreditation Policy Task Force, James Maule of Villanova has questioned "why law students should subsidize legal scholarship."[18]

> Members of Congress rarely, if ever, read the academic journals. Administrative agencies rely on those practicing in front of them or submitting comments, and rarely does a law review article turn up as an agency submission. Judges turn to the law reviews with ever-decreasing frequency. Practitioners subscribe to services that keep them current in the law, which means that their subscriptions to academic journals has withered away to de minimis numbers.
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> . . . So much of today's "dead" legal scholarship plays upon a theoretical landscape offering impractical ideas that it's no wonder the judiciary finds less and less value in the pages of the academic journals. . . .
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> . . . Not long ago, a professor from another school came here to present a paper. The issue was important, the analysis was interesting, but for me the paper ended too soon. I asked the author if the goal was to produce something to guide legislatures in framing a statutory solution, to help judges decide the seemingly inevitable case, or to provide practitioners with arguments and planning approaches to use in litigation and planning work. The answer floored me. "I'm not writing for them. I'm writing for other scholars." I bit my tongue. I wanted to ask, "On whose dime?" Why should law students undertake debt in order to fund this sort of production? The answer, of course, is that they are easy targets, riding on a bubble of education debt that made it a no-brainer to increase law school tuition every year to fund more and more faculty scholarship as average teaching loads declined, made possible by expanding the size of law school faculties.

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17. Patricia M. Wald, *Teaching the Trade: An Appellate Judge's View of Practice-Oriented Legal Education*, 36 J. Leg. Educ. 35, 42 (1986). See Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 Mich. L. Rev. 34 (1992); Judith S. Kaye, *One Judge's View of Academic Law Review Writing*, 39 J. Leg. Educ. 313, 318-320 (1989); Adam Liptak, *When Rendering Decisions, Judges Are Finding Law Reviews Irrelevant*, N.Y. Times, March 19, 2007, at A8.

18. James Edward Maule, *Law Schools, Teaching, Legal Scholarship, and the Economy, MauledAgain* Blog, March 27, 2009, at http://mauledagain.blogspot.com/2009_03_01_archive.html.

The real issue is not whether the draft standards would impose new costs. Instead, it's whether schools would be able to meet outcomes assessment responsibilities by reallocating resources to benefit students more directly.

In World War II, when fuel and other resources were scarce and needed for the war effort, people who wanted to travel for personal reasons were often asked "Is this trip really necessary?" A poster with a similar question appeared in train stations and elsewhere where transportation could be bought.

Legal education makes no effort to ration the resources that go into law review articles — even though students are paying for them and almost nobody outside academia reads them. In fact, faculties often lobby for *more* resources, in the form of reduced teaching loads, so they can write *more* articles. Erwin Chemerinsky has written that "if law professors wrote much less, teaching loads could increase, faculties could decrease in size, and tuition could decease substantially."[19] The context for that is that our "[t]eaching loads are light compared with many other departments in universities."[20]

Of the law review articles published every year, what proportion truly add to what we know (and need to know) about law, lawyering, or professional education? Reasonable people can disagree with each other about the proportion — but it is not 100%. At many schools, faculty compensation is the biggest item in the budget, and at others it's a close second. Even if 80% of articles turn out to be worth the student money it took to write them, the remaining 20% represent a very expensive inefficiency.

Outcomes assessment is not per se an added expense to be passed on to students. Publishing slightly fewer articles than before allows a reallocation of resources so that students' money is spent instead on work that directly benefits them.

If School A, for example, protests that it can't spend $50,000 or $100,000 or $150,000 on temporary transition costs to create a new system of formative assessments, that claim is balderdash. A faculty of professional teachers already has the intellectual assets to learn about, master, and practice the art of formative assessment, if only it were to redirect some small part of its effort from law review articles to pedagogical development. And if afterward that faculty were to produce slightly fewer articles per year, it would have ample time and teaching resources to perform all the assessment the toughest accreditation standards might

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19. Erwin Chemerinsky, *Why Write?*, 107 Mich. L. Rev. 881, 881 (2009). Chemerinsky concludes that articles are worth writing, although not necessarily all of them.

20. *Id.* at 882.

require.

Where a medical faculty member has research responsibilities, the portion of salary allocated to research is paid from grants or contracts, which the faculty member is supposed to obtain from outside sources like NIH. If that faculty member has not obtained a grant or contract, he or she might not be paid some or all of the research portion of the salary. At many medical schools, tenure does not guarantee the entirety of any particular salary.[21] To earn a complete salary, many medical faculty members must persuade outsiders to pay for their research.

There's no such limiting factor in legal education. We write law review articles on whatever subjects interest us. We're paid to do so automatically, at most schools out of tuition (the involuntary fee imposed on students). We write because we find it fulfilling and because the system incentivizes it. Merit pay increases are based largely on scholarly productivity.

In times of scarcity, some old habits can no longer be supported as generously as before. Unlimited production of law review articles may be one such habit. If accreditation requirements happen to cause schools to spend more of students' money directly on student needs, that would not diminish legal education. More likely, it would improve it.

Different schools will find different ways of resolving the cost issue. Some might do so without reducing their scholarly output appreciably. The cost issue is not a barrier to solid outcomes assessment standards.

No School Needs To Pay All Its Own Transition Costs

To create acceptable methods of assessment, schools will inevitably collaborate with each other to share development costs. They may do so on an ad hoc basis or in a more coordinated way facilitated by national legal education associations. The AAMC played an important role in medicine, and the AALS is capable of doing so in law.

Although it might be embarrassing to be the last form of professional education to adopt learning outcome standards, there is one advantage in being last. Everyone else has already figured out how to do it, and we can adapt their learning assessment methodologies

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21. AAMC, *The Relationship Between Tenure and Guaranteed Salary for U.S. Medical School Faculty*, 9 Analysis in Brief #6 (2010).

to legal education. Among the fertile sources are medicine[22] and architecture.[23]

Draft Standard 3 04
Individual Assessment of Student Learning Outcomes

The Subcommittee's first draft, in September 2009, contained a carefully thought out provision on assessment of learning outcomes. With one exception, that provision's substance continued intact through the October and January drafts. The exception was a requirement for validity and reliability. The September 2009 draft contained this sentence in Standard 303(a):

> **Consistent with sound pedagogy, the assessment activities must employ a variety of valid and reliable measures systematically and sequentially throughout the course of the students' studies.**

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22. These are from the legal literature: Jayne W. Barnard, *Assessment of Clinical Skills in Medicine and Law*, The Bar Examiner, Aug. 2004, at 18; David A. Binder & Paul B. Bergman, *Taking Lawyering Skills Training Seriously*, 10 Clinical L. Rev. 191 (2003) (medical schools have reorganized their curricula around learning-assessable skills rather than the "case rounds" structure on which law school clinical education is based); Lawrence M. Grosberg, *Medical Education Again Provides a Model for Law Schools: The Standardized Patient Becomes the Standardized Client*," 51 J. Leg. Educ. 212 (2001).

The following — published in the last 18 months — are only a small sample of the huge and rich empirical literature medical education has generated over the past 20 years on techniques for learning outcomes assessment: Bruce J. Bellande, Zev M. Winicur & Kathleen M. Cox, *Commentary: Urgently Needed: A Safe Place for Self-Assessment on the Path to Maintaining Competence and Improving Performance, 85* Academic Medicine 16 (2010); Patricia A. Carney, Rebecca Rdesinski, Arthur E. Blank, Mark Graham, Paul Wimmers, H. Carrie Chen, Britta Thompson, Stacey A. Jackson, Julie Foertsch & David Hollar, *Utility of the AAMC's Graduation Questionnaire to Study Behavioral and Social Sciences Domains in Undergraduate Medical Education*, 85 Academic Medicine 169 (2010); Latha Chandran, Maryellen Gusic, Constance Baldwin, Teri Turner, Elisa Zenni, J. Lindsey Lane, Dorene Balmer, Miriam Bar-on, Daniel A. Rauch, Diane Indyk & Larry D. Gruppen, *Evaluating the Performance of Medical Educators: A Novel Analysis Tool to Demonstrate the Quality and Impact of Educational Activities*, 84 Academic Medicine 58-66 (2009); David M. Fetterman, Jennifer Deitz, Neil Gesundheit, *Empowerment Evaluation: A Collaborative Approach to Evaluating and Transforming a Medical School Curriculum*, 85 Academic Medicine 813 (2010); Marianne Green, Amanda Zick, John X. Thomas, *Commentary: Accurate Medical Student Performance Evaluations and Professionalism Assessment*, 85 Academic Medicine 1105 (2010); Karen E. Hauer, Andrera Ciccone, Thomas R. Henzel, Peter Katsufrakis, Stephen H. Miller, William A. Norcross. Maxine A. Papadakis & David M. Irby, *Remediation of the Deficiencies of Physicians Across the Continuum From Medical School to Practice: A Thematic Review of the Literature*, 84 Academic Medicine 1822 (2009); Edward Krupat & Jules L. Dienstag, *Commentary: Assessment Is an Educational Tool,* 84 Academic Medicine 548 (2009); Stephen J. Lurie, Christopher J. Mooney & Jeffrey M. Lyness, *Measurement of the General Competencies of the Accreditation Council for Graduate Medical Education: A Systematic Review,* 84 Academic Medicine 301 (2009); Anne C. Nofziger, Elizabeth H. Naumburg, Barbara J. Davis, Christopher J. Mooney, Ronald M. Epstein, *Impact of Peer Assessment on the Professional Development of Medical Students: A Qualitative Study, 85* Academic Medicine 140 (2010); Joan Sargeant, Heather Armson, Ben Chesluk, Timothy Dornan, Kevin Eva, Eric Holmboe, Jolcelyn Lockyer, Elaine Loney, Karen Mann, Cees van der Vleuten, *The Processes and Dimensions of Informed Self-Assessment: A Conceptual Model*, 85 Academic Medicine 1212 (2010); Haruka M. Torok, Dario Torre, Dario & D. Michael Elnicki, *Themes and Characteristics of Medical Students' Self-Identified Clerkship Learning Goals: A Quasi-Statistical Qualitative Study*, 84 Academic Medicine S58 (2009).

23. See Donald Schön, *The Reflective Practitioner: How Professionals Think in Action* (1983) and Donald Schön, *Educating the Reflective Practitioner* (1987).

The October draft preserved this in slightly different wording but with no change in substance:

> **(a) In assessing student learning outcomes, a law school shall . . . (2) employ a variety of valid and reliable assessment methods, consistent with sound pedagogy, systematically and sequentially throughout the course of the students' studies . . . .**

In the January draft, the requirement for validity and reliability disappeared. Here is the January draft's provision governing individual student learning outcome assessment:

> Standard 304. **Assessment of Learning Outcomes and Institutional Effectiveness**
>
> **(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.**
>
> . . .
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> **Interpretation 304-1**
> *Assessment activities and tools are likely to be different from school to school and law schools are not required by Standard 303 to use any particular activities or tools.*
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> *Learning and other outcomes should be assessed using tools both internal to the law school and external to the law school. The following internal tools, when properly applied and given proper weight, are among the tools generally regarded to be pedagogically effective to assess student performance: completion of courses with appropriate assessment mechanisms, performance in clinical programs, performance in simulations, preparation of in-depth research papers, preparations of pleadings and briefs, performance in internships, peer (student to student) assessment, compliance with an honor code, achievement in co-curricular programming, evaluation of student learning portfolios, student evaluation of the sufficiency of their education and performance in capstone courses or other courses that appropriately assess a variety of skills and knowledge. The following external tools, when properly applied and given proper weight, are among the tools generally regarded to be*

> *pedagogically effective: bar exam passage rates, placement rates, surveys of attorneys, judges, and alumni, and assessment of student performance by judges, attorneys or law professors from other schools.*

In the May draft, even that has been gutted. Gone is the requirement in prior drafts that a school "determine the pedagogical effectiveness of the assessment activities" (previously in 304(a)(1)). Gone, too, is the requirement that a school assess students individually "about the attainment of its learning outcomes" (also previously in 304(a)(1)). Here is all that remains:

> Standard 304. **Assessment of Student Learning**
>
> **A law school shall apply a variety of formative and summative assessment methods across the curriculum to provide meaningful feedback to students.**
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> **Interpretation 304-1**
> *Formative assessment methods are measurements at different points during a particular course or over the span of a student's education that provide meaningful feedback to improve student learning. Summative assessments methods are measurements at the culmination of a particular course or the culmination of any part of a student's legal education that measures the degree of student learning.*
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> **Interpretation 304-2**
> *A law school need not apply a variety of assessment methods in each individual course; instead a law school shall apply a variety of assessment methods and activities over the course of a student's education. Assessment methods are likely to be different from school to school and law schools are not required by Standard 304 to use any particular activities or tools.*

The May 5 draft — the one above — sets out only three requirements.

First, a school would have to use summative assessments across the curriculum. All schools already satisfy this requirement because they use summative assessments to determine grades.

Second, a school would also have to use formative assessments across the curriculum. Skills courses already include formative assessments because student performances are critiqued during the course. This is nearly universal in clinical, legal writing, and simulation teaching. In a casebook course, a teacher who doesn't already give a mid-term exam might need to add one.

Third, these assessments would have to "provide meaningful feedback to students." This would not require any changes in skills courses. Meaningful feedback is a hallmark of skills teaching. In a casebook course, a teacher who does not already provide a post-exam model answer or its equivalent might need to do so.

The only effect of all this would be to require mid-term exams and model answers.

A school would not be required to assess whether individual students are attaining the school's learning outcomes. That requirement was deleted in the May draft.

Nor would a school be required to use valid and reliable methods of assessment. It appears that this requirement was deleted because of the cost argument. We've explained above why that argument should not prevent requirements like this. And no individual school would have to pay for validity and reliability studies. Once any given assessment method's validity and reliability have been established, that assessment method could be used throughout legal education. It remains only to coordinate the validity and reliability studies and spread the costs among law schools. Using the AAMC's involvement as a precedent, AALS is surely capable of organizing a consortium to do this. If AALS declines to do it, law schools are capable of organizing their own consortium or consortiums.

A school would not even have to determine the pedagogical effectiveness of its assessment methods. That requirement was deleted in the May draft. A school would be free to use any assessment methods that *seem* meaningful, even if the school has no empirical evidence of pedagogical effectiveness.

There may be more than one explanation for why some in legal education wanted this draft standard gutted. An uncharitable view is that the earlier drafts, if adopted, would have raised uncomfortable issues about whether schools really do accomplish what they say they accomplish, and those drafts would have required some faculty to spend more time and effort with student learning than they might like. A charitable view, on the other hand, is that reasonable faculty might fear what at the moment is unknown to them (even though they are capable of learning, as others have, new pedagogical skills). Although we prefer the charitable view, neither explanation justifies gutting this standard.

In its July 1 comments, CLEA explains why the current 304 language "sets the bar so low as to be meaningless." We strongly agree.

If the language in the May draft is adopted, a school would be able to use any assessment methods it finds convenient without having to prove that those methods measure anything accurately. The current language requires only that schools go through the motions of assessing, and many schools will do just that, making some superficial efforts to satisfy the ABA.

We believe that the current 304 language undermines the learning outcomes standards *as a whole* so thoroughly that adopting the entire package of standards might not be worth the effort.