

Comments submitted by American Bar Association, Section on Legal Education and Admission to the Bar, Committee on Clinical Skills

to the

American Bar Association, Section on Legal Education and Admission to the Bar, Standards Review Committee

on

Student Learning Outcomes Draft for January 8-9, 2010 Meeting
Prepared by the Student Learning Outcomes Subcommittee

The American Bar Association, Section on Legal Education and Admission to the Bar, Committee on Clinical Skills (“the Committee”) continues to endorse the efforts of the Standards Review Committee (“SRC”) to incorporate additional student learning outcome measures and assessment tools into its accreditation Standards. On October 5, 2009, we submitted written comments to the September 13, 2009 Discussion Draft prepared by the Student Learning Outcomes Subcommittee. Following the October 2009 meeting of the SRC, the Student Learning Outcomes Committee drafted new proposed Standards, which were discussed at its meeting on January 8-9, 2010.¹

Our comments focus on six aspects of the January 8-9 draft -- Standard 301, Standard 302(b)(2), Standard 302(b)(3), Standard 303, Interpretation 305-3, and the retention of input measures:

(1) With respect to Standard 301, the Committee believes that specific language that speaks to the obligation and value of the legal profession to promote justice and fairness should be added.

(2) For Standard 302(b)(2), the Committee proposes that the Standard provide law schools with some guidance as to the specific sets of skills that each school should consider in developing its mission and goals by identifying a broad category of professional skills deemed necessary for successful entry into the practice of law. In addition, the Committee proposes that the Interpretation provide a more detailed list of skills to be considered for effective and responsible participation in the legal profession;

¹ Please note that the Committee also submitted comments on January 5, 2010, which were made available to the SRC but were not posted online. This draft is intended as a substitute for our January 5 comments; it includes all the context from our January 5 draft, along with some additional comments.

- (3) With respect to 302(b)(3), the Committee proposes that the desired learning outcomes also include language requiring the knowledge and understanding of “the value and duty of the profession to enhance the capacity of the law and legal institutions to promote justice.”
- (4) With respect to Standard 303, the Committee continues to recommend that simulations not be included as one of the listed learning experiences that would provide law students with opportunities to reflect on their experiences, but recommends that clearer guidance be provided should simulations continue to be included as a method for learning law practice and professional responsibility;
- (5) With respect to Interpretation 305-3, the Committee recommends that Interpretation 305-3 banning payment for field placements should not be deleted, but rather should remain as is; and
- (6) Finally, we favor the retention of input measures in both Standard 302 and Standard 405 because the input measures therein help to ensure that certain core or essential qualities necessary for legal education are met.

Each of these recommendations is discussed, in turn, below.

Standard 301

The Committee believes that the Objective outlined in Standard 301(a) correctly requires that law schools “maintain an educational program that prepares its students for admission to the bar and effective, ethical and responsible participation in the legal profession.” However, the Committee believes that specific language that speaks to the obligation and value of the legal profession to promote justice and fairness should be added.

Standard 301(a) should read: “A law school shall maintain an educational program that prepares its students for admission to the bar, for effective, ethical and responsible participation in the legal profession and for an appreciation of the profession’s special responsibility for the quality and availability of justice.”

The inclusion of such language in Standard 301 would expand on the concept of core competencies identified in EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (hereinafter “Carnegie Report”).

The Committee maintains that language in the Standards about the obligation to prepare students for “ethical and responsible” participation in the legal profession is incomplete because it does not clearly include the idea that students be equipped with

the skills needed to recognize deficiencies in the legal system and to propose solutions. One can be an ethical and responsible lawyer, yet not identify and acknowledge shortcomings in the quality and availability of justice. However, policing the quality and availability of justice is one of the profession's obligations and that obligation should be reflected in the Standards. As noted in the ABA's MacCrate Report, "Lawyers play a critical role in the ongoing process of rationalizing and civilizing the law and legal institutions." Law schools must provide students with an appreciation of this value of the profession. As was noted by the Clinical Skills Committee in our comments to a previous draft of the Student Learning Outcomes Subcommittee, while personal competencies are critical for members of this dedicated profession in their service to individual clients, so too is the obligation to bear special responsibility for the quality of justice.

Standard 302(b)(2)

The Committee believes that Standard 302(b)(2) should have two primary goals: first, to provide flexibility to law schools in determining what skills its graduates need for successful entry into the practice of law; and second, to make explicit that law schools are required to undertake a process to determine the skills its graduates will need. The revised Standard and Interpretations should make clear that it is not sufficient for students to graduate having taken only one skills course nor is it sufficient for a law school to offer a number of skills courses with no thought as to what skills its graduates will need for effective and responsible participation in the profession. The teaching of particular skills should be related to the needs of the graduates and the profession. As such, the Standard should clearly communicate to some law schools that they will need to change the way they approach the teaching of lawyering skills within the curriculum. In order to strike the appropriate balance, the Committee proposes adoption of a Standard that identifies broad categories of professional skills and Interpretations that identify more detailed lists of possible skills. The Committee believes this approach provides guidance to law schools without unduly constraining creativity, innovation and specialization by law schools.

In addition to striking the right balance between guidance and flexibility, the Committee's proposal creates consistency within other sub-provisions of Standard 302 that utilize broad categories in the Standard and specific details in the Interpretation. As such, the Committee proposes retaining "organization and management of legal work" in the Standard and adding the following skills: interpersonal and communication skills; collaboration skills; working independently; organizing and managing legal work; balancing the various demands of practice; and responsibility for continuous professional development. The Committee proposes moving several of the skills in the SRC's Alternative Two (trial and appellate advocacy, alternative methods of dispute

resolution, counseling, interviewing, negotiating, factual investigation and drafting) to the section of the Interpretation that defines the skills delineated in Standard 302(b)(2)(i).

The Committee believes that the broad categories of skills belong in the Standard in order to give law schools some sense of the skills that it should consider. The Interpretation would provide the more detailed list of sub-skills that law schools attempt to tailor their skills curriculum to provide graduates the skills education they will need for effective, responsible and effective participation in the legal profession.

Proposed Language Revision to Standard 302(b)(2)

(b) The learning outcomes shall be consistent with and support the stated mission and goals of the law school. The learning outcomes shall include:

(1) knowledge and understanding of the substantive law generally regarded as necessary to effective and responsible participation in the legal profession;

(2) proficiency as an entry level practitioner in:

(i) legal analysis and reasoning, legal research, problem solving, written and oral communication in a legal context;

(ii) the ability to recognize and resolve ethical and other professional dilemmas; and

(iii) a sufficient depth and breadth of other professional skills that the law school identifies as necessary for effective, responsible and ethical participation in the legal profession, which shall include interpersonal and communication skills; collaboration skills; working independently; organizing and managing legal work; balancing the various demands of law practice; and responsibility for continuous professional development.

Proposed Interpretations for 302(b)(2)(iii)

Interpretation 302-1

Standard 302(b)(2)(iii) does not require that a law school ensures that each of its graduating students have the same breadth and depth of proficiency in each of the professional skills, so long as the law schools ensures that each graduating student have a sufficient depth and breadth in a sufficient number of professional skills for effective, responsible and ethical participation as an entry level practitioner in the legal profession.

Interpretation 302-2

The Standard requires that law schools ensure that its graduates have sufficient depth in a number of skills. A law school must undergo a process to identify the skills it finds necessary for effective, responsible and ethical participation in the profession. It must then implement a program of legal education that teaches the skills it has identified as necessary for effective, responsible and ethical participation in the profession. A law school may determine tracks for students, such that graduates from different tracks have proficiency in differing bundles of professional skills, such as counseling, negotiation, litigation or other advocacy skills. Evidence that students have enrolled in one skills course or that the law school offers a variety of skills courses is not sufficient to meet this Standard.

Interpretation 302-3

In developing learning outcomes for the categories of skills identified in Standard 302(b)(2), a law school shall consider the following skills:

Legal research includes the ability to retrieve and analyze information from all relevant sources; understand the range of available sources (primary and secondary sources such as case law, statutes, regulations, administrative manuals, internet, databases, journals, personal contact among others); understand the difference between primary and secondary sources; understand the interaction between law from different sources; update knowledge of law; create a research strategy and revise that plan; and authenticate research sources.

Legal analysis and reasoning skills include the ability to analyze statutes, regulations, case law and other legal precedent; understand and identify societal concerns and values behind legal principles and rules; critically evaluate arguments, assumptions, abstract concepts and data; develop legal theories for cases or projects; strategically plan for cases or projects; identify facts in cases and projects; gather and develop facts to meet legal elements of a claim; demonstrate practical judgment.

Written communication includes the ability to communicate persuasively and/or effectively to different audiences (clients, colleagues, various decision makers, counsel for other parties, members of a community, and legislators); write analytical and, where appropriate, persuasive memoranda, letters, briefs, pleadings, motions, legislation, legal opinions, narratives (such as in affidavits), contracts and other agreements, and applications or petitions; draft documents that incorporate relevant facts and law and, where appropriate policy arguments; and obtain information and convey it to others.

Interpersonal and communication skills include the ability to interview clients, witnesses, and others with relevant information; listen and demonstrate empathy; identify and understand client goals; communicate persuasively to different audiences (clients, colleagues, various decision makers, counsel for other parties, members of a community, and legislators); obtain information and convey it to others; counsel and advise clients; and identify and understand cultural, gender, racial and other differences and how they impact listening and communication.

Problem solving skills include the ability to identify and evaluate legal and other options; the ability to advocate on behalf of a client orally and in writing in various fora, including trial and appellate courts and administrative agencies; the ability to negotiate; the ability to resolve disputes through alternative methods of dispute resolution; and the ability to understand both legal and non-legal contexts in which disputes arise.

Recognizing and resolving ethical and other professional issues or dilemmas includes knowledge and understanding of, as well as, respect for the ethical rules; capacity to recognize ethical issues when they are embedded in complex and ambiguous situations; ability to evaluate a particular factual situation in light of the ethical rules; understand the resources available to lawyers facing ethical issues or dilemmas; understand and be able to recognize the various professional and personal pressures of practice and deal with them effectively; recognize the moral dimensions of lawyering and be able to recognize the tensions between the professional role and personal values.

Continuous professional development includes the ability for self reflection, to learn from experiences; critique one's own performance; accept critique from others; demonstrate sensitivity to one's own value system and of those with whom they interact.

Working collectively includes the ability to work effectively with clients, colleagues, co-counsel, staff, experts, counsel for other parties, the bar, court and administrative agency personnel, other professionals; work collaboratively with others to solve problems; respond to conflict.

Working independently includes the ability to take initiative, be creative and curious, and to take and give criticism effectively.

Organize and manage legal work includes the ability to plan effectively and balance competing priorities; distinguish between work that is most efficiently done collaboratively and individually; use time, resources and energy effectively

so that professional obligations such as deadlines are complied with and records are adequately maintained.

Standard 302(b)(3)

The Committee strongly supports the SRC's inclusion of learning outcomes about the lawyer's ethical and professional values and responsibilities in Standard 302(b)(3). However, we believe that the current draft should reinstate as a requirement "knowledge and understanding of . . . the legal profession's responsibility to enhance the capacity of the law and legal institutions to do justice."

The Clinical Skills Committee appreciates the fact that the learning outcomes identified in proposed Standard 302(b)(3) bring into the Standards many of the fundamental values of the profession identified in the MacCrate Report and further expanded upon in BEST PRACTICES FOR LEGAL EDUCATION. However, the current draft does not go far enough and should specifically include knowledge and understanding of the legal profession's responsibility to enhance the capacity of the law and legal institutions to do justice. This language appeared in the second draft of the Student Learning Outcomes, dated September 18, 2009 from Steve Bahls to the Standards Review Committee and reviewed by the SRC in October. But was deleted from the Draft for the January 8-9, 2010 SRC meeting. We believe that it should be not have been deleted.

While the Committee believes that the remaining values and responsibilities -- namely "knowledge and understanding of: (i) a lawyer's ethical responsibilities as a representative of clients, officer of the courts and public citizen for the quality and availability of justice; (ii) the legal profession's values of justice, fairness, candor, honesty, integrity, professionalism, respect for diversity and respect for the rule of law; and (iii) a lawyer's responsibility to ensure that adequate legal services are provided to those who cannot afford to pay for them" -- are all accurate and necessary components of desired learning outcomes for law schools, we believe that the responsibility of lawyers to enhance the capacity of the law and legal institutions to promote justice, is similarly fundamental to education on the ethical and professional values and responsibilities of lawyers. The Committee supports reinstatement of this language because it speaks to the lawyer's larger role in society as a member of a learned profession in ensuring that legal institutions perform their best. The inclusion of specific language that speaks to this broader role would expand on the proposed outcome in Standard 302(b)(3)(i) that students have knowledge and understanding of "a lawyer's ethical responsibilities as a . . . public citizen responsible for the quality and availability of justice."

We suggest that this language be added to Standard 302(b)(3)(ii), which would state in pertinent part: The learning outcomes shall include: ... (3) knowledge and understanding of:...(ii) the legal profession’s values of justice, fairness, candor, honesty, integrity, professionalism, respect for diversity and respect for the rule of law, and the value and duty of the profession to enhance the capacity of the law and legal institutions to promote justice.

Standard 303

For the reasons articulated in our comments filed on October 5, 2009, the Committee continues to recommend that Standard 303(a)(4) require either a live client clinic or a field placement for all students. As we stated then, “despite the value of an organized, well-designed simulation, students will not be competent entry-level practitioners through simulations alone.”

However, should simulations continue to be included as a method for learning law practice and professional responsibility, we recommend that either the wording in 303(a)(4) be changed or an Interpretation be added that clarifies this requirement. As we read the current proposal, a simulated case in a doctrinal law class might well satisfy the requirement of a “substantial exercise.” In order to clarify this, an Interpretation similar to 303-1 (which gives guidance on evaluating the rigor of writing instruction) should be drafted that explains that the simulated learning should be comparable to that learned in a live client clinic or other real-life practice experiences. This Interpretation should require that professional practice, professional skills and values be primary learning goals for the course. The course should involve multiple opportunities for students to perform in role and receive feedback from faculty and should simulate, to the extent possible, the experience of representing clients and solving clients’ problems.

If the SRC retains simulations as a possible method for meeting the 303(a)(4) requirement, we support Standard 303(b), the retention of a requirement that law schools provide substantial opportunities for live-client or other real-life practice experiences. Without this, Standard 303(a)(4) may create an incentive to eliminate these critical learning opportunities for students.

We also support the requirement that law schools create substantial opportunities for pro bono legal services or law-related public service activities.

Deletion of Interpretation 305-3

The Committee asks that Interpretation 305-3 banning payment for field placements not be deleted. Externships are a well recognized method for teaching essential skills and values to law students. Law schools provide credit for externships not because they may serve as a method for job placement, but in order that their students attain specific educational goals. BEST PRACTICES FOR LEGAL EDUCATION includes eight pages of best practices for externship courses, leading with the importance of using externships to achieve clear learning goals more effectively than other methods of instruction could do. It stresses the importance of externships in providing opportunities for students to study issues of justice, to develop insights into the values, behaviors, attitudes and ethical requirements of lawyers, i.e. into professionalism (at 198-199). Similarly, the CARNEGIE REPORT notes with approval that properly supervised externships are one sign that “education for practice is moving closer to the center of attention in the legal academy . . . and can provide students with a much needed bridge between the formal skills of legal analysis and the more fluid expertise needed in much professional work. In addition, . . . practice-oriented courses can provide important motivation for engaging with the moral dimensions of professional life. . .” (at 88).

We support the continued development of externship pedagogy and agree with the Carnegie Report that they are an important tool for learning professionalism values as well as skills and doctrine.

Accordingly, the Committee recommends that Interpretation 305-3 banning payment for field placements should stand as is for several reasons.

1. The educational value of the externship inevitably will be diminished if it becomes a paid activity for which the student also receives—and pays for--course credit. The students’ ability to negotiate for educational value, e.g., to ask for a greater variety of educational experiences, will be reduced when they are being paid for their time in the workplace. Both the students and the law schools lose leverage to ensure that specific educational goals are being met when the employer is paying for the student externs’ time. Employers’ incentive to provide educational value in exchange for a modicum of free labor will be removed.
2. It will become more difficult to motivate the employer to give the extern student an experience that is different—i.e., more explicitly educational—than that given to a paid clerk. Students’ professional explorations will be based more on income potential than on learning experience potential.

3. Judicial, public interest and government office externships will be less able to compete with private law placements for students in that they are typically less able to pay for externs.
4. Under the current Interpretation, if law schools are going to charge tuition for externship credits, they must ensure their students receives the primary benefit from the course activity. If the employers are the primary benefactors of the students' efforts, then wage and hour laws may be violated, according to the Fair Labor Standards Act. Thus, federal law supports paying students in the workplace *unless* the work the student performs is truly oriented toward education rather than production. This incentive to provide educational value will be removed if externs can be paid.
5. Requiring students to pay a law school for the privilege of being a paid law clerk in a workplace will breed cynicism. Justifying tuition dollars for these experiences will (and should) become more difficult.
6. The work of paid externs is more likely to be charged to clients than is the work of unpaid externs. When clients are paying for someone's work, there will be pressure to focus less on the students' education and more on client satisfaction. While of course these two goals will often overlap, there will nevertheless be greater pressure to decrease pure learning time and to increase production time.

Retention of Input Measures in Standards 303 & 405

We favor the retention of input measures in both Standard 303 and Standard 405 because these input measures help to ensure that certain core or essential qualities necessary for legal education are met.

The inclusion of outcomes measures in the Standards is a pedagogically sound move that we wholeheartedly support. At the same time, we see a continued need for input measures to ensure quality. First, we recognize that identifying outcomes and assessing whether they have been met is a challenge both because of difficulties in capturing certain goals as outcomes and because of transition uncertainties. Not all aspects of a quality professional education can be reduced to measurable outcomes. For example, a committed faculty with security of employment allows for the exchange of ideas and institutional growth and innovation that outcome measures are unlikely to measure. The input measure of tenure for faculty has historically been accepted as a necessary element for a quality education and should not lightly be abandoned. Thus we support the continued use of Standard 405, including 405(c).

Additionally, the difficulty of assessing outcomes may mean initially that law schools will be less ambitious in articulating outcomes. Schools will be most likely to articulate outcomes that can be assessed more easily. This is especially true because law schools, unlike many other professional schools, do not have a history of assessing the effectiveness of their teaching. Again, this difficulty is not a reason for the Standards Review Committee to avoid outcome measures altogether, but rather to recognize their limitations and the continued need for input as well as outcome measures.

Second, inputs are needed to insure that current improvements in legal education are not abandoned. For example, the proposed Standard 303(a)(4) mandates that law schools offer a curriculum in which every student have a simulated “or” live client or field supervised learning experience. If implemented, this new language could inadvertently lead a school away from offering live-client or field experiences. Thus, the continued inclusion of the input Standard 303(b) requiring “substantial opportunities” for clinical work is necessary to ensure that law schools provide more not fewer opportunities for students to develop the competencies needed for law practice. As we have pointed out in previous comments, we believe the learning involved in real world clinical work is different than that learned in simulation and that both forms of professional education need to be offered to students. The continued inclusion of input measures as a part of 303 will ensure that a quality education that includes substantial opportunities to develop professional competence is offered to students.

We again thank the Standards Review Committee for its important work on this project and continue to look forward to assisting in whatever ways we can.

Sincerely,

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