January 28, 2014

The Honorable Solomon Oliver, Jr., Council Chairperson
Barry A Currier, Managing Director of Accreditation and Legal Education
Section on Legal Education and Admissions to the Bar
321 N. Clark Street, 21st Floor
Chicago, IL 60654-7958

Re: Comments on Standard 303(a)(3)—Dec. 13, 2013 Version

Dear Judge Oliver and Mr. Currier:

I urge the Section on Legal Education and Admissions to the Bar to reject the Dec. 13, 2013 proposed version of Standard 303(a)(3), which would require students to complete fifteen credit hours of “experiential” coursework in order to graduate. I believe that “experiential” training is valuable. I also believe that law schools should increase opportunities for such training. But I strongly oppose mandating such an increase via accreditation standards for the reasons set forth in this letter.

I write in my individual capacity as an educator and public servant. My views are not necessarily those of the university that employs me and are not presented as such.

I. The Distinction Between “Experiential” And “Doctrinal” Courses Is Largely Artificial.

Much of the case for an “experiential” mandate is premised on the following reasoning: (1) “simulation,” clinical, and field placement courses are “skills” courses; (2) “doctrinal” courses are not “skills” courses; (3) therefore, legal education is not sufficiently focused on skills training. This reasoning is fatally flawed. Doctrinal courses are primarily skills courses. And thus the vast majority of legal education is in fact skills training.

To elaborate, the first year of legal education is focused on teaching the four foundational skills that drive all other legal work—(1) finding the law (research), (2) reading and comprehending the law, (3) applying the law to new circumstances, and (4) conveying in writing and orally the legal analysis from steps (2) and (3). We teach doctrine in Contracts, Torts, Property, Criminal Law, and Civil Procedure principally as a vehicle to train the students in skills (2) and (3), which together constitute “thinking like a lawyer.” And we do an excellent job of teaching the four foundational skills, especially skills (2) and (3), as even the Carnegie report acknowledges.\(^1\) In upper-level

\(^1\) For example:

Law schools are impressive educational institutions. In a relatively short period of time, they are able to impart a distinctive habit of thinking that forms the basis for their students’ development as legal professionals. Visiting
courses, we continue teaching the foundational skills and increase the attention given to other skills.

The previous paragraph helps to explain why I put the term “experiential” in quotation marks every time I used it in this letter. Virtually all law school classes are dominated by “experiential learning,” including all doctrinal classes. When students are preparing for and attending doctrinal classes, they are practicing the very skills that lawyers use every day—reading and comprehending the law and applying what they have read to new circumstances.

Let me elaborate further using the definition of “simulation” in proposed Standard 304:

(a) A simulation course provides substantial experience not involving actual clients, that is reasonably similar to the experience of a lawyer advising or representing a client or engaging in other lawyering tasks in a set of facts and circumstances devised or adopted by a faculty member, and that includes:
(1) direct supervision of the student’s performance by the faculty member;
(2) multiple opportunities for performance, feed-back from a faculty member, and self-evaluation; and
(3) a classroom instructional component.

Every doctrinal course I have taught meets this standard. In other words, my students receive substantial experience . . . that is reasonably similar to the experience of a lawyer advising or representing a client or engaging in other lawyering tasks in a set of facts and circumstances devised or adopted by the faculty member.” For example, the hypotheticals and problems I cover each session in my doctrinal classes are “reasonably similar” to the tasks lawyer’s complete every day. So are the reading assignments. In addition, I directly supervise my students’ performances when they are called on or volunteer in class and when they take the final exam. Finally, each

...
student has multiple opportunities for performance, feedback, and self-evaluation. They get called on multiple times per semester, they do practice exam questions which we go over in class, and they take a final exam, which I also review in class with my first-year students. In addition, I meet with more than half of my first-year students after the fall exam to go over their test individually.

Of course, the drafters of proposed Standard 304 almost certainly believe that traditional doctrinal courses are excluded from the definition of “simulation.” They probably have in mind small sections where students perform a greater variety of tasks, like in a trial advocacy course. But given that any reasonably-structured doctrinal course fits the definition of “simulation” as proposed, it should be clear that the line between “experiential” and “non-experiential” courses is largely (though not entirely) artificial.

II. Many Law Schools Do Not Have The Resources To Provide Fifteen Credits of “Experiential” Coursework

Many law schools do not have the resources to offer fifteen credits of “experiential” coursework, as that concept is likely being used in proposed Standard 303(a)(3). The faculties at these schools are simply not large enough. And the resource problem is especially acute for law schools not in the legal hub of their state, and thus with limited adjunct availability and field placement opportunities.

“Simulations” and clinics have far smaller student-faculty ratios than “doctrinal” courses because of the additional work involved. Increasing such offerings will thus require (1) a substantial increase in faculty, (2) a substantial increase in faculty work-load, and/or (3) dropping other critical activities that faculty currently perform. Many schools do not have the money for the first option. Given the hours that faculty already work, the second option is not a reasonable suggestion for most professors. And the third option would do real damage to other critical goals of legal education. For example, redirecting faculty to “experiential courses” may necessitate dropping bar courses from the curriculum, hindering bar preparation. The additional time faculty spend teaching “experiential” courses may force them to use more multiple choice exams in their other courses because they will no longer have sufficient time to grade essay tests. And public service and

---

4 See Laura T. Kessler, Paid Family Leave in American Law Schools: Findings and Open Questions, 38 ARIZ. ST. L.J. 661, 683 (2006) ("Many law professors do work fifty to sixty hours a week; these time demands can be quite unbounded."); Saranna Thornton, Maternity and Childrearing Leave Policies for Faculty: The Legal and Practical Challenges of Complying With Title VII, 12 CAL. REV. L. & WOMEN’S STUD. 161, 168 (2003) ("If full-time faculty members already work an average of 53.6 hours per week on their own teaching, scholarship, fund-raising, advising and other services to the college."); see also Patrick E. Longan, The Law and Economics of Aging and the Aged, 26 STETSON L. REV. 657, 674 n.22 (1996) ("A law professor who is doing his or her job responsibly, however, will spend many more hours than [what is required by the accreditation rules]. Preparing for class, meeting with students, assisting with the governance of the law school and the University, participating in bar association activities, and conducting scholarship are just a few of the duties that keep law professors working happily for more than forty hours per week.").
research conducted by law professors could suffer.\textsuperscript{5}

Note that my law school is located in the largest legal market in our state, and there are no other law schools in that market.\textsuperscript{6} That gives us the flexibility to increase our use of adjuncts and field placements should the fifteen-credit mandate pass. In fact, if Legal Writing counts as a “simulation” course (and there are differing views on that question), we may well have the resources to meet the new mandate. But many law schools are not so fortunate. College towns often have few lawyers, limiting adjunct and placement opportunities. These institutions should not be punished simply because of their location.

III. Increasing “Experiential” Learning Could Dramatically Increase The Cost Of Legal Education.

There are two general principles motivating virtually all of the criticism of legal education today. First, law schools should teach a wider variety of skills. Second, legal education should be less expensive. I am more than sympathetic to both of these principles. It would be wonderful if law schools could more thoroughly teach skills beyond the core group. Likewise, if legal education could be made cheaper, that would benefit our students and other constituencies. But here is the problem: The two goals are in conflict, and dramatically so. Professors are already working extremely hard. And there are few aspects of our jobs that can be eliminated or reduced. Thus, accommodating the additional skills training that the critics want us to add will often require \textit{substantial} increases in faculty size. That will increase the expense of law school significantly. In addition, the time needed to teach the additional skills may lengthen law school from three years to four years. That too will add to the expense.

“Experiential” learning is the paradigmatic example of this problem. “Simulations” (narrowly understood) and clinics, while wonderful courses, are extremely expensive. Clinic courses at our school have eight or fewer students. Doctrinal classes often have eighty to ninety-five. Thus,

\textsuperscript{5} I realize that some have called for reductions in scholarship. But I strongly oppose any such reduction. It is true that some faculty members do not fulfill their research responsibilities. I support asking these professors to teach five or even six classes per year rather than the standard three or four. But those of us who regularly engage in scholarship should not be asked to pick up additional teaching responsibilities. I became a law professor, not a law teacher. I did so because I wanted teaching to be the \textit{most important} part of my job, but not the \textit{only} part of my job. Moreover, scholarship and teaching critically augment each other. And scholarship is independently important for numerous reasons I will not articulate here. If I ever reach the conclusion that I no longer have significant time for research, I will resign and return to private practice. Because I am an award-winning teacher, the loss to my students would be substantial. And I know many gifted teachers who would do the same if they no longer were provided adequate opportunities for scholarly work.

\textsuperscript{6} The only other law school in Arkansas is located in the northwest region of the state, roughly three hours from Little Rock.
substantially increasing "experiential" course offerings as mandated by proposed Standard 303(a)(3) will pose critical fiscal challenges for institutions and students alike. Indeed, some law schools might be forced to close. 

Given the concerns so many have raised about law school debt, any accreditation mandate that significantly increases the cost of legal education must meet a very heavy burden. Otherwise, such a mandate is simply not justified. Whatever value "experiential" learning has—and I believe the value is significant—it is not sufficient to justify the increased cost in legal education that would result from a fifteen-credit requirement.

IV. Many Students Would Be Better Served By Taking Fewer Than Fifteen Credits Of "Experiential" Coursework.

Recall the four foundational skills of lawyering: (1) finding legal texts (research), (2) reading and comprehending such texts, (3) applying those texts to new circumstances, and (4) conveying the results from (2) and (3) in writing and orally. To paint with a broad brush, in my judgment, if students learn these four skills, they can figure out everything else necessary to be an effective lawyer after graduation. And if they do not learn the four foundational skills, it does not matter what else they know—they will not be effective lawyers. The four foundational skills are the focus of the first-year curriculum. However, many students have not sufficiently mastered these skills by the end of the first year. Indeed, many have not sufficiently mastered them by the end of the second year. Such students are often better served by continuing to focus their studies on traditional doctrinal classes rather than taking "experiential" courses. Law schools should try to teach skills beyond the four foundational skills. And we regularly do so. But the four foundational skills are the key. It is imperative that we get those right; everything else is of secondary importance. If a student is best served by continuing to focus on the foundational skills in doctrinal classes, the student should be able to concentrate on such courses.

Many students work during law school. Indeed, I suspect that more than half of the students at my school work ten to twenty hours per week in legal jobs during the school year. All of that work is "experiential" learning. Doctrinal courses often serve such students better than "experiential" courses. For example, suppose student X clerks for twenty-hours per week during three semesters after the first year. Suppose further that X is particularly concerned about the bar exam; perhaps X’s grades suggest that the odds of failure are higher than X would like. X might prefer to take bar courses rather than "experiential" courses. If X is forced to take fifteen credits of "experiential" classes, X may not have room in his or her schedule to take all the desired bar classes. I personally know numerous students in X’s position. And I am reasonably sure that there are many students

---

7 Of course, some critics would be happy to see a drop in the number of law schools. Whatever the merits of school closures (and I do not subscribe to the view that closures will be beneficial, all factors considered), I do not think closures should be imposed by unnecessary accreditation standards.
like X attending every law school in America located in a large or mid-sized city.

Other examples of students who would be better served by taking fewer than fifteen credits of experiential coursework are presented in the letter submitted by Associate Dean David I. Walker of Boston University School of Law.

To put this in more general terms, law schools have different needs when it comes to skill emphasis because they vary across numerous dimensions, including entering student credentials, bar passage rates, and work opportunities during the school year, among other differences. At some schools, faculty believe that their students need more focus on the four foundational skills. At other schools, work opportunities make bar courses more valuable to students. Requiring fifteen credits of experiential classes would prevent law schools from making the entirely reasonable judgment that their resources should be directed towards purposes other than "experiential" learning.

* * *

Despite my belief that the distinction between "experiential" and "doctrinal" courses has been dramatically overstated, I do strongly support increasing "experiential" opportunities, as that term is generally understood. But this should not be mandated by accreditation standards. Unlike with the tenure requirement in Standard 405, this is an area where law schools need flexibility to tailor the course of education to their specific resources and needs.

Sincerely,

Joshua M. Silverstein

Please note that the following law professors at my institution substantially agree with the contents of this letter and asked to have their names included as signatories. They join this letter in their individual capacities as educators and public servants, not as official representatives of the university that employs them.

Philip D. Oliver, Byron M. Eiseman Distinguished Professor of Tax Law
Ranko Shiraki Oliver, Professor of Law
Robert E. Steinbuch, Professor of Law
J. Thomas Sullivan, Professor of Law