February 5, 2014

The Honorable Solomon Oliver, Jr., Chairperson
Council of the Section of Legal Education and Admissions to the Bar
American Bar Association
321 N. Clark Street, 21st Floor
Chicago, IL 60654-7958

Barry A. Currier, Managing Director of Accreditation and Legal Education
Section of Legal Education and Admissions to the Bar
American Bar Association
321 N. Clark Street, 21st Floor
Chicago, IL 60654-7958

Re: Input on Proposed Standard 303(a)(3)

Dear Chief Judge Oliver and Mr. Currier,

Thank you for the opportunity to address the Standards Review Committee (SRC) proposal for a new Standard 303(a)(3), requiring all law graduates to take “one or more experiential course(s)” totaling either six or fifteen credit hours. We at Stanford Law School share the SRC’s desire to ensure that law school graduates are prepared for the changing legal marketplace they face in the twenty-first century. Our goals, therefore, very much mirror those that drove the SRC’s proposals. We do have serious concerns, however, about the proposed requirement.

To put these concerns in context, let me briefly explain our approach to experiential learning at Stanford. As you know, we have recently witnessed dramatic changes in how law schools think about educating their students to become lawyers. Although there have been cries for bridging the gap between law school and practice for close to a century, recently a great number of law schools have taken real action to broaden their curricula in ways that more thoroughly cultivate the types of expertise students need to achieve their maximum potential as lawyers.

These developments have taken an array of forms. At Stanford, we have dramatically expanded our clinical program in the past decade, and now have eleven clinics, offering a range of litigation-oriented programs but also transactional and policy work. These programs have the
benefit of close supervision by in-house faculty selected based on their talents as extraordinary lawyers, mentors and teachers. Students work in SLS clinics full-time – taking no other courses during that quarter – creating an extraordinary learning experience akin to a mini-residency. Over the last five years, between 60% and 65% of each graduating class has taken a full-time clinic. And our clinical program is robust enough to serve every member of the student body.

In other words, to the extent that the proposed standard calls for experiential learning to be a central part of legal education, we wholeheartedly agree. We are doing it already.

But the qualities of our clinical program described above (outstanding faculty, range of opportunities, and access for the entire student body) are resource-intensive. The ratio of teacher to student needs to be low enough to afford the kind of individualized observation, feedback, and reflection that leads to meaningful professional development. We think the quality of the learning that goes on in these clinics is well worth the cost, but not every law school can afford to do this.

Our concern, then, is less about how our students will meet such a requirement, and more about the incentives it creates for faculty and students at Stanford and elsewhere. Specifically, we are concerned that the proposal would hinder valuable innovation and experimentation among and within law schools. In addition, if adopted, the requirement would most likely lead to a dramatic expansion of externships, which will raise a host of issues about the quality of those experiences and the capacity of the practicing bar to take on dramatically expanded obligations to supervise law students.

Risk of Hindering Experimentation Among Law Schools. As you know, the American Bar Association’s Task Force on the Future of Legal Education has just issued a report indicating that the accreditation system “would better serve the public interest by enabling more heterogeneity in law schools and by encouraging more attention to services, outcomes, and value delivered to law students.” This call for heterogeneity has been well-received. Imposing an experiential-learning requirement, however, would reinforce homogeneity.

Aside from encouraging more flexibility and experimentation, the Task Force on Legal Education also signaled an openness to the possibility of accrediting two-year JD programs, as well as encouraging the provision of legal services by people without a JD. These ideas are worth serious consideration, but are likely incompatible with a significant requirement of experiential learning before individuals can practice law.

Even within the current framework of the three-year JD, the SRC’s proposal could put some of the most exciting developments in legal education at risk. Stanford Law School has also expanded the opportunities for students to do joint degrees in the last decade. Many students at Stanford do a JD/MBA in less than four years, for example, which many employers find to be valuable training. Others interested in patent law, for example, do joint degrees in engineering, or those interested in environmental law do joint degrees with our world-class school of earth sciences. For students who have a strong sense of the direction of their career, these joint degrees can provide them an unparalleled degree of training that will help them understand their clients’ concerns in a substantive way. But a fifteen-hour experiential learning requirement
would decrease the number of joint degree students here and elsewhere due to the additional time and cost needed to fulfill such a requirement.

*Which Courses Count?* Beyond our clinics and joint degrees, we are also committed to cutting-edge innovations in integrating experiential learning and practical training into conventional courses. The Carnegie Report emphasized this *integration* goal, in part to counter the tendency for practically oriented courses to be treated as second-class citizens of the curriculum. Many faculty members and law schools are taking this message to heart, but we worry that a significant experiential-learning requirement, which can only be satisfied by simulation courses, clinical courses and externships, signals to doctrinal faculty that this kind of integrated teaching is no longer their concern and will decrease the innovation that is happening today.

Many members of our faculty have designed their courses in core subjects to have extensive skills-based and professionalism-oriented dimension. These include an Administrative Law professor whose students draft comments on a proposed regulation; a Corporations class that replicates an actual deal from start to finish; a Mental Health law course in which students spend several sessions cross-examining experts; and a Private Equity Investing course that requires students to perform financial modeling, conduct due diligence investigations, and prepare forecasts. We believe there is great value and a great future in approaches like these to help make law graduates “practice ready.” Based on the draft proposal, however, it appears that the courses identified above that combine a traditional, doctrinal course with a practical component would not qualify as a “simulation” course.

Nor does the current definition include the courses that our students who intend to do transactional work would identify as the key to their effort to become practice ready—substantive courses that introduce them to corporate finance, accounting, or venture capital. To take another example, a course in E-Discovery might be quite valuable for future litigators, but unless taught in a particular way (through simulation), that course would not count either.

The current definition of what courses count, then, could hinder the ABA’s goal of law students graduating better equipped to practice law. Indeed, the research on pedagogy in professional education – synthesized and relied upon in the Carnegie Report -- emphasizes the cognitive benefits of acting “in role” for developing as a professional. The courses described above, along with clinical and more traditional simulation courses, deliver these benefits by asking students not just to think like lawyers, but to act in the role of lawyers. Our shared goal is that the ABA standards that emerge from this process will encourage faculty to teach (and students to take) more integrated courses like those just described, but we are concerned that the current proposal will actually discourage such pedagogic innovation in the doctrinal classroom.

*Expansion of Externships.* If the SRC is anticipating that this new standard will cause law schools to expand their in-house clinical programs, we are quite confident that view is mistaken. The reality is that most law schools will choose to satisfy the new requirement through externship programs because this is the lowest-cost alternative, and most law schools are not in the position to hire additional full-time clinical faculty, or even adjunct professors who might teach clinical or simulation courses.
Additional externships may be a good thing. In some cases, students in externships are closely supervised and taught by practicing lawyers who can spend the time to model and teach the professional virtues that we hope that they acquire. But the inevitable (and considerable) expansion of externships leads to a few concerns.

First, even with the decline in law school applicants, 36,675 law students started last fall as the class of 2016. Even if we assume that only 50% of those graduates do externships rather than satisfy the unit requirement simply by enrolling in clinics and simulation courses, that is a massive increase in the amount of supervision that members of the bar must do for law students, to add to what they are already doing for young lawyers.¹

Second, to the extent that the proposal will require significant expansion of these externship programs, the quality of the placements may suffer. An Administrative Law Judge who currently takes 1-2 students per semester, for example, may get pressure from law schools to take 4-6 a semester. Perhaps she would get more assistance in research and writing from more students, but the amount of feedback and mentoring per student will inevitably decline. And one can imagine the problem being even worse with supervising attorneys who bill by the hour. The demands of law practice are such that the time available to an attorney to supervise and provide feedback to a law student is likely to vary considerably among externships.

Exemption for LLMs. Finally, if the SRC adopts a requirement, we hope there will be an exemption for LLMs whose first law degree is from a foreign country from any experiential-learning requirement. As you know, LLM students enroll for only a single year. Our LLMs generally have at least 2-3 years of experience as lawyers in their home country, and they enter our program to get a broad introduction to U.S. law that will, in some cases, enable them to sit for the bar, and in other cases, allow them to return to their home countries with a greater sense of our legal system. If they were required to do experiential-learning credits as well, it would be impossible to get the exposure to different areas of U.S. law that they need, and we fear that they would not be willing or able to spend two years in residence. With the increasingly global nature of our profession, it would be unfortunate if we discouraged these talented lawyers from coming here and sharing their expertise.

* * * * *

¹ The submissions of Robert Kuehn and CLEA (relying on Kuehn’s work) can be read to suggest that little change would be necessary to satisfy the proposed requirement. But I do not believe the data supports that conclusion. Kuehn uses data submitted through the annual ABA-LSAC questionnaire to suggest that 79% of law schools already provide enough clinical and externship opportunities to cover their most recent incoming class. But this data just counts clinic and externship slots, not credit hours. Given that the proposed requirement is aimed at a certain number of credit hours, any assessment of present capacity to meet it must take account of the number of credit hours offered. According to the 2010-11 Survey of Applied Legal Education, the most common number of units granted per externship is three units, and in some cases, even less. If a 15-credit hour requirement is adopted, a significant share of Kuehn’s slot count would need to be multiplied by five to indicate the real number needed, in which case the percentage of law schools that could comply right now would fall drastically.
Thank you for the opportunity to comment on these proposed standards, and for your work in partnering with the law schools to help create lawyers who have the core competencies – both doctrinal and skill-based – and the ethical values worthy of the profession.

Sincerely,

M. Elizabeth Magill