



Legal Education and
Admissions to the Bar

Memorandum

To: Interested Persons and Entities

From: Scott Bales, Council Chair
William Adams, Managing Director of Accreditation and Legal Education

Date: May 25, 2021

Re: ABA Standards – Matters for Notice and Comment – Standards 205, 206, 303, 507, and 508

At its meeting held on May 13-15, 2021, the Council of the Section of Legal Education and Admissions to the Bar approved for Notice and Comment proposed revisions to Standards 205, 206, 303, 507, and 508 of the *ABA Standards and Rules of Procedure for Approval of Law Schools*.

All proposed revisions and accompanying explanations are published on the Section's website at https://www.americanbar.org/groups/legal_education/resources/notice_and_comment/.

We solicit and encourage written comments on all the proposals listed above. **Due to COVID-19, there will not be an open hearing, only a written comment period.** Please address all written comments on the proposals to Scott Bales, Council Chair. Please send comments to Fernando Mariduena (Fernando.Mariduena@americanbar.org) by June 28, 2021. Written comments received after June 28, 2021, may not be included in the materials considered by the Council at its August 2021 meeting.

PROPOSED CHANGES TO STANDARD 205

Explanation of Changes

The proposed changes add military status and gender expression as bases for non-discrimination. As the ABA's non-discrimination policy contains military status, as do those of some law schools, feedback is sought particularly on inclusion of military status to the list of bases for non-discrimination. The proposed changes to the Interpretations include these bases of non-discrimination and proposed Interpretation 205-6 clarifies that a law school that is part of a university may rely on the university's non-discrimination policy provided the policy complies with the Standard.

Redline of Standard 205

Standard 205: Non-Discrimination and Equality of Opportunity

(a) A law school shall ~~not adopt, publish, and adhere to a policy of non-discrimination that prohibits the use of~~ admission policies or ~~take~~ other actions to preclude admission of applicants or retention of students on the basis of race, color, ethnicity, religion, national origin, gender, gender identity or expression, sexual orientation, age, ~~or~~ disability, or military status.

(b) A law school shall adopt, publish, and adhere to policies that foster and maintain equality of opportunity for students, faculty, and staff, without discrimination or segregation on the basis of race, color, ethnicity, religion, national origin, gender, gender identity or expression, sexual orientation, age, ~~or~~ disability, or military status.

(c) This Standard does not prevent a law school from having a religious affiliation or purpose and adopting and applying policies of admission of students and employment of faculty and staff that directly relate to this affiliation or purpose so long as (1) notice of these policies has been given to applicants, students, faculty, and staff before their affiliation with the law school, and (2) the religious affiliation, purpose, or policies do not contravene any other Standard, including Standard 405(b) concerning academic freedom. These policies may provide a preference for persons adhering to the religious affiliation or purpose of the law school, but may not be applied to use admission policies or take other action to preclude admission of applicants or retention of students on the basis of race, color, ethnicity, religion, national origin, gender, gender identity or expression, sexual orientation, age, ~~or~~ disability, or military status. This Standard permits religious affiliation or purpose policies as to admission, retention, and employment only to the extent that these policies are protected by the United States Constitution. It is administered as though the First Amendment of the United States Constitution governs its application.

(d) Non-discrimination and equality of opportunity in legal education includes equal employment opportunity. A law school shall communicate to every employer to whom it furnishes assistance and facilities for interviewing and other placement services the school's firm expectation that the employer will observe the principles of non-discrimination and equality of opportunity on the basis of race, color, ethnicity, religion, national origin, gender, gender identity or expression, sexual orientation, age, ~~and~~ disability, or military status in regard to hiring, promotion, retention, and conditions of employment.

Interpretation 205-1

A law school may not require applicants, students, faculty, or employees to disclose their sexual orientation, although they may provide opportunities for them to do so voluntarily.

Interpretation 205-2

So long as a school complies with Standard 205(c), the prohibition concerning sexual orientation and gender identity or expression does not require a religiously affiliated school to act inconsistently with the essential elements of its religious values and beliefs. For example, Standard 205(c) does not require a school to recognize or support organizations whose purposes or objectives with respect to sexual orientation or gender identity or expression conflict with the essential elements of the religious values and beliefs held by the school.

Interpretation 205-3

Standard 205(d) applies to all employers, including government agencies and religiously affiliated organizations, to which a school furnishes assistance and facilities for interviewing and other placement services. However, this Standard does not require a law school to implement its terms by excluding any

employer unless that employer discriminates unlawfully.

Interpretation 205-4

The denial by a law school of admission to a qualified applicant is treated as made upon the basis of race, color, ethnicity, religion, national origin, gender, gender identity or expression, sexual orientation, age, ~~or~~ disability, or military status if the basis of denial relied upon is an admission qualification of the school that is intended to prevent the admission of applicants on the basis of race, color, ethnicity, religion, national origin, gender, gender identity or expression, sexual orientation, age, ~~or~~ disability, or military status though not purporting to do so.

Interpretation 205-5

The denial by a law school of employment to a qualified individual is treated as made upon the basis of race, color, ethnicity, religion, national origin, gender, gender identity or expression, sexual orientation, age, ~~or~~ disability, or military status if the basis of denial relied upon is an employment policy of the school that is intended to prevent the employment of individuals on the basis of race, color, ethnicity, religion, national origin, gender, gender identity or expression, sexual orientation, age, ~~or~~ disability, or military status though not purporting to do so.

Interpretation 205-6

The requirements stated in Standards 205(a) and 205(b) that a law school adopt, publish, and adhere to policies regarding non-discrimination and equality of opportunity may be satisfied by adopting, publishing, and adhering to policies of a parent institution that comply with this Standard.

PROPOSED CHANGES TO STANDARD 206

Explanation of Changes

Based on discussions during the Fall 2020 Roundtables, as well as recurring feedback from diversity groups at the ABA, the proposed revisions add the groups listed in Standard 205 to Standard 206. Additionally, the term “minority” is replaced with “people of color” as groups at the ABA expressed the importance of moving away from the use of the term “minority.”

Additionally, based on repeated requests from law schools to provide more guidance on the term “concrete actions,” there is a proposed change of terminology – that law schools are required to take “effective actions that lead to progress.” Several proposed Interpretations provide specific guidance on how law schools may demonstrate “effective actions that lead to progress.”

The U.S. Department of Education (the “Department”) requires notice to the public of a final decision to place an institution or program on probation or equivalent status. The Department provided guidance on what is considered “equivalent status” and explained that it is a serious compliance issue that must be addressed in order for an institution or program to retain its accreditation. The Department provided examples of these serious compliance issues: issues with institutional finances, recurrent noncompliance with one particular standard, or an area of noncompliance for which notice to the public is required to serve the best interest of students and prospective students. With this guidance in mind, the Council has determined that if a law school is found out of compliance (a Rule 11(a)(4) finding) with Standards 202, 301, 309, 316, 501, 507, and 509, notice to the public is required. The Council refers to these standards as “Core Standards.” The Council is now proposing to add Standard 206 to this list of Core Standards.

Redline of Standard 206

Standard 206: Diversity, ~~and~~ Inclusion, and Equity

~~(a) Consistent with sound legal education policy and the Standards, a law school shall demonstrate by concrete action a commitment to diversity and inclusion by providing full opportunities for the study of law and entry into the profession by members of underrepresented groups, particularly racial and ethnic minorities, and a commitment to having a student body that is diverse with respect to gender, race, and ethnicity.~~

(a) A law school shall provide:

- (1) Full opportunities for the study of law and entry into the profession by members of underrepresented groups, particularly those related to race, color, ethnicity, religion, national origin, gender, gender identity or expression, sexual orientation, age, disability, and military status; and
- (2) An environment that is inclusive and equitable with respect to race, color, ethnicity, religion, national origin, gender, gender identity or expression, sexual orientation, age, disability, and military status.

~~(b) Consistent with sound educational policy and the Standards, a law school shall demonstrate by concrete action a commitment to diversity and inclusion by having a faculty and staff that are diverse with respect to gender, race, and ethnicity.~~

(b) A law school shall take effective actions that, in their totality, demonstrate progress in

- (1) Diversifying the student body, faculty, and staff; and
- (2) Creating an inclusive and equitable environment for students, faculty, and staff.

Interpretation 206-1

The requirement of a constitutional provision or statute that purports to prohibit consideration of ~~gender, race, ethnicity, or national origin~~ race, color, ethnicity, religion, national origin, gender, gender identity or expression, sexual orientation, age, disability, or military status in admissions or employment decisions is not a justification for a school's non-compliance with Standard 206. A law school that is subject to such constitutional or statutory provisions would have to demonstrate the ~~commitment~~ effective actions and progress required by Standard 206 by means other than those prohibited by the applicable constitutional or statutory provisions.

Interpretation 206-2

In addition to providing full opportunities for the study of law and the entry into the legal profession by members of underrepresented groups, the enrollment of a diverse student body has been proven to improve the quality of the educational environment of all students, and further prepares law students for competent practice by providing opportunities for cross-cultural understanding; dispelling stereotypes; and enabling students to better understand persons of different backgrounds. ~~promotes cross-cultural understanding, helps break down racial, ethnic, and gender stereotypes, and enables students to better understand persons of different backgrounds.~~ The forms of concrete action required by a law school to satisfy the obligations of this Standard are not specified. If consistent with applicable law, a law school may use race and ethnicity in its admissions process to promote diversity and inclusion. The determination of a law

school's satisfaction of such obligations is based on the totality of the law school's actions and the results achieved. The commitment to providing full educational opportunities for members of underrepresented groups typically includes a special concern for determining the potential of these applicants through the admissions process, special recruitment efforts, and programs that assist in meeting the academic and financial needs of many of these students and that create a favorable environment for students from underrepresented groups.

Interpretation 206-3

Effective actions and progress towards diversifying the student body may include, but are not limited to, the following activities:

- (1) Setting and publishing goals related to diversity and inclusion including threshold data disaggregated by race, color, ethnicity, religion, national origin, gender, gender identity or expression, sexual orientation, age, disability, or military status and tracking and reporting progress in meeting those goals over a period of years (i.e., three years);
- (2) Adopting and using pipeline programs to facilitate the recruitment, preparation, and enrollment of students from underrepresented groups;
- (3) Designing recruitment outreach for prospective students from underrepresented groups;
- (4) Initiatives designed to attract and matriculate students from underrepresented groups; and
- (5) Providing need-based or diversity scholarships to students.

The determination of a law school's satisfaction of such obligations is based on the totality of the law school's actions and results achieved.

Interpretation 206-4

Effective actions and progress towards diversifying the faculty (full-time and adjunct) and staff may include, but are not limited to:

- (1) Setting and publishing goals related to diversity and inclusion including threshold data disaggregated by race, color, ethnicity, religion, national origin, gender, gender identity or expression, sexual orientation, age, disability, or military status and tracking and reporting progress in meeting those goals over a period of years (i.e., three years);
- (2) Adopting and applying criteria for selection among candidates, using rubrics, targeting pool-building efforts designed to attract diverse pools, keeping pools open until they include a diverse group of qualified candidates, using standard questions to all candidates, and providing the same information to all candidates, including a full description of the hiring process.

The determination of a law school's satisfaction of such obligations is based on the totality of the law school's actions and results achieved.

Interpretation 206-5

Effective actions and progress towards creating an inclusive and equitable environment under this Standard may include, but are not limited to:

- (1) Periodic assessment of progress towards having an inclusive environment through quantitative and qualitative measures of campus climate and academic outcomes disaggregated by race, color,

ethnicity, religion, national origin, gender, gender identity or expression, sexual orientation, age, disability, or military status and reporting progress towards those goals;

- (2) The description of efforts towards inclusion and equity in outreach to potential students, faculty, and staff;
- (3) Support of affinity groups;
- (4) Diversity, equity, and inclusion training;
- (5) Provision of mentoring opportunities; and
- (6) Support of pro bono and externship opportunities that reflect a commitment to an inclusive and equitable environment.

The determination of a law school's satisfaction of such obligations is based on the totality of the law school's actions and results achieved.

Interpretation 206-6

To the extent that this Standard requires a religiously affiliated law school to provide an environment that is inclusive and equitable with respect to sexual orientation and gender identity or expression, the school is not required to act inconsistently with the essential elements of its religious values and beliefs provided that its actions are protected by the United States Constitution.

PROPOSED CHANGES TO STANDARD 303

Explanation of Changes

The proposed revisions include a new section of the Standard and new Interpretations 303-6 and 303-7 requiring law schools to provide training and education on bias, cross-cultural competency, and racism. There was strong support at the Fall 2020 Roundtables for mandating this training, and a few commentators supported adding the requirement during the Notice and Comment period following the February 2021 Council meeting. Other groups of deans, faculty, and affiliates have also written to the Council expressing the need for this training. The revisions also include a proposed new definition of professional identity in Interpretation 303-5 based on comments from the Notice and Comment period following the February 2021 Council meeting.

Redline of Standard 303

Standard 303: Curriculum

(a) A law school shall offer a curriculum that requires each student to satisfactorily complete at least the following:

- (1) one course of at least two credit hours in professional responsibility that includes substantial instruction in rules of professional conduct, and the values and responsibilities of the legal profession and its members;
- (2) one writing experience in the first year and at least one additional writing experience after the first year, both of which are faculty supervised; and

(3) one or more experiential course(s) totaling at least six credit hours. An experiential course must be a simulation course, a law clinic, or a field placement, as defined in Standard 304.

(b) A law school shall provide substantial opportunities to students for:

(1) law clinics or field placement(s); ~~and~~

(2) student participation in pro bono legal services, including law-related public service activities; ~~and~~

(3) the development of a professional identity.

(c) A law school shall provide training and education to law students on bias, cross-cultural competency, and racism:

(1) at the start of the program of legal education, and

(2) at least once again before graduation.

For students engaged in law clinics or field placements, the second occasion for training and education will take place before or concurrent with their enrollment in clinical or field placement courses.

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Interpretation 303-5

Professional identity focuses on what it means to be a lawyer and the special obligations lawyers have to their clients and society. The development of professional identity should involve an intentional exploration of the values, guiding principles, and well-being practices considered foundational to successful legal practice. Because developing a professional identity requires reflection and growth over time, students should have frequent opportunities during each year of law school and in a variety of courses and co-curricular and professional development activities.

Interpretation 303-6

With respect to 303(a)(1), the importance of cross-cultural competency to professionally responsible representation and the obligation of lawyers to promote a justice system that provides equal access and eliminates bias, discrimination, and racism in the law should be among the values and responsibilities of the legal profession to which students are introduced.

Interpretation 303-7

Standard 303(c) may be satisfied by:

(1) Orientation sessions for incoming students on bias, cross-cultural competency, and racism;

(2) Guest lectures or trainings by experts in the areas of bias, cross-cultural competency, and racism;

(3) Courses on racism and bias in the law; or

(4) Other educational experiences that train students in cross-cultural competency.

While law schools need not add a required upper-division course to satisfy this requirement, law schools

must demonstrate that all law students are required to participate in a substantial activity designed to reinforce the skill of cultural competency and their obligation as future lawyers to work to eliminate racism in the legal profession.

PROPOSED CHANGES TO STANDARD 507

Explanation of Changes

At the Fall 2020 Roundtables, participants supported requiring law schools to provide information on resources related to financial aid and student loans, including individual student loan counseling, to admitted applicants. This proposed amendment to Standard 507 will provide admitted applicants with the information and counseling services needed to make responsible choices about financial aid and student loans before taking out such loans.

Redline of Standard 507

Standard 507: Student Loan Programs

- (a) A law school shall demonstrate reasonable steps to minimize student loan defaults, including provision of debt counseling at the inception of a student's loan obligations and again before graduation.
- (b) A law school shall provide each admitted applicant information on resources related to financial aid and student loan debt and the availability of individual student loan counseling at the law school, the university of which it is a part, or from third party sources. Such information shall also be posted on the law school's financial aid webpage.

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Interpretation 507-2

For a law school not affiliated with a university or not receiving access to Title IV through a university, the school's student loan cohort default rate is sufficient if it is not greater than 10% for any of the three most recently published annual cohort default rates. Failure to comply with Title IV of the Higher Education Act of 1965, as amended, or having a student loan cohort default rate greater than the rate permitted by Title IV is cause for review of a law school's compliance with the Standards. A school shall demonstrate that it has resolved all areas of deficiency identified in financial or compliance audits, program reviews, or other information provided by the United States Department of Education.

PROPOSED CHANGES TO STANDARD 508

Explanation of Changes

Based on comments received during the Notice and Comment period following the February 2021 Council meeting, several changes were made to Interpretation 508-1. First, "substance abuse" has been replaced with "substance use disorder" to align with current medical terminology. Second, "bar association legal assistance program" has been replaced with "lawyer assistance program" in recognition of the fact that various entities can offer these programs. Finally, language was added to encourage law schools to help destigmatize mental illness since this can prevent students from getting the help they need.

Redline of Standard 508

Standard 508: Student Support Services

A law school shall provide all its students, regardless of enrollment or scheduling option, with

- (a) Basic student services, including maintenance of accurate student records, academic advising and counseling, financial aid and debt counseling, and career counseling to assist students in making sound career choices and obtaining employment; and
- (b) Information on law student well-being resources.

If a law school does not provide these student services in (a) directly, it shall demonstrate that its students have reasonable access to such services from the university of which it is a part or from other sources.

Interpretation 508-1

Law student well-being resources include information or services related to mental health, including substance use disorders. Other law student well-being resources may include information for students in need of critical services such as food pantries or emergency financial assistance. Such resources encompass counseling services provided in-house by the law school, through the university of which the law school is a part, or by a lawyer assistance program. Law schools should strive to mitigate barriers or stigma to accessing such services, whether within the law school or larger professional community.

Interpretation 508-2

Reasonable access, at a minimum, involves informing law students and providing guidance regarding relevant information and services, including assistance on where the information and services can be found or accessed.