Comments on proposed changes to ABA Law School standards pertaining to "non-discrimination and equal opportunity" and "curriculum"
Date: Thursday, June 3, 2021 6:19:15 PM

Dear Mr. Mariduena:

I am writing to provide comments as noted in the heading above on the proposed ABA Law School standards,

Professor Brian Leiter and I agree on very little, and we have tangled publicly on various public policy and scholarly matters. However, I agree with every word of his critique of these proposed standards. I have reprinted his critique below. I would add that under the Grutter opinion, law schools may only engage in racial and ethnic preferences if the law school faculty and others involved in the school's academic mission have determined that such preferences would add diversity to the school in a way that would be educationally beneficial. By seeming to mandate such preferences, the ABA would be taking the decision out of the hands of the individual schools, and instead making it a requirement of accreditation. If a particular law school disagreed with the ABA"s views on diversity, the ABA would nevertheless require that school to act illegally lest its accreditation be threatened.

Here is Prof. Leiter's critique:

As a threshold matter, the ABA should have to explain why the existing standards were not more than adequate, especially since some of the proposed changes will impose substantial costs on schools and seem ill-supported by evidence.

(1) Proposed changes would replace previous language requiring "concrete action" and "reasonable efforts" related to diversity, to a standard that demands "demonstrat[ing] progress." What does "progress" mean? If a very diverse law school becomes slightly less diverse after a few years (but is still extremely diverse), does that mean it is in violation of the standard? That would seem bizarre. Suppose a law school becomes more diverse by enrolling more Asian-American students, but fewer African-American students. Is that "progress" within the meaning of the Standard? What if it enrolls more students with disabilities, but fewer Hispanic students?How is "progress" to be measured? Why is it a preferable standard?

(2) The proposals impose a substantial new burden on schools to collect and maintain data that will be both costly and time-consuming, and will almost certainly require schools to hire additional administrative staff (see esp. 206-3 and 206-4). This includes publishing "threshold data disaggregated by race, color, ethnicity, religion, national origin, gender, gender identity or expression, sexual orientation, age, disability, or military status" (several of these categories are new), plus requiring "quantitative and qualitative measures of campus climate and academic outcomes disaggregated" again by all the preceding demographic categories. Wouldn't the money spent on these reporting requirements be better spent on financial aid, for example, that increased diversity?

(3) Recommended actions that would demonstrate "progress...under the Standard" would include (206-5) "Diversity, equity, and inclusion training." This raises two concerns. First, there is evidence that such "training" is not effective, and can even be counter-productive. Second, and even more seriously, such training will almost certainly violate the academic freedom rights of faculty at many (probably most) schools by demanding conformity to a particular ideology about "diversity," its meaning, and its value. The ABA should not even be suggesting that schools violate the contractual and/or constitutional rights of faculty to academic freedom. (There is a

related problem with the mandatory "diversity statements" at certain public universities.)

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David E. Bernstein

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