



Yale Law School

Response to May 25, 2021, Notice re Proposed Revisions to Standards 205, 206, and 303 of the ABA Standards and Rules of Procedure for Approval of Law Schools, Promulgated by the Council of the Section of Legal Education and Admissions to the Bar

We are responding to the May 25, 2021, notice of proposed changes to “ABA Standards – Matters for Notice and Comment – Standards 205, 206, 303, 507, and 508” (“the Notice”) from the ABA’s Section on Legal Education and Admission to the Bar. We are present or emeritus holders of Sterling Professorships of Law at Yale Law School. We write as concerned individuals.

We understand the laudable motives underlying the Notice, and we voice no objection to the proposed changes to Standard 205 that would add ethnicity, military status and gender expression as bases for non-discrimination. We are, however, concerned about several of the other proposed changes: (1) Certain of the standards being proposed in the Notice are ambiguous, lacking in the precision appropriate to good legal drafting. (2) The substantive soundness of certain of the proposals is dubious. (3) Some of the proposed changes constitute unwarranted intrusions into the autonomy of member law schools and instructors, particularly those provisions mandating course content.

Imprecision.

Proposed Section 206(a) (2) requires law schools to provide “an environment that is inclusive and equitable with respect to” various identitarian traits, but the regulation supplies no guidance regarding what steps compliance would entail.

Proposed Section 206(b) requires law schools to “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.” The regulation gives no indication of what it means by the open-ended objective of “demonstrat[ing] progress.” What is sufficient “progress” and how is the school to “demonstrate” it?

Proposed Section 206(b) is the subject of Proposed Interpretation 206-3, which declares that

“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 [various identitarian traits] 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”

The recommended “goals” are unspecified, and may be a euphemism for quotas, about the appropriateness of which there is considerable controversy. The endorsement of “pipeline programs” makes no mention of what such a program is. Proposed Interpretation 206-3 concludes with the menacing and standardless observation that “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.”

There is an inconsistency between standards 205 and 206: Under interpretation 205-1, a law school “may not require applicants, students, faculty, or employees to disclose their sexual orientation” but under interpretations 206-3 and 206-4, law schools are required to maintain data “tracking and reporting” the “gender identity, expression or sexual orientation,” among other personal characteristics, of students and faculty.

Proposed Standard 303(c), which is a subsection of a Standard expressly dealing with law school curriculums, provides that “a law school shall provide training and education to law students on bias, cross-cultural competency, and racism at the start of the program of legal education, and at least once again before graduation. “No explanation is given regarding what “cross-cultural competency” entails, or how it should be taught, although Interpretation 303-6 assures us of its supposed “importance ... 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” Law school curriculums already provide substantial exposure to cross-cultural contrasts in courses in comparative law, legal history, human rights, and international law. The Standard further provides that a law school can substitute for the required advanced course “substantial activity designed to reinforce the skill of cultural competency and [students’] obligation as future lawyers to work to eliminate racism in the legal profession” but does not provide any benchmark or definition of what would qualify as “substantial activity.”

Unsound substance.

Proposed Interpretation 206-4(2), addressing “Effective actions and progress towards diversifying the faculty,” recommends “efforts designed to attract diverse pools, [and] keeping pools open until they include a diverse group of qualified candidates” This provision fails to take account of the downside to keeping a recruitment pool open, viz., that procrastination in a search risks causing qualified candidates to go elsewhere or otherwise withdraw.

Proposed Interpretation 206-5 endorses “Support of affinity groups.” Affinity groups are by definition non-diverse. There are good faith differences of opinion about whether some affinity group programs support or detract from diversity goals.

Interpretation 206-1 to proposed Section 206(b) states:

“The requirement of a constitutional provision or statute that purports to prohibit consideration of [specified identitarian traits] 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 [to] effective actions and progress required by Standard 206 by means other than those prohibited by the applicable constitutional or statutory provisions.”

The required “other means” are vague and undefined, and it would appear that the Notice instructs schools to risk violating state or federal law in order to retain certification. That is not legally defensible conduct for any institution, nor a legally defensible requirement by an organization certifying law schools. If the ABA or a law school believes that particular constitutional or legal requirements are

unjust or inconsistent with institutional obligations, the appropriate response is to seek repeal of the offending provisions rather than to encourage what might be illegal activity.

Mandates of Curricular Content and Unwarranted Intrusion.

Proposed Section 206(a) (1) requires law schools to “provide full opportunities for the study of law and entry into the profession by members of [specified] underrepresented groups.” This proposed regulation contains not the least indication of what is meant by “full opportunities” and how affected law schools should go about assuring “entry into the profession.” This change replicates the language of existing Standard 206(a) but omits a critical term from that Standard, that such action should be “Consistent with sound legal education policy.” Removing that key language would appear to prevent a law school from approaching the issue of diversity and inclusion in its student body and career services operations as it deems fit. It thus potentially intrudes on a crucial component of a law school’s autonomy, which is the determination of how best to accomplish its educational mission.

Proposed Standard 303(b) (3), purportedly dealing with curriculum, is seriously problematic. It requires law schools to “provide substantial opportunities to students for the development of a professional identity.” Interpretation 303-5 purports to explain this vacuous term. “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.” To the extent that matters of this sort customarily arise in professional responsibility courses that are already mandated, this requirement is redundant. Furthermore, our diverse student body has students with diverse career objectives, including students who do not intend to maintain “a successful legal practice.” Law schools do not ordinarily command expertise about the practicalities of law practice and should not be pressured to develop such a field. Nevertheless, Interpretation 303-5 envisions burdening law schools to supply “frequent opportunities during each year of law school and in a variety of courses and co-curricular and professional development activities” directed to this vacuous objective.

We find particularly disturbing the proposed change to Standard 303, mandating two new course requirements and attempting to dictate the course content for these offerings. One is a course on professional identity that requires instructing students that their obligation is to eliminate racism in the legal profession, and the other is a course presupposing that some students are biased and racist and therefore need instruction euphemistically referenced as “cross-cultural competency.” Mandating the specific content of courses for accreditation is an overreach by the ABA accreditation committee. By comparison, the existing requirement of standard 303(a)(1) of a course in professional responsibility does not specify what “values and responsibilities” are to be taught in such a course. Likewise, the requirement of existing standard 303(a)(2) that two writing experiences be supplied does not specify the subject matter of the written work. The requirement of existing standard 303(a)(3) mandating six credits of experiential coursework also does not specify any particular subject matter. The new proposed requirements of standards 303(b)(3) and (c), to the contrary, are altogether different in kind for they attempt to institutionalize dogma, mandating instruction in matters that are unrelated to any distinctively legal skill, hence intruding on the right and obligation of every professor to determine what to teach in a class and how to teach it. Mandating the content of such courses misconstrues the accreditation function and what a successful institution of higher learning seeks to inculcate in its

students: to teach them skills, but not to require students to adopt a specific world view. Institutions of higher education challenge students intellectually and provide them with the analytical capacities to think for themselves and reach their own conclusions.

We would also note that there already exists in American law schools, and certainly at Yale, a sincere and profound consensus about the desirability of promoting diversity both in the legal profession and, within the Law School, among our students, instructors, administrators, and staff. American law schools have many commonalities, but particular schools vary in their curricular offerings, in the scholarly work and research projects of their faculties and associated research centers, and in the career aspirations of their students. Our law schools are in a word “diverse.” Regulatory interventions such as those proposed in this Notice, by expressly or impliedly mandating particular curricular or other practices, inevitably undercut the diversity among schools. At Yale, we have a student body and an institutional culture that is strongly sensitive to diversity concerns. We also have a rich curriculum, which our students regret that they do not have time enough to explore. Adding mandates will further diminish our students’ choices. And unnecessarily so, for any reasonable observer of the legal profession would consider the proposed professional identity course redundant with the existing professional responsibility course requirement, which refers to the “values and responsibilities” of the profession. The ABA should not be interfering with member-school autonomy or students’ curricular choices.

Likewise, ABA interference with the content and duration of law school orientation programs such as those suggested in the Notice are costly. Orientation programs commonly operate under time constraints in order not to bring students to campus and away from summer employment needlessly early.

The suggestion in interpretation 206-5 that law schools can require “diversity, equity, and inclusion training” as a means of complying with a certification standard is in tension with well-established principles of academic freedom, which go to the heart of the educational enterprise. We believe it is inappropriate and should be deleted.

American law schools today are hotbeds of concern and activity to promote diversity. Further ABA intrusion into school autonomy on this matter is unneeded.

Bruce A. Ackerman

John H. Langbein

Akhil R. Amar

Jerry L. Mashaw

Mirjan R. Damaska

Robert C. Post

Owen M. Fiss

Roberta Romano

Anthony T. Kronman

Alan Schwartz

June 23, 2021