American Bar Association
Section of Legal Education and Admissions to the Bar

Re: Proposed Revisions to Standards 205 and 206

Dear Mr. Clark,

I am writing to submit comments on behalf of Regent University School of Law regarding the proposed revisions to Standards 205 and 206, as provided in the November 17, 2017 Memorandum from your office. These comments are intended to provide constructive input to the Committee and Council as they undertake the important and challenging task of weighing and balancing relevant concerns implicated by the issues surrounding these proposed revisions.

To provide the context from which these comments are made, Regent Law and Regent University have diverse student bodies and are committed to providing a welcoming and supportive environment for students. As just a few examples, Regent Law’s 2017 1L class included 55% women and 33% minorities (15% Hispanics and 14% African-Americans); Regent University’s overall graduate student population includes 65% women and 53% minorities, including 37% African-Americans; and Regent University has a Center for Student Happiness (see here) that insures a supportive and encouraging environment for law and all other students, including providing the Regent C.A.R.E.S. (Connection, Access, & Resources for Every Student) support and information center (see here). A significant portion of my personal scholarship has constructively engaged issues of discrimination (see, e.g., here and here), including advocating equitable treatment of immigrant populations (see, e.g., here). These achievements and services reflect Regent’s commitment to its Christian mission.

The following comments provide constructive input regarding concerns about textual ambiguities, practical compliance issues, compelled speech, and religious liberty.

**Textual Ambiguities**

The Committee has evidently attempted to provide flexibility by, for example, not mandating in Interpretation 206-3 specific forms of action that would be required to protect gender identity. Nevertheless, the inclusion of gender identity as a protected class would create significant issues not raised by the other classes. “Gender identity” is uniquely fluid, and this construct continues to evolve without a scientifically established or commonly accepted definition. One gender identity support website provides “an ongoing list” of (presently) 115 gender identities, which can be increased to 460 identities by substituting “boy,” “girl,” or “nonbinary” for “gender” in each definition (see here). In recognition of the inherent difficulty of defining gender identity, New York City recently added a list of 31 identities protected by its non-discrimination ordinance (see here). Notwithstanding the complexities
inherent in the concept of gender identity, the proposed revisions to Standards 205 and 206 provide no definition of gender identity or guidance as to how gender identity is to be identified. Also, adding “gender identity” while retaining “gender” suggests gender is both innate and fluid, which raises the possibility that other innate classes could also be fluid and deserving of similar protection (see, e.g., here).

In addition to these definitional problems, revised Standard 206 and proposed Interpretation 206-3 include facially ambiguous phrases that will make it difficult for schools to know how to comply. The following facially appealing terms are undefined generalities: “environment that is inclusive,” “environment that is welcoming,” “progress towards having an inclusive environment,” “portrayal of the law school as inclusive,” “support” (verbal, financial, other?) of “affinity groups,” and “support of pro bono and externship opportunities that reflect a commitment to an inclusive environment.” These phrases are at least as ambiguous as the phrases that were recently withdrawn (“or any other characteristic not relevant to the applicant’s ability to satisfactorily complete the school’s program of legal education” and “or any other characteristic not relevant to the law school’s capability to operate in compliance with the Standards and carry out its program of education”). Although apparently intended to provide flexibility, the last sentence of proposed Interpretation 206-3 potentially exacerbates the problem by not explaining how the various terms and considerations will be balanced to assess the mandated totality of the circumstance review.

**Practical Compliance Concerns**

Protecting gender identity will raise pervasive issues not inherent with other protected classes. School officials must regularly refer to students by gender; by contrast, it is rarely necessary, if ever, to refer to students’ other class characteristics. The proposed revisions provide no guidance regarding how to refer to gender identities, how to handle likely tensions and differences regarding preferred gender references, and how to otherwise accommodate different identities. To provide just two notable examples, there is longstanding disagreement between many feminists and gender identity advocates regarding the class of “female” and the opportunities and facilities extended to members of that gender (see, e.g., here), and prominent members of the transgender community have raised concerns about the implications of legal protection of gender identity (see, e.g., here). Given these conflicting views and interests, a law school that, for example, takes extensive steps to be “welcoming,” “support(ive)” of, and “committed” to biologically male students who identify as female could be accused of being the opposite to at least a significant portion of its women.

The sweeping proposed language would have consequences for classes other than gender. Proposed Interpretation 206-3 facially conflicts with *Christian Legal Society (CLS) v. Martinez*, 561 U.S. 661 (2010), that a law school can dictate leadership criteria for its CLS chapter as a condition of funding. Presumably, CLS would qualify as a religious “affinity group.” Dictating terms and denying funding to a group, as it defines itself, is not “welcoming” or “supportive” of that group. Interpretation 206-3 would require law schools to portray themselves as inclusive, supportive, and welcoming of all religious affinity groups—not just mainstream groups like CLS. For example, a hypothetical religious affinity group could advocate theocracy and subjugation or persecution of other religions, women, and sexual minorities—things that presumably no ABA accredited law school would want to support or

1 Christians comprise 70.6% of the American population, including 25.4% Evangelical Protestant, 20.8% Catholic, 14.7% Mainline Protestant, and 6.5% Historically Black Protestant (see here).
advocate. The proposed standards do not explain how a school could welcome and support such a group while welcoming and including others on the basis of religion, gender, and gender identity.

**Compelled Speech**

Presumably designed in part to protect free expression, the proposed revisions would at the same time compel speech. The proposed changes to 205(a) and (b) facially shift from requiring non-discrimination to compelling schools to say certain things to prove they do not discriminate. Interpretation 206-3 further potentially compels speech by, among other things, requiring the “portrayal of the law school as inclusive” and “support of affinity groups.”

**Religious Liberty/Exemption Implications**

To promote pluralism, diversity, and religious liberty, if gender identity is added to the list of protected classes, Interpretation 205-2 should be amended to specify that the exemption provided to religiously affiliated schools extends to gender identify as well as sexual orientation and to clarify that this exemption also applies to Standard 206. Because non-discrimination and inclusivity go hand-in-hand, Standards 205 and 206, and any exemptions to them, must be read in conjunction with, and cannot logically be interpreted in contradiction to, one another.

**Conclusion**

The ABA has shown a commitment to institutional pluralism rooted in academic freedom, demonstrated, for example, in Interpretations 205-2 and 315-1. To maintain that commitment, the ABA should not adopt any provisions, such as those identified and discussed above, that are ambiguous or compel speech or religious belief and practice. Regent Law respectfully requests that the proposed revisions to Standards 205 and 206 be given further study, with additional opportunity for input, at a time when no other proposed revisions are pending. If gender identity is added to the list of protected classes, the current religious exemption in Standard 205 should be extended to gender identity and, as amended, to Standard 206.

Please feel free to contact me at michher@regent.edu or (757) 352-4040 if I can answer any questions or provide additional assistance.

Sincerely,

Michael V. Hernandez
Dean and Professor