Memorandum

Date: April 5, 2018
To: Maureen A. O’Rourke, Chair
Section of Legal Education and Admissions to the Bar
From: Robert T. Gonzales, Chair
ABA Commission on Disability Rights
Mark Johnson Roberts, Chair
ABA Commission on Sexual Orientation and Gender Identity
CC: Barry A. Currier, Managing Director of Accreditation and Legal Education
Section on Legal Education and Admissions to the Bar
Subject: Standard 206

The ABA Commission on Disability Rights (CDR) and the ABA Commission on Sexual Orientation and Gender Identity (SOGI) lead the ABA’s efforts to fulfill its commitment to ensuring full and equal participation in the legal profession by persons with disabilities and persons of differing sexual orientations and gender identities. Our diversity and inclusion initiatives focus on both lawyers and those preparing to enter the profession. Law students with disabilities and those who are lesbian, gay, bisexual, and transgender (LGBT) are greatly underrepresented in law schools and throughout the profession.

We commend your efforts to incorporate a commitment to diversity and inclusion into the Standards, but strongly urge that Proposed Standard 206 be made fully inclusive. Accordingly, CDR and SOGI respectfully submit the following additions to Proposed Standard 206 of the ABA’s Standards and Rules of Procedures for Approval of Law Schools.

Standard 206. DIVERSITY AND INCLUSION

A law school shall demonstrate by concrete action a commitment to:

(a) Providing full opportunities for the study of law and entry to the profession by members of underrepresented groups, particularly racial and ethnic minorities;
(b) Having a student body, faculty, and staff that are diverse with respect to gender, race, and ethnicity, disability, sexual orientation, and gender identity; and
(c) Providing an environment that is inclusive with respect to race, color, ethnicity, religion, national origin, gender, gender identity, sexual orientation, age, and disability.

CDR and SOGI applaud both the addition and inclusiveness of provision (c). However, the sole reference to “disability,” “sexual orientation,” and “gender identity” in (c) serves only to underscore the exclusionary nature of (a) and (b), which address diversity. The Proposed Standard’s language in (b)—requiring law schools to demonstrate by concrete action a
commitment to “having a student body, faculty, and staff that are diverse with respect to gender, race, and ethnicity”—explicitly excludes persons with disabilities and LGBT individuals. With regard to the language in (a), we would suggest parenthetically that the phrase “providing full opportunities for the study of law and entry to the profession by members of underrepresented groups, particularly racial and ethnic minorities,” is incoherent. To say that there should be “full opportunities for Smith and Jones, but particularly for Jones,” presumably means that the opportunities to be accorded to Smith are less “full” than those provided to Jones.

It is worth noting that CDR and SOGI expressed these same concerns back in January 2014, when we urged that the coverage of the Standard be expanded to include “gender identity, sexual orientation, and disability”—diversity categories that are covered by the ABA’s own Goal III—in the list of specifically identified underrepresented groups. The Council declined to adopt this recommendation. Two months later, CDR and SOGI wrote to Judge Solomon Oliver Jr., then the chair of the Section, requesting that the Section reconsider the matter. The Section declined to do so, and the two commissions advised the Section that they were prepared to oppose the proposed revisions to the Standards as a whole (Report 103A) when they were presented to the House of Delegates (or to move to sever Standard 206) unless the Section agreed to undertake a further review of Standard 206. At the 2014 Annual Meeting, Judge Oliver informed the House that the Section would undertake such a review, and CDR and SOGI withdrew their opposition to the Report. The Council directed the Standards Review Committee to review the concerns raised and to draft any appropriate recommendations.

In February 2015, the Committee invited CDR and SOGI to participate in an Informational Session in Washington to discuss potential revisions to Standard 206. CDR provided, in addition to our prepared statement, written responses to a series of questions propounded by the Committee to assist them in framing an inclusive Standard with which law schools could comply in a meaningful and measurable way. The Committee presented possible revisions to Standard 206 to the Council in June 2015. The text of proposed Standard 206 stated: “Consistent with sound legal education policy and the Standards, a law school shall provide an environment in which diversity and inclusion are welcomed and embraced. A law school shall demonstrate this commitment to diversity and inclusion by concrete action.” Interpretation 206-2 made clear that the requirements to “provide an environment in which diversity and inclusion are welcomed and embraced” and “to demonstrate this commitment to diversity and inclusion by concrete action” apply, “without limitation,” to “race, color, religion, national origin, gender, gender identity, sexual orientation, age, and disability.”

During the discussion of the proposed revisions at the Council Meeting, Council members expressed concern that the proposed changes would result in diluting the Standards’ commitment to historically underrepresented groups. The Council discussed the possibility of separating into two different provisions the commitment to historically underrepresented groups and the requirement of having an environment in which diversity and inclusion are welcomed and embraced. Rather than send the proposal out for comment as drafted, the Council decided to ask the Committee to consider the concerns raised and draft revised recommendations.

The Committee’s revised Standard would have required a school to demonstrate by concrete action (1) a commitment to providing an environment in which diversity and inclusion are welcomed and embraced; (2) a commitment to providing full opportunities for the study of law
and entry into the profession by members of underrepresented groups, particularly racial and ethnic minorities; and (3) a commitment to having a faculty, staff, and student body that is diverse with respect to gender, race, and ethnicity.

Following the ABA Public Hearing on January 29, 2016, at which SOGI staff director Skip Harsch, on behalf of CDR and SOGI, testified, the Council had continuing concerns about the best approach to take with Standard 206 and tabled consideration of changes to the Standard to consider options.

In closing, CDR and SOGI respectfully request that Standard 206 be revised, and express our interest in working with the Section in good faith.