

## ABA ACCREDITATION STANDARDS AND QUALITY LEGAL EDUCATION

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Thank you. First, I want to make clear that my remarks today represent my personal views and not the views of the Section of Legal Education and Admissions to the Bar. Let me begin by agreeing with some of the comments made by previous speakers. I very much agree with Tom Morgan, for example, as to the two primary tests for the validity of a particular standard or standards as a whole. Ideally, standards should both (1) establish appropriate minimum standards for high-quality education, and (2) give schools as much flexibility as possible to design and create their own programs within the general parameters of the standards. Getting to that ideal is neither easy nor simple.

I also agree with Saul Levmore that there are in the current standards a number that are unnecessarily detailed and prescriptive, and a number that attempt to regulate matters best left to the judgment of law school faculty and deans. Each of us has a laundry list of which are the problematic standards. But let me help you understand the dynamics of the standards revisions process.

When the standards initially were promulgated in 1921, they were very bare-bones.<sup>1</sup> Then there was a major revision of the standards in the 1970s.<sup>2</sup> The standards that resulted from that revision were very detailed and prescriptive, in part for the purpose of providing guidance to the many new law schools

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1. Michael Ariens, *Law School Branding and the Future of Legal Education*, 34 ST. MARY'S L.J. 301, 310 (2003).

2. ROBERT K. WALSH, COUNCIL OF ABA SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR AND WAKE FOREST UNIV., AM. BAR ASSOC. STANDARDS FOR THE ACCREDITATION OF LAW SCHOOLS (2000), <http://www.aals.org/2000international/english/aba.htm>.

developing at that time to meet the huge increase in applications to law school. Others may attribute different or additional motivations to the regulatory system that developed in the 1970s.

By the mid-1990s, a great deal of criticism of the standards had mounted from wide-ranging sources, charging that the standards were too detailed and prescriptive, and that they interfered with creativity and innovation.<sup>3</sup> I think it is fair to say that over the past ten years, the ABA has attempted to respond, with some albeit modest success, to those criticisms. In addition to things others have mentioned, the requirements concerning the format and nature of a law library collection are very much more general now.<sup>4</sup> I think they've made good progress there. The revised library standards give law schools great discretion in how to design and implement a law library. The gravamen of the test now, as the accreditation committee has applied it, is whether the collection and the library services adequately meet the needs of the school's faculty and students.<sup>5</sup> I think that is basically as it ought to be.

Schools also have much more latitude now than they previously had in using distance education.<sup>6</sup> No, a law school that delivers essentially its whole educational program by distance technology cannot yet apply for ABA approval, but in 2002 there were major relaxations of the restrictions on the use of distance learning technology.<sup>7</sup> Since those revisions, I actually have been very surprised that so few law schools are using the flexibility they presently have to the maximum, to use distance education to reduce costs and work in collaboration with other law schools. There is only one ABA-approved law school in the country that has indicated that the distance education standards bind them. That school is presently being considered for a

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3. See generally *Symposium on Law School Accreditation*, 45 J. LEGAL EDUC. 415 (1995).

4. See, e.g., AM. BAR ASS'N SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, 2006-2007 STANDARDS AND RULES OF PROCEDURE at Standard 601-606 (2006), available at <http://www.abanet.org/legaled/standards/2006-2007StandardsBookMaster.PDF> [hereinafter ABA STANDARDS].

5. *Id.* at Interpretation 604, 605, 606(b).

6. *Id.* at Standard 306.

7. See Section of Legal Education and Admissions to the Bar, American Bar Association, *Commentary on the Changes to the Standards for the Approval of Law Schools and Rules of Procedure and the Work of the Standards Review Committee*, 2001-2002, at 3 (Aug. 2002), available at <http://www.abanet.org/legaled/standards/archives.html> (“[Approved changes] allow ABA-approved law schools to grant credit for a limited amount of distance education coursework.”).

variance that, if granted, would allow for an experiment that would provide the basis for evaluating the efficacy of using distance education more broadly in the curriculum.<sup>8</sup>

In the early 1990s, the Council adopted a very detailed set of standards that govern externships.<sup>9</sup> Unfortunately, they did so because law schools were just abdicating their responsibility as legal educators. There were a huge number of law schools with externship programs run without adequate supervisions, with highly uneven quality; they were giving away credits, basically. But what has happened because of the last two revisions is that those externship standards have been significantly relaxed, leaving much more discretion to the law schools to control the quality of their externship programs. This happened in part because the law schools developed good methods for quality control of externships, convincing the Council that it could rely more substantially on the law schools themselves to control the quality of externships.

Restrictions on academic calendars have been lessened,<sup>10</sup> not only in the way that Tom Morgan mentioned, but in a manner such that schools like Dayton can do an experimental program in which students get the J.D. in five fairly intensive semesters over a maximum of two years, rather than what is the usual required three years.<sup>11</sup> People will be looking to see whether the Dayton experiment works, and I think it will. They have a well-designed system that they could not have implemented before the standards had been changed.

The Council has also provided a lot more guidance on variances.<sup>12</sup> I'm hoping that the Council will be willing, in a reasonable number of circumstances, to grant variances to schools that come forward with well thought out experimental programs that do not meet the current standards so that we can test new models of legal education.

Nonetheless, I think all of us will agree that there are still too many unnecessary and unnecessarily detailed standards that

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8. The requested variance has since been granted by the Council.

9. See ABA STANDARDS, *supra* note 4, at Standard 305 (current externship standards).

10. See *id.* at Standard 304.

11. University of Dayton School of Law: Academic Programs, Two-Year Law Degree Program, <http://law.udayton.edu/academicprograms/two%20year%20law%20degree%20program> (last visited Apr. 15, 2007).

12. ABA STANDARDS, *supra* note 4, at Standard 802 (variance standard).

stifle the creativity in law schools, and that may unnecessarily increase the cost of legal education. Later on I will be mentioning some of these. But let me remind you of some of the additional factors and pressures in the standards revision process, in addition to the interest groups within the academy, that, if not barriers to change, at least are forces that may put change farther off than we might like.

The Council has to pay careful attention to the views of the supreme courts and the bar admission committees that implement the supreme courts' requirements. Practitioners, bar administrators, and judges are all represented, as they should be, on the decisionmaking bodies of the Section. And while the deans often argue for less regulation, some of those other constituencies get very concerned when there is discussion of significant deregulation; they fear that reduced regulation will create problems with respect to assuring an appropriate minimum quality of law school programs and those they graduate.

It also must be remembered that not all law schools are as good as those represented on this panel. One of the things the Council has to think about is whether it has standards that allow it appropriate oversight over that relatively small number of law schools that have particularly serious problems in bar admission and attrition. They have to design the standards so that they can deal with those problems, and they have to apply those standards consistently to every law school; not only because the Council believes that it ought to have a unitary set of standards, but also because the Department of Education will require the Council to apply its standards consistently to all law schools.

Thus there are a lot of forces that can be barriers to simplifying and reducing the amount of regulation contained in the standards. Actually, I think the problems in this regard are very similar to those faced when seeking simplification of the tax code.