

TO: Standards Review Committee

FROM: Richard K. Neumann, Jr
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RE: Outcomes Assessment Standards
(Draft Standards 301 through 305)

The Cost Issue

Predictably, outcomes assessment standards will be objected to on the theory that they will increase the cost of legal education.

The real issue is not whether the draft standards would impose new costs. Instead, it's whether schools would be able to meet outcomes assessment responsibilities by reallocating resources to more directly benefit students.

The movement towards outcomes assessment standards began with a recommendation in the 2007 Report of the Section's Accreditation Policy Task Force.¹ That recommendation led to the 2008 Report of the Outcomes Measures Committee, which in turn led to the draft standards now under consideration.

The 2007 Task Force also made the following observation in a discussion of whether the Standards should continue to require faculty scholarship:

1. ABA Section of Legal Education and Admissions to the Bar, Report of the Accreditation Policy Task Force 7-9 (2007).

Law schools are unusual among graduate and professional schools in that the majority of research and service in many law schools is funded by tuition. The tuition that is used to cover legal research is, for many students, the equivalent of an involuntary fee that they must pay in order to obtain law instruction and a law degree. . . .

. . . Assuming that there are benefits to society from this research, it is not clear what law students receive from their schools' research missions. Some believe that research contributes to better teaching, but the studies have not consistently demonstrated such a correlation.²

In medical education, faculty research costs (including salaries) are paid for through grants and contracts which are awarded by the government, corporations, and other outside organizations that have been persuaded that the research is worth the expense in improving medical care.

There's no such limiting factor in legal education. We write law review articles on whatever subjects interest us. We are paid to do so automatically, at most schools out of tuition — which is what the 2007 Task Force called an involuntary fee imposed on students.

At many schools, a productive faculty member will in a year teach four courses and publish a law review article (or perhaps two articles in a three-year period). At some schools, a faculty member can teach as little as three courses per year. A typical estimate is that throughout legal education 30% to 50% of a faculty member's job is to write and publish scholarship.

I'm generally considered to be a productive scholar. My articles tend to be decently placed, and most are published in a law review's lead position. The most recent one was 165 pages long and had 1,124 footnotes. Writing it did not help me teach more effectively. Perhaps half the articles I've written have had no positive effect on my teaching or, as far as I know, on anybody else's teaching.³ I cannot identify any legislation or court decision that has been influenced in any way by a law review article I've written. This is typical. Court citation rates to law review articles generally have been falling for many years and are now a fraction of what they once were.⁴

2. *Id.* at 5-6.

3. Writing a textbook typically would improve one's teaching and perhaps the teaching of others as well. But few law school faculty members write textbooks. The overwhelming majority of faculty scholarship appears in law reviews.

4. See Adam Liptak, *When Rendering Decisions, Judges Are Finding Law Reviews Irrelevant*, N.Y. Times, March 19, 2007, at A8.

If the norms were more aligned with what students need and are paying for, people like me might write less and teach more. My total work load would not increase if I were to teach five courses a year instead of four while writing fewer articles. But the incentives in legal education strongly discourage that. As things stand now, a school has no reason to ask productive scholars to write less and teach more.

The argument that outcomes assessment standards will raise the cost of legal education is based on assumptions that schools are already allocating their resources in ways that best provide for student needs. Different schools will find different ways of resolving the cost issue, perhaps some without reducing their scholarly output appreciably. The cost issue is not, in itself, a barrier to solid outcomes assessment standards.

The Current Draft

In his December 21 memo to the Committee, Roy Stuckey made a number of perceptive comments, all of which are well taken. Through the Best Practices project and in other ways, he has had a profound effect on understanding how outcomes assessment can operate in legal education.

As he points out, the current draft's 303(a)(4) wording is quite troubling. It would encourage schools to believe that a single course could accomplish most of what these standards would require. The wording he suggests (his page 2, 3d paragraph) would be far better.

If the current 303(a)(4) wording cannot be changed, I think it should be removed. It tends to undermine much of the excellent thought and fine drafting elsewhere in the document.