

MEMORANDUM

TO: Standards Review Committee,
ABA Section of Legal Education and Admissions to the Bar

FROM: Roy Stuckey, Professor Emeritus, Univ. of South Carolina School of Law

DATE: December 21, 2009

RE: Outcome Measures for U.S. Law Schools

I offer these comments about the Student Learning Outcomes Committee's report for discussion at your January 8-9, 2010, meeting. I am sorry that I will not be able to attend the meeting. As explained in more detail below, my suggestions are:

1. The Committee should either delete or substantially modify proposed S303(a)(4).
2. The proposed Standards should give more emphasis to the development of self-reflective skills.
3. The Committee should clarify the meaning of S302(b)(2)(iii).
4. The Committee should reconsider the placement and description of skills in Alternative Two of proposed S302(b)(2)(iii).

My reasons for making these suggestions are explained in the following sections:

1. If adopted, the current language in proposed S303(a)(4) could be more harmful than helpful to legal education. It says: **A law school shall offer a curriculum that requires every student to complete satisfactorily at least one appropriately supervised learning experience in either (i) a substantial simulated exercise that engages students in performances of professional skills involving a type of case or problem that practitioners encounter; or (ii) a live client clinic or field placement.**

The potential harm here is in the implicit suggestion that ABA-mandated and school self-identified skills could be acquired in a single simulated exercise or a single clinical course. Anyone who has tried to teach professional skills knows this is impossible. Further, this language also suggests that simulated exercises, live client clinics, and field placement are equally effective and efficient at teaching the same lessons, including professional skills instruction. This is a misconception. Each method of instruction has unique strengths. There is some overlap, but there are also significant differences, as my co-authors and I point out in *BEST PRACTICES FOR LEGAL EDUCATION* (2007) at pages 168-173, 180-184, 189-193, and 198-200.

I submit that the accreditation Standards would be improved if this proposal is withdrawn. Proposed S303(b)(1) (which is a modified version of existing S301(b)(1)) should be retained: **A law school shall provide substantial opportunities to students for (1) live-client clinics or other real-life experiences;**

I think we all know, as the Carnegie Report concluded, that law schools should provide multiple opportunities for students to engage in supervised law practice, but, unfortunately, we also know that most law schools would resist a mandate to do so from the ABA.

I wish the committee would reconsider the recommendation of the Ad Hoc Working Group on Learning Outcomes to include a standard requiring law schools **to offer a curriculum that requires all students to participate in multiple courses in which they perform well-supervised authentic legal work on realistic legal problems designed to encourage reflection by students on their professional experiences, the values and responsibilities of the legal profession, and the development of the ability to assess one's own performances, levels of competence, and professional judgment.**

While not mandating any particular method for accomplishing the desired learning outcomes, this proposal makes it clear that students must participate in multiple courses in order to become adequately self-reflective about their professional development. The importance of being self-reflective is discussed in the following section.

2. An earlier version of the Learning Outcomes Committee's report proposed adding the following language to S301, which describes the overall objectives of legal education: **S301(c) A law school shall strive to produce graduates who are reflective practitioners and who have the capacity and motivation to pursue expertise throughout their careers.**

Language similar to this is in existing S302(b)(1): **A law school shall offer substantial opportunities for live-client or other real-life practice experiences, appropriately supervised and designed to encourage reflection by students on their experiences and on the values and responsibilities of the legal profession, and the development of one's ability to assess his or her performance and level of competence.**

Of course, the development of self-reflective skills can be enhanced by educational experiences other than live-client or other real-life practice experiences, so I agreed with the initial decision to move the language into S301. In the new draft, however, proposed S301(c) has disappeared, and Interpretation 303-3 was added on page 4: **I303-3. A law school's curriculum should**

encourage reflection by students on their values and experiences and on the values and responsibilities of the legal profession, as well as the development of one's ability to assess his or her performance, professionalism and level of competence.

It is clear that the Committee wants law schools to produce reflective practitioners, as it should. I do not understand the politics that resulted in the decision to move this language out of a Standard and into an Interpretation. The skill of self-reflection should at least be on the list of mandated outcomes in S302(b)(2)(I), if not in S301.

This is what the authors of the Carnegie Report said about the value of self-reflection:

Practical judgment depends on complex traditions of living, which can only come alive through apprenticeship experiences with exemplars of inherited judgment and skill. Thus the apprenticeship of skill takes on critical aspects of the apprenticeship of professional identity and ethical meaning.

For this reason, professional schools cannot directly teach students to be competent in any and all situations: rather **the essential goal of professional schools must be to form practitioners who are aware of what it takes to become competent in their chosen domain and to equip them with the reflective capacity to pursue genuine expertise.** [Carnegie Report, p. 173]

Experience in the Daniel Webster Scholars' Program in New Hampshire reinforces this point. In that program, which allows graduates to be admitted to the New Hampshire bar without taking the bar examination, bar examiners, judges, and lawyers assess the portfolios of students enrolled in the Program to determine whether those students have the necessary knowledge, skills, and values to become competent lawyers.

The Director of the Program, John Garvey, reported at the Assessment Conference in September that the first thing those experts look at when assessing a student's portfolio is the students' self-critiques and self-reflections, because they recognize that a critical component of an effective and responsible lawyer is the ability to identify what one does not know and the ability and desire to achieve the necessary level of expertise.

If the development of self-reflective skills should indeed be the essential goal of legal education, it should be among the mandatory outcomes in S301 or S302, not just in an interpretation of S303.

3. I am confused by the phrase “sufficient depth and breadth” in both alternatives to proposed S302(b)(2)(iii).

S302(b)(2) requires “proficiency as an entry level practitioner,” thus, S302(b)(2)(iii) as proposed would read: **The learning outcomes shall be consistent with and support the stated mission and goals of the law school. The learning outcomes shall include: proficiency as an entry level practitioner in: [Alternative One] a sufficient depth and breadth of other professional skills that the law school identifies as necessary for effective, responsible and ethical participation in the legal profession.**

It does not seem to me that the phrase “sufficient depth and breadth” has any meaning. If it does, please explain what it means. If it does not, please remove it.

4. I am also confused by the placement of the list of skills in Alternative Two to S302(b)(2)(iii). . . . , **which shall include trial and appellate advocacy, alternative methods of dispute resolution, counseling, interviewing, negotiating, factual investigation, organization and management of legal work, and drafting.**

If these skills are under consideration as mandatory outcomes, why put them here instead of as additional skills to consider adding to S302(b)(2)(I)?

If the goal of the Committee is to produce a list of the basic skills that every lawyer should possess upon graduation from law school, I would note that very few lawyers practice in appellate courts, so appellate advocacy is a strange candidate for a mandatory list, as are trial advocacy skills.

I encourage the committee to continue trying to come up with a list of skills that all law school graduates should have, but I would also point out that the MacCrate Report’s statement of skills and values does not recommend that law school graduates should possess entry level proficiency in lawyering skills. Rather, the MacCrate Report uses language like, “a lawyer should be familiar with the skills and concepts involved in [a particular skill].” Perhaps the committee should use similar language with regard to appellate advocacy, trial advocacy, and other skills in which entry level proficiency is not necessary.

Thank you for considering my comments. Good luck on your continuing work.