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October 2, 2009

Dean Donald Polden
Santa Clara Law School
Santa Clara University
500 El Camino Real
Santa Clara, California 95053

Dear Dean Polden:

The Society of American Law Teachers submits these comments in response to the proposal of the Student Learning Outcomes Subcommittee of the Standards Review Committee, which will be considered by the SRC at its October 9, 2009 meeting. We would appreciate having the letter sent to SRC members.

SALT has long supported a shift in accreditation standards that would result in law schools consciously focusing on their students' acquisition of the knowledge, skills and values needed for the practice of law. We have carefully reviewed the Subcommittee's detailed proposal and commend the Subcommittee for its thoughtful and measured approach. We support the four guiding principles that animated the Subcommittee's work and believe that its proposal reflects those important principles.

SALT particularly applauds the extent to which the proposal incorporates essential values, including 302(a)(3)'s reference to a lawyer's ethical responsibility as a public citizen responsible for the quality and availability of justice and 305's reference to law as a public profession calling for performance of pro bono legal services and public service activities.

We comment here on four issues, three of them identified by the Subcommittee as particularly problematic: the extent to which the new Standards should mandate a comprehensive list of skills; whether the Standards should require a clinical learning experience; and the role that bar passage should continue to play in accreditation. We also suggest revising the Standard that articulates how to determine if a school has complied with the new Standards. We hope that the SRC will find the following comments and suggestions helpful.

Mandated Skills

We understand the difficulty of deciding whether the Standards should specify the precise learning objectives that all schools must adopt or leave designation of student learning outcomes to individual schools. We support the Subcommittee's middle ground approach, which identifies some baseline learning outcomes but gives a law school the latitude it needs to identify its other learning outcomes in light of its mission and goals.

The Subcommittee's list is an excellent starting point. However, we are concerned that many schools will look at that list and believe that their current curricula and teaching comply with the generalized listing of skills included in the Standard, a view we believe is inconsistent with the Subcommittee's goals. Thus, we suggest modifying the list to include a modest set of additional crucial skills, whether that is done in the text of the Standard itself or in an interpretation amplifying the expectations underlying the Standard.

First, we suggest making it clear that students must be educated in a variety of communication skills, including analytic and persuasive writing, oral advocacy, client communications, and drafting legal documents. Such a change would ensure that schools set learning outcomes that encompass this broader range of communication skills that are central to lawyer competence.

Second, we recommend specifying multicultural competence and effective handling of interpersonal dynamics as skills crucial for graduates. These skills play a critical role in the development of effective, ethical and responsible lawyers. Mastering interpersonal dynamics—e.g., responding to conflict, handling mistakes, working with clients, colleagues, and support staff, working collaboratively—is essential for every aspect of a lawyer's work. Likewise, multicultural competence has become an essential lawyering skill in an increasingly politically, culturally, ethnically and racially diverse world.¹ Indeed, other professions, including medicine and architecture, explicitly include multicultural competence as one of their specified learning outcomes.² Schools should be pressed to incorporate these skills, some of which are seldom taught and assessed, and some of which are taught only as part of clinic or field experiences.

We hope the subcommittee will consider adding these skills to its list of required practical skills to both emphasize the critical role they should play in legal education and to send a clear message that current educational practices are no longer sufficient.

Defining Outcomes, Refining Assessments and Measuring Compliance

SALT strongly supports the Subcommittee's goal of revising the accreditation standards to incorporate and emphasize assessment of learning outcomes. Requiring schools to define specific

¹ MARJORIE M. SCHULTZ & SHELDON ZEDECK, FINAL REPORT: IDENTIFICATION DEVELOPMENT AND VALIDATION OF PREDICTORS FOR SUCCESSFUL LAWYERING 26-27 (2008), available at <http://ssrn.com/abstract=1442118> (setting forth a list of 26 lawyering effectiveness factors identified by practicing lawyers in an extensively validated empirical research study, one of which was the ability to see things through the eyes of others); see also ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION 79 (2007) (noting that a key component of professionalism involves "the capacity to deal sensitively and effectively with clients, colleagues, and others from a range of social, economic, and ethnic backgrounds, identifying and responding positively and appropriately to issues of culture and disability that might affect communication techniques and influence a client's objectives") and at 119-121 (noting that 30 years ago, the Cramton Report noted "since lawyers today commonly work in teams or in organizations, law schools should encourage more cooperative law student work").

²The Accreditation Standards of the Liaison Committee on Medical Education explicitly include cultural competence at ED 21: "The faculty and students must demonstrate an understanding of the manner in which people of diverse cultures and belief systems perceive health and illness and respond to various symptoms, diseases, and treatments." The Standard Interpretation provides: "All instruction should stress the need for students to be concerned with the total medical needs of their patients and the effects that social and cultural circumstances have on their health. To demonstrate compliance with this standard, schools should be able to document objectives relating to the development of skills in cultural competence, indicate where in the curriculum students are exposed to such material, and demonstrate the extent to which the objectives are being achieved." Available at www.lcme.org/functionslist.htm. In its 2009 "Conditions for Accreditation," the National Architectural Accrediting Board lists "Cultural Diversity" as one of its student performance criteria and defines it as follows: "Understanding of the diverse needs, values, behavioral norms, physical abilities, and social and spatial patterns that characterize different cultures and individuals and the implication of this diversity on the societal roles and responsibilities of architects." Available at www.naab.org/accreditation/2009_Conditions.aspx

learning outcomes with respect to knowledge, skills, and values, and to use better and more frequent assessment of student progress, paves the way for law schools to better integrate doctrine, skills and values throughout their programs of legal education.

We are concerned, however, that the ultimate goal of improving legal education will be undermined by Standard 303, which appears to require schools to demonstrate that all their students achieve the school's designated learning outcomes by the time of graduation. While that is a worthy goal, we believe it is more realistic to require schools to use assessment data on student learning outcomes to examine and then improve their programs, and that accreditation and site visits should focus on that rather than whether students are all attaining the learning outcomes. In higher education, that is what most accrediting bodies do.³ Accreditation is based on looking at whether a school has made a good faith effort to identify and define its learning outcomes in accordance with its own goals and mission statement; developed methods to assess progress toward achieving its stated outcomes; and used the data it has gathered to improve its program of education. We think that changing the question from "Have you achieved your outcomes" to "What are you doing to improve" will help encourage schools to set the bar high, rather than low. We also believe that the major shift to outcomes measures will be better received if schools will be judged on their efforts to incorporate outcomes assessment effectively rather than on their success in achieving their stated learning outcomes for all graduates, especially in the early years after adoption.

Experiential Learning

The Subcommittee was divided on the difficult question of whether to mandate that a law school *offer* a clinical learning experience to each student or *require* every student to have such an experience, and whether the experience should be one that includes only live-client clinics and field placements or also include simulations. Our view is that whatever language is ultimately chosen, the Interpretations should make clear that the goal of the Standard is to encourage *multiple* opportunities for students to engage in experiential learning of the sort described in the current draft (well-supervised, designed to encourage reflection by students on their experiences and on the values and responsibilities of the legal profession, and to develop student ability to assess his or her performance and level of competence). One of the most important insights of the Carnegie Report and Best Practices is that students learn best when they are performing real life lawyering tasks. Their appreciation of ethical issues deepens and improves, as does their acquisition of skills and understanding of doctrine. Ideally, all students would participate in increasingly sophisticated lawyering tasks, starting with well-designed simulations, followed by well-supervised field placements and live-client clinics.

While there may well be consensus about this ideal, law schools may strongly resist any effort to mandate that all students participate in some form of clinical education, citing the cost of doing so. If quality education is the goal, however, cost should not be the deciding factor. Medical schools and other professions understand the importance of clinical training for professionals and require it for all their students, and law schools should be doing the same. Moreover, there is no definitive research documenting that clinical programs are, in fact, more expensive than other resource-intensive parts of the curriculum, and we understand that some schools have recently moved to requiring clinical work by all students without suffering serious financial repercussions.

³ See www.learningoutcomeassessment.org/Accreditation1.htm for a description of what higher education accrediting bodies look at when assessing whether colleges and universities have complied with outcome measurement criteria.

If the SRC and Council decide that requiring every student to participate in a clinical program is not possible in this revision of the Standards, law schools should at least be required to offer all students multiple opportunities to participate in courses that provide well-supervised authentic legal work on realistic legal problems, including the chance to participate in at least one live-client clinic or field placement. We prefer that formulation to one that would mandate participation by students, but include simulations in the list of eligible courses, because we fear that schools might respond by withdrawing resources from clinical programs and might even claim that simple role-play simulations in doctrinal courses would satisfy the standard. In the event that the SRC adopts language that requires students to participate in at least one experiential course but includes simulations in the list, we encourage the Committee to specify that the types of simulations that would qualify are courses dedicated to providing carefully constructed simulations, not doctrinal courses that include an occasional role play.

Although a Standard specifying what courses law schools must offer or require would be “input-based”—specifying what opportunities the school must offer rather than focusing directly on the learning outcomes—we believe that a requirement of this kind remains necessary to help ensure that schools accomplish the student learning objectives required elsewhere in the Standards. We also believe that the goal of this Standard can be accomplished with the “offer” language if the SRC clearly delineates, in the Standard or Interpretation, that many of the skills enumerated in Standard 302 can only be learned when students perform authentic legal work on realistic legal problems.

Bar Exam Standards

The Subcommittee noted in its report that one of the key questions to be answered in preparing revised Standards is whether the bar passage standards should be removed in conjunction with adopting more comprehensive outcome measures. We understand that the Subcommittee has tentatively concluded that the bar passage standards should be retained for the immediate future, though the question may be revisited after more experience with outcomes measures. Although we appreciate the political and other considerations that led to that conclusion, we believe that the bar passage standards should not be retained. Measuring law school success by bar exam performance is problematic because of the discriminatory impact of the bar exam and the effect on law school curriculum and resource decisions. More particularly:

- Bar exams produce a disparate racial effect, and using the bar exam as a measure of law school success reinforces that impact.
- Bar exams fail to measure the full range of skills needed for the practice of law, and retaining a bar passage standard as a required measure is inconsistent with the effort to have the revised Standards reflect that full range of skills that the practice of law demands.
- Bar passage standards drive a host of decisions in law schools affecting admissions, curriculum, and pedagogy, in effect forcing schools to make decisions not for sound educational reasons but to protect bar passage rates.
- Retaining the bar passage standards while adding outcome measures poses a serious resource issue, because schools will need to continue devoting considerable resources to maintaining or improving bar passage rates while devoting substantial resources to providing more opportunities for skill development and to developing effective outcomes measures.
- Maintaining the bar passage standard may make it more difficult to induce adoption of better learning assessment methodologies in law schools because the use of timed make-or-break multiple choice and essay question exams is often justified as efforts to prepare students to pass the timed make-or-break multiple choice and essay bar exam.

For all these reasons, we urge the SRC to reconsider the choice to retain the bar exam standard during the current revision. Bar exam passage as a make-or-break outcome measure undermines the effort to assure schools prepare its students by ensuring they have the knowledge, skills, and values necessary for the effective, ethical, and responsible practice of law. If the SRC decides to retain Interpretation 301-6 in the proposed revised Standards, we respectfully ask the Committee to revisit this issue soon after adoption of the new Standards.

We hope you find these suggestions helpful as you move forward in this critical effort to transform legal education. Please let us know if we can be of further assistance in these efforts.

Sincerely,

A handwritten signature in black ink that reads "Deborah W. Post". The signature is written in a cursive, flowing style with a large initial 'D'.

Deborah Waire Post
Co-President of SALT