

Accreditation Policy and Quality Instruction in Law

Comments of the

Association of Legal Writing Directors (ALWD)

to the

Accreditation Policy Task Force

of the American Bar Association Section of Legal Education
and Admissions to the Bar

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Contents:

I. Introduction

II. Comments on the Task Force's Nine Questions

A. Other Law School Missions

B. Output Measures

C. Transparency

D. Encouragement of Aspirations Beyond Compliance with Minimum Requirements

E. Costs and Imposition of Accreditation Requirements

F. Relevance of the Types of Practice of Graduates

G. Uniformity of Criteria and Review Processes

H. Feedback on the Quality of the Accreditation Process

I. Other Issues and the Task Force's Focus

I. Introduction

The Association of Legal Writing Directors (ALWD) thanks the Task Force for its work. In its input-request memorandum dated December 12, 2006, the Task Force articulated useful and pressing questions. ALWD welcomes the opportunity to address those questions and to engage in discussion concerning the goals and principles of accreditation.

The Association is composed of more than 210 law professors, primarily current and former legal writing program directors, from more than 110 ABA-accredited law schools. ALWD holds annual elections and acts through popularly elected directors and officers. Its mission is:

to pursue activities such as the following to help law schools provide excellent legal writing instruction:

- (1) supporting the administration of legal writing programs,
- (2) enhancing the leadership skills and professional development of legal writing professionals,
- (3) encouraging and supporting research and scholarship in, and development of, the discipline of legal writing, and
- (4) advocating on behalf of the discipline within the academy and the legal profession.

ALWD fulfills its mission by, for example, organizing conferences focused on improving the educational quality of law school legal writing programs, operating an extensive informational network, and awarding grants to support scholarship by legal writing professors. ALWD is thus deeply committed to legal education.

The Board of Directors of ALWD has approved the comments set forth in the present document.

II. Comments on the Task Force's Nine Questions

A. Other Law School Missions

The Task Force asked whether the Standards should recognize missions beyond the central mission of preparing students for participation in the legal profession. Precisely what such recognition would mean seems unclear. Similarly unclear are its potential benefits. In any event, for the following reasons ALWD urges the ABA to maintain its focus on its central accreditation mission and to strengthen that focus by embracing, for the purpose of revising Standard 302, the

Statement of Skills and Values in the ABA's 1992 MacCrate Report.¹

The ABA has articulated its central mission well. The ABA should indeed impose, as the Preamble to the Standards for Approval of Law Schools states, “minimum requirements” for “a sound program of legal education.” A sound program must, as Standard 301(a) states, prepare “students for admission to the bar, and effective and responsible participation in the legal profession.”

The ABA should do more, however, to ensure that all law schools offer those elements of a sound legal education that most specifically prepare graduates for admission to, and effective and responsible participation in, the profession. The ABA laid groundwork for identifying those elements fifteen years ago in the highly regarded *MacCrate Report*, specifically its Statement of Skills and Values (hereinafter “MacCrate Statement”). The MacCrate Statement is a comprehensive listing of skills and values, useful for all lawyers, not merely law students. The drafters did not seek to create an accreditation metric or to identify precisely the educational contributions due from law schools. Nonetheless, for at least three reasons the MacCrate Statement should serve as a lodestar for accreditation policymakers. First, it describes the skills and values necessary for “effective and responsible participation in the legal profession.” Standard 301(a). Second, broad consensus exists that it does so accurately and usefully, and that consensus is being strengthened by the report on legal education forthcoming from the Carnegie Foundation for the Advancement of Teaching. Third, the MacCrate Statement is consistent with the Preamble to the ABA Standards, which states that a law school must:

provide an educational program that ensures that its graduates:

- (1) understand their ethical responsibilities as representatives of clients, officers of the courts, and public citizens responsible for the quality and availability of justice;
- (2) receive basic education through a curriculum that develops:
 - (i) understanding of the theory, philosophy, role, and ramifications of the law and its institutions;
 - (ii) skills of legal analysis, reasoning, and problem solving; oral and written communication; legal research; and other fundamental skills necessary to participate effectively in the legal profession;
 - (iii) understanding of the basic principles of public and private law; and
- (3) understand the law as a public profession calling for performance of pro bono legal services.

¹ ABA Section of Legal Education and Admissions to the Bar, *Legal Education and Professional Development—An Educational Continuum* (1992) (popularly known as the *MacCrate Report*).

The MacCrate Statement's central insight for accreditors is that they should require law schools to prepare students both to **think** like lawyers and actually to **perform** the tasks that newer lawyers routinely perform. Even for beginning lawyers, thinking is not enough. They also need proven ability to apply knowledge—for example, to gather evidentiary support, communicate orally and in writing, counsel clients, negotiate, resolve disputes, and manage projects (MacCrate Statement, Skills 4-9).

The ABA should use that insight to improve the Standards, particularly Standard 302, which sets forth curriculum requirements. Standard 302 has improved in recent decades. It has not yet, however, fully embraced the compelling vision offered by the MacCrate Statement. For example, Standard 302 still permits law schools to let students slip through three years with just two writing experiences. Standard 302(a)(3). These experiences are supposed to be “rigorous.” *Id.* Yet that term is undefined, and Interpretation 302-1 merely names factors to be considered. Hence rigor, like beauty, exists less in rules than in the eye of the beholder. Standard 302 also permits law schools to let students avoid clinical, pro bono, and small-group work. In sum, law students may spend three years filled overwhelmingly with mere reading, talking, and completing short exams. They may then pass a largely multiple-choice bar examination. Then they can offer service to the public. It is no wonder, then, that the profession and the public voice concerns about recent law graduates' capacity for “effective and responsible participation in the legal profession.”² In short, Standard 302 ought to better serve the profession, students, and the public.

Using the MacCrate Statement, perhaps simplified somewhat, the ABA could better define, in a strengthened Standard 302, minimum training that every law school must provide. Standard 302, revised in this way, would ensure that every law student experiences, often and in realistically simulated or real contexts, what “participation in the legal profession” means. Effective participation includes, for example, effective written communication. Hence a strengthened Standard 302 would better define “rigorous writing experiences,” insist that each student have more than two of them, and require law schools to have students frequently write, research, problem-solve, negotiate, interact with simulated or real clients, and so on. Law schools would then require all students to prepare to work as lawyers, not just by the comfortably detached means of discussion

² See, e.g., Carnegie Foundation for the Advancement of Teaching, *Educating Lawyers—Summary* 4, 6 (2007) (finding, among other common weaknesses in legal education, “lack of attention to practice and inadequate concern with professional responsibility”).

and pondering, but also by engaged, active **practicing**—that is, creation of the documents, agreements, and solutions that lawyers typically create.

Of course the ABA should not limit or discourage law schools from offering more than practice-oriented analytical and experiential instruction. Rather, the ABA should more effectively require minimum levels of such practice-oriented analytical and experiential instruction. This should be the ABA's primary concern because no other accreditation task has more importance for the legal profession, students, and the public.

The ABA also should leave a law school considerable freedom to define its mission. Most law schools ought to continue to aspire to accomplish more than minimally preparing students to participate in the legal profession. Nonetheless, a law school would not deserve accreditation if it were to ignore this fundamental mission. A law school might aspire, for example, to gain renown as a think tank. Though the Standards should permit this, they must not permit the school as a result to leave much of the work of preparing students for the legal profession to the employers, bar associations, commercial bar-exam specialists, and so forth.

Consequently, ALWD sees little reason for the Standards to recognize missions beyond the central mission of preparing students for participation in the legal profession. Articulating and enforcing “minimum requirements” for “a sound program of legal education,” aimed at preparing students to participate in the legal profession, is a difficult and complex task. Doing it well, with mostly volunteer labor, is no mean feat. Doing it poorly would be a disservice to the profession, students, and the public. ALWD urges the ABA, therefore, to maintain its focus on its central mission and to embrace the MacCrate Statement for the purpose of revising Standard 302.

B. Output Measures

The Task Force's second set of questions asked to what extent the accreditation process should rely on output measures. Perhaps the ABA might benefit from carefully defining specific outputs, other than bar passage, that measure whether a law school is successfully preparing its students for “effective and responsible participation in the legal profession.” Carefully designed output measures can be valuable. ALWD members routinely measure outputs in their instruction. For example, they closely evaluate and critique practice-oriented documents written by students. The professors thereby assess whether the students have met articulated learning goals. Similarly, the ABA might for example review sample documents prepared by students who are close to graduation and

recordings that show such students using vital skills. Here again the MacCrate Statement could provide useful guidance.

ALWD urges caution, however. First, designing such measures well is difficult. This is particularly true when the designer is not the same person or institution that created the inputs—that is, the goals and instruction that underlie the outputs.

Second, as the prior sentence suggests, outputs and inputs are intimately related. The ABA therefore must pay attention to both. Some argue that the ABA unwisely regulates legal education inputs and should instead focus almost exclusively outputs. But law schools must deeply instill in their graduates the core professional values and abilities needed to serve the public effectively. The ABA must ensure that law schools do not leave this vital task to others—for example employers, courts, bar associations, or bar-exam specialists. The bar exam tests one rather narrow type of output. Therefore, the ABA and state bar authorities should work in tandem. Those authorities, who represent the profession and public, justifiably expect the ABA to ensure integrity and quality in the educational process.

The Task Force’s previous open forum, in Washington on January 5, 2007, provided an example that helps to illustrate why the ABA’s accreditation project cannot focus solely on law school output.

One speaker (Dean Matasar) asked at pages 57-58 of the transcript: “Can we all exist as Ritz Carlton law schools? Can’t we have Motel 6 law schools? There are clean beds in both places, but some of them are just fancier, deeper pile.” This comment instructively focuses on input, not just output, in its service-industry analogy. The output of either hotel chain is arguably a happy guest who slept well. That is hard to measure, and it appropriately played no role in the speaker’s analogy. Rather, the focus was on a fundamental input, namely clean sheets. When hotel industry monitors go into either the Ritz Carlton or Motel 6, they don’t simply ask guests: “Are you happy? Did you sleep well?” Instead, they look at the sheets. They check the bathrooms. They inspect the fire exits. In short, they not only ask guests about their experiences (outputs); they also study basic inputs. As a result, the public benefits.

C. Transparency

ALWD supports the ABA’s efforts to responsibly maximize transparency in the accreditation process. Though some sensitive data needs to be confidential, transparency fosters fairness among

law schools, sound planning in accreditation matters, and compliance with the Standards. In balancing confidentiality and transparency, ALWD urges the ABA to seek guidance in well-established judicial practice. Courts may keep certain evidence or party submissions confidential when compelling needs warrant. Nonetheless, courts publicize their decisions and the underlying reasons. Likewise, in accreditation matters the ABA should publicize its decisions and the underlying reasons. This would foster engagement, satisfaction, and respect within the legal academy, the legal profession, and the public, and would help the accreditation process function effectively and fairly.

D. Encouragement of Aspirations Beyond Compliance with Minimum Requirements The Task Force also requested comment on whether the accreditation process should encourage law schools to identify greater aspirations than mere compliance with minimum requirements. ALWD generally would welcome such encouragement. By articulating greater aspirations, law schools may foster “pluralism and innovativeness,” which the ABA’s Wahl Commission Report recognized as promoters of excellence in legal education.³ The ABA might need to take account of such greater aspirations, for example, to ensure that a school under review fulfills its promises to students as a truth-in-advertising matter. Otherwise, however, the ABA should remain tightly focused on compliance with minimum standards. High aspirations ought not to divert the ABA’s

attention away from a school’s requisite fundamental aspiration: to prepare students for participation in the legal profession.

E. Costs and Imposition of Accreditation Requirements

The Task Force also asked about the relevance of costs in the accreditation process. Of course costs always matter. But how much they matter depends heavily on context. Costs should matter little insofar as accreditors focus tightly on minimum requirements of a sound legal education—particularly instruction in the fundamental skills necessary for effective participation in the legal profession. Such foundational costs are the price of the ABA’s extremely valuable offering: accreditation. By contrast, costs linked to other aspirations or missions should matter less.

³*Report of the Commission to Review the Substance and Process of the American Bar Association’s Accreditation of American Law Schools* 21 (August 3, 1995, as revised, October 31, 1995).

F. Relevance of the Types of Practice of Graduates

Another of the Task Force's questions is whether the accreditation process should take into account the various types of practice of a law school's graduates. Of course accreditors need some flexibility to cope with the varied, complex, and changing circumstances of law schools. The MacCrate Report's vision, however, as embodied in the MacCrate Statement, is compelling for every lawyer, regardless of type of practice. Again, therefore, ALWD urges the ABA to stay focused on "minimum requirements" for "a sound program of legal education" and to use the MacCrate Statement to help define those minimum requirements, particularly in Standard 302.

G. Uniformity of Criteria and Review Processes

Another set of questions concerned uniformity of criteria and their application. ALWD generally supports a uniform set of accreditation criteria. All accredited law schools are similarly situated in that most of their graduates will work in the legal profession. Law schools thus deserve equal treatment with regard to the substance of minimum requirements.

By contrast, ALWD urges the ABA to consider seriously whether some law schools might warrant, in the Task Force's words, "a streamlined process of review." For example, the ABA might permit a school to demonstrate, before an accreditation review, that the school presumptively complies with the Standards, thereby satisfying a threshold burden designed to show that a streamlined review would be sensible and effective. A streamlined review might employ technological means of information-sharing, teleconferencing, and the like to make data-gathering and site visits less burdensome.

H. Feedback on the Quality of the Accreditation Process

The Task Force also requested suggestions regarding feedback on the quality of the accreditation process. The Task Force itself is an important means of gaining feedback. ALWD therefore commends the ABA Council for forming the Task Force. A useful further step would be to publicize well the Task Force's work. For example, the ABA should widely disseminate by email, and make easily accessible on the ABA's website, all the documents produced and collected by the Task Force.

The ABA also should continue its push to engage more constituencies in the accreditation project. ALWD members appreciate their opportunities to contribute to the accreditation project. Much is gained too from other contributors—practitioners, deans, clinicians, librarians, bar examiners, students, admissions and placement specialists, and so on. This multiplicity of voices strengthens a vital aspect of the accreditation project: its function as a forum for discussion of how best to serve the legal academy, the profession, students, and the public.

I. Other Issues and the Task Force’s Focus Finally, the Task Force asked for comments on other issues. In response, ALWD urges the ABA to reject calls for deletion of most of Standard 405.

That provision addresses professional environment, meaning how a law school attracts and retains a competent faculty. Standard 405 does so flexibly. It permits innovation and cost control because it requires only full-time faculty members to have tenure or tenure-like security. A law school remains free, however, to staff a significant number of courses without regard for tenure or tenure-like requirements. Standard 405 also complements Standard 302, which addresses curriculum. Even if Standard 302 were strengthened as described above in § II.A (“Other Law School Missions”), it still would neither prescribe actual courses nor mandate their design. It would leave substantial room for innovation and experimentation. But such freedom requires, as a counterbalance, some regulation of the structure by which law schools make curriculum choices. Chapter 4 of the Standards, particularly through Standard 405, provides this counterbalance, as Standard 401 indicates: “A law school shall have a faculty whose qualifications and experience are **appropriate to the stated mission of the law school and to maintaining a program of legal education consistent with the requirements of Standards 301 and 302**” (emphasis supplied). Consequently, if most of Standard 405 were to disappear, the ABA would then need more detailed curriculum regulation as a counterbalance to ensure satisfaction of the ABA’s central accreditation mission.

Of course Standard 405’s opponents do not call for a greatly expanded Standard 302. Yet an effective accreditation system must substantially regulate quality of either educational content, or a school’s curricular decision-making dynamic, or both. ALWD is unaware of **any** educational accrediting body that regulates **neither**. If the ABA were to regulate neither, then it would effectively have adopted a laissez-faire approach. That would have important, negative implications

for the ABA, for the legal profession generally, and for the public.

Standard 405 helps foster law faculties characterized by quality and experience, academic freedom, and profession-oriented faculty governance. First, Standard 405 requires at least modest job security for all full-time faculty, including clinicians and legal writing faculty. This helps ensure that law schools will not, in revolving-door fashion, continually staff skills courses with teachers who are inexperienced—and not coincidentally also inexpensive. Rather, Standard 405 prompts law schools to let skills professors gather experience, engage in practice-oriented research, and develop teaching expertise.

Second, by supporting clinical and legal writing professors, typically compose only a small portion of a faculty, Standard 405 helps professors whose academic freedom faces substantial risk. For example, even though the *ALWD Citation Manual* was sponsored, written, and reviewed by professionals, some deans and faculty forbade or threatened to forbid its use by legal writing professors and demanded instead a text written by students. By contrast, one could hardly imagine a faculty prescribing a teaching text for, say, a torts or contracts professor.

Third, Standard 405 helps to improve decision-making structures on law faculties. Its subsections (c) and (d) have helped reduce discrimination against clinicians and legal writing professors, many of whom are neither tenured nor tenure track. Subsection (c), as Interpretation 405-8 clarifies, mandates for clinicians participation in faculty governance which is “reasonably similar” to that of tenured faculty. Standard 405(d) suggests that law schools also should include legal writing professors in faculty decision-making. Inclusion is critical for the profession, students, and the public. A faculty is best equipped to achieve the goal identified by Standard 301(a)—preparing graduates for effective and responsible participation in the legal profession—when clinical and legal writing professors participate in faculty governance. This is true because those professors spend tremendous time and effort, often in individual conversations or written critiques, teaching students the skills required in law practice.

Of course Standard 405 still has room for improvement. Many skills professors, particularly legal writing teachers, still have limited or no participation in faculty governance.⁴ Moreover, women remain disproportionately excluded from some or all faculty decision-making, not just

⁴ See Susan P. Liemer, *The Hierarchy of Law School Faculty Meetings: Who Votes?*, 73 U. Mo. K.C. L. Rev. 351 (2004).

among law professors generally,⁵ but particularly among legal writing faculty. Women compose about two-thirds of the legal writing teachers hired in a typical year and about 75% of legal writing directors.⁶ When law schools exclude skills teachers from faculty governance, it is not surprising that faculties tend to invest too few resources in skills instruction to produce graduates with high degrees of competence in the skills described in the MacCrate Statement.

An important improvement to Standard 405, therefore, would be amendment of its subsection (c) to govern full-time legal writing professors. Standard 405(c), as written and originally applied, strikes a useful balance between flexibility for employers and the need—for the profession, students, and the public—for law schools to let primarily practice-oriented professors develop years of experience teaching, have sufficient academic freedom to serve students and the public well, and join in faculty decision-making. The dedication of full-time legal writing professors to practice-oriented instruction warrants ensuring that they, like clinicians, have “security of position [that is] reasonably similar to tenure” and “perquisites reasonably similar to those provided other full-time faculty members.” Moreover, that must mean for legal writing professors a voice in faculty governance.

In sum, Standard 405 contributes importantly to making the vision of the MacCrate Report a reality. With the revisions described above, it could do so even better.

⁵ Women form two-thirds of all law faculty who lack either tenure or tenure-related status, and only about one in four tenured full professors are women. Richard K. Neumann, Jr., *Women in Legal Education: A Statistical Update*, 73 U. Mo. K.C. L. Rev. 419, 428, 431 (2004) (data show that “the least secure, least compensated, and lowest status teaching jobs in law schools are predominantly female”).⁶ Association of Legal Writing Directors & Legal Writing Institute, 2006 Survey Results, at 3, 49, A-1, available at www.alwd.org, accessed 20 February 2007.