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March 28, 2011

Hulett H. Askew, Consultant on Legal Education
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Dear Bucky:

On behalf of the members of the Executive Committee of the AALS, I acknowledge the strenuous efforts to date by the Standards Review Committee ("SRC") and the Consultant's office to redraft the ABA Standards for Approval of Law Schools. All of us appreciate the ABA's continuing dialogue with the AALS and other organizations and, in particular, Steven Bahls's and Don Polden's willingness to appear on AALS programs to help explain the Standards Review Committee's work. The more we have gotten into the issues, however, the more concerned we are about the direction the Comprehensive Review of the Standards has taken.

For now close to a century, leaders of the ABA Section on Legal Education and Admissions to the Bar have helped improve legal education by promulgating and administering law school accreditation standards. With professional skill and an appreciation of the ABA's critical role in promoting the quality of the legal profession, you and your predecessors have created an accreditation regime that supports the multiple missions of legal education. The AALS has been proud to be the ABA's longtime partner in that work. As you know, leaders of the ABA Section, which was established by the ABA as its first section in 1893, were instrumental in forming the AALS in 1900 as a partner in improving legal education.

That partnership has featured a shared vision for the quality of legal education, one that recognizes the profound responsibilities of a self-regulated profession to the people who place in our hands their trust, their livelihoods, and even their lives. That vision has set legal education in the United States apart from much of the world.

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This longstanding vision of legal education has also been the foundation of a shared understanding of the elements of a quality legal education among the bench, bar, and legal academy. Those elements have included a committed, full-time faculty devoted to teaching, research, and service; an academically-qualified and diverse student body; and a commitment to critical thinking, ethical practice, sound judgment, clear communication, and professional skill. Every state Supreme Court has relied on this shared vision in permitting graduates of ABA-accredited law schools to sit for the bar examination. The federal government relies on accreditation for assuring the quality and accountability of institutions it supports and the quality of programs that students receive federal loans to attend. Many law schools rely on ABA accreditation when they consider whether a prospective transfer student has had an education adequate to underlie the degree the new school will one day award that student. In short, the reliance interests in the meaning of ABA accreditation are far-reaching and profound.

The vision animating the current standards proposals is not entirely clear, and the SRC has never invited or entertained a conversation about the broader vision of legal education advanced by its interlocking set of proposed changes. But one thing is clear: all constituencies need opportunities to discuss the overall vision behind and the combined effect of the proposed radical changes to those standards, standards that have been relied on by all accredited schools, state Supreme Courts, and the public that depends on the quality of the bar in life-changing matters.

We also reiterate our opposition to proposals that would strip legal education of many of its distinguishing and fundamental elements. While we have participated in the comment process on some of the individual proposals, it is the combination of the proposals that is particularly disturbing – most especially those proposals that contribute to the weakening of the American model of legal education. Our deepest concern is with the overall effect of weakening the requirements for full-time, committed faculty, eliminating a non-discriminatory and empirically valid student selection mechanism, and instituting a vague and potentially costly framework of outcomes and assessment.

We therefore ask the SRC and the Council to ensure that the larger vision that animates these proposals can be meaningfully debated. Such a process is essential to ensuring that we all understand the impact of the proposals. Currently we are focused piecemeal on individual proposals, not on the larger whole which is far more than the sum of its parts. In addition, a thorough study of the cost drivers in legal education would better inform decision-making. We hope that the AALS and the ABA can together move forward with an independent, fact-based study that examines both the actual costs involved in accreditation compliance and the other, potentially more important and serious, cost drivers schools are facing.

1. The SRC Vision For Legal Education

The SRC appears to be involved in a thought experiment that asks whether its members could imagine the existence of a school that would produce ethical, competent entry-level lawyers if the standards subtracted any particular element of the current standards, such as a full-time faculty whose activities all substantially relate to their teaching, scholarship or service, or a

student body accepted through a valid, reliable test, or access by students and faculty to books and other written research material as well as on-line services. One way to think about the overall body and effect of the proposed standards is to step back and ask whether, under the proposed standards, an open-access bar review course could be accredited as a law school if it also offered lectures about on-line research and traditional lawyer values, had student papers graded by people who had never met the students, and assigned each student to one field placement based "course," taught and supervised by an adjunct. If not, what provisions of the proposed standards would preclude such a diminished educational opportunity?

In raising such a thought experiment, our point is not to quibble about details. Our point is that the SRC appears now to be fine-tuning what amount to revolutionary changes to the ABA's basic accreditation standards, without apparent regard for the fact that these changes might work together to fundamentally transform what our system of legal education should be expected to produce. Such a transformation would undermine the legitimate expectations of the many constituencies that rely on the quality represented by ABA accreditation standards.

2. How Should the Standards Approach Legal Education?

No one believes that practicing law has recently become less complex or difficult. We believe that accreditation is a process that should assure that law schools engage in quality legal education sufficient to prepare lawyers to begin long careers in a societally-demanding and self-regulated profession. As we said in AALS President Reese Hansen's letter to you of June 1, 2010, the AALS believes that a law school worthy of accreditation must be organized around the work of its career, full-time faculty. This reliance on a full-time, committed faculty to provide high-quality legal education is the most fundamental of the values that the AALS and the ABA have shared. The current proposed reforms compromise this value.

The high quality and distinctiveness of American legal education are based largely on the work of career, full-time faculty who engage fully in the law school's teaching, scholarship, and service missions. Full-time faculty should be expert in their fields and continue to engage in scholarship that makes them even more accomplished. Given that law is fundamentally a public profession, law school faculty should perform public service that both models for law students the selflessness encouraged for all lawyers, and helps fulfill the role of law schools in contributing to the improvement of law, lawyers, the legal system, and the system of justice. The scholarship and public service of career, full-time faculty do not merely supplement their teaching role. Both scholarship and public service underlie teaching and give it an authority that teachers who merely pass on received understanding or transmit skills cannot match.

Most law schools will complement their full-time faculty with other faculty who bring valuable experiences to the education of law students. But only full-time career faculty can be expected to have the long-term commitment to, and expertise in, legal education that qualifies them, alongside their deans, to govern their institutions in ways that promote the quality and set the direction of the entire educational program.

Other accrediting bodies may take different approaches to the accreditation process than the ABA has taken, but those differences must be understood in light of the distinctive purposes that each accreditation system is designed to meet and the distinctive missions of the professions they are designed to support. The ABA Standards for Approval of Law Schools govern institutions that produce members of a profession that affects the way society is organized and governed. Up to now, the standards have reflected the shared understanding of American law schools as institutions that educate lawyers as well as train them. The current Comprehensive Review, however, emphasizes almost exclusively lawyer training. We believe the ABA rejects, at our society's and clients' peril, its holistic attention to professional education, including development of broad knowledge and critical thinking skills, use of interdisciplinary methods, and a focus on exercising judgment in indeterminate situations. To compromise the heretofore-shared goal of a broad professional education moves profoundly in the wrong direction.

We recognize that it is important to address the cost of legal education. Student debt loads are high and burdensome, and graduates' capacity to repay their loans is an important social question. While educational cost is important, and a full and open debate about which costs are critical to a quality legal education is warranted, it is not the only consideration. We can all agree that a low-cost legal education that does not produce a good lawyer, capable of complex work, will be money foolishly spent. It will cheat the individuals who take on significant debt without having the knowledge or experience to assess the consequences of a minimalist education until it is too late. It will also adversely affect the government that subsidizes much of that debt through educational loan programs, and the society that in often unseen ways bears the costs of inferior legal education.

The fundamental question for the accreditation process must be whether a given requirement furthers the goals of accreditation in a cost-effective manner, not simply whether it makes legal education less expensive. In that regard, we hope that the ABA and AALS can together move forward an independent, fact-based examination of the causes of the rise in educational cost over the last several years. As the recent GAO Report suggested, it may be that current accreditation standards have not been the primary drivers of costs. Institutional advertising, scholarships aimed at raising a law school's U.S. News ranking, and a variety of student services may prove to be even more significant drivers of cost. In short, we look forward to working with the ABA to find ways of reducing the cost of going to law school without thereby abandoning the qualities that have made American legal education great.

3. <u>Comments on Specific Proposals</u>

With that background, then, we offer comments on the specific proposals to be considered by the Standards Review Committee in April and the more general topics identified for discussion at the April 2 Open Forum.

A. Student Learning Outcomes

In our June 1, 2010 letter from then President H. Reese Hansen, we discussed our concerns about

proposed Standards 302 and 303 regarding outcome measures and assessment. We understand the pressure the ABA is under to require outcome measures, but we repeat our encouragement from that letter that you strive to "Do No Harm."

B. Security of Position, Academic Freedom, Governance, Attracting and Retaining Competent Faculty.

Career, full-time law school faculty become more than just experts in their fields, accomplished teachers, and models of excellence and public service. More importantly, they become guardians of a commitment to high-quality, engaged learning that leads to ever-improving work as a lawyer. The capacity to understand the trajectory of a student's learning and to see opportunities to intervene and shape student development through all aspects of legal education – from the overall course of study, to particular courses and clinics, to individual interaction – is the life's work of a full-time, professional law faculty.

As an ongoing community of teacher-scholars, the full-time faculty becomes a group of people who interact with one another and the dean in a project of critical evaluation and improvement of the law school. In an academic professional setting, the faculty provides education and training based in scholarly research and insight into law, lawyering, and the social and institutional contexts in which law takes on meaning. They remind students of the clients who encounter law and the students' ethical obligations as lawyers, and they facilitate the process of learning about law, lawyers, and the meaning of justice. While the culture of each faculty may vary, the structure of our law schools fosters this kind of commitment. In the short-term and long-term for our students and our institutions, full-time faculties with security of position are the critical instruments for ensuring that outcomes are meaningful guideposts within worthwhile educational programs.

We recognize that, to many, calls for retaining security of position requirements sound like special pleading. Most workers in the U.S. economy are at-will employees, and the Security of Position subcommittee has described tenure as an optional, "detailed requirement . . . for employment contracts." We disagree. Security of position provides faculty with the freedom and responsibility to perform each of their duties with courage and commitment.

In a university context, security of position is a foundational element of a vital and effective faculty. Security of position fosters a commitment to the kind of learning enterprise that is a trademark of the American legal education system. Security of position similarly supports and reinforces law school quality by encouraging long term investment of human capital and expertise. Teaching and research are related activities, and long-term faculty invest long hours over a lifetime to become expert teachers, mentors, and scholars.

Security of position also ensures that faculty can meet their governance responsibilities without fear of firing, and that they can practice and teach critical thought concerning legal issues about the exercise of public and private power. Law in our society often implicates controversial, deeply-held beliefs. Security of position protects faculty to carry out the function of stimulating

discussion and debate on issues of law and legal practice and of engaging in legal action on behalf of clients. These activities are at the heart of law within a system of democratic government.

As President Hansen's June 1, 2010, letter noted, weakening security of position standards would threaten academic freedom at a time of great polarization in the country. Law school scholarship has often offended particular outside interests, and attacks on law school clinic efforts on behalf of unpopular clients have seemed to increase in recent years. Indeed, your Section recognized this and successfully persuaded the ABA House of Delegates to vote in February 2011 to reaffirm its support for the ethical independence of law school clinical programs. Lifetime tenure for all faculty may not be the only way to protect freedom of inquiry, but preserving the principle of academic freedom in ways that have proved to be effective is not only an AALS core value; it is an essential public value.

Faculties have an impact on the evolution of the law beyond their own work. The power and insight to critique and improve the law and lawyers become powerful tools in the arsenal of graduates to serve clients and society in ways that the ABA has seen as essential to its concept of what it means to be a lawyer in a democratic society that values fundamental fairness and individual liberty. Indeed, one of the most exciting developments in legal education over the last 40 years has been the introduction of clinical education. Schools have taken diverse approaches to the integration of clinical education into their programs, maturing efforts that would not have been possible without the ABA standards and the work of the AALS. Clinical professors included within the full-time faculty have not only enriched the teaching within their institutions; they have also developed new forms of scholarship devoted both to the complexities and ambiguities of the work of lawyers within systems of law and institutional power and to the development of educational models for teaching the work of the lawyer. To remove security of position and disrupt one of the fundamental pillars of support for institutional innovation seems especially perverse, just at the moment when many in the clinical community are being embraced by their colleagues as having earned the kind of status that will encourage their long-term commitment to the school and their fuller participation in the faculty.

C. Valid and Reliable Admission Test

The AALS believes that law schools' use of an admission test that validly and reliably compares the likely law school success of students from a variety of undergraduate institutions remains important to a non-discriminatory process that admits only students likely to benefit from a legal education. The LSAT has long served that role effectively and, while we take no position on whether other tests might also do so, we urge you once again to be sure the ABA standards changes "do no harm." That is, the ABA should retain the requirement of an admission test and acknowledge tests and admission processes other than the LSAT as appropriate only after their validity and reliability has been demonstrated.[1]

1 On a related issue, we are aware that there is strong interest in using greater transparency to respond to the informational needs of applicants. But how to reconcile deregulation with transparency will not be easy. Without clear direction previously provided by the Standards that created uniform reporting, we foresee two problems:

D. All Other Standards, Interpretations and Rules of Procedure

We have probably not fully digested the significance of all pending standards revisions, and thus we do not mean by silence to indicate approval of those about which we do not comment. We would raise our concerns, however, about five other changes.

First, several of the changes in Chapter 2 reduce the protection that an accredited law school has had against arbitrary financial or personnel decisions that adversely affect the law school. When one moves from standards that require quality to standards that demand only minimum performance, the temptation to see law schools as even richer cash cows seems almost inevitable.

As we read the proposed standards, a university or a for-profit owner could both appoint and fire a dean with relatively little regard for faculty or student opinion or interests. The university or for-profit owner could similarly skim off all but the minimal resources needed to produce a law school that would barely meet the standards. Such treatment would be facilitated by your earlier deletion of the requirement that schools seek to exceed the standards. For all the reasons stated earlier in this letter, such a minimalist approach to law school regulation would threaten to abandon one of the world's great educational successes.

Second, the proposed standards erode the very notion of the commitment of a full-time faculty member to the educational mission of the law school. The definition of a full-time faculty member in the January 2011 draft of Standard 106 removes the requirement contained in current Standard 402(b) that a faculty member "devotes substantially all working time during the academic year to mandated responsibilities" and that limits "outside professional activities" to "those that relate to major academic interests or enrich the faculty member's capacity as a scholar and teacher, are of service to the legal profession and the public generally, and do not unduly interfere with one's responsibilities as a faculty member."

Instead, proposed Standard 106 would permit any faculty member to engage in any activity that "[does] not unduly interfere with one's responsibility as a faculty member." Non-academic work need have nothing to do with and need not advance the faculty member's capacities for teaching, scholarship and service. As the proposed commentary notes, the faculty member may engage in "law practice, governmental work or other business" so long as the faculty member fulfills his or her teaching responsibilities. In short, the proposed standards offer a definition of full-time faculty – thought long-ago abandoned – that includes those whose basic professional identity resides elsewhere.

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(1) There will be an inevitable growth of information provided by individual schools that is not comparable and thus misleads applicants (2) The greater latitude in self reporting in the public domain may create a climate where misinformation proliferates, creating a culture where misleading information is provided intentionally and unintentionally. On occasion this will come to light, bringing with it negative public attention that will easily be generalized to law schools and the profession. As the Section gains experience with how to respond to demands from law students for career placement information from the law schools, it may conclude that continuing to collect uniform data is a high priority.

Third, the proposed transformation in faculty responsibilities is equally stark. Current Standard 402(a)(2), requires that a law school have a large enough full-time faculty to ensure that faculty can "fulfill teaching obligations, conduct scholarly research, and participate effectively in the governance of the law school and in service to the legal profession and the public." The pending proposals would eliminate that requirement and effectively not replace it. The only mandated role of the full-time faculty contained in proposed Standard 403(a) is to teach a proportion of the formally-offered courses.

Beyond that, proposed Standard 404 would allow each law school to establish its own policies regarding the responsibilities of the faculty "as a collective body." The role of law schools and legal education in ensuring full-time faculty commitment to scholarly critique and improvement of law and lawyering, to engagement with individual students on a one-to-one basis, to service to the profession, and to the public mission of legal education in our society, including pro bono service, is relegated to the particular policies of each school. Presumably, consistent with the proposals, a law school could choose, as a matter of individual school policy, to vastly limit or even abandon its responsibilities to those very activities that have helped make legal education in America outstanding.

We believe that, to carry out its work, the full-time faculty must be large enough (1) to engage fully in the education of the law school's student body beyond a minimalist vision of teaching a percentage of formal course offerings, (2) to have a meaningful governance role, and (3) to engage in forms of public service related to their institutional responsibilities. To help assure this, we believe the appropriate size of the career, full-time faculty should remain significantly linked to the size of the student body.

We recognize that the method of calculating the student-faculty ratio had become complex and arbitrary. The interpretation has been repealed, and the SRC proposes abandoning the concept of using a ratio altogether, a step that threatens to drive schools toward larger classes and more contingent faculty. Having only a skeletal long-term, full-time faculty would mean that interaction between those faculty and most students could occur primarily in impersonal settings that provide few chances for meaningful interaction and sustained challenge. We encourage the ABA to reinstate a meaningful student-faculty ratio requirement. Related standards that require resources sufficient to support the multiple functions of a career, full-time faculty also need to be preserved.

Fourth, the proposed standards would significantly denigrate the role of faculty in the governance of law schools. While proposed Standard 205 requires that the dean and faculty both have "a significant role in determining educational policy" and proposed Standards 201(b) and (c) mandate that the dean and faculty "have primary responsibility for planning, implementing and administering the educational program of the law school" and for "the selection of members of the faculty" and recommendations on "retention, promotion and tenure (or granting of security of position)," these requirements are significantly modified when read together with proposed Standard 405(d).

Proposed Standard 405(d) requires only that "a law school shall have a policy that provides for participation of all full-time faculty in the governance of the school." None of the proposed commentary to Standard 405 addresses the meaning or extent of this "participation," and the faculty role in Standards 201 and 205 appears to apply to all faculty, not just full-time faculty. Our concerns are magnified by the Introductory Comments that accompanied the July 2010 draft of the proposals of the subcommittee on Security of Position. In that document, the subcommittee stated its wish that the standards "refrain from imposing, as an accreditation matter, policies mandating faculty rights to participate in governance of the law school." We believe such a view of law school governance would take legal education in the wrong direction.

Fifth, as we read Standard 306, it would allow a law school to deliver close to 30% of its legal education wholly online. We recognize the value of distance learning, particularly where it allows advanced students to get specialized instruction in courses that a given school cannot afford to teach. But as we read proposed Standard 306(e), it would permit 14,000 minutes (20 credit hours of 700 minutes each) of even the 45,000 minutes of required traditional instruction to be taught remotely. Indeed, the current draft has even reduced the requirement of "ample" interaction with the remote instructor to "regular" interaction with that person. We encourage the Standards Review Committee to reexamine the liberality of Standard 306 before so significantly abandoning the traditional value of in-person instruction.

These examples do not exhaust the particular provisions that, when taken together, abrogate the role for accreditation in assuring quality through the work of a career full-time faculty committed to the complex process of producing excellence in American legal education. These examples do, however, illustrate the potentially destructive process the proposals would produce in the nation's law schools.

Our plea to you at this point in time is to put the Comprehensive Review on hold for the time being while the Council initiates a broader discussion of first principles. That discussion should include consideration not only of the changing environment for legal education and the factors that might make reform desirable (the changing nature of legal practice, the cost of legal education, globalization, potential uses of technology, etc.), but also the aspects of current American legal education that are valuable enough to preserve through the accreditation process. We know that changes in legal education are inevitable and many of them will likely be desirable, but we believe that the ABA's current course in the direction of a minimal standards approach is likely to have profound consequences that need to be fully modeled and examined.

For example, the proposed standards may well ease financial pressure at law schools, but they may also lead to a "race to the bottom," as schools find that they can reduce their offerings and services while still remaining accredited. Some state Supreme Courts, employers, or prospective students may find a minimal standards approach unacceptable and, as a result, lean more heavily on substitute evaluation systems, like national rankings, which few believe have helped the quality of legal education. The AALS might theoretically fill the void, at least in part, by maintaining higher membership standards, but we are not organized to be a shadow accrediting agency. Moreover, the mission of the AALS – to assist schools in improving their quality – may

seem less appealing when the official accrediting agency no longer seems committed to that quality.

Conclusion

Those who seek to alter the fundamental assumptions underlying accreditation and its role in the system of legal education should bear the burden of justifying that need to the legal education community and all those who rely on the high quality of American legal education.

We therefore ask the Council and the Standards Review Committee to take the following actions:

1. Reject the radical proposed changes to the role of the faculty, and other changes to the standards that would weaken, rather than strengthen, legal education.

2. Initiate a process for the specific purpose of allowing all important constituencies to understand and debate the vision animating the current proposals and their combined effect on legal education.

3. Undertake or commission an independent, fact-based study of the actual cost drivers in legal education, and their relationship with the accreditation process.

We thank you for your consideration of our observations and for your passing them on to the Standards Review Committee. We look forward to future discussions of these issues and hope that we can soon again be aligned in our efforts to enhance the quality of legal education.

I look forward to seeing you when I appear before the Standards Review Committee at its Open Forum on April 2.

Cordially,

Michael A. Olivas
President

cc: The Honorable Christine M. Durham,
Chair, ABA Section on Legal Education and Admission to the Bar
Dean Donald J. Polden, Chair, Standards Review Committee
Dean John F. O'Brien
Chair-elect, ABA Section on Legal Education and Admission to the Bar
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