

September 29, 2023

RE: Comment on ABA Proposed Standard 208 regarding Academic Freedom and Freedom of Expression

Dear Justice McCormack and Members of the Council:

On behalf of the faith-based law schools we lead, including the Columbus School of Law at The Catholic University of America, Liberty University School of Law, Notre Dame Law School, J. Reuben Clark Law School at Brigham Young University, Cumberland School of Law at Samford University, and Pepperdine Caruso School of Law, we respectfully submit the following comment on the American Bar Association's proposed Standard 208 on Academic Freedom and Freedom of Expression.

Our institutions strongly support the ABA's efforts to protect and promote academic freedom and free expression in law schools. We are concerned, however, about the unfair and impermissible burden that proposed subsection (c)(3) places on religious institutions, and we urge the ABA to revise the subsection to remove that burden.

The institutions we serve heartily embrace the free exchange of ideas as a critical part of a robust law school education. We welcome the proposed Standard 208, which we believe will help promote the free and open dialogue that is crucial for the formation of exceptional attorneys. Exposure to dialogue encompassing a wide spectrum of views helps sharpen students' capacity to hear and analyze arguments and to articulate their own positions in response – preparing them to provide high-caliber representation to future clients who will be looking to their attorneys for sophisticated and zealous advocacy.

One element of the proposed Standard raises concerns, however. Proposed Standard 208(c)(3) provides that:

“[A] law school may . . . [a]dopt policies on academic freedom and freedom of expression that reflect the law school's mission, including a religious mission, so long as such policies are not in violation of the law and are clearly disclosed in writing to all faculty, students, and staff prior to their affiliation with the law school.”

The language of this provision seems to require – or at a minimum, could be construed to require – actual, proactive notice of a faith-based law school's mission-infused speech policies to every prospective student and employee. In other words, the requirement of clear disclosure in writing prior to affiliation with the school seems to demand more than the simple publication requirement made applicable to every law school by Proposed Standard 208(a) and (b). Requiring a faith-based law school to take the extra step of proactively disclosing its mission-aligned speech policies to every prospective student and every prospective member of the faculty or staff would risk painting the school's mission and policies in a negative light – as if the school's infusion of its mission into its policies is a defect about which prospective members of the law school community must be alerted.

The law schools we lead do not hide our faith-based missions; our faith is at the core of who we are as institutions and the education we provide to our students. And we agree that faith-based law schools – like every law school – should publish their academic freedom and speech policies, as the proposed Standard will require all law schools to do. But faith-based law schools should not bear any additional burden beyond that generally applicable publication requirement. Proposed Standard 208(c)(3) should be revised to say: “[A] law school may . . . [a]dopt policies on academic freedom and freedom of expression that reflect the law school’s mission, including a religious mission, so long as such policies are not in violation of the law.”

In sum, we applaud the ABA’s attention to the critical importance of academic freedom and free expression in legal education. We urge the ABA to remove the additional disclosure requirements placed on faith-based law schools by proposed subsection (c)(3).

Sincerely,

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