

# Adoption of Student Learning Outcomes: Lessons for Systemic Change in Legal Education

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The decision of the American Bar Association to modify its Standards for Approval of Law Schools<sup>1</sup> (the standards) to focus on student learning outcomes is the most significant change in law school accreditation standards in decades. A former president of the Association of American Law Schools (AALS) stated that the changes proposed by the ABA were “revolutionary.”<sup>2</sup> Another commentator called the movement from focusing solely on input measures to outcomes measures a “paradigm shift.”<sup>3</sup> The ABA Report of the Outcomes Measures Committee stated in 2008 that “movement to an outcomes-oriented approach is a quantum shift” in the structuring of legal education.<sup>4</sup> The chair of the ABA subcommittee drafting these proposed standards referred to the approach of shifting from inputs to outcomes as a “sea change.”<sup>5</sup> These changes are likely to drive the most significant curriculum

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1. AM. BAR ASS’N, STANDARDS & RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2017-2018 (2017) [hereinafter ABA STANDARDS], [https://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2017-2018ABASStandardsforApprovalofLawSchools/2017\\_2018\\_aba\\_standards\\_rules\\_approval\\_law\\_schools\\_final.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2017-2018ABASStandardsforApprovalofLawSchools/2017_2018_aba_standards_rules_approval_law_schools_final.authcheckdam.pdf).
2. *Letter from Michael A. Olivas, AALS President, to Hulett H. Askew, ABA Consultant on Legal Education* (Mar. 28, 2011), <http://taxprof.typepad.com/files/aals-submission-for-april-2-2011-src-openforum.pdf> [hereinafter *Olivas Letter*].
3. Daniel Thies, *Regulation of Legal Education Set to Undergo Paradigm Shift*, 58:6 YLD NEWS (June 2014).
4. ABA Section of Legal Education and Admissions to the Bar, *Report of the Outcomes Measures* 61 (July 27, 2008), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/reports/2008\\_outcome\\_measures\\_committee\\_final\\_report.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/reports/2008_outcome_measures_committee_final_report.authcheckdam.pdf).
5. James Podgers, *Your ABA: Self-Study Program* (Nov. 2, 2009), <http://www.abajournal.com/>

review and revision process at America's law schools in more than a century. The question of shifting accreditation standards from examining inputs to the classroom to outputs from the classroom had been vigorously debated for decades.<sup>6</sup> And throughout the debate, the concept of moving toward outcome assessment has been highly controversial. Many opponents of the move believe that moving to outcomes assessment would divert resources from traditional doctrinal faculty, thereby diminishing their role.<sup>7</sup> Others saw the potential migration of the ABA standards to be an opportunity to expand the influence and role of clinical educators.<sup>8</sup>

The path that eventually led to the adoption of standards for student learning outcomes was a long and tortuous one, in part because of the concerns about obtaining the proper balance between traditional methods of legal education and a shift toward more skills education. The formal process of amending the standards to reflect assessment of student learning outcomes began in 2009 and did not conclude until August 2014 when the ABA's House of Delegates finally approved of the measures. The process started and stopped,<sup>9</sup> nearly caused a rift between the ABA and AALS,<sup>10</sup> and led to headlines in the academic press that included "Law Schools Resist Proposal

[magazine/article/self-study\\_program/](#).

6. I first became involved in discussion of law school student learning-outcomes standards when I joined the University of Montana School of Law in 1985. The law school, under the leadership of Dean John O. Mudd, was engaging in a comprehensive review of its curriculum to move to student learning outcomes (then called "exit competencies"), which was funded by a grant from the U.S. Department of Education's Fund for Post-Secondary Improvement of Education. The grant was led by an undergraduate institution, Alverno College, in Milwaukee, Wisconsin, that had a national reputation for its work in assessing student learning outcomes. Dean Mudd became a member of the MacCrate Commission, *infra* note 14, which started to pave the way for the national conversation on the role of law schools bridging the gap in lawyer skills and values training.
7. See *Olivas Letter*, *supra* note 2.
8. See Karen Sloan, *Clinicians and Others Unhappy with ABA's Standards Review Committee*, NAT'L L.J. (Nov. 5, 2010), <http://www.nationallawjournal.com/id=1202474507147/Clinicians-and-others-unhappy-with-ABAs-Standards-Review-Committee-?slreturn=20170604173708>.
9. See Donald J. Polden, *Leading Institutional Change: Law Schools and Legal Education in a Time of Crisis*, 83 TENN. L. REV. 949, 962 (2016). In 2011, the Chair of the Section of Legal Education and Admissions to the Bar instructed the new Chair of the Standards Review Committee to restart the process of review (which included review of student learning outcomes) because of pressure from other legal education organizations. See *id.* at 963. According to Polden, stopping and restarting the review of the standards delayed the process for another three years, extending what was intended to be a three-year process to a six-year process. Polden observed: "The Council failed in its leadership role when it slow-walked the Standards for an additional three years to appease other legal education constituencies and they risked erosion of the legal community's trust in the Section to ethically move legal education forward at a time when law schools were in crisis and seeking effective leadership." *Id.* at 966.
10. Karen Sloan, *AALS Urges Delay in Debate over Law School Accreditation Standards*, NAT'L L.J. (Mar. 30, 2011).

to Assess Them Based on What Students Learn,”<sup>11</sup> and “As They Ponder Reforms, Law Deans Find Schools ‘Remarkably Resistant to Change.’”<sup>12</sup> Don Polden, who chaired the ABA’s Standards Review Committee’s review process of the student learning-outcomes standards, concluded that the process was compromised and delayed by poor leadership within the ABA, which was torn by the conflicting positions taken by various legal education organizations.<sup>13</sup>

This article will explore the ABA’s process of adopting student learning-outcomes standards and the intended impact of the standards with a special focus on how various legal education organizations influenced the process and the final standards. The article will conclude by exploring lessons for future systemic changes in legal education, observing that changes in legal education best take place when there are systemic changes in the profession and when an iterative process is used to construct incremental changes. I write this article from my vantage point as the Chair of the Student Learning Outcomes Drafting Committee of the ABA’s Standards Review Committee during the early development of the new standards.

### **The History of Recent Efforts to Adopt Student Learning-Outcomes Standards**

Within the leadership of the ABA, the process of moving toward student learning-outcomes standards began in 1992 with the *Report of the Task Force on Law Schools and the Profession: Narrowing the Gap*.<sup>14</sup> This document is commonly known as the MacCrate Report, named in honor of Robert MacCrate, chairman of the task force. The MacCrate Report, released in 1992, identified ten “Fundamental Lawyer Skills”: problem-solving, legal analysis and reasoning, legal research, factual investigation, communication, counseling, negotiation, litigation and alternative dispute resolution, organization and management of legal work, and recognizing and resolving ethical dilemmas.<sup>15</sup> The report also identified four “Fundamental Values of the Profession”: provision of competent representation; striving to promote justice; fairness and morality; striving to improve the profession; and professional self-development.<sup>16</sup> The MacCrate Report was critical of ABA accreditation standards, noting that “Standard 302 . . . which defines curricular requirements . . . bears little

11. Katherine Mangan, *Law Schools Resist Proposal to Assess Them Based on What Students Learn*, CHRON. HIGHER EDUC. (Jan. 10, 2010), <http://www.chronicle.com/article/Law-Schools-Resist-Proposal-to/63494/>.

12. Katherine Mangan, *As They Ponder Reforms, Law Deans Find Schools ‘Remarkably Resistant to Change,’* CHRON. HIGHER EDUC. (Feb. 27, 2011), <http://www.chronicle.com/article/As-They-Ponder-Reforms-Law/126536>.

13. See Polden, *supra* note 9.

14. A.B.A. SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM 138-41 (1992) [hereinafter MACCRATE REPORT].

15. *Id.* at 138-40.

16. *Id.* at 140-41.

relationship to the detailed set of skills and values” that the report identified.<sup>17</sup> It also concluded that it was time for the ABA “to revisit generally the treatment of skills and values instruction in the accreditation process in the recognition of the skills and values identified” in the report.<sup>18</sup>

Among the MacCrate Report’s recommendations to law schools was: “Each law school should undertake a study to determine which of the skills and values described in the task force’s Statement of Skills and Values are presently being taught in its curriculum and develop a coherent agenda of skills instruction.”<sup>19</sup> It also called upon law schools to provide “opportunity for students to perform lawyering tasks with appropriate feedback and self-evaluation [and] reflective evaluation of the students’ performance by a qualified assessor.”<sup>20</sup>

While the MacCrate Report was widely discussed by legal educators and the ABA hierarchy, law school accreditation standards were not changed to require training in the skills and values identified by the report. Few of the task force’s recommendations were included in ABA standards.

The discussion of the adequacy of law schools’ preparation of lawyers for law practice was ignited again by The Carnegie Foundation for the Advancement of Teaching in its report *Educating Lawyers: Preparation for the Profession of Law*, published in 2007.<sup>21</sup> The Carnegie Report was highly critical of the imbalance “between the cognitive and the practical apprenticeships of legal education.”<sup>22</sup> The report observed that law faculties paid scant attention to curricular issues and the impact of curriculum on the preparation of lawyers to engage in the responsible practice of law. The report noted:

In our study, we discovered that faculty attention to the overall purposes and effects of a school’s education efforts is surprisingly rare, partly due to the general tendency of faculty to focus on only their particular areas of the curriculum and partly due to the culture of legal education, which is shaped by the practices and attitudes of the elite law schools; those practices and attitudes are reinforced through a self-replicating circle of faculty and graduates.<sup>23</sup>

The notion that law schools are self-replicating circles of faculty and graduates is overly simplistic. Those who have spent even a few years as law professors or deans know that faculty members are diverse, independent thinkers, and not a narrow circle of like-minded individuals who seek to replicate themselves or

17. *Id.* at 234.

18. *Id.* at 330.

19. *Id.* at 331.

20. *Id.*

21. WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* (2007) [hereinafter *CARNEGIE REPORT*].

22. *Id.* at 89.

23. *Id.*

their own ideas. But most of those who have been involved in legal education would also agree that curricular change in legal education is, indeed, difficult.<sup>24</sup>

The Carnegie Report played an influential role in another special study of law school outcomes, this one conducted by the ABA's Section of Legal Education and Admissions to the Bar.<sup>25</sup> In October 2007, Ruth V. McGregor, then chairwoman of the section, appointed a Special Committee on Output Measures. The special committee was charged with determining whether and how output measures other than bar passage and job placement might be used in the accreditation process. In July of 2008, the special committee released an extensive analysis of how outcomes measures are used by other accreditation bodies, including those for medicine, dentistry, veterinary medicine, pharmacy, psychology, teacher education, engineering, accounting, and architecture. It concluded: "[The Committee] recommends that [the Section of Legal Education and Admissions to the Bar] re-examine the current ABA Accreditation Standards and reframe them as needed to reduce their reliance on input measures and instead adopt a greater and more overt reliance on outcome measures."<sup>26</sup> It also noted that "a shift towards outcome measures is consistent with the latest and best thinking of U.S. legal educators" as reflected in the Carnegie Report and the Best Practices report.<sup>27</sup> A retooling of standards to focus on outcomes, it concluded, "would be a long overdue course correction."<sup>28</sup>

The ABA Section of Legal Education and Admission to the Bar's Standards Review Committee (the Standards Review Committee), which is charged with recommending accreditation standards, reviewed the special committee's report and adopted a *Statement of Principles of Accreditation and Fundamental Goals of a Sound Program of Legal Education*. In this statement, the Standards Review Committee wrote:

Applying the lessons learned and practiced in other disciplines' accreditation review process, legal education programs and instruction should be measured both by essential program quality indicators (e.g. sufficiency of faculty and adequacy of facilities in light of mission and student body) and by the learning achieved by their students . . . Accreditation review in law, like other disciplines, must move law schools toward articulation and assessment of student learning goals and achievement levels.<sup>29</sup>

24. Cara Cunningham Warren, *Achieving the American Bar Association's Pedagogy Mandate: Empowerment in the Midst of a "Perfect Storm"*, 14 CONN. PUB. INT. L.J. 68, 77-78 (2014).

25. ABA Section of Legal Education and Admissions to The Bar, *Report of the Outcome Measures Committee 1* (2008) [hereinafter *ABA Outcome Measures Report*], <http://www.abanet.org/legaled/committees/subcomm/Outcome%20Measures%20Final%20Report.pdf>.

26. *Id.* at 1.

27. *Id.* at 1. The reference to the Best Practices report is a reference to ROY STUCKEY, ET AL., *BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP* (2007).

28. *ABA Outcome Measures Report*, *supra* note 25, at 2.

29. Donald J. Polden, *Memorandum to Standards Review Committee* (Jan. 7, 2010) (on file with author).

In line with this statement, the Standards Review Committee appointed the Student Learning Outcomes Subcommittee (“the Drafting Committee”), which I had the privilege of chairing from 2008 to 2011. The Drafting Committee developed multiple drafts of proposed student learning-outcomes standards, submitting the first draft to the Standards Review Committee for discussion in 2009. Members of the Standards Review Committee and other interested parties commented on each draft, and the Drafting Committee made appropriate revisions.

The Drafting Committee members were under no illusion that the new standards would make students totally practice-ready or assure that they would find employment. But the Drafting Committee agreed that when law schools take steps to ensure students achieve the appropriate learning outcomes, graduates will make better entry-level lawyers. Members of the Drafting Committee believed that the new standards were justified by five imperatives for change.<sup>30</sup>

The first imperative identified by the Drafting Committee was a matter of consumer protection. Law schools should satisfy student expectations by being clear about what learning outcomes students should expect, construct a curriculum to enable students to achieve those outcomes, measure whether students are achieving the outcomes, and work to increase the number of students achieving them. Members of the Drafting Committee believed that many law schools had not engaged in a serious attempt to identify learning outcomes in a holistic way. Instead, they tended to leave learning outcomes to individual professors to determine on a course-by-course basis. Likewise, given the traditional autonomy and independence of law professors, the Drafting Committee was concerned that assessment at law schools was focused on individual courses, instead of an overarching assessment of whether law students achieve the skills and values necessary to be responsible members of the legal profession. If curricular decisions are made primarily at the course level, students do not have sufficient assurance that they will have opportunities to achieve the overall outcomes necessary to prepare them to be responsible members of the profession.

The second imperative for change related to changes in the legal profession. Given the economic pressures on legal employers, the Drafting Committee feared that fewer and fewer legal employers invest time to ensure that students

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In addition to the author, the initial members of the Drafting Committee were Margaret Barry (Professor, The Catholic University of America, Columbus College of Law), Donald C. Dahlin (Professor of Political Science, University of South Dakota), E. Christopher Johnson, Jr. (Director of the Graduate Program in Law and Finance, Thomas M. Cooley Law School), Joseph Tomain (Reporter for the Drafting Committee and Professor and Dean Emeritus, University of Cincinnati College of Law) and David Yellen (Dean, Loyola University Chicago School of Law).

30. Memorandum from Steve Bahls, Chair of Student Learning Outcomes Committee, to Standards Review Committee (Apr. 17, 2010) [hereinafter Bahls Memorandum], [http://www.albanylaw.edu/media/user/celt/outcomes\\_page/student\\_learning\\_outcomes\\_key\\_issues\\_april\\_17\\_2010\\_2.pdf](http://www.albanylaw.edu/media/user/celt/outcomes_page/student_learning_outcomes_key_issues_april_17_2010_2.pdf).

develop the knowledge, skills, and values required of the legal profession. Most students, in fact, do not take positions with larger employers that have developed bridge programs into practice. At the same time, the Drafting Committee recognized that law schools could not and should not be expected to produce students who are practice-ready. The Drafting Committee opted for a middle ground between leaving professional preparation to chance and requiring law school graduates to be practice-ready. That middle ground is that law schools should identify the skills and values necessary for responsible participation in the bar, and then provide students with sufficient exposure and proficiency in these skills so that they are equipped to continue their professional development after law school.

The third imperative for change concerned the way law schools have always described their mission, to ensure that their graduates “think like lawyers.” But law schools must be more deliberate in helping students think like lawyers, and then use that skill to build other legal skills. Thinking like a lawyer involves critical-thinking skills, within the legal context, that enable students to identify issues, ascertain and challenge the facts, know and apply the rule of law to the facts, develop a reasonable plan of action, and challenge and revise the law when necessary. Many law professors assume that exposure to a considerable number of Socratic Method courses or other case-based courses will help to ensure that students gain the skill of thinking like a lawyer. Perhaps at many law schools that assumption is correct. But Drafting Committee members believed that it should not be left to chance. Law schools should be required to do more than merely assert that students have mastered these skills. Instead, law schools owe it to students to know that their curriculum supports developing these skills by using the appropriate assessment tools.

The Drafting Committee agreed that thinking like a lawyer should be enhanced in experiential courses as a capstone to legal education, but experiential courses should not be the primary focus of a legal curriculum. Traditional legal curriculum, which helps students think like lawyers, should remain at the center of most law schools. But all law schools should measure the degree to which students master this skill.

The fourth and perhaps most important imperative of the Drafting Committee was to elevate periodic curricular review as a central obligation of a law school. A focus on student learning outcomes serves as a catalyst for a law school to be intentional in developing its curriculum, avoiding the “incoherent and unstructured curriculum” that University of Montana law professor Greg Munro described in *Outcomes Assessment for Law Schools* (2000).<sup>31</sup> Curricular review processes are difficult within higher education. They are time-consuming and often threatening to faculty members who value their autonomy to teach what they want to teach in ways they believe to be the most effective. Some faculty members, valuing their own independence, are loath to do anything that might require their colleagues to change what they do. As a result, law school curriculum committees are often relegated to such

31. GREGORY S. MUNRO, *OUTCOMES ASSESSMENT FOR LAW SCHOOLS* 52 (2000).

administrative tasks as approving new courses or new clinical offerings, without asking the larger question of whether students achieve learning outcomes within the law school's mission.

Regional accreditation agencies for colleges and universities focus on identification and measurement of student learning outcomes, as well as improving curricula to better ensure students achieve the student learning outcomes. As a result, most colleges and universities, as part of the regional accreditation process, have given considerable attention to curricular revision. Several law school deans reported that regional accreditation that once gave a "pass" to law schools from demonstrating achievement of student learning outcomes was no longer doing so. The Drafting Committee and Standards Review Committee agreed that it was time for the ABA to move from its traditional focus on inputs to align better with the outcomes approach of regional accreditors. Drafting Committee members hoped new standards would spur law schools and their curriculum committees to take a harder look at what they are trying to accomplish in their academic programs and whether they are successful in doing so.

As a fifth imperative, members of the Drafting Committee and Standards Review Committee were also concerned that Department of Education (DOE) standards could be read to require the ABA to adopt student learning outcomes. Here is the language of the DOE guidelines, section 602.16(a)<sup>32</sup>:

The agency's accreditation Standards effectively address the quality of the institution or program in the following areas: (1) Success with respect to student achievement in relation to the institution's mission, which may include different Standards for different institutions or programs, as established by the institution, including, as appropriate, consideration of State licensing examinations, course completion, and job placement rates.

Section 602.16(f) provides further clarification: "Nothing in paragraph (a) of this section restricts . . . (2) An institution from developing and using institutional standards to show its success with respect to student achievement, which achievement may be considered as part of any accreditation review."<sup>33</sup>

The concerns about the DOE rules for the recognition of accrediting bodies did not have the same weight as the other four imperatives for change, because the ABA was not under a mandate from the DOE. Nonetheless, the Drafting Committee agreed that ABA accreditation standards should not simply default to bar passage to demonstrate "student achievement," as contemplated by the regulation. Instead, the ABA should view student achievement more broadly in the accreditation process by requiring law schools to identify student learning outcomes and then requiring them to measure student achievement of those outcomes.

32. 34 C.F.R. § 602.16(a) (2010).

33. *Id.*



### **Baseline Assumptions Guiding the Student Learning Outcomes Drafting Committee**

Early in their review, the members of the Drafting Committee agreed to be guided by these baseline assumptions in developing their proposals:<sup>34</sup>

1. Change should be incremental and standards should be easy to understand and easy to implement. Given the nature of law schools as less “procedure focused” than professions like medicine, architecture, and pharmacy, the changes should take a lighter touch than other professional accreditation agencies in specifying exactly what skills students must master. That lighter touch should include changes that are more incremental than radical and changes that could reasonably be implemented by law schools without significant disruption.

2. The process of identifying, assessing, and improving is more important than ensuring that each and every student achieves each and every outcome. The Drafting Committee realized that it would be unrealistic to require law schools to guarantee achievement of outcomes by every student. Instead, faculty members’ time is better spent in assessing whether students as a whole are achieving outcomes, and in developing ways to improve the curriculum.

3. Standards should recognize the important role that different types of faculty (and organizations representing these faculty—doctrinal, clinical, legal writing, and others) already play in identifying and assessing learning. The Drafting Committee recognized that interest groups would have a powerful pull on the Standards Review Committee, the Council of the Section of Legal Education, and the House of Delegates, all of which needed to approve any changes. The Drafting Committee acknowledged that in many ways the ABA is a political organization. For change to happen, many interest groups would need to see how the proposals might advance their agenda. Members of the Drafting Committee for the most part were sympathetic to the agendas of key associations of legal educators (e.g., AALS, the Society of American Law Teachers (SALT), and the Clinical Legal Education Association (CLEA)) and were confident that the leadership of these organizations would add to the conversation in ways that would improve the standards. The Standards Review Committee released each of the Drafting Committee’s many drafts in advance of the Standards Review Committee meetings, invited these associations to attend and comment during the Standards Review Committee meetings, carefully considered the comments of the associations, and revised its proposals as appropriate.

4. Standards should give faculty the central role in identifying, assessing, and improving learning outcomes. Shared governance is implicit in the ABA Standards for Approval of Law Schools. While the Drafting Committee respected the efforts of the bar to identify the skills and values necessary to being a lawyer, members believed that law faculty could best identify the skills

34. Bahls Memorandum, *supra* note 30.

and values that were consistent with their law school's mission and their ability to deliver over the course of their students' education.

5. Standards should accommodate differing law school missions and should avoid a "one-size-fits-all" mentality. Law school missions should have a central role in identifying outcomes. Rural law schools may seek to prepare students for practice settings different from urban ones. Law schools with a faith-based mission may identify different skills. Law schools with the mission of preparing lawyers to become change agents may identify skills different from law schools with the mission of helping students "hit the ground running" in a small-practice setting.

6. Standards should not significantly increase the cost of legal education. The Drafting Committee believed that standards should be relatively easy to administer. Likewise, the Drafting Committee was concerned that changes not be inconsistent with the standards of regional accreditation bodies and avoid adding to the "blizzard of paperwork" that plagues universities during the regional accreditation process. Many universities have established an assessment office or increased resources due to the requirements of regional accreditation. Others required detailed reporting from faculty members about their success skill by skill with each course. The Drafting Committee agreed that the goal of the standards should be to create a framework by which faculty, not professional assessment offices, could develop a workable assessment regime within the resources of the law school. I was a law professor at the University of Montana School of Law during the late 1980s. It was a law school with one of the smallest budgets in the nation, yet it was able to identify and measure lawyer competencies and require clinical education of students. It did so because the faculty made it a priority, not because of requirements of a university assessment office.<sup>35</sup>

7. Standards should be drafted and implemented in a way that builds a consensus on the importance of student learning outcomes, maximizes buy-in, and reduces the likelihood of gaming the standards. It was important to the Standards Review Committee to develop a participatory process whereby it was likely, if the student learning-outcomes standards were adopted, that most organizations dealing with legal education would endorse the standards or, at the least, work to educate their membership about how to effectively implement them. To accomplish this goal, the Standards Review Committee and the Drafting Committee understood that the process would take time and would be iterative, meaning that it would weigh the comments received and modify its drafts as these comments created opportunities to improve them.

8. Standards should respect calls for accountability made by the profession, law students, and the public. Though it valued the central role of faculty in developing and assessing student learning outcomes, the Drafting Committee was keenly aware of the responsibility of the ABA as the accreditor of law schools. In that role, the ABA is responsible to students to ensure that

35. See John O. Mudd & John W. LaTrielle, *Professional Competence: A Study of New Lawyers*, 49 U. MONT. L. REV. 11 (1988).

law schools are transparent about the skills students are likely to master. Accreditors must ensure that assessment and continuous improvement are part of the culture of protecting students. And accreditors must also be concerned about whether the professionals they train protect the public by delivering competent and ethical representation of clients.

9. The Drafting Committee determined that because of the significance of the changes and the desirability of giving law schools sufficient time to carefully consider the impact of new student learning-outcomes standards, consideration should be given to a longer-than-usual phase-in period. A delayed final effective date would also give the ABA, AALS, and others time to consider best practices for law schools and share best ideas about the many ways to comply with the new standard. The members of the Drafting Committee understood that there needed to be more scholarship about how to identify student learning outcomes and how to assess them. Professional associations of legal educators need time to develop the programming for faculty members to be proficient in identifying and assessing outcomes. In a sense, the Drafting Committee hoped that the final standards could be viewed as a product of “shared governance,” with significant participation by all of the organizations representing the profession and legal education.

### **Comments from Legal Education Organizations Shaping the Standards**

The Drafting Committee developed its first discussion draft in July 2009. Numerous drafts followed, and the House of Delegates didn’t finalize the proposal until August 2014. The initial discussion draft was controversial, and so were the subsequent drafts. Standards Review Committee meetings were open, often with twenty or more observers eager to comment on the Drafting Committee’s proposals. The Standards Review Committee received many dozens of comments.

As noted above, because of the traditional resistance to change in legal education, the members of the Drafting Committee had determined that their proposals for revisions in the standards would constitute an iterative process. The Drafting Committee put out a series of drafts, modifying each draft based on the comments received both within and from outside the Standards Review Committee. The Drafting Committee decided to use this iterative process for several reasons. An iterative process helps create a marketplace of ideas from which the strongest will rise to policy.<sup>36</sup> In addition, the leadership of the ABA’s Section of Legal Education and Admissions to the Bar is divided roughly equally between members employed by law schools and members who are not.<sup>37</sup> Any transition to greater emphasis on student learning outcomes needed to gain meaningful acceptance by both factions

36. Justice Oliver Wendell Holmes famously stated that “the best test of truth is the power of the thought to get itself accepted in the competition of the market” *Abrams v. United States*, 250 U.S. 616, 630 (Holmes, J., dissenting).

37. Of the twenty-five council members of the Section in 2007-2008, twelve were employed by law schools.

to obtain the endorsement of both the Section's Council and the ABA's House of Delegates. Each would ask how the practicing bar, the judiciary, and the legal academy viewed the proposals. The Drafting Committee knew that acceptance by the practicing bar and the judiciary would be far easier to obtain than acceptance by those in legal education.

Developing the consensus for changed standards to be adopted is only the first step in systematic legal curriculum change. As important, or more important, is that changes in the standards gain acceptance by the legal academy such that serious curricular reform actually takes place. The Drafting Committee understood that law faculties might be tempted to go through the motions, making only cosmetic changes to curriculum when forced to do so, if they did not buy in to the new standards. The Drafting Committee believed that new standards should value the contributions of both doctrinal and skills faculty and provide pathways for both to work together, within the missions of their schools, to advance student learning outcomes.

The comments received by the Standards Review Committee about early drafts were primarily from various associations of legal educators. Generally, doctrinal faculty and the AALS expressed great concern about the direction of the proposals, fearing a diminished role within legal education. Associations of legal educators who represent professional skills faculty generally supported the changes, but often urged the Standards Review Committee to be bolder in its proposals. Many comments were hortatory, while others provide detailed and thoughtful suggestions about specific language. Some comments critical of the Standards Review Committee and Drafting Committee and others questioned the openness of the process,<sup>38</sup> notwithstanding that the process was open and transparent at virtually every juncture. Members of the Drafting Committee understood that often if parties disagree with results within the academy, they are prone to attack the process used or the motives of those making the decisions. Because of the importance of the imperatives to move toward assessment of student learning outcomes, the members of the Drafting Committee determined to largely ignore these criticisms and focus only on the substantive comments offered to the Drafting Committee.

#### *A. Comments from the Association of American Law Schools*

The AALS expressed concern about the standards after the first drafts were released. In a March 15, 2010, letter from the AALS leadership to the committee, the AALS stated it was "particularly concerned" about the proposed student learning outcomes proposals.<sup>39</sup> The letter took a defensive posture that "legal education in the United States has been highly successful because of the value that has been placed on a framework which heavily depends on a full-time faculty dedicated to teaching and advancing knowledge about law and legal

38. See Sloan, *supra* note 10.

39. Letter from H. Reese Hansen, president of the AALS, and Susan Westerberg Prager, executive director of the AALS, to the ABA Section of Legal Education and Admissions to the Bar (Mar. 15, 2010) (on file with the author).

institutions where the faculty plays significant education policy roles.” The same letter announced the formation of an Advisory Group, within the AALS, to evaluate the proposed standards.

In a subsequent letter from the AALS leadership to the Standards Review Committee dated June 1, 2010,<sup>40</sup> the leadership again emphasized the importance of full-time faculty to law schools and the importance of legal scholarship to improve the legal system. The letter urged the ABA “not to let the rhetoric of industrial production control the conversation about the minimal Standards of a quality legal education,” noting that lawyers are not “trained” by law schools.<sup>41</sup> The letter urged the Standards Review Committee not to “conflate clinical thinking with skills training” and emphasized the important role of full-time faculty in setting the basis for skills training.<sup>42</sup> Finally, the AALS urged the ABA to “do no harm.”<sup>43</sup> The letter noted that not all that can be measured is worth measuring, and that no studies have documented valid and reliable outcomes measures. The letter also expressed concern about the proposals increasing the cost of legal education.

The AALS again expressed concern about the proposed student learning-outcomes standards in a letter from AALS President Michael Olivas dated March 28, 2011.<sup>44</sup> Olivas wrote, “The more we have gotten into the issues, however, the more concerned we are about the direction” of the review of the standards. The letter called the work of the Standards Review Committee to be “revolutionary” and “without regard for the fact that these changes might work together to fundamentally transform what our system of legal education should be expected to produce.” Most of the AALS letter, though, expressed concern about the Standards Review Committee’s work on issues of security of position, academic freedom, governance, and attracting and retaining competent faculty. The letter did not contain further criticism of the proposed student learning-outcomes standards, other than to reiterate that the Standards Review Committee should strive to “do no harm.”<sup>45</sup>

With President Olivas’s letter, the focus of the AALS started to shift away from deep opposition to student learning-outcomes standards to deep opposition to standards related to security of position (i.e., a perceived lessening of faculty tenure rights). In fact, in the ensuing years, the AALS has worked diligently to help law schools to identify and understand how to assess student learning outcomes. The cynic might say that one way to shift focus from a controversial proposal is to proffer an even more controversial proposal.

40. Letter from H. Reese Hansen, President of the AALS, to Hewlett H. Askew, ABA Consultant on Legal Education (June 1, 2010), <https://www.aals.org/services/presidents-messages/letter-aba-Standards-review/>.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Olivas Letter*, *supra* note 2.

45. *Id.* at 5.

My own view is that the AALS saw the inevitability of the shift to student learning outcomes<sup>46</sup> and focused on ensuring that the ABA's new standards respect the role of all faculty, including full-time doctrinal faculty, and that the proposals would not significantly increase the cost of legal education or diminish the fundamental role of law schools in ensuring that its graduates learn to think like a lawyer.

The AALS leadership, together with the leadership of other legal education organizations, may have been successful in persuading the ABA to stop and restart the standards review process.<sup>47</sup> But the focus of the stopping and restarting was not so much student learning outcomes, but issues related to job security, governance, academic freedom, and attracting and retaining competent faculty.

The AALS viewed the proposed standards as an effort to minimize the central role of full-time faculty in constructing the best course of study for students, though several Drafting Committee members believed that the AALS incorrectly assessed the Drafting Committee's intent. To that end, the Drafting Committee ensured that the learning outcomes in Standard 302 acknowledged the heart of what doctrinal law faculty traditionally do well—help students gain knowledge and understanding of the law and master legal analysis and reasoning, legal research, problem-solving, and written and oral communication in the legal context. Likewise, the Drafting Committee ultimately decided to reject proposals for a dramatic increase in the number of skills courses required (fifteen credit hours), opting for a more modest six credits-hours. The Drafting Committee also agreed that the required credit hours should be able to be delivered in a cost-effective way, including through simulation courses. In these ways and others, the AALS caution of “do not harm” became a baseline for the Drafting Committee in developing and refining its proposals.

#### *B. Comments from Society of American Law Teachers*

SALT was particularly active in commenting on the various drafts of the proposed standards. SALT consistently advocated that standards should base compliance on process, not results.<sup>48</sup> Many of the members of the Drafting Committee agreed with the following position taken by SALT:

It is our view that one of the most important benefits of moving to outcomes measures is the resulting need for faculty to engage in the process of (1) identifying and articulating what learning outcomes they seek in their teaching

46. President Olivas stated: “We understand the pressure the ABA is under to require outcome measures,” *Id.* at 5, and “[a]ll 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 Standard Review Committee’s work.” *Id.* at 1.

47. Polden, *supra* note 9, at 965.

48. Letter from SALT Co-presidents Raquel Aldana and Steven Bender to Steven C. Bahls (Oct. 14, 2010) (on file with author) [hereinafter Aldana and Bender letter].

(individually and collectively) and (2) sharing ideas on how to measure student learning effectively. We believe that the Standards would more likely be accepted by faculty, and would be most effective, if schools were reassured that, at least initially, accreditors would be judging schools on whether they are engaging thoughtfully in such conversations and moving towards better definition of student learning outcomes and more effective measurement, not on whether individual students have achieved particular outcomes or even on what overall level of achievement the school has attained.<sup>49</sup>

SALT suggested that, during the years immediately after the effective date of the standards, schools be evaluated on “seriousness of the school’s efforts to establish and assess student learning outcomes, not upon the achievement of a particular level of achievement for each learning outcome.” SALT suggested that the seriousness of a law school’s efforts be judged with the following factors:

. . . whether a school has demonstrated full faculty engagement in the identification of the student learning outcomes it seeks for its graduates; whether the school is working effectively to identify how the school’s curriculum encompasses the identified outcomes, and to integrate teaching and assessment of those outcomes into its curriculum; whether the school has identified when and how students receive feedback on their development of identified outcomes, and to integrate teaching and assessment of those outcomes into its curriculum; whether the school has identified outcomes, and to the extent the school has identified areas in which students need more opportunities for feedback and assessment, whether the school has a plan in place to provide those opportunities; and whether the school is engaging in an ongoing process of gathering information about its students’ progress toward mastery of identified outcomes and whether it is using the information gathered to regularly review, assess and adapt its program of legal education.<sup>50</sup>

The Drafting Committee agreed with this approach and ultimately adopted much of its reasoning. This approach is found in the final learning-outcomes standards and the Section of Legal Education and Admission to the Bar memo describing how the new student learning standards would be phased in.<sup>51</sup>

SALT provided helpful guidance with respect to requirements concerning assessment. SALT opposed any standard that would require psychometrically “valid and reliable” assessments. Rather, SALT suggested the standards should be drafted in such a way that they encourage schools to ask these questions: How are law professors assessing students? Do those assessments actually measure what professors want students to learn? Are the assessment methods giving students feedback about their progress? Are learning outcomes stated? Are there assessment methods that might improve students’ learning?<sup>52</sup> The

49. *Id.* at 3.

50. *Id.*

51. *See infra* note 80, at 1.

52. Aldana and Bender letter, *supra* note 48, at 5.

standards as eventually drafted encourage just this type of reflection by law school faculties.

Finally, SALT addressed the question of whether any input measures (e.g., required courses or required experiences) should be retained. Some members of the Drafting Committee thought no curricular inputs should be required. Again, SALT persuasively argued that the “Standards should continue to require some input measures primarily because it is too early in the transition to outcome measures to depend upon them entirely.”<sup>53</sup> SALT added that “until we can be certain that the outcomes measures are working effectively, identifying what kinds of experiences students must have may be the best way to ensure effective legal education.”<sup>54</sup> The Drafting Committee agreed that the move to an outcomes regime should consist of progressive steps and not the radical step of eliminating all curricular input requirements.

#### *C. Comments from the Clinical Legal Education Association*

CLEA also provided helpful comments throughout the course of the process.<sup>55</sup> The focus of these comments was, as expected, on the provisions related to required skills courses within the curriculum. Similarly, early CLEA comments helped the Drafting Committee develop its philosophy of identifying a limited number of important learning outcomes, but leaving law schools the flexibility to identify other learning outcomes consistent with its mission. CLEA makes a strong case that law schools should not be responsible for the mastery of all skills, but rather that students should be required to be proficient in a set of competencies. CLEA’s comments were particularly helpful to the Drafting Committee in helping to develop the requirements of the professional skills courses. Initial drafts from the Drafting Committee provided little detail about what was expected from the skills courses. CLEA’s effective advocacy helped the committee include standards that required multiple opportunities for performance and for feedback. Finally, CLEA’s clear advocacy of the importance of both formative and summative assessment helped lead to a standard addressing the need for both.

#### *D. Comments from ABA Special Committee on the Professional Education Continuum*

The Committee on the Professional Education Continuum (“Special Committee”), a special committee of the ABA Section on Legal Education and Admissions to the Bar, echoed many of the comments made by those with a traditional view of law schools. The primary concern of the Special Committee was what is now Standard 315, requiring law schools to engage in periodic evaluation of their programs of legal education, learning outcomes, and assessment methods, using the results to make appropriate changes in

53. *Id.*

54. *Id.*

55. CLEA issued comments concerning the proposed outcomes measures on Oct. 1, 2009, July 1, 2010, and July 1, 2013 (on file with author).



curriculum. The Special Committee launched a broad criticism of early drafts of this standard.<sup>56</sup> The Special Committee asserted that law schools do not have “the requisite understanding of assessment practices at the institutional level” to “understand how to do what is being asked of law schools.”<sup>57</sup> The Special Committee acknowledged that what is now Interpretation 315-1 identified assessment tools that law schools might use to improve their performance,<sup>58</sup> but it complained that the standard did not provide for a “model” or “best practice” to satisfy the proposed standard.<sup>59</sup> The Special Committee also stated that if the standard were taken seriously, “law schools would need to hire personnel with expertise in education and institution assessment, or delegate related responsibilities to faculty members who lack needed expertise (thereby taking them out of classrooms and clinics where they are sorely needed).”<sup>60</sup>

The Drafting Committee respectfully considered the concerns of the Special Committee and fundamentally disagreed with its concerns. To strip what is now Standard 315 from the standards would fundamentally gut the impact of the student learning-outcomes standards. Identifying and measuring outcomes at the student level is only half the equation to move law schools toward fundamental improvement of outcomes. If law schools did nothing more than assess whether individual students achieve outcomes, but were not required to improve the curriculum should the outcomes not be achieved, law schools could slide by without serious discussion of improving their curricula. The Special Committee’s argument that law schools will not be able to determine how to assess institutional performance and make the appropriate curricular revisions shortchanges law faculty. Law faculties, through curriculum committees, have been revising law school curriculum for years, enhancing curriculum with interdisciplinary courses, skills courses,

56. Letter from Randy Hertz, Chair, ABA Special Committee on the Professional Education Continuum, and Judith Welch Wegner, Special Consultant, ABA Special Committee on the Professional Education of Lawyers, to Donald Polden, Chair, ABA Standards Review Committee (Nov. 5, 2010) (on file with author) [hereinafter Hertz letter].

57. *Id.* at 4.

58. See AM. BAR ASS’N, *Interpretation 315-1, in ABA STANDARDS*, *supra* note 1, at 24. The interpretation states:

Examples of methods that may be used to measure the degree to which students have attained competency in the school’s student learning outcomes include review of the records the law school maintains to measure individual student achievement pursuant to Standard 314; evaluation of student learning portfolios; student evaluation of the sufficiency of their education; student performance in capstone courses or other courses that appropriately assess a variety of skills and knowledge; bar exam passage rates; placement rates; surveys of attorneys, judges, and alumni; and assessment of student performance by judges, attorneys, or law professors from other schools. The methods used to measure the degree of student achievement of learning outcomes are likely to differ from school to school and law schools are not required by this Standard to use any particular methods.

59. Hertz letter, *supra* note 56, at 4-5.

60. *Id.* at 5.

and courses in emerging areas of the law. The Drafting Committee wondered whether the Special Committee really wanted the ABA to enforce a required rubric or require best practices in assessing curriculum, as that would preclude faculty from engaging in curricular reform in a way most consistent with its mission and the talent of its faculty.

The Drafting Committee also disagreed with the argument that required curricular assessment and improvement would require law schools to hire personnel with expertise in assessment. Interpretation 315-1 to the standards provides numerous examples of methods of institutional assessment that can be done at very little cost. As Lori Shaw and Victoria L. VanZandt aptly observe, often curricular improvement is relatively modest.<sup>61</sup> Often curricular improvement entails not adding new courses, but rather making relatively minor modifications in existing courses. Through the tradition of shared governance, faculty and administrators are well-equipped to engage in curricular reform without hiring people from outside the law school. And excellent resources are available to faculty to help guide the process.

The Special Committee also cautioned the Drafting Committee that many law schools were in a vulnerable financial position, with budget cuts and personnel reductions. The Special Committee asserted that the proposed student learning outcomes standards would impose additional costs and exacerbate the problem of the high cost of legal education. The Special Committee, however, failed to fully understand why some law schools, particularly lower-tier law schools, are experiencing financial problems: It is because students do not perceive that law schools will deliver sufficient value in terms of outcomes (including employment outcomes) to justify the high levels of debt law students incur.<sup>62</sup> The solution to law schools' problems is not to hunker down and add nothing new; it is to redouble efforts to provide students with the outcomes they desire in order to justify the high cost of a legal education.

#### *E. Comments from ABA Committee on Clinical Skills*

The Drafting Committee was also influenced by the ABA Section of Legal Education and Admissions to the Bar Committee on Clinical Skills.<sup>63</sup> The Committee on Clinical Skills successfully advocated for the addition of the word "ethical" to Standard 301(a), such that law schools must prepare

61. See, e.g., LORI E. SHAW & VICTORIA L. VANZANDT, *STUDENT LEARNING OUTCOMES AND LAW SCHOOL ASSESSMENT: A PRACTICAL GUIDE TO MEASURING INSTITUTIONAL EFFECTIVENESS* (2015).
62. Steven Bahls, *The Law School Enrollment Collapse: Are Liberal Arts Colleges Next?*, INSIDE HIGHER ED (Dec. 18, 2013), <https://www.insidehighered.com/blogs/alma-mater/law-school-enrollment-collapse-are-liberal-arts-colleges-next>.
63. Comments submitted by the American Bar Association, Section on Legal Education and Admission to the Bar, Committee on Clinical Skills to the Standards Review Committee (Sept. 3, 2009) (on file with author).

students for the “effective, *ethical*, and responsible participation in the legal profession.”<sup>64</sup>

The comment of the Committee on Clinical Skills most discussed by the Drafting Committee was the suggestion that simulations should not be considered as experiential learning courses. The Committee on Clinical Skills argued that simulations were fundamentally different from more traditional clinical experiences, in that “live client and live matter experiences teach key ethical obligations.” Likewise, the Committee on Clinical Skills argued that in simulations, “students know there are no real consequences to clients for their choices.”<sup>65</sup> Live-client clinics help future lawyers learn “about the human dimensions of lawyering and the tensions that professionals face in their ethical and professional obligations to clients, colleagues, adversaries, forums and the public.”<sup>66</sup>

Many members of the Drafting Committee agreed that live-client clinics and simulations provide fundamentally different experiences. But many members of the Drafting Committee also recognized the costs associated with requiring live-client experiences for every student. Further, members of the Drafting Committee believed that most students already experience live-client experiences in law school through summer jobs, law-school-organized internships and externships, pro bono experiences, mentoring experiences, and related experiences.

The Drafting Committee also recognized that systemic change in legal education is often incremental and that well-constructed simulations are a good first step toward effective skills-based courses. The added costs associated with required clinical-type courses would surely increase the opposition to the standards. The Drafting Committee concluded that the best approach is to require law schools to create an outcomes-and-assessment culture at little additional cost. If, at a future point, the Standards Review Committee should determine that the marginal advantage of live-client experiences over well-crafted simulations is worth the cost, then standards might be revised later.

#### *F. Comments from Professors Neumann and Stuckey*

The Drafting Committee found comments from Professors Richard K. Neumann of Hofstra Law and Roy T. Stuckey of the University of South Carolina School of Law,<sup>67</sup> both highly respected in legal education, to be helpful, though the Drafting Committee disagreed with some of their comments. The harshest criticism of the proposal at the time their letter was written was what they considered to be the relatively weak requirements of what is now Standard 314, requiring law schools to provide multiple modes

64. *Id.*

65. *Id.*

66. *Id.* at 4.

67. Letter from Richard K. Neumann, Jr., and Roy Stuckey to Standards Review Committee (July 14, 2010) (on file with author).

of student assessment. Neumann and Stuckey contended that the assessment proposals were not rigorous enough. The standards, as they exist today, require nothing more than law schools using summative assessment and formative assessment across the curriculum, as well as providing meaningful feedback to students. Neumann and Stuckey argued that this requires little more than midterm exams and model answers.<sup>68</sup> Neumann and Stuckey argued for more robust assessment, described as “valuable and reliable methods of assessment.” They also argued that law schools might measure whether each student actually mastered the identified learning outcomes and whether law schools should be required to determine the pedagogical effectiveness of the assessment methods.<sup>69</sup>

Neumann and Stuckey also anticipated the Drafting Committee’s concern that a more detailed requirement for rigorous assessment might unduly increase costs. They clearly saw some of the Drafting Committee’s changes, at the time of their comments, as watering down more rigorous standards out of concern that the standards would raise the cost of legal education. They correctly argued that the cost of more rigorous standards has never been quantified. They also cogently argued that the cost of more rigorous standards could be offset if law schools were more pedagogically efficient. They observed that “[i]t is axiomatic in business that where a work force that has been doing pretty much the same thing for decades, absent opportunities for efficiency gains likely exist but are being ignored because the work force has settled into habits it does not want to change.”<sup>70</sup> They observed that teaching and exams have not changed much in the past generation and that there are great opportunities for fundamental changes in the way teaching is conducted, which might have some upfront expenses without adding expenses in the long run. They analyzed the cost of legal scholarship and suggested that some of these costs could be redeployed to an assessment regime in ways that better benefit students.

Neumann and Stuckey’s argument merits consideration. But the Drafting Committee, in the end, was not persuaded. The American Bar Association is a political organization, as is the Section on Legal Education and Admissions to the Bar. For reform proposals to be implemented, the proposals must be acceptable to the Standards Review Committee, the Council of the Section and the ABA House of Delegates. Each of these bodies has strong connections to traditional law professors. Standards that might divert resources from scholarship to assessment would violate several values of the ABA accreditation process—one being that law schools should have different missions and that micromanagement of finances of law schools should be avoided. To wade into a process that could entail a massive reallocation of resources from traditional faculty to clinical faculty, the Drafting Committee believed, would impair any

68. *Id.* at 17.

69. *Id.* at 6.

70. *Id.* at 6.

chance of reaching the consensus needed for full adoption and implementation of the proposal.

Notwithstanding the Drafting Committee's determination to reject many of the suggestions of Neumann and Stuckey, the argument they make for legal education reform will not go away. Are the standards as they were eventually adopted an ending point to the debate or are they a starting point for further discussion? Should resources shift from traditional doctrinal teaching to experiential learning? Because these standards represent a political compromise designed to garner sufficient support for adoption, it is my hope (and the hope of others on the Drafting Committee) that these standards are part of a continuing evolution of the standards to ensure students are well-equipped to engage responsibly in the legal profession.

### Changes Made by the Drafting Committee in Response to Comments

#### *A. Standard 301—Objectives of Legal Education*

The Drafting Committee concluded that Standard 301(a), as it existed before the recent changes, was arguably the most important of all the ABA standards. It stated: "A law school shall maintain an education program that prepares its students for admission to the bar, and effective and responsible participation in the legal profession."<sup>71</sup> An early draft of Standard 301(a) prepared by the Drafting Committee did not radically change the standard, but proposed meaningful modifications, which have been identified in bold: "A law school shall maintain an educational program that prepares its students for admission to the bar and effective, **ethical** and responsible participation **as entry level practitioners** in the legal profession." The requirement in this early draft of the proposed new student learning outcomes standards that law students are prepared for responsible participation "as entry-level practitioners" in the legal profession generated much discussion. The addition raised the question of whether law schools should ensure that students are practice-ready upon graduation. These words were deleted from the next draft because the Drafting Committee determined that law schools cannot and should not ensure that their graduates are fully practice-ready. Though many outside the legal profession assume that law graduates should be practice-ready, most within the profession and in the legal academy understand that preparation for practice involves an education continuum of law schools, bar admissions officers, and the practicing bar. The MacCrate Report, which served as a guiding force for discussion of student learning outcomes, acknowledged that legal educators and practicing lawyers are engaged in a "common enterprise" of training new lawyers.<sup>72</sup> Nonetheless, Standard 301(a), as eventually adopted,

71. AM. BAR ASS'N, *Standard 301: Objectives*, in STANDARDS & RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2008-2009 19 (2008), [https://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/standardsarchive/2008\\_2009\\_standards.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/standardsarchive/2008_2009_standards.authcheckdam.pdf).

72. MACCRATE REPORT, *supra* note 14.

added the words “upon graduation” to the mandate that law schools prepare students for admission to the bar and effective participation as members of the legal profession. The addition of these words was intended to send a signal to law schools that it is not adequate to assume that future employers will prepare students for the rigor of practice, but rather that it is the primary responsibility of law schools to provide a rigorous education that provides students with the skills to be members of the legal profession.

The discussions that led to the deletion of language suggesting that law students, upon graduation, should be practice-ready are consistent with the analysis of Robert Condlin.<sup>73</sup> Condlin asks, “practice-ready” for “what type of ‘practice?’”<sup>74</sup> He correctly surmises that “law schools cannot prepare students for all of these types of work because the range of skills is too large.” He observes that even if law school could prepare students for a narrower range of practice, most law students don’t know what type of practice or practice setting they will engage in after graduation from law school. The ultimate practice skill, he argues, is “thinking like a lawyer.”<sup>75</sup> Standard 302 recognizes this reality by requiring learning outcomes traditionally associated with thinking like a lawyer, including legal analysis and reasoning, legal research, and problem-solving, as well as written and oral communication skills.

Several other small but important changes were also made to Standard 301 in the review process. Standard 301(a) as it existed before the revisions did require law schools to prepare students for “effective and responsible” participation in the profession. The new standards add the word “ethical.”<sup>76</sup> This addition is arguably redundant with the word *responsible* and redundant with the requirement in Standard 302(d) identifying required outcomes as preparing students with an obligation for “ethical participation” in the legal profession. The Drafting Committee, however, agreed that Standard 301 is the most overarching and important of the accreditation standards, setting the table for other standards to follow. To ignore the ethical obligations of lawyers in this important standard could send the wrong signal to legal education about the underlying importance of ethics in the curriculum.

Another addition from the earlier standard was the word “rigorous.” Many of those who commented, including the AALS, were concerned that too much focus on assessment outcomes might water down the long tradition of providing students with a rigorous education in legal analysis and reasoning. To address that objection, the Drafting Committee decided to give law

73. See Robert J. Condlin, “Practice Ready Graduates”: A Millennialist Fantasy, 31 *TOURO L. REV.* 75 (2014).

74. *Id.* at 86-87.

75. *Id.* at 98-103.

76. Standard 301(a) now reads: “A law school shall maintain a **rigorous** program of legal education that prepares its students, **upon graduation**, for admission to the bar and for effective, **ethical**, and responsible participation as members of the legal profession.” AM. BAR ASS’N, *Standard 301: Objectives of Program of Legal Education*, in ABA STANDARDS, *supra* note 1, at 15 (The changes from the earlier standards are shown in bold).

schools wide latitude in the skills and values they identify and how to assess whether students are achieving those skills and values. The Drafting Committee intended to make clear that while there is wide latitude in those matters, there is no option of delivering an education anything less than rigorous.

*B. Standard 302—Learning Outcomes*

Several of the comments received urged the committee to be much more specific in identifying the minimum skills and values deemed to be important to the profession. In its early discussions, the Drafting Committee considered requiring a much more detailed list of skills and values than in the final rules. Some consideration was given to incorporating the ten lawyering skills and four values of the legal profession identified by the MacCrate Report as a nice compromise between the detailed list of outcomes required by other accreditation bodies and the Drafting Committee's desire not to be too prescriptive. Ultimately, the Drafting Committee determined it would be ill-advised to follow the lead of other professional school accreditation bodies, and that even the skills listed in the MacCrate Report would be too prescriptive. Even the MacCrate Report did not call on law schools to be "practice-ready" with respect to those skills. Instead, the MacCrate Report urged the accreditation process to understand that lawyers should be "familiar" with these skills "before assuming ultimate responsibility for a client."<sup>77</sup>

Many accreditation organizations for professional education, if not most, require their schools to ensure achievement of much more detailed skills. For instance, the National Architecture Accrediting Board identifies a list of thirty-four Student Performance Criteria.<sup>78</sup> The American Association of College of Pharmacy Standards enumerates detailed requirements for specific skills in the areas of pharmaceutical care, systems management, and public health.<sup>79</sup>

Instead of enumerating skills for which law students must be practice-ready, the Drafting Committee decided to replace the former requirement in Standard 302 that law schools provide "substantial instruction" in basic lawyer skills and values with the requirement that they "establish learning outcomes that shall, at a minimum, include competency in basic lawyer skills and values."<sup>80</sup> The Drafting Committee recognized that the quality of skills required of lawyers differed in some ways from those in the health science professions. The lawyering skills associated with "thinking like a lawyer" are much more difficult to enumerate with specificity and do not lend themselves to a laundry list of sub-skills. In addition, the Drafting Committee desired to

77. MACCRATE REPORT, *supra* note 14, at 330.

78. National Architectural Accrediting Board, *NAAB Conditions for Accreditation*, 3.5 (2004).

79. American Association of Colleges of Pharmacy: Center for the Advancement of Pharmaceutical Education, *Educational Outcomes* (2014).

80. ABA STANDARDS & RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS, Standard 302 (2016-2017).

respect the traditions of shared governance found in the standards by allowing deans and faculties to determine best how students might master the skills associated with “thinking like a lawyer.” The Drafting Committee recognized that the skills needed by students at a small law school preparing students for general practice in a rural state would differ from those needed by students at a large law school in an urban area who might specialize and have the benefit of much more post-J.D. mentoring in their employment settings.

### *C. Standard 303—Curriculum*

Standard 303, as adopted, identifies the skills and values curriculum that law schools must offer. The standard continued the then-existing requirement that law schools offer one legal writing experience in the first year and at least one legal writing experience after the first year. The revisions added that law schools require a course of at least two credit hours in professional responsibility, though almost all law schools did so already. The most significant addition was a requirement that law schools offer one or more experiential courses totaling at least six credit hours. Standard 303 also requires law schools to provide substantial opportunities for law clinics or field placements, as well as participation in pro bono legal services. This provision of the revised standards garnered the greatest number of comments.

The earliest draft of the proposal presented by the Drafting Committee did not include any changes in the already limited curricular requirements of the standards.<sup>81</sup> The initial view of many Drafting Committee members at the time was that doing so was unnecessary. The objective of the standards, some thought, was to require identified student learning outcomes, assessment of whether students were achieving those outcomes, and a requirement of improving the curriculum to better ensure students achieve the identified outcomes. There was considerable debate about whether the ABA should prescribe a specific number of skills courses or whether the ABA should more generally review the curriculum to determine whether it is constructed so that students attain the learning outcomes. Those advocating accreditation standards that do not mandate skills courses were concerned about the additional costs of doing so. A greater concern, however, is that the requirement of six credit hours’ worth of skills courses might leave law faculty to assume (falsely) that if they provided that number of hours they had completely satisfied the obligation of the faculty to develop a curriculum pointed toward student learning outcomes.

Most comments were aimed at Standard 303(a)(3), which states that all law students must complete “one or more experiential courses(s) totaling at least six credit hours,” specifying that an experiential course “must be a simulation course, a law clinic, or a field placement.” Nearly every phrase in this language was rigorously debated. The most hotly debated portion of the proposal was the number of required hours of experiential courses. Predictably, legal education organizations like CLEA argued for more than six required hours. Even after

81. *Id.*



the Standards Review Committee had determined that six credit hours was the appropriate requirement, CLEA urged the Council of the Section of Legal Education and Admission to the Bar to make it fifteen credits, though CLEA's plea was ultimately rejected by council.

The Drafting Committee was concerned that experiential courses be well-constructed. After considering many comments, the Drafting Committee defined experiential learning. Experiential learning should be learning that applies the skills of lawyers through experience. Quality experiential learning experiences should require a deeper dive by developing the concepts underlying the professional skills in order that students can appropriately apply those skills. Likewise, the Drafting Committee wanted to ensure adequate assessment of students' performance in these courses. The standards now require students to have "multiple opportunities for performance" and "provide opportunities for self-evaluation."

As previously discussed, the Drafting Committee determined that the required hours of experiential courses could include well-crafted simulations. The Drafting Committee, however, was concerned that some schools would not understand the elements of a well-crafted simulation. Standard 304 defined the elements of an acceptable, well-crafted simulation to be an exercise "reasonably similar to the experience of a lawyer advising or representing a client or engaging in other lawyering tasks." But the standards went further. For a simulation to be well-crafted under the standards, a more robust assessment is expected. Standard 304 requires that simulations provide "opportunities for performance, feedback from a faculty member, and self-evaluation."

#### *D. Standard 314—Assessment of Student Learning*

Standard 314 addresses how law schools should assess whether students achieve the law school's identified student learning outcomes. The Drafting Committee's initial draft concerning assessment of student learning outcomes borrowed heavily from *Accreditation Standards and Guidelines for the Professional Program in Pharmacy Leading to the Doctor of Pharmacy Degree*.<sup>82</sup> The July 18, 2009, Discussion Draft from the Drafting Committee proposed the following language:

A law school shall develop and carry out assessment activities to measure achievement of the identified outcomes and shall gather and provide data demonstrating that its students have, by the time of graduation, achieved those outcomes. Consistent with sound pedagogy, the assessment activities must employ a variety of valid and reliable measures systematically and sequentially through the course of the student's studies. A law school shall provide periodic feedback to students as to their progress in achieving learning outcomes with a view toward encouraging proficiency in each student. There shall be broad-

82. American Association of Colleges of Pharmacy, *Accreditation Standards and Guidelines for the Professional Program in Pharmacy Leading to the Doctor of Pharmacy Degree*, Standard 15 (Jan. 15, 2006).

based involvement of the faculty of the law school in developing and carrying out assessment activities.<sup>83</sup>

The provision underwent substantial revision. The standard eventually adopted by the House of Delegates is much simpler: “A law school shall utilize both formative and summative assessment methods in its curriculum to measure and improve student learning and provide meaningful feedback to students.”<sup>84</sup>

It is important to note that the standards, as finally adopted, do not state that every law student must achieve every outcome. Instead it merely requires that law schools use a variety of assessment methods to provide feedback to students on whether they are achieving the identified outcomes. One of the most significant changes from the Drafting Committee’s earlier proposal was elimination of the requirement that law schools “gather and provide data demonstrating that its students have, by the time of graduation, achieved those outcomes.” The Drafting Committee debated the extent of the obligation of law schools to assess student proficiency in achieving the identified skills. Must all students achieve all the skills that the law school identifies? The Drafting Committee, in its early deliberation, determined not to propose that law schools be required to ensure that every law student master every skill identified. If law schools were required to do so, faculties might be tempted to set the bar of required skills too low, simply to assure that every law student achieves the skills. In addition, to document that every student achieves every skill could require a massive amount of paperwork. Drafting Committee members were familiar with regional accreditation organizations that had enforced student learning outcomes in a way that required institutions to hire assessment specialists whose sole function was to track student learning. Often as these professionals worked with faculty members to obtain the necessary assurances about outcomes, the faculty adopted a “check the box” attitude that lost sight of deeper learning.

An overarching theme of many of the comments the Standards Review Committee received, including those from the AALS, was an appeal not to increase the cost of legal education. The Drafting Committee agreed that any changes in the standards involving student learning outcomes should not materially increase the cost of legal education, given the high rates of educational indebtedness that law students face. The Drafting Committee understood that an assessment regime could necessarily add some costs, but strove to construct one in which additional costs would be modest. The most important element in doing so was not to require documentation that every student achieves every learning outcome. Instead, the Drafting Committee opted to propose standards that would require schools to assess, more

83. *Draft of Proposed Standard 302 (c) presented to the Standards Review Committee* (July 18, 2009) (on file with author).

84. AM. BAR ASS’N, *Standard 314: Assessment of Student Learning*, in ABA STANDARDS, *supra* note 1, at 23.

generally, whether students as a whole were mastering the school's identified outcomes. If there is a gap between a law school's aspiration for student achievement of learning outcomes and actual achievement of the outcomes, the standards should encourage law schools to develop plans to close the gap.

The Drafting Committee also deleted the earlier proposal that "assessment activities must employ a variety of *valid and reliable* (emphasis added) measures systematically and sequentially through the course of students' studies." A valid measure is one that measures accurately what it says it is measuring. A reliable measure is one in which the results are consistent when the measure is administered twice or more to the same group of students. Comments, including those from the AALS, observed that no body of research identifies what measures are reliable and valid within the context of law school courses. To determine whether particular measures are reliable and valid is an expensive proposition, often involving the services of testing specialists or psychometricians. The Drafting Committee did not advance the proposal for "valid and reliable measures" because of concern with the difficulty and cost of developing such assessments. The Drafting Committee was also confident that most faculty members had substantial expertise in assessing in their courses.

The much simpler final version of Standard 314 requires much less from law schools. It simply requires that law schools use both formative and summative assessment to measure and improve outcomes. The interpretations to the standard define formative assessment as "measurements at different points during a particular course at different points over the span of a student's education" to provide feedback to students. The interpretations to the standard make it clear that the requirements for both formative and summative assessment are not applied at the course level, but must be applied at points the law school chooses over the span of a student's education. The standards concerning assessment are much less demanding than those for other professional associations,<sup>85</sup> but the skills and values for lawyers are much more difficult to quantify and measure than for other professions.

*E. Standard 315—Evaluation of Program of Legal Education,  
Learning Outcomes, and Assessment Methods.*

Standard 315, as adopted, states:

The dean and the faculty of a law school shall conduct ongoing evaluation of the law school's programs of legal education, learning outcomes, and assessment methods; and shall use the results of this evaluation to determine the degree of student attainment of competency in the learning outcomes and to make appropriate changes to improve the curriculum.<sup>86</sup>

85. See text accompanying *supra* notes 70-71.

86. AM. BAR ASS'N, *Standard 315: Evaluation of Program of Legal Education Learning Outcomes, Assessment Methods*, in ABA STANDARDS, *supra* note 1, at 23

The original draft of this standard, important elements of which are in the final version of Standard 315, was loosely patterned after the Accreditation Standards and Guidelines for the Professional Program in Pharmacy Leading to the Doctor of Pharmacy Degree.<sup>87</sup>

Many had concerns about how law schools might assess students' ability to master the skills the law school identified without substantial cost and substantial paperwork. What would be sufficient and what would be insufficient? Some wondered whether it would fall to clinical and skills faculty to make the assessment, thereby potentially diminishing the role of doctrinal faculty. The Drafting Committee drafted Interpretation 315-1 to address these issues by suggesting ways law schools could make these assessments in a cost-effective way. Many of the methods suggested were ones law schools already have access to (e.g., bar exam passage rates, placement rates). Other methods of assessing whether students were achieving the school's identified learning outcomes are quite inexpensive to develop, including surveys of attorneys, judges, and alumni, and student evaluation of the sufficiency of their own education. Other possible methods of assessment would entail more expense for law schools not already using the tools (e.g., evaluation of student learning portfolios, student performance in capstone classes or other courses that assess a variety of skills and values and assessment of student performance by judges, attorneys, or law professors from other schools). One goal of adding this interpretation was to provide law schools with cost-effective ways of assessing student learning, as well as a providing other examples that might stimulate law schools to develop more sophisticated assessment regimes. Another goal was to make it clear that there is no single best practice and that law schools should tailor assessment methods in ways that best fit their identified outcomes.

#### *F. Phased Implementation*

As part of addressing the concerns of those in legal education that the transition to the learning-outcomes standards amounted to too much too fast, the ABA developed a plan to phase in implementation of the standards. The concern that the ABA was acting too fast did not acknowledge that the effort was an eight-year process of gathering input and refining standards. At the same time, it is not unreasonable for law schools to wait to implement standards until they are finally adopted. The ABA's phase-in plan was released in 2014. The transition plan gave law schools until the 2016-2017 academic year to identify student learning outcomes and address implementing the curricular requirements. The standards relating to simulation courses, law clinics, and field placement apply to students beginning law school in fall 2016 who will graduate in 2019. As to the standards requiring law schools to assess institutional effectiveness, the ABA would evaluate law schools "based on the seriousness of the law school's efforts to engage in an ongoing process of gathering information about its students' progress toward achieving identified

87. American Association of Colleges of Pharmacy, *supra* note 82.

outcomes and whether it is using the information gathered to regularly review, assess and adapt its academic programs.”<sup>88</sup>

The phased implementation is consistent with the Drafting Committee’s view that the curricular review needed to support the identified standards; changes in curriculum and implementation of assessment regimes should not be rushed. The new student learning-outcomes requirements are a pivot point in higher education and should be implemented at law schools with great care.

### **Lessons for Future Systems Changes in Legal Education Curriculum**

While the implementation of student learning outcomes is, perhaps, the most significant systemic change in law school curricula in the past century, other changes have been implemented. Though systemic curricular change over the past century has been slow, it is not unheard of. In response to the Great Depression, Columbia Law Professor Karl Llewellyn effectively argued for curricular change within law schools.<sup>89</sup> The Depression caused changes in the skills and expertise required of lawyers, as firms were liquidated and the legal workforce was forced to retool. Jobs for law school graduates were scarcer than at earlier times. Llewellyn argued that law schools were not preparing students for the new world of law practice. He urged law schools to return to some form of practical office training. He also argued that law school curriculum should merge the traditional case-based study with contextual materials, with a greater emphasis on interdisciplinary materials. He was concerned about the cost of legal education and believed that the curriculum should prepare students for other types of work spurred by the New Deal.<sup>90</sup> As a result of Llewellyn’s efforts, law school casebooks started to be transformed to add readings of secondary materials to cases.

Systemic curricular change within higher education is difficult, at best, and is even more difficult within legal education. As pointed out by the Carnegie Foundation Report on *Educating Lawyers*, law schools are hybrid institutions.<sup>91</sup> Most are a part of a university, deeply steeped in the values of the university. At the same time, law schools are part of the legal profession and accredited by the American Bar Association, the largest association of lawyers in the United States. Faculty members and law school leaders debate how to resolve the tension between the commitment to the academic values of research, critical thinking about the profession and the desire to prepare students with the practical aspects of lawyering. Faculty members at law schools often differ in

88. ABA Section of Legal Education and Admissions to the Bar, *Transition to and Implementation of the New Standards and Rules of Procedure for Approval of Law Schools 2* (Aug. 13, 2014), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/governancedocuments/2014\\_august\\_transition\\_and\\_implementation\\_of\\_new\\_aba\\_standards\\_and\\_rules.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/governancedocuments/2014_august_transition_and_implementation_of_new_aba_standards_and_rules.authcheckdam.pdf).

89. Anders Walker, *Bramble Bush Revisited: Llewellyn, The Great Depression and the First Law School Crisis, 1929-1939*, 64 J. LEGAL EDUC. 145, 165 (2014).

90. *Id.* at 168.

91. Carnegie Report, *supra* note 21, at 4.

their view of the balance between academic values and the profession's values. Doctrinal faculty tend to place a greater emphasis on the value of critical thinking about the legal profession and the role of law, while clinical, legal writing, and skills faculty put a greater emphasis on providing students with the skills for ethical practice of law. Traditional doctrinal faculty members disproportionately hold tenure rights and voting rights on curricular issues. As such, with their more traditional way of thinking about legal education, they are the most powerful and decisive voices at American law schools.

Why did reforms that move from a nearly exclusive focus on inputs to a curriculum intentional about student learning outcomes become successful only recently, when they have been discussed for nearly a century? The question is important, as other changes in legal education may be ahead. Legal education, like all of higher education, is finding the ground under it shifting. Increasing consumerism by students, unrelenting cost pressures, fewer applicants, and fundamental changes in the legal profession are sure to affect legal education. As the demand for legal education shifts and the work of lawyers changes, law schools must also change. Now that legal education has finally embraced student learning outcomes in its schools,<sup>92</sup> the legal academy needs to determine how to respond to the many sectors of higher education that are embracing distance learning. The ABA has taken comparatively small steps to permit distance learning in its standards.<sup>93</sup> Likewise, as higher education is embracing alternatives to the path students traditionally take, such as accelerated programs, extended programs, one- or two-year master's programs in the law and more dispersed learning opportunities, legal education remains primarily a three-year, full-time endeavor (with an option for a four-year part-time program). Each of these innovations would require extensive changes in standards, which would likely displease those seeking to preserve the status quo of legal education.

Three lessons can be learned about systemic change in legal education from the experience of the process of adopting student learning-outcomes standards. The first lesson is that changes in students or in the legal profession can spur demand for change at law schools. The second is that processes that are patient and iterative are more likely to lead to change. And the final lesson is that change in legal education is most likely to succeed if it is incremental and not revolutionary.

#### *A. Systemic Change Occurs Only with Systemic Changes in the Profession*

The transition of law school casebooks from almost exclusively cases to both case study and secondary sources, as noted above, resulted from the Great Depression. Was the change to student learning outcomes successful

92. Cara Cunningham Warren observed when it comes to assessing student learning outcomes, American legal education "is arriving much more than fashionably late to the party." Cara Cunningham Warren, *Achieving the American Bar Association's Pedagogy Mandate: Empowerment in the Midst of a "Perfect Storm,"* 14 CONN. PUB. INT. L.J. 68, 77-78 (2014).

93. AM. BAR ASS'N, *Standard 306: Distance Education*, in ABA STANDARDS, *supra* note 1, at 19.

because of changes in the legal profession? The comprehensive review of the standards started before the Great Recession and the subsequent contraction in both the legal profession and the demand for lawyers, but the student learning outcomes came to fruition after these shifts. Certainly the state of disequilibrium in the supply and demand for law students (and for lawyers) caused by the Great Recession created conditions ripe for a serious discussion inside and outside of the academy about the future of legal education. The Great Recession, to be sure, caused applicants to be more scrutinizing about the outcomes they could expect from a law school, particularly employment outcomes. While law schools in the top tier were secure, the rest could expect a more difficult time recruiting law students, because students did not see that the outcomes from law school justified the costs. Perhaps even a greater threat to these law schools was the inability to retain law students who do not see how their studies might reasonably give them the skills that lead to employment.

But a more important factor than the Great Recession created conditions ripe for systemic curricular reform: It was a historic alignment between the practicing bar and the broader legal academy about the importance of assessing outcomes. The practicing bar, since the MacCrate Report of the 1990s, had been clear about the importance of law schools' addressing fundamental lawyer skills and values. The legal academy, however, did not embrace the MacCrate Report, believing that doing so might tip law schools too far toward becoming trade schools. That position was understandable, as the legal academy is, in the eyes of most professors, primarily part of the academy and secondarily part of the profession. The ground shifted for law schools when the academy joined the legal profession in insisting on learning outcomes.

As noted by the Report of the Outcomes Measures Committee, starting in the late 1990s, regional accreditation organizations "have all moved from an input-based, prescriptive system of accreditation to an outcome-based system of accreditation."<sup>94</sup> While law schools could once "fly beneath" the regional accreditation radar screen, they increasingly were no longer able to do so. This put law faculties into the position of either having universities dictate assessment regimes to them or working collectively with the ABA to develop standards and develop assessment regimes that make the most sense for legal education. Law school deans and faculty who argue for the traditional input-based regime lost support from both the broader academy and the legal professions. Headlines such as "Law Schools Resist Proposal to Assess Them Based on What Students Learn" called out those in the ranks of the academy resisting change at all costs.<sup>95</sup> The resulting realignment, however gradual, created conditions ripe for the shift to student learning outcomes.

94. *ABA Outcome Measures Report*, *supra* note 25, at 47.

95. See Mangan, *supra* note 11.

*B. Systemic Change Best Takes Place as an Iterative Process*

Those engaged in the accreditation process, particularly involving standards for curriculum, understand that the process is like making sausage: It is ugly, and it takes time, but the results are worth it. Those proposing reforms need to thicken their skin to personal criticism, repeated objections to process, and calls for delay. Instead they need to exercise the discipline to engage in an iterative process, even when their partners in the process are criticizing them or the process.

As described above, the leadership of the Standards Review Committee decided to have an open process, sharing multiple drafts and providing ample opportunity for comment (in writing and at committee meetings) before the formal ABA hearing process. Doing so helps give legal education organizations a sense of greater participation in and ability to influence the process. In my over thirty years in higher education, as both a faculty member and an administrator, I have observed that faculty prize their autonomy and independence. Change can rarely be crammed down, as faculty control what happens in their classrooms. Changes within colleges and universities are best achieved through shared governance,<sup>96</sup> not through top-down actions that may be regarded as heavy-handed. For systemic curricular change to be effective within legal education, accreditors should adopt many of the principles of shared governance: transparency, meaningful dialogue, willingness to revise proposals for buy-in, willingness to compromise, and respect for those opposing a proposal, even when they overstate their position.

The iterative process used by the Standards Review Committee materially improved the standards. Legal education organizations identified unintended consequences of some of the proposals. The admonition of the AALS to “do no harm” became a guiding principle for the Drafting Committee. The concerns of the AALS about the cost of the proposals spurred the Drafting Committee to break with the command-and-control approaches of other professional school accreditation organizations that identified learning outcomes and how they should be measured with much more specificity. The attention to detail provided by the SALT, CLEA, and the ABA Committee on Clinical Skills helped the Drafting Committee not only improve the language of the standards but also their substance. It also helped to bestow an element of buy-in to the standards.

It is true that some criticism of the Drafting Committee’s early proposals was sharp, sometimes unduly so. Among the more aggressive comments were those from the AALS. After the conclusion of the process, Donald Polden (the Chair of the Standards Review Committee, who initiated the comprehensive review process) stated that the AALS “attacked most of the draft proposals . . . claiming that expecting faculty members to articulate student learning goals and measuring the extent that students achieve those goals was oppressive to law faculties, notwithstanding the fact that all other professional

96. STEVEN C. BAHLS, *SHARED GOVERNANCE IN TIMES OF CHANGE: A PRACTICAL GUIDE FOR UNIVERSITIES AND COLLEGES* (2014).



education disciplines required such programs.”<sup>97</sup> My view is different from Polden’s. While the comments from the AALS and others might have felt like an attack to some, the language of the letters was understandable considering the extent of change being considered. And each letter came back to the same admonition, which is hard to argue with: “Do no harm.” The comments from the AALS and others increased the Drafting Committee’s resolve to draft standards that demonstrably did not harm and were within the means of law schools to implement. The harsh language of several of the letters received by the Standards Review Committee, I believe, stemmed from a desire to protect faculty who believed (unjustifiably in my view) that those spurring the change desired to diminish the role of traditional doctrinal faculty<sup>98</sup> because they were narrowly focused and self-replicating. The Standards Review Committee simply found itself in the crossfire of the larger emotional debate about the relative roles of doctrinal professors and clinical professors. As the Drafting Committee revised the proposed standards to clarify that traditional law faculty members were critically important to the required skills of “thinking like a lawyer” and to developing assessment regimes, the AALS position on student learning outcomes softened. Eventually the AALS joined the ABA in preparing law schools to comply with the new standards.

One can ask, however, whether the iterative process resulted in standards that were too watered down as a result of the process of compromise. To be sure, the ABA standards regarding student learning outcomes are less onerous than standards from other professional school accreditation organizations. The ABA standards do not have a lengthy list of required student learning outcomes. They do not require “valid and reliable” assessments of the outcomes. Little is required with respect to curriculum, other than a legal ethics course, two legal writing courses or experiences, and six credit hours of skills courses.

“Flexible” should not be confused with “lacking rigor.” Standard 301 requires a “rigorous program of legal education” to prepare students for participation as members of the bar “upon graduation.”<sup>99</sup> Standard 302 requires law schools to prepare students with the “professional skills needed for competent and ethical participation as a member of the legal profession.”<sup>100</sup> Perhaps the most significant requirement is found in Standard 315, which provides that law schools conduct ongoing evaluations of the law school’s program of legal education, learning outcomes, and assessment methods. Pursuant to this standard, law schools must use the results of their evaluation to determine whether students are achieving the standards and, if not, make the appropriate changes in the curriculum. Because of these standards, curricular review at law

97. Polden, *supra* note 9, at 964.

98. Carnegie Report, *supra* note 21, at 89.

99. AM. BAR ASS’N, *Standard 301: Objectives of Program of Legal Education*, in ABA STANDARDS, *supra* note 1, at 15.

100. AM. BAR ASS’N, *Standard 315: Evaluation of Program of Legal Education Learning Outcomes, Assessment Methods*, in ABA STANDARDS, *supra* note 1, at 23.

schools can no longer be an afterthought. Nor can it be subject to the whims of curriculum committees to make curricular changes without a keen focus on student learning outcomes. Moreover, as schools go through the accreditation process, Standard 204 requires them to complete an assessment of their “continuing efforts to improve the educational quality” of their programs.<sup>101</sup>

*C. Systemic Change Is Subject to Political Compromise, and the Task of Systemic Change Is Rarely Completed on the First Try*

It is important to understand that the proposed standards were less of a “sea change” than many originally predicted. While the proposed standards help chart a new direction for law school accreditation and delineate how law schools address student learning outcomes, many of the approaches are relatively modest. Many worthy proposals that were more aggressive (e.g., assessments that are valid and reliable, a requirement of fifteen hours of skills courses) and were either included in initial drafts or suggested by those who commented were not finally adopted. Many times they were not adopted because they would have jeopardized the ability to garner the votes necessary at each step of the ABA’s approval process. Those proposals are unlikely to go away, and many hope that the current ABA standards, like the initial assessment standards adopted by other professional school accreditation organizations, will continue to evolve.

Legal educators should continue to consider several questions as standards evolve.

1. Should the assessment standards for individual law students be more rigorous? Neumann and Stuckey may be correct that law schools can easily comply with these standards without making fundamental and thoughtful curricular change. I hope that legal educators will continue to develop and assess the best practices for assessment methods and will share these models broadly. At least in the short run, I expect law school curricular committees will, in good faith, keep themselves informed of best practices and tailor those best practices to their schools and their schools’ mission. If law schools do so, it is unlikely that there will be a need for additional standards from the ABA.

2. Should more hours of experiential education be required? It was for cost reasons that only six credit hours of experiential education were required. It is unlikely that the cost pressures on law schools will abate in the short or intermediate run, so I would be surprised if the ABA revised this standard in the near future. I hope, however, that law schools will do more than rely on experiential learning courses to help students gain the skills and values needed to enter the legal professions. Schools are best advised to map their curriculum by asking which courses (skills and traditional) are designed to help students master the skills the schools have identified.

3. Should more resources shift from traditional doctrinal courses to experiential courses? The new student learning outcomes will not put this topic

101. AM. BAR ASS’N, *Standard 204: Self Study*, in ABA STANDARDS, *supra* note 1, at 11.

to rest. I hope that the new standards will stimulate law schools to thoughtfully consider this question and that further revisions to the accreditation standards will not be immediately necessary. Legal scholarship plays an important role in higher education, the legal academy, and the legal profession. Pitting legal scholarship against an assessment regime, as Neumann and Stuckey advocate, creates a false dichotomy. In managing their resources, law schools need to accommodate several missions, usually complementary. It is best for law schools to be thoughtful about doing so instead of having solutions imposed by the ABA.

After the student learning-outcomes standards were adopted in January 2014, the report of the ABA Task Force on the Future of Legal Education provided additional signals about where the ABA might head on some of these issues, at least in the short run.<sup>102</sup> The task force reinforced that new prescriptions in accreditation standards do not solve the issues legal education is facing. The task force encouraged the accreditation process to look for ways to lower the cost of legal education and to mandate less homogeneity and more experimentation. It urged law schools to offer incentives for pedagogical innovation, instead of mandating specific innovation. The recommendations of the Task Force on the Future of Legal Education are consistent with “the lighter touch” approach of the ABA’s new student learning-outcomes standards. The task force calls on law schools to advance their curriculum voluntarily instead of waiting until they’re required to do so through the command-and-control approach of accreditation standards. The language offered by this task force indicates that the ABA will not be revisiting these issues any time soon.

### **Conclusion**

The full impact of the standards on legal education will not be known for some years. It will be several years before site visit teams in the accreditation process can fully evaluate whether law schools are successfully complying with all of the standards, particularly Standard 315 related to evaluation of a law school’s program of legal education and willingness to make the appropriate changes to improve the curriculum. But law schools appear to be off to a good start. Much has been written about assessment, and legal education associations have intently focused on helping law schools comply with the standards. Since the adoption of the standards, I have joined the ABA’s Accreditation Committee. The committee, for the most part, has been impressed with early efforts of law school curriculum committees to thoughtfully identify student learning outcomes connected with their individual missions and to begin revising curricula in ways designed to help law students achieve the outcomes. Based on what I have seen, and with continued pressure by regional accreditation organizations for assessment of student learning outcomes across

102. AM BAR ASS’N, REPORT AND RECOMMENDATIONS AMERICAN BAR ASSOCIATION TASK FORCE ON THE FUTURE OF LEGAL EDUCATION (January 2014), [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/report\\_and\\_recommendations\\_of\\_aba\\_task\\_force.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/report_and_recommendations_of_aba_task_force.authcheckdam.pdf).

universities, I am quite optimistic that law schools are carefully evaluating their programs of legal education and making the appropriate changes to improve their curricula. The next generation of law students will surely be the beneficiaries.