William A. Jacobson, Esq.
Clinical Professor of Law
Director, Cornell Securities Law Clinic
Cornell Law School

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The American Bar Association
Attn. Leo Martinez, Council Chair
c/o Fernando Mariduena (Fernando.Mariduena@americanbar.org)

Re: Response to ABA Standards – Matters for Notice and Comment – Definitions (7)-(8); Standards 206, 306, 311(c) and (e), and 405(b); and Rules 19 and 29

Dear Chair Martinez:

I am a Clinical Professor of Law at Cornell Law School and Director of the Cornell Securities Law Clinic, which I founded in 2008. I submit this letter in my individual capacity, in opposition to certain aspects of the ABA proposed modification to law school accreditation Standard 206 (the "proposed revision").

I object to the proposed revision to Standard 206. Like the earlier proposal noticed for comment on May 25, 2021, and despite the ABA's protestations to the contrary,[1] the proposed new standard – now renamed Diversity, Equity, and Inclusion – seeks to impose ideological viewpoint conformity in violation of academic freedom, and illegal racial and ethnic quotas on law school admissions as well as on faculty and staff hiring.[2]

Imposing Illegal Quotas

Revised Standard 206 states:

(a) A law school shall ensure the effective educational use of diversity by providing:

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[1] William Adams, head of the ABA Council of the Section of Legal Education and Admissions to the Bar, previously issued an undated statement in response to objections the ABA received to its May proposal. Among other things, Adams wrote: "In addition to other mischaracterizations of the proposal, reports that the proposal required quotas were inaccurate, and quotas will not be imposed in any new proposals." "Statement by Bill Adams, managing director of ABA Accreditation and Legal Education, on misleading media reports of proposed changes to law school standards," available online at https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/2021/legal-ed-statement-re-media-reports-on-206-and-303.pdf.

[2] The ABA's proposed Interpretation 206-5, exempting states that have "prohibit[ed] the consideration of race and ethnicity in employment and admissions decisions" (commonly known as "affirmative action"), fails to address the fundamental problem that it is attempting to impose quotas, which are illegal for state schools to impose throughout the United States.

(1) Full access to the study of law and admission to the profession to all persons, particularly members of underrepresented groups related to race and ethnicity;

(2) A faculty and staff that includes members of underrepresented groups, particularly those related to race and ethnicity;

Just what the ABA means by “full access” and “underrepresented groups” is explained by the proposed revisions to Interpretations 206-1 and 206-2. Revised Interpretation 206-2 says openly that underrepresented groups “particularly” means “groups that historically have been underrepresented in the legal profession because of race or ethnicity.” Revised Interpretation 206-1 further defines “underrepresented groups”:

> Underrepresented groups are groups related to race, ethnicity, religion, national origin, gender, gender identity or expression, sexual orientation, age, disability, and military status that are underrepresented in the legal profession in the United States *when compared to their representation in the general population of the United States* (*emphasis added*).

Like the prior proposal, the latest proposed revision also eliminates references to diversity efforts being consistent with “sound legal education policy” and “sound educational policy” found in the current version of Standard 206. The ABA seems to be signaling to schools that any negative impact the proposed changes may have on educational quality is irrelevant.

To prove compliance with the proposed standard revision, under Standard 206(b) of the proposed revision, each school would be required to publish data reflecting its “performance” in “satisfying” the new diversity standards. In other words, success in “diversity” is measured by a law school’s increasing the proportion of its students, faculty, and staff from underrepresented groups to a percentage that’s at least as high as the underrepresented groups ’overall percentage of the country’s population. This is just a round-about way of imposing quotas.

The standard the ABA seeks to impose would require schools to show that the percentage of students they admit and faculty/staff they hire from “underrepresented groups” is at least as high as those groups ’percentage in the U.S. population as a whole. To wit, a quota.

The ABA explains the purpose of its proposal this way:

> Revised Standard 206 aims to achieve the effective educational use of diversity, the compelling state interest recognized in *Grutter v. Bollinger*, 539 U.S. 306 (2003), *Fisher v. University of Texas*, 570 U.S. 297 (2013) (*Fisher I*), and *Fisher v. University of Texas*, 136 S. Ct. 2198 (2016) (*Fisher II*).

The ABA is correct to refer to a “compelling state interest,” given that courts in *Grutter, et al.*, apply strict scrutiny to attempts to treat people differently based on race or ethnicity. But, it completely fails to analyze or even mention the requirement that racial/ethnic classifications be narrowly tailored.

> *To be narrowly tailored, a race-conscious admissions program cannot use a quota system*— it cannot "insulat[e] each category of applicants with certain desired qualifications from competition with all other applicants." *Bakke*, 438 U.S., at 315 (opinion of Powell, J.). Instead, a university may consider race or ethnicity only as a " 'plus 'in a particular applicant's file," without "insulat[ing] the individual from comparison with all other candidates for the available seats." *Id.*, at 317. In other words, an admissions program must be "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight." *Ibid.*
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> We find that the Law School's admissions program bears the hallmarks of a narrowly tailored plan. As Justice Powell made clear in *Bakke*, truly individualized consideration demands that race be used in a flexible, nonmechanical way. *It follows from this mandate that universities cannot establish quotas for members of certain racial groups or put members of those groups on separate admissions tracks. See id.*, at 315–316. Nor can universities insulate applicants who belong to certain racial or ethnic groups from the competition for admission. *Ibid*. Universities can, however, consider race or ethnicity more flexibly as a "plus" factor in the context of individualized consideration of each and every applicant. *Ibid*.[3]

Besides expressly invalidating quotas, the Supreme Court has also cautioned: "Racial balancing is not transformed from 'patently unconstitutional 'to a compelling state interest simply by relabeling it 'racial diversity.'"[4]

There is nothing "narrowly tailored" about ABA's demand from above that schools boost the number of students, faculty, and staff from "historically underrepresented groups" until they comport with those groups 'percentage of the population. Instead, it seems to run squarely up against the prohibitions outlined in *Grutter* and *PICS*. (As an aside, does this also mean that law school should not exceed such percentages?)

Furthermore, it is unclear whether the ABA's proportional-standard *diktat* to state (and other) schools could pass muster as a "state" interest. In *Grutter*, the Supreme Court deferred to the *law school's* analysis that its chosen diversity policy provided educational benefit:

> Context matters… Today, we hold that the Law School has a compelling interest in attaining a diverse student body. The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer…. Our holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits.[5]

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[3] *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003) (*emphasis added*).
[4] *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 732 (2007)("PICS").
[5] *Grutter*, 539 U.S. at 327, 328.

By contrast, the ABA is trying to take individual schools' educational judgment out of the equation and impose its idea of diversity quotas on all law schools. Moreover, ABA's stripping out the existing standard's condition that its diversity recruitment policies be "consistent with sound legal education policy" demonstrates that educational judgment has *nothing* to do with the proposed revision. As Professor David Bernstein wrote in his June 3, 2021 response to the ABA's May 25 notice and comment letter:

> under the *Grutter* opinion, law schools may only engage in racial and ethnic preferences if the law school faculty and others involved in the school's academic mission have determined that such preferences would add diversity to the school in a way that would be educationally beneficial. By seeming to mandate such preferences, the ABA would be taking the decision out of the hands of the individual schools, and instead making it a requirement of accreditation. If a particular law school disagreed with the ABA's views on diversity, the ABA would nevertheless require that school to act illegally lest its accreditation be threatened.[6]

<u>Stifling Debate, Violating Academic Freedom, And Harming Viewpoint Diversity</u>

The proposed revision mandates something it calls "inclusivity" and requires each school annually to assess how "inclusive and equitable" its environment is:

> (a) A law school shall ensure the effective educational use of diversity by providing:
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> > (3) An inclusive and equitable environment for students, faculty, and staff with respect to race, color, ethnicity, religion, national origin, gender, gender identity or expression, sexual orientation, age, disability, and military status…
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> (c) A law school shall annually assess the extent to which it has created an educational environment that is inclusive and equitable under Standard 206(a)(3). The law school shall provide the results of such annual assessment to the faculty. Upon request of the Council, a law school shall provide the results of such assessment and the concrete actions the school is taking to address any deficiencies in the educational environment as well as the actions taken to maintain an inclusive and equitable educational environment.

Proposed new Interpretation 206-3 offers guidance in complying with Standard 206(a)(3).

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[6] Letter from David E. Bernstein, Comments on proposed changes to ABA Law School standards pertaining to "non-discrimination and equal opportunity" and "curriculum" (June 3, 2021), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/comments/2021/june-2021/june-21-comment-bernstein-and-leiter.pdf.

> Concrete actions towards creating an inclusive and equitable environment under Standard 206(a)(3) may include, but are not limited to:…
>
> (2) Diversity, equity, and inclusion education for faculty, staff, and students;

The proposal seeks to impose an ideological viewpoint as part of ABA accreditation. DEI education is nothing less than institutionalized dogma, to paraphrase the language from ten Yale Law School professors in their June 23, 2021 response to the ABA's May 25 notice and comment letter.[7] (The Yale professors were referring to proposed new Standard 303, but their comments apply equally well to the proposed revision to Standard 206(a)(3) and its interpretations.)

Specifically, Interpretation 206-3 seeks to impose education requirements on faculty and students. This imposition, while not mandated, is one of the suggested courses of action and in reality will be utilized. What is more, this sort of reeducation will almost certainly reduce ideological diversity and opposition to the CRT/DEI construct. As stated in my prior letter with regard to a similar approach for proposed Standard 303:

> Such curricula, if any, should be within the purview of individual law schools, and there is hardly a consensus around such mandates. In a somewhat analogous recent situation, there was a proposal to impose "anti-racism" educational mandates on students and faculty at Cornell University that ended up with substantial opposition in the Faculty Senate, resulting in no clear consensus for such mandates. See, https://www.forbes.com/sites/michaelpoliakoff/2021/06/03/how-will-cornell-balanceacademic-freedom-and-anti-racism/?sh=580a8bb62b06. These are debates that are playing out at law schools around the country. Those debates should not be preempted through the force of ABA accreditation.

Furthermore, Interpretation 206-3 violates the academic freedom of faculty and seeks to impose an ideological litmus test and reeducation under the rubric of Equity. As I pointed out in my prior comment, ABA is abusing its accrediting power:

> Standard 206 adds the word "Equity" to the title and substance, without definition. "Equity" is a relatively recent buzzword associated with various Critical Race Theory offshoots, particularly that espoused by Prof. Ibram X. Kendi. It is hotly contested whether equality of results, rather than equality of opportunity, is an appropriate goal,

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[7] Letter from Bruce A. Ackerman, Akhil R. Amar, Mirjan R. Damaska, Owen M. Fiss, Anthony T. Kronman, John H. Langbein, Jerry L. Mashaw, Robert C. Post, Roberta Romano, and Alan Schwartz (Yale Law School Professors' Letter), Response to May 25, 2021, Notice re Proposed Revisions to Standards 205, 206, and 303 of the ABA Standards and Rules of Procedure for Approval of Law Schools, Promulgated by the Council of the Section of Legal Education and Admissions to the Bar (June 23, 2021), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/comments/2021/june-2021/june-21-comment-yale-law-school.pdf.

> particularly where discrimination is used to achieve equal results. Regardless, by injecting "equity" as a concept into accreditation process, the ABA uses its accreditation power to make what will be understood to be an ideological point and will take "equity" off the table for debate. That is not the role of ABA accreditation, and it is an abuse of power.[8]

New Interpretation 206-6 does not remedy the violations to academic freedom, and also reveals (by implication) the negative impact the change will likely have on students and staff:

> Consistent with academic freedom, the requirement of creating an inclusive and equitable environment does not require law schools to censure or prohibit academic discussion of ideas that may be controversial or offensive to some students, faculty, or staff.

Interpretation 206-6 may seem designed to protect professors from facing blowback if they challenge the new quota system, as several have for airing politically incorrect ideas. But, it does not say that law schools *must* allow "controversial" discussion. It grudgingly *permits* schools to allow academic discussion. I assume that is why it doesn't use terms like "free speech," which might give professors (at least, at state schools) the idea that they have a *right* to express their opinion.

Also, it says nothing about *students* being allowed to discuss "controversial" or "offensive" topics. It doesn't even graciously permit schools to let students do so. The implication seems to be that schools should "censure or prohibit" students from indulging in "controversial" or "offensive" discussions.

In short, proposed Standard 206(a)(3) and 206(c), as well as Interpretations 206-3 and 206-6, suffer from the same problems as proposed Standard 303, in that they attempt to:

(i) impose an ideology and education in violation of academic freedom.

(ii) chill opposing viewpoints, and stifle debate.

I oppose this attempt and hereby incorporate my comments about Standard 303 from, and the other comments I incorporated into, my June 2021 submission in opposition to the proposal circulated in May 2021.[9]

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8 https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/comments/2021/june-2021/june-21-comment-william-jacobson.pdf

9 https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/comments/2021/june-2021/june-21-comment-william-jacobson.pdf

Finally, despite its nomenclature to the contrary, DEI has been shown to be uninclusive and inequitable in practice. [10] Yet under ABA directives, debate as to the effectiveness and effect of DEI initiatives is off the table for debate.

Conclusion

For the reasons set forth above and in my prior submission, I urge the ABA to drop its proposal, and not to abuse its accreditation power to advance an ideological agenda.

Respectfully submitted,

William A. Jacobson, Esq.
Clinical Professor of Law
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[10] Jay P. Greene, PhD, and James D. Paul, "Inclusion Delusion: The Antisemitism of Diversity, Equity, and Inclusion Staff at Universities," Heritage Foundation (December 8, 2021), https://www.heritage.org/sites/default/files/2021-12/BG3676.pdf.