Professional Responsibility & Legal Education:
ABA Accreditation Standards for Law Schools

John S. Baker, Saul Levmore, Thomas D. Morgan, John A. Sebert; Moderator: Douglas W. Kmiec

Professor Kmiec: Good afternoon, ladies and gentlemen. My name is Doug Kmiec from the Pepperdine Law School in Malibu, California. You may be asking yourself what is this topic, the accreditation of law schools, doing in a symposium on limited government. After all, the ABA is not a government, and it is not limited. Indeed, some opponents of ABA accreditation would say look up "regulatory monopoly" in the dictionary, and that's where you'll find it. And, of course, therein lies the rub. The ABA may not be a government or state actor, but in practical reality it exercises extensive authority over the nature of legal education and derivatively the provision of legal services. The debate this afternoon is a debate over whether ABA accreditation standards serve or disserve the primary purposes of legal education.

And so we begin, what is the primary purpose of legal education? In true, multiple-choice bar examiner fashion: Is it (a) the provision of competent legal services to the general public; (b) an opportunity to take on massive student debt, which in turn necessitates finding a professional position which precludes all meaningful social engagement; (c) a chance to become a member of the Federalist Society and thereby defend the Constitution as written, while simultaneously ending your career for the judiciary; or (d) none of the above, and simply opportunity to devote significant monetary resources to the study of catching foxes on wild and uninhabited lands, the rule against perpetuities, the shooting of spring guns, and the unfortunate lot of children with thin skulls.

More seriously, do accreditation standards ensure legal competence, or are they barriers to entry that simply raise the cost of legal education and, in turn, the delivery of legal services? We have four excellent scholars this afternoon to present several different aspects of this debate. From the more positive side toward regulation, but by no means totally endorsing of every jot and tittle of it, are professor Thomas Morgan, the Oppenheimer Professor of Antitrust and Trade Regulation of the George Washington University, and Dean John Sebert, who until recently had served as the consultant on legal education for the American Bar Association. John's role in that context was as primary administrator and coordinator of the ABA accreditation process.

Aligned against regulation, or at least more skeptical of it, is Professor John Baker, the Bennett Professor of Law at Louisiana State University. John is well-known to the Federalist Society, but it may not be as well-known that recently he was also the co-director of a study on accreditation standards for liberal education. And finally, Dean Saul Levmore, from the University of Chicago Law School, whose research focuses on behavioral effects of legal rules, and who has characterized the ABA accreditation standards as… I think the kind way he put it was misguided and excessive.

I want to just set the table very briefly with four arguments that are made in behalf of regulation, and the four counterpoints one most frequently finds in the literature on this subject; then turn it over to the distinguished panel. The arguments in favor of regulation go something like this:

First, That ABA accreditation is needed to protect the public from inadequately prepared graduates; Second, that ABA accreditation standards are necessary in order to promote legal scholarship of the highest quality—invaluable to the long-term health of the American Republic; Third, that ABA accreditation standards support the rule of law and are invaluable to it; And fourth, that ABA accreditation standards supply valuable consumer information to students and employers alike about the comparative qualities of legal institutions.

The counterpoints: With respect to the first, protecting the public from inadequately prepared law graduates, most critics of ABA standards would point out that from their vantage point, the standards are largely focused on inputs rather than outputs, and by virtue of that, there is considerable (and impliedly

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unnecessary) expense associated with accreditation standards—whether that expense be for the library research facilities, presentation technology, or the money associated with attracting and retaining high-priced legal talent for the faculty, or various tenure requirements—but very little in terms of the evaluation of the actual effectiveness of the graduates that are leaving these programs.

The second argument in favor of accreditation standards, as you remember, was the promotion of quality of legal scholarship. Most of the counterpoints here are not particularly complimentary of legal scholarship. There's a sentiment that says much of what is written in the law reviews is of no help to the courts, of little help to practitioners, and is mostly devoted to commentary on divisive social issues that could just as easily be resolved by Chris Matthews.

The third argument in favor of accreditation standards was promotion of the rule of law. The most telling counterpoint is one that merely cites the ABA's regulation on diversity, which was reenacted in February 2006. Many people contend this diversity standard actually mandates racial preference, and mandates racial preference in a way that actually purports to trump state law. I will quote, so that you don't think I'm making this up, "Standard 211 provides that the requirements of a constitutional provision or a statute that purports to prohibit consideration of race in admission or employment is not justification for a law school's noncompliance with Standard 211." So, the fact that the people in California or Michigan, for example, have enacted explicit constitutional limits on the employ of racial preferences is apparently to the ABA of no consequence. It is hard to see how this promotes the rule of law.

And lastly, the issue of whether or not ABA accreditation standards provide information to employers and students—as a former dean of a law school—I can say that we treated the information we generated in the accreditation process as nothing short of classified information; it was the equivalent of a state secret in a terrorist prosecution, not something that we were about to release.

So, why is there not a public outcry, if there's so much criticism of these accreditation standards? What didn't it dominate the midterm elections, rather than Iraq? Part of it, I suppose, is that when we vote in judicial retention elections it is not uppermost in our minds that in roughly 45 states, it is these judges who have required graduation from an ABA-accredited law school in order to enter the profession. While we may have great dissatisfaction with the existing accreditation standards, it just doesn't come to mind to register a no-vote because of that particular issue, or at least it doesn't for most of us. So perhaps we need to stir some creative thinking, and notwithstanding Patrick Leahy's assessment of the Federalist Society, this is the best place to do that in America. So let's stir our creative faculties, fire the rest of them, and begin with Professor Tom Morgan.

Tom.

Professor Morgan: Thank you, Doug. With all respect to the way Doug set up the problem, I'm going to try to set it up just a little differently. One can imagine a world without lawyers; that is, a world without a group of people who are licensed and certified to have a special skill and who have certain jobs reserved to them. I think there's good reason to believe that in the future, there may be less need for certified lawyers. Non-lawyers will do many things that lawyers do today. And yet, disappearance of lawyers or people designated as lawyers does not seem to be on the near horizon.

Once we concede the existence of a category of people called lawyers and distinguish them in significant part by the special education they receive, it becomes necessary to define what constitutes that special education and who is certified to provide it. In our system, the responsibility for licensing lawyers and certifying that they've received the appropriate training has fallen to supreme courts, of all the jurisdictions in the country (which is now more than 50 if you include D.C. and federal districts, courts of appeals, and so on). I believe, and I suspect many members of the Federalist Society believe, that it is a good thing that power over such an important aspect of American life has devolved to state agencies and remains at that level. Some state courts, most notably California, have set up their own bodies to define what constitutes a legal education and what is sufficient for that purpose and they certify or accredit state law schools located in their jurisdiction. One of the problems with state accreditation, however, is that other states don't necessarily trust each other's educational judgment, and indeed, almost nobody trusts California's educational judgment in terms of state accreditation other than California.

That presents a real collective action problem. How do we create a world in which lawyers trained in one jurisdiction can be admitted to the bar in other jurisdictions? Largely by accident, historically each of the state supreme courts has concluded that a law school accredited by the American Bar Association qualifies a graduate to take the bar examination in their state, and thus to become a lawyer in that state. No federal authority compelled the state supreme courts to do this. No one at the ABA had any authority or responsibility to tell states to do this. Whatever many of us might think about the ABA generally, or whatever our particular fights with the organization in other areas, the fact is that 50 state supreme courts, and other jurisdictions as well, have concluded independently that graduates of schools accredited by the ABA are appropriate for admission to the bar and indeed that the quality of those graduates is quite good.

That doesn't mean that we should accept everything in the current accreditation standards as appropriate. Indeed, I'd suggest that two significant questions ought to be applied to the standards that we have. First, is there a correspondence between the standard and the quality of legal training, the background that we believe lawyers should have? Second, do the standards provide enough flexibility for schools to differentiate themselves and to find new, more effective ways to deliver what they see as a quality legal education?

In fairness, in recent years the ABA accreditation standards have allowed schools greater flexibility than they once did. Perhaps the best illustration of this is the requirement that graduates from an ABA accredited law school must have 58,000 minutes of legal instruction. That is a most bizarre standard to anybody reading them for the first time. It sounds like the strangest, most arbitrary requirement of all. And yet, when you think about it, that turns out to be approximately the 80 to 85 hours of credit that most schools require and have required for many years. And by stating it in terms of minutes, it allows the school to have the freedom to design many different lengths of classes, lengths of semesters, indeed numbers of semesters, than they formerly did. So that's one area in which the ABA has performed well. I suspect John Sebert will suggest others.

I think there are three main areas of concern, and to some extent Doug Kmiec foreshadowed these. First is the requirement that each law school demonstrate a commitment to having a faculty and student body that is diverse with respect to gender, race, and ethnicity—and to do so even in the face of state law that prohibits consideration of those matters in hiring and admission. I don't have time to get into that now, but later I will be prepared to defend that standard, at least in part on the basis that any given state can have any rule they want, but if they certify people in other states as candidates for admission to their bar, they should not be entitled to impose their judgments on others. The second area of concern deals with requirements of tenure or tenure-like status for all faculty, including clinical, legal writing faculty, deans, regular faculty, librarians, etc. without an obvious link as to how that status relates to the performance of the job they're assigned to do. And the last category are some very specific requirements as to curriculum in ABA-accredited law schools. One of them, for example, is the use of live-client training in clinics, as opposed to simulation or other kinds of training. Another is a requirement of specific training in the American Bar Association's Model Rules of Professional Conduct. The Model Rules is the only book that is specifically required that everybody use as a basis for a particular kind of education.

But, the bottom line of my presentation is that the ABA accreditation process is likely here to stay because it meets the needs of a decentralized system of actual lawyer regulation. Something better could come along, but the switching costs would be enormous. This system contributes to a free flow of lawyer licensing that has become central to lawyer mobility. Until we find some replacement for the ABA, however, our effort should be to try to identify standards that can be improved, and then to get to work on changing them.

Thank you.

John S. Baker: Last night, Justice Alito quoted President Reagan about the impact of the Federalist Society on the legal culture of law schools. The Justice went on to say that, unfortunately, President Reagan may have been wrong in this area; that really the legal culture of law schools has not significantly changed. The reason for the lack of change is the lock that the ABA has on accreditation.

The first thing I want to do is to distinguish between the Section on Legal Education and the ABA more generally. Some in this room may find this difficult to believe, but generally the ABA is

more open to diversity of opinion and to different intellectual approaches today than it was some years ago—I would add, the change is due largely to the Federalist Society. I say that based on my experience with the ABA. Although I have spoken at the ABA events a number of times, most recently I did so when the specific request went out for someone from the Federalist Society to address the group. After the address, many people said, "This was wonderful, to have a different opinion. It was the best program." Now, don't get me wrong. I do not want to exaggerate the openness of the ABA generally. At the event just mentioned, I was outgunned three to one on the subject of Guantanamo, whereas at this convention this morning, we had a much more balanced panel on that subject. Indeed, this present panel is more balanced. But still we should give credit to the ABA for moving in a more open direction. The Section on Legal Education needs the same kind of competitive challenge in order to open it to the intellectual diversity that is available. Competition is good. The fact is that the Section on Legal Education has responded not to the power of ideas, but to the power of interest groups and more importantly, to the power of the Antitrust Division of the Justice Department. Justice has overseen the ABA Section for the last ten years, during which the changes you heard about have been made.

I want quickly to cover three points: (1) the structure of accreditation, (2) problems with how accreditation actually works, and (3) some possible solutions. State supreme court involvement in accreditation has already been mentioned and is well known. Many of you may not know, however, about the role of the U.S. Department of Education. DOE, through a federal statute, authorizes certain private accrediting agencies to monitor compliance with educational standards for those institutions that receive federal funding in some form—e.g., student aid. I happen to have worked for an accrediting agency that serves as a DOE-approved accrediting agency at the undergraduate level. Although DOE-accreditation is more important at the undergraduate level, the DOE-approved accreditation of the ABA has a bearing on its professional accrediting function. At the undergraduate level, there is not much competition in accreditation. Nevertheless having some alternative competing agency available gives undergraduate institutions an option for obtaining federal funding without regional accreditation and thus provides leverage against being forced to conform to regional accrediting standards based on notions of political correctness. In my view, law schools need competition in accreditation in order to make it possible to distinguish between competence and character on the one hand and ideology on the other. Just imagine if The Federalist Society were given sole authority to accredit law schools. There would be yelling and screaming from the legal establishment about bias. The Federalist Society would not and should not be in that position. Why? Clearly, The Federalist Society is a group of conservative and libertarian lawyers and its membership does not reflect the views of the entire spectrum of the Bar. Those who do not care to join The Federalist Society should be able to attend or operate law schools that meet basic standards of legal education. Their ability to practice law should not depend on having to attend a law school which adheres to either a conservative/libertarian or a liberal viewpoint. The fact is that the ABA is an ideological organization forcing its ideology into the standards on accreditation.

It is no answer to say that the standards of accreditation are left to state supreme courts and that accreditation is a matter of state autonomy. A national accrediting body serves a coordinating function, so that one state knows the standards for a lawyer education in other states. Suppose a state supreme court filled with Federalist judges decides that it wants to replace the ABA as the accrediting body for law schools in that state, or at least that they wish to have another, alternative accreditor. Say you are the dean of a law school in that state. At present, you cannot afford to lose ABA accreditation because your students would be unable to go to other states which require graduation from an ABA-accredited law school in order to take its bar exam. The ABA, operating under the benefit of the antitrust exception for state entities, has been able to suppress competition in accreditation nationwide. If it were not acting under the umbrella of state supreme courts, this cartel would be called what it is.

John Sebert says that there is great flexibility in these new standards. I disagree. The lack of flexibility applies not just to Standard 212. John has addressed criticisms about Standard 212. He says there is no requirement for quotas, no critical mass required, and no violation of state law is required. But all litiga-

tors know one very important thing: the outcome often turns on which party has the burden of proof. The key here is that the school has to demonstrate its commitment to diversity. In other words, the law school bears the burden of proof, which means that without quotas, it may not be able to carry its burden.

Let's consider how, in practice, this process works with respect to another requirement about which you have also heard, the requirement of live-client contact. The standard says a law school should provide either clinical or live-client experience. Our law faculty has chosen to offer live-client experience, but not clinical courses. The ABA does not accept this. We report to the ABA our "live client" and simulation offerings. Every time we do, the committee comes back and points to the numbers and concludes that we "do not meet the standard." As far as the objective criteria is concerned, we are in compliance. But we are told otherwise. In fact, the process is simply a numbers game. The ABA will say it is not a numbers game. But I have copies of the letters from the ABA to show it is a numbers game.

So, whatever the standards say, the reality is evident in the enforcement. The outgoing head of the Section, Steven Smith, has recognized that there are real problems with the ABA's process. He has written the following: "The current system is a victim of its own success. The ability to enforce meaningful standards has led groups to seek to use the accreditation process for their own narrow purposes. Such claims are made, for example, about deans, faculties, clinicians, legal writing instructors, and librarians." In other words, the whole process has become very politicized. It results from the lack of adequate competition.

So, what is a possible solution? Well, the ABA is up for reauthorization before the U.S. Department of Education. There is a hearing on December 4. Gail Herriot and Roger Clegg have been involved in this. The issue for decision is whether the Department should reauthorize the ABA as the federally-approved accrediting agency for law schools. It is unlikely that the ABA will be denied reauthorization. But there are other options to simple reauthorization. The Department could look for and encourage a competitor. Or maybe, the Department could extract from the ABA some kind of concession that there would be an A track and a B track of accreditation. On the A track—we might call it the Gold Star track—law schools could choose to comply with all of these controversial standards. But on the B track, law schools might be able to choose simply to be judged in terms of technical competence and leave to the state's supreme court and local bar associations the issue of character.

Ultimately, however, the best hope of forcing competition may lie with the *Washington Post*. Maybe the *Post* will take up the cause of competition in law school accreditation. Why? The ABA will not accredit Concord Law School, an online law school operating in California, and therefore, its graduates cannot take the bar exam in other states. Concord is owned by a subsidiary of the *Washington Post*. If the Bush administration would move for competition in accreditation, this Administration might finally win praise from the *Washington Post*.

Saul Levmore: Thank you. I agree, I think, with most of what John Baker has said. I will expand on some of these ideas and offer several examples. The message I hope to impart is that after you deal with the outrageous quality of our current institutions, you might well conclude that it is an open question whether the world could really look other than the way it does. Regulatory capture comes to seem inevitable.

It is unsurprising that most people in law, along with consumers and perhaps even today's audience, are uncomfortable with the idea of anybody being able to call himself or herself a lawyer, engineer, doctor, or nurse with no formal training or licensing. And this list could be expanded to include many more professions. One can imagine a competitive marketplace, with many well-informed consumers, where there was no expectation of licensing, and where the development of brand names as a means of conveying information was the order of the day. In this world, we might find no licensing or other certification, but it is a world remote from our own.

The question, then, is how do we regulate? One possibility is to measure output. We could have state or national exams. That might be the case for drivers' licenses and perhaps air conditioning engineers and some other professions. But even these examples generate political coalitions and interest group pressures. Consider, for example, the University

of Chicago, where I teach. We have great students. I like to think we add enormous value with their education. But, much as I resist sounding like Stanley Kaplan, I do not think any state bar can come up with an exam that our students could not pass at a 98 or 99 percent rate, so long as the intention is for well-equipped graduates of local law schools to pass as well.. Our students are simply smart and selected, in part, for their ability to do well at examinations. The students at elite law schools have a great many skills, and one of those skills is being very, very good at taking exams. We might think that some elite law schools could do a much better job training lawyers and educating students. But it is unlikely or even impossible for a bar exam to have much affect on the legal education at these elite schools, because any exam that works for the mass of applicants will be easily passed by those masters of exam taking. As a result, regulators, if empowered, will naturally seek to affect (even) the elite law schools through direct regulation of their inputs. There will develop rules about what ought to be taught and for how many hours, and so forth. I call this "natural" because when well-meaning people get together to certify members of a profession, it is inevitable that they will try to improve the profession in the process. Each regulator has a view of what the profession requires, and those views will be reflected in instructions to the law schools and applicants.

We might imagine a world where they did not do that. The potential regulators might assemble and say:, "Well, okay, let us solve this collective action, or potential consumer fraud, problem, by having the ABA or some national quasi-accrediting agency certify lawyers." But then, it will be the case that at some schools everybody will pass the bar exam, without any outside influence over the content or form of instruction. That is unrealistic because it is too juicy an opportunity for influence..

And then the influence turns to micromanagement. Potential regulators and certifiers, and the organizations with which they are affiliated, begin to think how they might have been better educated, or how they might ensure that lawyers are trustworthy and reputable. They begin by agreeing that not everyone ought to be able to self-identify as a lawyer, and they move to a scene in which there is an ABA and a Section on Legal Education with frequent meetings and proposals and requests from interest groups. They come to require 3.1 linear feet of bookshelf space per x, and blackboards of certain size in order to have a program in y, and on and on. Each step seems reasonable, or at least responsive to some particular concern, and each is a testament to process. But the overall product is a regulatory code that is long, subjective, open to constant lobbying, and capable of disparate and strategic interpretation. In turn, the regulated entities, which are the law schools for the most part, must prepare mountains of paperwork—in anticipation and then in response to each site visit. It is an enormous regulatory apparatus, all done, presumably, in order to seem evenhanded in saying to a few start-up schools, "You know, you look a little too much like some guy in his living room trying to turn out lawyers left and right." I do not know that we will find an easy solution to this problem, but you have to understand that what I describe is reality, and a perfectly predictable though unpleasant picture.

I am currently, or at least at the time of this meeting, the President of an entity called the American Law Deans Association, which might also sound like an interest group. When we meet, there are 150 people (all deans) in the room, carrying on about the need to send letters to the Department of Education and the Department of Justice in order to complain about regulations and the burdens they create. Students of regulatory capture will not be surprised to hear that at these meetings there are occasionally deans who stand and say, "No, no, I love the regulatory system. It has been good for me as a dean of five law schools over my career. Sometimes it has helped me convince my university's president to authorize funds for construction; sometimes it has helped by barring an incompetent new law school from starting up down the road from me, after all the hard work we put in." These, of course, are the words of anti-competitiveness. They are the complaints of someone who has leaped over the regulatory barrier and resents the idea or unfairness that the next institution in line might face a lower barrier. One you have a library of the "right" size, diversity of the right kind and degree, a legal writing program that meets someone else's (normally extant, very senior legal writing instructors themselves) idea of minimum standards, and an "appropriate" clinical program, you do not want that new fellow opening up a law school that could compete without having to meet

all of these requirements. Suddenly, those who were burdened by input regulation in the past become the biggest fans of regulation. The deans of secure, major law schools with 95 percent bar passage rates have no interest in this regulatory apparatus. But they do suffer the consequences of regulation. I think I have described a prototypical anti-competitive system.

As a matter of regulation theory, the only surprise is that the regulation of law schools greatly exceeds that of other professional schools. In the medical and engineering areas, for example, there are accreditation standards but nothing like the regulatory burden and insistence on conformity that we find in law. By and large a pediatrician needs to pass an exam that is focused on outputs, and this focus seems to work well. In law, as in medicine, we might count on insurance carriers to provide an extra degree of monitoring and certification. That law schools are the most burdened by their centralized organizations, and often even self-appointed regulators, is a red flag. It signals the presence of a bureaucracy that is out-of-control, though instituted by well-meaning people. It has become bogged down by a series of interest group pressures and well-meaning actions.

I encourage you to attend a meeting of the ABA Section on Legal Education. The room is circled with interest group representatives all getting together and conveying the message that they know what is good for America and the profession. What is good is to have more X, and so X is legislated for everyone. Good luck in the attempt at deregulation.

John S. Sebert: Thank you. First, I want to make clear that my remarks today represent my personal views and not the views of the Section of Legal Education and Admissions to the Bar. Let me begin by agreeing with some of the comments made by previous speakers. I very much agree with Tom Morgan, for example, as to the two primary tests for the validity of a particular standard or standards as a whole; Ideally, standards should both (1) establish appropriate minimum standards for high-quality legal education, and (2) give schools as much flexibility as possible to design and create their own programs within the general parameters of the standards. Getting to that ideal is neither easy nor simple.

I also agree with Saul Levmore that there are in the current standards a number that are unnecessarily detailed and prescriptive, and a number that attempt to regulate matters best left to the judgment of law school faculty and deans. Each of us has a laundry list of which are the problematic standards, but I won't go into my personal list here. But let me help you understand the dynamics of the standards revision process.

When the standards initially were promulgated in 1921, they were very bare-bones. Then there was a major revision of the standards in the 1970s. The standards that resulted from that revision were very detailed and prescriptive, in part for the purpose of providing guidance to the many new law schools developing at that time to meet the huge increase in applications to law school. Others may attribute different or additional motivations to the regulatory system that developed in the 1970s.

By the mid-1990s, a great deal of criticism of the standards had mounted from wide-ranging sources, charging that the standards were too detailed and prescriptive, and that they interfered with creativity and innovation. I think it is fair to say that over the past ten years, the ABA has attempted to respond, with some albeit modest success, to those criticisms. In addition to things others have mentioned, the requirements concerning the format and nature of a law library collection are very much more general now. I think they've made good progress there. The revised library standards give law schools great discretion in how to design and implement a law library. The gravamen of the test now, as the accreditation committee has applied it, is whether the collection and the library services adequately meet the needs of the school's faculty and students. I think that is basically as it ought to be.

Schools also have much more latitude now than they previously had in using distance education. No, a law school that delivers essentially its whole educational program by distance technology cannot yet apply for ABA approval, but in 2002 there were major relaxations of the restrictions on the use of distance learning technology. Since those revisions, I actually have been very surprised that so few law schools are using the flexibility they presently have to the maximum, to use distance education to reduce costs and work in collaboration with other law schools. There is only one ABA-approved law school in the country—that has indicated that the distance education standards bind them. That school

is presently being considered for a variance that, if granted, would allow for an experiment that would provide the basis for evaluating the efficacy of using distance education more broadly in the curriculum. [Note: The requested variance was granted by the Council.]

In the early 1990s, the Council adopted a very detailed set of standards that govern externships. Unfortunately, they did so because law schools were just abdicating their responsibility as legal educators. There were a huge number of law schools with externship programs run without adequate supervision, with highly uneven quality; they were giving away credits, basically. But what has happened because of the last two revisions is that those externship standards have been significantly relaxed, leaving much more discretion to the law schools to control the quality of their externship programs. This happened in part because the law schools developed good methods for quality control of externships, convincing the Council that it could rely more substantially on the law schools themselves to control the quality of externships.

Restrictions on academic calendars have been lessened, not only in the way that Tom Morgan mentioned, but in a manner such that schools like Dayton can do an experimental program in which students get the JD in five fairly intensive semesters over a maximum of two years, rather than what is the usually required three years. People will be looking to see whether the Dayton experiment works, and I think it will. They have a well-designed program that they could not have implemented before the standards had been changed.

The Council has also provided a lot more guidance on variances. I'm hoping that the Council will be willing, in a reasonable number of circumstances, to grant variances to schools that come forward with well thought out experimental programs that do not meet the current standards so that we can test new models of legal education.

Nonetheless, I think all of us will agree that there are still too many unnecessary and unnecessarily detailed standards that stifle the creativity in law schools, and that may unnecessarily increase the cost of legal education. Later on I will be mentioning some of these. But let me remind you of some of the additional factors and pressures in the standards revision process, in addition to the interest groups within the academy, that, if not barriers to change, at least are forces that may put change farther off than we might like.

The Council has to pay careful attention to the views of the supreme courts and the bar admission committees that implement the supreme courts' requirements. Practitioners, bar administrators and judges are all represented, as they should be, on the decision-making bodies of the Section. And while the deans often argue for less regulation, some of those other constituencies get very concerned when there is discussion of significant deregulation; they fear that reduced regulation will create problems with respect to assuring appropriate minimum quality of law school programs and those they graduate..

It also must be remembered that not all law schools are as good as those represented on this panel. One of the things Council has to think about is whether it has standards that allow it appropriate oversight over that relatively small number of law schools that have particularly serious problems in bar admission and attrition. They have to design the standards so that they can deal with those problems, and they have to apply those standards consistently to every law school; not only because the Council believes that it ought to have a unitary set of standards, but also because the Department of Education will require the Council to apply its standards consistently to all law schools.

Thus there are a lot of forces that can be barriers to simplifying and reducing the amount of regulation contained in the standards... Actually, I think the problems in this regard are very similar to those faced when seeking simplification of the tax code.