ALDA

AMERICAN LAW DEANS ASSOCIATION

Executive Director
Dawn Hinko
1111 East 60th Street
Chicago, IL 60637
Phone: 773-834-3583
Fax: 773-834-3607
dhinko@law.uchicago.edu

American Law Deans Association Public Comment On The Application Of The American Bar Association ("ABA") For Reaffirmation Of Recognition By The Secretary Of Education ("Secretary") As A Nationally Recognized Accrediting Agency In The Field Of Legal Education.

The American Law Deans Association ("ALDA") represents the chief academic officers of 110 of the nation's ABA-accredited law schools.

At the outset, we want to make clear our support for voluntary accreditation as a reliable and indeed necessary way to ensure the quality of education. Legal educators must join with practitioners and representatives of the public to establish and maintain standards upon which a variety of constituencies can rely to determine whether a law school provides the quality of education that meets generally accepted academic and ethical standards. And it is appropriate for the Federal government to rely upon this process of quality assurance in the allocation of student financial assistance. The Secretary has the statutory authority to recognize certain organizations as "reliable authorities regarding the quality of education or training" as set forth at Subpart 2 of Part H of Title IV of the Higher Education Act of 1965, as amended (20 U.S.C. §1099b *et. seq.*), and pursuant to regulations promulgated by the Secretary at 34 CFR Part 602. Our comment should therefore not be taken as an argument against voluntary accreditation, but rather as notice to the Secretary of our concern that certain ABA policies and standards are antithetical to the fundamental premises of quality assurance.

Our concern is very straightforward: the ABA continues to impose requirements on the law schools it accredits that are not only extraneous to the process of "assuring the quality of [legal] education," but also that improperly intrude on institutional autonomy in seeking to dictate terms and conditions of employment. Such extraneous requirements are in fact counterproductive in that they discourage precisely the innovation and flexibility that are called for in contemporary professional education. We therefore believe that certain ABA requirements do not "effectively address the quality of the institution or its program…" as required by 34 C.F.R. § 602.16(a)(1), and that the ABA has failed to demonstrate that it "maintain[s] a systematic program of review that demonstrates that its standards are…relevant to the educational or training needs of students" as required by 34 C.F.R. §

602.21(a). As such, we respectfully request that Secretary require the ABA to revise or rescind these standards prior to granting continued recognition.

Generally, ALDA objects to the ABA using its power as an accrediting body recognized by the Secretary to seek to enforce upon its accredited institutions terms and conditions of employment that are extrinsic to educational quality. Specifically, we wish to call to the Committee's attention to Standards 205(c), the entirety of Standard 405 and 603(d), which, respectively, essentially define the terms of employment of the law school dean, faculty, including those who supervise clinical programs, legal writing instructors and the director of the institution's law library. The referenced ABA Standards either state, or have been interpreted in the course of accreditation actions to mean, that compliance requires either the granting of tenure or incorporating a tenure-like equivalent in personnel policies. At a minimum, it is a short step from requiring long-term contracts to mandating tenure.

It is certainly true that many, indeed most, law schools, as a matter of choice have systems of tenure for their instructional faculty and other classes of their professional personnel. Many have also chosen to establish "tenure-like" models that provide for assured employment for a term of years. However, these are domestic decisions made through the established processes of the institution, not models imposed upon them as a condition of acceptance among the brethren of ABA-accredited law schools.

If mandating a tenure or tenure-like system is not necessary to protect academic freedom, what is its purpose? It is a condition of employment, a choice that should be a matter of institutional autonomy. If, as we believe is the case, an accrediting agency should not be setting terms and conditions of employment, none of the employment requirements embedded in the ABA Standards stand up to close scrutiny. This includes Standard 405, which presupposes that a law school faculty will be employed under the terms of a system of tenure or a "tenure-like" alternative. We most strongly believe that such requirements have no place in the standards of a voluntary accrediting organization. Indeed, this Committee is well acquainted with the historic abandonment of tenure requirements by each of the regional accrediting bodies, which accompanied the transition of those agencies from a focus on rigid input measures to an examination of academic processes and institutional outputs. The retention by the ABA of such an anachronistic requirement flies in the face of the entire evolution of the American accreditation process, an evolution that has been guided in significant measure by this Committee.

Beyond the general premise of tenure that undergirds the ABA Standards, there are specific provisions that are clearly intended to narrowly constrain institutional conduct in the employment of specific classes of personnel. As the association of law deans, let us start with our own positions. Standard 205(c) provides that:

> Except in extraordinary circumstances, a dean shall also hold appointment as a member of the faculty with tenure.

We see no reason whatsoever why the conditions of employment of the dean of a law school should be prescribed as an accreditation standard. The dean is the executive officer of the law school; in a university setting the dean will typically be accountable to the president or chancellor, while at a free-standing school he or she will report to the governing board. In either case, the dean is expected to diligently carry out the policies and manage the affairs of the law school. A distinguished legal scholar certainly should have academic rank consonant with his or her learning. But an outstanding dean need not be a legal scholar, just as an exceptional university president need not demonstrate great scholarship. The choice of a dean for the skills and talents a particular law school needs at a particular moment in time should not be impeded by having to fit the dean into an academic tenure system. Nor should his or her accountability be diminished by overlaying the artificial cloak of tenure.

Standard 405(a) requires that "A law school shall establish and maintain conditions adequate to attract and retain a competent faculty." With respect to faculty of any type, we believe that there is no reason to mandate tenure or other terms and conditions of employment. Institutions should be held accountable for the quality of their programs, not the means by which they achieve that quality. A good case can be made for some standards as instruments to guaranteeing quality, if only to take pressure off various measurements of quality. If a Standard required that only a fraction of the faculty possess law degrees, for example, one could make a good case for a likely impact on the quality of education. But tenure is unlikely to qualify on that count. Certainly, many institutions will decide on their own to provide tenure or other favorable terms and conditions of employment to their faculty, whether they be traditional faculty, clinical faculty, or instructors in legal writing. That is a decision that should not be mandated by the accrediting agency, but should be left to the judgment of the institution as the best way to provide quality legal education. Generally, we believe that Standard 405 should simply require that a law school engage a faculty that provides an effective legal education and that protects academic freedom.

Requiring tenure or tenure-like employment for clinical faculty is similarly faulty. Standard 405(c) provides in pertinent part:

> A law school shall afford to full-time clinical faculty members a form of security of position reasonably similar to tenure, and non-compensatory perquisites reasonably similar to those provided other full-time faculty members.[1] * * * [T]his standard does not preclude a limited number of fixed, short-term appointments in a clinical program predominantly staffed by full-time faculty members, or in an experimental program of limited duration.

[1] The alternative appears illusory. Under Interpretation 405-6, the term "A form of security of position reasonably similar to tenure" is defined as "a separate tenure track or a program of renewable long-term contracts." The term "long-term" is then specifically defined: "For the purposes of this Interpretation, "long-term contract" means at least a five-year contract that is presumptively renewable …."

Let us quickly emphasize the importance we place on the clinical component of legal education. The most profound change in legal education in recent decades has been a very substantial shift *from* a curriculum based entirely on the Socratic Method and occasional written examinations *to* a curriculum that includes other forms of learning, including a considerable clinical component where law students learn to deal with real clients in real-world situations. Indeed, it is precisely the importance that is placed on the clinical component of legal education that makes this Standard so onerous.

The irony is that in the same breath the ABA will commend an institution for the excellence of its clinical program and yet cite it as out of compliance with Standard 405(c) – and therefore risk serious sanction – entirely because clinical faculty are engaged under terms of employment which do not necessarily result in the granting of terms euphemistically defined as "reasonably similar to tenure." Indeed, it is entirely possible that the ABA's constraints on the terms and conditions of clinical appointments will result in fewer such appointments, as schools hesitate to create new programs and positions that lack necessary flexibility.

The ABA has professed that the purpose of Standard 405(c) is "to ensure that law schools can attract and retain quality full-time clinical faculty and thereby strengthen the clinical component of the law school curriculum."[2] There is, however, no evidence that law schools are having difficulty attracting or retaining highly qualified clinical instructors, or that the restrictions imposed by Standard 405(c) would improve the quality of clinics. To the contrary, the quality of clinics requires law schools to have maximum flexibility in developing the employment strategies most appropriate to their circumstances.

While innovation is a necessary attribute of all parts of any successful program of legal education, clinical programs are particularly sensitive to changing community needs and priorities, as well as serving as targets of opportunity in responding to emerging areas of practice. Maintaining relevance is a critical element of a successful clinical program, and flexibility in developing and modifying these programs is essential to their success both as pedagogical tools and as important community legal services. Inasmuch as this necessarily demands flexibility in the employment of clinical faculty, it is necessary to create terms and conditions of employment that are specifically designed to meet particular circumstances to secure the services of the most qualified individuals who are able to provide the best clinical experience. Without a reasonable degree of flexibility, law schools, including those most focused on quality, are likely to experiment more cautiously, or not at all, in developing new clinical opportunities, in order to avoid locking themselves into commitments that are not in the long-term interests of the school or of legal education in general. Standard 405(c) is an unnecessary intrusion into the economic relationship amongst the law schools and those who run their clinical programs.[3]

---

[2] December 10, 2004 Memorandum from Jon A. Sebert and J. Martin Burke on behalf of the ABA describing the proposed revisions to the ABA Standards for Approval of Law Schools.

[3] Parenthetically, while there is nothing that binds any accrediting organization to the practices of others, it is notable that other similarly situated professional accrediting organizations, such as those that accredit

Likewise, Standard 405(d) requires "A law school shall afford legal writing teachers such security of position and other rights and privileges of faculty membership as may be necessary to (1) attract and retain a faculty that is well qualified to provide legal writing instruction…and (2) safeguard academic freedom." As with all other faculty, we do not believe that ABA should require any specific terms and conditions of employment.

The same issues emerge in the context of the Standard applicable to the directors of law school libraries. Standard 603(d)[4] provides:

> *Except in extraordinary circumstances*, a law library director shall hold a law faculty appointment with security of faculty position. (Emphasis supplied.)

There is simply no reason for requiring that a senior administrative officer have such status. While some law schools have chosen to engage their library directors in tenured positions, there is no reasonable connection between the quality of the law library and the terms and conditions of employment of the director.

As in the case of reviews of clinical programs, the substantive reviews of institutions that have been cited for failure to comply with the requirement of Standard 603(d) are replete with glowing praise of the quality of their law libraries and the services those law libraries provide.[5] The tenure status of the law librarian seems uniformly unrelated to the qualitative review of the law library and the services provided by its professional staff. We further note that it is the entirely reasonable position of many law schools (and the universities within which most such schools are embedded) that it is inappropriate "to provide tenure or similar employment security to people who have significant management responsibility."[6]

There is, however, a very direct connection between the ABA Standard and the policy of the professional association of law librarians, the American Association of Law Libraries, which provides, under the heading "Policy Statement on Job Security, Remuneration, and Employment Practices," the following:

---

schools of medicine, dentistry and psychology, all fields with extensive clinical components, do not make a similar demand.

[4] As if for emphasis, Interpretation 603-3 reiterates the same prescriptive language: "The granting of faculty appointment to the director of the law library under this Standard normally is a tenure or tenure-track position."

[5] One ABA evaluation report, which strongly commends the school for the quality of its law library, notes that "The Law School reports that the Law Librarian, a well-respected member of the Law School community, holds the title of Professor of Law and Associate Dean for Information services. The Law Librarian is also a member of the Law School's seven member Management Committee, which oversees the Law School's strategy and finances." Nonetheless, as the Director is not in a tenured position, the law school is cited for violation of the Standard.

[6] This is akin to the exclusion of management from the coverage of the National Labor Relations Act. While an imperfect analogy, Congress clearly recognized the special role of managers in the leadership of an organization.

> Security of employment enables a law librarian to work responsibly without fear of interference or of arbitrary or unjust dismissal. Security of employment encourages a law librarian to make professional decisions without fear of reprisal. Security of employment provides a sufficient degree of economic security to make the profession of law librarianship attractive to persons of ability.
>
> *Security of employment means that, following the satisfactory completion of a probationary period, the employment of a law librarian under any form of permanent appointment status carries with it a commitment to continuous employment.* (Emphasis supplied.)[7]

Professional organizations can be expected to advocate job security for its members. And it is certainly within the discretion of a law school to decide whether to adopt such a policy. But it should not be within the realm of an accrediting organization, certainly not one bearing the imprimatur of the Secretary of Education, to translate advocacy for specific economic terms into prescribed conduct. This is an abuse of the power that the accrediting agency has secured by means of its governmental recognition.

We believe that in exercising its authority as an accrediting body recognized by the Secretary, the ABA has an obligation to focus its attention on those elements of institutional performance that relate to the quality of education provided its students. When it dictates terms and conditions of employment, the accrediting body inappropriately inserts itself into the internal affairs of the institutions it accredits and does so in a way that forces homogeneity, and conversely stifles innovation and diversity, among law schools.[8] We are fully aware that this Committee is not the Antitrust Division of the United States Department of Justice. We understand that the law, regulations and policies that guide this Committee in its deliberations are very different from the antitrust laws of the United States. We are also aware that the regulations governing the recognition of accrediting bodies expressly state that "an agency that has established and applies the standards [specifically prescribed in the regulation] may establish any additional accreditation standards it deems appropriate."[9] Still, we believe that experience suggests that scrutiny of standards and policies that are extraneous to the purpose of ensuring the quality of legal education is appropriate.

We therefore believe that it is incumbent upon the Committee to require the ABA, as a condition of its continued recognition, to demonstrate how its prescriptive language respecting the terms and conditions of employment of law school professionals, be they deans, faculty or library directors, "effectively address[es] the quality of the institution or its program…" and the referenced standards "are…relevant to the educational or training

---

[7] Published online at http://www.aallnet.org/services/hotline_security.asp

[8] It is not the intention of ALDA to here challenge the ABA requirement at Standard 405(b) respecting the requirement that an institution "have an established and announced policy with respect to academic freedom and tenure * * *." It is the extension of this premise to faculty who supervise clinical programs, and to directors of law libraries, that we believe represents an impermissible overreaching on the part of the ABA.

[9] 34 C.F.R. §602.16(d).

needs of students." Both of these showings are required by the regulations this Committee is obligated to enforce. It would be an injustice to legal education, and to the process of voluntary accreditation, for the Committee to fail to diligently examine the ABA respecting these critical elements of its accreditation practices and policies.

The American Law Deans Association also respectfully requests the opportunity to appear before the Committee at its June meeting to further explain its concerns respecting the accreditation practices of the ABA and to respond to the Committee's inquiries.

Submitted on behalf of the Board of Directors of the American Law Deans Association by:

Saul Levmore, Dean of the University of Chicago Law School, President, American Law Deans Association; David Van Zandt, Dean of the Northwestern University Law School, Vice-President, American Law Deans Association; Katharine Bartlett, Dean of the Duke Law School; James Huffman, Dean of the Lewis & Clark Law School, Treasurer, American Law Deans Association.