March 25, 2011

John Elson's Written Comments for the ABA Section of Legal Education's April 2, 2011Open Forum On Proposed Reforms to the Law School Accreditation Standards and Specifically on the Proposed Reforms to Standard 405c

I. Why the deregulatory philosophy underlying the Section Committee's proposal to deny clinical teachers security of position and governance rights undermines the ABA's prime directive.

What has been missing from the debate over whether law schools should now have complete freedom to employ clinical teachers with no security of position and no vote on faculty governance matters is due recognition of the ABA's primary mission in law school accreditation. If the Section's primary mission or directive is to assure the public, the state supreme courts, the legal profession and prospective and current law students that law school graduates have certain minimum readiness to practice law, this Committee should recommend strengthening, not eliminating, Standard 405's security and governance provisions. If, on the other hand, it is the role of ABA accreditation to meet the needs of law school deans and research faculty, the deregulatory philosophy that its proponents say is necessary in order for schools to most efficiently meet their unique needs should prevail.

Those familiar with how legal education operates understand this conflict between the goals of preparing students for practice and of promoting the interests of deans and research faculty. The conflict is rarely articulated, however, because it represents a fundamental challenge not only to the currently popular deregulatory philosophy, but also to the effectiveness of the Section's pursuit of its primary mission. Because the recent contraction in the market for legal services has made this conflict between the ABA's mission and the interests of deans and research faculty a matter of more urgent public concern, it is worth examining the reasons for this conflict. Even a cursory examination of those reasons shows that deregulation will not resolve the problem; to the contrary, it will only impede the Section from fulfilling its directive to assure that law students are minimally prepared for the ethical, competent practice of law.

Legal educators know that scholarly recognition is the currency that governs both law faculty hiring, pay, security and esteem and law deans' success in better U.S. News rankings. This incentive structure could be trusted to govern without much regulatory interference if it were also sufficient to assure that law schools employ faculty who are adequate to do what is needed in order to prepare students for law practice. Whether or not such trust has ever been warranted, at least in the past a plausible case for such trust could be predicated on three assumptions: first, that many, if not most, law faculty had significant backgrounds in, or at least knowledge of, law practice and, therefore, knew what preparation their students needed for their careers; second, that the bulk of students' preparation for practice could wait for on-the-job training by their employer, ad, third, even if they did not get such training, their law school credential would help them find decent alternative employment.

None of these assumption now holds. On the one hand, both the intensification of the pressures for quick scholarly recognition that only quick and sustained publication can bring and the increasing interdisciplinary focus among law faculty have resulted in full-time faculty who have far less background and interest in law practice than was common in the pre-U.S. News era.

On the other hand, students' need for a legal education that is more effective in preparing students for practice has never been more urgent in view of the recent decline in law jobs and the high cost of law school and students' consequent soaring debt burden. Students who cannot look forward to being prepared for law practice by their employers, who must show an effective skills set to compete effectively for law job and who have massive student debt have been ill served by the traditional law school curriculum. This crisis in legal education is becoming increasingly apparent to the public as well as unemployed and underemployed law graduates, many of whom are quite bitter because they feel law school did not give them what they expected and paid for.

Some law schools have responded to what some are portraying as a new crisis in legal education with programs that do seek to prepare students for effective competition in the new more competitive job market. Experienced clinical teachers, externship supervisors and legal research and writing teachers have developed innovative programs in both the realms of simulation and live-client practice that effectively lay the groundwork for competent, ethical law practice. However, because such programs have low student-teacher ratios and require experienced faculty to develop and implement, they are relatively expensive and available only to a minority of law students.

Instead of responding to the demand for lower cost, more practice-oriented legal education, the Section is moving in the opposite direction. The deans pushing for deregulation are not doing so in order to put more resources into experiential education. Indeed, some have made it clear they want deregulation primarily because experienced clinical teachers are too expensive; they want to cycle them in and out of their programs because making career paths for them is too expensive.

I don't want to imply that there is a nefarious decanal plot afoot; rather, the deans are pushing for deregulation because they want the freedom to put their money where they think it will do their schools the most good, which, given the incentive structure of modern legal education, means strengthening their capacity for high recognition scholarship-production. Whatever social utility the vast diversion of law school resources into scholarship production may have, there is no question that law students are not getting the benefit of their enormous collective investment that makes the scholarship production machine run.

Why does the ABA appear to be going along with a program that is so against its prime directive? This would require a digression into the theory of "agency capture," that is beyond the scope of this hearing. I would only point out in this regard that agency capture is the only explanation for the fact that the ABA is tolerating, and now appears to be strengthening, a system of legal education in which law schools i. can pay their "research" faculty multiples of what non-professional university departments pay their faculty, ii. can tenure their faculty more quickly under far more lax standards than those prevailing in the nonprofessional schools of research universities, iii. can allow their faculty to spend at least half their time on scholarship and consulting and iv. can afford to pay for these unique advantages that many in legal academia see as their right only because their students expect to recoup their law school tuition with well-paying law jobs. Of course, this handsomely rewarded scholarship-production factory that is the ABA-accredited American law school would not be possible without the barriers on market entry that the state supreme courts have allowed the ABA to erect with the expectation that those barriers will assure the graduation of students ready for competent, ethical law practice. Reaping the benefit of government barriers on market entry without providing the public the benefits these barriers are intended to assure is what economists call rent-seeking. Whether the deans who are arguing for their freedom not to have to pay for career clinical teachers despite the critical role

they play in preparing students for ethical and competent law practice should be deemed rent-seekers or free-riders on the largess of the legal profession, their argument for more deregulation is an argument for allowing them to increase their rent and make that ride even freer.

II. Clinical teachers' job security rights need to be strengthened not eliminated.

The January 2011 Committee proposal's suggestion that eliminating any tenure requirement from the Standards will make little if any difference to law school faculty hiring and status is partially true in light of the U.S News-enforced competitive market pressures for hiring and retaining the most promising scholars. With respect to clinical law teachers, however, the situation is very different in that there is an abundance of young practitioners seeking clinical teaching jobs and there is no U.S. News-enforced competitive market that would make it worthwhile for law schools to pay for experienced clinical teachers who have demonstrated superiority in law practice and in teaching. The many deans represented by ALDA would not be waging their sustained attack on 405c if they did not believe that the freedom to hire their clinical teachers on an at-will or short-term contractual basis would not save them substantial money they would prefer to spend for other purposes.

In enacting the current Standard 405c, the ABA House of Delegates made clear its understanding that security of position for a critical mass of clinical teachers was needed in order to build an experienced cadre of law teachers who would be dedicated both to preparing clinic students for the practice of law and to developing law school curricula responsive to students' developmental needs as professionals. As the Section's Special Committee Report recognized, 405c has brought about significant improvements in legal education. As a result of its requirement that clinical programs must be "predominantly staffed" by 405c eligible faculty, the majority of ABA-approved law schools have been able both to create educational programs that are the pride of their schools and to hire and retain clinical faculty who have often assumed leadership roles in their own schools and in legal education generally. By eliminating the "predominantly staffed" requirement, the alternative proposal will return to the days when clinical faculty were almost all short-term contract employees who did not have an opportunity either to develop their own sophisticated instructional programs nor bring their professional knowledge and priorities to the forefront of schools' curricular planning. It would also be especially anomalous for the ABA to adopt a system of de facto tenure for the "research faculty," whose scholarship production is inversely related to their longevity on the tenure-track,[1] while effectively denying long-term job status to clinical teachers, whose longevity in clinical teaching should be positively correlated with teaching effectiveness since the more practice experience clinical teachers accumulate, the more practical knowledge they should be able to impart to their students.

Being true to the ABA's "prime directive," requires, however, not merely retaining the current Standard 405c. That provision has been effectively emasculated by the Accreditation Committee's problematic construction of Interpretation 405-6 in the controversial Northwestern and St. Louis University cases, where the Committee found under threat of litigation that long-term renewable contracts were not required for clinical teachers if a school had an arrangement sufficient to ensure academic freedom. Unless the Accreditation Committee were to find that nonrenewal of clinical teachers' short-term contracts without cause or financial exigency was a per

[1] *See, Postlewaite, Life After Tenure: Where Have All the Articles Gone,* 48 JOURNAL OF LEGAL EDUCATION 558-567 (1998).

se violation of academic freedom, an unlikely development in view of the current Section leadership, the academic freedom option of Standard 405c needs to be eliminated if this Committee's proposed reforms to the Standards are to be true to the ABA's "prime directive."

III. Clinical teachers' governance rights need to be strengthened not eliminated.

The Standard's guarantee of equal participation in faculty governance by clinical faculty needs to be strengthened, not so much because of deficiencies in the language of Interpretation 405-8, but rather because of its lack of consistent enforcement. From my experience on the Accreditation Committee, on site-visit teams, and at my own School, it seems clear to me that this guarantee is often ignored and never enforced as to voting on personnel matters. The Interpretation should be revised to make clear that 405c qualified clinical teachers have governance rights, including voting on personnel matter, that are equal to the participatory and voting rights of the tenured and tenure-track faculty. Thus, Interpretation 405-8 should be revised with the underlined additions:

A law school shall afford to <u>Section 405c qualified</u> full-time clinical faculty members participation in faculty meetings, committees, and <u>all</u> other aspects of law school governance, <u>including voting on personnel matters, to the same extent as</u> other full-time faculty members,

The question here is not whether the ABA has a valid interest in regulating law schools' self-governance structures; as noted above, ABA accredited law schools have traded any immunity from ABA regulation for both their virtual monopoly over entrance to the bar as well as their students' eligibility for federal student loans. The question, instead, is whether such a regulation substantially furthers the ABA's prime directive of assuring minimally practice-ready law graduates.

My own experience at Northwestern strongly supports Interpretation 405-8's underlying premise that law schools' curricular and personnel decisions should have to take into account the views of the clinical faculty because of their special insights into, and concern for, what is needed to prepare students for the practice of law. For the last three decades at Northwestern, the four tenured clinical faculty have played important roles in law school and university faculty governance including, *inter alia*, serving on faculty hiring committees, chairing the curriculum committee, chairing the University's faculty governing body, voting without restriction on curriculum and hiring decisions and serving as elected members to the law school's faculty governance body. The lasting effects of such service must be left to others to judge, but there can be no doubt that this group of clinical faculty has been accepted as playing a major role in law school faculty governance. By contrast, during the last fifteen years of a deanship in which clinical faculty have been hired on short-term contracts without any prescribed role in faculty decision-making, such disenfranchised clinical faculty have played virtually no role whatever in faculty decision-making. The non-clinical faculty is mostly unaware of who these people are and have no idea of what their views are on the issues facing the law school. Whether Northwestern will continue to disenfranchise and isolate its clinical faculty under a new dean is unknowable since we are still in the dean search process, but there can be no question that continuation of the prior dean's policy in this regard will eliminate what has been an important voice on the Northwestern Faculty in furtherance of the ABA's mission of assuring that students are adequately prepared for law practice. The need for such a voice has become increasingly important on our Faculty as it,

like the faculties at many other law schools, has become more interdisciplinary and removed from the practice of law.

This history of the rise and fall of clinical status at Northwestern demonstrates a phenomenon that has been noted in a wide variety of contexts: that a faculty member without the vote need not be taken seriously by her colleagues who have the vote. Why the Accreditation Committee did not recognize the seriousness of the policies underlying Interpretation 405-8 in backing down from its original decision to enforce that Interpretation against Northwestern, many of us found inexplicable. That retreat, which the Accreditation Committee did not even try to explain, is further evidence as to why this Interpretation needs to be strengthened.

Finally, the argument that clinical faculty cannot be expected to have the competence to judge the scholarly competence of the research faculty ignores many aspects of how hiring and promotion decisions are made at law schools, including the fact that many of the research faculty have no background in the research methodologies of their colleagues, that outside reviewers often play a decisive role in evaluating the research competence of prospective hires and tenure candidates and that faculty steeped in law practice often have unique perspective into the practical merits of legal scholarship. Nevertheless, even assuming there is merit to the argument that clinical faculty do not have equivalent competence to judge the quality of research faculty members' scholarship, the ABA has a strong interest in assuring that hiring and promotion decisions take into account the extent to which faculty are competent to prepare students for law practice and clinical faculty have equal, if not greater competence, to be heard and to vote on that issue.

John S. Elson
Professor of Law
Northwestern University School of Law
357 E. Chicago Avenue
Chicago, Illinois 60611
Tel: 312-503-8573
FAX: 312-503-8977
e-mail: j-elson@law.northwestern.edu