August 12, 2019

Chairperson Diane Bosse,
Members of the Council of the Section of Legal Education
and Admissions to the Bar

Re: The upcoming agenda for ABA Standards and Rules of Procedure for Approval of Law Schools.

To Chairperson Bosse and Members of the Council,

I write at the Council’s invitation to offer suggestions for the upcoming agenda on the ABA Standards. I write specifically to suggest adding explanatory language to ABA Standard 501, Interpretation 501-3 (the 20% attrition rule). As a former Chair of the Accreditation Committee, former member of the Standard Review Committee that drafted the Interpretation, and long-time site evaluator, I have a perspective on this Interpretation that may be helpful to the Council moving forward. As such, I write this in my individual capacity and not as a member of the Southwestern law faculty.

Given that this Interpretation has been in existence for two full academic cycles, it may be an opportune time to revisit the language to achieve its maximum import and provide the greatest transparency. In that spirit, I suggest the addition of explanatory language on the type of evidence that may be used to rebut the presumption of violation.

**Background - The goals of ABA Standard 501, Interpretation 501-3.**

1. **The interpretation serves to curtail exploitation.** Simply put, Interpretation 501-3 provides guardrails for the broader policy concern of exploitation that is at the heart of ABA Standard 501. It ensures that law schools think more strategically about the students they admit, the students they attrit, and the relationship between them.

The addition of this Interpretation came at an important time in the history of the Section. Applications to law school had declined precipitously, and yet, despite this phenomenon, some accredited law schools had increased their enrollments with much lower predictors only to fail them out at the end of the first year. In these schools with ballooning enrollments, it was not unheard of to see disqualification rates of 40% and beyond. That statistic served as a warning sign that law school may have been admitting students it knew were incapable of satisfactorily completing its program of legal education or passing the bar. This practice was the kind of exploitation ABA Standard 501 prohibits. But, without added regulatory language, it was still potentially permissible within the Standards. Hence, the need to create an Interpretation that could address this specific issue.
However, the Standards Review Committee and Council also recognized that attrition remains a necessary tool and fact of law school life. Further, they understood that a certain measure of attrition when balanced with other competing interests (such as mission) should not suggest exploitation in itself. The goal was to create a line that would enable law schools to serve their admissions policies without hindering the goals behind ABA Standard 301 and 501. A bright line rule based on a one-size-fits-all approach was neither appropriate warranted. Based on those assumptions, the Council built in a measure of sensitivity to this regulation when it drafted the Interpretation as a rebuttable presumption and not as a bright line rule.

2. Including voluntary attrition in the 20% non-transfer rate was necessary to accurately assess the total number of students who were incapable of succeeding under ABA Standard 501(b). It is true that Interpretation 501-3 was intended to capture accurately the rates at which law schools disqualified wholesale numbers of students. To have an accurate picture of attrition, however, it became clear that a newly crafted Interpretation must include voluntary non-transfer attrition in the overall attrition rate because each year, students leave school while on academic probation. Although not technically because of disqualification, their choice to leave school is directly tied to their inability to succeed in the program of legal education. If those “hidden” academic probation numbers were not counted, the Council could not accurately assess whether a law school was admitting students who are incapable of meeting the requirements under ABA Standard 501(b).

The Issue: Although the Interpretation states that it is a rebuttable presumption whether a school violates ABA Standard 501 if its non-transfer rate exceeds 20%, there is a lack of transparency on the type of evidence a school might proffer to rebut the presumption.

Possible Approach: I would suggest additional language inside the Interpretation that addresses the type of evidence that a school may proffer to rebut the presumption of violation. No doubt, a regulatory body does not want to be tied down by finite lists or by “what ifs.” However, explanatory information is a commonly used tool in ABA Standards. Examples include Standard 303, Interpretation 303-4 (detailing what constitutes law-related public service activities); Standard 306, Interpretation 306-1 (describing methods to ensure security in distance education courses); and Standard 315, Interpretation 315-1 (listing examples of methods used to determine competency in evaluation of outcomes and assessments).

One clear illustration of analogous explanatory language is ABA Standard 402, Interpretation 402-2, which describes, at least generally, the evidence that a school may use to rebut the presumption that a practicing full-time faculty member does not count under ABA Standard 402. The presence of the Interpretation recognizes that not all full faculty members who practice law should be treated as non-full time despite the regulatory nature of the Standard.

And that is certainly true of the 20% rule. As we know, not all voluntary attrition is created equal. While it is undoubtedly true that students on academic probation make up a large percentage of the voluntary attrition statistic, it is equally true that a number of students leave on their own accord while they are in good standing. We also know that they leave for a variety of reasons not pertaining to their academic standing.

Especially in the diverse population of legal education, factors are as varied and individual as the students themselves are. Students cite lack of funding, mental or physical health issues for themselves or their family members, personal emotional issues such as deaths or divorces, an awareness they do not want to
practice law, and/or their need to relocate because of job transfers or family issues. It would provide greater transparency if the Council would create a non-exhaustive list of the types of worthy evidence schools may offer to rebut the presumption.

Further, to fulfill the intent behind Interpretation 501-3, it might be helpful if law schools that exceed 20% attrition completed a chart that differentiates voluntary academic withdrawal from non-academic withdrawal (see below). I think such data would provide a more accurate assessment to the Council of the nature of the non-transfer attrition rate the school is experiencing.

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<thead>
<tr>
<th>2019 1L Non-Transfer Attrition</th>
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<tbody>
<tr>
<td>Total 2019 1L Students</td>
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<tr>
<td>Academic Disqualification</td>
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<tr>
<td>Voluntary Withdrawal on Probation</td>
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<td>Voluntary Withdrawal in Good Standing</td>
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<tr>
<td>Total 1L Non-Transfer Attrition</td>
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Thank you for your consideration of these thoughts.

Catherine L. Carpenter  
Professor of Law