January 29, 2014

The Hon. Solomon Oliver, Jr., Council Chairperson,
Barry A. Currier, Managing Director of Accreditation and Legal Education, Section on
Legal Education and Admissions to the Bar
321 N. Clark Street, 21st Floor
Chicago, IL 60654-7958

via email to JR Clark, jr.clark@americanbar.org

RE: COMMENTS OF PROFESSOR ELSON REGARDING PROPOSED
REVISIONS TO STANDARD 405¹

Dear Judge Oliver, Mr. Currier and Members of the Council of the ABA Section of Legal
Education:

For the following reasons, the Council should retain Standard 405c regarding clinical
faculty’s security of position with a modification to Interpretation 405-6.

I. The Standards Review Committee’s failure to try to justify its proposal to abolish
Standard 405c shows both its proposal’s dubious merits and its failure to satisfy the
USDOE’s requirement that accreditation standards be relevant to students’
educational needs.

Given the enormous time and effort that has gone into the 405c revision process, it is
startling how weak and muddled the case for change appears. Not only was the Standards
Review Committee, (“SRC”), unable to decide among four alternatives and the Council unable
to decide between two of them, but, most important, the SRC has failed to give any reason
whatever to support its case for either 405c’s abolition or the adoption of either of the proposed
alternatives. The SRC explained what its proposed changes to 405c are, but conspicuously
failed, in contrast to most of its other recommendations, to give any reason why the Council
should adopt either of its proposed alternatives to 405c.

Were the Council on the basis of the present record to adopt either of the SRC’s
recommendations, it would not satisfy 34 CFR § 602.21’s requirement that the ABA demonstrate
that its standards are relevant to students’ education and training needs.² The current 405c has

¹ The author is a tenured member of the Northwestern University Law School faculty where he
has taught clinical and classroom courses since 1975 and is a former member of the
Accreditation Committee of the ABA Section of Legal Education, a member of 20 ABA-AALS
site inspection teams, former chair of the Section’s Skills Training Committee, a former member
of the Section’s Bar Admissions Committee and former chair of the AALS Teaching Methods
Section.

² 34 CFR 602.21(a) “The agency must maintain a systematic program of review that
not only been previously vetted and approved pursuant to the Council’s comprehensive Standards review process, but has also been widely recognized as having resulted in a national proliferation of effective clinical programs led by experienced, innovative faculty. This was the goal of 405c. The SRC has not only failed to question 405c’s essential role in making that achievement possible, but has also not tried to explain why the Standard’s abolition would not bring legal education back to pre-405c days when clinical programs were deemed sideshows to the ‘real learning’ that best, or only, happens in in the classroom. As discussed below, the economics of legal education and the priorities of the dominant ‘research’ faculty will guarantee that 405c’s abolition will once again make clinical programs largely the province of novices in both teaching and law practice.

Because the SRC has failed to adduce any facts or arguments to support its recommendation of the two 405c alternatives, the Council will likely look to the justification that 405c’s opponents have most commonly relied upon for its abolition, which is that the best education will emerge from market competition among schools responding to their local markets’ needs. Thus, schools can best decide for themselves whether security of position for any type of law teacher is relevant to their students’ educational needs and, if they decide wrongly, they will suffer accordingly in the legal education market.

The irony of this free market defense for abolishing 405c is that, while its proponents would abolish the Standard that has been critical to the educational programs that have been the most effective in preparing students for practice, they would preserve ABA accreditation’s barriers to market entry by schools that would offer practice-focused alternatives to the scholarship-directed priorities that now dominate all ABA accredited law schools. Were the proponents of 405c’s abolition serious about their free market ideals, they would support eliminating the standards that now virtually guarantee that accredited law schools devote about half their tuition revenues to supporting faculty scholarship. Such real free market reforms, however, have never even been on the Section’s agenda.

3 Any school that would choose not to follow the traditional scholarship-driven model would likely be disqualified from accreditation and reaccreditation under at least the following Standards: 401 requiring faculty to “possess a high degree of competence, as demonstrated by its scholarly research and writing;” 402(a)(3) making the size of faculty depend on, inter alia, the opportunities for the faculty adequately to conduct scholarly research; 404 requiring schools to adopt policies addressing “research and scholarship, and integrity in the conduct of scholarship;” 601 requiring law libraries to provide “effective support of the school’s scholarship, (and) research . . . programs;” and; 704 requiring “sufficient and up-to-date hardware and software resources and infrastructure to support the . . . scholarship (and) research needs of the school.”
Because law schools’ primary incentive remains that of increasing, or at least, maintaining their faculty’s scholarly prestige and their consequent US News rankings, the market simply will not reward schools that hire and promote experienced clinical teachers. To the contrary, because clinical faculty are not only less helpful for US News rankings, but are also relatively more expensive than classroom faculty with higher student-teacher ratios, market forces will advantage schools that devote more of their resources to classroom faculty, who both teach more students and produce more scholarship than is customary for clinical faculty.

Thus, without an accreditation standard requiring job security for clinical faculty, schools will be unlikely to pay the higher costs of developing a corps of experienced clinical faculty. Not only is this evident as a matter of economic logic, but it is also manifest from the history of 405c’s opposition by the Section leadership and the American Law Deans Association (“ALDA”). Standard 405c’s mandate was imposed by the House of Delegates only after the Section’s Council had repeatedly opposed the House’s recommendations to change the Standard for clinical teachers’ security of position from a “should” to a “shall.” Now, however, unlike in former decades, Section leaders who oppose 405c do not admit that clinical faculty’s job security is their real target. In light of both the many widely circulated reports recommending strengthening clinical programs and the competition among most law schools in promoting the superiority of their own such programs, such candor would be impolitic. Nevertheless, insight into the underlying motivation of the abolition movement can be found in the many statements of the movement’s original and primary advocate, a former Northwestern Law School dean and ALDA President, who expressly called for abolishing 405c on the ground that it was denying law schools the “flexibility” they needed to hire and replace clinical teachers on an as-needed basis.

The actual rhetoric of 405c’s opponents, however, is incidental. If clinical programs are not required to be predominately staffed by clinical teachers with presumptively renewable long-term contracts, both the financial and pedagogical interests of the great majority of law school faculty will ensure that clinical teachers will revert to the transient, second-class and powerless status they occupied before 405c.

II. **Standard 405c’s role in promoting an experienced corps of clinical teachers is critical to ABA Accreditation’s mission of assuring that law students are well prepared for the ethical and competent practice of law.**

It is, of course, uncertain whether the House of Delegates would once again challenge a new decision by the Council to nullify 405c’s protection of clinical teachers’ security of position. Even though the House no longer has ultimate veto authority over Council decisions, there are several obvious reasons, unnecessary to detail here, why the Section’s interests would not be served if the Council were to trigger another confrontation with the House over 405c.

Hopefully, such a confrontation will not happen because the Council will conclude that it shares with the House the overriding common interest of assuring that law students are well prepared for the ethical and competent practice of law. With this common purpose in mind, analysis of the current state of legal education should yield the following conclusions:

first, clinical teaching, whether through in-house or field placement programs, is critically important to effectively preparing the students of any profession to become ethical and competent practitioners;
second, by the very nature of both teaching and professional practice, the more practice and teaching experience faculty have, the more effective they can be in preparing students for the challenges they will face in practice, and, conversely, teachers with minimal practice experience cannot be expected to effectively teach novices how best to practice;

finally, allowing law schools to hire all of their clinical teachers on short-term contracts or on an at-will basis will not assure that clinical faculty have the experience needed for effective clinical teaching; rather, it is likely to assure that they will not.

If the Council agrees with these propositions, then there is simply no case for abolishing 405c. It does not follow, however, that tenure should be required for law faculty. Standard 405c’s requirement of presumptively renewable long-term contracts for the predominate number of a clinical program’s faculty allows for more flexibility than traditional tenure requirements, as is clear from the several Interpretations specifying various parameters for 405c.

The most important difference, however, between tenure and 405c status is, as noted above, first, that tenure, unlike 405c status for clinical faculty is unnecessary, and perhaps detrimental, to the ABA’s core mission of assuring practice-ready graduates and, second, that tenure will endure in the free market while 405c protections will not. Given the ABA’s continued protection of legal academia from competition by law schools that would focus entirely on preparing students for practice, law schools will soon realize, as they did before 405c, that funds that could sustain the careers of clinical teachers will be better utilized in promoting the scholarship that will sustain their U.S. News rankings.

In sum, I suggest that out of regard for clinical education’s vital role in assuring that students are adequately prepared for the ethical and competent practice of law, the Council not remove the one safeguard that now helps to assure that clinical teaching is effective.4

III. The Council should correct an Interpretation to Standard 405c that has been construed to contradict its language and intent.

Should the Council agree that the mission of ABA accreditation warrants keeping the current Standard 405c, it should then address an anomaly in the application of one of its Interpretations that has been used to undermine the Standard’s essential purpose. The Accreditation Committee, originally under one law school’s threat of litigation, has construed Interpretation 405-6 to allow one-year, and perhaps at will, contracts for clinical teachers. Reportedly, the Committee now routinely applies this construction to schools that do not want to comply with Standard 405c’s literal requirement of a “form of security of position reasonably similar to tenure.”

The sentence in Interpretation 405-6 that the Committee has so construed states:

For the purposes of this Interpretation, “long-term contract” means at least a five-year contract that is presumptively renewable or other arrangement sufficient to ensure academic freedom.

4 While I believe the same basic arguments I am making here on behalf of clinical teachers are also applicable to legal writing faculty, who are also essential to the effective preparation of law students for practice, I leave that argument to those more knowledgeable than I about the particular circumstances of such faculty.
It is not self-evident from this language whether it was intended, on the one hand, that the five-year contracts can be either “presumptively renewable” or subject to “other arrangement sufficient to ensure academic freedom,” or, on the other hand, whether, as the Accreditation Committee has now determined, the “other arrangement sufficient to ensure academic freedom,” can be an alternative to the “five year contract.” Recognizing the problematic nature of this ambiguity, the Council referred this question to the Standards Review Committee for a recommendation. To my knowledge, however, the SRC never responded to this request.

I suggest that if the Council believes the current 405c serves an important purpose and should, therefore, be retained, it clear up this ambiguity in interpreting 405c by simply eliminating the proposed “academic freedom” exception from the five year contract requirement, so that the Interpretation would read as follows:

For the purposes of this Interpretation, “long-term contract” means at least a five-year contract that is presumptively renewable.

The Accreditation Committee’s current application of Interpretation 405-6 to allow clinical teacher contracts that can be terminated at any time for any reason other than retaliation for the exercise of academic freedom undermines Standard 405c’s essential purpose of requiring clinical programs to be predominately taught by experienced clinical faculty. Any law school administrator who cannot figure out how to not renew a short-term contract for reasons that do not implicate academic freedom does not belong in legal academia. Furthermore, the Committee’s application flatly contradicts the language of the actual Standard that it purports to interpret. With or without academic freedom protection, one year contracts cannot under any plausible rationale satisfy the Standard’s requirement that “(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.” The bad drafting that inheres in Interpretation 405-6 should not be allowed to undermine the Standard it purports to interpret.

**Conclusion**

In sum, I respectfully suggest that the Council retain the present Standard 405c, but revise Interpretation 405-6 so that it is consistent with the language and purpose of that Standard.

Sincerely,

s/John S. Elson

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