January 28, 2014

The Honorable 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

Re: Comments on Standard 405

Dear Judge Oliver and Mr. Currier:

I urge the Section on Legal Education and Admissions to the Bar to reject both of the alternative proposed revisions to Standard 405 set forth in the Section’s Memorandum of September 6, 2013. The Section should either (1) not amend Standard 405, or (2) amend Standard 405 by making the requirement of tenure even clearer than it already is in the current version.¹

I write in my individual capacity as an educator and public servant. My views are not necessarily those of the university that employs me and are not presented as such.

Rather than restating points that were carefully articulated by prior commenters, I will begin by simply endorsing, in full, the contents of the following submissions to the Section regarding Standard 405:

- Society of American Law Teachers, Sep. 27, 2013
- Donald W. North, Sep. 28, 2013
- Alvin L. Goldman, Sep. 30, 2013
- Multiple Law Professors, Oct. 8, 2013
- Faculty of Rutgers University School of Law—Newark, Oct. 24, 2013
- Deans of Color, Nov. 26, 2103
- Former AALS Presidents, Dec. 9, 2013.

Next, I would like to respond briefly to what I believe is the central point contained in the comments submitted by a group of five law professors on October 23, 2013 (“the Five

¹ Based on the standards of interpretation applicable to contracts, statutes, and other legal documents, current Standard 405 clearly requires that law schools provide protection that amounts to tenure. However, since others have already addressed this issue, that is all I will say on the matter.
Professors”). The Five Professors wrote the following on pages 1 & 2 of their letter (italics in original, bolded italics added):

The question is not whether granting tenure or other forms of job security to a limited group of favored faculty members is beneficial or not, but merely whether the Council should impose it as a condition of accreditation even on institutions that do not believe it to be useful.

In proposing changes to Standard 405, the council . . . is preserving the academic freedom of these institutions by allowing them to organize themselves in the ways that they, as educational institutions, deem best. If law schools believe that tenure is important—and in our view the vast majority of them do—they will retain it no matter what the Council does.

The only way tenure could be cut back is if the schools themselves . . . have decided it is unnecessary or even counterproductive.

In essence, the Five Professors contend that removing tenure as an accreditation standard will provide law schools with the discretion to decide whether to adopt tenure policies or not. If this were true, I would be much more sympathetic to their comments. But I am highly skeptical.

Tenure is under attack throughout higher education. The percentage of faculty with tenure has dropped dramatically in the last forty years, as numerous sources have recognized. See, e.g., Robert J. Tepper & Craig G. White, Speak No Evil: Academic Freedom and the Application of Garcetti v. Ceballos to Public University Faculty, 59 CATH. U. L. REV. 125, 175 (2009) (“From 1975 to 2007, the percentage of full-time tenured and tenure-track faculty declined from 56.8% to 31.2% of university academic employees.”) (citing AM. ASS’N OF UNIV. PROFESSORS, TRENDS IN FACULTY STATUS, 1975-2007). Without a tenure accreditation rule like current Standard 405, constituencies outside the law school may pressure or require law schools to eliminate tenure. Such constituencies include (1) university administrators, (2) university trustees, (3) state departments of higher education, and (4) state legislatures. Rather than providing law schools with discretion to set institutional policy, as the Five Professors maintain, the elimination of the tenure standard may simply trade one external source of regulation (the ABA) for another (the broader university or state government). And the latter might be far less receptive to input from expert legal academics than the former.

In sum, I challenge the Five Professors’ claim that eliminating the tenure standard will provide law schools with discretion over the issue of tenure. They might be correct. But there is much evidence suggesting otherwise. Based on that evidence, I believe that the Five Professors are wrong. As such, given the history of attacks on academics from external
sources detailed in the comments of others—attacks that my school experienced as recently as this year—eliminating the tenure mandate in Standard 405 is extremely risky.

Thanks for your work on this matter. If you would like any additional information, please do not hesitate to contact me.

Sincerely,

Joshua M. Silverstein

Please note that the following law professors at my institution substantially agree with the contents of this letter and asked to have their names included as signatories. They join this letter in their individual capacities as educators and public servants, not as official representatives of the university that employs them.

Anastasia M. Boles, Assistant Professor of Law
J. Lyn Entrikin, Professor of Law
Frances S. Fendler, Professor of Law
Nicholas Kahn-Fogel, Assistant Professor of Law
Kenneth S. Gallant, Professor of Law
George Mader, Assistant Professor of Law
Philip D. Oliver, Byron M. Eiseman Distinguished Professor of Tax Law
Ranko Shiraki Oliver, Professor of Law
Robert E. Steinbuch, Professor of Law
J. Thomas Sullivan, Professor of Law