Dear Judge Oliver,

Thank you for the opportunity to comment on the proposed revisions to the American Bar Association (ABA) Standards and Rules of Procedure for Approval of Law Schools. As editor of the Best Practices for Legal Education Blog,\(^1\) I have followed with great interest the Comprehensive Review process. I write to express my concern that, in its worthy effort to encourage innovation, the Council of the Section on Legal Education and Admissions to the Bar should take care not to be reckless.

As a longtime legal education reform activist, I applaud the Council’s decision to approve for notice and comment a proposal requiring law schools to provide at least 15 credit hours of professional skills instruction. This proposal is responsive to: 1) the call for providing added value to students’ law school experience; 2) the need for tomorrow’s lawyers to possess more extensive skills sets; and 3) the complaint by employers that law schools need to graduate more profession-ready students. It wisely recognizes the need to produce graduates who not only know law but can apply their knowledge competently, ethically and creatively to help solve tomorrow’s legal problems. Globalization and digitalization have together so transformed law practice that tomorrow’s lawyers must be equipped with problem-solving, interpersonal, collaborative, multicultural, and teamwork competencies not needed by yesterday’s graduates. In addition, new findings from educational theorists, psychologists, and studies of the brain inform us that real situations are integral to the motivation and context needed for deep learning. Requiring law schools to provide substantial experiential and skills opportunities does a tremendous service to tomorrow’s consumers of legal education and the communities they will graduate to serve.

In contrast, the two alternatives that propose to remove from the Standards all meaningful forms of faculty security of position, including tenure, are neither innovative nor likely to serve tomorrow’s students well. Instead, these proposals recklessly abandon a hallmark of American higher education seemingly because of frustration about the current cost of legal education. That frustration is understandable given the problems of high student debt and the high unemployment and underemployment of law graduates. However, the tenure system is not responsible for the escalating costs of law schools.

Tenure systems and the protections of Standard 405 (c) for clinical faculty did not create low teaching loads, the U.S. News rankings expensive rankings race, high salaries for scholars, low faculty-student

\(^1\)bestpracticeslegaled.albanylawblogs.org
ratios, or the consumer demand for an explosion of student organizations, extensive moot court programs, and intensive student services. In response to escalating student debt, the ABA has taken appropriate steps such as improving law school transparency about the true costs of legal education, probable employment and anticipated salaries upon graduation. Other appropriate actions included censuring and sanctioning those who falsified data. The decline in admissions certainly demonstrates that, with transparency, the market is correcting itself.

To abandon the tenure system and 405 (c) now will have long term negative impacts on legal education without solving today's short term problems since it does not undo the tenure of those currently on faculties. It is both current (predominately untenured) and future clinic teachers and programs that will most likely be affected negatively. Clinical teaching is risky. Its pedagogy includes teaching students through the representation of clients many of whom are disadvantaged and must proceed against more powerful interests. Without the protection of tenure and 405 (c), clinical professors in the United States could not have created the sustained opportunities for students to begin to practice while in law school and students would not have had the kind of transformative professional experiences which are recorded in almost every law school's magazine, website or brochure. It is the academic freedom secured by tenure and 405 (c) that has allowed for experimentation with new kinds of clinical and learning opportunities without risk of losing employment.

Minority law professors and women are other newcomers to the academy who have more recently, like clinicians, entered in significant numbers. Because they are not currently tenured in the same proportion as non-minority male faculty, removing tenure and security of position now will likely discourage diversity in the academy. Dramatically changing the rules of the game just at the moment when people of color and women are entering the academy in significantly larger numbers is a mistake. Moreover, at a time when the profession is increasingly concerned about diversity in the profession and the decrease in minority enrollment in law schools, we should be very concerned about the make-up of our law faculties and the kind of message we send to prospective applicants.

Finally, assaults on academic freedom are not hypothetical or hyperbolic claims. There are two primary attacks with which the Council should be rightly concerned. First, vulnerable clinical professors have borne many assaults and political interference by powerful interests. As was noted by former American Association of Law Schools president Michael Olivas law school clinics have been “reviled for their work, and threatened in Maryland, Louisiana, Michigan, New Jersey, and in several other states.” It is our profession's obligation and calling to stand beside those who are unpopular, vilified or powerless and law school clinics provide students the first hand opportunity to experience that professional obligation.

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2 [http://www.aals.org/services_newsletter_presMarch11.php](http://www.aals.org/services_newsletter_presMarch11.php). See also [http://www.americanbar.org/content/dam/aba/migrated/2011_build/legal_education/committees/standards_review_documents/aals_june_2010_task_force_report_on_status_of_clinical_faculty_in_the_legal_academy.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/legal_education/committees/standards_review_documents/aals_june_2010_task_force_report_on_status_of_clinical_faculty_in_the_legal_academy.authcheckdam.pdf) (“Clinical educators commonly undertake representation, scholarship, or service projects that challenge the status quo.66 Explicit and uncompromised academic freedom is essential to allow clinical faculty to effectively engage in what they teach, as well as their scholarly and representation endeavors. Because clinical coursework invariably affect those outside of the law school, clinical professors are the members of the legal academy most vulnerable to attacks on and challenges to their educational decisions and, ultimately, their job security.”)
The second attack with which the Council should be rightly concerned is the role of law schools in discussing and naming the currently unpopular point of view. As vividly described at the January AALS panel presentation by ABA representatives, law professors, and in particular minority law professors, have come under attack for discussing legitimate legal issues such as second amendment law, national security and domestic violence law.\(^3\) Law is a profession, not a trade or business, because it has a civic aspect, a community orientation, and a code of ethics that goes beyond and sometimes against personal self-interest. Our law schools must be places where those who help professionally form future lawyers can and do speak about uncomfortable realities, write about controversial subjects and represent unpopular clients. A system such as currently proposed by the Council that places the burden on the terminated faculty member to prove a violation of academic freedom is inadequate to protect that freedom.

Law school communities should continue to immerse their students in the professional obligations of lawyers which extend far beyond what will make the lawyer the most profit. Similarly, law schools must employ faculty under a system of tenure and security of position that ensures academic freedom and the opportunity to speak and write about unpopular subjects and supervise students who represent unpopular clients without fear. Our current system of tenure and security of position has worked. It is recklessly dangerous to abandon these tried and true security tools in the speculative hope that some other, new and unnamed framework can do the same. For legal education, the importance of academic freedom and of modeling the professional obligation to stand by the currently unpopular idea or client is too closely entwined with the core mission of forming lawyers to be cavalier about its preservation.

I thank you for your attention to my letter.

Sincerely,

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\(^3\) [http://bestpracticeslegaled.albanylawblogs.org/2014/01/05/quite-moving-but-frightening-testimony-at-aals-conference/](http://bestpracticeslegaled.albanylawblogs.org/2014/01/05/quite-moving-but-frightening-testimony-at-aals-conference/)