

July 10, 2017

Gregory G. Murphy, 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, 21<sup>st</sup> Floor  
Chicago, IL 60654-7958

**Re: Comments on Standard 403(a)**

Dear Mrs. Murphy and Mr. Currier:

I urge the Section on Legal Education and Admissions to the Bar to reject the proposed revisions to Standard 403(a) set forth in the Section's Memorandum of March 24, 2017 (the "Memorandum").

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.

To begin with, I endorse in full the contents of the following submissions to the Section regarding the proposed changes to Standard 403(a):

- Clinical Legal Education Association
- Philip G. Schrag
- Theodore P. Seto
- Barnhizer et al.
- Society of American Law Teachers
- Jay L. Westbrook
- Carl T. Bogus
- Association of Legal Writing Directors

Next, adoption of the proposed changes to Standard 403(a) would almost certainly lead to a massive increase in the use of adjuncts by American law schools. This would critically damage American legal education in multiple ways. I will highlight just three here.

*First*, increasing adjuncts would significantly reduce teaching quality. I would not be anywhere near the teacher I am today if I were not a full-time professor. I practiced law for eight years before entering academia. But it was only after I spent five years dedicating 50-60 hours per week on my teaching that I became the instructor I am now (and that is 50-60 hours per week on teaching alone, not on teaching, service, and scholarship combined). It took me that much time to develop lesson plans and course materials that I am substantially satisfied with. As an adjunct, I would not have had the time to do even one tenth of this work. Nor would I have the time to

make significant course adjustments every few years to (i) address changes in the law, (ii) smoothly adopt new editions of course books, (iii) account for new institutional and ABA curricular recommendations and requirements, and (iv) improve my teaching protocols, my course materials, and my assessment tools.

Note that my school already uses adjuncts rather extensively, particularly in our upper-level simulation courses and electives. But we do everything we can to restrict the use of adjuncts in (a) first-year courses, (b) upper-level, required, substantive courses, (c) bar courses, (d) clinical courses, and (e) other courses at the center of our program of legal education.

I believe that adjuncts play an important role at my law school and at many others. They enable us to significantly expand our course offerings. And adjuncts are dedicated teachers that improve the law school experience for our students. But in virtually every field of human endeavor, spending additional time in one's job makes one better at that job. Because most adjuncts are otherwise employed in full-time positions, they do not spend the time perfecting their teaching craft that full-time faculty do. Thus, there is every reason to believe they are not as effective as full-time professors. In short, any financial savings from moving to an adjunct-based model in upper-level courses would be heavily outweighed by the loss of teaching quality.

*Second*, increasing the use of adjuncts would undercut faculty governance. Adjuncts do not and cannot fully participate in the life of a law school. Thus, the number of professors engaged in operating the institution would decrease significantly. That would make it much more difficult to find people to staff committees and take up other crucial service assignments. Among other problems, this would considerably slow the pace of reform in legal education.

In the Memorandum, the Council offers the following as a justification for changing Standard 403(a): "The proposal would give schools more flexibility to develop class schedules that serve the students' interests and fit well with the variety of full-time and part-time teaching resources available to the school." In other words, the Council maintains that the proposal will provide each law school with more discretion to decide on the size of its full-time faculty. But that ignores the external pressures being brought to bear on universities generally and law schools specifically.

As other commenters have noted, full-time faculty are declining throughout higher education. Without the protection of an accreditation standard ensuring adequate full-time faculty, constituencies outside of legal education will likely pressure or require law schools to eliminate as many full-time positions as permitted by the watered-down standard. 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 Memorandum suggests, the elimination of the post-first-year requirements in 403(a) will likely trade one external source of regulation (the ABA) for another (the broader university or state government). And the latter are generally far less receptive to input from expert legal academics than the former.

The Council further suggests that Standard 403(b), which requires that law schools ensure effective teaching, will limit the negative impacts of any changes brought about by revisions to 403(a). But there are many reasons to be skeptical of this. For example, 403(b) only sets a floor below which law schools may not drop. Changing 403(a) will create incentives for state legislators, universities, and law schools to lower standards down to the floor, rather than incentivizing them to strive for the best legal education practicable. Likewise, the requirement set out in 403(b) is general in nature, and thus is more difficult to measure. The specific requirements of current 403(a) provide a clear barometer to further ensure the quality of legal education at American law schools.

Finally, the specific potential benefits identified by the Council in the Memorandum—“creatively bringing into their communities and curricula members of the profession, the judiciary, and colleagues from elsewhere in the university”—can already be obtained in full under the status quo. In other words, current Standard 403(a) already provides law schools with all the flexibility they need. There is simply no need for any change. As a result, amending 403(a) has essentially no potential upside and a dramatic potential downside.

My thanks to you and the rest of the Council 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.

Sarah J. Adams-Schoen, Associate Professor of Law  
Kenneth S. Gallant, Professor of Law  
Kenneth S. Gould, Professor of Law Emeritus  
Nicholas Kahn-Fogel, Assistant Professor of Law  
Robert E. Steinbuch, Professor of Law<sup>1</sup>

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<sup>1</sup> While Professor Steinbuch endorses what I have written, he has not had a chance to review the letters that I cited and endorsed above. Thus, Professor Steinbuch takes no position on the contents of those letters.