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Council of the ABA Section on Legal Education
and Admissions to the Bar
321 N. Clark Street, 21st Floor
Chicago, IL 60604
By Email

Re: Comments on Proposed Revisions to Standard 403

Dear Council:

On behalf of the Society of American Law Teachers (SALT) we write this letter opposing the proposed change to Standard 403, which would permit considerable expansion of the use of adjunct teachers in the upper-level curriculum. The current Standard already permits extensive use of adjuncts in the upper level curriculum; approximately 60% to 70% of upper-level courses may be taught by adjuncts.¹ The proposed change to Standard 403 eliminates *any* requirement that full-time faculty members teach in the upper-level curriculum. SALT believes the proposed change would encourage schools, and particularly for-profit law schools, to make decisions based upon financial concerns rather than what is best for students and that it would undercut full-time faculty responsibilities that help ensure law students' educational needs are attended to as law schools engage in cost-cutting measures.

¹ Standard 403 requires full time faculty to: "... teach substantially all of the first one-third of each student's coursework. The full-time faculty shall also teach during the academic year either (1) more than half of all of the credit hours actually offered by the law school, or (2) two-thirds of the student contact hours generated by student enrolment at the law school." *Standards Section of Legal Education and Admissions to the Bar, American Bar Association* (2016), http://www.americanbar.org/groups/legal_education/resources/standards.html. Under the existing Standard, depending upon how many courses or credit hours a school offers, approximately 33 to 40% of the upper level curriculum must be taught by full-time faculty. Assume a school offers 400 student credit hours per year with 80 of those hours being multiple sections of first year courses. Under the existing Standard, more than half, i.e. 201, of the total 400 hours need to be taught by full-time faculty. If full-time faculty teach the first year curriculum, they already teach 80 required hours. That means that 121 of 320 hours (400 hours minus the 80 first year hours) must be taught by full-time faculty. Thus, the current rules would require only about 34% of the upper level courses be taught by full-time faculty at a school that offers 400 student credit hours per year. The percentage will vary depending upon how many credit hours a school offers and how many of those hours are first year courses. However, most schools likely would end up with a requirement that 30 to 40 percent of their upper level courses be taught by full-time faculty.

I. Trend in Undergraduate Education: For-Profit Schools Benefit from Deregulation

A significant move from full-time to part-time and adjunct faculty already has occurred in undergraduate institutions. “In 1970, full-time faculty comprised more than 75 percent of the academic workforce. Today, they comprise just over 50 percent; the remaining positions are filled by adjuncts.”² This trend is particularly strong in for-profit schools. While adjuncts comprise about 29.5% of the faculty at public universities, 42% at private colleges and universities, and 65% of the faculty at two-year non-profit schools, *93% of the faculty at for-profit institutions are part-time employees.*³

The experiences of undergraduate institutions should sound warning bells as the Council considers whether to enact this deregulatory change.⁴ At a time when for-profit law schools already are under particular scrutiny for bar passage rates, and many non-profit schools are struggling with declining bar passage rates, does the Council truly believe it is in students’ best interests to allow those schools, or other financially struggling institutions, to staff the entire upper-level curriculum with adjuncts?

II. Why the Proposed Change May Harm Law Students

Adjunct and other part-time faculty members can provide significant educational benefits to law students. Many adjuncts teach skills courses, specialized clinics, or doctrinal courses in their particularized areas of expertise. They often bring a depth of practical knowledge and experience into the law school curriculum that enhances students’ legal education, making adjuncts an invaluable part of a law school’s educational team.

The current Standard strikes a wise balance. It gives law schools great flexibility by allowing for 60% to 70% adjunct teaching in the upper-level curriculum, but also recognizes the crucial role that full-time teachers play throughout the curriculum and in the broader educational mission of a law school. Full-time teaching professionals play critical roles in teaching, curriculum design and coordination, student mentoring, and governance that cannot be filled by part-time teachers whose primary commitments lie elsewhere and whose expertise focuses on substantive law, not educational mission. Importantly, current Standard 403 articulates a requirement that the full-time faculty be large enough to meet the core faculty responsibilities set out in Standard 404.⁵ The proposed change to Standard 403 suggests that it is not necessary to have full-time faculty

² Phillip Magness, *For Profit Universities and the Roots of Adjunctification in US Higher Education*, Vol. 102, American Association of Colleges and Universities, available at: <https://www.aacu.org/liberaleducation/2016/spring/magness>.

³ Id.

⁴ 34 CFR 602.16 states that accrediting agencies must ensure accreditation standards are sufficiently rigorous to ensure the accrediting agency is a reliable authority regarding the quality of education provided by the institutions it accredits.

⁵ Among other things, Standard 404 calls on the full-time faculty, *as a body*, to fulfill responsibilities requiring a level of time, expertise, presence on campus, and institutional commitment that cannot be expected of part-time faculty: being sufficiently and consistently available for student consultation about classes, participating in academic advising, creating an atmosphere throughout the school in which students and faculty may voice opinions and exchange ideas, engaging in scholarship, and performing service to the law school and university community.

teaching upper-level courses; however, it would expand the burdens on a shrinking full-time faculty, thus silently undercutting the expectations outlined in the Standard 404 statement of educational responsibilities essential to effective law schools. It also increases uncertainty in both compliance and enforcement by eliminating a bright-line minimum threshold for participation of full-time faculty in upper-level instruction.

1. Adjuncts Have Less Time to Devote to Teaching, Student Interactions, and Overall Educational Mission

The primary role that adjuncts play in legal education is to teach, or assist in teaching, specific courses. Even in this primary area of responsibility, adjuncts do not have the same time as full-time faculty to devote to teaching. Many adjuncts do not have sufficient extra time to meet regularly with students outside of class to answer class-related questions or address particular learning challenges. While adjuncts' practice-based expertise may serve them well in the specialized courses they teach, some doctrinal courses, clinics, and legal research and writing courses require a significant amount of preparation to stay current with broader areas of legal doctrine and in pedagogical methodology. This is as true and important for upper-level courses as for first-year courses.⁶

As teaching methodologies and ABA accreditation standards change to include more formative assessment, measurement of learning outcomes, and innovative classroom pedagogies throughout the curriculum, professors are expected to adapt teaching to align with developing best practices. Few adjuncts have the time or financial support to attend colloquia on teaching or otherwise stay up-to-date on the teaching literature. Incorporating new techniques and updating teaching plans and materials—especially adding interim formative assessments—requires significant additional time, more than is generally available to adjuncts.

Of course, the educational mission of the full-time faculty goes well beyond teaching particular classes. Full-time faculty mentor and counsel students on overall curricular and career choices, write recommendation letters, coach student teams, read and edit law review notes, advise student organizations, and do a host of other behind-the-scenes work that allow law schools, and law students, to thrive. Adjunct faculty are not paid to do this work, are not on campus with the consistency needed to do it, and usually do not have time for it. Perhaps more importantly, many of these “extra-curricular” responsibilities depend on interactions and relationship building between students and full-time faculty that occurs in upper-level classes.

Not surprisingly, one study of undergraduate education found that adjunct faculty have less time for class preparation and fewer interactions with students on course and non-course related issues, challenge students less, and use fewer interactive and collaborative teaching methods.⁷ Additionally, adjuncts likely have less access to university teaching resources and less time to

⁶ For example, the Uniform Bar Examination tests 13 subjects, only three of which tend to be taught entirely in the first year of law school (contracts, federal civil procedure, and torts). The others are often taught substantially or exclusively in upper-level courses (business associations, conflict of laws, constitutional law, criminal law, criminal procedure, evidence, family law, real property, trusts and estates, and Uniform Commercial Code).

⁷ Paul D. Umbach, *How Effective Are They? Exploring the Impact of Contingent Faculty on Undergraduate Education*, 30 Rev. of Higher Educ. 91 (2007).

take advantage of those resources.⁸ There is every reason to think the same will be true of law school education.

Certainly, on an individual basis, some adjuncts are phenomenal teachers and devote countless hours to class preparation and to mentoring students. However, collectively, it is not realistic to expect adjuncts to be up to speed on pedagogical innovations as well as nuances within doctrinal areas, and to work with students at the same level one expects of full-time faculty. Thus, a move permitting an all-adjunct upper-level faculty is likely to deprive students of innovative classroom teaching techniques, in-depth doctrinal knowledge in broad subject areas, and critical mentoring and other forms of faculty support.

2. Fewer Full-Time Faculty Makes Supervising Adjuncts More Difficult

The Council's justification for allowing an all-adjunct upper-level faculty, as stated in its March 24, 2017 memo, is that elimination of the full-time faculty requirements allows for innovation and flexibility.⁹ The Council suggests that the proposed change will not result in lower educational standards because Standard 403(b) still requires schools to ensure effective teaching.¹⁰ Interpretation 403-1 states:

Efforts to ensure teaching effectiveness include: orientation, guidance and mentoring for new faculty members; a faculty committee on effective teaching; class visits; critiques of videotaped teaching; institutional review of student course evaluations; colloquia on effective teaching; and recognition and use of creative scholarship in law school teaching methodology.

The suggested steps contemplate a collective effort to ensure effective teaching. Although not mandatory, they would be nearly impossible to implement and thus meaningless without active leadership by experienced, professional teachers. As a practical matter, meaningful adjunct guidance, mentoring, and assessment is only possible if schools employ a critical mass of full-time faculty members in the upper-level curriculum. For example, clinical teaching methodology and the legal work performed by law school clinics are complex and constantly evolving. If a faculty lacks full-time clinicians, there will be no faculty members available to appropriately mentor adjunct clinical instructors on clinical learning pedagogy, or to support effective supervision of students practicing law in a clinical setting.

Likewise, as the number of full-time faculty decline, fewer faculty members will be available to engage in committee and other service work that supports law schools and their students.

⁸ See R. Eric Landrum, *Are There Instructional Differences Between Fulltime and Part-time Faculty*, 57 *College Teaching* (2009) available at: <http://dx.doi.org/10.3200/CTCH.57.1.23-26> (finding substantial differences in the support mechanisms provided to part-time and fulltime faculty)

⁹ Perhaps by flexibility and innovation, the Council means that having more adjuncts would allow for more adjunct-taught online courses. However, at least one study indicates “a performance and satisfaction advantage” for online students taught by full-time rather than adjunct faculty. See Brian Mueller, et al., *Adjunct Versus Full-Time Faculty, A Comparison of Student Outcomes in the Online Classroom*, 9 *Journal of Online Learning and Teaching* (2013) available at: http://jolt.merlot.org/vol9no3/mueller_0913.htm.

¹⁰ 403(b) requires schools to “ensure effective teaching by all persons providing instruction to its students.”

Meanwhile, those same faculty members also will be expected to continue scholarly productivity and as well as excellence in their own teaching. These responsibilities will further strain the full-time faculty's time and ability to engage in training, guiding, and assessing adjuncts, thus compounding adjuncts' current isolation from valuable informal discussions that take place through faculty meetings, lunch gatherings, and simply "in the halls."

The existing Standards have no mandatory requirements for adjunct training and do little to actually ensure adjuncts receive teaching support. The proposed Standard compounds the problem by potentially reducing the number of full-time faculty available to train, mentor, guide, and assess adjuncts.

3. Studies of Undergraduate Learning Outcomes Show Mixed Results

What about student learning outcomes generally? Does it make a difference if students are taught by adjuncts instead of full-time faculty? The undergraduate data is mixed. Some studies suggest that students taught by adjunct faculty do not learn as much,¹¹ and are more likely to drop out of college than students taught by full-time faculty.¹² However, other studies suggest there is no discernible difference in student learning when students are taught by adjuncts versus full-time faculty.¹³

We know of no study about law school learning outcomes when students are taught by adjuncts instead of full-time faculty members. As discussed above, we *can* predict that relatively smaller full-time faculties will find it difficult to support high quality adjunct teaching and we know that full-time law faculty provide extensive and important benefits to students and law schools beyond teaching specific courses. Given the mixed results on undergraduate student learning, there seems little reason to change the rules to permit an all-adjunct upper-level faculty, particularly when the current Standard already allows for approximately two-thirds of the upper level curriculum to be taught by adjunct faculty.

4. The Change Is Likely to Have a Negative Impact on Faculty Governance

The proposed change may have an unintended impact on faculty governance. As noted above,

¹¹ Florence R. Kirk and Charles A. Spector, *A Comparison of the Achievement of Students Taught by Full-Time Versus Adjunct Faculty in Business Courses*, 13 *Academy of Educational Leadership* (2009) (finding undergraduate students taught by full-time faculty in an introductory business accounting course performed better in upper level courses than their counterparts who had been taught by an adjunct).

¹² Ronald Ehrenberg and Liang Zhang, *Do Tenured and Tenure Track Faculty Matter?* *J Human Resources*, July 1, 2005 XL, doi: 10.3368/jhr.XL.3.647.

¹³ See e.g. Eric Bettinger and Bridget Terry Long, *Do College Instructors Matter? The Effect of Adjuncts and Graduate Assistants on Students' Interest and Success*, NCBR Working Papers (2004) available at: <http://www.nber.org/papers/w10370.pdf> (finding "that adjunct and graduate assistant instructors generally reduce subsequent interest in a subject relative to full-time faculty members, but the effects are small and differ by discipline. Adjuncts and graduate assistants negatively affect students in the humanities while positively affecting students in some of the technical and professional fields"); see also, David N. Figlio et al., *Are tenure track professors better teachers?*, 97 *Review of Economics and Statistics* 715 (2015) (finding that at Northwestern University, undergraduate students, on average, learned more from contingent faculty in introductory courses, but also noting that the contingent faculty were largely full-time faculty with an on-going relationship with Northwestern, and noting that Northwestern undergraduates may be sui generis).

full-time faculty handle committee work and other administrative responsibilities critical to the operation of a law school. Full-time faculty are indispensable in developing policies and making decisions about admissions, curriculum, faculty hiring and tenure, academic support, academic probation, and the like, as well as providing supervision and guidance for journals, competitions, student organizations, and other extra-curricular student academic activities. How will this work get done with relatively smaller full-time faculties and relatively increased need for supervision of adjunct faculty?

Additionally, fewer full-time faculty means fewer faculty with tenure or long-term contracts. This, too, has potential negative consequences for student learning. Tenured and tenure-stream faculty play a critical role in faculty governance, providing an important perspective on the educational effect of administrative decisions. A Standard that reduces the number of full-time faculty also reduces the number of faculty in a position to raise concerns about administrative actions that may help schools' financial bottom line but may harm students. This is particularly important to consider when one looks at the fact that for-profit schools may be the ones most likely to take advantage of the change to Standard 403. Those schools, and others struggling financially, may be the schools most in need of a strong faculty governance system that helps ensure students' interests are put ahead of, or at least on equal footing with, a desire to make a profit.

III. The Council Should Focus on Ways to Ensure Effective Teaching

There is no pressing immediate need for the proposed change in Standard 403. The existing Standard already allows for a substantial portion of the upper-level curriculum to be taught by adjuncts. In fact, rather than eliminating a regulation that requires a minimum threshold of full-time faculty, the Council should consider adding more stringent regulations that help promote quality teaching by all faculty members. Specifically, it should consider regulations that ensure adjuncts are trained in up-to-date educational methods and pedagogy, such as outcomes-based teaching and appropriate summative and formative assessments, and assisted in keeping up with developments in doctrine.

In sum, potential financial benefits to changing Standard 403 are outweighed by the educational disadvantages outlined above. Therefore, SALT respectfully urges the Council to reject the proposed change to Standard 403. We thank you for the opportunity to submit this comment.

SUBMITTED ON BEHALF OF THE SOCIETY OF AMERICAN LAW TEACHERS BY:



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