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Council on Legal Education
c/o Becky Stretch
321 N Clark Street
Chicago, IL 60610

Dear Members of the Council on Legal Education,

The American Law Dean's Association ("ALDA") is an association of the deans from over 130 law schools in the United States. These comments, however, express the views of ALDA's Board of Directors (the "ALDA Board") alone, and have not been reviewed or agreed to by the entire membership of ALDA.

As you know, ALDA has long advocated reform of the accreditation standards and processes in order to ensure that accreditation achieves the goals set out in the Preamble to the Standards:¹

- **Minimum Standards:** ensuring that law schools meet the minimum standards necessary to the provision of a sound legal education;
- **Consumer Protection:** ensuring that applicants and the public are protected;
- **Supporting Innovation:** providing a law school the ability to pursue its chosen mission and to innovate in the ways in which a legal education is provided as long as the law school complies with the minimum standards; and
- **Transparency:** making the accreditation process transparent to ensure the consistent interpretation of the rules as well as providing law schools notice of how they can comply.

Over the last few years, the ALDA Board has been greatly encouraged by the efforts of the Council and its Committees as led by prior Chair Rakes, current Chair McGregor, and Chair-elect Randall Hertz with the assistance of the Consultant to Legal Education, Bucky Askew, to rethink the Standards and the processes implementing them. Given this focus of ALDA, the remaining comments are addressed to these issues.

The ALDA Board has closely watched, commented on, and assisted both the Accreditation Policy Task Force established by past-Chair William Rakes (the "Task Force") and the three committees (Transparency, Outcomes, and Security of Position Committees) established by current Chair Ruth McGregor (the "McGregor Committees"). Members of the Board have also worked with Chair-elect Hertz, and fully expect that he will continue the promising progress to date. In a submission dated July 25, 2007, the ALDA Board commended the Task Force and indicated its support for each of the recommendations in the Report of the Task Force dated May 29, 2007

¹ See American Law Deans Association, Statement to the ABA Task Force on Accreditation (January 5, 2007) [found at <http://www.americanlawdeans.org/policystatements.html> under the "Submissions to ABA Council on Legal Education"].

(the “Report”). The ALDA Board is committed to remaining engaged in this review and reform of the Standards and accreditation processes.

Transparency and Outcomes

In a report to the Council at its meeting on June 8, 2008, ALDA President David Van Zandt and ALDA Vice President Richard Matasar expressed the ALDA Board’s strong support for the recommendations of the Transparency and Outcomes Committee. The ALDA Board has nothing to add to that report.

Recommendations: The ALDA Board urges the Council to approve the specific recommendations of the Transparency Committee at its September meeting, and at that same meeting the Council should ask the Outcomes Committee to continue its excellent work and provide the Council with specific proposals.

Specific Other Steps

Furthermore, the ALDA Board is greatly encouraged by the recent actions of the Council in approving the removal of Interpretation 302-7 (prohibiting “bar courses”) and the submission for notice and comment of the proposal to remove Standard 104 and place its content in the Preamble. The action with respect to Interpretation 302-7 removes from the Standards a provision that to the outside world seemed puzzling; after all, one of the goals of the accreditation process is to ensure that graduates are capable of passing the bar examination in their chosen state. The proposal with respect to Standard 104 is also laudable in that it emphasizes that the Standards exist to ensure that law schools meet the minimum requirements of a sound legal education and should not suggest that a law school that meets those requirements may still not be in compliance.

Recommendation: The ALDA Board urges the Council to approve the proposed deletion of Standard 104 at its September meeting.

Terms and Conditions of Employment

In its report to the Council on June 6, the ALDA Board also urged that the Council adopt the approach illustrated by the Alternative Approach set forth in the report of the Security of Position Committee. Since 2006, the ALDA Board has focused much of its attention on those Standards that require law schools to provide specific terms and conditions of employment to different categories of faculty and staff in our law schools. The position of the ALDA Board is that all such terms and conditions of employment have no place in the Standards and should be removed. This for the ALDA Board is the critical issue (although not the only one) on which the accreditation process needs to change from one that in effect advances the interests of specific groups of faculty and staff within the law school community to one that ensures that accredited law schools provide a sound legal education for students and the legal profession. The specific Standards and Interpretations that raise this issue are:

- Standard 206(c)
- Interpretations 402-1 and 402-2 to Standard 402
- Standard 405 and its Interpretations
- Standard 603(d) and Interpretation 603-3

At the outset, it is important to take a red herring off the table. It should be clear what the ALDA Board is not advocating. It is not advocating that tenure or similar security of position provisions be eradicated from the academic landscape. The ALDA Board believes that tenure and other contractual provisions do serve useful purposes in many contexts. What it is advocating here is that tenure and similar security of provisions **not be required** of all law schools by regulation through the Standards.

Each law school and its parent university should be able to decide whether or not and to whom to provide tenure or other types of terms and conditions of employment. In fact, even if the Standards related to terms and conditions of employment are removed, it is the expectation of the ALDA Board that tenure will continue to be an important form of employment relation in law schools and that most law schools will continue to provide such security of position to the categories of faculty and staff currently protected by the Standards. More telling, the ALDA Board expects that most of its own member schools will continue to provide tenure or security of position similar to the current Standards not only to traditional faculty, but also to their deans, clinical faculty, legal writing faculty and librarians. The issue instead is whether the Standards should require all law schools to provide the same terms and conditions of employment to its faculty.

Alternative Approach: The ALDA Board strongly endorses the functional approach set out in the Alternative Approach suggested but not recommended by the Security of Position Committee. Under that functional approach, a law school would be required to ensure that its faculty members enjoy academic freedom, that it is able to recruit and retain a satisfactory faculty, and that it provides for faculty participation in the determination of academic matters.¹ The functional approach requires that the law school have in place mechanisms and procedures to ensure that these outcomes are reached. Unlike the current approach, it does not mandate that every law school achieve those goals by use of specific terms and conditions of employment. Instead, it supports innovation and respects institutional autonomy by allowing law schools to devise their own ways to achieve these values and focuses on the outcomes rather than the inputs.

The described Alternative Approach does set up tenure or five-year presumptively renewable contracts as a safe harbor that schools may chose, and if they decide to use other methods it puts the burden on them to demonstrate that the method chosen meets the minimum standards. In a perfect world, the ALDA Board would oppose this privileging of a specific set of terms and conditions of employment as simply trying to pressure law schools to adopt those specific employment protections. The ALDA Board, however, sees the functional approach as a major step forward in aligning the Standards with the legitimate goals of accreditation.

Still, the Alternative Approach or another similar functional approach would allow a law school to innovate with respect to how it staffs its educational programs. The ALDA Board finds very persuasive the statements in support of the Alternative Approach in the Report of the Security of Position Committee.² Such an approach would allow a law school to adjust to the rapidly changing profession without incurring permanent obligations to specific individuals. It would allow individual schools to pursue their distinctive academic mission as a way to achieve the goals of the Standards. Innovative approaches to legal education, while still tested by more outcomes based Standards, would flourish. Many law schools may be dissuaded from such innovation. For example, they hesitate to build or even start clinical and other excellent and innovative programs because of the costs they would incur in staffing such innovations because of the need to meet the current Standards' terms and conditions requirements. Allowing this flexibility will also help law schools control the cost of their education and specialize in terms of what they provide. Certainly, many law schools will choose to offer the "Cadillac" version of legal education, but others will be able to offer a "Saturn" version at a lower cost that fully complies with the minimum requirements needed for a sound legal education. A major complaint from the outside world about legal education is that its cost has risen dramatically

¹ The ALDA Board also believes that law schools should be able to adopt whatever governance structure that they or their parent universities choose. The attempt by the current Interpretation 405-8 to mandate a specific governance structure hampers the ability of law schools to innovate and adapt quickly to the changing environment. It also violates the institutional autonomy of the law schools and their parent universities. This issue, however, is not the main focus of the ALDA Board's comments.

² Report of the Security of Position Committee (May 5, 2008), p. 16-17.

causing its graduates to carry more and more financial debt. Flexibility can be achieved without compromising the values that the accreditation process seeks to achieve.

A comparison with the requirements of other accrediting bodies is instructive. At present, the Standards and their Interpretation place the ABA, as an accrediting agency, far outside the normal pattern of accrediting agencies. To our knowledge, no other accrediting agency approved by the Department of Education requires that specific terms and conditions of employment be given contractually to faculty or other employees of the accredited institutions. While we understand that some agencies in the past (over 20 years ago) did have similar requirements, all other agencies have moved away from those requirements. This is because the outside world has insisted that accrediting agencies focus on academic quality and outcomes and not on ensuring the employment of particular faculty and staff with contracts enforceable against their institutions and their parent universities. The ALDA Board also knows of no reason why law schools should be treated as *sui generis* in this regard.³

Related to this is that the current Standards are also out of step with the overall trends in higher education. More and more universities are reducing the categories for which tenure or tenure-like employment arrangements are provided to teaching faculty. As noted above, no other accrediting agency requires such terms and conditions of employment as mandated by the Standards. The current Standards thus often put law schools into conflict with their parent universities policies with respect to faculty.

There are any number of versions of the Alternative Approach that the ALDA Board would endorse. The critical point for the ALDA Board is to remove from the Standards the requirements that all law schools must provide specific individuals with mandated terms and conditions of employment.

Recommendation: The ALDA Board recommends that the Council at its September meeting direct the Standards Review Committee to draft new Standards identical to or based on the functional approach of the Alternative Approach, which would replace Standards 206(c), Standard 405 and its Interpretations, and Standard 603(d) and Interpretation 603-3.

Interpretations 402-1 and 402-2: The ALDA Board is heartened by the Council's action at its June meeting to put out for notice and comment the proposed elimination of Interpretations 402-1 and 402-2. While not mandating specific terms and conditions of employment, those Interpretations penalize law schools that do not provide the terms and conditions of employment specified by Standard 405 by increasing the law school's student-faculty ratio. The student-faculty ratio is not only subject to the Standards, but also is used to provide information to potential applicants through the ABA's Guide and other sources. Whether or not a particular faculty member has tenure or is on a 5-year or more presumptively renewable contract has nothing to do with the amount of contact with faculty that an applicant selecting the school can expect to enjoy. A more sensible method of calculating this ratio that is consistent with the values that the accreditation process should advance would be to calculate the faculty number based upon a measure of full-time equivalency regardless of the terms of that faculty member's employment. That method, however, has not been recommended and the ALDA Board fully endorses the simple removal of those interpretations from the Standards.

³ The Report of the Security of Position Committee did not articulate any reasons why law schools should be so treated. In fact, it only obliquely referred to the fact that the ABA Standards are out of step with those of other authorized accrediting agencies. Report of the Security of Position Committee (May 5, 2008), p .16 ("The Alternative Approach, unlike the one in the current Standards, is more in line with what other accrediting bodies do regarding these issues in other educational settings. Thus, moving in this direction would make ABA accreditation Standards on these issues less of an "outlier" in the way they are addressed.")

Recommendation: The ALDA Board urges the Council to approve the deletion of Interpretations 402-1 and 402-2 at its September meeting.

Policy Decision: The ALDA Board believes that the issue of terms and conditions of employment has been well vetted by the Council in the past and by both the Task Force and the Security of Position Committee. Unfortunately, due to the controversial nature of the issue and the strength of the conflicting views held by different groups within the legal academy, neither the Task Force nor the Security of Position Committee was able to make a firm recommendation to the Council. The ALDA Board does not believe that the delegation of this issue a third time to a committee or group for a recommendation will yield such a recommendation. Therefore, the Council should exercise its policy making authority and decide definitively whether or not the Standards should require specific terms and conditions of employment. Upon such a decision, the Council could then ask the Standard Review Committee to draft proposed new Standards or revisions to Standards that would implement the policy decision. The ALDA Board understands that this will be a difficult decision for the Council given the strongly and often emotionally held conflicting views on the subject, but at the end of the day, such a decision is the Council's responsibility.

Recommendation: The ALDA Board urges the Council at its September meeting to decide definitively the policy that the Standards should follow with respect to the terms and conditions of employment issue and direct the Standards Review Committee to propose revisions to the Standards that would reflect that policy decision.

Conclusion

The issue of terms and conditions of employment is a critical issue for most law schools and their parent universities. The ALDA Board believes that such requirements are inappropriate and should have no place in the accreditation standards of any accrediting agency, including the ABA. The ALDA Board applauds the progress made on this and other issues by the Council and its committees led by Chairs Rakes, McGregor, and Hertz under extremely difficult circumstances. The ALDA Board urges the Council to act expeditiously and adopt the recommendations of the ALDA Board stated above.

Sincerely,

The Board of Directors of the American Law Deans Association