

November 2008

MEMORANDUM

TO: Interested Persons and Entities

FROM: Hulett H. Askew, Consultant on Legal Education
Donald J. Polden, Chair, Standards Review Committee

SUBJECT: Proposed Deletion of Interpretations 402-1 and 402-2 of the
ABA Standards for the Approval of Law Schools

At its June 7, 2008 meeting the Council considered the report of the Standards Review Committee regarding the calculation of student-faculty ratio. After discussion, the Council agreed to publish for notice and comment the Standard Review Committee's proposal to delete of Interpretation 402-1 and 402-2. The proposed changes are published on the Section's website, www.abanet.org/legaled. Notice of the proposed change and a request for comments were originally distributed in August 2008.

We again solicit comments on the proposal by letter, e-mail or through an appearance at a hearing that will be conducted by the Standards Review Committee on January 9, 2009 at 3:15 p.m. at the Hilton San Diego Bayfront during the Annual Meeting of the American Association of Law Schools. Please address written comments on the proposal, and requests to speak at the hearing, to Becky Stretch, Assistant Consultant, at our Chicago office or at StretchC@staff.abanet.org.

Comments on this change in the Standards should be submitted no later than December 15, 2008. All comments will be provided to, and reviewed by, the Standards Review Committee when it meets prior to the hearing.

Thank you.

cc: Randy A. Hertz, Council Chairperson
Dan Freehling, Deputy Consultant

Revisions to Standards for the Approval of Law Schools

(Additions underlined; deletions ~~struck through~~)

Standard 402. SIZE OF FULL-TIME FACULTY

(a) A law school shall have a sufficient number of full-time faculty to fulfill the requirements of the Standards and meet the goals of its educational program. The number of full-time faculty necessary depends on:

(1) the size of the student body and the opportunity for students to meet individually with and consult faculty members;

(2) the nature and scope of the educational program; and

(3) the opportunities for the faculty adequately to fulfill teaching obligations, conduct scholarly research, and participate effectively in the governance of the law school and in service to the legal profession and the public.

(b) A full-time faculty member is one whose primary professional employment is with the law school and who devotes substantially all working time during the academic year to the responsibilities described in Standard 404(a), and whose outside professional activities, if any, are limited to those that relate to major academic interests or enrich the faculty member's capacity as a scholar and teacher, are of service to the legal profession and the public generally, and do not unduly interfere with one's responsibility as a faculty member.

Interpretation 402-1

~~In determining whether a law school complies with the Standards, the ratio of the number of full-time equivalent students to the number of full-time equivalent faculty members is considered.~~

~~(1) In computing the student/faculty ratio, full-time equivalent teachers are those who are employed as full-time teachers on tenure track or its equivalent who shall be counted as one each plus those who constitute "additional teaching resources" as defined below. No limit is imposed on the total number of teachers that a school may employ as additional teaching resources, but these additional teaching resources shall be counted at a fraction of less than 1 and may constitute in the aggregate up to 20 percent of the full-time faculty for purposes of calculating the student/faculty ratio.~~

~~(A) Additional teaching resources and the proportional weight assigned to each category include:~~

~~(i) teachers on tenure track or its equivalent who have administrative duties beyond those normally performed by full-time faculty members: 0.5;~~

~~(ii) clinicians and legal writing instructors not on tenure track or its equivalent who teach a full load: 0.7; and~~

~~(iii) adjuncts, emeriti faculty who teach, non-tenure track administrators who teach, librarians who teach, and teachers from other units of the university: 0.2.~~

~~(B) These norms have been selected to provide a workable framework to recognize the effective contributions of additional teaching resources. To the extent a law school has types or categories of teachers not specifically described above, they shall be counted as appropriate in accordance with the weights specified above. It is recognized that the designated proportional weights may not in all cases reflect the contributions to the law school of particular teachers. In exceptional cases, a school may seek to demonstrate to site evaluation teams and the Accreditation Committee that these proportional weights should be changed to weigh contributions of individual teachers~~

~~(2) For the purpose of computing the student/faculty ratio, a student is considered full-time or part-time as determined by the school, provided that no student who is enrolled in fewer than ten credit hours in a term shall be considered a full-time student, and no student enrolled in more than 13 credit hours shall be considered a part-time student. A part-time student is counted as a two-thirds equivalent student.~~

~~(3) If there are graduate or non-degree students whose presence might result in a dilution of J.D. program resources, the circumstances of the individual school are considered to determine the adequacy of the teaching resources available for the J.D. program.~~

Interpretation 402-2

Student/faculty ratios are considered in determining a law school's compliance with the Standards:

~~(1) A ratio of 20:1 or less presumptively indicates that a law school complies with the Standards. However, the educational effects shall be examined to determine whether the size and duties of the full-time faculty meet the Standards.~~

~~(2) A ratio of 30:1 or more presumptively indicates that a law school does not comply with the Standards.~~

~~(3) At a ratio of between 20:1 and 30:1 and to rebut the presumption created by a ratio of 30:1 or greater, the examination will take into account the effects of all teaching resources on the school's educational program, including such matters as quality of teaching, class size, availability of small group classes and seminars, student/faculty contact, examinations and grading, scholarly contributions, public service, discharge of governance responsibilities, and the ability of the law school to carry out its announced mission.~~

Interpretation 402-3-1

A full-time faculty member who is teaching an additional full-time load at another law school may not be considered as a full-time faculty member at either institution.

Interpretation 402-4-2

Regularly engaging in law practice or having an ongoing relationship with a law firm or other business creates a presumption that a faculty member is not a full-time faculty member under this Standard. This presumption may be rebutted if the law school is able to demonstrate that the individual has a full-time commitment to teaching, research, and public service, is available to students, and is able to participate in the governance of the institution to the same extent expected of full-time faculty.

EXPLANATION OF DELETION OF INTERPRETATIONS 402-1 and 402-2

Interpretation 402-1 is what creates the formula for the student-faculty ratio by defining four different groups of faculty members: full-time teachers on tenure track or its equivalent, other full-time teachers, administrators and librarians who teach or hold faculty rank, and part-time teachers. Members of the first group count as one FTE each. Members of the other groups, known as “additional teaching resources,” count as 0.7, 0.5, and 0.2 FTEs respectively, subject to a cap of 20% of the first group. So the faculty count, for purposes of calculating the student-faculty ratio, is the number of full time teachers on tenure track or its equivalent, plus up to 20% in additional teaching resources. The student count is based on counting every full-time JD student as one FTE, and every part-time JD student as 0.67 FTE. A separate faculty and student count is collected for the fall semester and the preceding spring semester, and the ratio is calculated from the aggregate data for both semesters.

Interpretation 402-2 creates presumptions of compliance or noncompliance with standards based on the student-faculty ratio. A ratio of 20:1 or less creates a presumption of compliance. A ratio of 30:1 or more creates a presumption of noncompliance.

Rationale for Recommendation and Arguments Against:

Cost vs. benefit. The argument against calculation of a student-faculty ratio is that in a cost-benefit analysis, the benefits of the ratio are negligible and the costs are considerable. The student-faculty ratio is not a useful number. When the guidelines in Interpretation 402-2 were first adopted creating presumptions regarding compliance with the provisions of Standard 402(a) concerning the size of the full-time faculty, the student-faculty ratio was calculated in a much more straightforward fashion. The ratio was based simply on a comparison of full-time faculty and student FTEs. Today’s ratio, as defined by Interpretation 402-1, takes into account full-time teachers on tenure track or its equivalent and up to 20% of additional teaching resources, including administrators who teach or hold faculty rank, full-time faculty not on tenure track or its equivalent, and part-time faculty. The incorporation into the student-faculty ratio of these additional teaching resources significantly lowered ratios across the board, to the point where in the most recent B-2 takeoff, which reported the student-faculty ratios for 191 fully or provisionally approved law schools, no law schools reported ratios high enough to create a presumption of non-compliance under Interpretation 402-2 (30:1 or more), and 180 law schools reported ratios low enough to be considered presumptively compliant (20:1 or lower).

The Accreditation Committee, in looking at faculty size, looks to a number of factors to determine whether a law school’s faculty is large enough, including what portion of the first year curriculum and upper-level curriculum in the day and evening divisions are taught by full-time and part-time faculty, what core subjects beyond the first year courses are taught by full-time and part-time faculty, and the extent to which faculty members are

not meeting all of their obligations (teaching, scholarship, and service) because of overloads in one or more areas (e.g., high teaching or committee loads impacting scholarly productivity). Schools can be in trouble for inadequate faculty size for any of these reasons, even if they have what might otherwise appear to be an acceptable student-faculty ratio. And schools with high ratios have been found to have an acceptable faculty size. In other words, the student-faculty ratio, as a test of adequate faculty size, produces both false-positive and false-negative results. The student-faculty ratio is never dispositive of questions concerning adequacy of faculty size, and is rarely even helpful as a trigger for further review, since the other markers of inadequate faculty size are by in large objective and easily ascertainable.

Even if the ratio were not helpful to the Accreditation Committee, it might be worth keeping if it were valuable consumer information. But it is not. Interpretation 509-1 does not identify the student-faculty ratio as basic consumer information that must be published by law schools. Instead it refers to composition and number of faculty and administrators. The *ABA/LSAC Official Guide to ABA-Approved Law Schools*, in the ABA data pages, nevertheless publishes the student-faculty ratio along with data on the number of full-time faculty members, other full-time faculty members, deans and administrators who teach, and part-time faculty. The *Official Guide* also publishes information, much of it broken down into full time vs. part time data, on the typical size of first year classes, whether there are small section first year classes beyond legal writing, the typical size of those other small section classes, number of courses offered beyond the first year of law school, the numbers of upper level classes offered in various size ranges, number of seminars, and number of positions available and filled in seminars, simulation courses and clinical courses. The student-faculty ratio is not a useful or accurate indicator of what ranges of class size prospective students will experience in law school and prospective law students already get other information that far more directly speaks to this question. In fact, the correlation between student-faculty ratio and typical first year section size in the full-time program, based on data from the 2008 *Official Guide*, is a very low 0.137. Looking at part-time programs, the correlation between student-faculty ratio and typical first year section size in the part-time program is -0.018.

There was a point in the history of the accreditation process when the student-faculty ratio served an important function in helping to move schools away from extremely large ratios and enormous class sizes. The 30:1 standard for presumptive noncompliance was based on a notion that the ideal upper-level class size should be 30 students or fewer. However, as noted above, students today have far better consumer information about what their class size experience might be like. Furthermore, the competitive market place and pedagogical advances, including clinical and other skills courses make it important for schools to continue to pay attention to class sizes. The student-faculty ratio is, in today's environment, no longer useful. Indeed, from the consumer perspective it is positively misleading.

Furthermore, the burden of producing a student-faculty ratio is considerable. The data used to calculate the student-faculty ratio is collected in the profiles section of the annual questionnaire. A separate profile is created for each individual who teaches or

holds faculty rank at the law school, whether a full-time or part-time employee. A series of questions classify each employee into full-time and part-time categories, tenure track or its equivalent, other full-time, visitors replacing a tenure-track faculty member, visitors filling a permanent faculty slots reserved for visitors, faculty members with significant administrative duties, and faculty members on leave or sabbatical. Based on answers to these questions, employees are categorized into the different groups described in Interpretation 402-1: full-time faculty members (who count as one each in the faculty count); other full-time faculty (generally those not on tenure track or its equivalent, who count as 0.7 FTE subject to the 20% cap on additional teaching resources); administrators (who count as 0.5 FTE, again subject to the 20% cap); or part-time faculty (who count 0.2 FTE subject to the 20% cap). Since most law schools, in their use of additional teaching resources, exceed the 20% cap imposed by 402-1, the faculty count, for most schools, ends up being the full-time faculty count plus 20%.

Although properly categorizing the average faculty member for faculty count purposes is a relatively simple task, every year countless questions arise around the edges of categories. For example, what is the difference between being on leave and being light loaded? At a school where the normal teaching load is three courses a year, a two course load, one course per semester looks like a light load. So the faculty member should be included in the count in both semesters. But what if the two course load is taught in one semester, so that the lightening of the teaching load occurs entirely in the other semester, when no courses are taught instead of one course? Is this now a light load or a faculty member on leave? What if the faculty member is serving on key committees during the semester with no classes? What if the faculty member is directing independent study projects?

What about emeritus faculty members who have given up their tenure but might continue to teach full time at least one semester out of the year, and perhaps year round? Technically, they would only count as part of additional teaching resources, but law schools have argued that there is no reason to treat them differently than tenure-track faculty.

Even the question of whether a faculty member has significant administrative duties has proven to be controversial. One law school's responses to the annual questionnaire came to the attention of the Questionnaire Committee because the school attempted to characterize the associate dean as not having significant administrative duties. They claimed that he taught a half-time load and his administrative duties did not prevent him from meeting his teaching, research and service obligations. Most law schools do not consider directors of centers, institutes or programs to have significant administrative duties. But for some directors, the administrative duties associated with their directorships are considerable.

The student-faculty ratio significantly increases the tension surrounding the issue of terms and conditions of employment because only full-time faculty members who are on tenure track or its equivalent count as full-time faculty members. Full-time faculty

members on short-term contracts, by contrast, count as 0.7 FTE and are subject to the 20% cap on additional teaching resources.

Why do these fairly subtle distinctions matter so much to schools? Often the impact on the student-faculty ratio of answering one of these questions one way instead of another seems relatively minor. But schools think it matters a great deal because the student-faculty ratio is one data point in the U.S. News rankings over which schools feel they can exercise some control. As a result, the Questionnaire Committee has spent huge amounts of time tweaking the questions that are used to collect data for the student-faculty ratio to try to insure that the data collected is comparable across schools. It continually finds new loopholes that some schools have chosen to exploit to try to improve their ratio, driven by the desire to improve their rankings.

Nevertheless, there are obviously arguments in favor of continuing to produce a student-faculty ratio, as evidenced by the fact that three committee members voted to continue to calculate and publish a student-faculty ratio. First, schools may have put considerable effort and resources into improving the student-faculty ratio, so we ought not to eliminate the ratio without giving more careful thought to the different ways in which schools might be relying on the ratio. Second, even though the student-faculty ratio may not give us dispositive answers to the question whether a law school's faculty is sufficiently large, it does provide a starting point for inquiry, and we ought not eliminate it until we have developed better output measures that we might use in lieu of this traditional input measure. Third, to the extent that Interpretation 402-1 encourages schools to give more faculty members (e.g., legal writing faculty) security of position so that they count in the ratio, that is a good thing. And fourth, we may invite a range of potential unintended consequences if we eliminate the student-faculty ratio as an isolated question without a full assessment of all of Chapter Four of the Standards.

Changing the ratio vs. eliminating it. If one accepts the argument that the current ratio is not useful, an important subsidiary question that must be addressed before deciding to eliminate the ratio is whether a different formula for calculating the ratio would work better. One option, for example, would be to return to the ratio that was the basis for the presumptive guidelines in Interpretation 402-2. This would mean eliminating from the faculty count all part-time faculty. The relative ranking of law schools by ratio would change very little, since most schools max out on the cap. However, across the board, student-faculty ratios would rise, so that fewer schools would be presumptively compliant, under Interpretation 402-2, and some schools might fall into the category of being presumptively noncompliant. Whether the schools that become presumptively noncompliant will, in fact, be found noncompliant, is less clear. Nor would it be any clearer that schools that appear presumptively compliant really are compliant. Eliminating additional teaching resources from the ratio doesn't give us a better ratio. It just gives us a different ratio. But eliminating part-time faculty from the faculty count and the ratio would subject the ABA to further criticism that it is failing to recognize the unique missions of different law schools, some of whom operate on a model that makes much more robust use of adjunct faculty. It would be perceived as more evidence of a cookie cutter one size fits all mentality about the standards.

Another option would be to modify the formula in some other fashion, either changing the FTE portion of the formula to give greater or lesser weight to different groups of faculty, or raising or lowering the 20% cap on additional teaching resources. The problem is, once again, that this would not give us a better ratio, just a different ratio. Every part of the current formula is based on somewhat arbitrary assumptions concerning the value of different teaching resources. So counting deans who teach as 0.6 or 0.4 instead of 0.5, or counting adjuncts as 0.3 instead of 0.2 doesn't result in a more meaningful ratio. And changing the cap from 20% to 30% or 10% doesn't either. It would result in a change in how schools are ranked based on the ratio, but no one can say that one formula gives us a more accurate ranking or a more meaningful ratio than another. We could say that counting more additional teaching resources by raising the cap is better policy, or worse policy. But the ratio that any formula produces is still just a single number that tells us nothing about how a school deploys its faculty, or whether they have enough faculty to deploy them in the manner they are deployed while still meeting other relevant standards.

How to eliminate the ratio. Assuming the student-faculty ratio is eliminated, the next question is how it should be eliminated. There are at least three different approaches that could be taken. First, since the language concerning the ratio is found in Interpretations 402-1 and 402-2, alone, those interpretations could simply be deleted, leaving Standard 402 otherwise intact. Second, Interpretations 402-1 and 402-2 could be replaced with other language attempting to explain how compliance with the faculty size provisions of Standard 402(a) will be measured, now that the student-faculty ratio has been eliminated. Third, Standard 402(a) could be eliminated.

The least drastic method of getting rid of the student-faculty ratio would seem to be eliminating Interpretations 402-1 and 402-2 while leaving Standard 402 intact. This approach does raise the question of how the sufficiency of a law school's faculty size is to be determined under Standard 402(a), absent a student-faculty ratio. However, the Accreditation Committee has had years of experience applying the standards to determine whether a law school's full-time faculty is of sufficient size. There are a variety of factors it has looked to including the portion of credit hours taught in the full-time and part-time program by full-time faculty members, the portion of the first year curriculum and other core subjects taught by full-time faculty members, and the ability of the full-time faculty, collectively and individually, to fulfill its teaching, research and service obligations.

The second option would be to replace Interpretations 402-1 and 402-2 with a new interpretation that describes how these factors are used in measuring adequacy of faculty size. However, writing a new interpretation now, without more time for consultation with the Accreditation Committee, is not an easy task. More importantly, it may not be a necessary task, because there are already other standards in place that address all the important questions. Standard 401 requires the law school to have a faculty whose qualifications and experience are appropriate to the school's stated mission and to maintaining a program of legal education that meets the requirements of Standards 301 and 302. Standard 404 outlines the teaching, research and service obligations of the faculty

and requires the law school to have policies and review mechanisms in place to enforce these responsibilities. Standard 403 requires that the full-time faculty teach a major portion of the curriculum in all divisions, including substantially all of the first year curriculum.

When a law school's faculty is too small, it shows up in the inability of the school to meet its stated mission, in the kinds of courses being taught by adjunct faculty, the high portion of the curriculum being taught by adjunct faculty, or the inability of the full-time faculty to fulfill all of its responsibilities because it is overburdened in one or more areas. Each of these indicators of inadequate faculty size implicates other standards. Indeed, Standard 402(a) does not simply say that a law school must have a sufficient number of full-time faculty, it says "A law school shall have a sufficient number of full-time faculty to fulfill the requirements of the Standards and meet the goals of its educational programs." In other words, Standard 402(a) does not impose an independent requirement that a law school's faculty be of a certain size. The requirement of adequate faculty size is tied entirely to other standards. When the Accreditation Committee determines that those other standards are not being met because the faculty is too small, it doesn't need the hook of 402(a). The other standards that are being violated are quite sufficient in and of themselves.

As a result, the subcommittee which initially looked at the student-faculty ratio concluded, also by a split vote, that Standard 402(a) was not necessary. However, a majority of the full Standards Review Committee concluded that Standard 402(a) contains important statements about the normative reasons a faculty of sufficient size is desirable which help to clarify and hold together the various standards that directly or indirectly implicate faculty size. What is not helpful, and in some ways is affirmatively misleading, in attempting to make judgments about faculty size, is the student-faculty ratio.