

---

---

# THE “LAW” AND “SPIRIT” OF THE ACCREDITATION PROCESS IN LEGAL EDUCATION

Maureen A. O’Rourke<sup>†</sup>

## CONTENTS

INTRODUCTION .....	595
I. THE ACCREDITATION PROCESS.....	597
II. THE REVISED STANDARDS.....	600
A. <i>Instructional Methods</i> .....	601
B. <i>Financing</i> .....	603
C. <i>Faculty Status</i> .....	606
III. THE SPIRIT OF ACCREDITATION.....	607
CONCLUSION.....	608

## INTRODUCTION

In 1995, Dean Richard Matasar published an essay in the *Journal of Legal Education* entitled *Perspectives on the Accreditation Process: Views from a Nontraditional School*.<sup>1</sup> With characteristic acuity, he focused on the question “whether the accreditation process promotes or discourages curricular experimentation and resource conservation,”<sup>2</sup> noting that “[a]s we enter an era of scarcity of resources and diminished demand for legal education, traditional well-endowed schools will continue to flourish. For the rest of us, however, only the fittest and most clever will survive. Accreditation must serve this end.”<sup>3</sup>

What Dean Matasar may not have foreseen is that even “traditional well-endowed” schools have not, in fact, been exempt from the kinds of

---

<sup>†</sup> Dean, Professor of Law, Michaels Faculty Research Scholar, Boston University School of Law; Vice Chair of the ABA Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association. Thank you to Dean Hannah Arterian of Syracuse University College of Law for inviting me to the Symposium on Dean Matasar’s work, Dean Matasar for writing it, the other symposium attendees and Barry Currier for their thoughtful comments, and David Bachman of the Fineman & Pappas Law Libraries at Boston University School of Law for research assistance and helping to draft footnotes. The views expressed here are the author’s and, in particular, do not represent those of the Council or the ABA.

1. See generally Richard A. Matasar, *Perspectives on the Accreditation Process: Views from a Nontraditional School*, 45 J. LEGAL EDUC. 426 (1995) [hereinafter *Perspectives on the Accreditation Process*].

2. *Id.* at 426.

3. *Id.*

market pressures forcing both resource conservation and creative thinking, all hopefully with the end not just of survival, but also of better service to students. Between fall 2011 and fall 2014, applications to law schools for the J.D. degree declined by close to thirty-five percent nationally.<sup>4</sup> While it is certainly true that applications have always waxed and waned, the recent decline is particularly notable because there are more law schools than ever attempting to fill classes: between 1963 and 2012, the number of ABA-accredited law schools increased from 135 to 201.<sup>5</sup> Against this backdrop, it is past time to revisit what Dean Matasar had to say in his essay and consider whether the accreditation function is meeting its primary mission of protecting the public, in part by permitting schools the flexibility to adopt different strategies for achieving their missions.

Here, I first briefly outline the accreditation process. I then consider some of the questions raised and recommendations made by Dean Matasar in his essay, focusing on just a few of the most notable of the new, substantially revised accreditation standards that generally became effective in academic year 2014–15 to be applied to site visits in 2015–16.<sup>6</sup> I conclude that the letter of the “law” of accreditation has indeed evolved to provide schools with more flexibility at least in some areas to meet the demands of a rapidly changing environment. Because the standards are so new, however, the jury is necessarily still out on whether site evaluation teams will apply them in the spirit Dean Matasar suggests.

---

4. *End-of-Year Summary: ABA (Applicants, Applications & Admissions), LSATs, Credential Assembly Service*, L. SCH. ADMISSION COUNCIL, <http://www.lsac.org/lisacresources/data/lisac-volume-summary> (last visited Mar. 21, 2016).

5. Section of Legal Educ. and Admissions to the Bar, *Enrollment and Degrees Awarded 1963–2012*, A.B.A., [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/statistics/enrollment\\_degrees\\_awarded.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/enrollment_degrees_awarded.authcheckdam.pdf) (last visited Mar. 21, 2016).

6. STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCH. Introduction v–ix (AM. BAR. ASS’N 2014–2015) [hereinafter 2014–2015 ABA STANDARDS] (noting that the most recent “Comprehensive Review” of the standards occurred between 2008 and 2014); see also Jeffrey E. Lewis, *The Revised ABA Standards for Approval of Law Schools: An Overview of the Major Changes*, B. EXAMINER, Mar. 2015, at 44, 44–45 (describing the revision process and also noting that some standards will not be applied until 2016–17 site visits).

### I. THE ACCREDITATION PROCESS

The U.S. Department of Education (ED) has recognized the Council of the Section of Legal Education and Admissions to the Bar (the “Council”) of the American Bar Association (ABA) as the agency authorized to accredit domestic law schools since 1952.<sup>7</sup> Much of the heavy lifting is performed by the Standards Review Committee (SRC), the Accreditation Committee (AC), and the Data Policy and Collection Committee (DPCC). The SRC continually reviews the *ABA Standards and Rules of Procedure for Approval of Law Schools* (the “ABA Standards” or “Standards”), drafting proposed changes. The AC reviews the work of the site evaluation teams that visit schools to find facts relevant to the question of compliance with the Standards, and makes the substantive recommendation regarding accreditation status.<sup>8</sup> The AC also makes recommendations on applications for the approval of a new school and major changes in an existing school’s structure, and sometimes proposes sanctions when the Council determines that a school has violated one or more of the Standards. The DPCC recommends both the data the Council should collect from schools and the appropriate forms and instructions under which to do so. The Council is ultimately responsible for final decisions and meets routinely to consider how, if at all, to act on recommendations of the Committees.

“The goal of accreditation is to ensure that education provided by institutions of higher education meets acceptable levels of quality.”<sup>9</sup> The ED follows the regulations set forth in Part 602 of Title 34 of the Code of Federal Regulations in recognizing accrediting agencies. Part 602 requires that such agencies “demonstrate . . . standards for accreditation,” and those standards must, *inter alia*,

[E]ffectively address the quality of the institution or program in the following areas:

- (i) Success with respect to student achievement in relation to the institution’s mission . . . .

---

7. 2014–2015 ABA STANDARDS, *supra* note 6, at Preface vii; *see also The Database of Accredited Postsecondary Institutions and Programs*, U.S. DEP’T EDUC., <http://ope.ed.gov/accreditation/agencies.aspx> (last visited Mar. 21, 2016).

8. Often the AC, through the Managing Director’s Office, engages in an extended dialogue with schools to ensure compliance.

9. *Accreditation in the United States*, U.S. DEP’T EDUC., <http://www2.ed.gov/admins/finaid/accred/accreditation.html> (last visited Mar. 21, 2016); *see also* 34 C.F.R. § 602.1(a) (2014) (“The Secretary recognizes accrediting agencies to ensure that these agencies are, for the purposes of the Higher Education Act of 1965, as amended (HEA), or for other Federal purposes, reliable authorities regarding the quality of education or training offered by the institutions or programs they accredit.”).

- (ii) Curricula.
- (iii) Faculty.
- (iv) Facilities, equipment, and supplies.
- (v) Fiscal and administrative capacity as appropriate to the specified scale of operations.
- (vi) Student support services.
- (vii) Recruiting and admissions practices, academic calendars, catalogs, publications, grading, and advertising.
- (viii) Measures of program length and the objectives of the degrees or credentials offered.
- (ix) Record of student complaints received by, or available to, the agency.
- (x) Record of compliance [with regulations relating to financial aid] . . . .<sup>10</sup>

Additionally, ED regulations require an accrediting agency to “reevaluate, at regularly established intervals, the institutions or programs it has accredited.”<sup>11</sup>

The ABA Standards address each of the areas identified above as well as others not specified by ED regulations, including, for example, terms and conditions of employment. The Standards also provide for reevaluation “of a fully approved law school . . . in the third year following the granting of full approval and every seventh year thereafter.”<sup>12</sup>

An obvious question for which the Council and at least some accredited schools may have different answers is whether the Standards appropriately implement ED regulations. The regulations generally leave to the accrediting agency the task of defining precisely what the requirements are for each of the categories defined in the regulations: with specificity comes controversy over whether the Council has promulgated appropriate rules. And certainly, one could argue that the Standards should not address matters left unattended by the ED. Disputes of either type can never be resolved happily for all interested parties because they reflect different views of the purpose of accreditation. Dean Matasar takes a minimalist view: “[a]ccreditation . . . must separate what is *necessary* for a program from

---

10. 34 C.F.R. § 602.16(a)(1) (2014).

11. *Id.* § 602.19(a).

12. 2014–2015 ABA STANDARDS, *supra* note 6, Rule 5(b).

what is *desirable*.”<sup>13</sup> Some may agree with that purpose but disagree on what is necessary, while others may have the view that accreditation’s purpose is to promote what we believe is most desirable in a legal education, not merely what is necessary.

An example may prove helpful. Standard 303 defines the accreditation requirements relevant to curriculum per 34 C.F.R. § 602(1)(ii). Under Standard 303, every law school must require each student to complete certain instruction in professional responsibility, two faculty-supervised writing experiences, and, beginning in academic year 2016–17, six credits of experiential education.<sup>14</sup> None of this is required by ED. I suspect that Dean Matasar and many others would argue that the specifications of curriculum at this level of detail (particularly the new six-credit requirement) constrains schools’ flexibility unduly.

There are, however, many who contend that students should take *more* than six credits of experiential education to ensure that they are appropriately prepared for the practice of law upon graduation from law school. One such group, often overlooked by commentators, is at least some of the state courts. For many years, most state courts accepted successful completion of a J.D. at an ABA-accredited law school as essentially sufficient to meet the educational requirements for an applicant to sit for the bar. Recently, however, some states, most notably California<sup>15</sup> and New York,<sup>16</sup> have begun the process of implementing additional requirements candidates must meet either to take their bar exams or to be admitted. California would require that each student complete fifteen-credits of experiential education. Thus,

---

13. *Perspectives on the Accreditation Process*, *supra* note 1, at 430 (emphasis added).

14. *Id.* Standard 303(a).

15. See *New Experiential Learning Requirements for California Bar Applicants*, 2CIVILITY.ORG, <http://www.2civility.org/new-experiential-learning-requirements-for-california-bar-applicants/> (last visited Nov. 3, 2015) (describing California’s adoption of a fifteen-credit experiential education requirement as a condition for sitting for the California bar; this exceeds the six-credit minimum in Standard 303(a)). See, e.g., *Task Force on Admission Regulation Reform (TFARR)*, ST. B. CAL., <http://www.calbar.ca.gov/AboutUs/BoardofTrustees/TaskForceonAdmissionsRegulationReform.aspx> (last visited Mar. 21, 2016) (plan to implement three proposals, including a pre-admission requirement of fifteen units of practice-based, experiential coursework); Darby Dickerson et al., ASS’N OF AM. L. SCH. DEANS STEERING COMM., STATEMENT ON THE CALIFORNIA TASK FORCE ON ADMISSIONS REGULATION RECOMMENDATIONS (TFARR) 1 (July 6, 2015), <http://www.aals.org/tfarr-statement/> (opposing the TFARR recommendation).

16. See Press Release, New York State Unified Court System, Rules for New York Bar Admission Amended to Include New Experiential Training Component (December 16, 2015), [https://www.nycourts.gov/PRESS/PDFs/PR15\\_20.pdf](https://www.nycourts.gov/PRESS/PDFs/PR15_20.pdf) (describing amendments to New York Bar admission rules which include a new experiential training component).

---

---

while some schools and commentators may wish the ABA to provide fewer requirements regarding curriculum, state courts may be moving in the opposite direction, eschewing regulatory minimalism in favor of a more active approach. What may be lost in the debate is that regardless of whether a school believes the Standards are appropriately drawn, most would likely agree that ABA accreditation as the gateway for graduates to sit for the bar is far more cost-effective and efficient than state-specific regulatory regimes regarding educational requirements.

The regulatory environment is thus complex, involving the ED, ABA, and state courts, and the Standards must be evaluated against this backdrop. Indeed, even a regulatory minimalist like Dean Matasar did not call for a change in the Standards at the time he wrote his essay. He did note, “There’s a bad attitude out there that is causing people of good will to get angry.”<sup>17</sup> He sought change “not in the *law* of accreditation, but in its spirit. . . . Accreditation is not a method to extract resources from recalcitrant universities. It is not a process to impose one worldview on every school. We need a major attitude readjustment. Accreditation must become a vehicle for change.”<sup>18</sup>

The change that Dean Matasar did *not* seek—in the law of accreditation—has come, at least to a certain extent. ED regulations require the accrediting agency to review its standards periodically.<sup>19</sup> The last so-called “Comprehensive Review” of the Standards occurred between 2008 and 2014.<sup>20</sup> The resulting new Standards are substantively quite different from those in place in 1995 when Dean Matasar wrote his essay and are, in some cases if not others (like Standard 303 on curriculum, noted above), responsive to his concerns. Whether site teams will apply them in the spirit he recommended remains to be seen.

## II. THE REVISED STANDARDS

A review of all of the changes to the Standards is beyond the scope of this Essay. Here, I focus on the questions that Dean Matasar raised in his piece and how, if at all, the Standards have responded by becoming, in his words, “vehicle[s] for change.”<sup>21</sup>

In his essay, Dean Matasar posed a number of questions, including:  
How will we respond to distance learning . . . ? How will accreditors

---

17. *Perspectives on the Accreditation Process*, *supra* note 1, at 429.

18. *Id.*

19. See 34 C.F.R. § 602.21(b)(2) (2014).

20. See 2014–2015 ABA STANDARDS, *supra* note 6, at Preface ix.

21. *Perspectives on the Accreditation Process*, *supra* note 1, at 429.

react to the school that tries to reduce a student’s costs by offering a two-year J.D. degree? Or to the school that tries to spread payments over an eight-year J.D. program? What will happen to the school that uses computer exercises to teach hundreds in a class that a faculty member meets only once a week? How will accreditors react to a school that proposes student graders, teaching assistants, courses taught by faculty from other departments or schools, or faculty who do not teach at all? What will happen to a school that grows a large commercial law firm to pay its bills? What about the school that abolishes tenure? Or the school that adopts an incentive-based pay system with no base salary?

I doubt that the present accreditation process will react favorably.<sup>22</sup>

In fact, under the new Standards, accreditors would respond favorably to at least some of these approaches.

#### A. Instructional Methods

Revised Standard 306 increases the number of credits a student may earn online from twelve to fifteen, removes the former limitation to no more than four credit hours obtained online in any given term, and uses technology-neutral language, thus providing for the possibility of natural expansion of modes of online offerings without the need to re-draft the Standards.<sup>23</sup> It did retain a provision prohibiting distance education for credit until a student has completed twenty-eight credit hours of J.D. study.<sup>24</sup>

I suspect that Dean Matasar might say that this is still too limiting. It is, however, worth noting that the ABA recently granted a variance to William Mitchell College of Law to offer a hybrid J.D. program that will offer distance education credits in excess of those permitted by the Standards.<sup>25</sup> Additionally, the ABA does not accredit LL.M. programs, and a number of schools offer such programs wholly online.<sup>26</sup> All of

22. *Id.* at 430.

23. Compare 2014–2015 ABA STANDARDS, *supra* note 6, Standard 306 (current standard on distance education), with STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCH. Standard 306 (AM. BAR ASS’N 2013–2014) [hereinafter 2013–2014 ABA STANDARDS] (former standard on distance education).

24. 2014–2015 ABA STANDARDS, *supra* note 6, Standard 306(f).

25. ABA Approves Variance Allowing William Mitchell to Offer “Hybrid” On-Campus/Online J.D. Program, WM. MITCHELL C.L. (Dec. 17, 2013), <http://web.wmitchell.edu/news/2013/12/william-mitchell-to-offer-first-aba-accredited-hybrid-on-campus-online-j-d-program/>.

26. My own school offers an online LL.M. in Taxation and a blended (i.e., part residential/part online) Executive LL.M. in International Business Law. See generally *Graduate Studies Overview*, B.U. SCH. L., <http://www.bu.edu/law/prospective/llm> (last visited Mar. 21, 2016).

these programs will provide schools with a base of knowledge around technology, efficacy of different delivery methods, and demand for different programs—knowledge that can only prove useful in evaluating any proposal to expand distance education on the J.D. front. It is also worth emphasizing again that the ABA is not the only source of regulations relevant to law schools and their students. New York, for example, only recently brought its rule on distance education in line with the Standards: previously, it would accept only twelve credits of synchronous distance education credits toward the J.D. degree of a candidate sitting for its bar.<sup>27</sup> Additionally, 34 C.F.R. § 600.2 and Title IV on financial aid regulate distance education courses. Thus, the ABA is not quite the laggard in this area that some might think, nor has it noted many law schools making use of the distance education opportunities it does permit.

Standard 306 would also likely apply in addressing Dean Matasar's question regarding the viability of a class that meets residentially once per week with a faculty member using computer exercises to accomplish the bulk of the teaching. The focus of Dean Matasar's question may have been on whether, apart from Standard 306, the ABA would permit a faculty member to teach hundreds of students in this manner.

Under interpretations of the former Standard regarding faculty size,

A[n overall student-faculty] 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.

... A ratio of 30:1 or more presumptively indicates that a law school does not comply with the Standards.<sup>28</sup>

The revised Standard does not include these interpretations and instead focuses on faculty size at a high level: "A law school shall have a sufficient number of full-time faculty to enable [it] to operate in compliance with the Standards and carry out its program of legal education."<sup>29</sup> Additionally, the ABA no longer calculates a student-

---

27. For the old rule, *See Bar Exam Eligibility*, N.Y. ST. BD. L. EXAMINERS, <http://www.nybarexam.org/Eligible/Eligibility.htm> (last visited Mar. 21, 2016) (applicants for the New York State bar exam may count only twelve distance education credits and that education must be synchronous (a limitation not in the Standards)). For the current rule, *see* N.Y. COMP. CODES R. & REGS. tit. 22, § 520.3(6) (permitting fifteen distance education credits and not distinguishing asynchronous and synchronous distance education).

28. 2013–2014 ABA STANDARDS, *supra* note 23, Standard 402, Interpretation 402-2.

29. 2014–2015 ABA STANDARDS, *supra* note 6, Standard 402 (Standard 402 identifies factors relevant to the appropriate size of the faculty including, *inter alia*, the student body



faculty ratio for schools when they file their annual questionnaires, although it will do so during site visits.

Notwithstanding the deletion of the interpretations, I suspect that it will be natural for the AC to look to former guidance in applying the new Standard. I doubt that the AC would find a school with a small faculty teaching hundreds of students mostly online to pass muster—nor should it. Neither Dean Matasar nor anyone else wants to encourage so-called “diploma mills.”<sup>30</sup> The new Standards, however, focus on outcomes more than on input measures like the student-faculty ratio, leaving the AC and the Council with much more flexibility to approve a wide range of ratios as sufficient.

For example, at my own school, we have a graduation requirement that all students take or test out of a non-credit asynchronous online “Introduction to Business Fundamentals” course.<sup>31</sup> At any given time there could be hundreds working on the course. This approach seems wholly appropriate to us. The principles taught in the course are not up for discussion: for example, what constitutes net present value is not worthy of a Socratic dialogue. The (somewhat) massive online approach is excellent for providing instruction intended virtually entirely to convey information. (We do provide a mechanism for students to ask questions as well.) We certainly think this is permissible under the Standards and the type of innovation the ABA should encourage.

### B. Financing

Dean Matasar, like so many others in legal education, is concerned about and has raised questions about the cost of legal education. In the quote above, he queried whether a two-year program may be desirable for some students if it cuts their tuition. Alternatively, students might prefer a much longer program to spread the cost over time.

At one point, at least twelve law schools had begun offering two- or two-and-a-half-year J.D. programs,<sup>32</sup> including Brooklyn Law School,<sup>33</sup> Vermont Law School,<sup>34</sup> and the University of Washington.<sup>35</sup>

---

size and opportunities to meet individually with faculty and the ability of faculty to fulfill all of their obligations to the school and public.).

30. *Perspectives on the Accreditation Process*, *supra* note 1, at 429 (decrying “a world of fly-by-night correspondence law schools”).

31. *JD605 Business Fundamentals*, B.U. SCH. LAW (July 25, 2011), <http://www.bu.edu/law/courses/jd605.shtml>.

32. See Shawn P. O’Connor, *Balance the Pros, Cons of Enrolling in an Accelerated J.D. Program*, U.S. NEWS & WORLD REP. (June 22, 2015, 10:00 AM), <http://www.usnews.com/education/blogs/law-admissions-lowdown/2015/06/22/balance-the-pros-cons-of-enrolling-in-an-accelerated-jd-program>.

33. *Brooklyn Law School Creates the First Accelerated 2-Year J.D. Program in New*

As far as I can tell, however, at least some of these programs do not offer students savings: they take the cost of the three-year program and allocate it over the shorter timeframe.<sup>36</sup> Regardless, the Standards do not prevent a school from offering an intensive program that lasts as little as two years. Whether such programs are viable is the more interesting question. One of the pioneers in the area—Northwestern University Law School—recently announced that it would end its accelerated J.D. program, citing lower enrollments than anticipated.<sup>37</sup>

The Standards do require that the J.D. degree be completed within seven years.<sup>38</sup> Thus, there is a limit to a school's ability to offer a lengthy program of study that gives students a longer time period over which to pay tuition. Nothing in the Standards, however, prevents a school from offering its students payment plans that extend for as long as the school would like. The Standards require the *education* to be completed in seven years, not the *payment* for it.

The real issue with cost is that schools have structured their business models around the three-year J.D. These models are not amenable to rapid change in part because expenses are not so easy to control. It is difficult to decrease faculty salaries, buildings require upkeep, students rightfully demand services, etc. Dean Matasar has argued that the Standards unnecessarily raise schools' costs beyond

---

*York Metro Area*, BROOK. L. SCH. (May 8, 2013), <https://www.brooklaw.edu/newsandevents/news/2013/05-08-2013a.aspx>.

34. *Accelerated Juris Doctor (AJD)*, VT. L. SCH., <http://www.vermontlaw.edu/academics/degrees/jd/accelerated-jd> (last visited Mar. 21, 2016).

35. *Accelerated J.D. Program*, U. WASH. SCH. L., <https://www.law.washington.edu/Students/Academics/AcceleratedJD.aspx> (last visited Mar. 21, 2016).

36. See Elie Mystal, *Law School Offers Two-Year Program That (Shockingly) Costs Only Two Years of Tuition*, ABOVE L. (Sept. 4, 2013, 2:50 PM), <http://abovethelaw.com/2013/09/law-school-offers-two-year-program-that-shockingly-costs-only-two-years-of-tuition/> (discussing New York Law School's two-year J.D. program, for which students pay two year's tuition, in contrast to "current two-year programs [that] just jam all those credits into two years and charge people for three").

37. Mark Hansen, *Northwestern to End Accelerated JD Program*, A.B.A. J. (Oct. 7, 2015, 1:25 PM), [http://www.abajournal.com/news/article/northwestern\\_law\\_to\\_end\\_accelerated\\_jd\\_program](http://www.abajournal.com/news/article/northwestern_law_to_end_accelerated_jd_program) Northwestern also cited a lack of flexibility in the Standards as a motivating factor in ending the program. See *id.* As ABA Section of Legal Education and Admissions to the Bar Managing Director Barry Currier noted, however, there, has been no change in the accreditation standards that would prevent Northwestern from continuing its accelerated JD program. . . . [C]hanges in the reporting requirements [that mandate reporting an applicant's LSAT score if one is available even if another standardized test like the GMAT is used for admissions purposes] was made in service of the idea that all information schools are required to report should be complete, accurate and not misleading.

*Id.*

38. 2014–2015 ABA STANDARDS, *supra* note 6, Standard 311(c).

what is required to offer a quality legal education through Standards like that cited above on student/faculty ratio and others, including adequacy of the facility.<sup>39</sup> This may be the case, although a 2009 General Accounting Office study found that law schools’ competition for *U.S. News & World Report* rankings was a larger driver of increased cost than the Standards.<sup>40</sup> Certainly too, during the recent downturn, a number of schools have trimmed their budgets ostensibly without running afoul of accreditation standards, although it is unclear how much of that savings has been passed on to students or whether it has primarily been used to offset operating deficits.<sup>41</sup>

Dean Matasar raises the interesting question whether a school could pay its faculty on some sort of incentive-based system, without being specific on what that incentive would be—perhaps the school hitting its enrollment and financial aid targets or the individual faculty member placing a certain number of students in post-graduate employment or obtaining a particular rating on student evaluations. I think he is correct that the AC would take a dim view of such a system under Standard 405. That Standard requires schools to “establish and maintain conditions adequate to attract and retain a competent faculty,” “have an established and announced policy with respect to academic freedom and tenure,” and “afford to full-time clinical faculty members a form of security of position reasonably similar to tenure.”<sup>42</sup> Moreover, the ED has regulations that prevent certain incentive-based systems, and regional accreditors may as well.

The flip side to cutting expenses is raising revenue. Dean Matasar takes a creative approach to this by asking whether a school could pay its bills by opening a law firm. I do not believe there is anything in the Standards that would prohibit this, although certainly if the faculty were diverted to running the firm, a school could run afoul of the Standards. As a general rule, though, there is nothing in the Standards prohibiting creative financing. I suspect though that the AC would be more favorably disposed toward this strategy than incentive-based pay.

---

39. See *id.* Standards 701, 702.

40. See U.S. GOV’T ACCOUNTABILITY OFF., HIGHER EDUCATION: ISSUES RELATED TO LAW SCHOOL COST AND ACCESS 2, 26 (2009), <http://www.gao.gov/assets/300/297206.pdf>.

41. Ashby Jones & Jennifer Smith, *Amid Falling Enrollment, Law Schools Are Cutting Faculty*, WALL ST. J. (July 15, 2013), <http://www.wsj.com/articles/SB10001424127887323664204578607810292433272>; David Frakt, *Cost Cutting in an Age of Declining Law School Enrollment*, FAC. LOUNGE (Jan. 15, 2015, 10:35 AM), <http://www.thefacultylounge.org/2015/01/cost-cutting-in-an-age-of-declining-law-school-enrollment.html>.

42. 2014–2015 ABA STANDARDS, *supra* note 6, Standard 405.

*C. Faculty Status*

Chapter 4 of the Standards sets forth requirements regarding faculty. These Standards state, *inter alia*, “A law school shall have a sufficient number of full-time faculty to enable the law school to operate in compliance with the Standards and carry out its program of legal education . . . . The full-time faculty shall teach substantially all of the first one-third of each student’s coursework.”<sup>43</sup> Additionally, the Standards clearly contemplate a tenure system.<sup>44</sup> The Standards do not, however, specify what percentage of law school faculty must be tenured or the number that must be full-time. Regarding the latter question, the Standards provide:

The number of full-time faculty necessary depends on (a) the size of the student body and the opportunity for students to meet individually with full-time faculty members; (b) the nature and scope of the program of legal education; and (c) the opportunities for the full-time faculty to adequately fulfill its teaching obligations, conduct scholarly research, participate effectively in the governance of the law school, and provide service to the legal profession and the public.<sup>45</sup>

Thus, there is nothing in the Standards that bars a school from using, in Dean Matasar’s words: “student graders, teaching assistants, courses taught by faculty from other departments or schools, or faculty who do not teach at all[.]”<sup>46</sup> I suspect some already do. At my institution, a faculty member of the College of Communications taught Communications Law for many years. There is nothing (except perhaps economics) to prevent a school from allowing a faculty member to perform only the non-teaching (i.e., research and service) parts of the job.<sup>47</sup> As with many of the issues Dean Matasar raises, it is likely a question of degree.

---

43. *Id.* Standards 402, 403.

44. *Id.* Standard 405. Although Standard 405 does not explicitly require a tenure system, its wording indicates that such a system must be in place. For example, Standard 405(b) requires a school to “have an established and announced policy with respect to . . . tenure.” *Id.* Standard 405(c) requires a school to “afford to full-time clinical faculty members a form of security of position reasonably similar to tenure . . . .” *Id.* Taken together these sections imply that at least some faculty members must have tenure. This understanding is confirmed by Interpretation 405-1: “A fixed limit on the percent of a law faculty that may hold tenure under any circumstances violates the Standards.” *Id.* Interpretation 405-1.

45. *Id.* Standard 402.

46. *Perspectives on the Accreditation Process*, *supra* note 1, at 430.

47. 2014–2015 ABA STANDARDS, *supra* note 6, Standard 404 (Standard 404 states that the teaching, advising, scholarship and service be provided by the full-time faculty as a “collective body”).

So, for example, the faculty of a college of arts and sciences could not “double” as the law school faculty: the Standards clearly contemplate a “law school” faculty. I likewise doubt that the Standards would permit a system under which non-faculty members assign *all* grades. If I am correct, is that a bad thing? Arguably not, particularly at current tuition rates. If a school could cut tuition substantially by using alternative faculty arrangements, should the Standards allow it? Perhaps, particularly if the school can show a good bar passage rate and employment data. But I doubt the Standards as written provide that much flexibility.

Dean Matasar provocatively asks what accreditors would do if a school were to abolish tenure. The answer is clear: such a school would violate Standard 405 which clearly contemplates a tenure system. The more interesting question may be what accreditors’ tolerance is for mixed faculties—how many non-tenure-track and/or part-time faculty may a school employ without violating the Standards? I suspect that we will find out in the not-too-distant future as schools move to more flexible staffing models. These are likely to include increased use of practitioners to help meet the new requirement that all students take six credits of experiential education and to respond to criticism that law schools do not adequately prepare students for practice.

### III. THE SPIRIT OF ACCREDITATION

As noted above, Dean Matasar’s main concern was with the manner in which accreditation is conducted. He identified five principles for improvement:

First, we must presume in favor of choices made by a school. If a school has a rational explanation for its choices, they should be respected. Second, the burden of proof ought to rest on those who would deny a school the chance to choose its own destiny. Third, accreditation should not be an opportunity to relitigate every faculty dispute. Schools make choices, often over dissent. Dissident faculty members ought not to be able to call in outsiders to destabilize hard-fought internal compromises and choices. Fourth, every school cannot be at the median or higher. That would require either mediocrity (as everyone reaches the median) or the adoption of the Robin Hood approach to legal education: take from the rich to redistribute to everyone else. Finally, efficient allocation of resources should be applauded, not punished. If quality can be had for less, let’s have it.<sup>48</sup>

For anyone who has experienced an accreditation visit as an

---

48. *Perspectives on the Accreditation Process*, *supra* note 1, at 430.

administrator, these are worthy goals that depend less on the Standards or the Section staff and more on the attitude of site evaluation teams. The Managing Director's Office works hard to prepare teams to remain within the scope of their mandate—find facts relevant to compliance with the Standards. In my experience of two site visits, most team members try to be helpful and to do their jobs without unnecessary disruption to the daily life of the school. Some though seem to have the attitude that there must be some hidden outrage bubbling just under the surface and it is his or her duty to ferret it out and expose it to the light of day. Others seem to take some delight in tweaking a school over minutiae for reasons that are not readily apparent, especially to those on the receiving end of seemingly endless “report back” letters requiring an explanation of how the school is complying with one or more Standards.

In defense of the site teams and AC, they have a difficult and time-consuming job for which they volunteer. Moreover, they have a regulatory mandate to be consistent. What would be helpful for schools is if the process could be more transparent so schools have a “heads up” on common issues that arise and how they are resolved. This would be particularly helpful as site teams and the AC begin applying the revised Standards. Unfortunately, the process does not currently provide for disclosure of even redacted information. However, the Managing Director's Office has begun issuing guidance memos that should help schools better prepare for accreditation visits and to know what will be found satisfactory and what will not.

Additionally, the Council, on the recommendation of the AC, has begun making variances from the Standards public. This is critical to ensuring that all schools understand what options are available and what practices are at other schools.

#### CONCLUSION

Ultimately, accreditation is a means to protect the public. In the case of law schools, that function is extremely important given legal education's unique role in our democratic society. Respect for the rule of law and access to justice are principles on which our nation was built and is sustained. A rational accreditation process can play a positive role in helping ensure that schools continue to train graduates who will uphold the best of what the Constitution promises.

The accreditation process operates, however, in a world in which lofty goals must be translated into manageable rules on which many interest groups have differing views. Today's accreditation process is

under unprecedented pressure. It was not designed for the kind of flexibility and rapid change that today’s society seems to demand in every area, including legal education and practice. For the process to remain relevant, it would be advisable for all involved in it to heed Dean Matasar’s words and to keep an open mind when a school adopts what might seem to be unconventional modes of operation.