

ALWD

ASSOCIATION OF LEGAL WRITING DIRECTORS

December 16, 2011

Professor Jeffrey E. Lewis
Dean Emeritus and Professor of Law
Chair, Standards Review Committee
ABA Section of Legal Education and Admissions to the Bar
St. Louis University School of Law
St. Louis, IL 63108

Mr. Hulett H. Askew
Consultant
Office of the Consultant on Legal Education
ABA Section of Legal Education and Admissions to the Bar
321 N. Clark Street, 21st floor
Chicago, IL 60610

Dear Chairman Lewis and Mr. Askew:

Following ALWD's presentation at the November meeting of the Standards Review Committee, we promised to provide proposed language to revise the ABA accreditation standards as they relate to security of position, academic freedom, and governance rights. Our rationale for the changes we recommend is discussed below, followed by the proposed language. The rationale explains why we recommend standards that ensure equal rights for all full-time faculty and that retain current requirements for calculating teacher-student ratios.

I. No principled basis exists for discriminating against a field of study and the faculty who teach it.

The ABA standards should guarantee *all* categories of full-time faculty, including legal writing and clinical faculty, the opportunity to achieve security of position adequate to protect academic freedom and necessary to ensure meaningful participation in governance. As both AALS and SALT have argued, tenure, as traditionally understood, is essential to academic freedom. No rational justification exists for denying equivalent academic freedom, security of position, and governance rights to full-time legal writing faculty, especially since these and other skills faculty have the most expertise in formative assessment and outcomes-focused pedagogy.

In comments submitted to SRC last year, the ABA Special Committee on the Professional Education Continuum, co-chaired by Randy Hertz and Judith Wegner, noted that the “limited protections” the current standards and interpretations extend to legal writing faculty “offer insufficient recognition to the crucial role of legal writing faculty members in developing strong pedagogical practices and insights about the core institutional missions of law schools”¹ The Special Committee observed that “hiring and retaining a core group of expert full-time faculty members with security of position is as important in the arena of legal writing as in the context of clinical education and other substantive fields of instruction.”²

As generally understood in higher education, tenure is an assurance of continuous service, subject to termination only for demonstrated cause concerning the tenured faculty member specifically, or for extraordinary financial exigencies concerning the institution as a whole. Tenure carries with it full participation in faculty governance, such as decisions on curriculum. Lesser forms of job security, including those covered by existing Standard 405(c), typically involve lesser participation in governance. And existing Standard 405(d) does not require a school to afford any governance rights at all to legal writing teachers.

Tenure for all full-time faculty is the best way to ensure academic freedom and full participation in faculty governance. Standard 405(c), which provides for long-term presumptively renewable contracts of five years or more, is not an acceptable substitute for traditional tenure. Stratification of faculty groups based on differential terms and conditions of employment has had a balkanizing effect, discouraging the collaboration that must occur for true integration of the law school curriculum and making it clear to students that some fields of study are less valuable than others. To the legal profession, this stratification may appear to reflect a distortion of values, as the disfavored fields of study are those that most directly teach students how to practice law.

In addition, Standard 405(c) no longer means what it was generally thought to mean. The first and fifth sentences of Interpretation 405-6 read as follows:

A form of security of position reasonably similar to tenure includes a separate tenure track or a program of renewable long-term contracts. . . . For the purposes of this Interpretation, “long-term contract” means at least a five-year contract that is presumptively renewable or other arrangement sufficient to ensure academic freedom.³

¹ ABA Special Committee on the Professional Education Continuum, Letter to Standards Review Committee dated March 30, 2011, at 18, *available at* http://apps.americanbar.org/legaled/committees/Standards%20Review%20documents/20110330_comment_multiple_topics_aba_specia_committee_on_the_professional_education_continuum.pdf.

² *Id.*

³ 2011-12 ABA Standards for Accreditation of Law Schools, Interpretation 405-6.

Our understanding is that, since 2006, the Accreditation Committee has interpreted the phrase “or other arrangement sufficient to ensure academic freedom” to allow a school to satisfy 405(c) by offering contracts as short as *one year* as long as the law school has some sort of academic freedom policy and an appeals procedure. Nearly all research universities have adopted the AAUP academic freedom policy and appeal procedures, although it is impossible to tell (without reviewing years of university contract renewal decisions) whether those policies and procedures are honored in practice. Construing Standard 405(c) to mean that one-year contracts are “reasonably similar to tenure” contradicts at least the goals of the Standard 405, if not the letter, and leaves 405(c) inadequate to assure equality in terms of academic freedom and governance rights.

Standard 405, as currently written, discriminates against legal writing faculty. It has calcified disparities among full-time law faculty and has contributed to a caste system in legal education.⁴ The historical reasons for these disparities are thoroughly chronicled elsewhere.⁵ But no rational justification has been advanced for providing clinical or legal writing faculty less security of position, less academic freedom, and a lesser role in faculty governance than casebook or any other subcategory of full-time faculty.

II. Discriminating against skills faculty impedes implementation of outcomes assessment standards.

Discrimination against faculty based on the subject matter they teach is even less justifiable now than ever before, given the standards’ increasing recognition of legal writing, professional skills, and outcomes assessment as core components of the law school curriculum. Disparities among categories of full-time faculty undermine the goal of improving the quality of legal education; these disparities make it difficult to integrate skills courses into the law school curriculum for the benefit of students.⁶ As a practical matter, the goal of outcomes assessment will not be achieved as long as the standards continue to permit discriminatory treatment of clinical and legal writing faculty in the terms and conditions of employment.

⁴ John A. Lynch, *Teaching Legal Writing After a Thirty-Year Respite: No Country for Old Men?*, 38 Cap. U. L. Rev. 1, 6 (2009) (“Putting aside politesse, [Standard 405(d)] requires that legal writing teachers be treated only as well as required by the law of supply and demand. Essentially, this places such teachers in a separate caste.”); Kent D. Syverud, *The Caste System and Best Practices in Legal Education*, 1 J. ALWD 12, 13 (2002). “In . . . American Legal Education, caste was calcified and embodied . . . in the American Bar Association accreditation standards for law schools, which specify different terms and conditions of employment for at least six different types of legal educators.” *Id.*

⁵ E.g. Marina Angel, *The Modern University and Its Law School: Hierarchical, Bureaucratic Structures Replace Coarchival, Collegial Ones; Women Disappear from Tenure Track and Reemerge as Caregivers; Tenure Disappears or Becomes Unrecognizable*, 38 Akron L. Rev. 789, 797-798 (2005); Maureen J. Arrigo, *Hierarchy Maintained: Status and Gender Issues in Legal Writing Programs*, 70 Temp. L. Rev. 117, 130-137 (1997).

⁶ See William M. Sullivan, et al., *Educating Lawyers: Preparation for the Profession of Law* (Carnegie Found. for the Adv. of Teaching 2007).

Rigorous legal writing instruction is a critical component of the law school curriculum in every ABA-accredited law school. Proposed Standard 302, which lists required learning outcomes, allows schools the flexibility to identify many learning outcomes independently, but it *mandates* that schools include learning outcomes directly relevant to legal writing courses. For example, proposed Standard 302(b)(2)(i) provides, among other things, that a school’s “learning outcomes *shall include* competency as an entry-level practitioner in . . . the professional skills of . . . legal analysis and reasoning, critical thinking, legal research, problem solving, [and] written and oral communication in a legal context”⁷ Current Standard 302(a)(3) mandates that every law school provide its students with “one rigorous writing experience in the first year and at least one additional rigorous writing experience after the first year” Proposed Standard 303(a)(2) retains this mandate with the additional requirement that each rigorous writing experience must be faculty-supervised.

Thus, **legal writing is the only subject area the current and proposed standards require to be taught not once, but twice, during each student’s law school career.** Recognizing the importance of rigorous legal writing experiences in the legal academy without providing the same governance rights and security of position to full-time faculty who teach those courses is an anachronism and an inequity. Because that inequity deprives legal writing teachers of full governance participation at many schools, it limits their ability to persuade their faculties to adopt the types of outcomes assessment measures comparable to those that have proved effective in legal writing pedagogy as well as in clinics.⁸ Discrimination against faculty who teach lawyering skills, especially those who

⁷ Proposed Standard 302(b)(2)(i) (emphasis added), *available at* http://www.americanbar.org/content/dam/aba/migrated/2011_build/legal_education/committees/standards_review_documents/july2011_meeting/20110621_ch_3_program_of_legal_education_clean_copy.pdf.

⁸ Although the value of tenure is not readily understood by those outside the professoriate, tenure is the mechanism for guaranteeing freedom in research and an open exchange of ideas. It represents a commitment on the part of a college or university to a faculty member that he or she will have the support necessary to do the job well. Tenured faculty members have a greater stake in the success of their institutions and their graduates than do those without tenure

Faculty members serving in contingent appointments . . . do not have the protections of academic freedom that come with tenure. They do not have institutional support for pursuing the scholarship that serves as continuing education for college and university professors and often do not have the freedom or the time to research controversial topics. Contingent faculty members find that renewal of their appointments depends more on their ability to please students than their ability to conduct rigorous classes that force students to think critically about the material they are learning. [T]he major predictor of cognitive performance is rigorousness of instruction. We are not surprised by a lack of rigor in a system where 75 percent of the instructors are off the tenure track and therefore constantly worried about losing their jobs if they push their students too hard. [R]igor requires investing in the faculty members expected to provide it.

teach the fundamental skills of legal analysis, research, and writing, undermines the Standards' shift to outcomes assessment by marginalizing legal writing faculty, who have long-established expertise in assessment.

III. Discrimination based on field of study has a disparate impact on women and minorities.

Current disparities between categories of faculty have a disproportionate impact on women and minorities and are detrimental to legal education. Accreditation standards permitting differential terms and conditions of employment for full-time legal writing and clinical faculty cannot be reconciled with Standard 211(a), which mandates that schools “foster and maintain equality of opportunity in legal education” and prohibits employment “discrimination or segregation on the basis of race, color, religion, national origin, gender, sexual orientation, age or disability.”⁹

As we noted in our November 11 presentation to the Committee, full-time legal writing faculty include a disproportionately large number of women and a disproportionately small number of racial minorities as compared to full-time clinical and casebook faculty.¹⁰ By relegating legal writing teachers to Standard 405(d) and permitting law schools to offer substantially worse employment status to full-time legal writing faculty, the ABA has permitted accredited law schools to create and maintain a caste system in legal education, to the detriment of students as well as women in legal education.¹¹

AAUP Committee on Economic Status, *It's Not Over Yet: The Annual Report on the Economic Status of the Profession 2010-11*, at 9-10, (Mar.-Apr. 2011), available at <http://www.aaup.org/NR/rdonlyres/17BABE36-BA30-467D-BE2F-4C37325549A/0/zreport.pdf>.

⁹ 2011-12 ABA Standards for Approval of Law Schools 211(a). “(a) A law school shall foster and maintain equality of opportunity in legal education, *including employment of faculty* and staff, without discrimination or segregation on the basis of race, color, religion, national origin, gender, sexual orientation, age or disability.” *Id.* (emphasis added); see Morrison Torrey, *Actually Begin to Satisfy ABA Standards 211(a) and 212(a): Eliminate Race and Sex Bias in Legal Education*, 43 Harv. Civ. Rights-Civ. Lib. L. Rev. 615, 616 (2008) (offering a “radical proposal . . . to actually satisfy these standards”). Standard 211 is grounded in federal law. For example, Department of Education regulations prohibit gender discrimination and segregation in employment. 34 C.F.R. § 106.51(a)(2) (2010); see also *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512 (1982) (upholding § 106.51 as consistent with § 901(a) of Title IX of the Education Amendments of 1972).

¹⁰ See Attachment I (ALWD presentation distributed to SRC on November 11, 2011); see also Syverud, *supra* note 4, at 14-15 (describing legal writing faculty as “lower caste,” despite the dramatic evolution in the teaching of legal writing, lawyering, advocacy and research courses).

¹¹ See Syverud, *supra* note 4, at 16 (“legal writing faculty are always present in disproportionate numbers at experienced teaching conferences”); *id.* at 18 (“Strong caste lines discourage dissemination of best practices where, as in legal education, it is lower castes that have been more responsive and innovative in applying learning theory inside and outside the classroom.”).

In AALS member schools, 70% of legal writing faculty are women, while just over 30% of professors who teach other than clinical or legal writing courses are women. The continued disparity between the protection afforded law faculty in general under Standard 405(b) and protection provided legal writing faculty under Standard 405(d) dramatically and disproportionately disadvantages women in the legal academy. Furthermore, the low status of legal writing faculty discourages racial minorities from seeking positions teaching in this field.¹² Mentors are likely to tell prospective faculty candidates of color to avoid the double burden of being a racial minority in a low-caste segment of the legal academy.¹³

IV. Concerns that granting equal job security to full-time legal writing and clinical faculty would increase the costs of legal education are unfounded and misplaced. Tenure does not guarantee salary; nor is salary parity an appropriate consideration in law school accreditation.¹⁴

The primary argument advanced in favor of eliminating tenure is flexibility or, more specifically, saving money. But salary and security of position are distinct issues.

It is well known that salaries for even tenured law school professors are substantially less than the earnings they could generate from private law practice.¹⁵ Tenure does not guarantee a particular salary. Academic salaries differ based on a host of factors, always subject to contract negotiations between the individual faculty member and the law school administration.

A noted scholar in economics has observed that “[one] problem with the standard critique of tenure is that while tenure guarantees a lifetime job under most circumstances,

¹² Teri A. McMurtry-Chubb, *Writing at the Master's Table: Reflections on Theft, Criminality, and Otherness in the Legal Writing Profession*, 2 Drexel L. Rev. 41, 57-60 (2009).

¹³ See *id.* at 60 (“Giving LRW faculty greater autonomy over their curriculum and classroom would allow women of color to use their unique perspectives and experiences to shape the writing curriculum and minimize negative perceptions about their quality as faculty and scholars.”).

¹⁴ See *United States v. Am. Bar. Ass’n*, 934 F. Supp. 435, 436 (D.D.C. 1996) (enjoining ABA from adopting “any Standard, Interpretation, or Rule, or taking any action that has the purpose or effect of imposing requirements as to the base salary, stipends, fringe benefits, or other compensation paid . . . faculty . . . or other law school employees, or in any way conditioning the accreditation of any law school on the compensation paid . . . faculty . . . or other law school employees”). While the terms of the Consent Decree expired on June 25, 2006, the Council has repeatedly announced that it will voluntarily continue to comply with its substantive provisions. E.g. ABA Council of Legal Education and Admissions to the Bar, *2011-12 ABA Standards for Accreditation of Law Schools Preface*, at v.

¹⁵ See Elizabeth Mertz, et al., *After Tenure: Post-Tenure Law Professors in the United States* 26 n.7 (Am. Bar Found. 2011).

it does not guarantee a lifetime of salary increases.”¹⁶ The example of postgraduate medical education illustrates the lack of relationship between tenure and salary: “[G]aining tenure does not necessarily mean medical school faculty members are guaranteed a particular salary.”¹⁷

V. Cost pressures in legal education are the result of a number of factors, none of which justify accreditation standards pertaining to terms and conditions of employment that allow law schools to violate the prohibitions in Standard 211 against unequal treatment and segregation of full-time law faculty.

ALWD shares the Committee’s goal of improving the quality of legal education as well as its concerns regarding the rising cost of legal education. But accreditation standards that condone unequal treatment and segregation among law faculty, in particular Standard 405 as currently worded, cannot be justified by arguments that it is not feasible to remedy these inequities in difficult economic times.

A number of scholars have noted the various reasons for the increasing costs of legal education.¹⁸ Those reasons do not include ABA accreditation standards. In 2009,

¹⁶ Jeffrey A. Miron, *The Economics of the Tenure System*, Lib. of Econ. & Liberty (Sept. 24, 2001), available at <http://www.econlib.org/library/Columns/Mirontenure.html>. Miron is currently Professor and Director of Undergraduate Studies in the Economics Department at Harvard University. He holds a Ph.D. in Economics from MIT.

¹⁷ American Academy of Family Physicians, *AAMC Survey: Tenure Does Not Guarantee Salary in U.S. Medical Schools* (May 24, 2010), available at <http://www.aafp.org/online/en/home/publications/news/news-now/professional-issues/20100524tenure.printerview.html> (citing Ass’n of Am. Med. Colleges Analysis in Brief: *The Relationship between Tenure and Guaranteed Salary for U.S. Medical School Faculty* (Apr. 2010), available at https://www.aamc.org/download/125190/data/aibvol9_no6.pdf.) As AAMC acknowledges, “[t]his shift in policy is an explicit alteration of the economic security component of tenure, as originally outlined by the American Association of University Professors in 1940.” Ass’n of Am. Med. Colleges Analysis in Brief: *The Relationship between Tenure and Guaranteed Salary for U.S. Medical School Faculty* (April 2010); see also Mandy Liu & William T. Mallon, *Tenure in Transition: Trends in Basic Science Faculty Appointment Policies at U.S. Medical Schools*, 79 Acad. Med. 205, 208 (No. 3 Mar. 2004) (discussing the declining trend over time in the number of medical schools offering specific financial guarantees for tenured faculty). See generally Lawrence White, *Academic Tenure: Its Historical and Legal Meanings in the United States and Its Relationship to the Compensation of Medical School Faculty Members*, 44 St. Louis L. J. 51, 75-78 (2000) (reviewing cases upholding reductions in salary for tenured medical school faculty members). “In the last two years, several lawsuits and grievances have been filed challenging efforts by academic medical centers to revise compensation policies for tenured faculty members. To date, none of these legal challenges has led to a court decision establishing a link between tenure and protection against salary reduction.” *Id.* at 76.

¹⁸ E.g. James R. P. Ogloff, et al., *More Than “Learning to Think Like a Lawyer”: The Empirical Research on Legal Education*, 34 Creighton L. Rev. 73, 232-234 (2000); John A. Sebert, *The Cost and Financing of Legal Education*, 52 J. Legal. Educ. 516, 519-521 (2002).

the General Accountability Office (GAO) conducted a performance audit in response to a mandate of the Higher Education Opportunity Act.¹⁹ In its findings, the GAO found that for most law schools, ABA “accreditation requirements were not a major driver of cost increases in legal education.”²⁰ While survey participants noted that increased emphasis on hands-on skills instruction was a factor, more than half said “they would meet or exceed some ABA accreditation standards *even if they were not required*,”²¹ observing that the “standards often follow market trends and changing approaches to legal education.”²²

That is certainly true with respect to SRC’s revised standards that require law schools to focus on student learning outcomes to ensure that legal education prepares students to be practice-ready. To meet the demands of prospective students and employers alike, law schools have an obligation to offer educational experiences—like legal analysis, research, and writing courses and clinical skills courses—that integrate professional skills with legal doctrine.²³

Moreover, the GAO report cited other factors as contributing significantly to cost pressures in legal education. For example, public law schools reported that continuing declines in state funding led to rising tuition costs for students. In addition, law school officials reported that competition for rankings is another primary factor driving up the cost of legal education.²⁴ The costs of legal education are driven by a number of factors other than faculty salaries, including merit-based scholarships (awarded largely to high LSAT scoring applicants in order enhance U.S. News and World Report rankings),

¹⁹ U.S. Gov’t Accountability Office, *Higher Education: Issues Related to Law School Cost and Access*, GAO-10-20 (Oct. 2009), at 7, available at <http://www.gao.gov>.

²⁰ *Id.* at 22 (emphasis added).

²¹ *Id.* (emphasis added).

²² *Id.*

²³ See, e.g., Jarrod J. Green, *A Play on Legal Education*, 4 Phoenix L. Rev. 331, 387 (2010) (“An integrative model of cooperation is one example that can be provided and facilitated by all the characters [in legal education] to provide a better end product.”); Nancy L. Schultz, *How Do Lawyers Really Think?* 42 J. Legal Educ. 57, 64 (2008) (“Allowing students to integrate skills and doctrine while still in school, with time to think about the whys and wherefores, should make them better, more responsive and responsible lawyers.”); William R. Trail & William D. Underwood, *The Decline of Professional Legal Training and a Proposal for Its Revitalization in Professional Law Schools*, 48 Baylor L. Rev. 201, 203 (1996) (outlining “a program for making cost-effective skills training a central component of the law school curriculum”; “Law schools can fill the void, but doing so will require reconsidering accepted truths in legal education as well as reallocating resources.”)

²⁴ U.S. Gov’t Accountability Office, *supra* note 19, at 7.

technology, administration, and enhancements and modifications to infrastructure, including new buildings.

VI. Numerous studies demonstrate that the job security associated with tenure increases productivity, innovation, and organizational effectiveness.

The protections afforded by tenure will likely benefit legal education. Studies have shown that job security enhances productivity and, correspondingly, employees become less innovative when their jobs become insecure.²⁵ “The findings involving . . . resistance to change are consistent across studies. . . . The positive correlation between job insecurity and resistance to change . . . appears to contradict rational behavior. Specifically, one would expect insecure employees to welcome adaptive change because it should make their jobs more secure by counteracting organizational decline.”²⁶ However, this is not the case. The innovation-averse behaviors manifested by employees who lack job security “have organizational consequences in the form of impaired productivity, increased turnover, and barriers to adaptation. All of these reduce organizational effectiveness.”²⁷

Clinical and legal writing faculty are among the most recent additions to the legal academy. Because of the extraordinary time commitments associated with their teaching obligations,²⁸ many were historically not required to produce scholarship. That is no longer the case.²⁹ In fact, many clinicians and legal writing faculty have become productive scholars, even when their positions have not required scholarship.³⁰ Moreover, these

²⁵ See, e.g., Leonard Greenhalgh & Zehava Rosenblatt, *Job Insecurity: Toward Conceptual Clarity*, 9 Acad. of Mgmt. Rev. 438, 443 (1984) (“relationships have been documented between job insecurity and reduced work effort, propensity to leave, and resistance to change”).

²⁶ *Id.*

²⁷ *Id.*

²⁸ In addition to the normal teaching obligations of class preparation and class meetings, most skills faculty also devote significant time to individual teaching. Legal writing faculty, for example, may devote 10-20 hours of individual teaching time per semester to *each* student. This time consists of individual critiques of student work, individual student conferences, and the like. The faculty time devoted to individual student-focused work is one of the strengths of skills courses, and it is one of the reasons those courses provide such high value to students. Further, individualized teaching is a hallmark of quality legal education. Students need one-on-one teaching, and they have a right to receive it given the high tuition they pay.

²⁹ See *Report of the Annual Legal Writing Survey 2011*, at 60, 78 (Ass’n of Legal Writing Directors & Legal Writing Inst. 2011) (reporting obligations and expectations of legal writing faculty to produce scholarship), available at <http://www.alwd.org/surveys/2004-2011.html>.

³⁰ See, e.g., Almas Khan, *A Compendium of Legal Writing Sources*, 50 Washburn L.J. 395 (2011); Terrill Pollman & Linda H. Edwards, *Scholarship by Legal Writing Professors: New Voices in the Legal Academy*, 11 J. Legal Writing Inst. 3 (2005) (extensive bibliography of scholarship by legal writing professors). Professors

positions showcase the type of outcomes assessment the ABA standards envision as legal education continues to evolve and improve. Thus, there is no justifiable reason to discriminate against these equally productive categories of full-time academics with respect to academic freedom, governance rights, and job security. In fact, legal writing and professional skills faculty are likely to become even *more* productive and innovative if ABA-accredited law schools are required to extend the same terms and conditions of employment to all full-time faculty without regard to field of teaching.

ALWD recognizes that the recommended revisions to Standard 405 will result in significant changes for many law schools. Therefore, a reasonable transition period is appropriate before the revised standards take effect.

VII. The requirements for calculating student-teacher ratios in current Interpretation 402-1 should be retained.

As ALWD noted in its presentation to SRC on November 11, the student-teacher ratios currently in Interpretation 402-1 are critical to ensure uniformity in reporting the ratio of students to full-time equivalent teaching faculty. The existing ratios forbid law schools from counting faculty members as “full time” when they deny them the equivalent rights and responsibilities of tenure-track faculty. These ratios have provided an incentive to law schools to provide at least 405(c)-equivalent contracts to legal writing faculty. Had it not been for the ratios currently embodied in Interpretation 402-1, the disparities between legal writing faculty and other full-time law faculty would be considerably worse than they are now.

Prospective students rely on accurate data from ABA-accredited law schools to make informed decisions about where to attend law school. Without an ABA-approved methodology for reporting this important statistical data, law schools are likely to come up

Pollman and Edwards note that some law faculties express antipathy to topics related to legal writing, and they explore the possible reasons for those attitudes. Pollman & Edwards, *supra*, at 11-14. But as the authors note,

there is no legitimate reason to discourage legal writing professors from writing in their own field. Many legal writing topics are solidly within the canon of legal scholarship, have been the subject of work by well-respected legal scholars for many years, and have been evaluated by law faculties with ease. Other legal writing topics are more interdisciplinary, empirical, or otherwise innovative. These topics may be new to the imagination of the legal academy, but their relationship to law and to the advancement of legal knowledge is clear. Still other legal writing topics fall within larger categories of pedagogical or political articles. The viability of those topics as legal scholarship depends not on their relationship to legal writing but on a particular faculty's assessment of pedagogical or political scholarship in general. Whatever a faculty decides about pedagogy or politics, the decision should not be articulated with reference to any particular course.

Id. at 56.

with their own methods for calculating ratios in order to attract applicants. Those methods would have no consistency as each school develops a formula that flatters itself. Student-teacher ratios would join misleading employment and salary data in the category of untrustworthy statistics.

In conclusion, ALWD appreciates the opportunity to submit our specific recommendations, and we respectfully ask that you forward this letter to the members of the subcommittee you have appointed to consider Standard 405 and related provisions.

Very truly yours,



J. Lyn Entrikin
ALWD President



Anthony Niedwiecki
ALWD President-Elect

Attachments:

- Recommended Revisions to Current Standards
- Copy of materials presented to SRC, Nov. 11, 2011 Open Forum

Attachment I

Recommended Revisions to Current Standards (Redlined to Current Standards)

108. DEFINITIONS

(8) **“Full-time faculty member”** means an individual 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, and whose outside professional activities, if any, do not unduly interfere with his or her responsibilities as a faculty member.

405. PROFESSIONAL ENVIRONMENT

(a) A law school shall establish and maintain conditions adequate to attract and retain a competent full-time faculty sufficient to comply with the Standards and to accomplish its mission.

(b) A law school shall have ~~an established and announced policy with respect to a written~~ policy and procedures that protect the academic freedom of its full-time faculty in (1) exercising their teaching responsibilities, including those related to client representation in clinical programs, (2) pursuing their scholarship and research activities, and (3) engaging in law school related public service activities and tenure of which Appendix 1 herein is an example but is not obligatory. Academic freedom includes meaningful participation in law school governance.

(c) For all full-time faculty, a law school shall have an established and announced policy providing for tenure. Appendix 1 is an example that presumptively complies with this Standard, but a law school may develop another policy as long as it meets the requirements of this Standard.

(d) A law school shall not discriminate in its provision of security of position, academic freedom, governance rights, or other rights and privileges of full-time faculty membership based on a faculty member's field of study or method of teaching.

(e) This Standard does not preclude a limited number of fixed, short-term appointments predominantly staffed by full-time faculty members, nor does it preclude a law school from offering fellowship or visiting assistant professor programs designed to produce candidates for full-time teaching by offering individuals supervised teaching experiences of limited duration, so long as short-term appointments are not limited to particular fields of study or methods of teaching.

~~(e) A law school shall afford to full-time clinical faculty members a form of security of position reasonably similar to tenure, and non-compensatory perquisites reasonably similar to those provided other full-time faculty members. A law school may require these faculty members to meet standards and obligations reasonably similar to those required of other full-time faculty members. However, this Standard does not preclude a~~

~~limited number of fixed, short term appointments in a clinical program predominantly staffed by full time faculty members, or in an experimental program of limited duration.~~

~~(d) A law school shall afford legal writing teachers such security of position and other rights and privileges of faculty membership as may be necessary to (1) attract and retain a faculty that is well qualified to provide legal writing instruction as required by Standard 302(a)(3), and (2) safeguard academic freedom.~~

Interpretation 405-1

A fixed limit on the percent of ~~a law~~ full-time faculty, or any category of full-time faculty based on field of study or method of teaching, that may hold tenure under any circumstances violates the Standards.

Interpretation 405-2

The law school's written policy to protect the academic freedom of its full-time faculty members must provide procedures (a) to ensure that its policy is followed, including rules that prohibit the non-renewal, denial of promotion, or loss of a faculty position, unless a representative group of law or university faculty agree that the determination does not violate academic freedom and (b) that offer the affected faculty member the opportunity to present any claims to the faculty, or a subset thereof. A law school may support its compliance with Standard 405(b) by presenting evidence of its, or its university's, explicit acceptance of the protections of the 1940 AAUP Statement of Principles on Academic Freedom and Tenure and its 1970 Interpretive Comments.

Interpretation 405-2

A law faculty as professionals ~~should not be required to be a part of the general university bargaining unit.~~

Interpretation 405-3

A law school shall have a comprehensive system for evaluating full-time faculty candidates for promotion and tenure, including written criteria and procedures that are made available to the faculty.

Interpretation 405-4

A law school not a part of a university in considering and deciding on appointment, termination, promotion, and tenure of full-time faculty members ~~should~~ must have procedures that contain the same principles of fairness and due process that should be employed by a law school that is part of a university. If the dean and faculty have made a recommendation that is unfavorable to a candidate, the candidate ~~should~~ must be given an opportunity to appeal to the president, chairman, or governing board.

Interpretation 405-5

If the dean and faculty have determined the question of responsibility for examination schedules and the schedule has been announced by the authority responsible for it, it is not a violation of academic freedom for a member of the law faculty to be required to adhere to the schedule.

Interpretation 405-6

~~A form of security of position reasonably similar to tenure includes a separate tenure track or a program of renewable long term contracts. Under a separate tenure track, a full time clinical faculty member, after a probationary period reasonably similar to that for other full time faculty, may be granted tenure. After tenure is granted, the faculty member may be terminated only for good cause, including termination or material modification of the entire clinical program. A program of renewable long term contracts shall provide that, after a probationary period reasonably similar to that for other full time faculty, during which the clinical faculty member may be employed on short term contracts, the services of a faculty member in a clinical program may be either terminated or continued by the granting of a renewable long term renewable contract. For the purposes of this Interpretation, "long term contract" means at least a five year contract that is presumptively renewable or other arrangement sufficient to ensure academic freedom. During the initial long term contract or any renewal period, the contract may be terminated for good cause, including termination or material modification of the entire clinical program.~~

Interpretation 405-7

~~In determining if the members of the full time clinical faculty meet standards and obligations reasonably similar to those provided for other full time faculty, competence in the areas of teaching and scholarly research and writing should be judged in terms of the responsibilities of clinical faculty. A law school should develop criteria for retention, promotion, and security of employment of full time clinical faculty.~~

Interpretation 405-6

In determining whether a member of the full-time faculty meets the criteria for tenure, a law school may consider the respective faculty member's responsibilities for teaching, service, and scholarship, consistent with Standard 405(a).

Interpretation 405-87

~~A law school shall afford to full time clinical faculty members- For the purposes of this Standard, "meaningful participation in law school governance" means participation voting rights in faculty meetings, committees, and other aspects of law school governance involving matters such as mission and direction of the law school, including academic matters such as appointments, curriculum, academic standards, and methods of instruction, in a manner reasonably similar to other full-time faculty members. With respect to decisions concerning retention, promotion, or grant of tenure, this Interpretation does not preclude a law school from restricting or withholding governance rights of faculty members junior to the person who is being considered for retention, promotion, or tenure. This Interpretation does not apply to those persons referred to in the last sentence of Standard 405(e) 405(e).~~

Interpretation 405-9

~~Subsection (d) of this Standard does not preclude the use of short term contracts for legal writing teachers, nor does it preclude law schools from offering fellowship programs designed to produce candidates for full time teaching by offering individuals supervised teaching experience.~~

Proposed Standard 405
(Clean Copy)

405. PROFESSIONAL ENVIRONMENT

(a) A law school shall establish and maintain conditions adequate to attract and retain a competent full-time faculty sufficient to comply with the Standards and to accomplish its mission.

(b) A law school shall have a written policy and procedures that protect the academic freedom of its full-time faculty in (1) exercising their teaching responsibilities, including those related to client representation in clinical programs, (2) pursuing their scholarship and research activities, and (3) engaging in law school related public service activities. Academic freedom includes meaningful participation in law school governance.

(c) For all full-time faculty, a law school shall have an established and announced policy providing for tenure. Appendix 1 is an example that presumptively complies with this Standard, but a law school may develop another policy as long as it meets the requirements of this Standard.

(d) A law school shall not discriminate in its provision of security of position, academic freedom, governance rights, or other rights and privileges of full-time faculty membership based on a faculty member's field of study or method of teaching.

(e) This Standard does not preclude a limited number of fixed, short-term appointments predominantly staffed by full-time faculty members, nor does it preclude a law school from offering fellowship or visiting assistant professor programs designed to produce candidates for full-time teaching by offering individuals supervised teaching experiences of limited duration, so long as short-term appointments are not limited to particular fields of study or methods of teaching.

Interpretation 405-1

A fixed limit on the percent of full-time faculty, or any category of full-time faculty based on field of study or method of teaching, that may hold tenure under any circumstances violates the Standards.

Interpretation 405-2

The law school's written policy to protect the academic freedom of its full-time faculty members must provide procedures (a) to ensure that its policy is followed, including rules that prohibit the non-renewal, denial of promotion, or loss of a faculty position, unless a representative group of law or university faculty agree that the determination does not violate academic freedom and (b) that offer the affected faculty member the opportunity to present any claims to the faculty, or a subset thereof. A law school may support its compliance with Standard 405(b) by presenting evidence of its, or its university's, explicit acceptance of the protections of the 1940 AAUP Statement of Principles on Academic Freedom and Tenure and its 1970 Interpretive Comments.

Interpretation 405-3

A law school shall have a comprehensive system for evaluating full-time faculty candidates for promotion and tenure, including written criteria and procedures that are made available to the faculty.

Interpretation 405-4

A law school not a part of a university in considering and deciding on appointment, termination, promotion, and tenure of full-time faculty members must have procedures that contain the same principles of fairness and due process that should be employed by a law school that is part of a university. If the dean and faculty have made a recommendation that is unfavorable to a candidate, the candidate must be given an opportunity to appeal to the president, chairman, or governing board.

Interpretation 405-5

If the dean and faculty have determined the question of responsibility for examination schedules and the schedule has been announced by the authority responsible for it, it is not a violation of academic freedom for a member of the law faculty to be required to adhere to the schedule.

Interpretation 405-6

In determining whether a member of the full-time faculty meets the criteria for tenure, a law school may consider the respective faculty member's responsibilities for teaching, service, and scholarship, consistent with Standard 405(a).

Interpretation 405-7

For the purposes of this Standard, "meaningful participation in law school governance" means voting rights in faculty meetings, committees, and other aspects of law school governance involving matters such as mission and direction of the law school, including academic matters such as appointments, curriculum, academic standards, and methods of instruction, in a manner reasonably similar to other full-time faculty members. With respect to decisions concerning retention, promotion, or grant of tenure, this Interpretation does not preclude a law school from restricting or withholding governance rights of faculty members junior to the person who is being considered for retention, promotion, or tenure. This Interpretation does not apply to those persons referred to in Standard 405(e).

Attachment II

ALWD

ASSOCIATION OF LEGAL WRITING DIRECTORS

Standards Review Committee
Open Meeting – Chicago, Illinois
November 11, 2011

Supplement to the Testimony of Anthony Niedwiecki, President-Elect
Association of Legal Writing Directors (ALWD)

- **Successful transition to a learning outcomes-based regime for evaluating legal education will depend on the leadership of experienced skills professors with security of position and governance rights.**

- **ABA standards and federal regulations on nondiscrimination and diversity in legal education cannot be achieved under existing or proposed standards for security of position.**

- **Failure to remedy contradictions in existing and proposed standards will seriously impair the ABA's ability to assure quality legal education for our students and prepare them for the practice of law.**

Learning Outcomes and Tenure

ALWD fully supports the committee's learning outcomes approach to legal instruction. We have offered various suggestions for improving the rigor of the proposed standards and interpretations: increasing the emphasis on ethical and professional judgment, encouraging additional formative assessment tools, and enumerating professional skills expected of all law school graduates.

The legal writing community is a valuable resource for the transition to an outcomes-based regime. Our traditional model of instruction has always relied on formative assessment of clearly defined student learning outcomes. As experts in this area, we are committed to working with other members of the legal academy to improve the quality of legal education.

Our ability to support this transition, however, is severely limited by existing Standard 405(d), which relegates us to a position of inferiority within the legal academy. While we have the knowledge and experience to facilitate the transition in our respective schools, too often we lack the voice. Even if we are admitted to decision-making councils – and all too often we are excluded – we legitimately fear for our jobs if we speak out against the inevitable resistance from tenured faculty members who seek to preserve the status quo. The successful transition to outcome-based standards may depend on safeguarding our academic freedom.

Neither alternative proposal for changes in Standard 405 requires a law school to provide tenure. Without the opportunity for tenure, the current caste system that locks legal writing faculty into a subordinate position will be frozen in place or, worse, law schools will “race to the bottom” in hiring skills professors. Although few if any tenured professors will “lose” tenure under the standards, faculty members across the country have petitioned the committee to preserve it. Do not destroy the opportunity for those of us who aspire to become full participants in the leadership of the law schools by eliminating tenure and its accompanying governance rights.

Student Faculty Ratios

The reputation and credibility of legal education have been severely damaged because of “widespread and systematic” disingenuousness concerning placement rates, graduates’ salaries, so-called “merit” scholarships, and the LSAT’s of incoming classes. Schools are being accused of consumer fraud both in court and in the press. The ABA itself is being excoriated for lax accreditation requirements that have failed to prevent law schools from engaging in Enron-style accounting. Senators of both political parties have asked the DOE to investigate legal education and ABA accreditation with a view toward corrective legislation.

But schools have *not* been accused of falsely advertising their faculty/student ratios. That is because the Standards regulate quite efficiently on this point by requiring every law school to follow the Interpretation 402-1 formula. If that formula were deleted from the Standards, schools would decide for themselves how to compute their ratios, which they would then advertise. It is foreseeable that some schools would come up with formulae that create misleading impressions of their faculty resources — and the ABA would be accused of inviting schools to misrepresent those ratios when it deleted these two interpretations.

Eliminating the formula for calculating ratios will further exacerbate our situation. Today, only a professor with security of position and full governance rights may be counted as one full faculty member. That has served as an incentive at some, albeit relatively few, schools to place legal writing faculty on a tenure track.

If the standardized formula is eliminated, that incentive will also be eliminated, and law schools will be free to count any classroom teacher as a full faculty member.

We have seen law schools “game the system” with job placement statistics; we can expect more of the same with student-faculty ratios. These potential problems will be obvious to the press, the DOE, the senators who are concerned, and the Council. Interpretations 402-1 and 402-2 should be returned to their original form.

Nondiscrimination & Diversity

Nondiscrimination and diversity requirements cannot be achieved under existing or proposed standards for security of position. Failure to provide full security of position and governance rights to legal writing faculty will have a disparate impact on women and minorities, undermining the anti-discrimination and diversity commitments of the ABA and the Department of Education.

A disproportionate percentage of legal writing faculty are women. In AALS member schools, 70% of legal writing faculty are women, while just over 30% of professors who teach other than clinical or legal writing courses are women. The continued disparity between the protection afforded law faculty in general under Standard 405(b) and protection provided legal writing faculty under Standard 405(d) dramatically and disproportionately disadvantage women in the legal academy.

Standard 211 reflects the nondiscrimination mandate of federal statutes and regulations that govern the ABA’s accreditation function. It cannot be reconciled with either existing or proposed standards for security of position and governance rights. And, rather than create a level playing field, eliminating even the opportunity for tenure will result in intractable discrimination by gender.

Men and women of color are reluctant to consider legal writing as a viable teaching specialization in the legal academy. The doubly stigmatizing effect of being a person of color and teaching a subject already stigmatized by Standard 405(d) yields exactly the opposite result that ABA-accredited law schools should be creating as required by Standards 211 and 212.

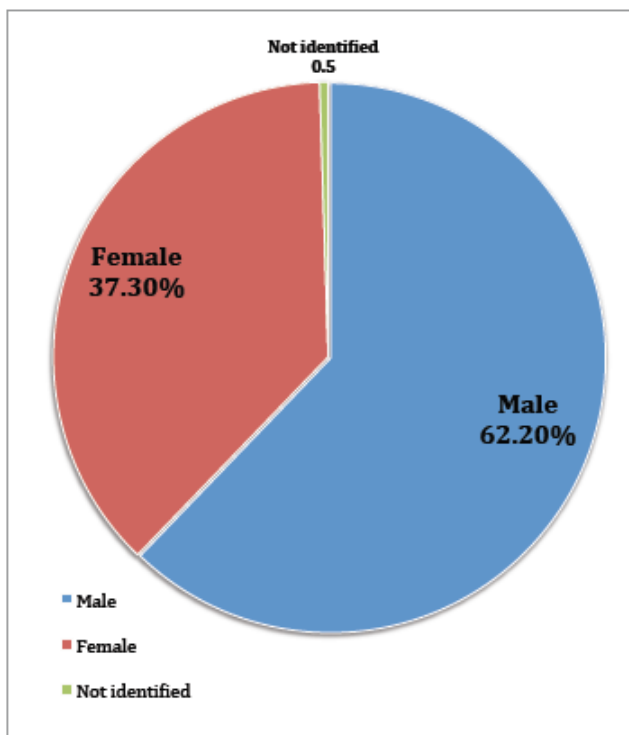
The resulting absence of persons of color also inhibits our teaching effectiveness among diverse student populations. We are not suggesting that only minority teachers can teach minority students, but rather that all of our efforts to serve those students will be enhanced by the presence of teachers of color as we develop our curricula, counsel our students, and assess their performance.

We should be represented here, too. While we appreciate the opportunity to present our case, only one legal writing professor, a man, has ever served on the Standard Review Committee – even though we became a field of specialty, with career teachers, in the early 1980s. After the controversies of the past two years, a

commendable effort has been made to include on SRC past presidents of CLEA and AALS – but no one from ALWD.

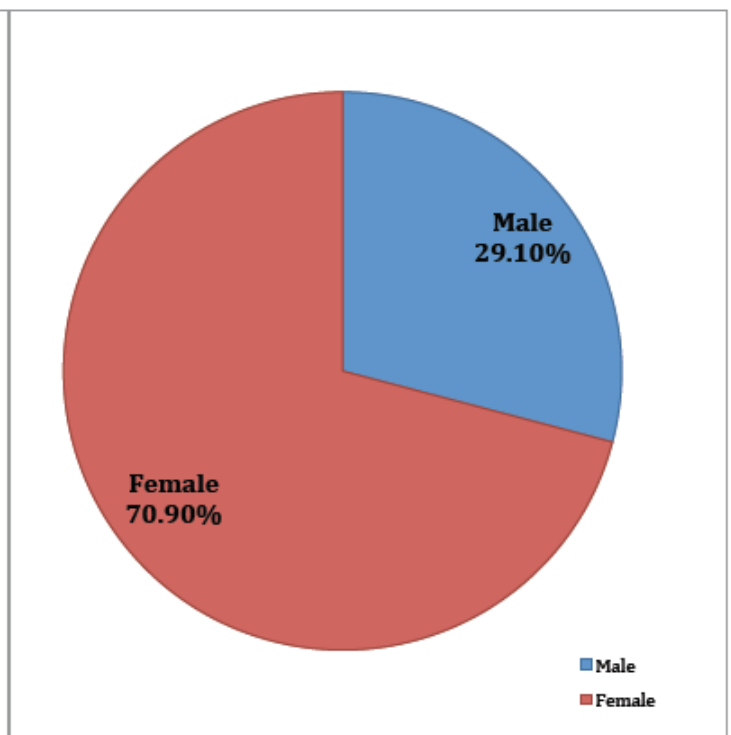
None of this is lost on our students. They see women treated as second-class faculty members, and legal writing as an unimportant subject. The message comes through loud and clear. If legal writing is not important enough to warrant tenured and tenure-track faculty members, it must not be very important to the practice of law. For the ABA to reinforce that perception through its accreditation standards would make a mockery of all the hard and valuable work this committee has been doing over the past several years.

**Gender Distribution of All AALS Law Faculty
2008-2009
(Tenure and Contract)***



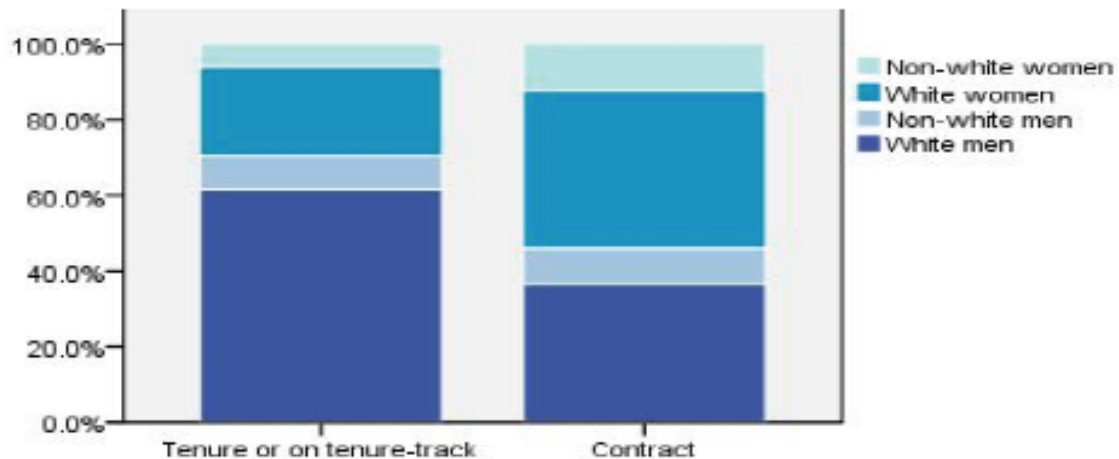
***2008-2009 AALS Statistical Report on Law Faculty**
(available at <http://www.aals.org/statistics/2009dlt/gender.html>)

**Gender Distribution of Legal Writing Faculty
2010-2011****



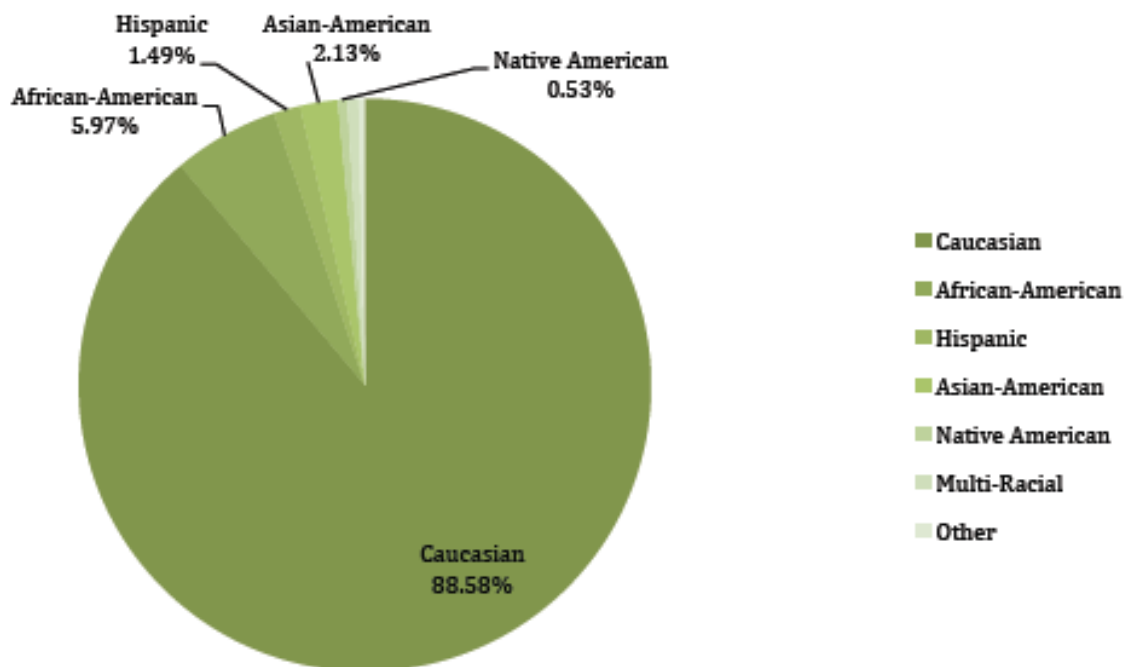
****2011 ALWD/LWI Annual Survey Report (187 schools responding)**
(available at http://www.alwd.org/surveys/survey_results/2011_LWI_ALWD_Survey.pdf)

Composition of Tenure and Contract Faculty*



*2008-2009 AALS Statistical Report on Law Faculty
(available at <http://www.aals.org/statistics/2009dlt/security.html>)

Racial Distribution of LRW Faculty**



**Question 71 (b), 2011 ALWD/LWI Annual Survey Report (187 schools responding)
(available at http://www.alwd.org/surveys/survey_results/2011_LWI_ALWD_Survey.pdf)