THE HISTORY OF AMERICAN BAR ASSOCIATION STANDARD 405(D): ONE STEP FORWARD, TWO STEPS BACK

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Abstract

The American Bar Association (ABA) Accreditation Standards include a provision that addresses the type of security of position that law schools must provide for faculty. Historically, that standard—405—has differentiated security of position for faculty based upon what they teach. Doctrinal faculty tend to enjoy tenure under standard 405(b). Faculty who teach clinical courses are addressed in standard 405(c), which provides security of position "reasonably similar to tenure." Faculty who teach legal writing are addressed in standard 405(d) and their security of position must simply be that which is "necessary to (1) attract and retain a faculty that is well qualified to provide legal writing instruction as required by Standard 302(a)(2), and (2) safeguard academic freedom."

Of course, the security of position standards applicable to faculty set forth in standard 405 impact other aspects of standing in the academy, including status and access to governance. The security of position standards therefore have a significant and practical impact on the academic experience of each category of faculty. Specifically, faculty who have tenure enjoy benefits and allowances denied to categories of faculty with less protective security of position.

This Essay traces the development and modification to the form of protection afforded by the standards for legal writing faculty.[1] It also posits, but does not fully develop, a position that the standard's security of position language fails to provide meaningful or adequate protections for this cohort of faculty in the legal academy.[2]

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[1] Portions of this essay have been excerpted in J. Lyn Entrikin, Lucy Jewel, Susie Salmon, Craig T. Smith, Kristen K. Tiscione & Melissa H. Weresh, *Treating Professionals Professionally: Requiring A Security of Position for All Skills-Focused Faculty Under ABA Accreditation Standard 405(c) and Eliminating 405(d)*, 98 OREGON L. REV. (forthcoming 2019) (on file with author).

[2] *See generally id.* In *Treating Professionals Professionally*, members of the Professional Status Committee of the Legal Writing Institute develop in

Introduction

The provision that explicitly relates to legal writing faculty first appeared in the ABA Accreditation Standards in 1996.[3] It is notable that the first articulation of the standard did not explicitly reference security of position, but rather stated: "[L]aw schools employing full-time legal writing instructors or directors shall provide conditions sufficient to attract well-qualified legal writing instructors or directors."[4] The standard has been revised once, in 2001, to refer explicitly to security of position, requiring that law schools "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)(2), and (2) safeguard academic freedom."[5] The protections in Standard 405 did come under review once again during the 2008–2014 ABA comprehensive standards review process.[6] While the language was not changed during that standards review cycle, arguments that were made in

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greater detail the position that the language in Standard 405(d) fails to provide meaningful protection for legal writing faculty. *See generally id*. The article further addresses the consequent impact on how the experience of legal writing faculty members is strained by the hierarchical structure of Standard 405. *Id*. at 38–72. Therefore, despite the appearance in this historical overview that 405(d) was enacted and has evolved to protect legal writing faculty, this author, among others, asserts that 405(d) does not provide sufficient protection. *See generally id*. Arguments made in support of tenure during the 2008–2014 ABA standards review process further prove this insufficiency. *See* Part C and accompanying notes *infra*.

[3] ABA Sec. of Leg. Educ. & Admis. to the Bar, Standards for Approval of Law Schools and Interpretations, Standard 405(d), at 43 (1996), https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/standardsarchive/1996_standards.pdf [hereinafter ABA, 1996 Standards].

[4] *Id*.

[5] ABA Sec. of Leg. Educ. & Admis. to the Bar, Standards for Approval of Law Schools, Standard 405(d), at 36 (2001–2002), https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/standardsarchive/2001_2002_standards.pdf [hereinafter ABA, 2001–2002 Standards].

[6] ABA, *Council Acts on ABA Law School Approval Standards at March 2014 Meeting* (March 2014), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/march2014councilmeeting/2014_march_council_announcment_re_comprehensive_review.pdf.

support of retaining tenure in the standards underscored the serious deficiencies of the protection afforded to legal writing faculty in 405(d).[7]

A. 1996 Adoption: Initial Protections for Legal Writing Faculty

Legal writing faculty were first recognized in the security of position standard in 1996.[8] While there is no definitive legislative history to explain the initial adoption of the security of position standard for legal writing faculty, events leading up to that adoption may yield insight into how, or why, the academy was first influenced to recognize the status of legal writing faculty.

1. Legal Education Conversations Preceding the Adoption of the Standard

It is impossible to determine the precise rationale for the initial version of the security of position standard relating to legal writing faculty, as there is no record of negotiations on the floor when the original standard was passed.[9] Nonetheless, it is helpful to consider certain events in legal education accreditation leading up to the 1996 adoption. These include reports emphasizing the importance of skills training in legal education,[10] the development of a consent decree between the Department of Justice (DOJ) and the ABA,[11] advances made by clinical law faculty which emphasized skills training and

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[7] *See* Entrikin, et al., *supra* note 1, at 32-39.

[8] ABA, 1996 Standards, *supra* note 3, 405(d), at 43.

[9] The commentary associated with the standards revision process is no longer available on the ABA website. Further, the transcript of the House of Delegates meeting in which the new standard was passed reflects no discussion of the new standard. *See* Proceedings for the Annual Meeting of the House of Delegates, 121 Annu. Rep. ABA. 25 (1996) (noting that proponents of the amendment waived their time to speak and the amendment passed).

[10] *See* ABA Sec. of Leg. Educ. & Admis. to the B., *Legal Education and Professional Development — An Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap* (ABA 1992) [MacCrate Report].

[11] U.S. v. Am. B. Ass'n, 934 F. Supp. 435 (D.D.C. 1996), *modified sub nom.* U.S. v. Am. B. Ass'n., 135 F. Supp. 2d 28 (D.D.C. 2001), *and modified*, CIV. A. 95-1211 (RCL, 2001 WL 514376 (D.D.C. Feb. 16, 2001). The consent decree expired on June 25, 2006. *Id.* at 439.

which improved the status of faculty teaching in clinical positions,[12] and a growing awareness of gender disparities in legal education.[13]

a. Increased Emphasis on Skills Instruction

Prior to the adoption of the new legal writing standard, there was an increasing emphasis on skills training in legal education that was facilitated by two, related ABA initiatives. The first was the 1987 ABA National Conference on Professional Skills and Legal Education held in Albuquerque, New Mexico, and the second was the 1988 creation of a Task Force of the ABA Section of Legal Education and Admissions to the Bar.[14] The latter would ultimately produce the MacCrate Report, named for Task Force chairman Robert MacCrate.[15] The MacCrate Report is widely regarded as one of the most significant catalysts for improved skills instruction in legal education.[16] In addition, both ABA initiatives would be masterfully facilitated by Rosalie Wahl, a former Justice of the Minnesota Supreme Court and former clinical law professor, as well as a pioneer in advancing clinical legal education.[17]

Wahl opened the National Conference on Professional Skills. Emphasizing the importance of skills instruction in legal education, she challenged attendees as follows: "The issue then is not whether the law schools should go on teaching legal analysis, or conducting skills training, but which legal analysis and skills the law schools should teach and how much of each."[18] She also questioned why few schools required clinical training and why the ABA Standards, despite their emphasis on teaching professional skills, did not require clinical

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[12] *See generally* Peter A. Joy & Robert R. Kuehn, *The Evolution of ABA Standards for Clinical Faculty*, 75 TENN. L. REV. 183 (2008).

[13] *See* ABA Comm'n on Women in the Profession, *Elusive Equality: The Experiences of Women in Legal Education* (Jan. 1996) [Elusive Equality].

[14] *See* Ann Juergens, *Rosalie Wahl's Vision for Legal Education: Clinics at the Heart*, 30 WM. MITCHELL L. REV. 9, 21-30 (2003) (describing Rosalie Wahl's involvement in both initiatives).

[15] MacCrate Report, *supra* note 10.

[16] Marcy L. Karin & Robin R. Runge, *Toward Integrated Law Clinics That Train Social Change Advocates*, 17 CLINICAL L. REV. 563, 564 (2011) ("There have been some significant catalysts and changes in clinical legal education in that time - the legacy of the MacCrate Report . . . .").

[17] *See* Juergens, *supra* note 14, at 12 (2003).

[18] *Id.* at 22 (citing Symposium, *The American Bar Association's National Conference on Professional Skills and Legal Education*, 19 N.M. L. REV. 1, 7 (1989)).

training.[19] With respect to the impact the conference had on legal education, and particularly skills instruction, one scholar observed, "The conference lasted four days. Participants referred to it for years."[20]

Following her participation in the ABA National conference and with a focus on gaining support for the work of clinical faculty, Wahl, as chair of the Accreditation Committee of the ABA Section of Legal Education and Admissions to the Bar, asked Professor Roy Stuckey, then chair of the Section's Skills Training Committee, to draft a proposal to create the Task Force on professional skills.[21] Stuckey and Wahl laid out seven proposed objectives for the Task Force:

> (1) to survey professional skills instruction programs and document the current status of professional skills instruction in American legal education . . .
> (2) to more specifically define the meaning of Standard 302(a)(iii): "law schools shall provide [adequate] instruction in professional skills . . . ."
> (3) to describe in detail some models of all forms of experiential learning which are designed to enhance professional skills instruction, including simulation courses, other skills courses, and in-house and field placement clinics.
> (4) to address the question of when and how students should obtain supervised live-client practice experience . . .
> (5) to explore how law schools can more effectively involve practicing attorneys and judges in professional skills instruction . . . .
> (6) to create an agenda for accomplishing any changes in legal education which are recommended in the Final Report . . . .
> (7) to assess the needs of law schools for facilities and the other resources they will need to accomplish the agenda described above . . . .[22]

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[19] *Id.* at 22–23.
[20] *Id.* at 24.
[21] *Id.* at 24–26.
[22] *Id.* Juergens noted that the Task Force's proposal was built upon five prior studies that the ABA had conducted which addressed skills training in law schools. Those studies included the following:

> The Report and Recommendations of the Task Force on Lawyer Competency: The Role of the Law Schools of the ABA Section of Legal Education and Admissions to the Bar

The Task Force issued its report, *Legal Education and Professional Development – An Educational Continuum,* better known as the MacCrate Report, in 1992.[23] The MacCrate Report specifically recommended that the ABA accreditation standards be amended "to clarify the 'interaction' between core subjects and skills instruction, and to add language requiring that law schools prepare their graduates not only to qualify for admission to the bar, as the then-current standard stated, but also 'to participate effectively in the legal profession.'"[24]

b. ABA Consent Decree and Recodification of the Accreditation Standards

It was also during this time that the House of Delegates was considering a full recodification of the standards, prompted by both the MacCrate Report but, more significantly, by a 1993 federal antitrust action filed against the ABA by the Massachusetts School of Law.[25] The action was driven by the ABA's decision to deny Massachusetts School of Law provisional accreditation, but it also raised allegations regarding tort, fraud and deceit, and breach of contract.[26] The lawsuit resulted in an investigation of the ABA's accreditation procedures by the Antitrust Division of the DOJ.[27] The

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(1979); The Report and Recommendations of the Special ABA Committee for a Study of Legal Education, Law Schools and Professional Education (1980); The Report and Recommendations of the ABA Task Force on Professional Competence (1983); ABA Commission on Professionalism, "... In the Spirit of Public Service": A Blueprint for the Rekindling of Lawyer Professionalism (1986); Report of the council of the ABA Section of Legal Education and Admissions to the Bar, Long-Range Planning for Legal Education in the United States (1987).

Id. at n. 72.

[23] *See generally* MacCrate Report, *supra* note 10.

[24] Juergens, *supra* note 14, at 30 (citing the MacCrate Report).

[25] Massachusetts Sch. of L. at Andover, Inc. v. Am. B. Ass'n, 107 F.3d 1026 (3d Cir. Cir. 1997).

[26] ABA Sec. of Leg. Educ. & Admis. to the B., *Informational Report from the ABA Board of Governors to the House of Delegates*, SYLLABUS, Spring 1996, at 4, https://www.americanbar.org/content/dam/aba/publications/syllabus/1996_vol27_no2_syllabus.pdf [Syllabus].

[27] Massachusetts Sch. of L. at Andover, Inc., 107 F.3d at 1032.

investigation pointed to specific accreditation criteria that could have anticompetitive effects, including:

> (1) faculty teaching hours:
> (2) leaves of absence, compensated or otherwise, or faculty and other law school staff;
> (3) the calculation of the faculty component of the student-faculty ratios;
> (4) the assessment of the law schools' physical facilities;
> (5) the allocation of resources to a law school by the law school or its parent university; and
> (6) the status of bar preparation courses within the law school curriculum.[28]

The DOJ investigation was completed in 1995 and, at that time, the ABA Board of Governors of the ABA, in consultation with the DOJ and the ABA Section of Legal Education and Admissions to the Bar, negotiated a consent decree to reevaluate the standards in light of concerns raised by the DOJ.[29] While the ABA took the position that the above criteria represented matters within their regulatory oversight,[30] it did agree to form a commission to review the accreditation process. That commission, chaired by Wahl, became known as the "Wahl Commission."[31]

The Wahl Commission produced a report[32] recommending that the ABA continue to administer law school accreditation, but suggesting amendments to certain standards, including those relating to student-faculty ratios, and physical plant and financial resources.[33] With regard to one of the biggest issues implicated in the DOJ investigation, the Wahl Report suggested that the standards no longer address faculty compensation.[34] Further, and related to the ultimate development of the legal writing employment standard, the Wahl

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[28] Syllabus, *supra* note 26, at 4.
[29] *Id.*
[30] *Id.* (characterizing the criteria as "legitimate exercises of educational policy").
[31] *Id.*
[32] *Report of the Commission to Review the Substance and Process of the American Bar Association's Accreditation of American Law Schools* 25 (1995), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/reports/1995_wahl_report.pdf [Wahl Report].
[33] Judith Welch Wegner, *Two Steps Forward, One Step Back: Reflections on the Accreditation Debate*, 45 J. LEG. EDUC. 441, 444 (1995).
[34] *Id.*

Report recommended that the standards impose a requirement that law schools provide all students varied instruction in professional skills.[35]

c. Improved Status for Clinical Faculty

Also during this recodification of the standards, the standard relating to security of position for clinical faculty was enhanced to *require*, rather than *suggest*, that such faculty be afforded security of position reasonably similar to tenure.[36] When the standard addressing clinical faculty was first enacted in 1984, it provided that law schools "should" provide security of position reasonably similar to tenure.[37] This was in spite of earlier recommendations by both the ABA Standards Review Committee and the Council of the ABA Section of Legal Education and Admissions to the Bar (Council) that the standard require such security of position.[38] In the years following the 1984 enactment, clinical faculty were able to demonstrate that the watered-down "should" standard did not have its intended impact because clinical faculty were being denied opportunities to participate in faculty governance and were not enjoying enhanced job security.[39] Recognizing that the non-mandatory language had failed to provide clinical faculty adequate security of position, the ABA changed standard 405(c) to require

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[35] *Id*. ("It also proposed changes in the site evaluation process, including reducing the frequency of inspection of foreign programs, suggesting that the ABA should appoint site teams more promptly and tailor their composition to meet the needs of the school, and clarifying that only violations of standards could jeopardize a school's accreditation (not failure to meet its aspirations).").

[36] Joy & Kuehn, *supra* note 12, at 212 (explaining that the ABA amended 405(c) by replacing the term "professional skills" with "clinical" and by changing the word "should" to "shall").

[37] *Id*. at 205–06 (explaining that "[t]he 1984 version of Standard 405(e) remained the applicable accreditation provision on the status of clinical faculty until continued lack of improvement in the status of clinical faculty led the ABA to revisit the 'should' versus 'shall' issue in 1996").

[38] *Id*. at 195-206 (recommending that the standards be revised to substitute "shall" for "should").

[39] *Id*. (citing an ABA study that concluded, "'In sum, the data produced by this project does not demonstrate that ABA Accreditation Standard 405(e) has improved the status of full-time teachers of professional skills, nor does the data indicate trends which would suggest a probability of significant future progress'").

schools to provide security of position reasonably similar to tenure by changing "should" to "shall."[40]

This enhancement to security of position for clinical faculty may have been influenced by the MacCrate Report's recommendation to enhance skills training, an emphasis that was furthered in changes to the Interpretations of Standard 302 which pertains to the curriculum. The Wahl Commission noted that some commentators to the standards review process, in keeping with the MacCrate Report's focus on skills training, "urged that the Standards be amended to require that law schools focus more heavily on profession-oriented training and skills."[41] Commentators suggested that these practical skills could be incorporated into legal education in a variety of ways, "including direct representation of clients in fieldwork clinics, simulations, and courses in negotiation, mediation, and drafting."[42] Opponents to this position argued that such a change would increase the cost of legal education[43] and would infringe on the freedom of law schools to develop their own curricula.[44] Nonetheless, the 1996 recodification did result in a new articulation of skills education in Interpretation 302-1, which indicated, in part: "Instruction in professional skills need not be limited to any specific skill or list of skills. Each law school is encouraged to be creative in developing programs of instruction in professional skills related to the various responsibilities which lawyers are called upon to meet, using the strengths and resources available to the school."[45]

d. Acknowledgement of Legal Writing Faculty—Fractionally—in the Accreditation Standards

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[40] *Id*. at 212 (noting that the ABA also made changes to Interpretation 405-7 related to the security of position for clinical faculty).

[41] Wahl Report, *supra* note 32, at 20.

[42] *Id*.

[43] *Id*. at 21 ("One commentator predicted that a mandatory requirement of a live-client clinical course for every student would result in the closing of many law schools.").

[44] *Id*. at 20 (noting that such opponents "argued that mandatory skills training is unnecessary because '[i]t does not take very long for a new lawyer to find his way to the courthouse and to discover the nuances of local procedures'").

[45] ABA, 1996 Standards, *supra* note 3, Standard 302, Interpretation 302-1, at 30 (The interpretation included the following suggested methods for skills instruction: "Trial and appellate advocacy, alternative methods of dispute resolution, counseling, interviewing, negotiating, problem solving, factual investigation, organization and management of legal work, and drafting").

In addition, the recodification addressed one significant issue that had been raised in the consent decree – that of computing student-faculty ratios under the standards. When the ABA communicated its acquiescence with the recommendations of the Wahl Commission to the court in connection with the Consent Decree, it reserved action on three issues, one of which was the manner in which faculty were computed for purposes of the student-faculty ratio.[46] With respect to the student-faculty ratio, the Wahl Report recommended that the standard continue to use a quantitative measure for determining the student-faculty ratio.[47] The Wahl Report urged the ABA to make certain that the criteria for determining the student-faculty ratio "be re-examined to ensure that they adequately take into account the contributions of adjunct instructors and faculty members who are still teaching although they have administrative posts or are on research leave or emeritus status."[48]

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[46] Syllabus, *supra* note 26, at 5. The ABA also reserved action on the standard relating to how physical facilities were assessed and the standard that inquired as to allocation of resources between law schools and parent universities. *Id*.

[47] Wahl Report, *supra* note 32, at 25.

[48] *Id*. The commission specifically recommended the following:

> The criteria for assessing student/faculty ratios under the Interpretations of Standard 201 should be re-examined to ensure that they adequately take into account that:
> i) Faculty members who are still teaching although they have administrative posts or are on research leave or emeritus status continue to play an active role in the law school community and therefore should be counted in some proportionate way in assessing student/faculty ratios;
> ii) Adjunct instructors may enrich a law school's curriculum in a variety of ways, including expanding the number and types of course offerings and providing different perspectives. Therefore, it is reasonable to consider the effect of adjuncts on the quality of the academic program in assessing the significance of student/faculty ratios.
> iii) Faculty members with substantial responsibilities outside the law school should not be deemed "full time faculty" for purposes of student/faculty ratios if their outside activities unduly interfere with their obligations as faculty members.

Id. at 25–26.

Prior to the recodification, the student-faculty ratio standard provided: "The law school shall have not fewer than six full-time faculty members, in addition to a full-time dean and a full-time law librarian. It shall have such additional members as are necessary to fulfill the requirements of this

In response, the ABA resolution on the student-faculty ratio endeavored to cover a wide array of faculty, including legal writing faculty.[49] The 1996 recodification of the standards took into account teaching resources in the context of the ratio standard by allowing a school to count faculty employed under 405(b) (tenure) and 405(c) (reasonably similar to tenure) as one faculty member. Additional teaching resources were to be computed as follows:

> (i) teachers on tenure track or its equivalent who have administrative duties beyond those normally performed by full-time faculty members: .5;

Chapter and the needs for its educational program . . . ." ABA Sec. of Leg. Educ. & Admis. to the B., Standards for Approval of Law Schools and Interpretations, Standard 402 (a), at 34 (1995), https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/standardsarchive/1995_standards.pdf. The standard was criticized for failing to address faculty other than those defined as full-time, "one[s] who during the academic year devote[] substantially all working time to teaching and legal scholarship, ha[ve] no outside office or business activities and whose outside professional activities, if any, are limited to those which relate to major academic interests or enrich the faculty member's capacity as scholar and teacher, or are of service to the public generally, and do not unduly interfere with one's responsibility as a faculty member." *Id*. at 402(b), at 34.

[49] The resolution provided:

> RESOLVED, That, in determining whether a law school complies with the Standards, the ratio of the number of full-time equivalent students to the number of full-time equivalent faculty members shall be considered; that, in computing the student-faculty ratio, each full-time teacher on tenure track or with tenure-equivalent status shall be counted as one, and each other teacher (including tenured or tenure track teachers who have administrative duties, or are on partial research leave, or have emeritus status from the tenured faculty, and teach less than a full course load, and administrators and librarians who teach, clinical instructors, writing and other instructors, joint-appointment faculty, adjunct faculty and all other persons who teach at the law school) shall be counted at a fraction of less than one; and that, for the purpose of computing the total number of full-time equivalent faculty; all non-tenure track or non-full-time teachers counted at a fraction of less than one shall not, as so counted, in the aggregate constitute more than 20% of the full-time equivalent faculty.

Informational Report of the Board of Governors, 121 Annu. Rep. ABA 29, 41 (1996).

> (ii) clinicians and legal writing instructors not on tenure track or its equivalent who teach a full load: 0.7; and
> (iii) adjuncts emeriti faculty who teach, non-tenure track administrators who teach, librarians who leach, and teachers from other units of the university: 0.2.[50]

The recognition of legal writing faculty in the student-faculty ratio standard, while at a fractional degree, may have been an important to the ultimate passage of the legal writing employment standard in 405, as the change in the ratio standard was an explicit recognition of non-tenure-eligible, legal writing faculty. In fact, in remarks offered in support of a prior amendment that would have counted clinicians not on 405(c) and legal writing faculty as one full faculty member,[51] Ralph Gabric, then-President of the Illinois Bar Association, argued, "[t]he first change contemplated by this recommendation, would count clinical teachers and legal writing instructors fully in the student/faculty ratio. Putting clinicians and legal writing instructors on a par with the academic faculty *ends their second class status within the academic community*."[52] While an admirable goal, the shortcomings of this rationale are clear given suboptimal conditions for legal writing faculty currently employed under Standard 405(d). Nonetheless, acknowledging faculty without tenure or its equivalent in the ratio standard may demonstrate increased recognition by the ABA of legal writing faculty, and the ABA's subsequent willingness to recognize writing faculty in the security of position standard 405.[53]

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[50] Legislative Draft Recommendation 402-1, 121 Annu. Rep. ABA 592 (1996).
[51] Illinois State B. Ass'n Report, 121 Annu. Rep. ABA 593 (1996). This version was withdrawn and the fractional computation of additional teaching resources was ultimately adopted as part of the recodification. *Id*.
[52] *Id*. (emphasis added). As history has demonstrated, counting legal writing faculty as one under the ratio standard would not likely have ended second class status, as that status has been firmly rooted in the security of position hierarchies instantiated in Standard 405. Nonetheless, the ratio standard was beneficial to legal writing faculty, who could then make the argument that converting their positions to 405(c) security of position would enable a law school to count them as full faculty members for ratio purposes. *See* Melissa H. Weresh, *Form and Substance: Standards for Promotion and Retention of Legal Writing Faculty on Clinical Tenure Track*, 37 GOLDEN GATE U. L. REV. 281, 289–91 (2007) (explaining the benefits for a law school to afford writing faculty 405(c) status in order take advantage of the full point per faculty member for purposes of ratio calculation).
[53] Much of the controversy over the standards addressed in the lawsuit and consent decree involved controversy over the computation of ratios. This might explain why the last issue of Syllabus in 1996, reflecting on the

e. Recognition of Gender Inequity in the Legal Academy

One other report provides some context to the years leading up to the passage of the first legal writing employment standard. This report was a 1995 study titled *Elusive Equality: The Experiences of Women in Legal Education* published by the ABA Commission on Women in the Profession.[54] That report recognized that gender disparity—indeed, gender discrimination—existed in the legal education academy, and the greatest impact of this discrimination fell on legal writing professionals.[55] The report noted that legal writing was openly known as the pink ghetto.[56] The report recognized that skills professors, including clinicians and legal writing faculty, were disproportionately female and were disproportionately denied access to tenure.[57] Commissioner member Cunyon Gordon explained that

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standards changes, failed to even mention the new standard regarding legal writing faculty, but did address the ratio issue:

> The old student/faculty ratio formula was widely misunderstood. It was never a talismanic number that decided whether a faculty's size was acceptable or not . . . the new Standards and Interpretations provide for a formula that expressly counts in the triggering formula adjuncts, administrators who teach, writing instructors, and non-405(c) clinicians in ways that will lower every single school's basic student/faculty ratio, but will hopefully preserve the quality of legal education attained under the prior Interpretations.

Bob Walsh, ABA Sec. of Leg. Educ. & Admis. to the B., *House of Delegates Adopts New Standards and Interpretations*, SYLLABUS, Fall 1996, at 6–7, https://www.americanbar.org/content/dam/aba/publications/syllabus/1996_vol27_no4_syllabus.pdf.

[54] *See* Elusive Equality, *supra* note 13.

[55] *Id.* at 32.

[56] *Id.*; *see also* Jenny B. Davis, *Writing Wrongs: Teachers of legal prose struggle for higher status, equal treatment*, ABA J. 24 (August 2001**).**

[57] Elusive Equality, *supra* note 13, at 33 (recognizing that "the majority of legal research and writing directors are male and a number of them do not even teach research and writing.") The report quoted the observation of one participant:

> If you ask our Dean, 32.6% of our faculty are women. But of course, more than half of those people were hired as [non-tenure track] clinical or legal writing instructors. If you take out the legal writing and clinical component, only 18.75% of the faculty is female.

"'[i]n the study, we identified that this particular area of teaching was overrepresented with women and underrepresented with tenure and tenure-track people—the people who are regarded as the superstars on the faculty.'"[58]

While *Elusive Equality* did not specifically recommend modifications to the ABA Standards, it did recommend that each law school appoint a "Standing Committee on Gender," and that one charge of such a committee should be to collect data on "the numbers of tenured and non-tenured women and minorities relative to total law faculty."[59] These law school committees were further encouraged to evaluate whether females were disproportionately represented in legal writing positions, clinical positions short term contracts, and administrative positions.[60] Further, the Commission recommended that national organizations such as the ABA, Association of American Law Schools (AALS), and Law School Admissions Council (LSAC) establish a "National Committee of Gender Issues in Law Schools" to collect data on the number of non-tenured women and minorities on law faculties in order to help law schools create policies and practices relating to hiring and working conditions.[61] While the goals and recommendations of Elusive Equality were laudable, it is not clear that any have been realized to overcome gender disparities in legal education employment.[62]

2. The First Legal Writing Employment Standard

Notwithstanding widespread recognition of gender discrimination in legal writing positions, the legal writing standard was not initially part of the ABA's 1996 proposed recodification of the

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The report also noted that even if writing professors chose to produce scholarship, "many schools will not consider promoting anyone from these positions to a tenure track position," arguing that such promotions would be financially prohibitive even though "[m]any who testified thought that this problem could be overcome if the administration chose to do so." *Id.*

[58] *Id.*

[59] *Id.* at 47.

[60] *Id.* at 48.

[61] *Id.* at 59–60.

[62] *See* Kristen K. Tiscione, *Gender Inequity Throughout the Legal Academy: A Quick Look at the (Few) Numbers,* J. LEG. ED. (forthcoming) (demonstrating that legal writing faculty are 68 percent female and that skills faculty, who are predominantly female, earn significantly less than their doctrinal peers).

standards.[63] Rather, the provision addressing legal writing was the result of two proposed amendments to the recodification.[64] An initial, proposed draft of the standard, revised prior to passage on the floor of the ABA House of Delegates,[65] read, "A law school employing full-time legal writing instructors should provide terms of employment and working conditions sufficient to attract well-qualified teachers and to permit and encourage them to develop their expertise."[66] An additional recommendation, withdrawn at the meeting, addressed security of position for legal writing directors and provided: "A law school shall afford to legal writing directors a form of security of position reasonably similar to tenure, and non-compensatory perquisites reasonably similar to those provided other full-time faculty members."[67]

Commentary supporting the proposed legal writing standard, provided by Gabric, noted that the most prevalent model of legal

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[63] Report No. 1 of the Sec. of Leg. Educ. & Admis. to the B., 121 Annu. Rep. ABA 349–88 (1996); Report No. 2 of the Sec. of Leg. Educ. & Admis. to the B., 121 Annu. Rep. ABA 389–90 (1996); Report No. 3 of the Sec. of Leg. Educ. & Admis. to the B., 121 Annu. Rep. ABA 391–92 (1996).

[64] Report No. 3 of Illinois State B. Ass, 121 Annu. Rep. ABA 595 (1996); Legislative Draft 405, 121 Annu. Rep. ABA 596–98 (1996); Report No. 4 of Illinois State B. Association, 121 Annu. Rep. ABA 599 (1996).

[65] House of Delegates Third Session, 121 Annu. Rep. ABA 28 (1996); Report No. 3 of Illinois State B. Ass'n, 121 Annu. Rep. ABA 595 (1996).

[66] Report No. 3 of Illinois State B. Ass'n, 121 Annu. Rep. ABA 595 (1996).

[67] Report No. 4 of Illinois State B. Ass'n, 121 Annu. Rep. ABA 599 (1996). A proposed interpretation, also withdrawn, provided "A law school shall afford to legal writing directors an opportunity to participate in law school governance in a manner reasonably similar to other full time faculty members." *Id.* Interestingly, Gabric's explanatory text accompanying the withdrawn proposal acknowledged the breadth of skills addressed in the legal writing curriculum:

> Many legal writing programs increasingly teach other things of value, such as reasoning skills. For example, classroom repartee in doctrinal courses can teach students how to dissect what others have written or said. But one very effective method of teaching synthesis and other forms of constructive reasoning is to have students solve complex problems and reduce their solutions to writing that can be critiqued by a teacher. There is no other place in the required portion of the curriculum where the thought processes and expression—necessary elements of problem-solving and reasoning—are the primary focus of instruction.

Legislative Draft 405, 121 Annu. Rep. ABA 601 (1996).

writing instruction at the time was a staffing model of full-time faculty.[68] Gabric further explained:

> [A]s the practice of law has grown more paper-oriented and more complex, it has become necessary to teach more in a legal writing course and to teach it better. It can take several years to become a good legal writing teacher. At the same time, legal writing teachers as a group have changed. Many of them have developed an expertise and a body of knowledge of the kind that qualifies as an academic discipline. But unfavorable terms of employment are hindering this educational development.[69]

Gabric clarified that the proposed standard did not require all law schools to address terms of employment in a uniform fashion, but rather was one that encouraged law schools to create employment conditions that would "attract well-qualified teachers and then give them the tools they need to do their jobs."[70]

A transcript of the August, 1996 House of Delegate meeting establishes that the House was considering the significant recodification of the standards prompted by the Consent Decree and recommendations of the Wahl Commission.[71] Specific commentary at the meeting appeared to be limited to suggested amendments to the proposed standards, and the proposed amendments included the new legal writing standard.[72] That material was presented to the House by Professor Susan Lynn Brody, then Delegate from the Illinois State Bar Association and Associate Dean of John Marshall Law School.[73] Brody put forth the proposed amendment:

> (d) Under Standard 405(a), law schools employing full-time legal writing instructors or directors shall provide conditions sufficient to attract well-qualified legal writing instructors or directors.[74]

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[68] *Id.* at 596.
[69] *Id.* at 596–97.
[70] *Id.* at 597.
[71] Report No. 1 of the Sec. of Leg. Educ. & Admis. to the B., 121 Annu. Rep. ABA 349–88 (1996); Report No. 2 of the Sec. of Leg. Educ. & Admis. to the B., 121 Annu. Rep. ABA 389–90 (1996); Report No. 3 of the Sec. of Leg. Educ. & Admis. to the B., 121 Annu. Rep. ABA 391–92 (1996).
[72] Proceedings for the Annual Meeting of the House of Delegates, 121 Annu. Rep. ABA 24 (1996).
[73] *Id.*
[74] *Id.* at 25.

Brody explained to the delegates that the proposed standard "stresses the importance of a curriculum that develops competency in skills of legal writing, legal reasoning, legal analysis, research and oral communication, and creates working conditions conducive to employing professional legal writing teachers."[75] The transcript from the House of Delegates meeting indicates that proponents of the amendment waived their time and, upon voice vote, the amendment, with no corresponding interpretations, passed.[76] This provided legal writing faculty their first explicit protection under the ABA standards.

Reporting on the comprehensive recodification, Ralph Brill noted the new emphasis on legal writing.[77] Addressing the new 405(d) standard, Brill explained that the new standards recognized legal writing professors as members of the faculty, required schools to provide legal writing professors with employment conditions to attract and retain well-qualified faculty, and counted legal writing professors, at least fractionally, as faculty for purposes of the student-faculty ratio.[78]

B. 2001 Revision: Modest Improvement to Security of Position

The next change to the standard occurred in 2001, when the standard was revised to explicitly refer to security of position for legal writing faculty. That new standard is still in effect. As with the adoption of the legal writing standard in 1996, it is difficult to discern the precise rationale for the change, but context for other changes proposed during the 2001 revision cycle may shed some light on this development.

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[75] *Id.*

[76] *Id.*

[77] Ralph L. Brill, *ABA Adopts New Standards Relating to Legal Research and Writing*, 5 Perspectives: Teaching Legal Research and Writing 71 (Winter 1997). Brill further explained:

> The standards do not require schools to adopt any specific model for their programs, but require schools to have programs that are reasonably designed to inculcate the essential skills legal writing programs teach. The standards do not accord tenure status to legal writing teachers or directors, but do provide a basis for a finding that poor job conditions, burdensome teaching loads, or job insecurity do not provide conditions amenable to attracting well-qualified legal writing teachers or directors.

[78] *Id.*

Leading up to the 2001 revision, the ABA had begun to consider major changes to Standard 405, prompted in part by an assertion by the American Law Deans Association (ALDA) that the standards should not (or did not) require a system of tenure.[79] In the *1998-1999 Final Commentary on Changes in Chapters Three and Four of the Standards for Approval of Law Schools*,[80] the Standards Review Committee ("SRC") noted that it had solicited and reviewed comments and had conducted public hearings on proposed changes to chapters 3 (Program of Legal Education) and 4 (The Faculty), explaining that the review process had "thus receiv[ed] input from various constituencies including: individual law school Deans, Faculty members, and Chief Justices; the American Law Deans Association (ALDA); the Clinical Legal Education Association (CLEA); the Legal Writing Institute; and the Association of Legal Writing Instructors [sic]."[81]

Regarding standard 405, the SRC explained:

> In response to ALDA's observation that Standard 405(c)'s requirement of 'a form of security of position reasonably similar to tenure' was inconsistent with the Standards' eschewal of any requirement that a law school have a tenure system at all, the Committee recommended a restructuring all of Standard 405 to move away from the concept of tenure and to focus instead on the programmatic objectives that 'security of position and other rights and privileges of faculty membership' are designed to achieve: ensuring that there is a faculty competent to fulfill the educational missions set forth in Chapter 3 of the Standards, and preserving academic freedom.[82]

In the 1998–1999 review period, the SRC noted that the Council had chosen to maintain the language of Standard 405 but had requested that the SRC continue to review the standard and to solicit input from constituencies in legal education and the legal

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[79] ABA Sec. of Leg. Educ. & Admis. to the B., *Final Commentary on Changes in Chapters Three and Four of the Standards for Approval of Law Schools 1998-1999*, at 6 (copy on file with author).
[80] *Id.*
[81] *Id.* at 1.
[82] *Id.* at 6.

profession.[83] The following year (1999-2000) resulted in a similar refusal to restructure 405.[84]

During this time, many constituencies weighed in on proposed revisions to standard 405, with the bulk of commentary focused on 405(d).[85] Much of the commentary at that time focused on whether the use of non-renewable or short term contracts for writing faculty had the potential to interfere with quality legal writing instruction.[86] The Association of Legal Writing Directors (ALWD), together with the Legal Writing Institute (LWI), submitted comments (ALWD/LWI report) in connection with the standards revision process.[87] Asserting that "Standard 405's current provisions on legal writing are a disservice to students, the legal profession, and the public," ALWD and LWI argued that 405(d) was "the lowest form of protection given to any subject matter in the law school curriculum, even though Legal

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[83] *Id.*

[84] ABA Sec. of Leg. Educ. & Admis. to the B., *Commentary of the Changes to the Standards for the Approval of Law Schools 1999-2000* (copy on file with author). The report explained:

> The Standards Review Committee and the Council once again considered a major restructuring of Standard 405, which would have focused on insuring a competent faculty, a solid academic program and the protection of academic freedom, without specifying the form of job security, such as tenure. Because of its belief in the important role of tenure in protecting academic freedom, the Council decided to leave Standard 405 in its current form. The Council directed the Standards Review Committee to continue its study of faculty job security.

Id.

[85] ABA Sec. of Leg. Educ. & Admis. to the B., *Commentary on the Changes to the Standards for the Approval of Law Schools and Rules of Procedure and the Work of the Standards Review Committee 2000-2001* (October 2001) (copy on file with author). The report notes, "The matter of security of position for legal writing program directors and instructors has been discussed for the last several academic years by both the Council and the Committee [and] [t]his matter received the bulk of both the written and oral review and comment received by the Committee." *Id.*

[86] *Id.*

[87] Ass'n of Leg. Writing Dirs. and the Leg. Writing Inst., *Quality Legal Writing Instruction and ABA Accreditation Standard 405: Report and Recommendation to the ABA Standards Review Committee and Council of the ABA Section of Legal Education and Admissions to the Bar* (January 21, 2000), https://www.alwd.org/images/resources/Standard%20405%20-%20ALWD%20_%20LWI%20Report%20_%20Recommendations%20-%20January%202000.pdf [hereinafter ALWD 2000 Report].

Writing is a required course at virtually every law school."[88] The organizations asserted that the inadequate protections afforded by the standard "harms" the teaching of legal writing faculty, resulting in an alarming impact given the importance of legal writing in law practice.[89]

ALWD and LWI stressed the importance of legal writing instruction and the consequent importance of adequate protection for legal writing faculty. The organizations explained that a "legal writing program is effective only if directors and teachers are provided with adequate job security. A school cannot provide quality or success in any instructional activity unless it guarantees continuity, professionalism, and resources for those who administer and teach."[90] The ALWD/LWI report also highlighted the standard's troubling discriminatory impact on women in legal education.[91] The report offered startling statistical evidence that male members of the academy enjoy the superior security of position and working conditions codified in 405(b), while the female professoriate were disproportionately burdened by the inferior status codified in 405(d).[92] The report revealed:

> The Legal Writing field is overwhelmingly female, and it holds the lowest status in legal education. Of the Legal Writing faculty identified in responses to the ABA's fall 1998 annual questionnaire, 70% were female. During the same academic year, 28% of assistant, associate, and full professors and 10% of law school deans were female. The ABA Standards protect the status of the overwhelmingly male components of the profession (deans and the tenured and tenure-track professoriate). But the Standards do not protect the status of the overwhelmingly female Legal Writing faculty.[93]

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[88] *Id.* at 2.

[89] *Id.* (emphasizing the "disservice to law students, the bench, the bar, and the public" occasioned by the standard's poor protection of legal writing faculty).

[90] *Id.* at 7 (explaining that, in legal writing programs with capped employment, "it is not uncommon for teachers to be forced to leave just as they are beginning to acquire the skills that would make them valuable to their schools and to the legal profession").

[91] *Id.* at 10.

[92] *Id.*

[93] *Id.* at 10. It is profoundly troubling that these statistics have remained consistent even to this day. *See* Tiscione, *supra* note 62 (noting that the

Questioning whether the current standard, which merely required that law schools "provide conditions sufficient to attract well-qualified legal writing instructors or directors" adequately protected the longevity of legal writing employment, the ALWD/LWI report made two recommendations.[94] One proposal was to move legal writing faculty into the "reasonably similar to tenure" protections of 405(c), obviating the need for 405(d).[95] The other proposal was to extend 405(c) and its interpretations to legal writing directors, and to add "and retain" to standard 405(d).[96] The latter change was designed to disallow employment caps in legal writing programs.[97] The ALWD/LWI report asserted:

> Law schools treat no other class of employees this way. No accredited law school can adopt a similar policy regarding clinicians. Assistant deans, development officers, librarians, placement officers, admissions directors, and academic support teachers are not asked to leave at the point where they reach a level of expertise. Nor are non-professional employees such as secretaries or janitors. There is no justification for some schools' singling out legal writing faculty and legal writing courses for this kind of treatment, particularly where it falls disparately on women and damages instruction in a field that the bench and the bar consider essential.[98]

This emphasis on conditions of employment adequate to retain competent faculty was reflected in the 2001 modifications to the standard, which was revised to refer specifically to security of position and academic freedom.[99] The new standard, which remains in effect today, requires law school to "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)(2), and (2) safeguard academic freedom."[100]

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percentage of women teaching legal writing has remained consistent since 2000).

[94] ALWD 2000 Report, *supra* note 87, at 15–19.

[95] *Id.* at 14–15.

[96] *Id.* at 16–19.

[97] *Id.* at 16 (asserting that such caps "cripple" legal writing programs).

[98] *Id.* at 17.

[99] ABA, 2001–2002 Standards, *supra* note 5, 405(d), at 36.

[100] ABA Sec. of Leg. Educ. & Admis. to the B., ABA Standards and Rules of Procedure for Approval of Law Schools 2019–20, at 405(d),

Notwithstanding the reference to security of position, the new standard maintained the somewhat vague language and allowed for the use of short-term contracts for legal writing faculty.[101] In commentary, the Section on Legal Education and Admissions to the Bar explained that, while short-term or non-renewable contracts might interfere with the ability of a law school to offer a sound program of instructions, "it was not possible to conclude that such employment arrangements would always have those effects."[102]

Describing the 2001 change as a compromise, one author noted that the modification "strengthened 405(d) by adding language to

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https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2019-2020/2019-2020-aba-standards-chapter4.pdf.

[101] ABA, 2001–2002 Standards, *supra* note 5, 405(d), Interpretation 405-9, at 37.

[102] *Id*. at 74. Interpretations to standard 405(c) were also modified at this time in response to concerns about whether the interpretations provided clinic-wide security or whether certain clinics could be terminated under the standards. Specifically, a question had arisen as to

> whether a law school complies with Standard 405(c) by providing security of employment to a clinical law teacher only in the particular clinic or program in which that person works, rather than in the law school's clinical program as a whole. The question arises because of an apparent inconsistency in Interpretation 405-6. The last sentence of the first paragraph of that Interpretation refers to "termination or material modification of the clinical program." The last sentence of paragraph two of the Interpretation refers to "termination or material modification of the professional skills program."

Proposed Revisions to Standards, Interpretations, Rules of Procedure and Bylaws Being Circulated for Comment, ABA, 31:34 Syllabus 8, 10 (Summer/Fall 2000), https://www.americanbar.org/content/dam/aba/publications/syllabus/2000_vol31_no3_no4_syllabus.pdf. In response, "[t]he Council concluded that the legislative history made clear that Standard 405(c) intended to provide clinic-wide job security for a person who has security of employment under Standard 405(c). A law school may not limit Standard 405(c) protection to the continuation of a particular clinical program." ABA, 2000-2001 Annual Report of the Consultant on Legal Education to the American Bar Association 24-25 (2001), *quoted in* Joy & Kuehn, *supra* note 12, at 232 n.178.

emphasize retention and academic freedom."[103] Nonetheless, at the time of the modification, legal writing professionals were skeptical about the impact of the new language on employment conditions. In August 2001, the ABA Journal interviewed Pamela Lysaght, then immediate past-president of ALWD and director of the Applied Legal Theory and Analysis Program at the University of Detroit Mercy School of Law.[104] In that article Lysaght questioned whether the change would be meaningful, observing that any impact of the change would be forthcoming, as the academy learned how ABA accreditation site teams interpreted the new standard.[105]

C. 2008-2016 Standards Review: Hierarchy Maintained

Standard 405(d) has not been modified since 2001. However, Standard 405's requirement of a system of tenure did come under attack again in the standards review process that began in 2008 and culminated in 2014.[106] The length of this process was probably the result of two controversial issues addressed in that cycle - the shift to outcomes and assessment, and the consideration of abolishing the tenure standard.[107]

The tenure protections of 405 were initially questioned in 2008 when a Special Committee on Security of Position was empaneled to consider provisions relating to academic freedom and security of position in Chapter 4 (the Faculty).[108] The committee was charged with addressing the efficacy of how the security of position standards

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103 Davis, *supra* note 57, at 25 (explaining that the "changes reflect two years of testimony and debate, including proposals to bring legal writing instructors into Standard 405(c), putting them on par with clinicians [and that] [t]he council's actions . . . reflect a compromise between this and an array of other opinions").

104 *Id*.

105 *Id*. at 24-25 (Lysaght observed, "Whether the council's changes to 405(d) will have any tangible effect remains to be seen. We will not know what it means until the [ABA accreditation] site teams and the accreditation committee have an opportunity to tell us what it means.").

106 The description of this standards review process is adapted, with permission, from Melissa H. Weresh, *Wait, What?: Harnessing the Power of Redirection in Persuasion*, 15 LEG. COMM. AND RHETORIC: JALWD 81 (2018).

107 *Id*. at 81-84.

108 Report of the Special Committee on Security of Position, 1-3 (May 5, 2008), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/reports/2008_security_of_position_committee_final_report.authcheckdam.pdf.

were keyed to category of faculty.[109] The Committee's initial report was relatively modest. It identified but did not make a recommendation on an "alternative approach" to the existing standard.[110] This alternative was designed to be more flexible and was "drafted along functional lines based on the policies to be fostered rather than by establishing categories of faculty and setting out precise rules related to those categories."[111]

The conversation in the legal academy about Standard 405 then pivoted when the "alternative approach" offered by the Special Committee was mischaracterized as one advocating for the elimination of tenure. A July 15, 2010 document (whose authorship was not entirely clear[112]) titled "Draft, Security of Position, Academic Freedom, and Attract and Retain Faculty," indicated that the current standards did not require a system of tenure.[113]

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[109] *Id.* at 2.

[110] *Id.* at 16.

[111] *Id.* The "alternative approach" consisted of proposed standards and interpretations that were less prescriptive, giving law schools more flexibility for methods to ensure academic freedom, to attract and retain quality faculty, and to ensure that faculty continue to have a role in governance over academic matters. *Id.* at 15.

[112] In a July 22, 2010 letter from CLEA, Robert R. Kuehn, then President, wrote with regard to the July 15, 2010 document:

> it is troubling that this proposal, which raises issues that are fundamental to the structure of legal education, is posted so late that interested persons and organizations cannot provide comments prior to the Committee beginning its deliberations on those issues. It is also troubling that, although it appears to represent the viewpoint of only a single author (we note that the draft, on page 7, is written in the first-person singular and states that it is not endorsed by the subcommittee), this "discussion" document does not provide the Committee with any alternate points of view.

Letter from Robert R. Kuehn, CLEA President, to Donald J. Polden, Chair, Standards Review Comm., and Margaret Martin Barry, Vice-Chair, Standards Review Comm., *Standards Review Committee's July 15, 2010 Draft re Security of Position, Academic Freedom, and Attract and Retain Faculty* 1 (July 22, 2010) (copy on file with author).

[113] Draft Memorandum from ABA Sec. of Leg. Educ. & Admis. to the B. Standards Review Committee, *Security of Position, Academic Freedom, and Attract and Retain Faculty* (July 15, 2010) (copy on file with author) (stating "the current Standards do not require approved law schools to have tenure earning systems for any or all of their faculty members and this draft retains the current policy").

This then resulted in a prolonged discussion in the academy about whether the standards should require (or encourage) a system of tenure at every law school. One ABA report documented the variety of positions on the matter, indicating:

> Current Standard 405 requires approved law schools to have "an established and announced policy with respect to academic freedom and tenure" of faculty members. Some commentators have argued that the current Standard requires schools to have tenure earning rights because that is "implied" by the language in Standard 405(b) and Interpretation 405-3. Other commentators have argued that the Standards should require all schools to have tenure earning rights for some or all faculty. And, still others have argued that the Council has been presented with opportunities to reject a requirement of tenure but has refused to do so.[114]

In light of the discussion on whether the standards did, or should, require a system of tenure, the ABA Section on Legal Education and Admissions to the Bar worked for several years on this issue. It ultimately put forth two proposals to modify 405.[115] These included what was characterized as Alternative 1, which would have removed the term "tenure" from Standard 405(b) and instead would have included a requirement that law schools provide full-time faculty members with a form of security of position sufficient to ensure academic freedom and to attract and retain a competent full-time faculty. [116] This language is very similar to that used in 405(d).

A second alternative, Alternative 2, did not include a provision regarding security of position, leaving schools even more flexibility and faculty even less protection.[117] In a memo directed to Interested

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[114] ABA Sec. of Leg. Educ. & Admis. to the B. Standards Review Committee, *Security of Position, Academic Freedom and Attract and Retain Faculty* (DRAFT for November 7-8, 2010) (copy on file with author).

[115] Memo from The Hon. Solomon Oliver, Jr., Council Chairperson of American Bar Association Section of Legal Education and Admissions to the Bar, and Barry A. Currier, Managing Director of Accreditation and Legal Education, to Interested Persons and Entities (September 6, 2013) (available at https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/20130906_notice_comment_chs_1_3_4_s203b_s603d.pdf)

[116] *Id.*

[117] *Id.*

Persons and Entities, the Section described the alternatives as follows:

> Alternative 1 requires, in 405(d), that all full-time faculty have a form of security of position sufficient to ensure academic freedom and to attract and retain a competent full-time faculty. It does not require that all full-time faculty have the same form of security of position, and it does not require tenure.
>
> Proposed Interpretations 405-1 and 405-2 provide that a tenure system is a safe-harbor for satisfying the security of position required in Standard 405(d). For full-time faculty positions not covered by tenure, the law school must establish that its policies establish conditions sufficient to attract and retain a competent full-time faculty and protect academic freedom.
>
> Alternative 2 requires a law school to maintain conditions adequate to attract and retain a competent full-time faculty sufficient to permit the law school to comply with the Standards. It requires policies to protect academic freedom of its faculty and provide for meaningful participation of full-time faculty in the governance of the school. Alternative 2 does not require tenure or security of position for any full-time faculty.
>
> Proposed Interpretations 405-1 and 405-2 provide that a tenure system is a safe-harbor for satisfying the attract and retain provision and the academic freedom provision of Alternative 2. For full-time faculty positions not covered by tenure, the law school must establish that its policies establish conditions sufficient to attract and retain a competent full-time faculty and protect academic freedom.[118]

In response to these proposals, there was an outpouring of support for the protection of tenure to be maintained in the standards. Many constituencies spoke out publicly in favor of maintaining a system of tenure in the standards. For example, at a public hearing before the ABA Section on Legal Education and Admission to the Bar on February 5, 2014, several individuals argued in favor of retaining tenure protections in the ABA accreditation standards, with many asserting (directly or indirectly) that only tenure adequately protects

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[118] *Id.*

academic freedom.[119] Arguing on behalf of the American Association of University Professors (AAUP), Theresa Chmara asserted that the "guarantee of academic freedom is particularly important in a law school,"[120] that "tenure -- the value of tenure, that is the best vehicle protecting faculty,"[121] and that the AAUP's position was that tenure for all faculty was the best vehicle for protecting the academic freedom of all faculty.[122]

Several others spoke in support of tenure, offering varying arguments as to its importance in the legal academy. Elliott Milstein, past president of AALS, focused on the conventional understanding of tenure,[123] noting that a protection that merely referenced academic freedom would be vague and "opaque."[124] Professor Terry Smith,

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[119] ABA Sec. of Leg. Educ. & Admis. to the B., *Transcript of Public Hearing - Amendments to Standards and Rules of Procedure for Approval of Law Schools* (Feb. 5, 2014) (copy on file with author) [Feb. 5, 2014 Transcript].

[120] *Id*. at 8.

[121] *Id*. at 14.

[122] *Id*. at 15 ("AAUP believes that all faculty should have tenure to protect their academic freedom"). John Elson, a professor from Northwestern, argued in favor of retaining 405(c) for clinical faculty, emphasizing that the standard "has been responsible for a transformation of American legal education." *Id*. at 17. Elson recognized the deficiencies of 405(c)'s ambiguous "reasonably similar to tenure" protections and the loophole created by interpretations allowing some form of security of position other than 5 year, presumptively renewable contracts, so long as such protections preserved academic freedom. *Id*. at 23. Elson therefore argued that the interpretation should be modified, asserting that the Council should

> change interpretation 405-6, which the Accreditation Committee has for several years now misconstrued to allow a university's guarantee of academic freedom to substitute for long-term contracts, even though standard 405(c) itself requires that clinical teachers be provided "a form of security in position reasonably similar to tenure." Now, teaching contracts that can be terminated at any time for any reason which is not in retaliation for the teacher's exercise of academic freedom is simply not a form of security of position reasonably similar to tenure. *It is, in fact, no security of position*."

Id. (emphasis added).

[123] *Id*. at 46 (describing himself and the community he represented thusly: a "company of warriors for academic freedom, of people who have fought for scholarly integrity, of people who love legal education and have spent their lives building institutions").

[124] *Id*. at 48. Milstein explained:

speaking on behalf of approximately 635 law professors opposing the abolishment of tenure,[125] argued that the tenure provisions should be maintained over some vague standard tied only to terms such as "academic freedom" or "security of position."[126] He asserted "[t]here's nothing talismanic about the term "academic freedom," and that this term, as well as the notion of security of position were "litigation terms."[127] Smith explained

> we now have decades of experience under the requirement that schools provide a system of tenure. And generally, tenure is understood as being able to dismiss only for cause and providing due process -- or financial exigency, and providing due process when one does attempt to dismiss a professor.[128]

With respect to the justification for abolishing the tenure system in favor of a more "flexible" standard that merely obligated schools to

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> We have 100 years of jurisprudence about what tenure means in terms of the protection of academic freedom. What does it mean to say academic freedom will be protected outside of that jurisprudence? Essentially, the committee is calling for the Council is calling for a whole new jurisprudence that is completely opaque going forward.

Id. at 46. Noting that the protections of tenure in terms of governance and academic freedom are well-understood, and any dilution of those specific protections by modifications to the standards that allow for more flexibility, much like those articulated in 405(c) and 405(d), Milstein lamented:

> it feels like the proposal sends us into territory that's so unchartered that I don't think that the proponents of this have thought through what does it mean? What will happen? What will happen to law schools? What will happen in the professoriate? And I don't think that any written thing that I've seen from the Council or from the Standards Review speaks to the question of what will happen. What are the consequences?

Id. at 51; *see also id*. at 126 (Smith testimony noting that "the clinicians, CLEA, are opposed to requiring tenure for clinicians for fear that law schools will simply stop hiring clinicians"); *id*. at 128 (Smith testimony noting that "the clinicians actually have experience under a provision that requires security of position. And that hasn't worked terribly well for them").

[125] *Id*.

[126] *Id*. at 109 (referring to a letter signed by 635 law professors and indicating that signatories were increasing).

[127] *Id*. at 119 (arguing, "Because this term 'security of position,' the term itself 'academic freedom,' all they are are litigation breeding terms").

[128] *Id*. at 119.

provide conditions necessary to secure academic freedom, Smith asserted,

> If you want to afford law schools that kind of flexibility to bring on new people and potentially displace in the process incumbent professors with or without tenure then the meaning of the term security of position that's in the proposed change has little or no practical meaning because under that scenario it's an at-will system virtually.[129]

Also arguing in favor of maintaining a system of tenure, Carol Chomsky, speaking on behalf of the Society of American Law Teachers (SALT), noted that the two, alternative proposals offered by the ABA were admirable in their emphasis on the need to protect academic freedom and afford law faculty the opportunity to participate in governance.[130] She asserted,

> The two proposals that have been submitted to council that have been sent out for notice and comment do some very good things. They make more clear than the current standards do that all faculty must be accorded academic freedom in teaching and research and governance and in service. It makes more clear than the current standards do that all full-time faculty must have an opportunity to participate in governance in a meaningful fashion.[131]

The problem with the proposals, Chomsky explained, was that without explicit security of position – the type afforded by tenure - any guarantee of academic freedom would be "hollow."[132]

Illustrating the deficiency of this language by comparing it to the content of 405(d) – also written in this vague, attenuated manner - Chomsky emphasized:

> The difficulty we see is that those guarantees are hollow without the security of position that is written out of these two proposals. Alternative 2 clearly has no requirement of any security of position. It simply states that there will be academic freedom and meaningful participation in governance. Alternative 1 on its face looks like it has a requirement of security of

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[129] *Id.* at 123.
[130] ABA Sec. Leg. Educ. & Admis. to the B., *Transcript of Public Hearing - Amendments to Standards and Rules of Procedure for Approval of Law Schools* 6 (Feb. 6, 2014) (copy on file with author).
[131] *Id.* at 10.
[132] *Id.*

> position, security of position sufficient to ensure academic freedom and retraction (sic) and retention of a competent, full time faculty, but experience shows us that *that language carries no punch. That's exactly what legal writing instructors are guaranteed now and at many institutions they have no security of position*.[133]

She emphasized, "[h]aving the security of position of tenure is the best way and maybe the only way to really ensure that academic freedom truly exists."[134] Focusing on the hierarchies embodied in 405 and their impact on legal writing faculty, Chomsky asserted, "at the very least, full-time legal writing faculty who have not been embraced and granted any security of position should be brought up to . . . [the] security of position . . . [afforded] . . . clinical faculty."[135]

Testifying on behalf of the legal writing community, Anthony Niedwiecki, then immediate past president of the ALWD, emphasized the legal writing community's position that "academic freedom is essential to a solid legal education."[136] Niedwiecki noted three reasons

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[133] *Id.* at 10-11 (emphasis added). Chomsky further revealed:

> And [legal writing faculty] will tell you that that means that they have, in actuality, often have no real voice in governance and no real academic freedom. They tell us that when -- and this is true both for those as legal writing instructors who have no security of position, but also true of untenured faculty before they get past that hurdle. And others who may have different status at their law school, they come to tenured faculty and sometimes tenured track faculty and ask us to speak for them, to say things that they are concerned about saying, that they are afraid to say, whether it's in a faculty meeting. Not doing their research for them, but mostly in governance issues.

[134] *Id.* at 12. Chomsky emphasized the peculiar appeal of tenure in the legal academy, noting "though we are not unique in the academy in needing academic freedom, the kinds of activity that law faculty more regularly engage in - clinical work on behalf of underserved and low income communities, criticizing government officials and official policy, teaching about controversial political issues, put them at more risk than is largely true in other disciplines." *Id.* at 17-18.

[135] *Id.* at 16. Asked for clarification, Chomsky noted that her position was partly to clarify that tenure should be "the standard, the norm, the starting place" and partly to assert that modification should "strengthen[] the protections for those who have not had really any security of position," which referred to legal writing faculty. *Id.* at 17.

[136] *Id.* at 60.

why tenure was necessary to protect academic freedom:[137] 1) law professors regularly engage in controversial topics;[138] 2) tenure promotes innovation;[139] and 3) the lack of security of position afforded by Standard 405(d) has a discriminatory impact on women.[140] With regard to the latter, Niedwiecki confirmed that "three-quarters of legal writing professors are women who have substantially less academic freedom, security of position, and governance rights than anybody else. And those with the most protections are 64 percent men, 36 percent women."[141] He therefore stressed that "Standard 405 has built in a caste system [which] has a negative impact on women and runs counter to the ultimate goals of equality and diversity as articulated in Standards 211 and 212."[142]

Ultimately, the arguments in favor of preserving tenure were convincing and the ABA elected to maintain the current structure of Standard 405. This therefore preserved tenure for a category of faculty while also ensuring that the caste system established by the inferior protections 405(c) and (d) was maintained. It is interesting, nonetheless, that proponents of preserving tenure were quick to note that an amorphous obligation to simply provide conditions "sufficient to ensure academic freedom and to attract and retain a competent full-time faculty"—essentially the security of position contemplated in 405(d)—could never adequately protect academic freedom. This underscores the very open secret that the "protections" of 405(d) fail to provide any real protection whatsoever.

Conclusion

The ABA Accreditation Standards have endeavored to address security of position for law faculty. Standard 405(d) began as a simple acknowledgement that legal writing faculty should at least be afforded working conditions sufficient to attract well-qualified individuals.[143] This language, falling far short of acknowledging security of position, was modified in 2001 to make that clarification. In this way, the

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[137] *Id.* (stressing that "[w]e all realize the special role that law schools play in society as we are catalysts for change in our society. That's why tenure has always been and will continue to be necessary to protect academic freedom. In fact, I think it's the only way to protect academic freedom").
[138] *Id.*
[139] *Id.* at 61.
[140] *Id.* at 62-66.
[141] *Id.* at 62-63.
[142] *Id.* at 62.
[143] *See supra* note 1.

revised standard might be viewed as an accomplishment for the field, ensuring that our security of position and entitlement to academic freedom has been formally acknowledged and protected.[144]

However, as the legal writing community has repeatedly explained,[145] 405(d), remains an inadequate form of protection for legal writing faculty.[146] It fails to afford legal writing faculty the type of security of position enjoyed by those with tenure and, in so doing, instantiates a discriminatory hierarchy that is, after all of these years, simply astonishing.[147] It is particularly alarming given the

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[144] *But see* Kathryn M. Stanchi & Jan M. Levine, *Gender and Legal Writing: Law School's Dirty Little Secrets*, 16 BERKELEY WOMEN'S' L. J. 3 (2001). The authors note that the inclusion of clinical and legal writing faculty under the employment condition standard "perpetuate a two-tiered system that discriminates against clinical faculty and legal writing teachers," and that it is a "hidden iron[y]" that these provisions were initially viewed as "positive steps, added to offer some protection to clinical faculty and legal writing faculty." *Id*. at 16.

[145] *See, e.g.,* Maureen J. Arrigo, *Hierarchy Maintained: Status and Gender Issues in Legal Writing Programs*, 70 TEMP. L. REV. 117 (1997); Linda L. Berger, *Rhetoric and Reality in the ABA Standards*, 66 J. LEGAL EDUC. 553 (2017) Jo Anne Durako, *Second-Class Citizens in the Pink Ghetto: Gender Bias in Legal Writing*, 50 J. LEGAL EDUC. 562 (2000); Lucille A. Jewel, *Oil and Water: How Legal Education's Doctrine and Skills Divide Reproduces Toxic Hierarchies*, 31.1 COLUM. J. GENDER & L. 111 (2015); John A. Lynch, Jr., *Teaching Legal Writing After a Thirty-Year Respite: No Country for Old Men?,* 38 CAP. L. REV. 1 (2009); Mitchell Nathanson, *Dismantling the Other: Understanding the Nature and Malleability of Groups in the Legal Writing Professor's Quest for Equality*, 13 J. LEG. WRITING 79 (2007); Kristen Konrad Robbins, *Philosophy v. Rhetoric in Legal Education: Understanding the Schism Between Doctrinal and Legal Writing Faculty*, 3 J. ASS'N LEGAL WRITING DIRECTORS 108 (2006); Kent D. Syverud, *The Caste System and Best Practices in Legal Education*, 1 J. ASS'N LEGAL WRITING DIRECTORS 12 (2002); Kathryn M. Stanchi, *Who Next, the Janitors? A Socio-Feminist Critique of the Status Hierarchy of Law Professors*, 73 UMKC L. REV. 467 (2004); Stanchi & Levine, *supra* note 141; Kristen Konrad Tiscione, *"Best Practices": A Giant Step Toward Ensuring Compliance with ABA Standard 405(c), a Small Yet Important Step Toward Addressing Gender Discrimination in the Legal Academy,* 66 J. LEGAL EDUC. 566 (2017); Kristin K. Tiscione & Amy Vorenberg, *Podia and Pens: Dismantling the Two-Track System for Legal Research and Writing Faculty*, 31 COLUM. J. OF GENDER & L. 46, 57-59 (2015); *cf.* Melissa Weresh, *Stars upon Thars: Evaluating the Discriminatory Impact of ABA Standard 405(c) Tenure-Like Security of Position*, 34 LAW AND INEQ.127, 146-49 (2016).

[146] *See generally* Entrikin, et al., *supra* note 1.

[147] *See* Lynch, *supra* note 145, at 13 (asserting that "the predominantly female legal writing cohort endures 'a version of gender discrimination that no law

professionalization of the field and the myriad contributions legal writing faculty have made to legal education. In this way, the standard and its modifications may be viewed as one step forward, two steps back.

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firm or corporation would dare institutionalize or rationalize, let alone put into print'").