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2017

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ABA Standard 405(c): Two Steps Forward and One Step Back for Legal Education

Peter A. Joy

Introduction

Opposition has long existed to American Bar Association (ABA) Standard 405(c),¹ the accreditation standard that by its express language requires law schools to establish long-term employment relationships with clinical faculty and to provide them with a meaningful voice in law school governance.² By adopting this standard, the Council of the ABA Section of Legal Education and Admissions to the Bar sought to integrate clinical faculty into law schools, which in turn would recognize the value of clinical legal education and the professional skills and values that it promotes.³ By requiring law schools to provide clinical faculty “a form of security of position reasonably similar to

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1. The history of opposition to Standard 405(c) is found in an article that I co-authored with Bob Kuehn. Peter A. Joy & Robert R. Kuehn, *The Evolution of ABA Standards for Clinical Faculty*, 75 TENN. L. REV. 183, 195-229 (2008). In this current article, I incorporate and build upon some ideas appearing in the previously published co-authored article.
2. Current Standard 405(c) provides: “A law school shall afford to full-time clinical faculty members a form of security of position reasonably similar to tenure, and non-compensatory prerequisites reasonably similar to those provided other full-time faculty members.” SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, AM. BAR ASS’N, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2016-2017, Standard 405(c) at 29 (2016) [hereinafter 2016-2017 STANDARDS].
3. See *infra* Part I. Maureen O’Rourke recently wrote a good explanation of the ABA accreditation process and explains the roles of the Council of the Section of Legal Education and Admissions to the Bar, the standards review committee, and the accreditation committee, which will be helpful to those unfamiliar with the ABA accreditation process. See Maureen A. O’Rourke, *The “Law” and “Spirit” of the Accreditation Process in Legal Education*, 66 SYRACUSE L. REV. 595, 597-600 (2016). At the time she wrote the article, O’Rourke was vice chair of the council, and she is currently chair-elect.

tenure,”⁴ Standard 405(c) has also served to guarantee academic freedom for faculty teaching clinical courses.

As this article will discuss, many opposed and continue to oppose providing clinical faculty the security of position necessary for academic freedom and participation in faculty governance that Standard 405(c) appears to guarantee.⁵ Starting in 1999, those opposing Standard 405(c) and security of position for clinical faculty shifted their focus to oppose security of position for all full-time faculty by advocating for the elimination of the requirement that at least some law school faculty have tenure.⁶

This article proceeds in four parts. Part I briefly analyzes the importance of tenure, or the equivalent security of position, to securing academic freedom protection for law faculty. Part II explores why the ABA initially addressed clinical faculty status and security of position. Part III summarizes the events leading to the accreditation standard aimed at clinical faculty, including what is known as Standard 405(c) currently in effect. Part IV examines resistance to Standard 405(c) and efforts to remove security of position from the accreditation standards, and actions of the ABA Accreditation Committee that have eroded the protections of Standard 405(c) and its interpretations. This article concludes that in light of the history of Standard 405(c) and efforts to eliminate security of position from the ABA Standards, it is unlikely Standard 405 will be amended to provide a path of equal status for all full-time faculty and improve the status of clinical and legal writing faculty in the foreseeable future.

I. The Importance of Tenure or Equivalent Security of Position to Academic Freedom

Tenure, or the equivalent security of position, is essential to protecting academic freedom for all law faculty. Standard 405(b) recognizes this by stating, “A law school shall have an established and announced policy on academic freedom and tenure,” and referencing as an example the 1940 Statement of Principles on Academic Freedom and Tenure of the American Association of University Professors (AAUP).⁷ The AAUP statement explains:

Tenure is a means to certain ends; specifically: (1) freedom of teaching and research and of extramural activities, and (2) a sufficient degree of economic security to make the profession attractive to men and women of ability. Freedom and economic security, hence, tenure, are indispensable to the success of an institution in fulfilling its obligations to its students and to society.⁸

4. See 2016–2017 STANDARDS, *supra* note 2, at 29.

5. See *infra* Parts III & IV.

6. See *infra* Part IV.

7. 2016–2017 STANDARDS, *supra* note 2, Standard 405(b) at 29 & App. 1 at 133.

8. *Id.* App.1 at 133.

William Van Alstyne, a leading authority on academic freedom, aptly described the relationship between tenure and academic freedom: “Tenure, accurately and unequivocally defined, lays no claim whatever to a guarantee of lifetime employment. Rather, tenure provides only that no person continuously retained as a full-time faculty member beyond a specified lengthy period of probationary service may thereafter be dismissed *without adequate cause*.”⁹ Van Alstyne continued: “In a practical sense, *tenure* is translatable principally as a statement of *formal assurance* that thereafter the individual’s professional security and *academic freedom* will not be placed in question without the observance of full academic *due process*.”¹⁰

Simply put, tenure protects academic freedom by guaranteeing that a faculty member’s employment will not be terminated without just cause and due process. Without tenure, or security of position reasonably similar to tenure, a full-time faculty member does not, and cannot, have meaningful academic freedom because the faculty member’s employment may be terminated after the contract period is over for any reason or no reason.¹¹ As a result, a university or law school policy that guarantees academic freedom, for it to be a true guarantee, must establish a process requiring just cause for ending employment and affording a faculty member due process before the faculty member is terminated.

A law school policy that guarantees just cause for ending employment and due process is critically important, especially for private schools. As a constitutional matter, academic freedom is elusive and not well-defined,¹² and it is not expressly mentioned as a right in the First Amendment or anyplace else in the Constitution. “[W]hatever constitutional protection there may be for academic freedom, it is solely against state action—that is, the action of some governmental actor.”¹³ Without a meaningful academic policy, faculty at private law schools would have no protection beyond possible common-law protections for wrongful discharge,¹⁴ and faculty at public law schools would have whatever due process is afforded other state employees.

9. William Van Alstyne, *Tenure: A Summary, Explanation, and “Defense,”* 57 AAUP BULL. 328, 328 (1971) (emphasis in original).

10. *Id.* (emphasis supplied).

11. *See, e.g.,* Board of Regents v. Roth, 408 U.S. 564, 578 (1972) (holding that a university may decline to reemploy a faculty member at the end of the contract without providing a reason).

12. *See, e.g.,* Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 TEX. L. REV. 1265, 1289 (1988) (“A sizeable literature of legal commentary asserts that the Supreme Court constitutionalized academic freedom without adequately defining it.”).

13. Peter A. Joy, *Government Interference with Law School Clinics and Access to Justice: When Is There a Legal Remedy?*, 61 CASE W. RES. L. REV. 1087, 1094 (2011). Unless it can be established that a private university is exercising power as a state actor, a private university is not limited by the First Amendment. *See* 1 JAMES A. RAPP, EDUCATION LAW § 3.05 (6)(a) (2010); J. Peter Byrne, *Academic Freedom: A “Special Concern of the First Amendment,”* 99 YALE L. J. 251, 299–300 (1989).

14. Charles J. Muhl, *The Employment-at-Will Doctrine: Three Major Exceptions*, MONTHLY LAB. REV., Jan. 2001, at 3, 4 exh.1.

Van Alstyne explained that “academic due process merely establishes that a fairly rigorous procedure will be observed whenever formal complaint is made that dismissal is justified on some stated ground of professional irresponsibility.”¹⁵ This process requires “the fair determination of three facts”: 1) the stated reason for terminating employment is “authentic” and not “a pretense or makeweight for considerations invading the academic freedom or ordinary personal civil liberties of the individual”; 2) “the stated cause exists in fact”; and 3) “the degree of demonstrated professional irresponsibility warrants outright termination of the individual’s appointment rather than some lesser sanction. . . .”¹⁶

Concerns about the need for the due-process protection of tenure, or a reasonably similar form of security of position, for law faculty, and especially clinical faculty, are very real. More than thirty-five instances of interference with law school clinics and faculty have been publicized since the first publicized instance in 1968.¹⁷ A 2005 survey of clinical faculty indicates that these publicized instances are just examples of a more widespread problem. “In a 2005 survey of clinical law professors, 12 percent reported similar interference with their courses, with more than a third reporting that they worried about how the university might react if they took on controversial cases or clients.”¹⁸

As the following section describes, the ABA was primarily motivated to provide clinical faculty with security of position and participation in law school governance as a way of promoting the value of clinical faculty and clinical legal education. At the time that the first standard including clinical faculty was adopted, the law school deans on the council and some other members of the council are also on record as stating that tenure, or some reasonably similar equivalent status, is necessary to assure academic freedom for clinical faculty.¹⁹

II. Why the ABA Addressed Clinical Faculty Status and Security of Position

To understand Standard 405(c) today one must understand the origins of the accreditation standard addressing clinical faculty status and security of position. In an earlier article, Bob Kuehn and I discuss in great detail the origins and evolutions of accreditation standards addressing status of clinical faculty,²⁰ and I will not repeat that history here. Instead, I will provide a sufficient summary to enable readers to understand that while Standard 405(c)

15. Van Alstyne, *supra* note 9, at 328.

16. *Id.*

17. Robert R. Kuehn & Bridget M. McCormack, *Lessons from Forty Years of Interference in Law School Clinics*, 24 GEO. J. LEGAL ETHICS 59, 92-95 app. (2011).

18. Robert R. Kuehn & Peter A. Joy, “Kneecapping” *Academic Freedom*, ACADEME, Nov.-Dec. 2010, at 11.

19. *See infra* note 52 and accompanying text.

20. Joy & Kuehn, *supra* note 1.

represented two steps forward, opposition to Standard 405(c) has caused one step back from its intent.

In adopting a standard addressing clinical faculty, the ABA responded to repeated calls from leaders of the legal profession and reports on legal education expressing concerns over what they considered the unfair treatment of clinical faculty and its negative effects on the development of clinical legal education. The pressure on the ABA to take action began in the 1970s and lasted until 1984, when the ABA, after much study and public comment, included a provision in Standard 405 expressly for clinical faculty.

The 1979 report “Lawyer Competency: The Role of Law Schools” (known as the “Cramton Report”)²¹ was the first ABA report to identify the need for law schools to appoint and value faculty teaching fundamental lawyering skills equally with faculty who teach legal doctrine. The Cramton Report identified a series of institutional factors that were inhibiting law schools from doing a better job of training their graduates for the practice of law and entry into the legal profession, and it recommended that law schools place greater value on having faculty teach the development of lawyering skills.²² The Cramton Report singled out law school policies on faculty appointments, promotion, and tenure for failing to focus sufficiently on a commitment to teaching, including teaching focused on the development and improvement of lawyering skills.²³ A year later, the Foulis Report,²⁴ another ABA study on legal education, concluded that “the status of clinicians in the academic setting has

21. SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, AM. BAR ASS'N, REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON LAWYER COMPETENCY: THE ROLE OF THE LAW SCHOOLS 26 (1979) [hereinafter the CRAMTON REPORT]. The report is named after the chair of the twelve-person task force, Dean Roger C. Cramton of Cornell Law School. The task force included three judges, one university president, two law school deans, a law professor, and five attorneys. Nine members of the task force were present or former members of the ABA Section of Legal Education and Admissions to the Bar. *Id.* at vii.

22. *Id.* at 24-27.

23. The Cramton Report stated:

Law school policies and practices of faculty appointment, promotion, and tenure should pay greater rewards for commitment to teaching, including teaching by techniques that foster skills development. Experimentation with and creation of new teaching methods and materials that focus on the improvement of such fundamental lawyer skills as legal writing, oral communication, interviewing and counseling, or trial advocacy should be valued no less highly than research on legal doctrine.

Id. at 26.

24. LAW SCHOOLS AND PROFESSIONAL EDUCATION: REPORT AND RECOMMENDATIONS OF THE SPECIAL COMMITTEE FOR A STUDY OF LEGAL EDUCATION OF THE AMERICAN BAR ASSOCIATION (1980). This report is referred to as the “Foulis Report” after Ronald J. Foulis, the chair at the time the report was issued. The report was the final product of a seven-year study of legal education.

not been satisfactorily resolved,”²⁵ and recommended “that appropriate weight be assigned to the effective teaching of legal skills.”²⁶

At approximately the same time, a joint committee of the ABA and the Association of American Law Schools (AALS) was developing guidelines for clinical legal education. In its 1980 report, “Clinical Legal Education Guidelines,”²⁷ the ABA/AALS study reached conclusions similar to the Cramton Report and the Foulis Report,²⁸ including the recommendation that one or more faculty teaching clinical courses “should have the same underlying employment relationship as faculty teaching in the traditional curriculum.”²⁹ The guidelines explained that addressing the status issue was necessary because “the importance of clinical legal studies to the law school curriculum requires the application of tenure status to individuals principally teaching in the clinical legal studies curriculum.”³⁰

Prompted by the two prestigious ABA reports and the ABA/AALS Clinical Legal Education Guidelines, the ABA began to consider the status of clinical faculty as an accreditation matter. The next section explains that process.

III. The Route to the ABA Standard on Clinical Faculty

In 1973, the ABA adopted Standard 405 as the primary standard for full-time faculty, and it stated: “The law school shall establish and maintain conditions adequate to attract and retain competent faculty.”³¹ The first three sections

25. *Id.* at 9.

26. *Id.* at 105.

27. ASS’N OF AM. LAW SCHS. & COMM. ON GUIDELINES FOR CLINICAL LEGAL EDUC., AM. BAR ASS’N, CLINICAL LEGAL EDUCATION: REPORT OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS—AMERICAN BAR ASSOCIATION COMMITTEE ON GUIDELINES FOR CLINICAL LEGAL EDUCATION (1980) [hereinafter ABA/AALS CLINICAL LEGAL EDUCATION GUIDELINES]. The ABA and AALS members of the committee did not include any clinical faculty. *See id.* at 3. Former law school dean Robert McKay was the committee chair, and the remaining members were a university president, two law school deans, two tenured nonclinical law school faculty members, and one member of the public. *Id.* at i, 3. Two nonvoting staff members for the committee were clinical faculty. *Id.* at 4.

28. *See generally id.*

29. *Id.* at 33 (noting that “[a]t most schools eligibility for tenure is the basic employment relationship”). The guidelines also stated that in addition to clinical faculty with equal status, some “individual schools may wish to have some principal clinical teaching responsibilities fulfilled by individuals not eligible for tenure” due to “budgetary considerations” and “the experimental and innovative nature of clinical legal studies [at this time],” but “full-time positions not eligible for tenure should be long-term employment” if the nontenure-track clinical faculty were to develop expertise in clinical teaching, develop components of the curriculum, or supervise the training of other faculty who were also teaching clinical studies. *Id.*

30. *Id.* at 113.

31. AM. BAR ASS’N, APPROVAL OF LAW SCHOOLS, AMERICAN BAR ASSOCIATION STANDARDS AND RULES OF PROCEDURE, Standard 405 at 12 (1973) [hereinafter 1973 STANDARDS].

of Standard 405 addressed: (a) compensation;³² (b) research leaves;³³ and (c) secretarial and clerical assistance.³⁴ The fourth section, Standard 405(d), addressed academic freedom and tenure and stated: “The law school shall have an established and announced policy with respect to academic freedom and tenure of which Annex I herein is an example but is not obligatory.”³⁵ Interpretation 1 of Standard 405 explained: “Any fixed limit on the percent of law faculty that may hold tenure under any circumstances is in violation of the Standards, especially Standard 405.”³⁶ When read together, Standard 405 and Interpretation 1 made it clear that every ABA-approved law school had to have at least some faculty with tenure.

Although originally Standard 405 did not mention faculty teaching clinical courses, in the late 1970s ABA accreditation site-inspection teams began “reporting to the accreditation committee that many schools were not providing their clinicians an opportunity to achieve tenure or any other form of job security.”³⁷ Responding to these reports in July 1980, the Council of the ABA Section of Legal Education and Admissions to the Bar adopted Interpretation 2 of Standard 405(d), which stated that full-time faculty teaching clinical courses were “‘faculty’ for purposes of Standard 405, and denial to them of the opportunity to attain tenure appears to be in violation of

32. Standard 405(a) stated:

The compensation paid faculty members should be sufficient to attract and retain persons of high ability and should be reasonably related to the prevailing compensation of comparably qualified private practitioners and government attorneys and of the judiciary. The compensation paid faculty members at a school seeking approval should be comparable with that paid faculty members at similar approved law schools in the same general geographical area.

Id. at 12. This provision and the collection of faculty salary data were later discontinued after the ABA reached a settlement with the U.S. Department of Justice over antitrust charges. Press Release, U.S. Dep’t of Justice, *Justice Department and American Bar Association Resolve Charges That the ABA’s Process for Accrediting Law Schools Was Misused*, U.S. JUST. DEP’T (June 27, 1995), https://www.justice.gov/archive/atr/public/press_releases/1995/0257.pdf [<https://perma.cc/NB3U-SP82>]. The settlement prohibited the ABA from “fixing” faculty salaries, refusing to accredit for-profit law schools, and refusing to permit ABA-approved law schools to accept credits from unapproved law schools for students transferring in to an ABA-accredited law school. *Id.*

33. “The law school shall afford faculty members reasonable opportunity for leaves of absence and for scholarly research.” 1973 STANDARDS, *supra* note 31, Standard 405(b) at 12.

34. “The law school shall afford faculty members reasonable secretarial and clerical support.” *Id.* Standard 405(c) at 12.

35. *Id.* at 13.

36. AMERICAN BAR ASSOCIATION STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS, Interpretation 1 of 405 (1981) [hereinafter 1981 STANDARDS]. The ABA first started publishing the Interpretations to the Standards in 1981, and the 1981 standards show that Interpretation 1 of 405 was adopted in Feb. 1973.

37. Roy Stuckey, *A Short History of Standard 405(e) 1* (Apr. 1994) [<https://perma.cc/QQR6-D6HV>].

Standard 405(d).”³⁸ Shortly after this interpretation was adopted, the council suspended it “following a negative reaction from some law schools, and created a subcommittee of the accreditation committee, chaired by Gordon Shaber, to consider how the problem should be resolved.”³⁹

The next development in addressing clinical faculty status came in 1982, when the ABA Accreditation Committee and Clinical Legal Education Committee proposed to the council that it adopt and submit to the House of Delegates a new Standard 405(e) and interpretations.⁴⁰ The proposed standard stated: “Full-time clinical faculty members shall be entitled to an employment relationship substantially equivalent to that required for other members of the faculty under Standard 405.”⁴¹ The interpretation explained that the employment relationship could be satisfied in one of three ways: (1) the same tenure track as the other members of the faculty; (2) a separate tenure track; or (3) “an approach that provides features substantially equivalent to tenure.”⁴² The council considered the proposed standard and interpretation at its May 1982 meeting but did not act on them.⁴³

Throughout 1982–1984, the accreditation committee and the standards review committee considered the status of clinical faculty.⁴⁴ In September of 1982, the standards review committee sent out for comment a proposed Standard 405(e), which required clinical faculty to be on a tenure track or to be on “successive renewable, long-term contracts that provide features substantially equivalent to tenure.”⁴⁵

38. “Individuals in the ‘academic personnel’ category whose full time is devoted to clinical instruction and related activities in the J.D. program constitute members of the ‘faculty’ for purposes of Standard 405, and denial to them of the opportunity to attain tenure appears to be in violation of Standard 405(d).” 1981 STANDARDS, *supra* note 36, at Interpretation 2 of Standard 405(d). During this period, the ABA House of Delegates gave the council the authority to interpret accreditation standards.

39. Stuckey, *supra* note 37, at 1.

40. Memorandum from Frederick R. Franklin, Staff Dir., Am. Bar Ass’n Section of Legal Educ. and Admissions to the Bar, to Members of the Clinical Legal Educ. Comm. (April 28, 1982) (on file with author).

41. *Id.* at 1.

42. *Id.*

43. See Memorandum D8283-17 from James P. White, Consultant on Legal Educ. to the Am. Bar Ass’n, to Deans of ABA-Approved Law Schools (Dec. 8, 1982) (on file with author).

44. Joy & Kuehn, *supra* note 1, at 196-98.

45. See Memorandum D8283-17 from James P. White, *supra* note 43, at 2-3. The proposed Interpretation to Standard 405(e) provided:

Full-time clinical faculty members are entitled to an employment relationship substantially equivalent to that enjoyed by other members of the full-time faculty. This Standard may be satisfied by: (1) the inclusion of full-time clinical faculty on the same tenure track as the other members of the full-time faculty; (2) a separate tenure track; or (3) Employment contracts, such as successive renewable, long-term contracts that provide features substantially equivalent to tenure. The approach chosen shall also include terms and conditions of employment substantially equivalent to those offered

Opposition to the proposed Standard 405(e) arose, especially among some deans and the leadership of the AALS. For example, three deans argued that the accrediting process should be “lean” and should not intrude on the “autonomy and sense of professional responsibility of the institution being regulated.”⁴⁶ The AALS Executive Committee argued that security of position for clinical faculty “may well impede instead of support the development of clinical legal education.”⁴⁷ In the face of this opposition, the council repeatedly delayed acting on versions of Standard 405(e) and interpretations that would require law schools to provide full-time clinical faculty a form of security of position reasonably similar to tenure.⁴⁸

Finally, at its May 1984 meeting, the council took up Standard 405(e) once more. Speaking in favor of proposed Standard 405(e), Robert McKay, former Dean of New York University School of Law and Chair of the Section of Legal Education and Admissions to the Bar, stated that “equity, fairness, and educational necessity underpin this issue.”⁴⁹ Norman Redlich, Dean of New York University School of Law and a member of the council, characterized the issue of status for clinical faculty as the “most important issue that he has faced in the accreditation of law schools”; and Judge Henry Ramsey, another council member, argued “that it was grossly unfair to discriminate against law teachers on the basis of what they teach.”⁵⁰

After much debate and four public hearings, at its May 1984 meeting the council unanimously voted to adopt Standard 405(e), which stated: “The law school shall afford to full-time faculty members whose primary responsibilities are in its skills program, a form of security of position reasonably similar to tenure and perquisites reasonably similar to those provided other full-

to non-clinical, full-time members of the faculty.

Id. (underscores in original).

46. Letter from Paul D. Carrington, Dean of Duke Univ. Sch. of Law et al., to Am. Bar Ass’n Section of Legal Educ. and Admissions to the Bar (April 27, 1984) (on file with author). Two other deans, Gerhard Casper of University of Chicago Law School, and Terrance Sandalow of University of Michigan Law School, signed on to the letter. Previously, as a subcommittee member of the AAUP investigating the increasing use of nontenure-track teaching staff, Sandalow argued that only with “very limited exceptions” should universities make academic appointments with anything other than tenure. Judith J. Thompson & Terrance Sandalow, *On Full-Time Non-Tenure-Track Appointments*, 64 AAUP BULL. 267, 273 (1978). Sandalow argued that administrators and faculty members who support full-time nontenure-track appointments “should recognize clearly that they are supporting practices which are inequitable, harmful to morale, and a threat to academic freedom.” *Id.*
47. Statement of the Executive Comm. of the Ass’n of Am. Law Schs. on Proposed Standard 405(e), ABA Standards for Approval of Law Schools 3-4 (May 17, 1984) (on file with author).
48. Joy & Kuehn, *supra* note 1, at 196-202.
49. Dean Rivkin & Roy Stuckey, *Update on 405(e)*, CLINICAL LEGAL EDUC. NEWSL. (Ass’n of Am. Law Schs., Washington, D.C.), June 1984, at 2, 4.
50. *Id.*

time faculty”⁵¹ In a letter to law school deans explaining their support for Standard 405(e), the law school deans on the council, joined by three other council members, stated: “Tenure, or some equivalent status, provides the assurance of academic freedom, which has long been regarded as essential for a quality faculty. This is no less true for teachers in a professional skills training program.”⁵²

Shortly after the council acted, the AALS Executive Committee reaffirmed its opposition to the proposed standard and promised that there would be a contested vote on the standard in the ABA House of Delegates.⁵³ This prompted the council to change the language in proposed Standard 405(e) from “shall” to “should,” fearing that without the change Standard 405(e) might not be enacted.⁵⁴

In August 1984, the ABA House of Delegates voted to adopt Standard 405(e) with the “should” language concerning security of position for clinical faculty.⁵⁵ The House of Delegates also adopted three interpretations for Standard 405(e) that the council had recommended. The first explained that “[a] form of security of position reasonably similar to tenure includes a separate tenure track or a renewable long-term contract,” and that the long-term contract could be “terminated only for good cause, including termination or material

51. Memorandum D8384-51 from James P. White, Consultant on Legal Educ. to the Am. Bar Ass’n, to Deans of ABA-Approved Law Schools 4 (May 22, 1984) (on file with author).

52. Letter from Richard Huber, Dean, Boston Coll. Law Sch., et al., to Deans of ABA-Approved Law Schools (June 18, 1984) (on file with author). The letter continued to explain:

The assurance of academic freedom affects quality in at least two ways: (a) it permits teachers to perform their academic responsibilities, in the classroom and in scholarship, without fear of reprisal; and (b) it helps to recruit high-quality faculty since potential teachers of distinction are more likely to be attracted to academic life if they can be assured of permanent status on a law school faculty.

Id.

53. Memorandum from Joseph R. Julin, President, Ass’n of Am. Law Schs., to Deans of Member Schools and Members of the Am. Bar Ass’n House of Representatives 1 (June 29, 1984) (arguing that the ABA standards should not be amended such that a mandatory relationship would exist between a law school and its clinical faculty) (on file with author).

54. Joy & Kuehn, *supra* note 1, at 204.

55. Memorandum D8485-6 from James P. White, Consultant on Legal Educ. to the Am. Bar Ass’n, to Deans of ABA-Approved Law Schools (Aug. 10, 1984) (on file with author). Standard 405(e) provided:

The law school should afford to full-time faculty members whose primary responsibilities are in its professional skills program a form of security of position reasonably similar to tenure and perquisites reasonably similar to those provided other full-time faculty members by Standards 401, 402(b), 403 and 405. The law school should require these faculty members to meet standards and obligations reasonably similar to those required of full-time faculty members by Standards 401, 402(b), 403 and 405.

Id.; AMERICAN BAR ASSOCIATION STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS, Standard 405(e) (1985) [hereinafter 1985 STANDARDS].

modification of the professional skills program.”⁵⁶ The second stated that law schools should establish “criteria for retention, promotion and security of employment of full-time faculty members in its professional skills program.”⁵⁷ And the third stated that “Standard 405(e) does not preclude a limited number of fixed, short-term appointments in a professional skills program predominantly staffed by full-time faculty members within the meaning of this Standard, or in an experimental program of limited duration.”⁵⁸

After this long route to the adoption of Standard 405(e) addressing the status of clinical faculty, it remained in place until 1996, with one change. The ABA found that many law schools were not adopting a form of security of position for clinical faculty, some law schools also were terminating clinical faculty with little or no notice, and many law schools did not permit clinical faculty to participate meaningfully in faculty governance.⁵⁹ Responding to some of these concerns in 1988, the council adopted a new interpretation on governance rights for full-time clinical faculty that provided that law schools should provide them with the “opportunity to participate in law school governance in a manner reasonably similar to other full-time faculty members.”⁶⁰ The council adopted this new interpretation because some law schools did not understand that the perquisites referred to in Standard 405(e) include participating in law school governance.⁶¹

Law schools continued to be slow to provide security of position to clinical faculty, and this was highlighted in July 1992 with the release of the MacCrate

56. 1985 STANDARDS, *supra* note 55, at Interpretation 1 of Standard 405(e).

57. *Id.* at Interpretation 2 of Standard 405(e).

58. *Id.* at Interpretation 3 of Standard 405(e).

59. Joy & Kuehn, *supra* note 1, at 207.

60. *Interpretation of 205, 403 and 405(e)*, in AMERICAN BAR ASSOCIATION STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS (1990); Memorandum D8889-33 from James P. White, Consultant on Legal Educ. to the Am. Bar Ass’n, to Deans of ABA-Approved Law Schools, at 1 (Dec. 15, 1988) (on file with author).

61. The council’s action was explained:

In December of 1988, the Council adopted this Interpretation to make it clear that the “perquisites” and “obligations” language in S405(c) [then as S405(e)] includes participation in governance by full-time professional skills teachers. There was no uncertainty among members of the Council about this. The only question was whether an Interpretation was needed or whether it was sufficiently apparent from the language of the Standard. After hearing evidence that not every school understood that S405(c) includes governance, Rosalie Wahl [Justice, Minnesota Supreme Court, and Chair of the Council 1987-88] brought the discussion to an end by commenting that “if that is what we mean, we should not hesitate to be clear about it.” I do not believe that there was a dissenting vote.

Memorandum from Roy Stuckey, Professor, Univ. of S.C. Sch. of Law, to Members of the Council, Am. Bar Ass’n Section of Legal Educ. and Admissions to the Bar 1 (May 17, 1996) (on file with author). Professor Stuckey was a member of the council from 1988 to 1994, a member of the Skills Training Committee from 1984 to 1996, and a member of the standards review committee from 1991 to 1995.

Report.⁶² In studying data about the status of clinical faculty, it found that “progress has not been uniform, and at some institutions, it has come slowly and without the commitment that is necessary to develop and maintain skills instruction of a quality commensurate with the school’s overall educational aspirations.”⁶³ The ABA assembled data supporting this concern and found that the percentage of full-time professional skills faculty holding “tenure eligible slots” actually dropped by more than five percent during the seven-year period from 1984 to 1991.⁶⁴ It concluded that “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.”⁶⁵

The slow progress toward security of position prompted the standards review committee in 1994 to recommend that the council amend Standard 405 to change the wording in Standard 405’s security-of-position requirement to “shall” rather than “should.”⁶⁶ The council held two public hearings, but did not make any substantive changes to Standard 405(e) beyond moving 405(e) to Standard 405(c).⁶⁷ The security-of-position language of old section (e) retained the “should” language and the relevant interpretations remained unchanged.⁶⁸

The status of clinical faculty remained an issue throughout 1995 and into 1996. The council voted to amend Standard 405(c) by replacing the words “professional skills” with “clinical” and changing the word “should” to “shall” at its meeting in June 1996, and the ABA House of Delegates adopted these changes at its annual meeting in August 1996.⁶⁹ Nothing in the standards

62. TASK FORCE ON LAW SCHS. AND THE PROFESSION: NARROWING THE GAP, Am. Bar Ass’n, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM (1992). The report is named after the chair of the task force, Robert MacCrate. *Id.* at v.
63. *Id.* at 266.
64. ROY STUCKEY, FINAL REPORT: RESULTS OF SURVEYS AND QUESTIONNAIRES REGARDING THE STATUS OF PROFESSIONAL SKILLS TEACHERS 1984-1991, at [3] (1991).
65. *Id.* at 5.
66. CONSULTANT ON LEGAL EDUC. TO THE AM. BAR ASS’N, 1994-95 ANNUAL REPORT 41-42 (1995) [hereinafter CONSULTANT’S 1994-95 REPORT]; Joseph W. Bellacosa, *Report No. 2 of the Section of Legal Education and Admissions to the Bar*, 120 A.B.A. ANN. REP. 351, 352 (1995).
67. CONSULTANT’S 1994-95 REPORT, *supra* note 66, at 41-42; Bellacosa, *supra* note 66, at 351-53; *General Minutes*, 120 A.B.A. ANN. REP. 24 (showing the approval of the council’s recommendation); *Actions of the House of Delegates*, SYLLABUS (Am. Bar Ass’n Section of Legal Educ. and Admissions to the Bar, Chi., Ill.), Spring 1995, at 15.
68. CONSULTANT’S 1994-95 REPORT, *supra* note 66, at 41-42; AMERICAN BAR ASSOCIATION STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS 36-37, 43-44 (1995); Bellacosa, *supra* note 66, at 352.
69. AMERICAN BAR ASSOCIATION STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS 43 (1996); Erica Moeser, *Report No. 1 of the Section of Legal Education and Admissions to the Bar*, 121 A.B.A. ANN. REP. 349, 375-76 (1996).

ever defined “professional skills” and after the revisions the standards did not define “clinical.” The 1980 ABA/AALS Clinical Legal Education Guidelines defined clinical studies as including “law student performance on live cases or problems, or in simulation of the lawyer’s role, for the mastery of basic lawyering skills and the better understanding of professional responsibility, substantive and procedural law, and the theory of legal practice.”⁷⁰ The council has revisited the status of clinical faculty several times since then, and each time there has been resistance to Standard 405(c), including efforts to remove security of position from the standards.

IV. Resistance to Standard 405(c) and Efforts to Remove Security of Position from the Standards

Resistance to the “shall” language in Standard 405 requiring treatment of clinical faculty reasonably similar to that of other faculty continued after the 1996 amendments to Standard 405. In 1996, the Association of Law Deans of America (ALDA) urged that Standard 405(c) be deleted because requiring a form of security of position for clinical faculty reasonably similar to tenure was inconsistent with the lack of any ABA “requirement that a law school have a tenure system at all.”⁷¹

Following this urging by ALDA, the standards review committee has three times recommended revisions to Standard 405 to remove the requirement of tenure for at least some faculty and tenure or security of position reasonably similar to tenure for clinical faculty. Each time, the council has rejected the recommendation. Even an effort to clarify how a long-term contract may be an alternative to tenure unwittingly has led to an erosion of Standard 405(c).

A. 1999: First Attempt to Eliminate the Tenure Protection for Academic Freedom

In 1999, the standards review committee held hearings and received comments on Standard 405, after which the committee proposed removing all mention of tenure.⁷² The standards review committee recommended that law

70. ABA/AALS CLINICAL LEGAL EDUCATION GUIDELINES, *supra* note 27, at 12.

71. *Final Commentary on Changes in Chapters Three and Four of the Standards for Approval of Law Schools, 1998-1999*, SYLLABUS (Am. Bar Ass’n Section of Legal Educ. and Admissions to the Bar, Chi., Ill.), Summer 1999, at 8, 10, 15 [hereinafter *Final Commentary*]; see Am. Law Deans Ass’n, Statement of the American Law Deans Association on Proposed Modification of the Standards for the Approval of Law Schools of the American Bar Association 9-10 (attachment to Letter from Ronald A. Cass, President, Am. Law Deans Ass’n., to James P. White, Consultant on Legal Educ. to the Am. Bar Ass’n (Apr. 21, 1997)). ALDA did not object to the retention of Standard 405(b), which requires law schools to have an established policy with respect to tenure, but objected only to any requirement of security of position reasonably similar to tenure for clinical faculty. See *Final Commentary, supra*, at 15.

72. *Validation of Standards Chapters 3 and 4—Preliminary Proposals and Request for Comments*, SYLLABUS (Am. Bar Ass’n Section of Legal Educ. and Admissions to the Bar, Chi., Ill.), Winter 1999, at 1, 17-18 [hereinafter *Validation of Standards*].

schools adopt such policies for security of position and academic freedom as are necessary to attract and retain a competent faculty.⁷³

Many spoke out against this change, including Carl Monk, Executive Director of the AALS. Monk testified at one of the hearings on the proposed change that the AALS Executive Committee voted to oppose all proposed changes to Standard 405, including removing the tenure policy requirement in Standard 405, because “such a change to such a major core traditional value of the academy should not be made without very broad consultation that goes beyond these series of hearings with all types of law faculty and others in the higher education community.”⁷⁴ Monk stressed that tenure is necessary to secure academic freedom.⁷⁵

The council considered the standards review committee’s proposal to eliminate tenure and rejected it. The 1999-2000 Annual Report of the Consultant on Legal Education explained that the council rejected the call to eliminate language concerning job security “[b]ecause of its belief in the important role of tenure in protecting academic freedom.”⁷⁶

B. 2003: Second Attempt to Eliminate the Tenure Protection for Academic Freedom

In 2003, the council and the accreditation committee asked the standards review committee “to consider the meaning of ‘renewable’ in Interpretation 405-6.”⁷⁷ The request noted that there was “no agreement about whether ‘renewable’ means ‘presumptively renewable,’ so that a person holding such a contract could rely on long-term and continuing employment so long as the person’s work performance was satisfactory, or ‘capable of being renewed,’

73. Memorandum D9899-78 from James P. White, Consultant on Legal Educ. to the Am. Bar Ass’n, to Deans of ABA-Approved Law Schools (July 21, 1999) [hereinafter Memorandum D9899-78] (on file with author).

74. Am. Bar Ass’n Section of Legal Educ. and Admissions to the Bar, Standards Review Comm. Hearing on Recodification of Standards, in S.F., Cal., at 7-8 (May 19, 1999) [hereinafter 1999 Standards Review Committee Hearing] (transcript on file with author) (statement of Mr. Monk).

75. *Id.* at 8.

76. CONSULTANT ON LEGAL EDUC. TO THE AM. BAR ASS’N, 1999-2000 ANNUAL REPORT 31 (2000); see also *Validation of Standards*, *supra* note 72, at 17-18 (stating that a law school must have a policy promoting academic freedom in order to keep a professional environment); Office of the Consultant on Legal Educ., Am. Bar Ass’n Section of Legal Educ. and Admissions to the Bar, Commentary on the Proposed Changes to Chapters Five, Six and Seven of the Standards for the Approval of Law Schools 1999-2000 (attachment to Memorandum D9900-26 from James P. White, Consultant on Legal Educ. to the Am. Bar Ass’n, to Deans of ABA-Approved Law Schools 2 (Dec. 22, 1999)) (“The council voted not to place the Standards Review Committee’s revised recommendation on Standard 405 out for comment because of its belief that the standard’s current tenure requirement is an important protection of academic freedom.”) (on file with author).

77. Office of the Consultant on Legal Educ., Am. Bar Ass’n, Commentary on the Changes to the Standards for the Approval of Law Schools and the Work of the Standards Review Committee 2002-2003, at 14 (Aug. 2003) (on file with author).

meaning that the contract is not subject to a term limit or cap”⁷⁸ The request explained: “The history of Standard 405(c) suggests that this question was not resolved at the time the Standard was adopted.”⁷⁹

During 2003, the standards review committee considered various changes to Standard 405, but did not directly address the council’s request to clarify if long-term contracts for clinical faculty had to be presumptively renewable to be reasonably similar to tenure. Instead, the committee focused on deleting references to tenure and expanding the definition of academic freedom.⁸⁰

In November 2003, the standards review committee forwarded to the council proposed changes to remove all mention of tenure,⁸¹ which was the same recommendation that it had made to the council in 1999. In February 2004, the council rejected the call to delete any reference to tenure from Standard 405 for a second time.⁸²

C. 2004–2006: One Step Back

In 2004, the standards review committee continued to consider changes to Standard 405. In November 2004, the committee recommended changes to an interpretation of Standard 405 to specify that “long-term contracts” must be at least five years in length and renewable to satisfy the “reasonably similar to tenure” requirement for employment relationships with clinical faculty to equate to those for tenure-track faculty.⁸³

In December 2004, the council sent out for notice and comment revisions to interpretations to Standard 405.⁸⁴ Proposed Interpretation 405-6 stated that “‘long-term contract’ means at least a five-year renewable contract.”⁸⁵

78. *Id.* At the time, the accreditation committee was using the latter interpretation of the term. *Id.*

79. *Id.*

80. Standards Review Comm., Am. Bar Ass’n, Revisions to Chapters 3 and 4: Tentative Decisions/Drafting Directions 11 (Sept. 19–20, 2003) (on file with author).

81. Memorandum from Michael J. Davis, Chairperson, Standards Review Comm., Am. Bar Ass’n, to Council of the Am. Bar Ass’n Section of Legal Educ. and Admissions to the Bar (Jan. 15, 2004) (on file with author).

82. Memorandum from John A. Sebert, Consultant on Legal Educ. to the Am. Bar Ass’n, and Michael J. Davis, Chairperson, Standards Review Comm., to Deans of ABA-Approved Law Schools et al. 1, 3 (Feb. 20, 2004) (on file with author).

83. *Commentary on Revisions to Standards for Approval of Law Schools 2004-05*, SYLLABUS (Am. Bar Ass’n Section of Legal Educ. and Admissions to the Bar, Chi., Ill.), Fall 2005, at 74–75 [hereinafter *Commentary on Revisions to Standards 2004-05*]; The Consultant on Legal Education mentions in his annual report that the Standards Committee recommended changes to Standard 405 in November 2004. CONSULTANT ON LEGAL EDUC. TO THE AM. BAR ASS’N, 2004–2005 ANNUAL REPORT 56 (2005) [hereinafter CONSULTANT’S 2004–2005 REPORT].

84. *Commentary on Revisions to Standards 2004-05*, *supra* note 83, at 59; CONSULTANT’S 2004–2005 REPORT, *supra* note 83, at 56.

85. *Proposed Revision of Chapter 4 of the Standards*, SYLLABUS (Am. Bar Ass’n Section of Legal Educ. and Admissions to the Bar, Chi., Ill.), Feb. 2005, at 1, 12 [hereinafter *Proposed Revision of Chapter 4*].

Proposed Interpretation 405-8 defined participation in faculty governance to be “participation in faculty meetings, committees and other aspects of law school governance in a manner reasonably similar to other full-time faculty, including voting on non-personnel matters.”⁸⁶

Accompanying the proposed changes was a memorandum prepared by the Consultant on Legal Education and chair of the standards review committee summarizing the history of the debate and explaining that the council was acting because the accreditation committee had been approving schools with three-year contracts and no presumption of renewal and that such contracts were “inconsistent with the plain meaning of that Standard [405(c)].”⁸⁷ The memorandum explained: “The proposed revision to Interpretation 405-6 clarifies the circumstances under which a program of long-term contracts will be considered to provide full-time clinical faculty a ‘form of security of position reasonably similar to tenure’ as required by Standard 405(c).”⁸⁸

The ABA held a number of public hearings on the proposals to change the interpretations to Standard 405(c) from January through May 2005.⁸⁹ ALDA opposed the changes.⁹⁰

86. *Id.* at 13.

87. Memorandum from Sebert & Davis to Deans of ABA-Approved Law Schools, *supra* note 82, at 4. The memorandum explained:

There has been considerable debate regarding the role of the Standards in establishing conditions and terms of employment. Considering, however, that the Standards continue to establish conditions and terms of employment, it was the prevailing view that the practice developed by the Accreditation Committee—that a three-year renewable contract carrying no presumption regarding renewal is a “form of security of position reasonably similar to tenure” within the meaning of Standard 405(c)—is inconsistent with the plain meaning of that Standard. The proposed change . . . makes clear that a “program of renewable long-term contracts” will only be “reasonably similar to tenure” if, following a probationary period during which a full-time clinical faculty could be employed on short-term contracts, the employment of the faculty member is either terminated or continued by a granting of a renewable contract at least five years in length. The five-year term reflects the pattern for post-tenure review that is evolving at many schools. By providing greater security of position than the Accreditation Committee’s practice, the proposed revision is designed to achieve the goal of Standard 405(c), i.e., to ensure that law schools can attract and retain quality full-time clinical faculty and thereby strengthen the clinical component of the law school curriculum A proposal that renewable long-term contract carries with it a presumption of renewal was considered and ultimately rejected.

Id.; see also *Proposed Revision of Chapter 4 of the Standards*, *supra* note 85, at 12 (including the same explanation for the proposed revisions by the council).

88. Memorandum from Sebert & Burke to Deans of ABA-Approved Law Schools, *supra* note 82, at 4; see also *Commentary on Revisions to Standards 2004-05*, *supra* note 83, at 12 (including the same explanation for the proposed revisions by the council).

89. *Commentary on Revisions to Standards 2004-05*, *supra* note 83, at 59; CONSULTANT’S 2004-2005 REPORT, *supra* note 83, at 56, 61 (reprinting the ABA Section of Legal Education and Admission to the Bar’s “Commentary on Revisions to Standards for Approval of Law Schools 2004-05”).

90. Letter from Saul Levmore, Dean, Univ. of Chi. Law Sch., to Stephen Yandle, Deputy

The standards review committee considered all of the comments and recommended to the council that it “adopt without change the proposed revisions to Interpretation 405-6.”⁹¹ The committee explained that the proposed revisions did not expand security of position for clinical faculty but instead would “provide much-needed specific guidance to law schools and the accreditation committee regarding the proper interpretation of the language of Standard 405(c).”⁹² The standards review committee stated that long-term contracts not only ensure that law schools can attract and retain quality clinical faculty but also “play a significant role in ensuring the academic freedom of full-time clinical faculty.”⁹³

At its June 2005 meeting, the council reviewed the recommendations from the standards review committee.⁹⁴ The council’s review included a discussion of whether a long-term contract that was not presumptively renewable would suffice, a proposal that the standards review committee had considered and rejected. The council then added the following language to Interpretation 405-6: “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.”⁹⁵

In August 2005, the ABA House of Delegates concurred with the proposed changes.⁹⁶ The resulting Standard 405(c) and interpretations, which are still in effect, state that “[a] law school shall afford to full-time clinical faculty members a form of security of position reasonably similar to tenure,” and where a school chooses a system of long-term contracts, “‘long-term contract’ means at least a five-year contract that is presumptively renewable or other arrangement sufficient to ensure academic freedom.”⁹⁷

The council’s insertion of the phrase “or other arrangement sufficient to ensure academic freedom” into Interpretation 405-6 has resulted in continued uncertainty about the appropriate means to provide security of position for clinical faculty. Since 2005, there has been continued resistance to treating clinical faculty reasonably similarly to nonclinical faculty, and at least two

Consultant, Am. Bar Ass’n Section of Legal Educ. and Admissions to the Bar (Apr. 28, 2005) (on file with author).

91. Memorandum from J. Martin Burke, Chairperson, Standards Review Comm., to Council of the Am. Bar Ass’n Section of Legal Educ. and Admissions to the Bar 1, 1 (May 22, 2005) (on file with author).

92. *Id.* at 1-2.

93. *Id.* at 2.

94. *Commentary on Revisions to Standards 2004-05*, *supra* note 83, at 59.

95. *Approved Changes to the Standards Approval of Law Schools and Associated Interpretations*, SYLLABUS (Am. Bar Ass’n Section of Legal Educ. and Admissions to the Bar, Chi., Ill.), Fall 2005, at 73-74 [hereinafter *2005 Approved Changes*].

96. *Commentary on Revisions to Standards 2004-05*, *supra* note 83, at 59; CONSULTANT’S 2004-2005 REPORT, *supra* note 83, at 16-17.

97. *2005 Approved Changes*, *supra* note 95, at 73-74.

reported of instances of accreditation committee actions that have permitted short-term contracts for clinical faculty and no meaningful participation in law school governance.

Relying on the language “or other arrangement sufficient to ensure academic freedom” in 2006, Northwestern prevailed in its position that it was in compliance with Standard 405 even though only seven of its thirty-eight clinical faculty had tenure or contracts of more than one year because the remaining clinical faculty on one-year contracts were covered by the university’s academic freedom policy.⁹⁸

In approving Northwestern’s approach, the accreditation committee read the provision “other arrangement sufficient to ensure academic freedom” as a completely separate avenue for ensuring security of position reasonably similar to tenure. In doing so, the accreditation committee equated “other arrangement sufficient to ensure academic freedom” with “long-term contract,” which the same sentence in Interpretation 405-6 defines first as a “five-year contract that is presumptively renewable.”

Northwestern also maintained that although the clinical faculty on short-term contracts did not have any vote in faculty meetings, they did serve on faculty committees other than those dealing with appointment and tenure of faculty.⁹⁹ Without explaining how serving on some committees was “reasonably similar to other full-time faculty members,” the accreditation committee ultimately concluded that Northwestern had demonstrated compliance with Interpretation 405-8 even though the overwhelming majority of clinical faculty had no vote in faculty governance.¹⁰⁰

No public record exists of other accreditation committee decisions that have adopted the reasoning used for Northwestern, as accreditation matters are kept confidential unless the law school decides to make them public. However, on at least one other occasion the accreditation committee is reported to have approved one-year contracts for clinical faculty at another law school, though

98. Accreditation committee actions are kept confidential by the ABA, but Dean David Van Zandt of Northwestern University School of Law released the decision of the committee on a law school dean group e-mail list. Letter and Decision of the Am. Bar Ass’n Accreditation Comm. from Hulett H. Askew, Consultant on Legal Educ. to the Am. Bar Ass’n, to Dr. Henry S. Bienen, President, Nw. Univ., and David E. Van Zandt, Dean, Nw. Univ. Sch. of Law (Nov. 15, 2006) [hereinafter 2006 ABA Accreditation Decision for Northwestern] (on file with author).

99. *Id.* at 2. At the time of the decision, Interpretation 405-8, which has remained unchanged, stated: “A law school shall afford to full-time clinical faculty members participation in faculty meetings, committees, and other aspects of law school governance in a manner reasonably similar to other full-time faculty members.” AMERICAN BAR ASSOCIATION STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS, 2006-2007, Interpretation 405-8 at 33 (2006).

100. 2006 ABA Accreditation Decision for Northwestern, *supra* note 98, at 3.

that law school did not publicly release its accreditation committee decision letter.¹⁰¹

After the Northwestern decision, the accreditation committee and the council requested the standards review committee to review what was required to satisfy Standard 405(c) “security of position reasonably similar to tenure” and to clarify Interpretation 405-6 with respect to the clause “or other arrangement sufficient to ensure academic freedom.”¹⁰² In addition, the council voted in August 2007 to form a special committee to look at the issue of security of position and governance rights for clinicians.¹⁰³

After considering the ambiguous language added by the council in 2005, the standards review committee unanimously approved and forwarded to the council a revised version of Interpretation 405-6 that provided:

A form of security of position reasonably similar to tenure includes a separate tenure track or a program of renewable long-term contracts sufficient to ensure academic freedom. 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 long-term renewable contract. For the purposes of this Interpretation, “long-term contract” means a contract for a term of at least a five-year contract that is presumptively renewable or includes other provisions 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.¹⁰⁴

101. See Paulette J. Williams, *President's Message*, CLEA NEWSLETTER (Clinical Legal Educ. Ass'n, New York, N.Y.), Feb. 2007, at 1, 2 (stating that the accreditation committee approved one-year contracts for clinical faculty at St. Louis University School of Law).
102. Memorandum from Richard Morgan, Chair, Standards Review Comm., and Hulett Askew, Consultant on Legal Educ. to the Am. Bar Ass'n, to Deans of ABA-Approved Law Schools et al. (Aug. 21, 2007) (on file with author) (identifying the committee's agenda for academic year 2007-08); e-mail from Mark Aaronson to Clinical Legal Educ. Ass'n Board of Directors (May 17, 2007) (on file with author) (reporting the actions of the standards review committee at its May 16, 2007, meeting).
103. Paulette J. Williams, *President's Message*, CLEA NEWSLETTER (Clinical Legal Educ. Ass'n, New York, N.Y.), Sept. 2007, at 1.
104. Standards Review Comm., Am. Bar Ass'n, Draft Revisions to Standards for Approval of Law Schools and Explanation of Amended Interpretation 405-6 (attached to e-mail from Hulett Askew, Consultant on Legal Educ. to the Am. Bar Ass'n, to Michael Pinard, President, Clinical Legal Educ. Ass'n (Feb. 15, 2008)) (on file with author) [hereinafter Draft Revisions and Explanation of Amended Interpretation 405-6] (underscores in original).

The accompanying explanation stated that the proposed amendment makes clear that “a one year [sic] contract plus a policy on academic freedom is not sufficient under this Standard [405(c)].”¹⁰⁵ This proposal would have addressed the uncertainty that the accreditation committee’s decision for Northwestern had created.

In February 2008, the council considered the proposed amendment and decided to postpone any action until after the report from a newly created special committee on security of position due in the summer of 2008.¹⁰⁶

Before that committee report was issued, a special ABA Accreditation Task Force issued a report in which more than a quarter of the report focused on the security-of-position issue in Standard 405(c).¹⁰⁷ The report observed that tenure or a form of position reasonably similar to tenure is not explicitly required in standards of other accrediting bodies, but such a protection for clinical law faculty may be necessary “because of the documented history of repeated attempts at outside interference with litigation and other forms of advocacy by law school clinics.”¹⁰⁸

The accreditation task force did not reach a consensus on a recommendation concerning security of position, but a majority signed on to a statement that concluded it was unlikely that “adequate alternative mechanisms can be fashioned” that “would promote the goals of a sound program of legal education, academic freedom, and a well-qualified faculty.”¹⁰⁹

In May 2008, the special committee on security of position issued its report,¹¹⁰ the first part of which reviewed the historical reasons for protecting academic freedom and examining the relationship between tenure and academic freedom. The report noted that tenure is “a shield to protect academic freedom from external threats,”¹¹¹ and that a faculty member with tenure could “be terminated for cause so long as the faculty, or a representative group of the

105. *Id.*

106. E-mail from Michael Pinard, President, Clinical Legal Educ. Ass’n, to lawclinic@lists.washlaw.edu (Feb. 14, 2008) (on file with author) (reporting on ABA actions concerning Interpretation 405-6); e-mail from Dan Freeling, Deputy Consultant on Legal Educ. to the Am. Bar Ass’n, to Peter Joy (Feb. 15, 2008) (on file with author) (confirming reports of ABA actions concerning proposed amendments to Interpretation 405-6).

107. SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, AM. BAR ASS’N, REPORT OF THE ACCREDITATION POLICY TASK FORCE 17-26 (2007), http://www.americanbar.org/content/dam/aba/migrated/legaled/actaskforce/2007_05_29_report_accreditation_task_force.authcheckdam.pdf [<https://perma.cc/UHW3-J85E>].

108. *Id.* at 22.

109. *Id.*

110. *Report of Special Committee on Security of Position*, AM. BAR ASS’N (May 5, 2008), http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/reports/2008_security_of_position_committee_final_report.authcheckdam.pdf [<https://perma.cc/VL2V-DRJ8>].

111. *Id.* at 8.

faculty, finds that the termination is not a violation of academic freedom.”¹¹² The report also stated that “if the various ‘security of position’ provisions included in the current Standards and Interpretations did not exist, they or some comparable substitute would have to be invented.”¹¹³ It also stated: “As a final matter, no law school can exist without faculty who has some security of position.”¹¹⁴

D. 2008-2014: The Third and Most Recent Attempt to Eliminate the Tenure Protection for Academic Freedom

The most recent comprehensive review of the ABA Standards took place from 2008 to 2014. During that review, the most contentious issue was the review of Standard 405, and “[t]he issue discussed by the Council that generated the most public comment was the effort to clarify the requirements regarding tenure.”¹¹⁵

During the comprehensive review in July 2011, a subcommittee of the standards review committee made the following controversial statement:

“First, the current Standards do not required [sic] approved law schools to have systems for tenuring of any or all of their faculty members and this draft retains this feature. Some have argued that the current Standards do require tenure systems or rights as approved schools because that is ‘implied’ by the language in Standard 405(b) and Interpretation 405-3.”¹¹⁶

The operative language in Standard 405(b) that the report referred to states: “A law school shall have an established and announced policy with respect to academic freedom and tenure of which Appendix 1 herein is an example but is not obligatory.”¹¹⁷ Interpretation 405-3 states: “A law school shall have a comprehensive system for evaluating candidates for promotion and tenure or other forms of security of position, including written criteria and procedures that are made available to the faculty.”¹¹⁸

112. *Id.* at 9.

113. *Id.*

114. *Id.* at 12.

115. *Standards Review Committee Meeting Agenda*, AM. BAR ASS’N 15 (Apr. 25, 2014), http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/201404_src_meeting_materials.authcheckdam.pdf [<https://perma.cc/NN9A-6FYV>].

116. Standards Review Comm., *Security of Position, Academic Freedom and Attract and Retain Faculty, Draft for July 15, 2010*, AM. BAR ASS’N 1 (July 15, 2010), http://www.americanbar.org/groups/legal_education/committees/standards_review/comp_review_archive/meeting_drafts.html [<https://perma.cc/6BYA-U79L>].

117. SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, AM. BAR ASS’N, STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2010-2011, Standard 405(b) at 12 (2010).

118. *Id.* at Interpretation 405-3 at 33.

The glaring flaw in the subcommittee's analysis is that it made no mention of Interpretation 405-1, which states: "A fixed limit on the percent of a law faculty that may hold tenure under any circumstances violates the Standards."¹¹⁹ If a law school did not tenure any faculty, such a law school would thereby have a fixed limit of zero percent of a law faculty that may hold tenure. This obvious error in the subcommittee's draft report led the subcommittee to walk back its claim.

The subcommittee redrafted its report for the November 2010 standards review committee meeting, revising its view on whether the standards require accredited law schools to have a system of tenure.¹²⁰ The report no longer stated that the standards do not require tenure, but instead pointed out "that there is ambiguity in the language of the Standards concerning security of position and inconsistency in the application of Standard 405's 'policy with respect to academic freedom and tenure' language."¹²¹ The draft report also acknowledged:

Without question, there has been widespread acceptance of the notion that the Standards require (or encourage) approved law schools to have a system of tenure. A fair reading of several provisions supports the contention that the current accreditation policy requires tenure earning rights at approved schools (see, e.g., 405(c) requiring clinical faculty members to have a form of contract protection "similar to tenure"; 405-1 finding that a "fixed limit on the percentage [sic] of a law faculty that may hold tenure" is prohibited; 405-3 requiring schools to have a "comprehensive system for evaluating candidates for promotion and tenure . . ."). Moreover, it is clear that virtually all approved American law schools have some form of tenure for some of their faculty members and that the availability of tenure has become the norm in American legal education.¹²²

Throughout 2010–2013, the standards review committee considered various changes to Standard 405, including clarifying it and its interpretations to ensure that clinical faculty truly have security of position and participation in law school governance reasonably similar to tenure-track faculty. Among the proposed changes, an alternative draft would have required a law school to "afford all full-time faculty a form of security of position sufficient to ensure academic freedom and meaningful participation in law school governance" and to provide "a written comprehensive system for evaluating candidates for

119. *Id.* at Interpretation 405-1 at 33.

120. Standards Review Comm., *Security of Position, Academic Freedom and Attract and Retain Faculty, Draft for November 7-8, 2010*, AM. BAR ASS'N 2-3 (Nov 8, 2010), http://www.americanbar.org/content/dam/aba/migrated/2011_build/legal_education/committees/standards_review_documents/november_2010_meeting_materials/academic_freedom.authcheckdam.pdf [<https://perma.cc/GR7Z-KJDT>].

121. *Id.* at 2.

122. *Id.*

all positions for renewal, promotion and termination.”¹²³ It also defined forms of security of position sufficient to ensure academic freedom as including: “(a) tenure; (b) programmatic tenure that may be terminated only for good cause after a probationary period reasonably similar to that for tenure-track faculty members; or (c) a program of renewable long-term contracts that are at least five years in duration and either presumptively renewable or nonrenewable only for good cause after a probationary period reasonably similar to that for tenure-track faculty members.”¹²⁴

In addition, the alternative proposal defined meaningful participation in law school governance as including “faculty participation in decisions affecting the mission and direction of the law school, including academic matters such as curriculum, academic standards, and methods of instruction, and participation in the appointment, renewal, promotion, and termination of members of the faculty.”¹²⁵ The proposed change would have required that participation in law school governance would be equal to that afforded tenure-track faculty except that a law school could limit “voting rights of faculty members on appointments, retention, promotion and tenure (or granting of security of position) outside their field of study or method of teaching.”¹²⁶

By April 2013, the alternative draft had developed into one of four alternatives, and was known as Alternative C.¹²⁷ Minutes from the meeting at which it was discussed stated the key feature as “all full-time faculty members must have the same rights with respect to security of position, governance and other rights of full-time faculty, regardless of a faculty member’s academic field or teaching methodology.”¹²⁸ By July 2013, a proposed interpretation to Alternative C of Standard 405 provided that if a law school did not have a system of tenure as “an effective method of protecting faculty members’ academic freedom,”¹²⁹ the burden was on the school to demonstrate that it had a “written policy with respect to academic freedom of its full-time faculty . . . including rules that prohibit the non-renewal, denial of promotion, or

123. Standards Rev. Comm., *Security of Position, Academic Freedom and Attract and Retain Faculty, Draft for April 2011 Meeting*, AM. BAR ASS’N 5 (Apr. 2011), http://www.americanbar.org/content/dam/aba/migrated/2011_build/legal_education/committees/standards_review_documents/april_2011_meeting/report_of_subcommittee_on_academic_freedom_and_status_of_position.authcheckdam.pdf [https://perma.cc/U768-QSGF].

124. *Id.* at 5 (Interpretation 405-1).

125. *Id.* at 5 (Interpretation 405-2).

126. *Id.*

127. Standards Review Comm., *Minutes, April 26-27, 2013*, AM. BAR ASS’N 5 (Apr. 27, 2013), http://www.americanbar.org/content/dam/aba/migrated/2011_build/legal_education/committees/standards_review_documents/april_2013/201304_src_meeting_minutes_amended_draft.authcheckdam.pdf [https://perma.cc/4PK3-ZMMP] (discussing Alternative C to Standard 405).

128. *Id.*

129. *Standards Review Committee Meeting Agenda, July 12-13, 2013*, AM. BAR ASS’N 85 (July 13, 2013), [https://perma.cc/J4N3-U2ZR] (discussing Alternative C, Interpretation 405-2).

loss of a faculty position unless a representative group of faculty agree that the determination is not a violation of academic freedom and that offer the affected faculty member the opportunity to present any claims to the faculty making that determination.”¹³⁰

Another draft, known as Alternative A, would have addressed some of the issues the application of Standard 405 had raised. It included a provision stating that all full-time faculty have “meaningful participation . . . in the governance of the school.”¹³¹ A proposed Interpretation 405-3 to Alternative A explained: “Meaningful participation in law school governance minimally includes participation and voting in decisions affecting the mission and direction of the law school, and academic matters such as curriculum, academic standards, and methods of instruction.”¹³² Proposed Interpretation 405-6 spelled out that for clinical faculty this meant “participation in faculty meetings, committees, and other aspects of law school governance in a manner reasonably similar to other full-time faculty members.”¹³³ And proposed Interpretation 405-5 explained that a form of security position reasonably similar to tenure “includes a separate tenure track or a program of renewable long-term contracts,”¹³⁴ and “‘long-term contract’ means at least a five-year contract that is presumptively renewable or other substantially similar arrangement sufficient to ensure academic freedom.”¹³⁵ Under a system of a separate tenure track for clinical faculty or a program of renewable long-term contracts, employment could only “be terminated for good cause, including termination or material modification of the entire clinical program.”¹³⁶

At its July 2013 meeting, the committee voted to forward all four drafts to the council.¹³⁷ The council considered the four proposals, including the alternative that would have created a new Standard 405 requiring law schools to treat all full-time faculty reasonably equally in terms of security of position, protection of academic freedom, and meaningful participation in faculty governance.

130. *Id.* at 85 (Alternative A, Interpretation 405-2).

131. *Id.* at 84 (Alternative A, Standard 405(c)).

132. *Id.* at 85 (Alternative A, Interpretation 405-3).

133. *Id.* at 86 (Alternative A, Interpretation 405-6).

134. *Id.* at 85 (Alternative A, Interpretation 405-5).

135. *Id.* at 86 (Alternative A, Interpretation 405-5).

136. *Id.*

137. *Standards Review Committee Meeting Agenda, Oct. 11-12, 2013*, AM. BAR ASS’N 4-5 (Oct. 12, 2013), http://www.americanbar.org/content/dam/aba/migrated/2011_build/legal_education/committees/standards_review_documents/201310_src_meeting_materials.authcheckdam.pdf [https://perma.cc/3ET9-M8HN]. The straw vote indicated that no alternative received more than four first-preference votes, and Alternative A received three first-preference votes while Alternative C received two first-preference votes. *Id.*

The council chose to send out only two alternative versions of Standard 405 and its interpretations comment.¹³⁸ Both versions would have removed the requirement of tenure. The first alternative would have required “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,” but it did not explain what such an alternative might be.¹³⁹ The second alternative did not require any type of security of position.¹⁴⁰

In terms of protecting academic freedom, both of the alternatives contained a draft Interpretation 405-2 that stated that tenure “can be an effective method of protecting faculty members’ academic freedom,”¹⁴¹ and stated that for full-time faculty without tenure “the law school bears the burden of establishing that it provides sufficient protection for academic freedom.”¹⁴² The rest of the interpretation in one of the alternatives used “should” rather than “shall” language in terms of discussing a law school’s policies.¹⁴³ When a standard or interpretation uses the word “should” rather than “shall” in describing an action by the law school, it is precatory only, and a law school is not required to take such action.

The two proposals, neither of which provided a clear method of ensuring that a law school would protect academic freedom if it did not have tenure or its equivalent, generated a number of comments. Among those commenting was a group of ABA deans of color representing eleven law schools, including both private and public law schools.¹⁴⁴ They argued that among the reasons legal education in the United States is valued “is that U.S. law faculty have the freedom speak truth to power, a freedom that only tenure can secure. Another reason is that U.S. law faculty play a critical role in law school governance and have the kind of security of position that enables them to sacrifice short-term considerations in favor of longer-term commitments and initiatives

138. *Memorandum from Hon. Solomon Oliver, Jr., Council Chairperson, Am. Bar Ass’n Section of Legal Educ. and Admissions to the Bar, and Barry A. Currier, Managing Director of Accreditation and Legal Education, to Interested Persons and Entities, on Comprehensive Review of the ABA Standards for Approval of Law School Matters for Notice and Comment*, AM. BAR ASS’N 57-59 (Sept. 6, 2013), http://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_authcheckdam.pdf [https://perma.cc/N8K6-5XSL].

139. *Id.* at 58 (Standard 405, Professional Environment Alternative 1).

140. *Id.* (Standard 405, Professional Environment Alternative 2).

141. *Id.* at 66 (Interpretation 405-2, Alternative 1; *id.* at 68 (Interpretation 405-2, Alternative 2).

142. *Id.* at 66 (Interpretation 405-2, Alternative 1); *id.* at 68 (Interpretation 405-2, Alternative 2).

143. *Id.* at 66 (Interpretation 405-2, Alternative 1).

144. *Letter from Deans of Color to Hon. Solomon Oliver, Jr., and Barry A. Currier, with Comments on Proposed Changes in Standard*, AM. BAR ASS’N 3-4 (Nov. 26, 2013), http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/comments/201311_comment_ch_4_deans_color_authcheckdam.pdf [https://perma.cc/4YRX-8H9T].

that are only possible with the protection of the tenure system.”¹⁴⁵ Another commentator feared that eliminating tenure would have an even worse effect than the current version of Standard 405 on women and people of color, who already “disproportionately fall into those hired as contractual professors.”¹⁴⁶

The council considered these and other comments and rejected both proposals. The chair of the council noted that the comments received “were overwhelmingly in favor of keeping some form of tenure system,” and the council “did not receive a large number of submissions in support of either of the proposals we put forth.”¹⁴⁷ He also stated that the council did not receive “a clear picture of what law school-staffing models would look like without” tenure, nor “any clear arguments about what, exactly, the problems are with the tenure system.”¹⁴⁸

In commenting on the council’s decision to keep tenure for at least some faculty, the Executive Director of the AALS stated that she was “very pleased” because she thought both of the alternatives “were seriously flawed.”¹⁴⁹ She explained: “Tenure is not a perk for law faculty. It’s a protection for people who think it’s important to innovate in law schools. You need to feel comfortable in order to be able to try new things.”¹⁵⁰

In a recent article about the accreditation process, the chair-elect of the council affirmed that “the Standards clearly contemplate a tenure system.”¹⁵¹ She explained that the provisions of Standard 405 “imply that at least some faculty members must have tenure.”¹⁵²

Conclusion

The importance of efforts to remove tenure or some other due-process protection of academic freedom from Standard 405(c) should not be underestimated. What started first as opposition to Standard 405(c) requiring

145. *Id.* at 1.

146. *E-mail from W. Burlette Carter, Professor of Law at George Washington Law Sch., to Mr. Clark, Am. Bar Ass’n Manager, Program Administration, on Discussion of Tenure*, AM. BAR. ASS’N 1 (Sept. 23, 2013), http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/comments/201309_comment_ch_4_w_burlette_carter.authcheckdam.pdf [https://perma.cc/JJ9T-VTWM].

147. Karen Sloan, *ABA Council Abandons Bid to Drop Tenure Requirement*, NAT’L L. J., Mar. 17, 2014 (quoting Solomon Oliver, Jr., Chair of the Council and Chief Judge of the U.S. District Court for the Northern District of Ohio), <http://ncforaj.org/wp-content/uploads/2014/03/NLJ-3-18-14-ABA-Council-Abandons-Bid-to-Drop-Tenure-Requirement.pdf> [https://perma.cc/M7DX-RZXS].

148. *Id.*

149. *Id.* (quoting Judith Areen, Executive Director of the Association of American Law Schools).

150. *Id.*

151. O’Rourke, *supra* note 3, at 606.

152. *Id.* at 606 n.44.

that full-time clinical faculty have tenure or security of position reasonably similar to tenure developed into an effort to remove tenure or any security-of-position requirement to protect academic freedom from Standard 405.¹⁵³ Since 1999, the standards review committee has responded to calls to eliminate tenure and has repeatedly proposed alternatives to Standard 405 that would not require by the plain language of many of the proposals any due-process protection of academic freedom. Most recently, the council did not even circulate for comment an alternative to Standard 405 that would have treated all full-time faculty substantially equally, and put out for comment two alternatives to Standard 405 that would have removed tenure without requiring any explicit due-process protection for academic freedom.¹⁵⁴

In the shadow of these efforts, the accreditation committee's decision to approve one-year contracts for clinical faculty and to permit a law school to bar clinical faculty from voting at faculty meetings has interjected uncertainty over what Standard 405(c) actually provides for clinical faculty.¹⁵⁵ The standards review committee's early effort to remove this uncertainty was rebuffed by the council,¹⁵⁶ and most recently the council considered and put out for comment only those changes to Standard 405 that potentially would have approved one-year contracts for all faculty.¹⁵⁷

Even with this uncertainty, Standard 405(c) is better than the provision for legal writing faculty under Standard 405(d), which requires only "such security of position . . . necessary to (1) attract and retain a faculty that is well qualified to provide legal writing instruction . . . , and (2) safeguard academic freedom."¹⁵⁸ A major problem with Standard 405(d) is that it does not expressly require due process as a means to safeguard academic freedom. The Legal Writing Institute notes that although Standard 405(c) states that it applies to "full-time clinical faculty," many law schools have placed legal writing faculty on a Standard 405(c) rather than keep them on a Standard 405(d) track.¹⁵⁹ The Legal Writing Institute states that an incentive to do so was for calculating student/faculty ratios under a prior version of the ABA Accreditation Standards.¹⁶⁰

For law schools that have clinical faculty and legal writing faculty on a Standard 405(c) track true to the intent of Standard 405(c), such faculty would be on a separate tenure track or a presumptively renewable long-term

153. *See supra* Parts III & IV.

154. *See supra* notes 123-40 and accompanying text.

155. *See supra* notes 98-101 and accompanying text.

156. *See supra* notes 102-06 and accompanying text.

157. *See supra* notes 138-40.

158. 2016-2017 STANDARDS, *supra* note 2, at Standard 405(d) at 29.

159. *Best Practices for Protecting Security of Position for 405(c) Faculty*, LEGAL WRITING INST. I, <http://www.lwionline.org/uploads/FileUpload/BestPractices.pdf> [<https://perma.cc/HEP3-3Q2A>].

160. *Id.* at 1 n.1.

contract requiring just cause for ending employment and due process before termination to protect academic freedom. Clinical faculty and legal writing faculty on such a Standard 405(c) track would also participate in law school governance, including participating in faculty meetings and voting on most matters, perhaps only to the exclusion of personnel decisions for full-time faculty not teaching in the clinical or legal writing programs.

But not all law schools have fully embraced Standard 405(c) by valuing all aspects of the law school curriculum, valuing and protecting the academic freedom of all faculty, and giving all full-time faculty a meaningful voice in law school governance. Given the history of Standard 405(c) and efforts to eliminate security of position from the ABA standards, it is unlikely the Standard 405 will be amended to improve status for clinical and legal writing faculty in the foreseeable future. It seems more likely that those opposed to Standard 405(c) and meaningful security of position in Standard 405 would once again advocate for a revised standard to eliminate tenure and any other form of meaningful security of position needed to guarantee academic freedom for all law faculty.