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Dear Don and Bucky:

We are writing to offer comments to the Standards Review Committee in connection with ongoing deliberation regarding revisions to the American Bar Association's Accreditation Standards. The comments that follow reflect the sentiments of the Special Committee on the Professional Education Continuum,¹ which met in Baltimore, Maryland, on February 26, 2011, for deliberations on pending

¹ Those in attendance at this meeting included the following members of the Special Committee: Vice Dean Randy Hertz (NYU, chair), Professor Jane Aiken (Georgetown) Professor Mary Lu Bilek (CUNY), Diane Camper (public member), Professor Robert Dinerstein (American), Chief Justice Christine Durham (Utah), Dean Bryant Garth (Southwestern), Professor Laura Gasaway (UNC-Chapel Hill), Dean Phoebe Haddon (Maryland), Judge Solomon Oliver (Chief Judge, Federal District Court for Northern Ohio); Professor Judith Wegner (UNC-Chapel Hill, Special Consultant to the Special Committee). Special Committee members unavoidably absent included Dean Roger Dennis (Drexel)

revisions to the Standards for Law School Accreditation. Chief Justice Durham and Professor Dinerstein participated in the discussion but recused themselves from expressing their views as part of this letter in light of their continuing role as members of the ABA Section Council of Legal Education and Admissions to the Bar.

In particular, the Special Committee devoted its meeting to discussion of several aspects of the pending Standards revisions including: provisions regarding transparency; public information and employment data; outcome measures; security of position; bar passage and admissions test requirements; and attacks on law school clinical programs. The Special Committee agreed to offer you the following observations in hopes that they will assist the Standards Review Committees in its continuing deliberations.

1. Transparency.

The Special Committee appreciated Dean Yellen's discussion of current drafts on transparency in the accreditation process (proposed Rule 25). It also benefited from observations offered by two of its members (Dean Haddon and Ms. Camper) who served on an earlier ABA committee that reported on related issues in 2007. As a general matter, the Special Committee believes that proposed Rule 25 reflects the ongoing movement toward transparency in accreditation as a means of providing public information and assuring accountability. The proposed Rule strikes a reasonable balance by setting a reasonable time frame for public disclosure of decision letters, giving the school discretion to release its self study, and providing a check that allows the Consultant to release a full report with consent of the Section Chair if a school releases portions that are not representative.

The Special Committee wishes to offer two additional suggestions for consideration apart from the Standards Review process.

- *Trends.* The Special Committee believes that it would be helpful to have the Consultant include a summary of accreditation trends (such as issues flagged with regard to schools visited in a given year) when formal disposition letters are posted for schools reviewed in particular years. Identifying such trends would help schools to be reviewed in subsequent years to be aware of common problems and interpretations by the Accreditation Committee and the Council.
- *Site Visits and Accreditation Review Process.* The Special Committee also discussed at some length perceptions about unevenness and possible inefficiencies in the site review process itself. Sometimes members of teams are not always well-trained and teams themselves do not always proceed consistently in site visits. Moreover, accreditors in other fields have implemented fresh approaches to accreditation visits that may be more effective and cost-efficient. For example, more preliminary documentation could be presented by a school reviewed on-line by team members in advance; team chairs might make preliminary on-site visits to identify key issues for focus by the

and Professor Andi Curcio (Georgia State). The views expressed in this letter may or may not reflect opinions of committee members who were unavoidably absent from the meeting. Guests who participated in the meeting included: Mr. Bucky Askew (ABA Consultant on Legal Education), Dean Susan Prager (Executive Director, Association of American Law Schools), and Dean David Yellen (Loyola-Chicago, and ABA Standards Review Committee).

full-team when it comes onsite; or review duties might be differently allocated between site teams and ABA personnel. The Special Committee recommends that the Section Chair and Consultant consider either appointing a new special committee to review such matters or designating the Special Committee on the Professional Education Continuum to take on this task.

2. Public Information and Employment Data. (Standard 509)

The Special Committee appreciated Dean Yellen's overview of preliminary proposals regarding publication of employment data. It agreed in substantial degree with these proposals and offers only a few comments for further consideration at this time.

- *Links to NALP Data Requirements.* The Special Committee commends ongoing efforts to work closely with NALP in determining what data should be collected and reported by law schools. There remain some issues where further clarification may be needed (for example, more clearly defining such categories as “long-term” versus “short-term” employment, and perhaps distinguishing between instances in which law schools hire students into bona fide “fellowships” in contrast to funding them in other sorts of short-term or non-professional roles). In general, benchmarking data requirements to NALP standards seemed to the Special Committee a wise approach in order to maintain consistent standards and encourage accurate reporting by law schools.
- *Due Diligence in Seeking Information about Graduates' Employment.* Some members of the Special Committee suggested that paragraph (b)(4) explicitly require law schools to employ due diligence in seeking employment information regarding their graduates (rather than simply referencing compliance with definitions and instructions included in the annual ABA questionnaire).
- *Fairness and Accuracy of Reporting.* The Special Committee applauds Dean Yellen's draft proposal to require schools that disclose additional employment information to assure that such information is “fair and accurate.” It suggests that this requirement be modified in two modest respects, however. First, the Standard as proposed states that “(b)(5) Any additional employment information the law school discloses must be fair and accurate.” The Special Committee believes that this provision should explicitly address *all* employment information *reported, posted, or distributed* by a law school (not just “additional employment information” and not just information “disclosed”) so as to emphasize that the requirements apply to the full range of information stemming from the school. Second, the Standard should reach beyond “fair and accurate” disclosure and should instead require law schools to assure that employment information provided is “fair, accurate, and *not misleading to a reasonable law school applicant*” (so that there is a clear indication that schools may not mislead potential applicants by casting their descriptions of employment prospects in elusive terms).
- *Other Information.* Some members of the Special Committee voiced the view that additional information should also be required (such as debt load upon graduation), although Dean Yellen explained the challenges in calculating and tracking such data. The Special Committee also understood that there may be additional disclosure requirements that will be developed by the Standards Review Committee depending on their resolution of other issues (such as whether to continue imposing the requirement of an admissions test). The Special Committee therefore looks forward to offering further comments in the future.

3. Curriculum: Standard 303(a)(3)

- *Current Proposal.* The Special Committee discussed at some length the provisions of proposed Standard 303(a)(3), which requires each law school to require every student to complete one faculty-supervised, rigorous course after the first year that integrates doctrine, theory, skills and ethics and engages students in performance of one or more professional skills identified in Standard 302(b)(3). The course shall be: (i) a simulation course; (ii) a live client clinic; or (iii) a field placement complying with Standard 305(e).
- *Concerns.* The Special Committee had several concerns with this provision as currently framed and hopes that the Standards Review Committee will consider a possible revision as suggested below. The Special Committee appreciates the proposal's initial formulation which (a) calls for rigorous, faculty-supervised courses, (b) addresses the integration of doctrine, theory, skills and ethics and (c) requires students to engage in performance of one or more professional skills). All these requirements make a good deal of sense. What is less clear is whether the Standard should specify that (d) such offerings must occur after the first year and (e) must take only one of the pedagogical forms listed.

In the Special Committee's experience, a number of schools have strengthened their first-year offerings to incorporate as many as 6 or 8 units of instruction in "lawyering skills" (not just traditional legal writing and research, but also interviewing, counseling, problem-solving and more). In many instances, schools expanding their commitments to skills instruction have done so by hiring full-time faculty to teach expanded offerings of this sort in order to provide students with a solid, required foundation in lawyering skills, and then to allow these students options regarding upper division courses that will enhance such skills (if the students choose to pursue those opportunities). The philosophy of schools adopting such models deserves consideration and respect. Many of them have taken to heart the call by the ABA and others to give more emphasis to lawyering skills and have indeed concluded that incorporating such enhanced instruction in the first year is desirable so that students integrate theory, practice and lawyering values from the start (as recommended by the Carnegie Foundation's study, *Educating Lawyers*). While the Special Committee believes that providing students with additional skills-oriented offerings beyond the first year is highly desirable, it also thinks that it is unwise and inappropriate to dismiss the educational strategies adopted in such schools without considering their legitimacy, effectiveness, and creative promise.

The Special Committee also believes that the proposed Standard prematurely limits the pedagogical strategies law schools may legitimately employ in integrating instruction in doctrine, theory, skills, and ethics beyond the first year, and in requiring students to engage in professional performance subject to careful assessment. Each of the three pedagogical approaches listed in the proposed Standard (simulations, live-client clinics, and field placements) can prove effective in integrating instruction and providing opportunities for performance and assessment, but it would be very unfortunate to curtail current efforts by law schools and their faculties to experiment with pedagogical strategies of other types. In particular, many schools have begun experimenting with various sorts of "capstone," "theory into practice," or "transition into practice" courses that involve

collaboration or team-teaching by traditional doctrinal faculty and clinical colleagues or practicing lawyers in order to provide integrated advanced instruction in a variety of contexts and substantive fields that reach beyond those commonly addressed through simulations, live-client clinics, and field placements. In the Special Committee's view it is therefore very important for the Standard to provide opportunities for legitimate, effective instructional alternatives that take more innovative forms.

- *Proposed Language.* Based on these considerations, the Special Committee recommends that the current draft version of Standard 303(a)(3) be revised as follows:

(3) one course with all of the following characteristics:

- a. *use of rigorous instructional and assessment strategies, providing students with multiple opportunities for feedback, self-evaluation, and evaluation by the supervising faculty member;*
- b. *integration of doctrine, theory, skills and ethics in a systematic fashion throughout;*
- c. *engagement of students in performance and assessment of one or more professional skills identified in Standard 302(b)(3) and*
- d. *use of an instructional format of one of the following types*
 - i. *a simulation course;*
 - ii. *a live client clinic;*
 - iii. *a field placement complying with [Standard 305(e)]; or*
 - iv. *another format that*
 1. *is rigorous in its instructional and assessment strategies, providing students with multiple opportunities for feedback, self-evaluation and evaluation by the supervising faculty member;*
 2. *integrates instruction in doctrine, theory, professional skills, and ethics, throughout; and*
 3. *engages students in performance and assessment of one or more professional skills identified in Standard 302(b)(3);*
- e. *delivery either*
 - i. *beyond the first year of law school or*
 - ii. *in the first year of law school if the instruction is part of a comprehensive two-semester program that addresses*
 1. *legal analysis, research and writing, and*
 2. *additional professional skills such as counseling and negotiation, problem-solving, dispute resolution, and other skills, provided that at least two units of instruction are allocated to instruction in skills other than legal analysis, research, and writing.*

4. Tenure in General: Standard 405 (faculty)

a. *Existing provisions.* Tenure is addressed in a number of respects in existing Standard 405 and related interpretations. Although recent debates have been particularly intense regarding the particular provisions in Standard 405(c) (relating to security of position for clinical faculty members), the Special Committee believes that it is important initially to address the more general question of the role of tenure in law schools, before turning to the more specific issues relating to faculty members who

play particular instructional and institutional roles (clinical and legal writing faculty, the dean, and library director).

In their current incarnation, Standard 405 and related interpretations address tenure in several specific ways.

- *Standard 405(b)* states:
 - (b) 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.
- *Appendix 1* indicates that its text follows the “1940 Statement of Principles on Academic Freedom and Tenure” of the American Association of University Professors.” Appendix 1 reads, in part, as follows:

The purpose of this statement is to promote public understanding and support of academic freedom and tenure and agreement upon procedures to assure them in colleges and universities. Institutions of higher education are conducted for the common good and not to further the interest of either the individual teacher or the institution as a whole. The common good depends upon the free search for truth and its free exposition.

Academic freedom is essential to these purposes and applies to both teaching and research. Freedom in research is fundamental to the advancement of truth. Academic freedom in its teaching aspect is fundamental for the protection of the rights of the teacher in teaching and of the student to freedom in learning. It carries with it duties correlative with rights.

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.

- *Interpretations of Standard 405.* There are also several interpretations of Standard 405 that address general matters relating to tenure including interpretations (a) limiting quotas for the proportion of law faculty who may hold tenure, (b) requiring comprehensive systems for evaluation relating to promotion and tenure, and (c) mandating that stand-alone law schools have policies and procedures that address appointment, tenure, and promotion, and incorporate principles of fairness and due process that are similar to those used at university-based law schools.²

² *Interpretation 405-1* A fixed limit on the percent of a law faculty that may hold tenure under any circumstances violates the Standards.

Interpretation 405-3 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.

b. *Rationales for Tenure: Then and Now.* Before turning to discussion of proposed changes regarding tenure, it is important to review the policy rationales for tenure, not only as the notion of tenure was recognized initially by the Association of American University Professors (AAUP) and universities around the country, but as they exist today and as they relate to the particular context of American law schools. Much has been written on this topic, but a few salient points will have to suffice here.

- *Traditional Rationales: Academic Freedom and Economic Security.* The case for tenure is generally made in terms of the need to protect academic freedom and to provide sufficient economic security to attract talented professors, and these are the bases cited in the AAUP statements referenced in current Appendix I of the Standards.

To gain a full flavor for the core concerns that animate the AAUP's statements, it is useful to look back to its 1915 "Declaration of Principles on Academic Freedom and Tenure."³ This Declaration considered three matters at the outset: (1) the scope and basis of the power exercised by those bodies having ultimate legal authority in academic affairs; (2) the nature of the academic calling; and (3) the function of the academic institution or university. In the view of the drafters, those with oversight over academic institutions are charged with a "public trust" to protect academic freedom because of the importance of such freedom as a necessary condition for the functioning of institutions of higher learning. The character of the academic calling necessitates independence and "prolonged and specialized" instruction in specialized areas of knowledge so that students and other fair-minded persons can trust the truth told them by "professional scholars." Finally, the Declaration stressed the role of the university in promoting inquiry and advancement of human knowledge, instructing students, and developing expertise to be made available in service to the public.

Tenure was thus understood as a means to important ends: recruiting and retaining the best possible faculty members, assuring them of fair and expert review before they could be discharged based on their unpopular ideas, and protecting the integrity of institutions of higher education. It is important, however, to recognize that tenure and long-term security of position policies are not designed to operate *in retrospect* as a means of remedying violations of academic freedom or loss of talented personnel, but instead as a *prophylactic* means of maintaining institutional effectiveness and integrity and heading off problems such as those referenced by the Declaration before they occur.

- *Institutional Implications.* The institution of tenure has been criticized because of implications for higher education that may not have been fully appreciated at the outset. Some have criticized tenure

Interpretation 405-4

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

³ AAUP 1915 Declaration on Academic Freedom and Academic Tenure.

<http://www.aaup.org/NR/rdonlyres/A6520A9D-0A9A-47B3-B550-C006B5B224E7/0/1915Declaration.pdf>

[last visited March 26, 2011]

systems as protecting highly-paid “deadwood” senior faculty, in a time when universities need more flexible hiring practices, opportunities to hire younger scholars knowledgeable in emerging fields, or must cut budgets.⁴ Many universities have instituted “post-tenure review” requirements that provide oversight by peers, incorporate criteria relating to removal for cause in their tenure standards, and incorporate performance incentives in salary policies.

Whatever critiques might be leveled at the advisability of tenure in general, it is important, however, to recognize the significant risks that may be associated with elimination of tenure requirements. In recent years many universities and colleges have turned to short-term or part-time appointments as a means to fulfill some of their core instructional responsibilities.⁵ Researchers have just begun efforts to document the implications of such significant changes in practice. There are at least some indications that, at least in research/doctoral institutions, faculty members in full-time tenured/tenure-track positions were (a) significantly more productive in research, (b) significantly more productive in education, (c) significantly more committed to staying in academics and their current position, and (d) worked more hours than their non-tenure colleagues did.⁶

In addition, policies on tenure and security of position also assure that educational programs are staffed by a core of committed, experienced faculty members who take collective responsibility for

⁴ See Richard Chait (ed.), *THE QUESTIONS OF TENURE* (Harvard U. Press 2002), at 6-31 (discussing why debates regarding the legitimacy of tenure continue) [hereinafter referred to as “Chait”]. See also Ralph Brown & John Kurland, *Academic Tenure and Academic Freedom*, 53 *LAW & CONTEMP. PROBLEM* 325 (Summer 1990) (discussing basis for tenure in protection of academic freedom, assertions that tenure interferes with discharge of “deadwood” professors who may not be sufficiently problematic to warrant dismissal, the benefits of extended tenure as a means for getting important work accomplished without disruption, the shortcomings of alternatives to tenure such as a need for state action to trigger due process requirements, and the more limited forms of protection provided by academic freedom in the absence of tenure systems).

⁵ See John Cross & Edie Goldenberg, *OFF-TRACK PROFS: NONTENURED TEACHERS IN HIGHER EDUCATION* (MIT Press 2009) [hereinafter “Off-Track Profs”]; Adriana Kezar, *Non-Tenure Track Faculty in Higher Education: Theories and Tensions*, *ASHE HIGHER EDUCATION REPORT* (v. 36 no.5), 1-89 (2010) [hereinafter Kezar “Theories”]; Adriana Kezar and Cecil Sam, *Understanding the New Majority of Non-Tenure-Track Faculty in Higher Education*, *ASHE HIGHER EDUCATION REPORT* (v. 36, no. 4) 1-133 (2010) (providing information regarding the complex profile of different types of non-tenure track appointments employed in higher education, describing the experiences of non-tenure track faculty members, and considering possible approaches to regularizing use of and support for non-tenure track faculty members).

⁶ See Carole Bland, Bruce Center, Deborah Finstad, Kelly Risbey, & Justin Staple, *The Impact of Appointment Type on the Productivity and Commitment of Full-Time Faculty in Research and Doctoral Institutions*, *JOURNAL OF HIGHER EDUCATION*, Vol. 77, No. 1 (January/February 2006), pp. 89-123. This study was not narrowly focused on law faculty members, but instead considered differences in tenure-track and non-tenure track faculty members across a range of disciplines. See also Ted Youn & Tanya Price, *Learning from the Experience of Others: The Evolution of Faculty Tenure and Promotion Rules in Comprehensive Institutions*, *JOURNAL OF HIGHER EDUCATION*, Vol. 80, No. 2, 204-237 (March/April 2009).

quality control in academic planning and delivery, and who accordingly bring needed stability to academic programs over the long haul. As institutions of higher education have increasingly turned to part-time and short-term faculty members to deliver core instruction, relatively little attention has been paid to the long-term implications of these trends on the capacity of the institution as a whole to maintain a cohesive educational program rather than simply a fragmented set of course offerings.⁷ Particularly in an era in which many deans serve for relatively short periods and in some cases lack significant experience within the academy, a substantial risk is created by removing meaningful assurances that law schools will have a strong core of long-time committed faculty members whose expertise as teachers and scholars has been proven over time.

- *Law Schools, Their Faculty, and Lawyers in Particular.*

The ABA's current review of its accreditation standards was preceded by an analysis of accreditation practices in other fields. Comments by a number of university presidents during the current round of review also question the propriety of addressing "conditions of employment" as part of the law school accreditation process. Before treating others' failures to address tenure and security of position as a controlling precedent, however, the Standards Review Committee and the Council need to weigh carefully the special roles played by legal educators in "speaking truth to power" within their institutions and the greater society. Indeed, in its 1915 Declaration, the AAUP noted the special vulnerability of faculty members in the social sciences to challenges by external forces infringing on their continuing employment at universities.⁸ Tenure and security of position for law faculty members is especially warranted on a number of grounds.

- *Speaking Truth in the Classroom.* Law professors in many instances must speak the truth about the state of the law and the state of justice in society, even when those around them wish they would not. The case of Professor William P. Murphy, who taught constitutional law at the University of Mississippi during the 1950's, is just once example. Murphy instructed his students that *Brown v. Board of Education* was a legitimate decision that should be respected,

⁷ See Chait, *supra* note 4, at 144-151 (discussing the potential for fragmentation and institutional uncertainties raised by complex systems of insecure part-time and fixed term appointments); OFF-TRACK PROFS, *supra* note 5 at 131-136 (discussing risks to shared governance resulting from heavy reliance on more vulnerable instructors without security of position), and 136-152 (discussing dangers to academic freedom); Kezar, *supra* note 5 (discussing the challenges of researching the use, rationales, and experiences of non-tenure track faculty members given different approaches and theories, and concluding that new conceptualizations of their role may be required such as that of a hybrid employee/professional).

⁸ The AAUP had its genesis in the reaction of faculty around the country to the dismissal in 1900 of an economics professor at Stanford University. The professor, Edward Ross, was criticized by patron Mrs. Leland Stanford for his expressed views on economic issues (in particular those relating to immigrant labor and railroad economics). Later, in 1915, philosophy professor Arthur Lovejoy (one of seven Stanford professors who resigned in protest against the firing of Ross) worked with others to establish the AAUP.

drawing opprobrium from leaders in the state and efforts to have him discharged from the faculty.⁹ In the current divisive era, such efforts may come again.¹⁰

- *Speaking Truth to Society through Scholarly Work.* Law faculty members, just as those in other academic fields, endeavor to push the frontiers of knowledge with their scholarly research and publication. Because the law is such a central and at times highly-contested dimension of society, topics selected and views expressed can trigger external pressures on faculty members (or their administrators) to avoid or cease their exploration of controversial matters.
- *Speaking Justice in Clinical Programs.* The ABA’s House of Delegates has recently gone on record with its concerns about protecting the integrity and independence of law school clinics faced with challenges from legislators or other external sources.¹¹ Faculty members in clinical programs, as well as the programs themselves, run the risk of retaliation for bringing litigation on behalf of their clients may unsettle those in power.¹² Long-term security of position or tenured/tenure-track status plays an important role in assuring clinical faculty that they can safely make independent judgments regarding educational opportunities for their students and representation of eligible clients without fear or favor. Students involved in such programs benefit from seeing important role models of effective and powerful representation that seeks to achieve justice, even under attack from “the powers that be.”
- *Speaking Truth as a Part of the Academy.* Law schools have struggled since the late 19th Century to become full-fledged, respected participants within the academy, rather than “trade schools” providing marginally valued “training.”¹³ Having surmounted such prejudices, law schools have

⁹ See Charles W. Eagles, “Thought Control” in *Mississippi: The Case of Professor William P. Murphy*, 66 J. MISS. HIST. 151 (2004).

¹⁰ See Paul Krugman, *American Thought Police*, NEW YORK TIMES, March 27, 2011 (discussing requests for emails sent by University of Wisconsin history professor who had spoken publicly about his views on collective bargaining and related legislation affecting public employees).

¹¹ See

http://www.americanbar.org/content/dam/aba/migrated/2011_build/house_of_delegates/100a_2011_my_authcheckdam.pdf (Resolution adopted in February 2011 expressing opposition to outside interference and support for the independence of law school clinics).

¹² See, e.g., Robert R. Kuehn & Peter A. Joy, *Lawyering in the Academy: The Intersection of Academic Freedom and Professional Responsibility*, 59 J. LEGAL ED. 97 (2009).

¹³ Indeed, Thorstein Veblen said “In point of substantial merit the law school belongs in the modern university no more than a school of fencing or dancing.” See THE HIGHER LEARNING IN AMERICA: A MEMORANDUM ON THE CONDUCT OF UNIVERSITIES BY BUSINESS MEN (1918) at 211 (discussing “vocational training” and describing law schools as akin to business schools, in light of their commitment to training practitioners rather than jurists, employment of faculty members who serve as mere “coaches” to their students, and law schools’ failure to grasp even “quasi-scientific” notions of metaphysics that underlie the legal system). For an overview of the evolution of American legal education generally, see Robert B. Stevens, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* (UNC Press, 1983).

systematically provided generations of lawyers with high-quality education. For the ABA to signal so clearly that it no longer expects law faculty members to be treated as full-fledged members of the academy with tenure or security of position runs a considerable risk that law schools might again be marginalized. This concern is of special importance during an era of major university budget cuts and growing reliance on short-term or part-time instructors in basic undergraduate classes. Legal educators also play a crucial role within the academy, just as lawyers elsewhere endeavor to keep society honest. Law professors are crucial players in addressing university-wide issues regarding institutional integrity and academic freedom, often serving in crucial roles as leaders of faculty senates.¹⁴ Removing protections related to tenure and security of position would put the integrity of universities at risk as well.

- *Lawyers, Respect for the Rule of Law, Due Process, and Related Legal Principles.* Current Standard 405(b) relating to tenure and academic freedom was adopted in its current form by the ABA in 1973, during a time in which American society was sharply divided with regard to the Vietnam War and race relations. During this period, crucial decisions by the United States Supreme Court established clearer understandings regarding faculty employment rights and due process protections.¹⁵ There can be little doubt that both legal educators and lawyers were aware of these developments.

The history of this provision reaches back even farther, however, to 1963, and demonstrates that current references to tenure and academic freedom are far from casual. The 1963 Standards reflected the approach, employed earlier in the century, when only six principal standards were listed along with more detailed “factors” to be employed in determining whether law schools complied with accreditation requirements. One of the factors bearing on Standard B:3¹⁶ at that time explicitly addressed the “conditions of faculty employment” in the following terms:

The ability of a law school to mount and maintain a sound educational program depends in large part on the presence of conditions conducive to the faculty’s effective discharge of its scholarly responsibilities. Therefore, the following factors will be examined:

¹⁴ A case in point concerns the experience of the University of Minnesota-Twin Cities. When the governing board sought to abolish tenure at the institution, two law professors and the sitting dean were able to negotiate a reasonable resolution at a point when the faculty at large might have otherwise opted to establish a collective bargaining unit. See Fred L. Morrison, *Tenure Wars: An Account of the Controversy at Minnesota*, 47 J. LEGAL ED. 369 (1997).

¹⁵ See *Perry v. Sinderman*, 405 U.S. 593 (1972); *Board of Regents of State Colleges v. David F. Roth*, 408 U.S. 564 (1972).

¹⁶ Standard B 3 stated: “A law school shall maintain a faculty of high competence and of suitable size, with primary responsibility for determining general educational policies, working under conditions conducive to the faculty’s effective discharge of its scholarly responsibilities.” American Bar Association, Section of Legal Education and Admissions to the Bar, STANDARDS OF THE AMERICAN BAR ASSOCIATION FOR LEGAL EDUCATION (1963) at 19.

- a. Academic freedom and tenure. The extent to which faculty members have academic freedom and tenure. In this connection, the Statement of Principles of the American Association of University Professors are endorsed.¹⁷

What was to become section 405(b) was part of the package of revisions to the Standards presented by the Section of Legal Education and Admissions to the Bar to the ABA House of Delegates in February 1973. In the course of debate on the floor, an Idaho delegate opposed this provision's adoption, stating that he believed that only university boards of regents should be allowed to address tenure. After considered discussion of the provision, the Idaho delegate's motion to eliminate this provision was defeated 149-111.¹⁸

In subsequent years, interpretations of Standard 405 were added, prohibiting quotas on the proportion of faculty who may be tenured, requiring schools to have comprehensive tenure-evaluation systems, and imposing similar requirements on free-standing schools. Based on this history, it appears that assertions that the ABA's standards never intended law faculty members to possess rights to tenure or security of position are unfounded. Seemingly, those who understand the law regarding employment rights and due process expected that universities with law schools would comply with legal principles. The ABA should thus not readily put aside its historical understandings of these issues, absent sound bases to do so.

c. *The Case for Changing Current Standards and Related Questions.*

¹⁷ *Id.* at 22. Later, when efforts were begun to develop an updated set of Standards, this provision was carried forward, and linked to the following statement of purpose: "A more explicit statement with respect to conditions of faculty employment as a means of eliminating areas of potential disagreement because of present ambiguities; and an up-grading of conditions of employment as a means of improving legal education." American Bar Association Section of Legal Education and Admissions to the Bar, PROPOSED REVISED STANDARDS FOR LEGAL EDUCATION OF THE ABA (1966) at 12. Revised Standards proposed by a Special Advisory Committee (chaired by Howard Oleck), in May 1969, included the following text as part of proposed Standard B:3:4:a: "Academic freedom and tenure. A law school should have a policy with respect to academic freedom and tenure, such as the policy reflected in the 1940 Statement of Principles of the American Association of University Professors." American Bar Association, Section of Legal Education and Admissions to the Bar, STANDARDS FOR LEGAL EDUCATION AND APPROVAL OF LAW SCHOOLS (May 21, 1969) at 32. The source of this requirement was referenced as "Present Factor II (7) Policy of school as to tenure of teaching staff." *Id.* at 38. *See also* MEMORANDUM FROM EDWARD W. KUHN ON BEHALF OF THE SECTION ADDRESSED TO CHIEF APPELLATE JUDGES, BAR EXAMINERS AND DEANS (dated December 8, 1971), at page 12 (summarizing proposed new Standards ultimately adopted by the ABA House of Delegates in 1973).

¹⁸ ABA JOURNAL, Vol. 59, pp. 390-391 (April, 1973). *See also*, Thomas Shaffer, *Four Issues in the Accreditation of Law Schools*, 32 J. LEGAL ED. 224, 232-235 (1982) (discussing history of Idaho challenges, and noting that, as of 1978, the Section of Legal Education and Admissions to the Bar had adopted an Interpretation stating that "A law school which appears to have no comprehensive system for evaluation for and granting of tenure is not in compliance with Section 405." *Id.* at 233, n.44.

The January 2011 report of the Subcommittee on Academic Freedom and Security of Position based its recommendations for changes in existing Standards and Interpretations on several considerations including

- Interpretation of language requiring that deans have tenure (to be eliminated);
- Prior action by the ABA's Accreditation Committee that have not required tenure in at least one law school;
- A general view that accrediting authorities should not address employment status and conditions of employment (citing, in particular, the absence of such provisions in the accreditation standards applicable to dentistry and pharmacy) ; and
- A judgment that alternative measures could be implemented to address concerns about academic freedom and the role of faculty in institutional governance decisions.

The first two of these rationales are the least persuasive. That the Standards specifically require tenured status for deans simply recognizes on its face that a single individual serving in a crucial role of leadership should be given security of position so that he or she will not pull punches in making judgments on behalf of the law school in the face of pressure from higher-level administrators on the campus. The legislative history of Standard 405 noted above should put such textual arguments to rest. The second rationale does not give a basis for the action of the Accreditation Committee. Moreover, a decision to waive a requirement in a specific case is very different from a broader decision about what the requirement should be.

The third justification (adopting the view stated in correspondence from university presidents) fails to consider the specific considerations affecting the risks of eliminating tenure requirements for law professors (as noted above). Comparisons to dentistry, pharmacy and medicine are not particularly relevant, since in those disciplines many faculty members may be funded by grants and may serve only part-time in an academic role. Faculty members in these fields are also less likely to confront the sorts of challenges that may be brought to bear on faculty members in social science fields.

The fourth justification (that alternative protections can substitute for tenure) deserves fuller exploration here. It is commendable that the Subcommittee has endeavored to address several crucial questions on their own terms, in an effort to protect academic freedom, require recruitment and retention of talented faculty members, and assure an effective faculty voice in important institutional decisions regarding core academic questions (such as hiring, curriculum, admissions, and more). Unfortunately, however, such protections do not function as the equivalent of Standards addressing tenure and security of position.

- *Academic freedom.* The Subcommittee has proposed a Standard relating to academic freedom¹⁹ and two Interpretations²⁰ that would put the burden on the law school to show that it has protections in

¹⁹ *Proposed Standard 405(b)* (April 2011 version) would read as follows:

A law school shall have an established and announced policy that provides protection for the academic freedom of its full time faculty in exercising their teaching responsibilities, including those related to client representation in clinical programs, and in pursuing their research activities, governance responsibilities, and law school related public service activities, and provide similar protections, as applicable, for part-time faculty.

place to assure academic freedom (including acceptance of the AAUP's model policies on academic freedom and the establishment of a "representative group of faculty" to review allegations of academic freedom violations).

However well-meant these protections may be, they are not the equivalent of tenure. If a faculty as a whole lacks security of position, there is little likelihood that they can stand up against injustices effectively when the personal job security of a "representative group of faculty" members is at stake. Perhaps more importantly, it is unclear what the application of a "burden of proof" requirement would mean in this context, particularly when reaccreditation visits only occur every seven years. History has demonstrated that it is often difficult to demonstrate whether individual cases of non-reappointment are linked to faculty members' expression of viewpoints that have been unwelcome. Moreover, tenure and security of position standards provide a broader penumbra of protection that reduces the "chilling" reality that a faculty member should "stifle" him or herself, rather than speaking truth to power, covering litigation costs and facing difficulty securing employment while awaiting vindication in the courts.

²⁰ *Interpretation 405-2* (April 2011 version) would read:

A system of tenure earning rights, while not required, can be an effective method of protecting faculty members' academic freedom. For full-time faculty positions in the law school that do not carry traditional tenure, the law school bears the burden of establishing that it provides sufficient protection for academic freedom. A school may meet its burden by presenting evidence of its, or its university's explicit acceptance of the protections articulated in the 1940 AAUP Statement of Principles on Academic Freedom and Tenure and its 1970 Interpretive Comments and an established procedure involving a representative group of faculty to review the performance of those faculty for appointment, renewal of contracts of appointment, and termination that effectively protects academic freedom involving the faculty, or a subset thereof.

Interpretation 405-3 (April 2011 version) would read:

The law school's written policy with respect to the protection of the academic freedom of its full time faculty members should provide procedures to ensure that its policy is followed, including rules that prohibit the non-renewal, denial of promotion, or loss of a faculty position unless a representative group of 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.

- *Hiring and retention.* The Subcommittee has also proposed a Standard²¹ and an Interpretation²² relating to attracting and retaining a competent full-time faculty (another classic justification for tenure systems). The role that tenure systems can play in attracting and retaining talented faculty members is acknowledged in this provision, and the Interpretation states that a law school “shall bear the burden of showing that it has established sufficient conditions to attract and retain competent faculty” in those positions (flagging evidence of turnover, success or failure of recruitment, involvement in governance, and forms of support as relevant to a determination about compliance). Once again, shaping the relevant Standard (and Interpretations) to focus on tracking hiring and retention patterns *after the fact* runs risks that law school faculty quality may significantly deteriorate during intervals between reaccreditation reviews and evidence about potential versus existing faculty quality may prove difficult to evaluate.
- *Governance.* The latest drafts incorporate a Standard relating to the role of full-time faculty in governance of law schools.²³ This statement is a welcome one, but once again assumes that assuring a role in governance is a substitute for long-term security of position and tenure. If full-time faculty members lack security of position, there is a significant risk that they may pull their punches in articulating their views regarding significant institutional judgments. Moreover, in the absence of a core of full-time faculty members who have substantial experience in legal education, there is a risk that important policy judgments regarding hiring of personnel and academic programming will not reflect in-depth experience and may instead be based on decisions by “full-time” but “short term”

²¹ *Proposed Standard 405(a)* (as of April 2011) would read:

(a) A law school shall establish and maintain conditions that are adequate to attract and retain a competent full-time faculty and to maintain a part time faculty sufficient to accomplish its mission.

(b) A law school shall have an established and announced policy that provides protection for the academic freedom of its full time faculty in exercising their teaching responsibilities, including those related to client representation in clinical programs, and in pursuing their research activities, governance responsibilities, and law school related public service activities, and provide similar protections, as applicable, for part-time faculty.

²² *Proposed Interpretation 405-1* (as of April 2011) would read:

A system of tenure earning rights, while not required, can be an effective method of attracting and retaining a competent full time faculty. For full-time faculty positions that do not include the possibility of a tenured appointment, the law school bears the burden of showing that it has established sufficient conditions to attract and retain competent faculty in those positions. In assessing whether the school has met that burden, the following should be considered: evidence of turnover in full time faculty members, history of successful hiring of full time faculty members, evidence of a system that permits full time faculty members in those positions to be appointed with long-term, presumptively renewable contracts, evidence of full-time faculty members ability to participate in governance of the law school, and evidence of other perquisites similar to tenured faculty, such as participation in faculty development and support programs.

²³ *Proposed Standard 405(d)* (April 2011) would read as follows:

(d) A law school shall have a policy that provides for participation of all full time faculty in the governance of the school.

faculty members who are beholden for their positions to a dean (who in turn lacks security of position as an academic and may have limited experience in the academy).

d. Conclusions. Proposed changes in the Standards and Interpretations would eliminate references to tenure and related requirements to develop and make available policies regarding tenure and security of position. Although the Standards Review Committee and its Subcommittee on Academic Freedom and Status of Position have endeavored to develop alternative criteria that would seem to address some of the crucial considerations that have historically informed academic tenure policies, these alternatives are insufficient to provide needed assurances regarding the quality and integrity of law school faculties, whose members are often called to “speak truth to power.” Based on its review of related matters, the Special Committee believes that

- Tenure and security of position policies are well-justified as a basis for protecting the integrity of the academic enterprise against external influences that may seek to silence alternative viewpoints.
- Tenure and security of position policies should not be readily jettisoned in the current era in view of the risks to institutional quality and integrity that may arise if a core of long-term, expert faculty members is not retained.
- Care should also be taken not to compromise the hard-won stature of law schools as part of the academy with intellectual integrity during a time of financial constraint.
- The view that ABA’s Standards have not recognized tenure in the past should be reconsidered based on historical evidence.
- The ABA should recognize that tenure and security of position provisions remain important as a means of assuring the quality of law school programs, particularly given the specific roles and responsibilities of law faculty members.
- Alternative strategies for addressing concerns about academic freedom, recruitment and retention of faculty, and the role of faculty members in institutional governance are important, but do not provide the same level of protection as the existing Standards and Interpretations relating to tenure and security of position.

The Special Committee accordingly urges the Standards Review Committee to keep intact the current provisions relating to tenure as embodied in Standard 405 and related Interpretations.

5. Special Cases: Tenure and Security of Position for Deans, Law Library Directors, Clinical and Legal Writing Faculty Members.

a. *Existing Provisions.* The current Standards and Interpretations include a number of special provisions relating to security of position for deans,²⁴ law library directors,²⁵ clinical faculty members,²⁶ and legal writing instructors.²⁷

²⁴ Dean: *Standard 206(c)* Except in extraordinary circumstances, a dean shall also hold appointment as a member of the faculty with tenure.

²⁵ Law Library Director: *Standard 603(d)* Except in extraordinary circumstances, a law library director shall hold a law faculty appointment with security of faculty position.

²⁶ Clinical Faculty: *Standard 405(c)* currently states

- b. *History.* Each of these provisions has its own justifications and history.

A law school shall afford to full-time clinical faculty members a form of security of position reasonably similar to tenure, and non-compensatory perquisites reasonably similar to those provided other full-time faculty members. A law school may require these faculty members to meet standards and obligations reasonably similar to those required of other full-time faculty members. However, this Standard does not preclude a limited number of fixed, short-term appointments in a clinical program predominantly staffed by full-time faculty members, or in an experimental program of limited duration.

Interpretation 405-6

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

Interpretation 405-8

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. This Interpretation does not apply to those persons referred to in the last sentence of Standard 405(c).

²⁷ Legal Writing Instructors. *Standard 405 (d)* current states:

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

Interpretation 405-9

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

- *Clinical Faculty.* Others have recounted the complex history behind relevant provisions.²⁸ After extensive deliberations within the ABA and the AALS, a Standard stating that “reasonably similar” security of position “*should*” be provided for clinical was initially adopted by the ABA Council in 1984. That language was changed to “*shall*” be provided in 1996, based on the Council’s judgment that the “*should*” language had been insufficient to provide meaningful security of position or involvement in governance for clinical faculty members.

In recent days, even more justifications have emerged for according clinical faculty members security of position and tenure-track/tenured status.

- Clinical legal education has come of age and the great majority of law schools have recognized that clinical law faculty on tenure-track or long-term contracts possess enormously important viewpoints that contribute to collective judgments regarding curricular design.
 - Most law schools have recognized that instruction in the practice of law is and should be a crucial part of their missions during a time in which more students than ever must be prepared to enter practice ready to serve their clients and more law firms expect their new hires to have acquired significant expertise in lawyering skills prior to employment.
 - Law clinics have come under attack by legislators and others who would prefer that law students and their faculties not challenge those with established financial or political power. Protecting clinical faculty members and their programs is of great importance to the integrity of law schools and to the ability of law students to prepare to serve their clients under challenging circumstances.
 - Clinical faculty members with tenure or other forms of security of position have contributed important scholarly insights²⁹ about crucial issues facing society, drawing on their experience as practitioners, teachers and scholars. Reducing security of position for those in such positions would in turn impoverish the collective dialogue about how the law and society needs to address issues of injustice.
- *Legal Writing Instructors.* Legal writing instructors are among the newest group of faculty members who have begun to make important contributions within the legal academy. Current Interpretations indicate that legal writing instructors should be offered sufficient security of position to attract and retain talented personnel and protect such instructors’ academic freedom. Such limited protections seem to offer insufficient recognition to the crucial role of legal writing faculty members in developing strong pedagogical practices and insights about the core institutional missions of law schools to assist their students in developing strong analytical and writing skills. As explained above, hiring and retaining a core group of expert full-time faculty members with security of position is as important in the arena of legal writing as in the context of clinical education and other substantive fields of instruction.

²⁸ See Peter Joy & Robert Kuehn, *The Evolution of ABA Standards for Clinical Faculty*, 75 TENN. L. REV. 183 (2008).

²⁹ See, e.g., Robert Dinerstein, *Clinical Scholarship and the Justice Mission*, 40 CLEV. ST. L. REV. 469 (1992). The *Clinical Law Review*, established in 1994, has been a crucial vehicle for publishing important scholarship by clinical faculty members. Scholarship by clinical law faculty members is also routinely published in a variety of other venues.

- *Deans.* Provisions according deans tenure give them security of position that will allow them to speak up on behalf of their law schools in the face of pressures from university presidents. Such provisions also assure law faculties that those who lead law schools have sufficient academic expertise to warrant their respect as scholars warranting respect as equals.
- *Law Library Directors.* Provisions according law library directors security of position also assure that they have the capabilities and expertise that warrant respect as scholars from their academic colleagues. In challenging budget and political times, law library directors must make hard choices regarding the resources they select for law library collections and the services they provide. According them security of position also protects them from being readily put aside based on their exercise of independent judgment. Specifying that law library directors receive security of position also assures law schools the capacity to attract talented leaders of this important part of their operations.

c. *Proposed Revisions.*

The Special Committee notes that pending proposals from one of the SRC's subcommittees would provide protection to faculty members in general regarding academic freedom (including issues arising in client representation in clinical contexts), but would eliminate references to tenure. Moreover, the pending proposals would no longer address the protections for clinical and legal writing faculty in specific terms. The pending proposals would, on the other hand, provide academic freedom protections for part-time faculty members even though such faculty members have not generally been protected by tenure.³⁰ The Special Committee further notes that pending proposals propose to benchmark treatment of deans and law library directors to that accorded to other faculty members.³¹

³⁰ It is unclear what is intended by this proposed modification in existing policy. Very few universities have accorded part-time faculty members protections relating to academic freedom or security of position, since it is generally understood that hiring practices for such personnel are contingent upon resources and institutional need and since the policy considerations that have influenced the development of tenure and academic freedom policies generally have not been thought to apply to those whose role in the academy is more occasional and less subject to peer review. See Richard Chait (ed.), *supra* note 4, at 45-46 (very few institutions grant tenure to part-time faculty members).

³¹ As to *deans*, proposed Standard 206(c) would read as follows: (c) Except in extraordinary circumstances, a dean shall also hold appointment as a member of the faculty with tenure with the rights and protections accorded to other members of the full time faculty under Standard 405.

As to *law library directors*, proposed Standard 603(d) would read as follows: (d) Except in extraordinary circumstances, a law library director shall hold a law faculty appointment with security of faculty position with the rights and protections accorded to other members of the full time faculty under Standard 405.

As to *faculty members*, Standard 405 would provide:

(a) A law school shall establish and maintain conditions that are adequate to attract and retain a competent full-time faculty and to maintain a part time faculty sufficient to accomplish its mission.

(b) A law school shall have an established and announced policy that provides protection for the academic freedom of its full time faculty in exercising their teaching responsibilities, including those related to client

d. *Recommendations.* The Special Committee discussed at length its concerns with the proposed revisions of the Standards relating to security of position for clinical faculty members as well as related issues that could affect faculty members teaching in legal writing and research programs, deanships and law library director positions. The Special Committee urges the Standards Review Committee and the Section Council to consider an alternative such as the following in moving forward:

- *Retain and expand provisions relating to tenure and security of position (including long-term contracts) for faculty members under Standard 405 (Professional Environment), with modifications as follows (proposed changes are in bold):*

(a) A law school shall establish and maintain conditions that are adequate to attract and retain a competent full-time faculty **in core areas of instruction including those relating to clinical, legal writing, and other professional skills. A law school shall also** establish and maintain conditions adequate to attract and retain a part time faculty sufficient to accomplish its mission.³²

(b)(Version 1) (Retaining Existing Policy, at Minimum)

The Special Committee believes that, at minimum, the existing provisions in Standard 405(b) should be retained with a clear reference to free-standing law schools and their obligations within the text of the Standard. Under this approach, the text might read as follows:

(b) A law school (whether affiliated with a university or free-standing)³³ shall demonstrate that it has an established and announced policy with respect to academic freedom and tenure for long-term members of which Appendix I is an example but not obligatory in order to comply with this requirement.³⁴

(b) (Version 2): (Clarifying Existing Policy)

representation in clinical programs, and in pursuing their research activities, governance responsibilities, and law school related public service activities, and provide similar protections, as applicable, for part-time faculty.

(c) A law school shall have an announced and written comprehensive system for evaluating candidates for promotion, termination and, if applicable, tenure and renewal of contracts or other forms of security of position.

(d) A law school shall have a policy that provides for participation of all full time faculty in the governance of the school.

³² This provision has been expanded to address, specifically, the importance of maintaining conditions sufficient to attract faculty members in a variety of fields including those in clinical and other skills areas. The language accordingly addresses issues previously considered in Interpretations of the Standards.

³³ This proposed version incorporates policies relating to free-standing law schools previously addressed in an Interpretation of Standard 405 (Interpretation 405-4, *supra*).

³⁴ This proposed version tracks existing language in in Standard 405(b).

As previously indicated the Special Committee believes that Standard 405 and its Interpretations should at minimum retain current requirements. If, however, the Standards Review Committee and Council are prepared to proceed with possible amendments, the Special Committee believes the following proposal would address the important underlying values that have described in this letter, and would assist visiting teams, the Accreditation Committee, and the Section Council in future applications of this part of the Standards. The Special Committee believes that the following language would accomplish these objectives:

- (b) **A law school (whether affiliated with a university or free-standing)³⁵ shall demonstrate that it extends to full-time members of its faculty protections relating to the exercise of academic freedom and security of position (whether in the form of tenure or other type of long-term appointment) that takes into account the responsibilities of those faculty members. The law school shall also have an established and announced policy with respect to academic freedom, and security of position (tenure, or other form of renewable long-term contract) that complies with the Principles set forth in Appendix I.**

- (c) **A law school shall have a comprehensive system for evaluating candidates for full-time appointment, promotion, and tenure or other forms of security of position, including written criteria and procedures that are adopted by and made available to the faculty. The system shall address the role of full-time faculty members with tenure or tenure-track status, and the role of those with other forms of security of position (such as long-term contracts) in determining the qualifications of candidates for appointment to the faculty.**³⁶

- (d) A law school shall provide protection for the academic freedom of its full time faculty in exercising their teaching responsibilities, including those related to client representation in clinical programs, and in pursuing their research activities, governance responsibilities, and law school related public service activities, ~~and provide similar protections, as applicable, for part-time faculty.~~³⁷

- (e) **To the extent that a law school adopts policies that extend differing forms of security of position (such as tenure and long-term contracts) and perquisites to faculty members with differing instructional and scholarly roles and responsibilities, it shall demonstrate the basis for such distinctions through a policy explaining relevant aspects of faculty qualifications, responsibilities, and instructional objectives.**³⁸

³⁵ This proposed version incorporates policies relating to free-standing law schools previously addressed in Interpretations of relevant Standards. See Interpretation 405-4, *supra*.

³⁶ This proposed provision specifically addresses the role of full-time faculty members in decision-making regarding faculty appointments.

³⁷ Historically, as noted in note 30, *supra*, part-time faculty members have not been accorded security of position or academic freedom. The subcommittee's proposal to extend such protections to part-time faculty member is not explained or justified.

³⁸ This provision would require law schools to justify differences in treatment of tenure-track faculty and those with other forms of security of position and perquisites, in terms of qualifications, responsibilities and instructional objectives.

(f) **Definition of “long-term contract.”** For purposes of this Standard, ‘long-term contract’ means at least a five-year contract that is either (1) presumptively renewable or (2) provides an alternative structure sufficient to assure academic freedom, the ability to attract and retain high-quality faculty, and a significant role in faculty governance for the faculty member.³⁹

(g) This Standard does not preclude a limited number of fixed, short-term appointments in a clinical, legal writing, visiting assistant professor or experimental programs of limited duration.⁴⁰

- *Retain provisions regarding tenure of deans* in order to retain independence of judgment in law school leadership:

Standard 206(c) Except in extraordinary circumstances, a dean shall also hold appointment as a member of the faculty with tenure.

- *Retain provisions relating to tenure of law library directors* in order to retain independence of judgment and standing in decision-making regarding law library resources.

Standard 603(d) Except in extraordinary circumstances, a law library director shall hold a law faculty appointment with security of faculty position .

6. Governance.

a. Existing provisions. Existing Standards and Interpretations address important issues relating to the role of faculty members in institutional governance.

Existing Standard 404(a) addresses the responsibilities of full-time faculty:

A law school shall establish policies with respect to a full-time faculty member’s responsibilities in teaching, scholarship, service to the law school community, and professional activities outside the law school. The policies need not seek uniformity among faculty members, but should address:

(3) Obligations to the law school and university community, including participation in the governance of the law school...

In addition, Standard 405 (“Professional Environment”) has been interpreted to provide clinical faculty members with a role in institutional governance, through the language of *Interpretation 405-8*, which states:

³⁹ This provision defines long-term contracts.

⁴⁰ This provision more clearly defines current practices with regard to fixed, short-term faculty appointments.

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. This Interpretation does not apply to those persons referred to in the last sentence of Standard 405(c).

b. Proposed revisions. Proposed revisions to the Standards and Interpretations include provisions relating to law school governance in several distinct areas.⁴¹ In particular, proposed changes address the role of faculty members in institutional decision-making most significantly in Standard 405(d) which states:

(d) A law school shall have a policy that provides for participation of all full time faculty in the governance of the school.

Specific Interpretations are not provided to address the role of different groups of faculty members in governance roles.

⁴¹ Proposed revisions to Chapter 2 of the Standards address the following matters:

Standard 201 Governing Board and Law Library Authority

(a) The policies of a governing board of a university may establish general policies that are applicable to a law school if they are shall be consistent with the Standards.

(b) The dean and faculty shall have primary responsibility for planning, implementing, and administering the educational program of the law school, including curriculum, methods of instruction and evaluation, admissions policies and procedures, and academic standards.

Standard 202 Law School-University Relationship

(a) If a law school is part of a university, that relationship shall serve to enhance the law school's program.

(b) Appropriate separate policies shall be established for the law school where a university's general policies do not adequately facilitate the law school's efforts to recruit and retain a competent law faculty or adequately protect academic freedom.

(c) The dean and faculty shall have primary responsibility for the recommend the selection of members of the faculty, and shall recommend retention, promotion, and tenure (or granting of security of position) of members of the faculty.

Standard 205. Allocation of Authority between Dean and Faculty

The allocation of authority between the dean and the law faculty is a matter for determination by the law school as long as both the dean and the faculty have a significant role in determining educational policy.

Standard 206 relates to the responsibility of the dean and faculty to engage in long-range planning and educational assessment.

Standard 404 (Responsibilities of Full-Time Faculty) refers to the responsibilities of full-time faculty referenced in Standard 205.

c. Recommendations. Although the new proposed Standard endeavors to address the role of faculty members in institutional governance more generally, it fails to consider the importance of assuring that faculty members with differing roles and perspectives have designated opportunities relating to their expertise insofar as they play significant roles in institutional governance. “Non-traditional” faculty in non-tenured positions--including those with long-term security of position who teach in clinical and legal writing positions--have critical insights regarding curricular issues and their judgments should be brought to bear in law school policy-making. Indeed, law schools that fail to tap such expertise are likely to be ineffective in meeting other obligations under the proposed Standards, such as those relating to long-term planning, assessment of student competences, skill-related education, and consumer protection.

On the other hand, it may be legitimate to focus the role of these faculty members in the areas of their expertise, rather than expecting them to be accorded authority to make decisions regarding to hiring, promotion, and tenure decisions for faculty members with differing research, teaching, and service responsibilities.

The Special Committee accordingly believes that the proposal by CLEA relating to the roles of law faculty in governance responsibilities are well-founded, and would support the inclusion of language in *Interpretation 405-8* addressing related issues in terms such as the following:

A law school shall afford to full-time faculty members participation in faculty meetings, committees, and other forms of law school governance involving matters such as curriculum, academic standards, methods of instruction, and faculty appointments and promotions. This Interpretation does not preclude a law school from determining that faculty members without tenure may be accorded limited rights with regarding to decision-making as to faculty appointments, retention, promotion or tenure outside their field of study or teaching. This Interpretation does not apply to those on short-term faculty appointments as referenced in proposed Standard 405(f) as discussed above.

7. Conclusions and Consolidated Recommendations. The Special Committee appreciates the opportunity to comment on pending proposals for revisions of the Standards and Interpretations. In summary, it recommends the adoption of the following revisions to ABA practices, Standards and Interpretations:

Transparency.

- Adoption of Proposed Rule 25, with attention to issues raised in the comments above.

Public Information and Employment Data:

- Adoption of Standard 509, with consideration of comments noted above.

Curriculum

- Adoption of Standard 303 with modifications as noted above.

Tenure and Security of Position for Faculty Generally

- Standard 405(b)(Version 1) *Retention* of key existing provisions of Standard 405 and revisions as indicated above, OR
- Standard 405(b)(Version 2) *Clarification* of issues relating to tenure and security of position as indicated above.

Special Cases: Security of Position for Clinical Faculty, Legal Writing Faculty, Deans and Library Directors

- Retention of key existing provisions with modifications as noted above.

Governance

- Adoption of Interpretation 405-8, in terms similar to those proposed by CLEA, as noted above.

Conclusion

Thanks very much for your consideration of these observations and recommendations. Please feel free to ask our Special Committee to offer further suggestions in coming days.

Sincerely,

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