

TO: Standards Review Committee,
ABA Section of Legal Education and Admissions to the Bar

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RE: Standard 405(b) and its Interpretations

Standard 405(b) and its Interpretations require a law school to operate a system of tenure.

That is reflected in the history of these provisions, including past actions by the Council and the Standards Review Committee. It's also reflected in their wording, construed in the way that we as lawyers are generally expected to construe enactments.

The History

The last two pages of this memo are a chart summarizing the history of the language in Standard 405(b) and its Interpretations.

Standard 405(b)

Standard 405(b) was adopted in 1973 and numbered as Standard 405(d). Here's the original wording:

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.

In 1995, the first word was changed from "The" to "A." In 1996, "Annex" was changed to "Appendix." Otherwise, the wording today is exactly as it was in 1973. Here's the current version:

A law school shall have an established and announced policy with respect to academic freedom and tenure of which Appendix I herein is an example but is not obligatory.

There has been no change in substance. Whatever this Standard meant in 1973 — and whatever it has meant to the Council in the intervening 37 years — is what it means today.

In 1999, the Standards Review Committee recommended abolishing 405's requirement of a system of tenure. SRC framed its recommendation that way. The Council debated it that way. And *Syllabus* reported it that way.¹ Everyone involved believed that 405(b) requires a law school to operate a system of tenure. I attended the Council meeting as an observer when this was debated. On the Council, Herma Hill Kay was the leading advocate for retaining 405's requirement of a system of tenure. Bob Walsh led the anti-tenure faction. This was a good-natured discussion, but the views were deeply felt and expressed. Everybody in the room called the factions “the friends of Herma” and “the friends of Bob.” When the vote was taken, Herma's friends won. The entire discussion was about whether schools should be required to have systems of tenure. Everybody in the room believed that 405(b) requires schools to do so. And the Council voted to preserve that meaning.

At an SRC meeting in 2003, a committee member made a motion to strike 405(b) from the standards on the ground that a school should not be required to have a system of tenure. The committee discussed it in the belief that 405(b) requires every law school to have a system of tenure. I was a committee member at the time. SRC decided again to recommend to the Council that 405 be rewritten to delete the requirement that a school have a system of tenure. I was not at the Council meeting that rejected that recommendation, but the Consultant and Deputy Consultant at the time both reported back to us on SRC that the Council voted down the recommendation in a matter of minutes on the ground that it had decided this issue only a few years before. Again, everybody involved understood 405(b) to require that a law school have a system of tenure.

Interpretation 405-1

In 1973, simultaneously with the adoption of Standard 405(b) — and reflecting the intent of the Standard's drafters — the ABA adopted the predecessor to Interpretation 405-1. The original wording appears to have been this:

Any fixed limit on the percentage of a law faculty that may hold tenure under any circumstances is in violation of the Standards, especially Standard 405.

¹ *Syllabus*, Summer 1999, at 10, 15, 18.

In the 1970's and 1980's, the Section frequently did not publish, or at best erratically published, Interpretations in the same volume as the Standards. The present practice of publishing them both together annually dates from some time in the 1980's. Until 2005, the Section published legislative history dates with individual Standards and Interpretations. These dates uniformly attribute Interpretation 405-1 to February 1973. The wording above appears in the 1986 Standards with the 1973 date, and it's reasonable to infer that the wording above was substantially the wording in which it was adopted. From the 1980's until 2005, whenever a Standard or Interpretation's wording was changed, the date of the change was added to the published legislative history dates, and those dates were quite reliable.

In the current Standards, Interpretation 405-1 appears thus:

A fixed limit on the percent of a law faculty that may hold tenure under any circumstances violates the Standards.

Except for cosmetic word-smithing, it's the same today as when it was adopted in 1973.

A school that refuses to provide tenure to anybody — a school without a system of tenure — has “a fixed limit” of zero and thus “violates the Standards.” The Accreditation Committee is not an enacting body and lacks the power to amend the Standards. An error by the Accreditation Committee, approving a school without a system of tenure in plain violation of 405-1, does not change the Interpretation's meaning. The Council, not the Accreditation Committee, amends Interpretations and Standards.

In 1999, when SRC proposed deleting 405's requirement of a system of tenure, it proposed redrafting of this Interpretation to read “A law school *that has a system of tenure* ... shall not have fixed limits on the percent of faculty that may hold tenure.”² When the Council rejected the proposal to delete the 405 requirement of a system of tenure, it also rejected this proposed wording.

Interpretation 405-3

In 1978, the ABA added this Interpretation:

A law school which appears to have no comprehensive system for evaluation for granting of tenure is not in compliance with Standard 405.

In 1980, the ABA added this Interpretation as well:

Promotion and tenure criteria must be clearly defined and made

² Syllabus, Summer 1999, at 18 (italics added).

available to faculty.

These two Interpretations separately covered parts of the same subject, and in 1996 they were merged and numbered 405-3:

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

A law school without a system of tenure could not possibly comply with this language. Such a school would have no “candidates for ... tenure.” It would have no “written criteria” for judging tenure-worthiness. And it would have no “written ... procedures” for deciding applications for tenure.

In 1999, as part of the recommendations package intended to delete 405's requirement of a system of tenure, SRC proposed consolidating 405-3 into 405-1 so that the relevant provision would read “A law school *that has a system of tenure* ... shall have a comprehensive system for evaluating candidates for promotion and tenure, including written criteria and procedures that are made available to the faculty.”³ When it rejected SRC's recommendation to delete the requirement of a system of tenure, the Council rejected this wording as well.

After the 1996 merger, the only change to 405-3 was to add wording in 2005 that extends its provisions to faculty covered by Standard 405(c):

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.

I have heard the claim that somehow the insertion of the words “or other forms of security of position” changed the meaning of 405(b) so that the Standard no longer required a system of tenure. I was a member of SRC at the time, and in recommending this amendment to the Council our only intent was to provide the same procedural protections to 405(c) faculty that the Standards had long required for tenure-track faculty. The amendment was characterized exactly that way in *Syllabus*:

The revision to Interpretation 405-3 requires that a school have a comprehensive system for evaluating not only candidates for promotion and tenure but also candidates for other forms of security of position.⁴

³ *Id.* (italics added).

⁴ *Syllabus*, Fall 2005, at 63.

Construing Enactments

The claim that 405(b) does not require a system of tenure is inconsistent with some of the most basic concepts of the interpretation of enactments:

- An enactment is to be construed so that its parts are internally consistent.
- An enactment is to be interpreted as a whole and not by pulling wording out of context.
- The enacting body is presumed to have intended that every word have meaning. If a word or phrase is there, it is not to be ignored.
- The enacting body is presumed not to have intended an illogical or impractical result.
- If the enacting body has treated the enactment as having a certain meaning, that is its meaning.

Standard 405(c) requires a law school to “afford to full-time clinical faculty members a form of security of position reasonably similar to tenure.” If 405(b) does not require tenure, clinicians would be the most protected people on any law school faculty. They would be entitled to job security “reasonably similar to tenure” even if the school has no system of tenure and hires every doctrinal teacher as an at-will employee. Could the drafters conceivably have intended to provide more job security to clinicians than to doctrinal teachers? The drafters were themselves for the most part doctrinal teachers on previous Standards Review Committees and on the Council.

Standard 206(c) requires that deans have tenure. A school can comply with that Standard only by having a system providing for tenure. That would be the system of tenure that 405(b) has always been understood to require.

Interpretation 405-1 provides that “A fixed limit on the percentage of a law faculty that may hold tenure ... violates the Standards.” As explained above, a school that refuses to provide tenure to anybody has “a fixed limit” of zero and thus “violates the Standards.” And as explained above, an error by the Accreditation Committee does not change the meaning of a Standard or an Interpretation.

Interpretation 405-3 requires a school to “have a comprehensive system for evaluating candidates for promotion and tenure, including written criteria and procedures that are made available to the faculty.” As explained above, to comply with this language, a school would need “candidates for ... tenure,” “written criteria” for evaluating a candidate’s tenure-worthiness, and

“written ... procedures” for deciding applications for tenure. To comply, in other words, a school would need a system of tenure.

Conclusion

When I started doing site inspections in 1994, everybody understood 405(b) to require schools to have tenure systems and clearly stated policies controlling those systems. People active in accreditation then would have been flabbergasted at the idea that Standard 405(b) and its Interpretations could be construed to permit a school to have a policy providing, in effect, “This school does not award tenure to anybody.” The governing Standard and Interpretations are in substance the same now as they were then and have been since they were adopted.

The following statement, published in July in the National Law Journal and elsewhere, is not accurate: “There have been a few people who have argued that what we [*the Standards Reviews Committee*] are doing is an attack on tenure. The reality is that the current standards do not require law schools to have tenure.”⁵

⁵ National Law Journal, July 27, 2010, at <http://www.law.com/jsp/article.jsp?id=1202463917764> and elsewhere, including ABA Journal Law News Now, July 27, 2010, at http://www.abajournal.com/news/article/aba_committee_proposal_to_eliminate_tenure_word_raises_law_prof_ire.

**STANDARD 405(b) &
INTERPRETATIONS**

<u>year</u>	<u>Standard</u>	<u>Interpretation</u>	<u>Interpretation</u>	<u>Interpretation</u>
<p>1973 Standards revision</p> <p><i>[NOTE: In the 1970's and well into the 1980's, the Section did not always print the Interpretations with the Standards.]</i></p>	<p><i>Std 405(d):</i> "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."</p>	<p><i>[The Interp below was adopted with the original Standard in 1973. As to whether the original's wording was identical to that below, see Note in the left column.]</i></p>	<p><i>[The Interp below was added in 1978. As to whether the original's wording was identical to that below, see Note in the left column.]</i></p>	<p><i>[The Interp below was added in 1980. As to whether the original's wording was identical to that below, see Note in the left column.]</i></p>
<p>1986 edition of the Standards</p> <p><i>[the earliest publication I've seen that prints the Standards and the Interps together]</i></p>	<p><i>[same]</i></p>	<p><i>Interp 1 of 405:</i> "Any fixed limit on the percentage of a law faculty that may hold tenure under any circumstances is in violation of the Standards, especially Standard 405. February 1973."</p>	<p><i>Interp 7 of 405:</i> "A law school which appears to have no comprehensive system for evaluation for granting of tenure is not in compliance with Standard 405. August 1978."</p>	<p><i>Interp 1 of 405(d):</i> "Promotion and tenure criteria must be clearly defined and made available to faculty. July 1980."</p>
<p>1995 revision</p>	<p><i>Std 405(b):</i> "A 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."</p>	<p><i>[same]</i></p>	<p><i>[same but renumbered Interp 4 of 405]</i></p>	<p><i>[same but renumbered to refer to Standard 405(b)]</i></p>

<u>year</u>	<u>Standard</u>	<u>Interpretation</u>	<u>Interpretation</u>	<u>Interpretation</u>
1996 revision	<p><i>Std 405(b):</i> “A law school shall have an established and announced policy with respect to academic freedom and tenure of which Appendix I herein is an example but is not obligatory.”</p>	<p><i>Interp 405-1:</i> “A fixed limit on the percent of a law faculty that may hold tenure under any circumstances violates the Standards. (February 1973; August 1996)”</p>	<p><i>Interp 405-3:</i> “A law school shall have a comprehensive system for evaluating candidates for promotion and tenure, including written criteria and procedures that are made available to the faculty. (August 1978; 1995; August 1996)”</p>	<p>[consolidated into Interp 405-3]</p>
<p>2005 revision</p> <p>[NOTE: As a general policy in 2005, the ABA — throughout the Standards — stopped publishing the Interps’ legislative history dates.]</p>	[same]	[same, except for deletion of legislative history dates; see Note in the left column]	<p><i>Interp 405-3:</i> “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.”</p>	[see above]
2010 edition	[same]	[same]	[same]	[see above]