

**American Bar Association
Section of Legal Education and Admissions to the Bar
Standards Review Committee**

**Security of Position, Academic Freedom
and Attract and Retain Faculty**

Draft for January 8-9, 2011 Meeting

I. Introductory Comments

This document contains draft standards and interpretations concerning law schools' ability to attract and retain a qualified faculty, their obligation to protect the academic freedom of all faculty members, and faculty roles and responsibilities in governance of the law school. The draft report is being submitted by the subcommittee as a discussion draft and not as recommendations for action by the full committee.

There are a few important notes concerning this draft of proposed standards and interpretations and these relate to the many comments and recommendations it has received on the previous draft.

Special Committee on Security of Position. The subcommittee is mindful of the action of the Council in referring to the Standards Review Committee the report of the Special Committee on Security of Position ("Report"). The Standards Review Committee was asked to consider the Report, including its "alternative approach" to current policies concerning security of position, in its comprehensive review of all the Standards, Interpretations and Rules of Procedure. The Report's "alternative approach" included (1) elimination of "tenure" and "security of position" language in the Standards themselves and (2) emphasis on the key values of academic freedom, institutional ability to attract and retain a qualified faculty, and faculty governance.

This draft reflects the key aspects of the "alternative approach" by concluding that the core values to be served by accreditation policies are the ability of approved schools to attract and retain a qualified faculty, protect the academic freedom of faculty members and to ensure that the program is governed by the full time faculty and dean. These three core values serve to support and enhance the quality of approved schools' educational programs, a fundamental value of accreditation review, while permitting approved schools the flexibility needed to control their costs and creatively educate their students for a changing profession and economy.

Policy concerning tenure. Current Standard 405 requires approved law schools to have "an established and announced policy with respect to academic freedom and tenure" of faculty members* . Some commentators have argued that the current Standard requires

* However, language in Standards 206 and 603 requires that deans and law library director "hold appointment" with tenure or "security of position," "except in extraordinary circumstances." Those provisions are discussed below.

schools to have tenure earning rights because that is “implied” by the language in Standard 405(b) and Interpretation 405-3. Other commentators have argued that the Standards should require all schools to have tenure earning rights for some or all faculty. And, still others have argued that the Council has been presented with opportunities to reject a requirement of tenure but has refused to do so.

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

However, it is also accurate that there is ambiguity in the language of the Standards concerning security of position and inconsistency in the application of Standard 405’s “policy with respect to academic freedom and tenure” language. First, it is clear from the language of Standard 206 (that the dean “hold appointment as a member of the faculty with tenure”) that the Standards Review Committee and Council know how to require tenure for a group or class of faculty if they so desire. That clear and mandatory language is missing in Standard 405. Second, the Accreditation Committee has interpreted the language in the current Standard 405(b) as requiring that schools have a policy on academic freedom but not mandating that some or all faculty members have tenure earning rights or status. Indeed, at least one law school has been approved without any traditional tenure earning rights for any faculty members. This fact serves to underscore the absence of any definition of “tenure” in the Standards. Third, other professional disciplines’ accreditation regimes require approved programs to articulate a policy concerning employment status and activities but none require tenure. Indeed, several mention tenure as one of a list of employment transactions (e.g., appointment, renewal, dismissal, etc.) but then qualify the award of tenure as “where tenure exists” (Commission on Dental Accreditation), or “if applicable” (Accreditation Council for Pharmacy Education). Finally, it has been argued that tenure is the most important way (indeed, some commentators have argued that it is the only way) to ensure that faculty members enjoy some form of protection of their academic freedom. However, many institutions protect the academic freedom of all faculty members, whether on short or long term contracts or on tenure lines, through adoption of AAUP policies or through internal employment policies.

One important goal of the comprehensive review of the Standards is to ensure that accreditation requirements are clear to law schools and can readily be interpreted by the Accreditation Committee. Therefore, in the opinion of the majority of the subcommittee, interests of greater clarity and transparency require that the revised Standards explicitly state

whether or not schools must provide tenure rights and, if so, for whom on the law faculty. One member of the subcommittee disagrees with this draft of 405(b) and believes that approved programs should be required to provide tenure earning rights to all full time faculty members. Ultimately, the Council will decide the proper policy on security of position for approved law schools.

This draft retains, explicitly, the current policy that tenure is a fundamental and long honored method of attracting and retaining a qualified faculty and protecting faculty members' rights of academic expression and opinions but that approved schools do not, as a matter of accreditation policy, have to offer all faculty members some form of tenure of position. We acknowledge that tenure earning rights play an important part in ensuring that law schools can attract and retain a high quality faculty and protect the expression of viewpoints and ideas by their faculty members. Moreover, most law schools have tenure policies in place due to their university's adoption of AAUP polices and because the law schools are members of AALS and meet its membership requirement that "a faculty member shall have academic freedom and tenure in accordance with the principles of the [AAUP]." Section 6-6(d) of AALS Bylaws. We do not anticipate that this clarification of existing ABA accreditation policy will cause any changes in the ways that law schools and universities hire full time faculty members through tenure earning policies.

Protection of academic freedom. The draft more explicitly articulates the obligation that schools have processes or programs that protect the academic freedom of their faculty members and possess the ability to attract and retain a qualified faculty. This is a significant change from the current language that requires only that approved schools have an "announced policy" concerning academic freedom protections. Moreover, the proposed Interpretations create a clearer statement of presumptions and burdens of proof in the accreditation process. The draft provides that approved law schools that have tenure earning polices for some or all faculty presumptively have established that they protect faculty members' academic freedom and have attracted and retained a qualified faculty. The presumption can be rebutted by contrary facts established in the accreditation review process. Conversely, law schools that do not provide tenure rights to some or all full time faculty have the burden of establishing that they are capable of attracting and retaining qualified faculty members in those positions (e.g, clinical faculty appointments, etc.) and that they have policies and practices in place for the protection of academic freedom of all faculty members. The drafters believe that the proposed draft more clearly articulates what law schools must do to demonstrate that they can and do attract and retain a qualified faculty and protect their faculty members' freedom in their academic and law school related work.

The proper role of accreditation in defining faculty status. The proposed changes to the Standards and Interpretations represent a movement away from current policies that impose detailed requirements for employment contracts and rights for clinical and legal research and writing faculty. The proposed revisions also eliminate anomalous provisions that require tenure for deans or "security of position" for law library directors "except in extraordinary circumstances". These mandates do not appear to be the proper province of an accreditation agency and may increase the uncertainty and complexity of accreditation review. The majority of subcommittee members believe that the revisions provide approved

law schools and universities with greater latitude and flexibility in articulating and implementing policies to attract a qualified faculty and protect faculty members' academic freedom.

The responsibility for governance of the law school. A current standard ((205(b)) reposes the responsibility for governance of the law school in the law school faculty and dean and another provides for the allocation of authority in governance of the school to the dean and faculty (207). This draft proposes a new provision that requires approved schools to provide for the participation of all full time faculty members in the governance systems and processes while leaving to the schools the responsibility of allocating these responsibilities. The proposal is based on the idea, which is shared by virtually all other professional disciplines' accreditation bodies, that governance of the essential attributes of a quality program is the responsibility of the faculty with the leadership of the dean.

The proposed policy requires schools to provide participatory rights and responsibilities to full time faculty members according to their academic appointment or duties in the school (their faculty positions) and other appropriate criteria. For example, it may be appropriate for a school to provide that only tenured faculty members can make determinations of tenure for faculty in tenure-earning positions or that clinical faculty members are responsible for the hiring of other faculty members in clinic faculty positions and in making policy concerning experiential learning curriculum, and that legal writing faculty members participate in decisions about, at a minimum, the parts of the curriculum for which they are responsible. Again, the concern here is about the quality of the educational program and this approach reflects the belief that law schools' educational programs will be stronger if all key educators have responsibility for making decisions about the program.

Deans and library directors. The Standards concerning employment of deans and library directors require special attention. The current Standard concerning deans provides that they shall, except in "extraordinary circumstances", "hold appointment as a member of the faculty with tenure". While this Standard clearly attempts to provide deans with sufficient security of position to effectively and forcefully advocate for the law school in dealings with university administrators and overseers, it places the accreditation standards in a position to require law schools or their universities to grant tenure to individuals who have never met that law school's tenure requirements or who have never earned tenure at another institution. While awarding tenure to a new dean may be an appropriate way to protect him or her in potential conflicts with the university administration or outside groups, it is difficult to align this mandated employment arrangement with accreditation policy goals. Indeed, a dean may be in the best position to negotiate the sort of employment protection to ensure that he or she is free of the fear of losing his or her job for forcefully advocating for the law school.

Similar concerns about the appropriateness of a similar approach to law library directors suggests that the requirement in Standard 603(d) that "except in extraordinary circumstances, a law library director shall had a law faculty appointment with security of faculty position." (See also language in Interpretation 603-3, pointing out that such

appointment with “security of position “normally” is a tenure or tenure track appointment but is “not in the administrative position of director”). There are many reasons why law schools will want to appoint their library directors to positions on the tenure or tenure track faculty. However, that matter—appointment with tenure or the less precise “security of position”—is one that should be addressed by the law school. It is not clear why accreditation policy is advanced by mandating that they be granted “security of position”.

II. Proposed Changes to Existing Standards and Interpretations (redlined to current Standards and Interpretations)

Standard 206. DEAN

(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.

Standard 405. PROFESSIONAL ENVIRONMENT

(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 implemented policy that provides protection for the academic freedom of its 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 with respect to academic freedom, and tenure of which Appendix 1 herein is an example but is not obligatory.

~~(c) 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.~~

(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 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.~~

(d) A law school shall have a policy that provides for effective participation of all full time faculty, according to their faculty position and academic responsibilities, in the governance of the school.

Interpretation 405-1. 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: the law school's history of attracting and retaining new 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.

Interpretation 405-2. 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. The law school's written policy with respect to the protection of the academic freedom of its 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.

Interpretation 405-4. "Faculty positions" as the term is used in 405(d) refers to distinctions that law schools may draw between full time faculty in positions such as clinical faculty, legal research and writing faculty, "doctrinal" or research faculty.

Interpretation 405-5. "Effective participation" as the term is used in 405(d) means decision making responsibility in a faculty member's area of academic responsibility for

law school curriculum planning, strategic or institutional planning, and hiring and retention in their positions.

Interpretation 405-1

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

Interpretation 405-2

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

Interpretation 405-3

~~A law school shall have a comprehensive system for evaluating candidates for promotion and tenure or other forms of security of position, including written criteria and procedures that are made available to the faculty. [moved to new 405(c)]~~

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.~~

Interpretation 405-5

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

Interpretation 405-6

~~A form of security of position reasonably similar to tenure includes a separate tenure track or a program of renewable long-term contracts. Under a separate tenure track, a full-time clinical faculty member, after a probationary period reasonably similar to that for other full-time faculty, may be granted tenure. After tenure is granted, the faculty member may be terminated only for good cause, including termination or material modification of the entire clinical program.~~

~~A program of renewable long-term contracts shall provide that, after a probationary period reasonably similar to that for other full-time faculty, during which the clinical faculty member may be employed on short-term contracts, the services of a faculty member in a clinical program may be either terminated or continued by the granting of a long-term renewable contract. For the purposes of this Interpretation, "long-term contract" means at least a five-year contract that is presumptively renewable or other arrangement sufficient to ensure academic freedom. During the initial long-term contract~~

or any renewal period, the contract may be terminated for good cause, including termination or material modification of the entire clinical program.

Interpretation 405-7

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

Interpretation 405-8

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).

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.

Standard 603. DIRECTOR OF THE LAW LIBRARY

- (a) A law library shall be administered by a full-time director whose principal responsibility is the management of the law library.**
- (b) The selection and retention of the director of the law library shall be determined by the law school.**
- (c) A director of a law library ~~should have a law degree and a degree in library or information science~~ shall have the requisite skills, education and experience to provide leadership to the law school's information resource needs and shall have a sound knowledge of and experience in library administration, library technology, and issues involving legal research and legal education.**
- (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.**

Interpretation 603-1

The director of the law library is responsible for all aspects of the management of the law library including budgeting, staff, collections, services and facilities.

Interpretation 603-2

The dean and faculty of the law school shall select the director of the law library.

Interpretation 603-3

The granting of faculty appointment to the director of the law library under this Standard normally is a tenure or tenure-track appointment. If a director is granted tenure, this tenure is not in the administrative position of director.

Interpretation 603-4

It is not a violation of Standard 603(a) for the director of the law library also to have other administrative or teaching responsibilities, provided sufficient resources and staff support are available to ensure effective management of library operations.