

## MEMORANDUM

To: Hon. Solomon Oliver, Jr. Date: October 23, 2013  
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From: Franklin G. Snyder, Texas A&M University School of Law  
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Re: Notice and Comment on Comprehensive Review of the ABA  
Standards for Approval of Law Schools (September 6, 2013)

As tenured professors at ABA-accredited schools, we appreciate the opportunity to comment on the revised Standards. In particular, we write to support the Council's recommended Alternative 2 to Standard 405, relating to Professional Environment. In doing so, we wish specifically to respond to arguments advanced by our colleagues in the Letter from "Multiple Law Professors," dated October 8, 2013 ("the MLP Letter").

To the extent that the points made in the MLP Letter are valid, we believe they are addressed to the wrong body. The Section's charter, and the Council's goal, is to determine whether particular legal education programs are adequate to train new lawyers for service to the profession and the public. The question is not whether granting tenure or other forms of job security to a limited group of favored faculty members is beneficial or not, but merely whether the Council should impose it as a condition of accreditation *even on institutions that do not believe it to be useful*. In proposing changes to Standard 405, the Council is not meddling in the internal affairs of law schools. On the contrary, it is preserving the academic freedom of these institutions by allowing them to organize themselves in the ways that they, as educational institutions, deem best. The MLP Letter asks the Council not to defer to the law schools, but to substitute its own judgment for theirs. The Council has correctly concluded that its current tenure standard is an unwarranted interference by outsiders in the internal affairs of academic organizations.

If law schools believe that tenure is important—and in our view the vast majority of them do—they will retain it no matter what the Council does. But if the very institutions most expert in legal scholarship and pedagogy believe that they can meet the substantive requirements of the Standards more effectively and efficiently in some other way, the Council should permit them to do so. This deference allows the Section and the law schools each to concentrate on their respective strengths and responsibilities.

The MLP Letter makes several points and raises several arguments to which we wish to respond. These are interlined in bold, with responses, below.

**We have no doubt that adoption of the proposal will lead to law schools opting not to offer tenure to professors. [p. 1]**

No empirical support is offered in support of this assertion. Tenure flourishes in other university disciplines where outside accreditation requirements do not require it. Some accredited universities follow a tenure model and some do not. Both coexist successfully. The only way tenure could be cut back is if the schools themselves—who are in a far better position than the Council to determine such issues—have decided it is unnecessary or even counterproductive. In that case, the Council simply has no basis on which to interfere. The Council’s role is, and ought to be, to focus on outputs. If a school can demonstrate that its program adequately “prepares its students for admission to the bar, and effective and responsible participation in the legal profession,” the Council has fulfilled its obligation to the profession and the public. If the authors of the MLP Letter are correct that schools with untenured faculties will be unable to meet that standard, their accreditation can and should be revoked on that ground. If a school can meet or exceed the substantive standards without tenure, it should be free to do so.

**Academic freedom is critical for effective law teaching and scholarship. [p. 2]**

The MLP Letter erroneously conflates “academic freedom”—which the Council’s revised Standard explicitly protects—with “tenure.” There are many ways that schools can and do protect employees from being fired or disciplined for espousing unpopular or radical positions that do not require the lifetime job guarantees of tenure. Even under the current Standard, most law school teachers do *not* enjoy tenure protection, yet they do enjoy considerable academic freedom. Untenured tenure-track faculty, faculty on long-term contracts, some clinicians, most legal writing faculty, visiting faculty, and adjuncts make up the bulk of law school faculties, and yet the MLP Letter advances no evidence that they are less effective or more likely to be cowed into silence than their tenured colleagues. In fact, the specific examples cited in the MLP Letter directly undercut its argument. The Critical Race scholars cited, for example, were largely *untenured* when they began their seminal early works. The suggestion that only tenure allowed them to speak out without retaliation is untenable. Anecdotal evidence, in fact, suggests that the single group in a law school most likely to be silenced are untenured tenure-track faculty, yet studies show that they are often the most effective teachers and most prolific scholars.

Given that tenure has been part of the legal academy for over a century, it is remarkable how little empirical research supports the claim that it is critical to the effective delivery of legal education. The academy has had ample opportunity to develop evidence that a tenure system leads to better teaching and scholarship, but we have failed to do so. On the contrary, at least some research (of which we assume the Council is aware) suggests tenured faculty produce less scholarship than untenured colleagues, and that students learn more from adjuncts than they do from tenured professors. These studies may be flawed, and the defenders of tenure may be correct, but it is not for the Council to pick sides in this dispute. The revised Standard clearly

permits tenure and even, by its insistence on the preservation of academic freedom and faculty participation in governance, encourages it. But there is no legitimate basis for imposing it on a school that can achieve these goals without it. The law schools, not the Council, are in the best position to weigh tenure's costs and merits.

**Both teaching and scholarship require a professor to use her expertise and creativity to explore topics that foster students' critical analytical skills. Educating our students to become effective advocates, public policy makers, and even teachers themselves, is an important mission of the profession. However, creativity and innovation in the classroom will be stifled if a teacher is overly concerned that her job may be jeopardized if she asks her students to tackle provocative topics.** [p. 2]

As legal academics, we train the lawyers who will be on the cutting edge of important and controversial legal issues. We exhort them to fight for the right, regardless of consequences; to stand up against overweening and abusive power; to defend the outcasts; and to put themselves on the line for their clients and for righteous causes. But when they do so themselves, they will discover that they do *not* have the protections of tenure. They will have to stand fast in the face of credible threats of serious retaliation. They may even lose their jobs. It is troubling that the MLP Letter suggests that we, as legal academics, cannot be expected to be as courageous as our students—that we will only teach them to charge bravely forward against oppression if we ourselves are safely ensconced behind the lines in a bombproof bunker. Of all the arguments in favor of tenure, this is the worst. Providing a safe harbor to those otherwise too timid to speak, and foisting such as mentors to future law students, is not a legitimate goal that the Council should pursue.

**In eliminating a requirement of tenure, the Council has proposed a radical departure from a system of academic freedom that is entirely consistent with the ABA's mission of eliminating bias in the legal profession in favor of one that would deprive the most vulnerable category of teachers of the protections against bias.** [p. 3]

The Council is not making any changes to the nation's "system of academic freedom." It could not do so if it wanted to. On the contrary, it is a professional accrediting body responsible for setting the standards for training and admission to the bar, not for running universities. The Section's job is to determine the standards for what constitutes sufficient legal education; the law schools' job is to provide this education in what they believe to be the best and most effective manner. The proposed Alternative 2, in fact, is *removing* outside interference with academic freedom by removing a regulation that interferes in the internal workings of law schools.

Nor is the change "radical." The current Standard, not Alternative 2, is the one that runs contrary to the modern accreditation standards for professional schools. The MLP Letter undercuts its own argument by pointing out that business schools are actively involved in recruiting under-

represented groups *even though their accrediting bodies do not require tenure*. There is no reason to believe that we in law schools are *less* attuned to the problems of discrimination than our colleagues in business schools.

Even if we assume, for purposes of argument, that changing the Standard would reduce or eliminate tenure at some universities, the argument that this will disproportionately harm members of disadvantaged groups seems groundless. Tenured faculty are disproportionately white and male. What the MLP Letter correctly calls the “slow” progress of women and minorities into tenured ranks is not due to administrative discrimination. Outside the tenured ranks, the proportion of women and minorities is, strikingly enough, much higher. These groups are disproportionately clustered in the ranks of non-tenure-track clinicians, legal writing teachers (often called the “pink collar ghetto”), and instructors. For some reason, tenured faculty have been slower to admit disadvantaged groups into their own ranks than their institutions have been to employ them in the first place. It would be easy enough to compare the diversity in the tenured ranks of accredited law schools with the faculties of unaccredited law schools and with the faculties of university departments that do not have an analogue to Standard 405. But the MLP authors have not done so. A quick review of many unaccredited schools and other university departments suggests that they are at least as diverse as the tenured faculty at most accredited schools.

But, once again, whether tenure is good or bad for diversity is irrelevant to this discussion. Law schools have an independent responsibility under the Standards to promote diversity, and those that do not should and will be sanctioned. A law school could, quite plausibly, *increase* its diversity and thus opportunities for disadvantaged groups if it had fewer tenured white males. A law school that does not meet the call for diversity ought to see its accreditation jeopardized on *that* ground, not on the ground that it fails maintain an institution that for nearly all its history has disproportionately benefitted white males.

**Every school that grants tenure currently has the ability to reduce its fixed costs by curtailing hiring or declaring a financial exigency, among other options. [p. 4]**

Given that the MLP Letter concedes that tenured faculty are disproportionately white and male, it is difficult to see how curtailing hiring of new faculty (who are much more likely to be members of disadvantaged groups than are existing tenured faculty) to protect the existing jobs of tenured white males would result in greater diversity. A school, by replacing one expensive, unproductive, tenured faculty with two less-expensive untenured faculty who are better teachers and better scholars, *might* quite reasonably improve both education and diversity, with a substantial benefit to students and (ultimately) to the public. The Standard removes from schools the right to make that choice and thus potentially inflicts on students education that is more expensive, lower quality, and less diverse.

**Fixed costs have nothing to do with the merits or utility of having tenure in the first place.**  
[p. 4]

It is unclear what the MLP Letter means by this. If the claim is that tenure cannot affect costs, it is simply untrue. Assuming tenure prevents unproductive employees from being eliminated or replaced by better and less expensive employees, it plainly has an effect on fixed costs. If the claim is, rather, that tenure actually allows schools to attract faculty for less money that they would otherwise have to pay, and therefore *as a factual matter* is not more expensive than the alternatives, that claim ought to be addressed to budget officers at the respective schools who are in a better position than the Council to do the necessary calculations. And if the claim is, instead, that costs should not be taken into account in the discussion of tenure, then the claim is untenable. No aspect of legal education can be evaluated without taking into account its costs. Tenure may be valuable enough that its cost is worth it, or it may not. Outside the legal academy, there is considerable agreement that law school is too expensive. These outsiders may be wrong. But the Council owes it to the profession and the public to decide whether requirements that impose substantial costs are worth those costs.

**Moreover, it should be noted that increased fixed costs due to salaries have as much to do with the longevity of service of a professor as they do with any system of tenure. In almost every profession, longevity of service correlates with a higher salary. Dean O'Rourke's comments, however, fail to take the relationship between longevity of service and salary into account. Instead, her comments seem to suggest that legal education would somehow be improved if law schools paid less to their most experienced teachers.** [p. 4]

Unlike the compensation of assembly-line workers, that of professionals is usually based not on time-in-grade but on quality and productivity. Relatively junior lawyers, physicians, and engineers commonly make considerably more money than colleagues who have spent more time in the institution. Those who are senior but unproductive are just as commonly eased out, or see their compensation reduced, so that more productive professionals are rewarded. Tenure, however, prevents this from happening.

The question is actually a factual one that the Council is not in a position to answer. If tenured faculty, as a result of their experience, are actually worth what they are earning, a change in the Standard will not affect them because there will be no reason for schools to eliminate them. The MLP Letter seems to assume there is no tenured deadwood in the system. If that assumption is correct, schools will have no motive to rework tenure and the change to the Standard is irrelevant. If the authors are wrong, then removing tenure might quite plausibly improve legal education. The law schools, not the Council, are in the best position to make such judgments. In our view the Council should be encouraging innovation that will improve education and reduce costs for students.

**More to the point, the fact that people outside the academy do not know why tenure exists is wholly irrelevant to a discussion about its utility and importance.** [p. 4]

What is striking about this argument is that the MLP Letter is actually asking a group *outside* the academy—the Council—to impose its own notions of the utility and importance of tenure on those *inside* the academy who, the authors apparently fear, do not properly value tenure. It is difficult to see how the Council rationally could impose tenure on the unwilling unless it has some knowledge of why tenure is necessary. The members of the Council and the Standards Review Committee are, for the most part, graduates of ABA-accredited law schools who have been actively involved in the practice of law and in legal education. A majority of them are or have been legal educators. If anyone ought to understand the importance of quality legal education, it is they. But if we in the academy have done such a poor job of explaining tenure’s importance that *our own former students* cannot understand it, the fault is ours, not theirs. The MLP Letter assumes that, if given the chance, those inside the academy will abandon tenure. We do not agree that this is likely. But it is difficult to see how the Council could possibly impose it on the law schools if only law professors are able to understand “why tenure exists.”

**The “flexibility” that Mr. Pierce is referring to is one that has long been craved by some career administrators in education—it is the flexibility to rid institutions of those professors who take faculty self-governance seriously.** [p. 5]

Dean Pierce is a distinguished lawyer who left a lucrative private practice to help strengthen one of the nation’s great historically black law schools, and who in his career has amassed an impeccable record in the areas of civil rights enforcement, increasing access to justice, and fostering scholarly endeavors. The suggestion that he and the other deans who support the change are mere pettifogging career academic bureaucrats, only interested in their personal agendas, is baseless.

But even if we attribute the basest of motives to Dean Pierce and the other deans, the fact is that no career academic administrator, no matter how sinister his or her intentions, has the power unilaterally to alter an institution’s tenure system. This is presumably why other portions of universities that are not subject to an analogous standard still contain their shares of “professors who take faculty self-government seriously.”

**Legal education, indeed, higher education more broadly, has prioritized core values that include academic freedom and debate, intellectual curiosity and rigor, diversity and social justice.** [p. 5]

This is an argument that is best addressed to legal educators, not to those charged with supervising admissions to the bar. Again, the fear seems to be that “legal education” itself does not “prioritize” these values and will not do so unless forced by accreditation standards to do so.

We doubt that the authors of the MLP Letter are correct in this. But if they are, it is unlikely that any outside regulation from the bench and bar, let alone imposition of a specific system of employment terms, can instill these virtues in unwilling subjects.

**The Council includes too few law teachers. It simply has not fully benefitted from the full participation of key stakeholders on the delicate and politically sensitive issue of abolishing tenure as a requirement of law school accreditation. [p. 5]**

The MLP Letter appears to misapprehend the job of the Council, which is to regulate law school accreditation in the public interest, not to facilitate tradeoffs of “stakeholders” in the manner of a labor arbitrator. The Council contains a great many tenured and formerly tenured faculty, and doubtless their views were cogently expressed and carefully considered. Tenured professors, in fact, were already far more heavily represented on the Council than other important stakeholders, such as students, non-tenure-track faculty, administrative staff, prospective clients, and the public. We count 10 of the 14 members of the Standards Review Committee and 13 of 21 members of the Council who are or have been full-time law school professors. That is more than enough representation for any stakeholder group.

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We appreciate the hard work the Council has put in on these Standards, and we also appreciate the opportunity to comment. We urge the Council to continue to pursue what it conceives to be the best interests of the profession and the public, and to pursue higher quality and greater diversity in legal education. If someone can build a better law school that provides a less expensive education and increases access to justice for Americans, we should all be in favor of it.