January 27, 2014

The Honorable, Solomon Oliver, Jr., Chairperson
Council of the Section of Legal Education and Admission to the Bar
American Bar Association
321 N. Clark Street, 21st Floor
Chicago, IL 60654-7958

Mr. Barry A. Currier, Managing Director of Accreditation and Legal Education
Section of Legal Education and Admission to the Bar
American Bar Association
321 N. Clark Street, 21st Floor
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Dear Chief Judge Oliver and Mr. Currier:

Atlanta's John Marshall Law School's faculty thanks the ABA for the opportunity to comment on the proposed revisions to Standard 405. As discussed further below, we are opposed to the proposed revisions because tenure allows faculty to govern from a student-centered perspective and increases the number of minority faculty, which, in turn, impacts the law school's and the profession's ability to attract, matriculate, and graduate minority students. Tenure provides the professors with the freedom to promote the curriculum and programs that support the academic needs and interests of our students.

**Tenure is a necessary precursor to faculty governance**

The Atlanta John Marshall faculty believes it is essential to focus the discussion regarding tenure on what is truly of paramount importance - the student. We must look at whether the proposed changes will improve or diminish the educational experience of law school students. One of the primary responsibilities of faculty is governance of the educational program of the institution – setting academic standards, including grading policies; setting admission and graduation requirements; designing and implementing curriculum; and ensuring quality instruction through the retention, promotion, and tenure review processes. Tenure is essential because it creates a law faculty who can exercise independent and well informed professional judgment in designing and delivering a program of legal education responsive to the evolving needs of law school graduates to compete in a globalized market for legal services. In fact, the concept of tenure originally arose with the students as the beneficiaries of both the able faculty tenure attracts and the ability of that able faculty to exercise their professional judgment and expertise in the design and delivery of educational programs. The AAUP's 1940 Statement of Principles on Academic Freedom and Academic Tenure describe tenure as "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" founded on
the indisputable basis that "[f]reedom and economic security, hence, tenure, are indispensable to the success of an institution in fulfilling its obligations to students and to society."

Without tenure, faculty governance is diminished and essentially meaningless. Tenure allows for the faculty governance necessary to ensure decisions are made in the best interests of the students. In considering a student-centered legal education, the faculty needs to be free to exercise their independent judgment. The faculty are the experts in educating the students, and because faculty interact daily with students, faculty are the most aware of student interests and are in the best position to protect those interests. The current climate of both legal education and the legal profession requires that faculty reassess their institution’s curriculum and propose innovative programs and changes to traditional models of legal education. These proposals are very likely to change the status quo and, because they are new, to entail risk. Faculty are in a position to propose and implement innovative programs of legal education precisely because they have the protection of tenure. Faculty governance may not be a perfect model, but it is the best available method of protecting the best interests of the students. The proposed revisions to Standard 405 move the decision-making process on curriculum and teaching methodology away from the experts engaged in frontline delivery to the students in the direction of a corporate model focused on the commodification of education. This movement clearly goes in the wrong direction.

Tenure is a gateway for minority communities and social justice

One of the highest aspirations of the government of a free people is that of just society. Implicit in that concept is a recognition of the importance of equal access by all citizens to participate in the creation, administration and enforcement of the law. Unfortunately, while our society has had publicly stated and long-standing commitments to social justice, American law has a history of excluding others from political and legal participation based on gender and race. Within a living generation, racial and ethnic minorities were prohibited from receiving a legal education and faced state-imposed barriers to their admittance to the Bar, along with restrictions on the right to elect representatives (and judges) to remove those restrictions.

Gradual societal change toward empowering all citizens with civil rights was initiated and promoted by members of the legal professoriate. Opening up legal education as a pathway by all communities to become members of the Bar mirrored society’s move towards equal access to legal institutions. The law professoriate played a critical role in defining barriers to equal access to justice and describing a path to remove those barriers. A half-century of legal scholarship gave judges, legislators, and other legal actors, a philosophical and practical grounding to advocate for a societal sense of justice that encourages full participation in societal rule-making by every citizen, independent of status.

Not surprisingly, these causes were unpopular at the time they were undertaken, and remain unappreciated in our post-racial world. However, our society is made better by a group of legal scholars who can speak truth to power. The protection of tenure allows the law professoriate the ability to research and explore unpopular causes. Without it, scholars interested in social justice would be incentivized not to explore controversial topics. Unsurprisingly, in a society where race and ethnicity has played a dispositive role in social ordering, marginalized racial, ethnic, and gender minorities would lose an important voice in bringing their causes to the center.

The general protections tenure provides are magnified in a law school like Atlanta’s John Marshall Law School, where a diverse student body engages with a similarly diverse faculty.
Many of our students are interested in the intersection of justice and marginalization of racial, ethnic, and gender minorities. Our student body is filled with aspiring prosecutors and public defenders interested in differential outcomes of defendants based on race. Many others are interested in pursuing careers in public policy and yearn to understand the effects of power and privilege on creating rules that may favor those in power, or differentiate based on historic status. The nascent academic curiosity of these students requires scholars who have the freedom to explore the issues of race, ethnicity, and gender, and are free to describe its boundaries. Aside from the loss of an important dialogue in higher education, or in our own law school community, future practitioners who will deal with issues of cultural difference on a daily basis, will have lost an important space to develop their own understanding and perspective. In short, the absence of tenure creates the absence of a forum in a marketplace of ideas. The remaining ideas are likely to be less controversial and not interrogate important assumptions about race, ethnicity, and gender. Unfortunately, it is precisely those discussions that our students yearn for and our society has benefitted from to become a free and open place, free of the ugly history of legal constructs defined by race, ethnicity, and gender.

The criticisms of tenure can be addressed without abolishing tenure

The criticism of tenure for law faculty fails to take into consideration the significant benefit to the law student experience that tenured faculty brings to the table. Students benefit when faculty is afforded the freedom to exercise their best professional judgment in educating the students. A tenure system fosters this type of freedom, and no suitable alternative has yet been proposed. The proposed revisions to Standard 405 are offered as "fixes" for "problems" perceived to be caused by tenure. However, the problems that have been mentioned in these discussions are problems not with tenure, nor with faculty, but rather with poor implementation of a tenure system at some institutions, which in turn gives rise to convenient stereotypes of the "tenured professor" at which criticisms are easy to make. As the late William Van Alstyne of Duke Law School observed, "Tenure, accurately and unequivocally defined, lays no claim whatever to a guarantee of lifetime employment. Rather, tenure provides only that no person continuously retained as a full-time faculty member beyond a specified lengthy period of probationary service may thereafter be dismissed without adequate cause." Mark L. Adams, *The Quest for Tenure: Job Security and Academic Freedom*, 56 Cath. U. L. Rev. 67, 69-70 & n. 7 (2006). Understood accurately, tenure is what provides a faculty with the freedom to exercise their best professional judgment for the direct benefit of their students.

The reality, then, is that tenure's strong and beneficial effects for higher education, and law school education in particular, vastly outweigh the asserted problems. Of even greater import, the asserted problems caused by tenure are solved without gutting or diluting tenure. Indeed, those asserted problems disappear entirely with the adoption of a post-tenure review process. See Ira P. Robbins, *Exploring the Concept of Post Tenure Review in Law Schools*, 9 Stan. L. & Pol'y Rev. 387 (1998). Atlanta's John Marshall Law School has had post-tenure review since the inception of its current tenure process in 2001. As a result, we have a hard-working, productive, and fully engaged tenured faculty who dispel the stereotypes of "fat and happy" academics lounging in their sinecures.

The proposed revisions of Standard 405 will not protect faculty governance or academic freedom

Neither of the proposed revisions of Standard 405 takes into account the concerns raised herein. The first proposed recommended revision does not provide enough protection for security of position. While it allows for protection of academic freedom, it dilutes the very freedom to
exercise the independent judgment that tenure provides. Tenure is the mechanism by which the faculty is able to impart their expertise to the students. It is the best way to ensure student learning outcomes as it protects the experts (professors) who are interacting with students on a daily basis. With the ultimate goal of creating effective advocates, the faculty must be afforded the opportunity to discuss and consider controversial topics. Moreover, tenure and a tenure track system protect the faculty by enabling them to choose to teach and author scholarship on those same controversial topics. If that protection is not available, the faculty members will be less inclined to consider and discuss those topics. The second proposed recommended revision 9 of Standard 405 fails to provide any security of position at all. While it attempts to require law schools to have policies and procedures in place to attract and retain a competent full-time faculty, it would have the opposite result. Providing tenure attracts competent faculty as experts in their respective fields, and schools need to continue to offer tenure to attract qualified individuals to their faculty.

In sum, we believe that the proposed changes to Section 405 should be rejected. Protecting tenure and the security it provides faculty is critical to the future education of law students and must be preserved for the benefit of students, professors, and legal education as a whole. With the law student at the center of legal education, tenure is critical in enabling the students, including racial, ethnic, and gender minorities, to become competent members of the legal profession. The best way to ensure learning outcomes for law students is by enabling educators to use their professional judgment to impart that knowledge to the students with the freedom that tenure affords.

Respectfully submitted,

The Faculty of Atlanta's John Marshall Law School