The Importance of Tenure and Security of Position in Promoting the Education of Effective and Ethical Lawyers

Statement of
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Hearing of the ABA Council of the Section of Legal Education and Admissions to the Bar
Hearing on Proposed Changes to Standards for Approval of Law Schools
February 5-6, 2014

We submit these comments in opposition to both Alternatives 1 and 2 proposed changes to Standard 405 (c).

We do so as two law professors who as colleagues have created at our law school an outstanding clinical program, teach clinical and non-clinical courses, have published extensively in the field of clinical education and in our other areas of study, and have been in faculty academic policy positions. Nationally, we have been in the leadership of organizations responsible for the quality of legal education. Professor Dinerstein was a member of the ABA Council of the Section of Legal Education and Admissions to the Bar from 2006-11; served on its Special Committee on Security of Position (2008) and Special Committee on the Professional Educational Continuum (2013); and has participated on sixteen (16) joint ABA-AALS Site Evaluation teams, chairing three of them. Professor Shalleck served on the Executive Committee of the Association of American Law Schools from 2010 through 2012, as well as on the Special Committee Advising the Executive Committee on ABA Law School Accreditation Standards, and, on behalf of the Executive Committee of the AALS, attended Standards Review Committee meetings from 2010 to 2013. She has chaired the association’s Professional Development Committee and served on numerous planning committees for clinical legal education conferences. We have both participated over many decades in numerous initiatives to transform and improve law teaching.

We are proud of the professional careers we have been able to craft but we did not always think of our work as having a career orientation. When we began clinical teaching in the early 1980s it was as contingent faculty with no status. We valued the work we did and the contributions we made, and hoped others did as well, but did not—and could not—have a sense that our institution would continue to value it beyond the short term. Fortunately, our law school, buttressed in no small part by the promulgation of then-Standard 405 (e) (now Standard 405 (c)), regularized our status, creating a clinical tenure track (later folded into the existing tenure track, thereby creating a unitary system), for which we were evaluated and hired.

We are now tenured faculty members who have played critical roles in shaping our home institution, as well as the role of law schools nationally and internationally as they have sought to integrate clinical education into the traditional law school curriculum. We have benefitted from and contributed in many
capacities to the efforts of the ABA Section and the AALS to promote high-quality legal education that trains students to develop the analytic, critical, and practical skills necessary for work in the legal profession. Supported by the ABA’s Accreditation Standards, legal education has gone through a period of intense transformation during the span of our careers; it now includes academically sound training in the work of lawyers and the operation of law, as well as in knowledge of legal doctrine and theory. The model of clinical education developed in American law schools has propelled efforts internationally to change legal education. These changes have often faced resistance. Indeed, without the infusion of Ford Foundation grant funding in the late 1960s, later followed by Department of Education Title IX funding, law schools would not have adopted clinical education programs, certainly not to the extent they now have. Clinical educators have benefitted from an ABA accreditation standard that, over time, has advanced the inclusion of clinical education within a sound program of legal education.

The Section of Legal Education has furthered the development of clinical legal education as a crucial component of a transformed legal education. This transformation would not have been possible without current Standard 405(c) guaranteeing to clinical faculty members “a form of security of position reasonably similar to tenure.” Clinical faculty members have been at the forefront of developing sound educational methods to educate students to become effective and ethical practitioners committed to the provision of justice. We, therefore, oppose the elimination of current Standard 405 guaranteeing tenure or its equivalent to full-time faculty, including clinical faculty addressed in section (c), and its replacement by either Alternative 1 or 2 proposed by the Council. Neither alternative would protect the role of faculty, including clinical faculty, in exercising their academic freedom, participating in governance, or in shaping the academic programs of law schools. For the transformation of legal education to continue, the current approach contained in Standard 405 (with relatively minor adjustments that other commentators have noted) should be retained.

To be sure, the view of some, as was commonly heard on the Council when Prof. Dinerstein was a member, is that “if we were writing on a clean slate, we would not write a standard such as Standard 405.” Thinking about writing on a clean slate can be a useful intellectual exercise in examining any piece of legislation or social policy but it ignores context and history. There is a reason why Standard 405 and its Interpretations evolved the way that they have: too many law schools sought to interpret reasonably plain language on equal treatment of clinical faculty to create or perpetrate distinctions that the Accreditation Committee did not intend, therefore requiring new Interpretations or tightened Standard language (famously the 1996 change of “should” to “shall”) to restore the original meaning. That history, especially in the current economic climate for law schools, strongly suggests that some number of law schools operating under either Alternative 1 or 2 would deny to clinical faculty security of position altogether or else devise a separate system that would be clearly second-class when compared to non-clinical faculty security.

We have both consistently stated in our leadership positions within legal education our support for academic freedom and security of position for full-time clinical faculty, as for other full-time faculty. We summarize here our two main reasons for retaining the current approach reflected in Standard 405 and
attach crucial documents dating back to 2008 that explain fully the importance of retaining academic freedom and security of position for clinical faculty.

First, clinical faculty who have academic freedom, security of position, and a full role in faculty governance have been successful at effecting curricular change within law schools. We know that our positions as tenured faculty members have enabled us to develop and promote a top-notch clinical program at our law school. We have had the freedom to innovate without fear that experiments might not be fully successful. We have had the time and support to develop programs in which students provide superb representation to clients in adjudicative and transactional matters, while they develop the conceptual understanding, skills, and values necessary to the practice of law. We have been able to conceive and implement projects that took several years to bear fruit. We have fully engaged in the debates that shape appointments and curricular decisions. These decisions effectively determine the role of clinical education within the academic program. We have had the stature to integrate the substance and methods of clinical education throughout the curriculum. We have contributed to a new field of inquiry and scholarly writing that has elucidated the dynamics of lawyering and the pedagogy of teaching lawyering. In short, we have had a seat at the table.

Clinical teachers throughout legal education who have these protections have created many variants on this dynamic form of legal education, all of which have adapted legal education to a changing practice of law. These critical innovations are threatened if the continuing support provided by the Standards is removed. At a time when critics and supporters of legal education alike are emphasizing the importance of turning out "practice-ready lawyers," to undercut the security of the very faculty most crucial to achieving such a goal is nothing short of perverse.

Second, legal education involves developing the ability and willingness to challenge power and authority. While all legal education seeks to instill in students the capacity to question and challenge authority when public or private institutions or individuals fail to live up to the ideals and principles of law, clinical educators face these challenges on a daily basis. Others have written comments about targeted attacks on clinical programs. We share a deep concern about these threats to academic freedom. We reiterate that after-the-fact procedures for challenging adverse actions against clinical faculty are no substitute for security of position which has a long record of protecting those advocating unpopular positions.

Apart from involving students in representing clients with particularly controversial claims, virtually all clinical work involves the potential of alienating members of the bench or bar or powerful governmental or private entities. Vigorously litigating immigration cases, domestic violence cases, consumer cases, or even fair use claims in intellectual property cases can generate opposition. As legal educators, we teach students to advocate zealously on behalf of their clients within the limits of law, even when a judge, agency administrator, or opposing counsel finds their claims troublesome or threatening. Many constituencies can complain to a dean or governing board about the regular practices of a clinical program. Law school administrators may have many reasons for wanting the support of these constituencies. Clinical educators need to know that, in teaching students to exercise independent
professional judgment on behalf of clients, they are insulated from threats to fulfilling their responsibilities.

Although the Council’s Memorandum of September 6, 2013, sending out the proposed Standards for notice and comment purports to provide a rationale for Alternatives 1 and 2—to serve the “interests of greater clarity and transparency”—the Alternatives do much more than that. They gut the protections that current Standard 405(c) and its Interpretations have provided to clinical faculty. We are struck by the fact that nowhere in the rationale for these Alternatives is there any analysis of the possible effects of these changes on legal education in general and clinical education in particular. At a minimum, we would have hoped and expected that such a significant proposed change would have been accompanied by a rationale sufficient to justify it. Instead, the Alternatives threaten to undercut what is probably the most significant programmatic innovation in law schools in the last 40 years.

Because we ourselves are not writing on a clean slate, we have attached to this statement three documents that reflect the comments we offer to the Council today. Professor Shalleck was a member of the AALS Executive Committee that submitted comments on June 1, 2010 opposing a similar revision to standard 405, as well as other proposed changes to the standards. Professor Dinerstein was a member of the ABA Special Committee on the Professional Education Continuum, on whose behalf the Chair of the Committee, Vice Dean Randy Hertz, and the Special Consultant to the Special Committee, Professor Judith Welch Wegner, submitted comments opposing the same proposed revision of standard 405 (as well as on other matters) on March 30, 2011. We also attach a statement co-written by Professor Dinerstein as a member of the Clinical Subcommittee of the Council’s Security of Position Committee. Neither Alternative 1 nor 2 the Council proposes now will promote the curricular innovation, participation in governance, nor academic freedom that clinical education and all legal education require.

Respectfully submitted,

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Attachments
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Dear Bucky:

The ABA and AALS have cooperated closely for many decades on important questions of legal education and the quality of American law schools. It has been a positive, productive relationship, and we are proud to be a partner of the ABA in working to make legal education a source of pride for American lawyers and a model for much of the rest of the world.

Needless to say, the AALS has a great interest in the work of the Standards Review Committee and the Council as you consider revising the ABA Standards for Accreditation of Law Schools. We welcome your invitation to comment on the proposals. Toward this end, I appointed an Advisory Committee to advise the AALS Executive Committee on potential issues raised by proposed changes in the Standards. Following the work of the Advisory Committee, the AALS Executive Committee has undertaken serious consideration of those issues. These deliberations produced three guiding principles that we propose which we hope will be helpful as the ABA continues its efforts to improve the Standards.

The first principle relates to a number of the changes that the Standards Review Committee has under consideration: "The Measure of a Law School is the Quality of its Full-Time Faculty." One of the core values of the AALS is that its member schools value a faculty "composed primarily of full-time teacher/scholars who constitute a self-governing intellectual community engaged in the creation and dissemination of knowledge about law, legal processes, and legal systems, and who are devoted to fostering justice and public service in the legal community." This commitment entails law schools having a substantial full-time
permanent faculty that is responsible for, knowledgeable about, and actively engaged in legal education. That faculty must necessarily have academic freedom and security of position in order to be able to pursue their teaching, scholarship, and faculty governance responsibilities free of the threat of penalty for their particular views or because of the content of their work. A law school so composed, while not necessarily university-based, incorporates into the vision of professional education the values that have defined our great universities.

To illustrate the importance of a full-time faculty to a law school, a comparison to the world of law practice might be helpful. Imagine a law firm made up entirely of "of counsel" lawyers who are either in part-time retirement or devoted primarily to some other professional undertaking. Such a firm would be a far different kind of organization than what most law firms aspire to be. It would likely be less committed to firm organization and governance, strategic thinking, the articulation and implementation of a firm mission, the public service obligations of the firm and advancement of the profession more generally. While the analogy is not perfect, a law school run by a governing faculty made up largely of members whose primary affiliations lie elsewhere would also lack some of the same, critical attributes. This is not to say that adjunct faculty do not have an important role in law schools; they can bring needed specialized skills and experience to the classroom, just like "of counsel" attorneys can bring special skills and experience to a law firm. But adjunct and part-time faculty with primary commitments elsewhere cannot be expected to be fully invested in the school’s mission, governance, strategic thinking, curricular planning and development, creation of new and innovative teaching methods, service obligations, and institutional improvement.

Primary reliance on full-time faculty members also helps achieve a second AALS core value – "scholarship, academic freedom, and diversity of viewpoints." Legal scholarship is essential to the improvement of our laws and legal system, because it identifies the strengths and weaknesses of that system and evaluates opportunities for improvement. Legal scholarship keeps the legal process self-reflective, self-aware and self-critical. In that sense, legal scholarship is essential to the improvement of our laws and legal system, and full-time law teachers play a crucial role in that enterprise. Scholarship comes in many forms – from foundational writing that helps change ways citizens think about an area of the law, through doctrinal analysis that may be directly relevant to how judges interpret laws or how legislators draft new laws, to analysis of the work of lawyers and the impact of law on clients and communities. As examples, legal scholars have been in the forefront of efforts to evaluate specialized courts, improve handling of juvenile offenses, and improve environmental regulation. Scholars have also led debates about such matters as the appropriate treatment of enemy combatants, the permissible scope of a police search, the standards that should apply in resolving a custody dispute, the limits on state seizure of private property for public uses, and the duties of employers with respect to sexual harassment. Without full-time law faculty engaged and committed to scholarship on these and countless other issues, deep generative research about law, the work of lawyers, and the impact of law on clients and
society would not occur, and the quality of our laws and legal system would be the worse for it.

The scholarly activities of a full-time faculty also directly improve the quality of teaching in America’s law schools. Research gives faculty expertise that they impart to students. The engagement in research activity also models for students the importance of sustained inquiry and commitment to improving the law, legal processes, and legal institutions. Through their research faculty also model the value in exchange between people with diverse viewpoints – principles that are essential to the integrity and diversity of the legal profession.

A full-time, fully-engaged faculty also supports the need for a rich, evolving curriculum. The AALS is committed to "a rigorous academic program," "strong teaching," and "a dynamic curriculum that is both broad and deep." Law schools should teach theory and practice, substantive law and process, rigorous analytical thinking, the exercise of professional judgment, approaches to problem solving, and applied skills. Students need a mix of broad survey courses and intense focus on particular issues. They need exposure to both domestic and international legal systems. Some courses should be required; students should be allowed to select among a menu of other, non-required courses. Shaping the mix of offerings and a program’s requirements, again, is best done by a core of full-time faculty that determines the teaching and research functions of the school. Our system may seem obvious to us, but the model of a professional legal professoriate is distinctive. It is one of the most important reasons why our legal education is respected across the world.

For these reasons, we are concerned about any revisions in the ABA Standards that might either undercut the basic structure of faculty governance of law schools by full-time faculty or weaken the academic freedom of faculty. Measures that would weaken or abolish the tenure and security of position requirements in the ABA standards are central to our concerns; such measures would inevitably contribute to a decline in effective faculty governance and undercut efforts to improve law school quality that only joint efforts by a dean and faculty working together can achieve. It is also unlikely that any substitute for tenure designed to protect academic freedom and faculty teaching programs will be as effective as tenure in protecting the internal balance of institutional governance or responding to external pressures law schools will certainly face. One example of outside pressure is the growing number of attacks some law school clinics have faced for representing unpopular clients. Preserving the principle of academic freedom is not only an AALS core value; it is an essential public value.

We have related concerns with measures that would make it more difficult to determine the extent to which a law school is functioning according to the model based on a full-time faculty described above. This concern extends to the proposal to eliminate the calculation of a law school’s student-faculty ratio. We are sympathetic with the fact that the calculation formula in the current ABA Standards can be hard to apply in a way
that gives a true picture of available teaching resources, and we urge further effort to improve upon it. But we are concerned that eliminating student-faculty ratio data, however calculated, from the accreditation calculus is almost certain to move law schools in the direction of larger classes, fewer full-time teachers, or both. Such a move—however effective in an effort to reduce costs—would represent a terrible loss for both the legal system and for the very students in whose name the cost savings likely will be justified by depriving potential students of important information that could be obtained from reliable numbers that could come from the ABA.

In our stress on the importance of faculty role and faculty governance, we recognize that, if anything, law school decanal leadership is becoming even more important. As demands of law school constituents become more varied and intense, prudent management of resources becomes ever more difficult. But we urge the ABA not to let the rhetoric of industrial production control the conversation about the minimal standards of a quality legal education. It is appropriate to ask whether legal education is worth its cost and whether law students are getting what they have been promised. But legal education is not primarily achieved by better managers. Lawyers are not “produced” or even “trained” by law schools. What lawyers must ultimately deliver is judgment—whether judgment about what action a client should take, judgment about what issues or materials are relevant, or judgment about how ideas should be expressed. That kind of mature judgment is primarily created by personal interaction between individual faculty and individual students in countless educational settings. What law schools ultimately deliver, in short, are not skills alone. What law schools deliver are graduates who have fundamentally matured into independent professionals as a result of rich, reflective and varied educational experiences.

The second accreditation principle that we commend to you is: “Don’t conflate clinical education with skills training.” The two ideas are quite different. One source of the confusion is that any mental process can be reframed as a skill (e.g., the skill of critical thinking). Clinical education and skills training are, however, quite different teaching concepts. Skills training focuses largely on discrete, concrete and quantifiable skills, typically taught in single courses aimed at those skills. This training can be beneficial to students and is a useful component of a complete legal education. But lawyers must act skillfully and ethically in the world based upon complex knowledge. The challenge for legal education is to develop a way to frame a broad and deep commitment to professional knowledge and education that draws upon what the AALS sees as an intellectual project that incorporates rather than isolates the skill dimension of legal education.

Most clinical education goes beyond the accumulation of practical skills. It aims at the integration of substantive and applied learning. Clinical courses are less add-ons to the traditional substantive curriculum than they are culminations of these courses, in which students reinforce and extend the learning in substantive courses to the practice context. Through these courses, students typically develop problem-solving skills, learn to exercise critical judgment, and enhance analytical thinking as they bring substantive
law to bear on practice experience. They represent some of the kinds of integrative education that are highly praised in the Carnegie Report.

Integrative teaching methods and new approaches to law, lawyering, and legal practice are spreading throughout the curriculum at many schools. These efforts bridge traditional divisions in the curriculum and enhance not only the integration of skills and content, but also the relevance of other disciplines such as economics, psychology, history, and business. They have occurred because full-time teachers have exercised their responsibility for curriculum development as well as governance of their institutions more generally. These efforts, which the ABA and AALS have both helped to generate, continue to evolve and should be encouraged to percolate.

Our third principle is: "Do No Harm." "Do no harm" is the first principle in medicine and we commend it as a key principle of lawyer regulation as well. Trying to measure outputs without reliable techniques to do so, for example, runs a real risk of producing data that is more misleading than helpful.

Our focus here is the pending proposal for greater reliance on outcome measures. We all agree that verifying student learning is central to the educational process; determining what students have gained from their legal education is everyone's bottom line issue. We also agree that inputs often are imperfect, only "second-best" measures of student learning. Setting aside the difficulty of distinguishing in all cases between input and output measures, it is surely reasonable to say that an input measure such as passing a class in trial practice is at least some measure of learning trial skills. The same can be said for passing a course in property law or civil procedure. Our review of the literature suggests that no one has yet documented significant, reliable or valid outcome measures that would better measure what law schools do. Inputs theoretically may be "second best," but so long as output measures are unreliable, we are very concerned that the proposed shift to output measures may replace one system of quality control with one that is even less effective.

Furthermore, not everything that can be measured is worth measuring. Unless output standards measure qualities that matter, they will do nothing to improve legal education and may even trivialize it. As a system of measurable outcome measures becomes institutionalized, there is a danger that pressure to define goals in measurable ways will lead law schools to move away from what matters most — i.e., the development of students' analytical skills, professional judgment, and concern about public values. It is simply easier to measure a simplified image of learning than a complex one. While measurement of individual skills might work for activities that can be broken down into elements that can be taught as skills, it seems inevitable that mandating things that are measurable will distort, over time, what is taught and how it is taught.

Still further, while an outcome measures approach is, in part, a response to the desire for greater accountability of law schools to the students who pay high tuitions, compliance with the new approach will, without question, add to the cost of legal
education. Some of the costs will be administrative, including the cost of developing measurement and assessment tools that satisfy the standards and establishing the reliability and validity of such tools. Still greater costs will be necessary if the shift to outcome standards makes a school feel it needs new programs and courses whose learning goals are more readily measurable.

Most important, we are concerned that the proposals before you may have a profound negative impact on the diversity of law school faculty, staff, and students. Our commitment to diversity springs from the benefits of diversity to a rigorous educational program, as well as to the need to educate lawyers who are broadly representative of society, and who, in turn, are able to reflect the importance of inclusion and non-discrimination in our society. The AALS has a clear commitment to diversity — in viewpoint, personnel matters, and composition of the student body and the legal profession. Substituting a vague and unreliable set of outcome standards for a system that is increasingly creating multi-dimensional learning opportunities for students and that has at least begun to achieve a measure of diversity in the legal profession seems to us to be unwise. "Do no harm" is a principle with which it should be hard to disagree.

To the extent that the impetus for reform of the accreditation standards is driven by a desire for curricular reform, it is important to underscore that innovation today characterizes the curricula of a great many law schools. Some schools have added an emphasis on the lawyering process in the first year, while others introduce first-year students to international issues, to exemplars of their profession, to different disciplinary perspectives, or to public service work. Clinical and skills courses that used to be focused on trial and pre-trial practice and oral advocacy now include a broad range of practice areas and introduce many aspects of the work of a lawyer, including fact-finding, interviewing, negotiation, contract drafting, administrative hearings, and transactional work. Practice areas such as tax, intellectual property, and bankruptcy now have clinical offerings. A few schools are even experimenting with an entirely new model for the third year, in which students integrate their substantive law learning with actual cases through a wide range of in-house clinical courses, placement clinics, externships, internships, and mentoring relationships with practicing attorneys.

Few would doubt that we are passing through a challenging time in legal education. The cost of going to law school remains high, the current recession has meant that available jobs for law graduates have been fewer, and law firms have faced sometimes conflicting directions from their clients about how they want legal services delivered. At the same time, we see this as one of the most exciting and creative times at U.S. law schools. There is curricular innovation and competition at schools all over the country as schools seek to attract the very best students by offering the most innovative possible ways to become lawyers. We believe that a shift in the standards to reliance upon formulaic outcome measures will stifle this kind of innovation by pushing schools to adopt curriculum and teaching methods that are most easily measurable.
When we reflect about why American law schools are so innovative and so well regarded around the world, it seems to us that, over the years, the self-study process required by accreditation standards has been one of the most important, positive factors in the improvement of legal education. In its self-study, a law school revises and affirms its mission, defines its distinctive identity, assesses its external environment, evaluates the strengths and weaknesses of its faculty, curriculum, intellectual life, facilities, technological support, communications, and resources, and sets short- and long-term goals. This process allows a law school to take account of the constituencies it serves, and its own goals and needs. Does the law school serve primarily the needs of residents of a given state or region, including a substantial number of sole practitioners or attorneys who practice in small firms? Does a school prepare more of its students for large, national or international law firm practices? Does a given school produce a large number of academics, or entrepreneurs, or public interest advocates? Does it have a religious mission, or a goal of meeting the needs of special populations, such as Native Americans, or the inner-city poor? Does it place a priority on criminal law practice? Or, does it wish to be a pioneer in alternative dispute resolution, international and comparative law, or constitutional theory? Done right, the self-study process takes considerable time, energy, and resources, but it is generally viewed as a productive undertaking, by helping the school to define its core values, evaluate its challenges and opportunities, articulate new initiatives, and set institutional priorities. An AALS concern is that a focus on measurable student learning outcomes in the ABA Standards will deflect a law school’s attention in the self-study process from the most fundamental questions about the school’s identity, assessment, and priorities, to those matters most susceptible to objective measurement.

Finally, legal education occurs in the context of preparing students to take their place in what is ultimately a public profession. While lawyers may primarily represent private clients, they inevitably do so in ways that have public consequences. Courts have long seen lawyers as among their “officers” in the sense that lawyers have a responsibility for helping achieve justice in ways that are reputable and honorable. And there has long been a consensus that more law enforcement is done by private lawyers counseling their clients to stay out of trouble than by enforcement officials charging clients who did not get the message. The public quality of private lawyers can never be wholly defined by reference to what private clients demand, and any decline in the excellence of law schools is likely to be seen first in that effect on lawyers’ public role. Beyond private practice, countless lawyers work in the public sector and on pro bono matters. We believe it is essential, in short, that before the accreditation standards are changed that there is certainty that the changes will, in fact, produce the desired results.
I end this letter as I began: The AALS Executive Committee has great respect for the efforts made by the ABA to improve the quality of legal education over many years. We appreciate your openness to suggestions and hope you will take the comments in this letter as simply the first phase of a continuing dialogue. We look forward to continuing our common effort to keep U.S. legal education the finest in the world.

Sincerely yours,

H. Reese Hansen
President

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March 30, 2011

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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 Pheobe 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 uneveness 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

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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.

Interpretation 405-4
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." 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 systems as protecting highly-paid "deadwood" senior faculty, in a time when universities need more

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.
flexible hiring practices, opportunities to hire younger scholars knowledgeable in emerging fields, or must cut budgets.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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 quality control in academic planning and delivery, and who accordingly bring needed stability to

\textsuperscript{4} See Richard Chait (ed.), \textit{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, \textit{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).

\textsuperscript{5} See John Cross & Edie Goldenberg, \textit{Off-Track Profs: Nontenured Teachers in Higher Education} (MIT Press 2009) [hereinafter “Off-Track Profs”]; Adriana Kezar, \textit{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 Cecill Sam, \textit{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).

\textsuperscript{6} See Carole Bland, Bruce Center, Deborah Finstad, Kelly Risbey, & Justin Staple, \textit{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. \textit{See also} Ted Youn & Tanya Price, \textit{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).
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. 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. 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 one example. Murphy instructed his students that Brown v. Board of Education was a legitimate decision that should be respected,

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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

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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).


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.\textsuperscript{14} Removing protections related to tenure and security of position would put the integrity of universities at risk as well.

- \textit{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.\textsuperscript{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:3\textsuperscript{16} 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:

\textsuperscript{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, \textit{Tenure Wars: An Account of the Controversy at Minnesota}, 47 J. LEGAL ED. 369 (1997).


\textsuperscript{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, \textit{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 403 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 freedom and two Interpretations that would put the burden on the law school to show that it has protections in

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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.

- *Hiring and retention.* The Subcommittee has also proposed a Standard\(^{21}\) and an Interpretation\(^{22}\) relating to attracting and retaining a competent full-time faculty (another classic justification for

\(^{20}\) *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.

\(^{21}\) *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.
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. 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" 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

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.
• 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,\textsuperscript{24} law library directors,\textsuperscript{25} clinical faculty members,\textsuperscript{26} and legal writing instructors.\textsuperscript{27}

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

\textsuperscript{25} \textbf{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.

\textsuperscript{26} \textbf{Clinical Faculty: Standard 405(c)} currently states
   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.

\textit{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
b. History. Each of these provisions has its own justifications and history.

- Clinical Faculty. Others have recounted the complex history behind relevant provisions.\textsuperscript{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 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.

\textit{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).

\textsuperscript{27} Legal Writing Instructors. \textit{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.

\textit{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.

\textsuperscript{28} See Peter Joy & Robert Kuehn, \textit{The Evolution of ABA Standards for Clinical Faculty, 75 Tenn. L. Rev. 183 (2008).}
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 insights 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.

- **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.

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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.
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.\textsuperscript{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.\textsuperscript{31}

\textbf{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

\textsuperscript{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.), \textit{supra} note 4, at 45-46 (very few institutions grant tenure to part-time faculty members).

\textsuperscript{31} As to \textit{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 \textit{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 \textit{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 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.
(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.
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.  

(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) 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.  

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

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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).

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

(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

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.

39 This provision defines long-term contracts.

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

   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

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\(^{41}\) 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.
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.

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

(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.
hiring, promotion, and tenure decisions for faculty members with differing research, teaching, and
service responsibilities.

The Special Committee according 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,

Randy Hertz, Vice Dean, NYU School of Law  
Chair, ABA Special Committee on the Professional Education Continuum

Judith Welch Wegner, Dean Emerita and Burton Craige Professor of Law, UNC School of Law  
Special Consultant, ABA Special Committee on the Professional Education Continuum
Susan Kay of Vanderbilt and I were members of the Security of Position Committee. For purposes of helping us to think through the issues of academic freedom, role in governance, and attraction and retention of faculty from the perspective of clinical faculty, we wrote the following memorandum. We thought it might be helpful to the Council as background information as it considers this important issue.

Bob Dinerstein
July 15, 2008

Security of Position
Clinical Subcommittee—Bob Dinerstein and Susan Kay
February 22, 2008

a. Clinical Faculty in Interest in Academic Freedom

Academic freedom is traditionally conceived as the ability to teach and publish without fear of interference or adverse treatment against the viewpoint expressed or methodology used in that teaching or those writings.

The AALS has relied on the AAUP definition of academic freedom which states in pertinent part:

The teacher is entitled to full freedom in research and in the publication of the results, subject to the adequate performance of his other academic duties; . . .
The teacher is entitled to freedom in the classroom in discussing his subject, but he should be careful not to introduce into his teaching controversial matter which has no relation to his subject. . . .
The college or university teacher is a citizen, a member of a learned profession, and an officer of an educational institution. When he speaks or writes as a citizen, he should be free from institutional censorship or discipline, but his special position in the community imposes special obligations. As a man of learning and an educational officer, he should remember that the public may judge his profession and his institution by his utterances. Hence, he should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that he is not an institutional spokesman.

1 In its final report, the Committee may wish to define what kind of faculty it seeks to include in the category of "clinical faculty." Broadly speaking, the category can include individuals who teach in-house, live-client clinical programs, externship programs, or skills simulation courses. Our assumption in this report is that we are addressing the particular needs and concerns of clinical faculty in the first two categories. Whatever one thinks about differential security practices for the first two categories of clinicians, it is difficult to think of any justification for treating a full-time pure simulation teacher any differently from a teacher in a traditional subject in terms of security of position. To do so would be to countenance providing security of position for torts but not contracts teachers, for example.

2 As noted in Appendix I — Statement on Academic Freedom and Tenure, ABA Standards for the Approval of Law Schools, this text follows the "1940 Statement of Principles on Academic Freedom and Tenure" of the American Association of University Professors.
When clinical teachers are engaged in writing or in classroom teaching, their need for academic freedom is indistinguishable from those of other legal academics. Clinicians’ writing is subject to the same need to be free from censorship and their teaching choices subject to the same need for independence as are the equivalent activities of any other faculty member. The choice of methodology and choice of materials, whether they be simulated cases or more traditional casebooks, are the very type of choice at the heart of the AAUP statement’s protection. It is, however, in those aspects of clinical teaching distinct from other types of legal teaching that protection of academic freedom is even more imperative.

In the recent past, political interference has assaulted clinical education more acutely than any other aspect of legal education. While most are familiar with the attacks on the Tulane Environmental Clinic, Kuehn and Joy make clear that Tulane was not an isolated instance. These attacks have challenged the types of cases and clients that particular clinics have chosen to represent and they have challenged the methods that clinics have used to represent those clients. Over the last thirty years, challenges have come from a variety of sources: interference by state officials in the clinics of their state-supported law schools, interference from the universities themselves in the choices made by their own clinics and interference from politically-connected detractors. While some universities have protected their clinical faculty from attacks from the outside, others have rushed to join the attack for fear of upsetting legislators, donors or other interests. Not only have some universities failed to protect their clinicians, they have actively assisted in the interference. Obviously no protection of academic freedom can silence all outside detractors of an academic pursuit; all that the protection ensures is that the university or law school will protect the faculty member from adverse consequences from such attacks. Given the very mixed record of universities in independently protecting the interests and freedom of their clinicians, it is clear that the ABA must enforce the provision of academic freedom for clinicians.

In clinical teaching that involves the use of live clients, the selection of cases is the pedagogical equivalent of the selection of materials or choice of subject matter for discussion in a more traditional course. A clinical faculty member chooses the subject matter of cases — and often the particular cases themselves — precisely because of their

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3 Such “classroom” teaching may include traditional casebook-based, classroom teaching, use of simulations, or the use of examples from the actual client representation occurring in the clinic.

4 For a brief description of several of the most prominent instances of political interference in clinical education and against clinical faculty, see R. Kuehn and P. Joy, “An Ethics Critique of Interference in Law School Clinics,” 71 FORD. L. REV. 1971, 1976-92 (2003). After discussing the long list of these cases, the authors conclude that:

given the frequency and severity of attacks on law clinics over the past two decades, outside efforts to influence a clinic supervisor’s case and client selection are likely to continue in one form or another. Moreover, the breadth of clinical programs that have been attacked demonstrates that no law clinic program is immune from such assaults. Any law school clinic is just one controversial case, one unpopular client, one angry legislator, alumnus or opposing attorney, or one unsupportive dean or university official away from attempts to interfere in its case and client selection.

Id. at 1992.
ability to teach the student the particular skills and doctrine that the clinic chooses to
teach. Representation of a client involves choices of strategy. For example, advocacy on
behalf of a client need not always take the form of litigation. Community advocacy on
behalf of groups or advocacy within the context of governmental agencies may be the
chosen method of client representation. Indeed, one of the educational goals of a clinic
may be teaching about choice of advocacy forum and methodology. Unlike the more
traditional classroom model, this choice of pedagogy is necessarily exceedingly public,
and often incorrectly seen as political. Consequently, it is clinical teaching that has
recently inspired the most direct attacks on the freedom to teach without interference.

When a clinical faculty member is attacked personally, or where a clinic is attacked, it is
quite easy to see the implications for the academic freedom of that teacher and for his or
her institution. More insidious is the effect of the attack and the response to the attack on
the teachings of other clinical faculty. When there has been such an attack — and if there
is an absence of protection for the affected faculty member — other clinical faculty may
choose to select cases or subject matter less controversial, but also less educationally
valuable. As with any such attack, the result is a silencing of others who have not been
attacked. Fear of vulnerability in the face of attack may cause as much interference as an
attack itself.

Clinical faculty may also teach through the use of externship placements. In this
methodology, the choice of locations and site supervisors may occasion attempts at
interference that require the protection of academic freedom. Placements and supervisors
are chosen because of the pedagogical value that they offer or because the faculty
member wants to ensure that certain issues or methodologies are covered. Any attempt to
second-guess the choices of placements potentially interferes with the faculty member’s
ability to ensure appropriate education.

Because of their representation of particular clients or involvement in particular issues,
clinical faculty may be more likely to engage in personal advocacy — public speaking or
expression of viewpoints on issues of public note — precisely the type of personal
expression noted in the third level of protection offered by the AAUP statement. It is
absolutely essential that they be able to expect protection in such speech.

**Clinical Faculty role and interest in governance**

If faculty governance is an important value for law faculty in general, then it is difficult
to see how there can be a principled reason to distinguish the interests of clinical faculty
in governance from those of other full-time faculty. To be involved in faculty
governance means to have some involvement in determining what courses should be
taught, who should teach them, who should be admitted to the law school, and all of the

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5 We do not address the role in governance, if any, that part-time faculty (whether or not clinical) should
have in law school governance.
other decisions that are critical to the running of a well-functioning law school. Clinical faculty members are, and should be, interested in these issues.

Traditionally, law school faculty exercised their role in governance through the work of standing faculty committees (such as curriculum, admissions, appointments), ad hoc faculty committees (such as a long-term projects or strategic planning committee) and as voting participants in faculty meetings. As law schools have expanded and grown more complex, faculty governance at many law schools has arguably become more attenuated, and more decision-making power is lodged within central law school administration. Nevertheless, faculty committees and faculty meetings still play an important role within the law school governance structure, and full-time faculty, including clinical faculty, should have a voice in these settings.

Involvement of clinical faculty in law school governance is particularly important because these faculty members have a significant (and some might argue a pre-eminent) role in helping law schools achieve one of the two objectives of the Program of Legal Education that the ABA Standards recognize: “preparing . . . students for . . . effective and responsible participation in the legal profession.” If this objective is an important one, it would stand to reason that the faculty intimately involved in helping law schools achieve that objective should have an important role in law school governance.

Having a role in law school governance, of course, does not mean that any particular segment of the faculty is entitled to have its views prevail. Nor would all clinical faculty have the same view about issues related to curriculum, admissions, appointments or other matters, or even matters directly related to clinical education—any more than we would expect all traditional, legal writing or other faculty to have uniform views on these subjects. But having a role in governance means that one has a “seat at the table” and can make one’s voice heard in forums that matter.

With the recent attention to law school curricular change occasioned by the Carnegie Foundation Report, the Best Practices Report, and the well-publicized efforts of law schools such as Harvard, Stanford, Vanderbilt, Georgetown, and many others to re-examine the shape of their first-year and/or upper-class curricula, the need for integrating a clinical perspective is especially timely and compelling. Such integration is unlikely to occur in law schools that do not afford their clinical teachers a substantial role in curricular governance.

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6 ABA Standards and Rules of Procedure for Approval of Law Schools, Standard 301 (a) (2007-08).
7 To the extent that the Section’s Outcomes Committee proposes additional educational outcome measures for law schools, and that the Council adopts such measures as new standards or interpretations, the connection between governance and outcomes may well become even more direct.
At some law schools, clinical faculty have a role in governance that is equivalent to the role that other faculty have with the exception of faculty appointments or promotions. Clinical faculty may have no role in such matters, or else a reduced one. This distinction in participation or governance rights is sometimes based on the assumption that if the criteria for selection of clinical faculty differ from that for traditional faculty, the former will be less able to assess the qualifications of the latter. So, for example, if clinical faculty at a particular law school are not expected to produce conventional legal scholarship (and in fact have not done so), some argue that they would not be in a position to judge the quality of faculty candidates for hiring or promotion where the assessment was based in (large) part on the quality of their scholarship.\(^1\) This supposed inability to judge the work of others is both over- and under-inclusive. That is, non-clinical faculty members with a paltry scholarship record have the right to participate in hiring and promotion decisions regarding non-clinical scholars despite their lack of productivity while at those schools with this distinction clinicians who have produced scholarship may be denied such participation despite their own often impressive scholarly achievements. One strongly suspects, therefore, that the distinctions are based not on ability or merit but rather on the perception of the differences in prestige between traditional and clinical faculty. In any case, such distinctions, even if accepted, do not go toward the issue of whether clinical faculty have a legitimate interest in governance participation, but rather to the narrower question of whether, if so, any distinctions in governance rights among full-time faculty based on the subject matter or method of teaching are justifiable.

It might be argued, of course, that law schools should be free to decide on their own what role in governance their faculty, or subset of their faculty, should have, and that, unless a lesser role in governance for clinicians could be tied to educational outcomes, accreditation standards should not address faculty governance at all. For faculties that choose to value fully the contributions of their clinical colleagues, equal or nearly equal governance rights would obtain. For law schools that had a different vision of the importance of clinical education, or at least a different view of the appropriate position and role for clinical faculty, clinicians' role in law school governance might be attenuated or even non-existent. Such an argument might have an intuitive appeal to some (in promoting flexibility and experimentation, for example), but does not come to grips with the history of law schools' grudging embrace of clinical education. It is fair to say that had the Council on Legal Education for Professional Responsibility (CLEPR) and later the U.S. Department of Education Title IX program not provided substantial external funding to law schools to develop clinical programs, modern clinical legal education

\(^1\) Interestingly, the premise of this argument—that one cannot judge that activity in which one does not engage—could also apply to the ability of non-clinical faculty to judge those aspects of clinical faculty members' background, such as their ability as legal practitioners and as supervisors of inexperienced attorneys and attorneys-to-be, with which they are not familiar. Yet at many if not most law schools, non-clinical faculty have full governance rights in determining who is hired as a non-clinical faculty member and who should be promoted or retained (if that option is available to clinicians at the law school). Of course, as an informal matter non-clinicians might defer to senior clinical colleagues on some elements of a potential new clinical hire's lawyering abilities (or on the comparable abilities of a clinician up for promotion), but the decision to defer to colleagues, and the degree of deference accorded, would depend on the judgment of the non-clinical faculty member.
would have remained a marginal development on the legal education scene. Although
many law schools have now embraced the value of having strong clinical programs, a
number of law schools continue to resist thinking of their clinical colleagues as entitled to
play a substantial role in law school governance. Removing an accreditation standard
that traditional faculty have a role in law school governance is unlikely to lead law
schools systematically to disenfranchise teachers of torts or contracts. We are not as
guine that at least some law schools would feel similarly constrained with respect to
clinical faculty.

Attracting and Retaining Clinical Faculty

Unlike the interest in governance, a focus on attracting and retaining clinical faculty is
less oriented toward the interests of these faculty members and more directed to the law
schools’ interests and, in particular, the need to have in place accreditation standards that
will encourage law schools to be able to attract and retain clinical faculty. From the law
school perspective, the question then is whether law schools, which presumably have an
interest in attracting and retaining high-quality faculty of all kinds, have any lesser
interest in (or need for) doing so for their clinical faculty.

For traditional faculty, the need to have a secure employment status (tenure or its
equivalent) can be justified on a number of “attract and retain” grounds, including the
need to compete with non-law school legal employers (especially law firms) as well as
with other law schools. If law school A offers its torts teachers a tenure-track system for
advancement and retention, law school B may well conclude that it cannot afford to
abjure such a system if it hopes to compete with law school A for the most talented
potential faculty members. And law school B might be worried that potential faculty
member X could well refrain from entering the legal academic market if he or she could
be more highly compensated in practice with no less job security than a non-secure
position within a law school.

These arguments are relied upon implicitly more than explicitly, and may be deployed
even when their premises can be questioned—such as when a tenure-track position is
offered to a non-law teacher with a terminal degree in another discipline, where the
alternative of law practice does not exist and where the alternative of university teaching
in a non-law discipline might be much less attractive, financially and otherwise, than a
law school position. Moreover, even for traditional faculty for whom these
considerations might apply, few if any law schools in the present or recent past have
made a serious effort to explore whether they could field a substantial portion of their
traditional curriculum with a less-than-full-time faculty member who did not have

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11 Presumably, it is obvious that all faculty, including clinical faculty, would wish to be eligible for jobs
that were attractive on both personal and professional grounds, and, further, that the positions remained (or
became) attractive enough to make them want to stay at their law school.
security of position. Furthermore, the market justification may not be as salient for potential faculty members whose geographic mobility, for reasons of family or otherwise, are limited to a particular metropolitan area.

Is there any reason to think, therefore, that the need to attract and retain clinical faculty is any less important than for traditional faculty? We would submit the answer is no unless one could demonstrate that (1) the market for clinicians, or their ease of mobility, is sufficiently different from that for traditional teachers that clinicians can be attracted to, and retained in, faculty positions with less security of position than that offered to traditional faculty; (2) clinical programs, while valuable, can be staffed adequately with faculty who do not have security of position; or (3) clinical courses are less valuable than non-clinical courses, so that it was less important to attract and retain high-quality faculty in the former setting. We take up each of these possible justifications for differential treatment in turn.

(1) **The market for clinicians.** When modern clinical education took hold in the late 1960s and early 1970s, the primary source for clinical teachers were legal services and public interest programs (with a significantly smaller number of people coming from government). For such individuals, the pay differential between legal services and new clinical positions was not only much less than that between private practice and traditional teaching positions, but in some cases even low-paying clinical positions might have paid better than legal services positions. In such an environment, one might have been able to argue that law schools did not need to provide security of position to clinicians.

But the world of clinical education has changed since the late 1960s and early 1970s. As a consequence of the greater security provided to clinical positions at many law schools, clinical law jobs have become highly desirable not only as an alternative to legal services but in their own right. In fact, clinical legal positions have changed from jobs to positions with career potential. As such, the entry points for clinical education are now much more varied, and include the full range of pre-law school environments that exist for traditional faculty—private law firms, judicial clerkships, and short-term fellowship programs (clinical or otherwise), for example, as well as legal services, public interest and government positions. A law school uninterested in providing security of position to its clinicians is unlikely to attract, let alone retain, the best and the brightest of potential clinicians.

Nor is there any basis to think that clinicians are any less geographically mobile than their traditional colleagues. Although clinicians, unlike traditional faculty, need to be

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12 Of course, ABA-accredited law schools could not do so to a significant degree without running afoul of ABA Standard 403 (a), which provides that "The full-time faculty shall teach the major portion of the law school's curriculum, including substantially all of the first one-third of each student's coursework."

13 Presumably, law school clinical programs would not be interested in hiring non-lawyers with advanced degrees, or law-trained people with no practice experience, if they expected them to serve as supervisors of students' legal work.
members of the bar in the state in which the law school's clinic practices (or, at least, eligible to become a member of the bar within a reasonable period of time), the requirement to take another state's bar in order to move to a different clinical program is a relatively minor obstacle in the grand scheme of things. Indeed, for clinicians who have been lawyers for five years or more, bar membership in a new state may be as easy as filling out an application or, at worst, taking a lawyers' examination that is considerably less demanding than the bar exam for entry-level candidates. Bar membership may serve as an impediment to seeking visitorships in other jurisdictions, but that limitation is much less applicable in the permanent market.

(2) Clinical programs can be adequately staffed with lawyers who do not have secure faculty positions. It is probably true that some law schools could find talented lawyers who could supervise students in a clinical program even if the law school did not provide significant security of position for them. But it is doubtful that law schools could do so if they defined the goals of their clinical programs more broadly to include educational goals of inculcating in students a set of lawyering skills, professional values, and ethical precepts, and of integrating these skills, values and precepts with their doctrinal and theory-based courses in the rest of the curriculum. In this day and age, it is difficult to justify having a clinical program at a law school that eschewed these educational goals and was only interested in providing legal services. Because the security options for clinical teachers varies to a much greater extent than it does for traditional teachers, one may get a sense of whether it matters to the market of potential clinical teachers whether a law school offers security of position to its clinicians. Without getting into an assessment of rankings, and recognizing that there are exceptions, we believe that for the most part law schools that offer security of position to their clinicians tend to attract more of those clinicians generally regarded as at the top of their sub-profession. The partial exception may be at some elite law schools that are able to attract talented lawyers who may believe that the value of the law school's overall prestige (and, possibly, the resources it can make available to its clinics and clinicians) outweighs the limitations in security of position. But even the elite law schools have found that they were unable to attract the most prominent clinicians at lower-ranked law schools (as they would normally expect to be able to do with traditional faculty) because these clinicians were unwilling to trade their status as tenured professors at the "lesser" school for short-term contract positions or long-term contract positions with limited governance roles at the higher-prestige institution.15

(3) Clinical courses are less valuable than non-clinical courses, so that it is less important to attract and retain high-quality faculty in the former setting

14 Of course, some states, like California, require all lawyers seeking to practice within the state to take a bar examination, no matter how much law practice experience they possess.

15 Our information here is necessarily somewhat anecdotal but given our experience of over 25 years each in clinical teaching, we believe the observation to be accurate.
There was certainly a time when the above statement was true for many law schools. As mentioned previously, most American law schools did not rush to embrace clinical education because of internally-driven motivations or analyses, but rather were induced into establishing these programs because of the desirability of attracting soft-money funding. But, over time and incrementally, virtually all law schools now not only tolerate their clinical programs but extol their virtues to a wide range of constituencies. The recent reports on legal education mentioned in the previous section, not to mention prior influential reports such as the MacCrate Report,\(^{16}\) have established the unquestioned legitimacy of clinical education within the legal academy.

Thus, the reasons to treat clinicians differently with respect to the desirability of attracting and retaining high-quality faculty do not stand up to examination. We submit, therefore, that law schools need to be every bit as concerned with such issues for clinical faculty as they are for traditional faculty.

If clinical courses are at least as valuable as traditional courses, then attracting and retaining talented faculty to teach in these courses is undeniably important. Retention of talented clinical teachers is especially important if a law school wishes to take full advantage of having teachers who have the time and motivation to adopt long-term perspectives on clinical education and its place in legal education more generally. A clinician in a position without security of position has little incentive to plan and implement a clinical curriculum that may take several years to reach full development, to examine and compare (and, over time, adjust) the range of practice areas most amenable to clinical practice, or to work closely with non-clinical colleagues to explore the possible connections between traditional and clinical courses. Moreover, a clinical teacher without security of position has virtually no incentive to engage in the kind of sustained, scholarly inquiry that has led to the proliferation of a vibrant clinical scholarship over the last 25 years.\(^{17}\) Just as traditional scholarship has informed the teaching of traditional teachers, so too has clinical scholarship informed and enriched the teaching of clinicians. Such scholarship, while not impossible, is very difficult to achieve and sustain without the possibility of attaining an academic position with security.

Law schools need to be interested in attracting and retaining clinical faculty. Many law schools, perhaps most, if left to their own devices, would continue to take the steps necessary to attract and retain the most talented clinical faculty available. Others might well cut back on these efforts, satisfied to offer a more streamlined clinical program that emphasized the provision of legal services over educational goals. This latter choice would ill serve the interests of law students, lawyers, the public, clients and other consumers of legal services.


\(^{17}\) Of course, an individual clinician in a position that did not offer security of position might engage in such scholarly work in order to facilitate movement to another institution that did provide such status, but, in that case, the current institution would not be retaining the individual.