The Society of American Law Teachers (SALT) is an organization of law teachers, with members in almost every law school in the country and from all parts of the legal academy, whose mission embraces social justice, diversity, and excellence in legal education. We write with a comment on the alternatives proposed for Standard 405 on Professional Environment. In short, we think the two proposals are in reality identical, though they have the appearance of difference, and neither of them is acceptable. Both would vitiate the current requirement that full-time law faculty (except for legal writing faculty) have security of position that allows them to exercise their responsibilities to students and to the profession with the freedom those responsibilities demand.

Rather than repeat the general arguments we have made during the development of the proposed alternatives, we append to this statement our letter of September 27, 2013, in which we addressed the critical importance of tenure for faculty to allow them to “discuss complex and controversial problems; to explore these problems in an experiential setting; to use the rules of law but also to question them; and to combine traditional and new approaches to pedagogy.” As noted in that letter, it is security of position—real security of position—that makes this innovation and critical inquiry possible. Tenure is not a life-time contract that stifles creativity; it is a commitment of a law school to allow a critical range of inquiry and experimentation to full-time faculty who have dedicated their professional lives to educating students and expanding legal knowledge and understanding and, through the process of achieving tenure or security of position, have proved their ability and willingness to contribute to that enterprise. That mutual commitment should be supported, not undermined.

Alternative 2 requires only that a law school maintain conditions adequate to attract and retain a competent full-time faculty sufficient to permit the law school to comply with the standards, clearly rejecting any requirement of security of position. Alternative 1 would require that all full-time faculty have a form of security of position sufficient to ensure academic freedom and to attract and retain a competent full-time faculty, but because of the elimination from the circulated draft of the language specifying a minimum requirement for such security of position (5-year presumptively renewable contracts), Alternative 1 offers only lip service to security of position. Alternative 1 is virtually identical to the provisions applicable under the current standards to legal writing faculty, and it is clear from their experience that the requirements stated in Alternative 1 offer no real protection.
We applaud the changes in the proposed drafts that clarify and strengthen the commitment to academic freedom and substantial governance roles for all faculty, and we ask that those aspects of the changes be retained. We support the proposal by the Clinical Legal Education Association (CLEA) in its statement of January 27, 2014, to retain the current Standard 405 but improve it with provisions that address those shortcomings of the current rule. As noted in the CLEA statement, the Standards should strengthen, not undermine, the role of the very faculty who are most able to lead law school efforts to further experiential education.

In the name of greater flexibility for law school administrators, the proposed standard would backtrack on progress made in the status of clinical faculty, and would undermine the ability of all faculty to both serve their students and help strengthen and transform legal education. At the very least, any standard adopted should retain the current statement that five-year presumptively renewable contracts are the minimum necessary to satisfy the requirement of security of position sufficient to protect academic freedom, governance rights, and attracting and retaining a competent faculty. We urge the Council to reject both alternatives to 405 that have been proposed, and suggest that the best path is to retain the current standard with the changes CLEA has proposed.

Submitted on behalf of the Society of American Law Teachers by

Olympia Duhart
Co-President

Ruben Garcia
Co-President
TO: The Hon. Solomon Oliver, Jr., Council Chairperson, 
   Barry A. Currier, Managing Director of Accreditation and Legal Education, 
   Section on Legal Education and Admissions to the Bar

From: Society of American Law Teachers

Date: September 27, 2013

RE: Comment on Standard 405

The Society of American Law Teachers ("SALT") writes to express its 
opposition to proposed changes to Standard 405. A full-time tenured faculty is a 
critical and necessary component to a quality legal education. SALT urges the 
Council to strengthen, not weaken, legal education by continuing to expect schools 
to provide tenure or comparable security of position to full-time faculty.

A quality legal education requires schools to discuss complex and often 
controversial problems; to explore these problems in an experiential setting; to use 
the rules of law but also to question them; and to combine traditional and new 
approaches to pedagogy. To achieve all of this, law faculty must be free to innovate; 
to develop and implement missions reflecting the needs of their students; to 
support, directly and indirectly, access to legal services for the public; and to 
impress upon students their role as public citizens as they become practicing 
lawyers.

Tenure—the long-term commitment of schools to their faculty—makes this 
innovation and critical inquiry possible. As is true with respect to other academic 
disciplines, society benefits from tenure because tenure encourages wide-ranging, 
unconstrained, intellectual exploration, where inquiry is driven by individual 
viewpoints and research plans. But tenure in the legal academy serves additional, 
unique functions; it encourages study and critique of the legal profession itself and 
our system of justice, and allows faculty (and their students) to write, teach, and 
litigate both against and in support of the interests of the powerful and entrenched. 
The expansion and development of clinical and, to a growing extent, legal writing 
instruction is a testament to the importance of tenure, as clinical and legal writing 
faculty have gained greater security of position protections and attendant 
institutional commitment and attention within law schools.

These programmatic gains have been achieved because of the current 
standards’ explicit mandate of security of position for clinical faculty, including at 
least five-year presumptively renewable contracts, and the security of position 
accorded legal writing faculty in a few law schools (but only a few) in the absence of
a mandate for those faculty. The proposed versions of Standard 405 contain no explicit protections for security of position for any faculty and, therefore, threaten the advances achieved and supported by the current Standards and the status of all faculty, not just clinical and legal writing instructors. Tenure and presumptively renewable contracts protect academic freedom more completely than any policy statement protecting academic freedom can or does. Requiring only an announced policy protecting academic freedom or requiring such (undefined) security of position as necessary to safeguard academic freedom, as the proposals would do, is insufficient, as years of experience in the academy, in law schools and elsewhere, demonstrate. Knowing the law school can decline to renew an appointment unless the faculty member proves the action was a violation of academic freedom will deter many from exercising that freedom. Legal education as a whole will be undermined if the mandate of tenure is undermined, and those faculty who have achieved greater protections and institutional commitment over the years may see those advances stalled and reversed.

It would be a mistake to assume that so long as some law schools provide tenure and operate out of a vision of a broad concept of education, society obtains the same benefits when other law schools operate without tenure. Law schools serve local as well as national communities and constituencies, and these local communities of students, lawyers, and citizens will suffer if the rules do not mandate the same aspirations for all. Similarly, law schools with missions defined with special focus on race, religion, or class often provide services to underserved communities, and tenure ensures an effective space for innovation and inquiry for populations at those law schools and the communities they serve.

As has long been recognized in the discussions of the purposes of tenure, tenure is critical because of its consequences for society and, in our context, the legal profession. Tenure enables law teachers to demonstrate to law students and lawyers how legal practitioners at all levels can question, critique, experiment, and innovate. Tenure allows law teachers to freely question, critique, and innovate in ways not possible for practitioners constrained by the economics of their law practice, and to share their insights broadly. Law teachers regularly engage and collaborate with the bar in clinical advocacy, practice-oriented scholarship in state and local bar newsletters, presentations to practitioners including CLE events, and participation on amicus briefs. Through these mechanisms, the public benefits from the protection afforded by tenure to legal academics. Tenure facilitates productive adaptation in all aspects of the practice of law.

The suggestion that tenure be removed as a mandate in the accreditation standards arises in part as a response to the economic difficulties law schools, law students, and the legal profession are now facing. But tenure is not the problem and removing tenure is not the appropriate answer. The economic difficulties the profession and the academy face have many sources: a correction in the market’s assessment of how to value legal services and legal education, the overall recession, misleading job statistics publicized by law schools, restructuring of some aspects of legal practice and the resulting uncertainty about legal jobs for graduates, concern about student loan practices (undergraduate as well as law school), publicized attacks on the behavior and scholarly production of particular academics, critique of legal education as not practical enough, and attacks on public
financing of law schools whose faculty and students have challenged powerful interests in their communities. The economic difficulties law schools face at the moment thus have little to do with tenure. Tenure, once earned, guarantees that the faculty member will only be fired for cause and is not by itself a guarantee of any particular salary. Tenure protects against unwarranted terminations and thus supports innovation and long-term development; it does not stand in the way of change or impair a school’s ability to respond to economic circumstances.

The conversation around tenure sometimes creates fault lines between and therefore divides the various communities within legal education (doctrinal, clinical, and legal writing faculty; faculty and administration; students and faculty; academic and practicing legal professionals), but we all have a shared interest that transcends our differences: the delivery of quality legal education to all law school students. Legal education, like higher education generally, includes preparing for a vocation, learning to communicate, building character, preparing for citizenship, promoting diversity, preparing for a global society, and acquiring the perspective to address the challenges of a dynamic, troubled world and envision a better future. SALT calls on law schools, indeed higher education institutions as a whole, to recognize that we are at a critical juncture in how higher education is being articulated and valued. Weakening tenure and security of position provisions would be a short-sighted response that would undermine crucial aspects of the purposes that legal education serves.

Submitted on behalf of the Society of American Law Teachers by

Jackie Gardina
Co-President

Ngai Pindell
Co-Président