

## **A Proposal for Eliminating Standard 405(d) and Conforming Standards Changes Affecting Legal Writing Faculty**

**Jointly Submitted by the Association of Legal Writing Directors and the Legal Writing Institute, May 2023**

Standard 405 creates an unjustified hierarchy regarding security of employment among law school faculty.<sup>1</sup> Almost all permanent law “*faculty*” have a route to either tenure or long-term presumptively renewable contracts under Standards 405(b) and (c). However, only “legal writing *teachers*” can be offered “short term contracts” that are not presumptively renewable under Standard 405(d) and Interpretation 405-9. Providing different classes of faculty with different employment security based on the subjects they teach is outdated and hinders the ABA’s recent efforts to improve legal education. Treating legal writing “*teachers*” as something less than non-legal writing “*faculty*” also adversely affects legal writing professors’ role in faculty governance at many schools, as well as their job security. As detailed below, Standard 405(d) and Interpretation 405-9 are out of step with the ABA’s increased emphasis on practical skills training in legal research and legal writing, act as a barrier to legal writing faculty’s full participation in faculty governance, frustrate curricular efforts to produce practice-ready graduates, and have damaging gendered and racial effects on faculty diversity.

First, Standard 405’s hierarchy is inconsistent with the ABA’s increased emphasis on producing practice-ready graduates. ABA Standard 303 has long required a “writing experience in the first year,” and “at least one additional writing experience after the first year” as two of only a few curricular requirements. More recently, the ABA has required “at least six credit hours . . . in an experiential course(s)” and material on developing professional identity and cross-cultural competency. These are the skills and courses legal writing faculty teach. Further, the NextGen Bar Exam will test the written analytical skills inherent in legal writing courses. Standard 405(d) is therefore out-of-step with the contemporary evolution of legal education, particularly the Council’s increased emphasis on skills training. Legal writing faculty need security of employment to develop a curriculum that teaches and develops those skills.

A lack of long-term security inhibits legal writing faculty from full participation in a law school and inhibits their academic freedom. Standard 405’s hierarchy allows schools to subject their legal writing faculty perpetually to governance risks faced by pre-tenure faculty. Like all faculty, legal writing professors need security of employment to express views on contentious issues, and to develop a curriculum, which may be controversial both internally and externally. “Short-term,” not presumptively renewable contracts do not provide that protection. The Council at least implicitly recognized this when it last debated revisions to Standard 405 in 2014. Then it considered replacing the requirement that a school have an announced tenure policy with a standard granting “all full-time faculty members a form of security of position sufficient to ensure academic freedom and attraction and retention of a competent full-time faculty.”<sup>2</sup> Instead

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<sup>1</sup> A redlined version showing our proposed changes to the current ABA Standard 405 and its related Interpretations is included as Appendix A to this proposal.

<sup>2</sup> Memorandum from the Hon. Solomon Oliver, Jr., Council Chairperson of Am. Bar Ass’n, Section of Legal Educ. & Admissions to the Bar, and Barry A. Currier, Managing Dir. of Accreditation and Legal Educ, to Interested Persons and Entities (Sept. 6, 2013),

of deciding to apply the language of the proposal to all faculty, the Council left the lesser protections to apply solely to legal writing “teachers” in Standard 405(d) and kept the greater protections of an announced tenure policy for tenure-line faculty only.<sup>3</sup>

The Standards’ allowance for legal writing faculty to be denied long-term security of employment has a disproportionate gendered effect. Over 70% of legal writing faculty identify as female.<sup>4</sup> No reason has ever been offered as to why such a largely female segment of the Academy is provided less security of employment protections and governance than other faculty, and why the burdens of what has been accurately called a “caste system” in legal education<sup>5</sup> fall disproportionately on this large segment of legal writing faculty.

The third-class status of legal writing faculty under the Standards likely also has an inhibitory effect on racial diversity and inclusion within the legal writing discipline. A recent article in the ABA Journal reported that about 21% of full-time law professors identified as belonging to a racial minority group.<sup>6</sup> However, recent data provides that only 13.9% of the legal writing community identifies as non-white.<sup>7</sup> This discrepancy is unsurprising: minority candidates’ choice between a career path leading to security of employment or one leading to short term contracts is not much of a choice. Eliminating Standard 405(d) would help the legal writing community and law faculties as a whole become more diverse by eliminating the disincentive for candidates to choose a legal writing career. Doing so would advance the rationale expressed in Standard 206(b)’s requirement that law schools “demonstrate by concrete action a commitment to diversity and inclusion by having a faculty and staff that are diverse with respect to gender, race, and ethnicity.”

Our proposal is measured and targeted. Although these equity and inclusion principles support equal faculty status and rights for all faculty, we do not seek a unified tenure requirement. Instead, we propose that Standard 405(d) be eliminated so that, after a probationary period, full-time legal writing faculty have either some form of tenure under 405(b) or 405(c) or, at a minimum, the protection of presumptively-renewable long-term contracts as clinical faculty under 405(c) as explained in Interpretation 405-6. Because Interpretation 405-6 sometimes uses

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[https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/council\\_reports\\_and\\_resolutions/20130906\\_notice\\_comment\\_chs\\_1\\_3\\_4\\_s203b\\_s603d.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/20130906_notice_comment_chs_1_3_4_s203b_s603d.pdf) at 66 [<https://perma.cc/J8N8-U4DS>].

<sup>3</sup> Section of Legal Educ. and Admissions to the Bar, Am. Bar Ass’n, Council Acts on ABA Law School Approval Standards at March 2014 Meeting (2014),

[https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/council\\_reports\\_and\\_resolutions/march2014councilmeeting/2014\\_march\\_council\\_announcement\\_re\\_comprehensive\\_review.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/march2014councilmeeting/2014_march_council_announcement_re_comprehensive_review.pdf) at 1 [<https://perma.cc/S95W-2YNK>]

<sup>4</sup> See ASS’N OF LEGAL WRITING DIRS. & LEGAL WRITING INST., ALWD/LWI ANNUAL LEGAL WRITING SURVEY: REPORT OF THE 2019-2020 INSTITUTIONAL SURVEY (hereinafter “2019 survey”) question 8.11 (71% of survey respondents identify as female), available at <https://www.alwd.org/resources/survey>. This is the latest publicly available results of a survey of legal writing programs conducted by ALWD and LWI seeking information from each member school. The survey had an 85% response rate (169 schools). *Id.* at iii.

<sup>5</sup> See, e.g., Kent D. Syverud, *The Caste System and Best Practices in Legal Education*, 1 J. ASS’N LEGAL WRITING DIRECTORS 12, 14 (2002), available at <https://www.alwd.org/lcr-archives/fall-2002-volume-1/245-the-caste-system-and-best-practices-in-legal-education>.

<sup>6</sup> <https://www.abajournal.com/web/article/how-many-tenured-law-professors-are-black-public-data-does-not-say>.

<sup>7</sup> 2019 survey, *supra* note 4, at question 8.22.

the term “renewable long-term contracts” and in other places uses the term “presumptively renewable” contracts, we propose a consistent usage of the term “presumptively renewable long-term contracts” in the Interpretation. Additionally, we propose that the word “presumptively” in this context be defined in accord with its ordinary meaning, namely that reappointment of a professor at the end of such a contract would be presumed, and the professor would not have to justify his or her reappointment absent a good faith and substantial objection to reappointment made to or by the Dean. Finally, for clarity, we propose that 405(c) specifically apply to “clinical” and “legal writing” faculty.

A school that offers legal writing using adjuncts or in a fellowship model would not be affected by our proposal, although we do recommend elimination of the specific reference in Interpretation 405-9 that a law school can teach legal writing via fellows. We do not believe the ABA Standards should specifically authorize fellows to teach legal writing, but not other subjects. Our proposal also continues the practice of a limited use of short-term legal writing appointments, such as for Visitors to fill temporary needs and “look-see” hirings.

A consequence of this proposal is that a school must allow legal writing faculty to participate meaningfully in the governance of the law school, either as part of the tenured faculty or as part of the clinical faculty under Interpretation 405-8. Recent survey data show that less than 1% of legal writing faculty who lack 405(c) protection have “full voting rights,” and about 39% have no voting rights at all.<sup>8</sup> This proposal includes a modification of Interpretation 405-8 to require meaningful voting rights for legal writing faculty equivalent to what clinical faculty now have.<sup>9</sup>

At least 74 schools use 405(d) short-term contracts for some permanent legal writing faculty.<sup>10</sup> Thus, eliminating Standard 405(d) would affect approximately 37% of accredited law schools, and other schools may need to make adjustments to their implementation of Standard 405(c) and the other suggested changes in our proposal.

Legal writing faculty are “faculty,” and they play an essential role in legal education. Those who chose legal writing as a career should not be put at a security of employment disadvantage for doing so by the ABA Standards. Elimination of Standard 405(d) and the other changes in our proposal are the next logical step in the ABA’s ever-increasing focus on skills, promotion of diversity, and demands for equality in ABA-accredited institutions.

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<sup>8</sup> 2019 Survey, *supra* note 2, at Q10.2. Zero full time faculty on short term contracts had “full voting rights,” while 42% had no voting rights. *Id.* For those on long-term contracts that do not meet 405(c) standards, one respondent (3% overall) had full voting rights, while 33% identified that they had no voting rights. *Id.* The Survey also shows that some legal writing faculty with less than 405(c) status are not permitted to serve on law school committees (question 10.8), and those with that status who do serve on committees face limitations on that service. *Id.* at questions 10.9.1-10.9.2.

<sup>9</sup> Interpretation 405-8 already requires that clinical faculty be afforded faculty governance rights “in a manner reasonably similar to” other faculty. This proposal adds to that Interpretation an explicit reference to voting rights, to be implemented in accordance with each school’s particular governance standards.

<sup>10</sup> 2019 Survey, *supra* note 4, at question 8.2. Additionally, 33 schools report employing full-time legal writing faculty with long-term contracts that do not satisfy Standard 405(c). Because schools often use multiple approaches to legal writing faculty status, it is impossible to measure the extent of the overlap, so the true figure may be higher. *See id.* at question 8.16.

## ATTACHMENT A

### Redlined Version of Proposed Changes to Standard 405 and Relevant Interpretations

#### Standard 405. PROFESSIONAL ENVIRONMENT

- (a) A law school shall establish and maintain conditions adequate to attract and retain a competent faculty.
- (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.
- (c) A law school shall afford to full-time clinical **and legal writing** 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 **or legal writing** program predominantly staffed by full-time faculty members, or in an experimental program of limited duration.
- ~~(d) A law school shall afford legal writing teachers such security of position and other rights and privileges of faculty membership as may be necessary to (1) attract and retain a faculty that is well qualified to provide legal writing instruction as required by Standard 303(a)(2), and (2) safeguard academic freedom.~~

#### *Interpretation 405-6*

A form of security of position reasonably similar to tenure includes a separate tenure track or a program of **presumptively** renewable long-term contracts. Under a separate tenure track, a full-time clinical **or legal writing** faculty member, after a probationary period reasonably similar to that for other full-time faculty, may be granted tenure. After tenure is granted, the faculty member may be terminated only for good cause, including termination or material modification of the entire clinical **or legal writing** program. A program of **presumptively** 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 **the** faculty member ~~in a clinical program~~ may be either terminated or continued by the granting of a **presumptively renewable** long-term renewable contract. For the purposes of this Interpretation, “**presumptively renewable** long-term contract” means at least a five-year contract ~~that is~~ **whereby reappointment at the end of such a contract would be presumed, and no justification for reappointment by the clinical or legal writing faculty member would be required, absent a good faith and substantial objection to reappointment made to or by the Dean** ~~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 **or legal writing** program.

***Interpretation 405-7***

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

***Interpretation 405-8***

A law school shall afford to full-time clinical **and legal writing** faculty members participation in faculty meetings, **voting**, committees, and other aspects of law school governance, in a manner reasonably similar to other full-time faculty members. This Interpretation does not apply to those persons referred to in the last sentence of Standard 405(c).

***Interpretation 405-9***

~~Subsection (d) of this Standard does not preclude the use of short-term contracts for legal writing teachers, nor does it preclude law schools from offering fellowship programs designed to produce candidates for full-time teaching by offering individuals supervised teaching experience.~~