

**American Bar Association
Section of Legal Education and Admissions to the Bar
Standards Review Committee**

**Security of Position, Academic Freedom
and Attract and Retain Faculty**

DRAFT for July 15, 2010

I. Introductory Comments

This document contains draft standards and interpretations concerning law schools' ability to attract and retain qualified faculties and their obligation to protect the academic freedom of their faculty members. The draft report is being submitted by the subcommittee as a discussion draft and not as recommendations for action by the full committee. There are a few important notes concerning this initial draft of proposed standards and interpretations.

First, the current Standards do not require approved law schools to have tenure earning systems for any or all of their faculty members* and this draft retains the current policy. Some commentators have argued that the current Standard do require schools to have tenure earning rights because that is "implied" by the language in Standard 405(b) and Interpretation 405-3 and others have argued that the Standards should require all schools to have tenure earning rights for some or all faculty. Interests of greater clarity and transparency require that the revised Standards explicitly state whether or not schools must provide tenure rights and for whom on the law faculty. Therefore, this draft retains, explicitly, the current policy that tenure earning is not required as a matter of accreditation policy. We acknowledge that tenure earning rights play an important part in ensuring that law schools can attract and retain a high quality faculty and protect the expression of viewpoints and ideas by their faculty members. However, most law schools have tenure policies in place due to their university's embrace of the policies of AAUP, and, more importantly, most American law schools are members of AALS and have tenure earning policies in place because they meet its membership requirements.

Second, the draft more explicitly articulates the obligation that schools have processes or programs that protect the academic freedom of their faculty members and possess the ability to attract and retain a qualified faculty. Moreover, the proposed Interpretations create a clearer statement of presumptions and burdens of proof in the accreditation process. The draft provides that approved law schools that have tenure earning policies for some or all faculty presumptively have established that they protect faculty

* However, language in Standards 206 and 603 require that deans and law library director "hold appointment" with tenure or "security of position," "except in extraordinary circumstances." Those provisions are discussed below.

members' academic freedom and have attracted and retain a qualified faculty. The presumption can be rebutted by the Accreditation Committee based on facts established in the accreditation review process. Conversely, law schools that do not provide tenure rights to some or all of the full time faculty have the burden of establishing that they are capable of attracting and retaining a qualified faculty and that they have policies and practices in place for the protection of academic freedom of all faculty members. The drafters believe that the proposed draft more clearly articulates what law schools must do to demonstrate that they can and do attract and retain a qualified faculty and protect their faculty members' freedom in their academic and law school outreach work.

Third, the proposed changes to the Standards and Interpretations represent a movement away from current policies that provide detailed requirements for employment contracts and rights for clinical faculty members and legal research and writing faculty. The proposed revisions also eliminate anomalous provisions that require tenure for deans or "security of position" for law library directors "except in extraordinary circumstances". These arguably intrusive mandates are not the proper providence of an accreditation agency and increase the uncertainty of accreditation review. The drafters believe that the revisions provide approved law schools and universities with greater latitude and flexibility in articulating and implementing policies to attract a qualified faculty and protect faculty members' academic freedom. The proposed standards also refrain from imposing, as an accreditation matter, policies mandating faculty rights to participate in governance of the law school. Another standard reposes the responsibility for governance of the law school in the law school faculty and dean.

Finally, the last section of this report contains the "black letter" recommendations of the Special Committee on Security of Position. The report was helpful in the subcommittee's discussion and in formulating some of the following draft of standards and interpretations concerning security of position, protection of academic freedom and approved schools' ability to attract and retain a qualified faculty. They are reprinted here for convenience.

II. Proposed Changes to Existing Standards and Interpretations

Standard 206. DEAN

(c) Except in extraordinary circumstances, a dean shall also hold appointment as a member of the faculty with tenure.

Interpretation 405-2. As a member of the faculty, the dean shall have the rights and protections accorded to other members of the full-time faculty under Standard 405(a) and (b).

Standard 405. PROFESSIONAL ENVIRONMENT

(a) A law school shall establish and maintain conditions that are adequate to attract and retain a competent full-time faculty.

(b) A law school shall have an established and announced policy with respect to the protection of academic freedom of its faculty members and shall provide procedures to ensure that its policy is followed. and tenure of which Appendix 1 herein is an example but is not obligatory. The policy shall provide protection for the academic freedom of its full-time and part-time faculty in exercising their teaching responsibilities and in pursuing their research activities, governance responsibilities, and law school related public service activities.

(c) A law school shall have an announced, comprehensive system for evaluating candidates for renewal, promotion and termination tenure or other forms of security of position, including written criteria and procedures that are made available to the faculty. [formerly, Interpretation 405-3]

Interpretation 405-1

A fixed limit on the percent of a law faculty that may hold tenure under any circumstances violates the Standards.

Interpretation 405-2

A law faculty as professionals should not be required to be a part of the general university bargaining unit.

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. [moved to new 405(c)]

Interpretation 405-4

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.

Interpretation 405-5

If the dean and faculty have determined the question of responsibility for examination schedules and the schedule has been announced by the authority responsible for it, it is not a violation of academic freedom for a member of the law faculty to be required to adhere to the schedule.

Interpretation 405-1. The term "faculty" as used in Standards 405 (b) includes all individuals who have teaching and/or research responsibilities in the law school, regardless of their titles, their field of study, and any administrative responsibilities they may bear.

Interpretation 405-2. Any full-time faculty position within a law school that is part of a traditional tenure system is presumptively one designed to attract and retain a competent 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 assessing whether the school has met that burden, the following should be considered: the law school's history of attracting and retaining new faculty members, evidence of a system that permits full time faculty members to earn tenure, or 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.

Interpretation 405-3. Any faculty position within a law school that is part of a traditional tenure system is presumptively one that is designed to protect 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 cannot meet its burden without presenting evidence of, at a minimum, explicit acceptance of the 1940 AAUP Statement of Principles on Academic Freedom and Tenure and its 1970 Interpretive Comments in any employment relationship with those faculty members together with an established procedure involving a representative group of faculty to review the performance of those faculty for appointment, renewal, and termination.

Interpretation 405-4. The law school's written policy with respect to the protection of the academic freedom of its 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.

(c) 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.

(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 302(a)(3), 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 renewable long-term contracts. Under a separate tenure track, a full-time clinical 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 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.

Interpretation 405-7

In determining if the members of the full-time clinical 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 faculty. A law school should develop criteria for retention, promotion, and security of employment of full-time clinical faculty.

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).

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.

Standard 603. DIRECTOR OF THE LAW LIBRARY

(a) A law library shall be administered by a full-time director whose principal responsibility is the management of the law library.

(b) The selection and retention of the director of the law library shall be determined by the law school.

(c) A director of a law library ~~should have a law degree and a degree in library or information science~~ shall have the requisite skills and experience to provide leadership to the law school's information resource needs and shall have a sound knowledge of and experience in library administration, library technology, and issues involving legal research and legal education.

(d) Except in extraordinary circumstances, a law library director shall hold a law faculty appointment ~~with security of faculty position.~~

Interpretation 603-1

The director of the law library is responsible for all aspects of the management of the law library including budgeting, staff, collections, services and facilities.

Interpretation 603-2

The dean and faculty of the law school shall select the director of the law library.

Interpretation 603-3

~~The granting of faculty appointment to the director of the law library under this Standard normally is a tenure or tenure track appointment. If a director is granted tenure, this tenure is not in the administrative position of director.~~

As a member of the faculty, the director of the law library shall have the rights and protections accorded to other members of the full-time faculty under Standard 405(a) and (b).

Interpretation 603-4

It is not a violation of Standard 603(a) for the director of the law library also to have other administrative or teaching responsibilities, provided sufficient resources and staff support are available to ensure effective management of library operations.

Interpretation 603-5

Possession of a law degree and a degree in library or information science presumptively demonstrates that the library director has the requisite skills, knowledge and ability to serve as director of a law library.

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III. Recommendations of Special Committee on Security of Position.

The following are the “black letter” recommendations of the Report of the Special Committee on Security of Position from which I have drawn heavily in preparing this draft. Please consider this set of recommendations to determine if the proposed draft is complete.

Standard # 1. Academic Freedom

(a) To ensure the development of a sound educational program, a law school shall have an established and written policy with respect to the protection of the academic freedom of its faculty members and shall provide procedures to ensure that its policy is followed, including rules that prohibit the nonrenewable, 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.

(b) A law school shall provide protection for the academic freedom of its full-time and part-time faculty in exercising their teaching functions.

(c) A law school shall provide protection for the academic freedom of its full-time faculty in pursuing their research interests.

(d) A law school shall provide protection for the academic freedom of its full-time faculty in pursuing their governance responsibilities.

(e) A law school shall recognize the academic freedom of its full-time faculty when exercising their right to make public comments outside the school.

Interpretation 1-1. The term "faculty" as used in Standards # 1-3 includes all individuals who have teaching and/or research responsibilities in the law school, regardless of their titles, their field of study, and any administrative responsibilities they may bear.

Interpretation 1-2. Any faculty position within a law school that is part of a traditional tenure system is presumptively one that is designed to protect academic freedom.

Interpretation 1-3. 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 cannot meet its burden without presenting evidence of, at a minimum, explicit acceptance of the 1940 AAUP Statement of Principles on Academic Freedom and Tenure and its 1970 Interpretive Comments in any employment relationship with those faculty members together with an established procedure involving a representative group of faculty to review the performance of those faculty for appointment, renewal, and termination.

Standard # 2. Attracting and Retaining a Competent Faculty

To ensure the development of a sound educational program, a law school shall establish and maintain conditions that are designed to attract and retain a competent full-time faculty.

Interpretation 2-1. Any faculty position within a law school that is part of a traditional tenure system is presumptively one designed to attract and retain a competent faculty.

Interpretation 2-2. For 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 assessing whether the school has met that burden, the following may be considered:

(a) evidence of faculty retention and success at attracting new competent faculty to those positions over a seven-year period;

(b) evidence of a system ultimately resulting in eligibility for a separate form of tenure or for long-term, presumptively renewable contracts for the faculty members involved, including a process by which those contract renewals include the review and recommendation of other faculty and the development of standards by which the contract faculty members are assessed;

(c) evidence of other perquisites similar to tenured faculty, such as those that offer faculty a role in institutional governance and that provide sufficient training and support to enable faculty to develop their talents and knowledge and thereby enhance their contributions to the educational program;

(d) any other evidence relevant to showing that the school has established a climate encouraging the attraction and retention of competent faculty who are not in a traditional tenure-track system.

Interpretation 2-3. This Standard does not preclude a law school from having a limited number of fixed, short-term faculty appointments in a program or having an experimental program of limited duration.

Standard # 3. Faculty Role in Governance

To foster the development of a sound educational program, a law school shall ensure that all full-time faculty members are allowed to participate in law school governance involving academic matters, such as curriculum, academic standards, methods of instruction, and faculty appointments, so that the faculty has the primary responsibility for determining educational policy. Governing boards should exercise their power adversely to the faculty in these areas only in exceptional circumstances.

Interpretation 3-1. Any faculty position within a law school that is part of a traditional tenure system is presumptively one that accords an adequate faculty role in governance in the institution.

Interpretation 3-2. For faculty positions that do not include the possibility of a tenured appointment, evidence that those faculty members are afforded meaningful participation in faculty meetings, committees, and other aspects of governance exercised by tenured faculty generally may demonstrate compliance with this Standard.

Interpretation 3-3. This Standard does not preclude a law school from determining that faculty members not in tenured positions have limited voting rights on certain matters, such as faculty appointments.