

Report on ABA Standards Review Committee meeting, July 2013
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The Council of the ABA Section of Legal Education and Admissions to the Bar is the accrediting agency for JD programs in U.S. law schools. The Council's Accreditation Standards, contained in the "ABA Standards and Rules of Procedure for Approval of Law Schools," are subject to a comprehensive review every five years. The Council has delegated to the Standards Review Committee, an appointed committee comprised of legal educators and others, the task of recommending changes to the standards. After receiving a report and recommendation from the SRC, the Council asks for comment from interested constituencies on the proposed changes and then acts on the SRC's recommendations. The web site from which a reader can find information on the Council, the current standards, and the work of the Standards Review Committee is at http://www.americanbar.org/groups/legal_education.html.

The Standards Review Committee is nearing the end of the fifth year of its most recent comprehensive review of the standards, which began in the fall of 2008. At its meeting on July 12-13, 2013, the Standards Review Committee finalized its recommendations on most of Chapter 3: Program of Legal Education (it did not complete its consideration of the bar pass rate standard) and on Chapter 4: Faculty. The SRC's proposals most notably include final recommendations on student learning outcomes and on faculty tenure, governance, and academic freedom. The Council will receive and discuss these recommendations at its next meeting, in San Francisco on August 9, 2013. After the Council considers and possibly amends these recommendations, they will be sent out for notice and comment by the public.

Standard 405: Tenure and Other Faculty Security of Position

The SRC discussed and voted its preferences on four alternative possible versions of Standard 405 on faculty competence, which at present requires that most law faculty have tenure but permits clinical faculty to be given long-term presumptively renewable contracts and requires no employment security for legal writing professors. The four alternatives and the preference vote will be sent to the Council.

All four alternatives contain provisions requiring law schools to adopt and adhere to policies that provide that all full-time faculty have academic freedom and "meaningful participation" in law school governance over mission and curriculum. They all require (in varying language) that schools have a comprehensive system for considering and making decisions regarding promotion, tenure, renewal of contracts or other forms of security of position, and termination. While there are some bedeviling details, the primary differences among the four alternatives relate to tenure and security of position for faculty.

Alternative A ("modified status quo") is intended to reproduce the current practice of providing for tenure for doctrinal faculty while permitting other arrangements for clinical and legal writing

faculty. It is the only alternative that requires a tenure system, whether called tenure or a functional equivalent. It permits schools to give full-time clinical faculty “a form of security of position reasonably similar to tenure,” defined in the Interpretations as including a separate tenure track or a program of long-term presumptively renewable contracts . With respect to full-time legal writing faculty, Alternative A allows schools to provide only “such security of position and other rights and privileges of faculty membership as may be necessary to attract and retain a faculty that is well qualified to provide legal writing instruction,” which has been interpreted in practice to require no more than at-will contracts. In the course of the discussion, Alternative A was amended to add that full-time legal writing faculty members should receive “non-compensatory perquisites reasonably similar to those provided other full-time faculty,” as is already accorded to full-time clinical faculty.

Alternative A would require that all full-time faculty have “meaningful participation” in law school governance, defined as minimally including “participation and voting in decisions affecting the mission and direction of the law school, and academic matters such as curriculum, academic standards, and methods of instruction.” Schools would be directed to have “a written policy on full-time faculty participation in appointment, renewal, promotion, and grant of tenure or presumptively renewable contract status,” but would not require equal voting rights for all full-time faculty on those matters.

Alternative B (“sufficient, but undefined, security of position”) as first presented to the SRC would have required at least 5-year presumptively renewable contracts for all full-time faculty to satisfy its stated requirement of “a form of security of position sufficient to ensure academic freedom and attraction and retention of a competent full-time faculty.” However, the SRC voted to delete the presumptively-renewable contract requirement. Thus, as amended, Alternative B contains only a requirement that schools afford full-time faculty “a form of security of position sufficient to ensure academic freedom and attraction and retention of a competent full-time faculty.” Tenure is noted to be “an effective method of protecting faculty members’ academic freedom” and “of attracting and retaining a competent full-time faculty” (a safe harbor for satisfying the accreditation standards), but neither a system of tenure nor any particular form of security of position would be required for *any* faculty (doctrinal, clinical, or legal writing). The law school would bear the burden of showing its faculty is competent if it does not offer tenure. Schools could use varying forms of security of position categorically (e.g., distinguishing among doctrinal, clinical, and legal writing faculty as groups) or individually (distinguishing among individual faculty members within one or more of those groups).

Alternative C (“same rules for all”), like Alternative B, requires a law school to afford all full-time faculty members a form of security of position sufficient to ensure academic freedom and to insure that the faculty is competent, would make tenure a safe harbor, and would place on schools not granting tenure the burden to demonstrate that it fulfills the standard. The distinguishing feature of Alternative C is that it requires that all full-time faculty members have the same rights with respect to security of position, participation in law school governance, and

other rights or privileges of full-time faculty membership, irrespective of a faculty member's academic field or teaching methodology. Its intent is to equalize the status of all faculty in any given law school but not to prescribe that status.

Alternative D ("no security of position"), like all the other alternatives, would require each school to "establish and maintain conditions that are adequate to attract and retain a competent full-time faculty that will enable the law school to operate in compliance with the Standards and accomplish its mission" and to have policies that provide protection for the academic freedom of all faculty and meaningful participation in governance for all full-time faculty, but it makes no mention of security of position of any kind as necessary to ensure those outcomes. Tenure would be the a safe harbor for establishing that a faculty is competent, schools without tenure systems would bear the burden of demonstrating competence, but Alternative D would not otherwise require any particular (or any) form of security of position.

After the amendments by the committee were completed, there remains little, if any, difference between Alternative B and Alternative D. While, unlike Alternative D, Alternative B requires that schools have "a form of security of position sufficient to ensure academic freedom and attraction and retention of a competent full-time faculty," as long as a school can persuade the Council that its faculty is competent and has academic freedom, it is permitted to offer solely at-will contracts to any and all faculty. A virtually identical provision currently exists in Standard 405 for legal writing faculty (Standard 405(d): "A law schools shall afford legal writing teachers such security of position and other rights and privileges of faculty membership as may be necessary (1) to 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"). This provision has, as noted, been interpreted to require no security of position at all.

The committee members were asked to vote their preferences (first, second, third, and fourth choice) among the proposals as amended. The weighted votes (awarding "points" for first place, second place, etc.) were as follows: A-28, B-37, C-30, D-22.

All four alternatives are being forwarded to the Council, along with the SRC voting results on them.

To summarize: As forwarded to Council, the four alternatives provide as follows:

Alternative A: The existing system. A tenure system for doctrinal faculty, at least a "reasonably similar to tenure" system for clinicians, and no security of position for legal writing faculty.

Alternative B: "Sufficient" security of position for all. No security of position is necessary if a school can show it can otherwise attract and retain a competent faculty. A school may distinguish among faculty categorically or individually in according forms of security of position.

Alternative C: Same as B, except all full-time faculty must be given the same status.

Alternative D: No security of position required for any faculty. A school must only demonstrate it can attract and retain a competent faculty.

Chapter 3: Learning Outcomes

The SRC revisions to Chapter 3 (Program of Legal Education) were left largely intact at the July 2013 meeting. Notable provisions that carried over from earlier meetings include:

- A requirement that all law school graduates have competency in legal knowledge, analysis, research and communication, and in “other professional skills needed for competent and ethical participation as a member of the legal profession.” (Proposed Standard 302)
- A requirement that law students’ work be assessed by means in addition to final written examinations. “A law school shall utilize both formative and summative assessment methods in its curriculum to measure and improve student learning and provide meaningful feedback to students ... [but] need not apply multiple assessment methods in any particular course. Assessment methods are likely to be different from school to school. Law schools are not required by Standard 313 to use any particular methods.” (Proposed Standard 313)
- A requirement that every law school must “conduct ongoing evaluation of the law school's academic program, learning outcomes, and assessment methods; and ... use the results of this evaluation to determine the degree of student attainment of competency in the learning outcomes and to make appropriate changes to improve the curriculum.” (Proposed Standard 314)

The proposal under consideration by the SRC at the July meeting would have increased the required experiential learning requirement for all law students from one credit (out of 84) to three, which could be satisfied by a simulation, a clinic, or an externship. CLEA had petitioned for an increase in that requirement to fifteen credits in light of the needs of newly licensed attorneys to be competent to practice and the models from all the other professions, which require that at least one quarter of a professional students’ pre-license study be in practice settings. Without reference to CLEA’s request or its reasoning, the committee voted to increase the experiential requirement to six credits, in any combination of one or more simulations, clinics, or externships. (Proposed Standard 303)

At the July meeting the SRC for the first time considered and adopted a definition of a clinical course for the purpose of satisfying (along with simulations and externships) the six-credit experiential requirement. To qualify as a “clinical course,” students in that course must represent or advise an actual client under the direct supervision of a faculty member (whether full or part time); must have multiple opportunities to perform; and must receive feedback on the performances from the faculty member. (Proposed Standard 304)

Finally, the committee voted down a motion to remove the existing ban on students receiving both credit and pay for a “field placement” (externship) course.

The committee’s work on Chapter 3, with the exception of the standard governing the bar pass rate, was thus completed and will be forwarded to the Council.

Bar Passage Requirements (Proposed Standard 315)

The proposal regarding the minimum bar pass rate for law schools that was discussed at the July meeting would increase the existing minimum bar passage rate from 75 percent of exam-takers from each of the past five years to 80 percent of exam-takers over two years. This proposal had generated numerous objecting comments from various constituencies, including every US minority bar association, several Congressional groups, the ABA Council on Racial Diversity, the deans of every law school in Michigan, SALT, and CLEA. None of these comments or the concerns they raise was discussed during the committee meeting.

There was no dissent voiced by any member of the committee to raising the minimum bar pass rate as proposed. However, members were concerned about the proposal that a school must account in its calculations for all of its graduates who take any bar exam and that it must count as failing any graduate who takes the exam but whose outcome is unknown. Several jurisdictions, including New Jersey, refuse to provide information about individual bar examinees. In addition concern was expressed about a provision that schools would have to show compliance with the standard in only 4 of 7 years.

In order to do further drafting on these latter provisions, a final decision on Proposed Standard 315 was deferred to the committee’s next meeting, in October, 2013.

Chapter 4 (The Faculty), including the Student-Faculty Ratio

In addition to finalizing the four alternative formulations of Standard 405, covering faculty rights, the committee concluded their work on the remainder of Chapter 4. Their proposal includes a definition of “full-time faculty member.” As amended at the meeting, the definition is:

“Full-time faculty member” means an individual whose primary professional employment is with the law school, who is employed by the law school with faculty rank and status, who devotes substantially all working time during the academic year to responsibilities described in Standard 404(a), and whose outside professional activities, other than those described in Standard 404(a), if any, do not unduly interfere with his or her responsibilities as a full-time faculty member.

Proposed Standard 404(a) identifies the responsibilities of the faculty as a whole, including teaching and related obligations, advising students, assessing student learning, engaging in scholarship, service to the law school and university community, service to the profession and to the public, and any other contributions deemed important by the law school for the achievement of its mission.

Both the current and the proposed revised standards require that schools have “a sufficient number of full-time faculty to fulfill the requirements of the Standards and meet the goals of its education program.” (Proposed Standard 402) The current standards also contain a method of computing a student-faculty ratio in order to help assess the sufficiency of the size of a law school’s full-time faculty. The current provision has been both criticized and strongly supported. At the July meeting the SRC considered a proposed revision to the student-faculty ratio that would have simplified the calculations contained in the current standard. However, after briefly discussing some of the problems with determining which faculty members to count so the ratio has meaning as a reflection of program quality (e.g., some faculty have more contact with students than others; in some institutions, LLM students interact primarily with adjunct rather than full-time faculty; at some schools, deans counsel many students), the committee voted to delete the provision on student-faculty ratios altogether.