

MEMORANDUM

To: Council of the ABA Section of Legal Education and Admissions to the Bar

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Re: Standard 405 (Notice and Comment)

We are co-authoring an extensive article on the law of tenure. When Standard 405 has been debated over the past few years, we have heard many statements that reflect fundamental misconceptions about what happens in courtrooms when academic job security is at issue. We submit this memo in hopes of clearing up those misconceptions — and to address some related issues.

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1. The Legal Meaning of Tenure

Tenure is a contract¹ for indefinite employment that can be terminated by the faculty member through resignation — or by the school for cause or financial exigency,² following procedures established by the school.³

Tenure requires only that dismissal be for a good reason, which the law calls “cause,” or for financial exigency, and that dismissal be done through appropriate procedures. The employer has the power to define cause and to create the procedures.

Even the American Association of University Professors doesn’t claim more than that. William van Alstyne, the constitutional law scholar and a former president of the AAUP, wrote in the organization’s own journal that tenure “lays no claim whatever to a guarantee of lifetime employment.”⁴ “Contrary to popular misperceptions,” according to a leading treatise on education law, “tenure does not amount to a lifetime guarantee of employment.”⁵

Because every school is free to define its own version of tenure and the grounds and procedures for revoking it, the school has by far the controlling hand. We have read virtually every reported tenure case issued over the last half century. If a school has cause, according to the school’s own definition, and if it follows its own procedures, a dismissed tenured faculty member almost always loses in court. This is settled law and has been for a very long time.

Many law firm partners enjoy job security comparable to or stronger than tenure, for reasons explained later in this memo.

¹ *Williams v. Nw. Univ.*, 497 N.E.2d 1226, 1229 (Ill. App. Ct. 1986) (“Tenure is essentially a contractual interest; therefore, the specific rights and duties associated with it are contained in the understandings of the parties. . . . Thus, a court must look to the tenure agreement to define the relationship between an educational institution and a tenured faculty member”).

² Because the due process clause doesn’t protect contract rights, courts will accept an argument that tenure is a property right, but only for the purpose of adjudicating federal due process claims involving public universities. In the same cases, however, a state law contract claim can usually be pleaded on the same facts. For example: *Farkas v. Ross Lee*, 727 F. Supp. 1098, 1106–07 (W.D. Mich. 1989). Some public schools are also subject to state employee statutes. For example: *Stastny v. Bd. of Trustees*, 647 P.2d 496, 504–06 (Wash. App. 1982). At private schools, a contract claim might be a plaintiff’s only arguable theory.

³ *Tennyson v. Univ. of Minn.*, 2008 WL 2344257, *1 (Minn. Ct. App. June 10, 2008). In a few state schools, the procedures are established by state employee statutes.

⁴ William W. Van Alstyne, *Tenure: A Summary, Explanation, and “Defense,”* 57 AAUP Bull. 328, 328 (1971).

⁵ STEVEN G. POSKANZER, *HIGHER EDUCATION LAW: THE FACULTY* 208 (2002).

The tenure contract is rarely, if ever, expressed in a single, integrated writing executed by both parties. Because there's no single integrated document, the contract incorporates the school's regulations and personnel policies as well as any agreements directly between the school and the professor.⁶

The school and university are free to change the relevant regulations and policies, and the tenure contract incorporates those changes. A faculty member who continues to work at the school is deemed to have agreed to the changes. This is common in contract law generally, and everyone has experienced it in other contexts. For example, when credit card bills arrive with small-print notices amending the credit card contract, the customer is deemed to have agreed to them by continuing to use the card.

The governing board at Brooklyn Law School was reported recently to be considering amending the school's regulations to add lack of collegiality as one of the grounds for revoking tenure. The board has the legal authority to do that. Faculty might not like it. But if the board amends its regulations, every faculty member who continues to work at the school will have agreed contractually that the tenure contract has been amended accordingly.

The Brooklyn board probably doesn't need to amend its regulations. For reasons explained later in this memo, courts have held that uncollegial conduct is inherently within the definition of cause for dismissing a tenured professor.

In most universities, a professor is annually sent a letter or memo stating the salary for the following academic year. In some but not all schools, the faculty member is asked to countersign the letter or memo, and that document may have the word "contract" in its subject line, as though the professor is signing a new contract. Regardless of the label an administrator puts on this document, it's not legally a new contract. It's an amendment to an existing contract — the tenure contract of employment that continues until termination by the employee's resignation, or by the employer for cause or exigent circumstances. The annual letter or memo is at most an amendment that sets a salary for period of time within the tenure contract's term of employment.⁷ It will be succeeded by another amendment a year later and another amendment the year after that.

⁶ The case law is filled with statements like this: "Plaintiff's contractual relationship with the University appears to consist of only two documents: the Faculty Code and the Faculty Handbook." *Saha v. Geo. Wash. Univ.*, 577 F. Supp. 2d 439, 442 (D.D.C. 2008), *aff'd*, 358 Fed. App'x 205 (D.C. Cir. 2009).

⁷ *Fox v. Parker*, 98 S.W.2d 713, 724 (Tex. App. 2003).

2.
**Many Law Firm Partners Enjoy
Legally Enforceable Job Security
Comparable to or Stronger Than Tenure**

Depending on the state, a law firm's partnership agreement is governed by the Uniform Partnership Act (1914) or the Revised Uniform Partnership Act (1994), as well as by common law. Neither of the uniform statutes implies into partnership agreements a power to expel a partner, even for cause. Nor does the common law.⁸ The only source of that power, if it exists at all, would be the partnership agreement itself.

Traditional law firm partnership agreements typically don't have provisions for expelling a partner. The traditional assumption historically has been that partners are congenial colleagues who will spend their careers together, and that it would be offensive to provide in advance for a process to eject any of them.

A law firm with a traditional partnership agreement can get rid of a recalcitrant partner only by dissolving the entire firm, leaving the other partners to create a new partnership, which might — or might not — legally be able to take on the name and property of the old firm. In 1988, White & Case, a giant law firm, had to do exactly that just to expel a single partner.⁹ In 1994, Cadwalader, Wickersham & Taft tried to expel a partner and was liable for punitive damages because its agreement had no expulsion clause.¹⁰

National law firms no longer have traditional partnership agreements. Some earn over a billion dollars in annual revenue, and their current business practices are based on profit-driven corporate models. They have replaced traditional partnership agreements with other forms of business organization. Tucked away in the typical current governing documents will be provisions permitting the firm to remove or de-equitize a partner.

Local firms typically are still run as pure partnerships. No one knows how many of them have amended their partnership agreements to add expulsion clauses.

The smaller the firm, the more difficult it is to amend a partnership agreement for the purpose of adding an expulsion clause. Partners who are all collegial and have worked

⁸ Cf., e.g., *Heller v. Pillsbury Madison & Sutro*, 58 Cal. Rptr. 2d 336, 346 (Ct. App. 1996); *Winston & Strawn v. Nosal*, 664 N.E.2d 239, 243 (Ill. App. Ct. 1996); *Lawlis v. Kightlinger & Gray*, 562 N.E.2d 435, 442–43 (Ind. Ct. App. 1990); *Holman v. Coie*, 522 P.2d 515, 523 (Wash. Ct. App. 1974).

⁹ *Dawson v. White & Case*, 672 N.E.2d 589, 591–92 (N.Y. 1996). In 2013, White & Case was the sixth largest U.S. law firm, with approximately 1,900 lawyers, about 400 of whom are partners, and offices on five continents. See 2013 NLJ 350, available at <http://www.nationallawjournal.com/id=1202603325795>.

¹⁰ *Cadwalader, Wickersham & Taft v. Beasley*, 728 So. 2d 253 (Fla. Dist. Ct. App. 1998).

together trustingly for years would find it awkward to discuss adopting language that would provide for the future expulsion of one of them. There are about 47,000 law firms in the United States, and 63% of them have ten or fewer partners.¹¹

Regardless of a firm's size, a partnership agreement cannot be amended by majority vote. It's a contract, which can be amended only with the assent of every member of the partnership. If even a single partner suspects the motives of the others, the agreement will remain a traditional one in this respect.

It's a fair inference that when local firms have expulsion clauses in their partnership agreements, the clause probably got there in either of two ways. First, the firm may have been formed recently, and the partners happened to use a nontraditional agreement template that by coincidence included an expulsion clause. Second, an older firm may have replaced its entire partnership agreement for general business reasons and happened to use a similar template. Probably a significant number of local law firms have expulsion clauses, and a significant number don't have them.

A partnership agreement would fall into one of three categories.

The first are traditional partnership agreements with no expulsion clauses. They provide job security far greater than tenure. Partners cannot be expelled, no matter how badly they behave. No university has ever had to do what White & Case did.¹²

The second category consists of partnership agreements that provide for expulsion for "cause" — the same word that permeates tenure law. Many of these agreements also have procedural requirements. Because so few partner expulsion cases are litigated, it's difficult to say with certainty whether cause for expelling a partner from a law firm is equal in gravity to cause for dismissing a tenured professor in a university setting. But they are clearly in the same ballpark.

The third category consists of agreements that provide for expulsion without cause. Even here, a partner has more job security than an at-will employee would. Partners owe each other

¹¹ American Bar Association, *Lawyer Demographics* (2013) (firm number and size statistics from 2005 but stable from 2000), available at http://www.americanbar.org/resources_for_lawyers/profession_statistics.html.

¹² See *supra* note 9 and accompanying text.

a duty of good faith in the contract sense,¹³ which is a persistent issue in expulsion disputes.¹⁴ An expelled partner plaintiff will typically claim that the other partners were motivated by greed to take over the expelled partner's share of the firm's profits. If the expelled partner can prove that, the expulsion was illegal.

3. **Tenure Doesn't Protect Salary**

Nothing in the law of tenure prevents reduction of a tenured professor's salary. If, for example, a tenured faculty member is doing only two-thirds of a job — perhaps teaching halfheartedly, avoiding individual availability to students, producing minimal scholarship, and performing minimal school or public service — the school has no legal obligation to pay a full salary. The school can legally cut that faculty member's salary by a third or more.

Below are examples of tenured professors who sued and lost after a reduction in salary.

A college demoted a liberal arts professor for plagiarism and reduced his salary. He sued, arguing that the salary of a tenured faculty member cannot be reduced. The court held instead that “no college is required to perpetuate and even improve salaries or benefits each year, simply because the incumbent is tenured.”¹⁵ In another case, an English professor was demoted and his salary reduced for insulting and vindictively failing a student.¹⁶ In yet another, an economics professor's salary was reduced after he persisted in teaching a course on a web-assisted distance learning basis without departmental permission.¹⁷

Salary reductions have been upheld many times when a medical school professor has become a less productive researcher, has lost salary-supporting grants, or has been assigned to reduced academic responsibilities. For example, a faculty member's salary was reduced

¹³ *Ehrlich v. Howe*, 848 F. Supp. 482, 491 (S.D.N.Y. 1994); *Heller v. Pillsbury Madison & Sutro*, 58 Cal. Rptr. 2d 336, 348 (Ct. App. 1996); *Winston & Strawn v. Nosal*, 664 N.E.2d 239, 244–45 (Ill. Ct. App. 1996); *Lawlis v. Kightlinger & Gray*, 562 N.E.2d 435, 442 (Ind. Ct. App. 1990); *Holman v. Cole*, 522 P.2d 515, 523–24 (Wash. Ct. App. 1974). This isn't the same as the fiduciary duty one partner owes to the partnership as a whole regarding partnership business. It's the duty of good faith, implied by law into contracts generally and owed by each contracting party to the other parties.

¹⁴ Paula J. Dalley, *The Law of Partner Expulsions: Fiduciary Duty and Good Faith*, 21 CARDOZO L. REV. 181 (1999); Larry E. Ribstein, *Law Partner Expulsion*, 55 BUS. LAW. 845 (2000); Douglas R. Richmond, *Expelling Law Firm Partners*, 57 CLEV. ST. L. REV. 93 (2009); Jeff Schwartz, *Good Faith in Partner Expulsions: Application of a Contract Law Paradigm*, 9 CHAP. L. REV. 1 (2005); Allan W. Vestal, *Law Partner Expulsions*, 55 WASH. & LEE L. REV. 1083 (1998).

¹⁵ *Klinge v. Ithaca Coll.*, 634 N.Y.S.2d 1000 (Sup. Ct. 1995), *aff'd on other grounds*, 652 N.Y.S.2d 377 (App. Div. 3d Dept. 1997). The trial court denied the college's motion for summary judgment for a different reason: that a jury could find that the college had not followed the procedures in its Faculty Handbook.

¹⁶ *Keen v. Penson*, 970 F.2d 252 (7th Cir. 1992).

¹⁷ *Chang v. Univ. of Toledo*, 480 F. Supp. 2d 1009 (N.D. Ohio 2007).

because his laboratory wasn't supporting itself financially.¹⁸

At another school, a court held that a medical professor's tenure rights weren't violated when administrators reduced his salary after they found that he had "changed his research focus and, in consequence, became unproductive and unable to attract essential grant funding[, and] they chose to allocate [his] salary and other resources to more productive faculty members."¹⁹

Another medical professor's salary was reduced from \$520,000 to \$11,000 after her faculty responsibilities declined. She sued, arguing that "this dramatic reduction in salary is tantamount to taking away her tenure" — but the court held instead that "tenure by itself does not guarantee any particular salary level."²⁰

In medical education, it's not unusual for a professor to be paid partly from the medical school's academic budget and partly from the school's faculty practice plan. In one case, the academic budget portion of a tenured professor's salary was reduced from \$194,000 a year to zero after he declined to participate in a new teaching program and after the medical school modified budgeting procedures.²¹ In another case at a different university, a medical school cut the practice plan portion of a tenured professor's salary to zero because the professor "had not generated the expected amount of grant money."²²

A theme running through the medical school cases is finances. When the faculty member's value to the professional school is less than the salary, the salary can be reduced. This trend has continued for over twenty years; the earliest reported medical school case is from 1993.²³

Because tenure doesn't protect salary, it does not, isolated from other factors, raise the cost of education to any significant degree. To bring compensation in line with value, a school can legally reduce the salary of any unproductive faculty member, tenured or not. Medical education began experiencing cost crises in the 1990's, partially because federal funds became less freely available, and that's when medical schools started raising salary reduction issues. Law school administrators have the legal authority to do the same thing — and might need to

¹⁸ *Univ. of Miami v. Frank*, 920 So. 2d 81 (Fla Ct. App. 2006).

¹⁹ *Tavoloni v. Mount Sinai Med. Ctr.*, 26 F. Supp. 2d 678 (S.D.N.Y. 1998).

²⁰ *Conlay v. Baylor College of Med.*, 688 F. Supp. 2d 586 (S.D. Tex. 2010).

²¹ *Valenzuela v. Meislin*, 2009 WL 3710677 (D. Ariz. Nov. 2, 2009).

²² *Williams v. Tex. Tech Univ. Health Sciences Ctr.*, 6 F.3d 290 (5th Cir. 1993).

²³ The single reported contrary case was decided for the plaintiff only because his offer letter had promised that throughout his employment, he would be paid a salary computed according to a formula recited in the letter — a rare situation in higher education and unheard of in law schools. *Helpin v. Trustees of the Univ. of Pa.*, 10 A.3d 267 (Pa. 2010).

in current conditions.

During the Great Depression, student enrollment fell 26% nationally.²⁴ Of 125 colleges and universities surveyed by the AAUP during the Depression, 84% had addressed budget shortfalls by reducing professorial pay, including the pay of the most senior faculty members.²⁵ Universities have the legal authority to do the same thing today, regardless of tenure.

4. Tenure Doesn't Protect Other Workplace Benefits

Tenure doesn't guarantee assignment to teach the professor's favorite courses, or to keep a nice office the professor has used for decades, or to be provided with resources for scholarship such as research assistants or travel funds. While law school deans may want to avoid making difficult decisions such as altering preferred teaching assignments or reducing workplace benefits, tenure doesn't limit their legal authority to do so.

For example, a professor claimed "that he was constructively discharged from his tenured position because" his school "allegedly failed to provide him with certain intangible 'benefits' of tenure such as teaching assignments, . . . support for research projects and grant proposals, and opportunities to participate in dissertation committees." An appellate court held that claim to be "meritless."²⁶

In another case, a medical school professor claimed his tenure rights were violated when his school ordered him and his five-person research staff to vacate office and work space they had occupied for the past twelve years and move to a smaller space in a less desirable location.²⁷ He claimed the move would "deprive him of the opportunity to conduct the advanced experiments [and] would render meaningless his ability to research or teach — a basic tenet of academic freedom and the rationale underlying the tenure contract."²⁸ An appellate court rejected his argument, holding that tenure did not entitle him to "adequate

²⁴ Ellen Schrecker, *The Bad Old Days: How Higher Education Fared During the Great Depression*, CHRON. HIGHER EDUC., June 26, 2009.

²⁵ *Depression, Recovery, and Higher Education: A Report by Committee Y of the American Association of University Professors* 35–49 (1937).

²⁶ *Kirschenbaum v. Nw. Univ.*, 728 N.E.2d 752, 761 (Ill. App. 1999). The professor also alleged that his tenure was violated because he was given no academic salary and was paid only from outside-supplied funds that couldn't be guaranteed. He lost that claim, too, because Northwestern — unusual among medical schools — has a formal policy of not paying academic salaries to faculty members who work in teaching hospitals and similar settings, and instead paying them entirely from practice-generated funds.

²⁷ *Gertler v. Goodgold*, 487 N.Y.S.2d 565 (App. Div. 1985), *aff'd*, 489 N.E.2d 748 (N.Y. 1985).

²⁸ *Id.* at 568.

space for research,” and that “nothing in the complaint or the record [showed] that tenure guarantees a faculty member any office at all, much less space of his own choosing.”²⁹

Tenure protects only a job. It doesn’t guarantee a good job. And it doesn’t guarantee as good a job next year as the faculty member had last year.

5. Tenure Doesn’t Prevent a School From Downsizing Faculty

When a university has a bona fide financial exigency, courts uniformly hold that a tenured faculty member may be dismissed on that basis alone, regardless of how well that faculty member is doing the job,³⁰ with the sole condition that the school must have acted in good faith. Because bona fide financial exigency terminations are based solely on an institution’s resources and revenue, courts don’t consider them a threat to academic freedom.

Although courts haven’t settled on a single definition of financial exigency, they have not adopted the narrow definition of that term advocated by the AAUP, and at times the courts have specifically rejected it.³¹ Courts generally defer to university officials on the issue³² as long as evidence supports the financial exigency finding as the good faith motivation for the tenured faculty member’s dismissal.

Even if an institution’s internal regulations and personnel policies don’t explicitly provide for terminations due to financial exigency, courts have held that the power is implied in tenure contracts because “[t]he authority to terminate tenured faculty members because of an economic crisis is an important tool to college administrators in maintaining fiscal stability.”³³ Courts have specifically rejected the AAUP position that financial exigency must be university-wide rather than limited to a single unit — such as a department or a professional school.³⁴ Otherwise, a university would be compelled to drain financial resources system-wide

²⁹ *Id.* at 567–568.

³⁰ “[A] tenured professor may be terminated when the reasons are not personal to the teacher, but are created by . . . declining enrollment that alleviates the need for programs [or] financial problems result in the necessity for termination of programs, positions, or courses.” *Bd. of Cmty. Coll. Trustees v. Adams*, 701 A.2d 1113, 1139 (Md. Ct. Spec. App. 1997).

³¹ *E.g., Scheurer v. Creighton Univ.*, 260 N.W.2d 595, 599-600 (Neb. 1977).

³² *E.g., Refai v. Cent. Wash. Univ.*, 742 P.2d 137, 142 (Wash. Ct. App. 1987).

³³ T. Michael Bolger & David D. Wilmoth, *Dismissal of Tenured Faculty Members for Reasons of Financial Exigency*, 65 MARQ. L. REV. 347, 348 (1982); see *id.* at 352–53.

³⁴ *Scheur v. Creighton Univ.*, 260 N.W.2d 595, 599-600 (Neb. 1977).

to subsidize a unit that suffers enrollment declines or other financial problems unique to the unit.³⁵

A financial exigency can be based entirely on enrollment declines or failure to meet enrollment projections.³⁶ It isn't necessary for a school to be on the brink of bankruptcy. Financial exigency means a "state of urgency" regarding *operating revenue* — not capital. A school isn't required sell capital assets before it dismisses tenured faculty.³⁷

Courts inquire only whether financial exigency was both the bona fide motive and the true cause for the dismissal. A typical judicial statement is that "such terminations are matters of policy and generally not the business of the judiciary."³⁸ And courts defer to schools on the question of which faculty members to terminate based on institutional policies and priorities.³⁹

Even if the university as a whole is financially healthy, it can downsize a specific unit for declining enrollment and dismiss tenured faculty members of that unit alone.⁴⁰ Courts additionally recognize schools' need to improve education by shifting resources to remedy curriculum deficiencies or to satisfy increasing student demand in other areas.⁴¹

³⁵ *Jimenez v. Almodovar*, 650 F.2d 363 (1st Cir. 1981); *Scheur*, 260 N.W.2d at 600–01.

³⁶ E.g., *Bignall v. N. Idaho Coll.*, 538 F.2d 243, 249 (9th Cir. 1976); *Johnson v. Bd. of Regents*, 377 F. Supp. 227, 230, 235 (W.D. Wis. 1974); see also *Graney v. Bd. of Regents*, 286 N.W.2d 138, 146–47 (Wis. App. 1979).

³⁷ *AAUP v. Bloomfield Coll.*, 346 A.2d 615, 617 & n.1 (N.J. Super. App. Div. 1975).

³⁸ *Bd. of Cmty. Coll. Trustees v. Adams*, 701 A.2d 1113, 1139 (Md. Ct. Spec. App. 1997).

³⁹ Courts have even permitted institutions downsizing faculty due to enrollment declines to retain untenured faculty members while discharging tenured faculty members. *Brenna v. S. Colo. State Coll.*, 589 F.2d 475, 476–77 (10th Cir. 1978) (upholding dismissal of tenured faculty member rather than untenured faculty member in same department when college officials reasonably determined the former "least met the [ongoing] needs of the [downsized] department"); *Brady v. Bd. of Trustees*, 242 N.W.2d 616, 619 (Neb. Ct. App. 1976) (upholding dismissal of tenured faculty member after state budget reductions even though untenured faculty were retained in same department).

⁴⁰ *Rose v. Elmhurst Coll.*, 379 N.E.2d 791, 794 (Ill. App. 1978).

⁴¹ "American courts and secondary authorities uniformly recognize that, unless otherwise provided in the agreement of the parties, or in the regulations of the institution, or in a statute, an institution of higher education has an implied contractual right to make in good faith an unavoidable termination of right to the employment of a tenured member of the faculty when his position is being eliminated as part of a change in academic program." *Jimenez v. Almodovar*, 650 F.2d 363, 368 (1st Cir. 1981).

6. Tenured Faculty Can Be Fired for Behavior That Leads to Firing Outside Academia, Including Insubordination

Universities determine, in their internal regulations, the grounds for termination of tenure. Some do so in specific detail.⁴² Others do it more generally. But regardless of the wording, every university has the power to fire tenured faculty who do their jobs badly. A university can also suspend a tenured faculty member without pay in an attempt to resolve a personnel problem short of dismissal⁴³ or as a last step before dismissal.⁴⁴

Tenure requires only that dismissal be for a good reason (cause or exigent circumstances) using appropriate procedures. Through internal regulations and personnel policies, the employer gets to define cause and create the procedures. Courts enforce the employer's definition and procedures, as long as they are followed.

In the overwhelming majority of reported lawsuits brought by fired tenured professors, the professors lose. Below are examples from the case law:

Doing the job badly (teaching): A professor was fired for, among other things, revealing confidential information about a student to other students; ending a class a month before the semester ended; and ignoring student questions and individual student requests for assistance.⁴⁵ Another was fired for, among other things, teaching without adequate preparation; habitually discussing irrelevant material in class; failing to cover material listed in the school's official course description; canceling classes; not keeping regular office hours; and not engaging in research.⁴⁶ And another was fired for, among other things, not responding to questions in class; criticizing students for asking questions; behaving belligerently to students; giving failing grades vindictively; and refusing to attend faculty meetings.⁴⁷ Tenure revocations

⁴² For example, at the University of North Carolina, one of several grounds for termination is two consecutive unsatisfactory performance reviews or three unsatisfactory ones within five years. *Bernold v. Bd. of Governors*, 683 S.E.2d 428 (N.C. Ct. App. 2009).

⁴³ Cf., e.g., *Wexley v. Mich. St. Univ.*, 25 F.3d 1052 (6th Cir. 1994); *Tennyson v. Univ. of Minn.*, 2008 WL 2344257 (Minn. Ct. App. June 10, 2008); *Mills v. W. Wash. Univ.*, 246 P.3d 1254 (Wash. 2011).

⁴⁴ *Murphy v. Duquesne Univ.*, 745 A.2d 1228 (Pa. Super. Ct. 1999); *Potemra v. Ping*, 462 F. Supp. 328 (S.D. Ohio 1978).

⁴⁵ *Peterson v. N.D. Univ. Sys.*, 678 N.W.2d 163 (N.D. 2004).

⁴⁶ *Riggin v. Bd. of Trustees*, 489 N.E.2d 616 (Ind. Ct. App. 1986).

⁴⁷ *Potemra*, 462 F. Supp. at 330–31.

for sex harassment are routinely upheld.⁴⁸

Inability to get along with co-workers: A professor was fired because his “interactions with colleagues had been so disruptive that the effective and efficient operation of his department was impaired.”⁴⁹ Another was fired because he repeatedly insulted colleagues, made false accusations, and filed frivolous job grievances.⁵⁰ Yet another was fired for treating colleagues and administrators in a dishonest, abusive, and demeaning manner.⁵¹ Making it difficult for colleagues and administrators to do their jobs is a fireable offense, regardless of tenure.

Insubordination: Tenured faculty must do what their employers tell them to do. Academic freedom does not prevent university officials from making teaching assignments or enforcing rules. For example, one tenured professor was fired for refusing a teaching assignment.⁵² Another was fired for canceling two class meetings without authorization and on four occasions missing classes while traveling. Another professor was fired for refusing to continue teaching a class that included a student who had clashed with the professor.⁵³ And two professors were fired for refusing to attend a faculty workshop and refusing to participate in a graduation ceremony.⁵⁴ A university defines the job and can require that it be done according to the university’s expectations.

7.

Because Law Is Focused on Conflict and Controversy, It’s Different from Other Professions and Has Unique Needs for Academic Job Security

For very good reasons, the ABA requires faculty job security even though other accrediting agencies do not.

Law is different. Law teachers can be subjected to unique personal risks because lawyers must be able to represent clients against powerful interests. This isn’t part of pharmacy or dentistry or medicine or architecture or engineering. The essence of a lawyer’s job is to

⁴⁸ E.g., *Tonkovich v. Kan. Bd. of Regents*, 159 F.3d 504 (10th Cir. 1998); *Haegert v. Univ. of Evansville*, 977 N.E.2d 924 (Ind. 2012);

⁴⁹ *Bernold v. Bd. of Governors*, 683 S.E.2d 428, 431 (N.C. Ct. App. 2009).

⁵⁰ *De Llano v. Berglund*, 282 F.3d 1031 (8th Cir. 2002).

⁵¹ *Sengupta v. Univ. of Alaska*, 21 P.3d 1240 (Alaska 2001).

⁵² *Pollock v. Univ. of S. Cal.*, 2001 WL 1513870, *7 (Cal. Ct. App. Nov. 29, 2001).

⁵³ *McConnell v. Howard Univ.*, 818 F.2d 58 (D.C. Cir. 1987).

⁵⁴ *Shaw v. Bd. of Trustees*, 549 F.2d 929 (4th Cir. 1976).

protect clients in conflict, often by resisting power. No other profession has the responsibility to do that.

In the healing professions, the adversary is disease. In the building professions, it's gravity, problematic terrain, and weather. But lawyers — alone among the professions — are expected, more than anything else, to speak truth to power.

Clients hire lawyers for protection, typically from people and organizations more powerful than the clients are. Law faculty can't teach students how to represent clients effectively if faculty themselves can be fired for doing exactly that.

This isn't just an aspect of academic freedom. It's academic *responsibility*.

Here's an example from a law school where one of us teaches:⁵⁵

In 2006, the law school's housing clinic took on impoverished clients who were being evicted illegally from a New York residential building so their apartments could be converted to upscale condominiums. The supervising clinical teacher had two decades of experience in housing law and understood perfectly how New York law was being violated. The clinic sued the holding company that owned the building. The holding company in turn was owned by a member of the university's board of trustees, who had pledged \$1 million to the university.

You can imagine the conversations between an outraged trustee and a university president who had worked tirelessly to persuade this trustee to pledge a \$1 million gift. You can also imagine the conversations that followed between university administrators and the law school dean.

The rules of professional responsibility required this clinician and his students to bring this lawsuit. Sometimes a law firm prefers to avoid disputes with a potential defendant and might decline to take on a *prospective* client for that reason — even though declining that client is inconsistent with the ideals of the legal profession. But once the firm has agreed to represent the client, the firm is ethically obligated to sue whomever the client wants to sue, as long as the client has an arguable claim.

In this instance, the university trustee threatened to revoke his \$1 million pledge, and ultimately he did revoke it. The housing clinician was able to keep his job — and do the right thing for the clinic's clients — only because he had tenure.

The difference between a law school teacher and a lawyer in private practice is that influential defendants often have power over law schools that they wouldn't have over law firms that have sued them. Private universities are dependent on good relations with well-financed, influential people and organizations, and with their communities generally. Similarly,

⁵⁵ See Andrew Keshner, *Housing Discrimination Case Proceeds Against L.I. Village*, N.Y. L.J. (Apr. 5, 2011); Valerie Cotsalas, *A Pledge to Hofstra Is Caught in Controversy*, N.Y. TIMES (Oct. 7, 2006).

public universities are dependent on legislative appropriations and executive branch good will, which makes their law schools vulnerable to politically influential interest groups.

Appendix A to this memo is a list of well-known attempts by powerful interest groups to threaten and intimidate law school faculty teaching in clinics.

Appendix B is an excerpt from an article on the same subject by Robert Kuehn and Peter Joy. The last paragraph of that excerpt shows that the incidents listed in Appendix A are the tip of an iceberg. Most clinicians who survive threats do so by handling the problem quietly, and those incidents are not mentioned in Appendix A. They probably vastly outnumber the ones that are listed.

These things don't happen in schools of medicine, architecture, pharmacy, or accounting. Medical school teachers aren't at risk of unemployment for doing a good job of healing patients. Nobody wants to get an architecture school teacher fired for designing a useful building, or a pharmacy professor fired for teaching how to fill a prescription, or an accounting professor fired for teaching how to keep accurate books.

Law is different because law is the only profession specializing in resolving disputes. A teacher-lawyer's job includes undertaking professional risks that teachers in other professional schools don't have. A law school professor can't teach students how to protect clients ethically, particularly disadvantaged clients, without risking the wrath of people who have enough power to try to retaliate against the law school. For a retaliating adversary, the ultimate success would be to get the law school teacher dismissed.

8. Discrimination Against Selected Faculty Because of the Courses They Teach Undermines Core Accreditation Goals

The overwhelming majority of law school teachers are either tenured or on tenure-track. A minority have whatever job security is provided by Standard 405© or (d). That minority is almost entirely clinicians and legal writing professors.

Most clinicians lack conventional tenure — the kind casebook teachers have. Most clinicians instead have, or may eventually receive, either long-term contracts or a lesser form of job security called “clinical tenure.” And they have that *only* because Standard 405© requires it. Before the adoption of what is now Standard 405©, it was rare for a clinician to have any kind of job security.

Most legal writing professors have even less job security than what 405© requires for clinicians. Many have no genuine job security at all, not even the lesser form required for clinicians. Standard 405(d) permits that form of inequality, based solely on what legal writing professors teach.

These differentiations among law faculty ratify the hierarchy that has prevailed in legal education for generations.

Standards 405© and (d) have improved job security for many clinicians and legal writing teachers over what they once had. But the current standards still amount to discrimination based entirely on the courses faculty members teach.

The Council is now considering two Chapter 3 proposals that would increase the amount of skills learning required for a J.D. degree. Either Chapter 3 proposal, if adopted, would multiply exponentially the amount of skills teaching law schools would have to provide. Judging by the commitment of key state bar associations to accomplish the same thing as a condition of admission to the bar, the two Chapter 3 proposals may represent the most far-reaching changes in the Standards currently under consideration.

The enhanced and expanded skills teaching required by the proposed revisions to Chapter 3 would be done by the very law teachers against whom ABA-accredited law schools are currently permitted to discriminate: clinicians and legal writing professors. Clinicians obviously teach experiential courses. Legal writing courses include analysis, research, and writing skills — essential to law practice. Many legal writing professors also incorporate skills such as counseling and negotiation into legal writing courses. And many more teach simulation skills courses in addition to legal writing. Moreover, one of the most frequent comments made by judges and hiring partners about legal education is that law students need more rigorous writing instruction than they receive now.

The Council has approved two Standard 405 proposals for notice and comment. Both of those proposals would have the effect of permitting even worse discrimination than currently exists against law professors who teach lawyering skills.

Neither of the 405 proposals would take tenure from anyone who already has it. That's legally impossible anyway because tenure is a right created by contract between the faculty member and the law school or university.

But both 405 proposals would allow schools to *increase* discrimination against clinicians and legal writing professors. Tenured and tenure-track casebook teachers numerically dominate nearly every law school faculty. Those majorities have discriminated against clinicians and legal writing teachers in the past more than they do now — but only because the current version of Standard 405 puts limits on their ability to discriminate.

Removing limits on unacceptable behavior typically increases the amount of that behavior.

It would be counterproductive to permit increased discrimination against the same faculty members who will be expected to provide the increased skills education required by the proposed revisions to Chapter 3. This point is explained in detail in written comments already submitted by the Clinical Legal Education Association and the Association of Legal Writing Directors. In addition, the empirical research cited in the next part of this memo demonstrates that with better job security than they have now, clinicians and legal writing professors would

be more effective and engage in even more innovative teaching.

The ALWD submissions also detail how current law school hiring practices have caused something resembling disparate impact gender discrimination. The most recent statistics available from the Association of American Law Schools show that in 2009, a minority of tenured and tenure-track faculty were female — only 29%. In contrast, among contract faculty, who are covered by the lesser protections of Standard 405(c) and (d), more than half — 54% — were female.⁵⁶ But among legal writing professors, who have the least protection of all under Standard 405(d), the great majority — 73% — are female, according to the most recent statistics.⁵⁷

These gender disparities based on field of teaching could become even worse after adoption of either of the 405 proposals now out for notice and comment. That is because neither proposal expressly prohibits discrimination against those who teach skills courses based on the terms and conditions of employment.

Disparate impact on gender equality in the legal academy is inconsistent not only with the need for more skills education, but also with federal laws⁵⁸ and other accreditation standards⁵⁹ that preclude discrimination in hiring and retaining faculty.

9. Empirical Research Shows That Among Well Educated Professionals, Job Security Increases Innovation

Empirical studies show that job security *increases* innovation. None have been found that suggest it isn't true. Professional employees who could easily lose their jobs will typically do whatever is safe in the workplace. They won't innovate because innovation creates risk. If an innovation fails, the employee who proposed it can be at risk of termination.

⁵⁶ See <http://www.aals.org/statistics/2009dlt/security.html>.

⁵⁷ ALWD & LWI, *Report of the Annual Legal Writing Survey 68* (2013) (Question 71(b)), available at <http://www.alwd.org/wp-content/uploads/2013/08/2013-Survey-Report-final.pdf>. The 2011 percentage, mentioned in previous ALWD submissions, was 71%. *Id.*

⁵⁸ See generally, e.g., 20 U.S.C. § 1681 (2012); 34 C.F.R. § 106 Subpart E.

⁵⁹ See ABA Standard 211(a). “A law school shall foster and maintain equality of opportunity in legal education, *including employment of faculty and staff*, without discrimination or segregation on the basis of race, color, religion, national origin, gender, sexual orientation, age or disability.” *Id.* (emphasis added). See also ABA Standard 212(b). “Consistent with sound educational policy and the Standards, a law school shall demonstrate by concrete action a commitment to having a faculty and staff that are diverse with respect to gender, race and ethnicity.” *Id.*

For a very few faculty members, tenure protects sloth. Those people are obvious *because they're so few in number*. What isn't obvious is the value-added effect that job security has on most faculty members.

The research shows that greater job security is correlated with innovation and creative problem-solving among most employees, especially highly educated ones. Below are representative quotes from some of the most thorough empirical studies.

- The leading researcher on creativity in the workplace describes a study of “scientists working in research organizations [with] doctorates or masters degrees . . . [f]our social-psychological factors seemed most important in facilitating the realization of creative potential: (1) high responsibility for initiating new activities, (2) high degree of power to hire research assistants [different in the sciences], (3) no interference from [an] administrative superior, and (4) *high stability of employment*.”⁶⁰
- Other researchers have found that employees become less innovative when their jobs become *insecure*. “The findings involving . . . resistance to change are consistent across studies. . . . The positive correlation between job *insecurity* and resistance to change also is of interest because it . . . appears to contradict rational behavior.”⁶¹
- “Clearly one of the obstacles to making an organization innovative,” according to another researcher, “is the conservatives of most disciplines and their professional associations. *Young faculty members in particular must worry about deviating from the ‘party line’ of their disciplines . . .*”⁶²
- “Two key features of job roles may be important for ultimately realizing creativity in the workplace, specifically, a challenging job and freedom. When these are provided by the organization, employees are motivated to . . . attempt new approaches and ideas, *even if they involve risk of failure*.”⁶³

⁶⁰ TERESA M. AMABILE, CREATIVITY IN CONTEXT 210–211 (1996) (emphasis added).

⁶¹ Leonard Greenhalgh & Zehava Rosenblatt, *Job Insecurity: Toward Conceptual Clarity*, 9 ACAD. OF MGMT. REV. 438, 443 (1984) (emphasis added).

⁶² Richard M. Cyert, *The Design of a Creative Academic Organization*, in FRONTIERS OF CREATIVE AND INNOVATIVE MANAGEMENT 299, 305 (Robert Lawrence Kuhn, ed. 1985) (emphasis added).

⁶³ Ravit Cohen-Meitar & Abraham Carmeli, *Linking Meaningfulness in the Workplace to Employee Creativity: The Intervening Role of Organizational Identification and Positive Psychological Experiences*, 21 CREATIVITY RES. J. 361, 371 (2009) (emphasis added).

- “Employees who fear that they might be laid off may be more likely to try to avoid any behavior that would increase the likelihood of losing their positions.” “The possibility that *the threat of losing one’s job may have a negative effect on creative problem-solving is provocative. Our results demonstrate that this is the case . . .*”⁶⁴

10. Conclusion

Empirical research demonstrates that for well-educated, professional employees, job security fosters creativity and innovation. Members of the legal academy have a unique responsibility to demonstrate to law students that the ethical practice of law will often require them to champion unpopular causes and speak truth to power. For these reasons, the accreditation standards have long been understood to recognize the critical role tenure plays in protecting the legal academy from outside pressure from powerful forces that could undermine the work of law professors in addressing controversial legal issues in their research, teaching, and clinical work.

Tenure is worthy of protection. When properly understood, academic tenure is no different, and probably less protective, than the job security most law partnership agreements provide partners in a traditional law firm. Similarly, federal judges are appointed for life, subject to removal only for good cause, in recognition of the challenge of making difficult decisions in controversial cases.

Contrary to the misconceptions of many, tenure does not increase the cost of legal education. Nor does it tie the hands of law school and university leaders who have a responsibility to manage personnel and financial resources wisely. Within the constraints of the employment agreement, appropriate procedures and, where applicable, due process considerations, the courts have repeatedly deferred to university officials. The law of tenure allows difficult personnel decisions to be made when a bona fide financial exigency exists, or even when university officials have good reason to restructure academic programs in light of enrollment declines and changing educational needs.

The empirical research, together with relevant judicial decisions dealing with the scope of tenure protection, demonstrate not only the value of tenure, but also the reasonable flexibility university officials already have to manage law school resources wisely. Eliminating tenure from the accreditation standards cannot be justified based on widespread misconceptions that tenure prevents university officials from responsibly managing resources, including faculty salaries, workplace benefits, and teaching assignments. To the contrary, a genuine commitment to experiential learning, skills education, and diversity in law schools requires the Council to ensure that tenure is equally available to all full-time law faculty, including those who teach courses essential to an expanded skills curriculum.

⁶⁴ Tahira M. Probst, Susan M. Stewart, Melissa L. Gruys & Bradley W. Tierney, *Productivity, Counterproductivity and Creativity: The Ups and Downs of Job Security*, 80 J. OCCUPATIONAL & ORGANIZATIONAL PSYCH. 479, 483, 491 (2007) (emphasis added).

Appendix A

Publicized Instances of Interference in Law School Clinics Academe (Nov.-Dec. 2010)

Adapted from Kuehn & McCormack, *Lessons from Forty Years of Interference in Law School Clinics*
24 Geo. J. Leg. Ethics 59 (2010)

Institution	Year	Description	Resolution
University of Mississippi	1968	Clinical professors on desegregation lawsuit are dismissed under employment policy.	Court rules dismissal unlawful and employment policy is rescinded.
University of Connecticut	1971	Dean Proposes that clinic cases be approved by the dean and faculty.	Policy is rescinded because of American Bar Association Ethics Opinion 1208.
University of Arkansas	1975	Legislative rider states that no professor can handle or assist in any lawsuit.	Court rules restriction unconstitutional.
University of Tennessee	1977	Tennessee Valley Authority pressures school to drop clinic lawsuit.	Clinical professor removes case from clinic and handles case on his own.
University of Colorado	1980	Business interests are critical of clinic advocacy group working out of school.	Dean successfully deflects criticism.
University of Oregon	1980	University donor criticizes clinic and withholds \$250,000 gift.	University president severs ties with outside sponsor.
University of Tennessee	1981	Attorney general challenges clinic request for attorneys' fees in suit against the state.	New trustees policy prohibits significant suits against the state.
University of Colorado	1981	Legislation prohibits law professors from assisting in suit against the government.	Governor vetoes legislation.
University of Oregon	1981	Timber interests are critical of outside sponsorship of clinic.	University president says clinic must sever ties with outside sponsor.
University of Iowa	1981	Legislation proposed that would prohibit funds for suits against the state.	Legislation is defeated.
University of Connecticut	1981	Legislator threatens legislation to restrict criminal clinic.	Legislation is never introduced.
University of Idaho	1982	Legislation proposed that would prohibit courses that assist in suits against the state.	Legislation passes only one chamber of legislature.
University of Oregon	1982	Opponent seeks to depose clinic and dean over funding.	Court says depositions are allowed.
University of Oregon	1983	Timber interests allege clinic is illegally using public funds for private benefit.	Attorney general says educational goals are a public benefit.
University of Oregon	1986	Ethics complaint alleges clinic's selective evidence misled judge.	Ethics board deems complaint without merit.
Rutgers University, Newark	1987	State claims law prohibits clinic from appearing opposite agency.	Court says there is no violation of conflict-of-interest statute.
University of Maryland	1987	Governor proposes that clinic funding be contingent on not suing the state.	Policy is withdrawn, but the clinic must notify the state before suing.
Northwestern University	1990	Attorney for the defense in case pressures university to withdraw and sues clinic attorney.	University rebuffs pressure, and suit against clinic attorney is dismissed.

University of Oregon	1993	Legislature threatens to defend law school over clinic cases.	Clinic moves off campus and operates as a public-interest law firm.
Tulane University	1993	Governor threatens to cut state funds over clinic director's comments.	University president says director has academic freedom.
Tulane University	1993	Governor asks state supreme court to investigate clinic activities.	Court says there is no reason to exercise oversight.
Arizona State University	1995	Legislator threatens to cease all funding of clinics.	Rider is adopted that prohibits clinic from participating in prisoner suits against the state.
Rutgers University, Newark	1997	Opponent in lawsuit challenges clinic's right to represent citizens against the state.	Court says help is not improper donation of public funds.
Tulane University	1997	Governor and industry threaten to cease university funding and donations and to seek restrictions on clinic cases.	State supreme court imposes limits on clinic representation.
Saint Mary's University (Texas)	2000	Law dean is unhappy with clinic's human-rights case against Mexico.	Dean unilaterally withdraws clinic from case.
University of Pittsburgh	2001	Legislator threatens to reduce university funding because of forest suit.	Budget for university prohibits use of state funds for environmental clinic.
University of Pittsburgh	2001	University threatens to cut funding and close clinic over its involvement in highway dispute.	University changes stance and refuses to restrict clinic.
University of Denver	2002	Alumni attorneys complain after clinic seeks fee award in successful case.	Professor ordered not to seek fees but does; his position is not renewed.
University of Houston	2002	District attorney refuses to hire students who participated in innocence clinic.	After news reports, district attorney denies he discriminates.
University of North Dakota	2003	Legislator complains that clinic cannot represent clients in suits against the state.	Attorney general says nothing in state law prevents such suits.
University of North Dakota	2004	Rejected client claims bias in clinic's case-selection criteria.	Court says plaintiff is allowed to put on proof of discrimination.
Hofstra University	2006	Trustee threatens to withhold funds after clinic lawsuit against trustee's properties.	University president rebuffs attack, citing academic freedom.
Rutgers University, Newark	2008	Opponent makes public records request for clinic's internal documents.	Court says public law does not require access to case information.
University of Michigan	2010	District attorney lists innocence-clinic students as witnesses for prosecution.	District attorney drops case after witness list is challenged.
University of Maryland	2010	Legislative rider conditions funding on report of clinic's cases, expenditures, and funding.	Rider is amended to drop funding conditions and to limit required report.
Tulane University	2010	Bill introduced to strip funds to universities whose clinics sue the state or seek monetary damages.	Legislation is defeated in committee after public outcry.

Appendix B

Kuehn & Joy, “Kneecapping” Academic Freedom Academe (Nov.-Dec. 2010)

More than thirty instances of interference in law school clinics have been publicized since the late 1960s. The first occurred in 1968 at the University of Mississippi, where the appointments of two untenured professors were terminated following complaints that their new clinical program participated in a desegregation lawsuit. After an AAUP investigation found that the action violated the professors’ academic freedom and a court ruled the terminations unlawful, the administration offered to reappoint the professors.

. . . Starting in 1981 and continuing into the 1990s, timber companies attacked the environmental law clinic at the University of Oregon because they were upset over clinic cases that interfered with their plans to log national forests. In efforts to terminate the program, clinic opponents sponsored a bill in the legislature to withdraw state funding for the entire law school. . . .

Tulane University has repeatedly been targeted because of its environmental clinic. In 1993, then-governor Edwin Edwards . . . threatened to deny financial assistance to state residents attending the university and to prohibit Tulane medical students from working in any state hospital unless the director was fired. Tulane’s president at the time, Eamon Kelly, declined to intervene, arguing that academic freedom protected the professor. A few years later, the clinic’s success in representing a low-income, minority community opposed to a proposed chemical plant led then-governor Mike Foster and business interests to threaten to revoke Tulane’s tax-exempt status and deny it access to state education trust-fund money, to organize an economic boycott of Tulane, and to refuse to hire its graduates. When the university still refused to terminate the course, clinic opponents successfully persuaded the Louisiana Supreme Court to impose restrictions on whom law school clinics can assist and what kinds of representation students can provide. . . .

The past year has seen an unprecedented number of attacks on law clinics. The clinical program at Rutgers University is defending itself against a lawsuit brought by a developer, who was defeated in a clinic case and is now seeking to use the state’s public records law to gain access to internal clinic case files that would otherwise be beyond the reach of a party to a lawsuit. A dispute in Michigan this past winter demonstrates that attacks also can occur when students get in the way of powerful government interests. The district attorney in Detroit, upset with the efforts of a University of Michigan innocence clinic to exonerate a man it alleged was wrongfully imprisoned for ten years, sought to force the students to testify at trial against their client

In Maryland, Jim Perdue, chair and chief executive officer of Perdue Farms, was angered by a University of Maryland clinic lawsuit alleging his company and its contract farmers were unlawfully polluting the Chesapeake Bay. Perdue persuaded legislators to attach a rider to the university’s appropriations that conditioned \$750,000 in funding on submission of a report

detailing clinic cases, clients, expenditures, and funding, much of which is confidential information. . . . The rider was defeated after the AAUP and other organizations successfully argued that the action was a serious violation of academic freedom that threatened the ability of institutions of higher education to serve the state's numerous constituencies. Even in defeat, one of the rider's sponsors was confident that the university had gotten the message—don't select cases based on educational or legal merit but instead ask whom you might offend if you go forward.

An even harsher attack occurred in Louisiana this past spring, where the Louisiana Chemical Association (LCA) pushed for legislation, subject to narrow exceptions, that would forfeit all state funds going to any university, public or private, whose clinics brought or defended a lawsuit against a government agency, represented anyone seeking monetary damages, or raised state constitutional claims. The bill also would have made clinic courses at the state's four law schools subject to oversight by legislative commerce committees. The LCA sought the legislation after a Tulane University clinic filed a lawsuit that would have required LCA members to pay millions of dollars in fines for violating air pollution laws. The bill was part of a leaked LCA strategy to force Tulane to drop its environmental law clinic. The strategy included ceasing all corporate support for Tulane, not hiring any Tulane graduates, contacting donors to persuade them to withhold donations from Tulane, urging the Louisiana Board of Regents to withdraw all support, and getting the governor and congressional delegation to pressure Tulane to close its clinic.

. . . Legislators debated the bill while oil was gushing in the Gulf of Mexico from BP's oil rig, and the bill was defeated in committee, although its supporters were unrepentant in defeat and threatened to return with a revised bill that would more narrowly focus on Tulane.

These are just a few troubling examples of a much larger phenomenon. In a 2005 survey of clinical law professors, 12 percent reported similar interference in their courses, with more than a third reporting that they worried about how the university might react if they took on controversial cases or clients. As one would expect, these worries chill the professional judgment of a significant number of professors: one in six reported self-censoring their choices about the legal cases students should handle because of concerns about adverse reactions to potentially controversial clinic coursework. . . .