

ALWD

ASSOCIATION OF LEGAL WRITING DIRECTORS

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Dean Don Polden, Chair
ABA Standards Review Committee
Santa Clara Law
Heafey Room 224
500 El Camino Real
Santa Clara, California 95053

Re: Comprehensive Standards Review - April 2 Open Forum

Dear Mr. Askew and Dean Polden:

The Association of Legal Writing Directors expresses its appreciation to the Standards Review Committee chair, members, and staff for inviting a more open dialogue among relevant constituencies and other interested parties regarding the substance of your ongoing comprehensive review. ALWD welcomes this opportunity to comment on the Committee's most recent draft proposals, and to share our concerns with you about the potential implications of those proposals for the quality of legal education and its relevance to the needs of law students.

We begin with general comments regarding the appropriate objectives of law school accreditation and how best to achieve those objectives. Next, we offer specific comments on the following topics SRC has identified for purposes of the April 2 public forum: (1) outcome measures, (2) security of position, academic freedom, governance, and attracting and retaining competent faculty, and (3) other standards and procedures.

General Comments

- I. The proper objective of the required comprehensive review of law school accreditation standards is to ensure that accredited institutions provide high quality legal education that is relevant to law students' educational needs.

As you know, the Council on Legal Education and Admissions to the Bar has a legal obligation under Department of Education regulations to periodically undertake a comprehensive review for two stated purposes: to ensure that "its [accreditation] standards are [1] adequate to evaluate the quality of the education or training provided by the institutions and programs it accredits and [2] relevant to the educational or training needs of students."¹ The Council in turn has delegated this critical responsibility to this Committee.

Much has been said over the last two years by SRC members and others about the proper role of the ABA Council as an accrediting agency. Some observers have gone so far as to speculate about the motives underlying the comprehensive review. Others have suggested that the standards should impose only barebones requirements on accredited law schools in order to maximize opportunities for innovation and flexibility. But if the federal regulations are indeed the driving force for the Council's delegation of authority to SRC to review the standards, then the only *legitimate* goals of this complex, costly, and time-consuming review process are those explicitly set out in the federal regulations governing the Council: first, to ensure that the standards adequately evaluate the *quality* of legal education, and second, to ensure that accredited institutions provide a program of legal education *relevant* to student needs.

- A. The mission of ALWD, as a designated Council affiliate organization, is consistent with the stated goal of ensuring quality legal education that is relevant to the educational needs of law students.

Like SRC, ALWD also has a responsibility to serve the Council as one of its designated affiliate organizations. ALWD represents a large community of law faculty engaged in teaching, scholarship, and service related to legal analysis, research, and writing. Our members care passionately about ensuring that ABA-accredited law schools continue to provide quality legal education. We also believe it is vital that law schools provide accurate data that will enable prospective law students to make informed decisions about whether an accredited law school's program is relevant to their educational needs.²

¹ 34 C.F.R. § 602.21(a) (2010).

² *Id.*

Consistent with an accrediting agency's overarching goal of ensuring high-quality, relevant legal education, ALWD's mission is primarily focused on helping law schools provide excellent legal writing instruction. Our sister organization, the Legal Writing Institute (LWI), supports ALWD's mission by providing a forum for exchanging ideas about legal writing, as well as encouraging research and scholarship about legal writing and legal analysis. Virtually every ALWD member holds a dual membership in LWI, and the two organizations jointly sponsor many ongoing projects designed to improve the quality of legal education. Together, ALWD and LWI represent close to 2,700 legal writing professionals, and more than half of them teach law school. Many teach not only courses in the first-year curriculum, but also a variety of upper-level legal drafting, advocacy, and "casebook" courses. In summary, we are a diverse community with a common goal: to improve the quality of legal writing education, research, and scholarship.

Like other Council affiliates, ALWD officers and representatives have collectively devoted many hundreds of hours over the last two and a half years monitoring SRC's undertaking, under the auspices of the Council, to comprehensively review the accreditation standards. Last fall, ALWD submitted two formal comments to SRC in direct response to earlier versions of the draft proposals you are considering today. One, dated September 30, 2010,³ offered a number of specific suggestions regarding proposed changes to Chapter 3 addressing Student Learning Outcomes. The other, dated October 22, 2010,⁴ addressed the subcommittee report on Security of Position and Faculty Governance, posted shortly before SRC's July 2010 meeting. Each formal comment was the product of many weeks of thoughtful dialogue and input solicited from our broad membership base. Both are posted on the SRC Comprehensive Review website, along with the numerous comments you have received from a host of other constituents who, like ALWD, share a deep concern about the long-term implications of SRC's work.

³ Letter dated Sept. 30, 2010, from ALWD to Hulett H. (Bucky) Askew, *available at* <http://www.abanet.org/legaled/committees/Standards%20Review%20documents/Outcome%20Measurements/Comment%20-%20outcome%20measures%20-%20ALWD%20-%20September%202010.pdf>.

⁴ Letter dated Oct. 22, 2010, from ALWD to Hulett H. (Bucky) Askew, *available at* <http://www.abanet.org/legaled/committees/Standards%20Review%20documents/ALWD%20Comments%20Ch%20%204%2010-22.pdf>.

- B. All relevant constituencies must work in partnership to ensure that the revised accreditation standards meet the Council's legitimate goals as the Department of Education's designated accrediting agency for postsecondary legal education.

In short, we are all in this together. The comprehensive review process is destined to fail unless all relevant constituencies continue to work in partnership with SRC to produce a set of standards carefully crafted to meet the Council's dual obligations under the federal regulations: to ensure that accreditation standards allow the Council, through its accreditation and re-accreditation process, to evaluate the quality and relevance of legal education. The proper purpose of the comprehensive review process is certainly *not* to provide "flexibility" to law school deans and administrators, to make it less onerous for new law schools to achieve accreditation, or even to allow room for "innovation" in legal education. Nor is the proper purpose of the comprehensive review process to reduce the cost of legal education. While each of these may be laudable goals for independent policy reasons, they are not within the proper scope of the comprehensive standards review process the Council has delegated to this Committee.

As SRC proceeds with its comprehensive review, we urge you to step back a few paces to consider these two overarching purposes. First, what do we mean by "quality" legal education? Once that central question is settled, what accreditation standards are "adequate" to evaluate the quality of legal education as so defined? Second, how can we best evaluate whether a particular standard is "relevant" to the educational needs of students? More importantly, how do we identify the educational needs of law students? Until SRC and the Council answer these central questions, observers of and participants in the review process will understandably remain unclear about the goals of this costly undertaking, or whether its broad sweep has exceeded the proper scope of the federal regulation's periodic comprehensive review requirement.

The straightforward, unambiguous federal regulations envision a two-phase process.⁵ The first phase requires the accrediting agency to conduct a comprehensive review of the standards to determine whether any changes are warranted. This phase is currently underway by SRC. In the past, SRC has proposed only selective revisions to the standards. In contrast, the unprecedented process currently underway by SRC appears to have presumed, without deciding, that virtually every standard warrants revision. Yet what evidence supports that implicit finding? It appears that SRC has undertaken a sweeping overhaul of the standards without a threshold finding, supported by a plausible rationale, that changes are warranted.

⁵ See 34 C.F.R. § 602.21(a) (2010).

While the record is voluminous, ALWD has not been able to identify any record of a finding by either the Council or SRC that massive changes are warranted to virtually every accreditation standard.

Even assuming the Council, as the accrediting agency, has determined that sweeping changes are warranted, SRC must fully consider both the purpose and the likely effect of each proposed change to ensure that the revised standards meet the legitimate goals of the comprehensive review process. Once SRC reports its proposed changes to the Council, the second phase of the comprehensive review process begins. This second phase will occur if, and only if, the Council as a whole approves the publication of specific proposed revisions for notice and comment by all interested parties.⁶

Setting aside for a moment the conscious *purpose* of this undertaking, ALWD representatives have found it increasingly challenging to anticipate and fully comprehend the interrelated *effects* on the quality of legal education that will undoubtedly result from any massive overhaul of the standards. Particularly troubling is the fact that significant portions of each chapter have been assigned to different subcommittees for review. Each chapter, standard, and interpretation has its own legislative history and interpretive context, in some instances spanning many decades.⁷ SRC should carefully study the policy history of the current standards and tread lightly before proposing massive changes to standards and interpretations that have long stood the test of time.

Moreover, none of the individual subcommittee reports should be considered in isolation. The Accreditation Committee will be asked to evaluate programs of legal education holistically against the accreditation standards in their entirety. Each specific amendment proposed by the Committee must be carefully evaluated not in isolation, but in the context of the entire package.⁸

⁶ See *id.* at § 602.21(c).

⁷ See e.g. Richard K. Neumann, *Academic Freedom & Security of Position*, AALS Annual Meeting, Jan. 6, 2011 (panel presentation to AALS Committee on Academic Freedom & Tenure, *Can There Be Full Academic Freedom Without Tenure?*) (compiling historical documents demonstrating that Standard 405 has long been understood to require accredited law schools to have an established tenure policy comparable to Appendix 1).

⁸ See 34 C.F.R. § 602.21(c) (2010). “[T]he agency must ensure that its program of review—(1) Is comprehensive; (2) Occurs at regular, yet reasonable, intervals or on an ongoing basis; (3) *Examines each of the agency’s standards and the standards as a whole*; and (4) Involves all of the agency’s relevant constituencies in the review and affords them a meaningful opportunity to provide input into the review.” *Id.* (emphasis added).

ALWD pledges its continuing cooperation as the Council works to meet its legal obligation, as the designated accrediting agency, to engage in comprehensive review of the law school accreditation standards every five years.⁹ We acknowledge the hours of hard work Committee members have devoted over the last two years to accomplish this very important task. Yet we join other constituency groups and knowledgeable observers in cautioning that the final work product of SRC's comprehensive review process must refrain from inadvertently causing irreparable harm to the reputation for quality that American legal education has long enjoyed.

Specific Comments

I. Student Learning Outcomes.

ALWD has consistently supported SRC's efforts to refocus the accreditation standards to encourage law schools to employ outcomes assessment, consistent with the direction undertaken by the Department of Education in overseeing postsecondary professional education. While the Subcommittee's current draft takes an important symbolic step forward, ALWD supports accreditation standards that place substantially greater emphasis on student learning outcomes, formative assessment, and skills education. Refocusing law school accreditation standards on outcomes with an emphasis on formative assessment holds the most promise for ensuring that the program of legal education offered by accredited law schools is relevant to the educational needs of most law students:¹⁰ preparing them for the practice of law.

Without a doubt, professors of legal analysis, research, and writing have considerable knowledge of and experience with outcomes-focused education. To illustrate, the legal writing community has already undertaken several initiatives to help develop and disseminate formative assessment techniques and other outcomes-based teaching approaches across the spectrum of legal education.¹¹ Legal writing and clinical skills faculty are most likely to facilitate developments in outcomes assessment.¹² Further, students often find that the student-

⁹ See 34 C.F.R. § 602.21(a) (2010). "The [accreditation] agency must maintain a systematic program of review that demonstrates that its standards are adequate to evaluate the quality of the education or training provided by the institutions and programs it accredits and relevant to the educational or training needs of students." *Id.*

¹⁰ *Id.* ("relevant to the educational or training needs of students").

¹¹ The written and oral reports ALWD has provided to the ABA Council over the past year summarize these joint efforts by ALWD and LWI.

¹² See Kent D. Syverud, *The Caste System and Best Practices in Legal Education*, 1 J. ALWD 12, 18 (2002) ("[C]aste lines discourage dissemination of best practices where, as in legal education, it is

focused, innovative teaching methods employed by legal writing and clinical skills faculty are also those most relevant to their educational needs. Ironically, clinicians and legal writing faculty are also most susceptible to the chilling effect of unequal status and lack of job security.

For far too long, legal writing faculty have had significantly less voice in curriculum development and other governance issues than any other segment of the law faculty. Unfortunately, the ABA standards have persistently failed to erase the chronic disparities among legal writing, clinical, and non-skills faculty with respect to security of position, faculty status, and governance rights. Until the standards fully acknowledge and remedy the longstanding disparate treatment of legal writing and other skills faculty, even the most well-intentioned efforts by the Council to encourage outcomes-focused law teaching will undoubtedly founder—at the same time accredited law schools are encouraged to adopt student learning outcomes as a primary measure of the quality of legal education.

Turning to the April 2011 proposed draft submitted by the Student Learning Outcomes subcommittee, we offer the following specific comments:

1. ALWD supports the addition of the word “ethical” to Standard 301. A high-quality, relevant program of legal education should instill the values of the profession, including the ethical practice of law as well as effective and responsible participation in the legal profession. Many members of the legal writing community actively seek ways to incorporate the pervasive teaching of professional ethics into legal writing, drafting, and advocacy coursework. We also agree with Interpretation 301-1, which observes that an acceptable bar passage rate is a necessary but insufficient condition of compliance with the standards regarding the program of legal education.

2. By allowing law schools to identify and define their own learning outcomes, Standard 302(a) appears to undermine other proposed language designed to encourage law schools to adopt meaningful outcome measures. ALWD has previously urged stronger language in Standard 302(a),¹³ and we reaffirm those comments here.

3. ALWD supports language in Standard 302(b)(2)(i) that requires accredited law schools to require competency in the professional skills of “legal analysis and reasoning, critical thinking, legal research, problem solving, and written and oral communication in a legal context.” All of these skills are central to the legal writing curriculum and demonstrate the breadth and complexity of legal writing courses.

lower castes [including legal writing and clinical faculty] that have been more responsive and innovative in applying learning theory inside and outside the classroom.”).

¹³ Letter dated Sept. 30, 2010, from ALWD to Hulett H. (Bucky) Askew, *supra* n. 3, at 2-4, 6.

4. ALWD supports the inclusion of new language in Standard 302(b)(2)(ii) and (b)(4) that emphasizes the exercise of professional and ethical judgment consistent with the values and obligations of the legal profession.

5. Consistent with the subcommittee's early proposed drafts, ALWD urges consideration in Standard 302(b)(3) of an enumerated list of those professional skills that every competent lawyer should be expected to perform upon admission to the bar, including but not limited to client counseling, negotiation, and drafting. Assuming that SRC has determined that Chapter 3 warrants revision to encourage an outcomes approach to evaluating the quality of legal education, SRC should "go the distance" by identifying those skills that the legal profession has a right to expect any entry-level member of the bar to perform.

While Interpretation 302-2 suggests various professional skills that "could fulfill" the standard, it lacks the specificity of an enumeration in the standard itself. To allow each law school to determine the professional skills deemed "sufficient for effective, responsible, and ethical participation in the legal profession" appears to impose an unrealistic burden on accreditation site teams to enforce this vague standard. It also offers so much flexibility to law schools in terms of offering basic professional skills instruction as to undercut even the superficial focus the standards appear to place on outcomes assessment.

On an editorial note, the references in Interpretation 302-2 (in the redlined version only) should be corrected to refer to Standard 302(b)(3) rather than Standard 302(b)(2)(iii), which no longer appears in the proposed draft.

6. ALWD supports the retention in Standard 303(a)(2) of language requiring at least one rigorous writing experience in the first year and at least one additional rigorous upper-class writing experience, both faculty-supervised. We also support the addition of language in 303(a)(3) and Interpretation 303-2 that requires one faculty-supervised, upper-level course that integrates doctrine, theory, skills, and ethics and engages students in professional skills, including multiple opportunities to engage in professional tasks with appropriate feedback and evaluation. Many of the upper-level courses taught by our members strive to integrate doctrine with theory, skills, and ethics with multiple opportunities for formative assessment.

7. ALWD strongly supports the retention of Interpretation 303-1, which enumerates factors to be considered in evaluating the rigor of writing instruction required by Standard 303(a)(2). However, we urge the subcommittee to reinstate language referring to "writing instructor" and revise those references to "writing faculty member." The language of the current standard acknowledges that writing faculty members are uniquely qualified to ensure that the "rigor" required by Standard 303(a)(2) includes individualized assessment, detailed feedback, and opportunities to meet one-on-one with a writing professional. Striking the

references to “writing instructor” would allow law schools to assign faculty members to oversee “rigorous writing experiences” even if they lack sufficient experience in rigorous writing instruction. In doing so, the proposed changes inadvertently undercut the policy reason for adding Interpretation 303-1: defining the factors to be considered in evaluating whether every law student has satisfactorily completed a minimum of two “rigorous” writing experiences.

On an editorial note, the new language in 303(a)(3) refers to “one or more of the professional skills identified in Standard 302(b)(3),” even though that language no longer “identifies” any specific professional skills. Because the enumeration of skills has been relocated to Interpretation 302-2, perhaps the cross-reference should be corrected to refer to the Interpretation rather than the Standard.

8. ALWD supports the inclusion of Interpretation 302-4, which encourages law schools to incorporate in the law school curriculum opportunities for self-reflection on the values, experiences, and responsibilities of the legal profession. Self-reflection and self-evaluation are among the hallmarks of formative assessment and effective adult education.

9. ALWD supports Standard 304 and related Interpretations, which require law schools to apply a variety of formative and summative assessment methods designed to provide meaningful feedback to students. The standard summative assessment in the form of a traditional bluebook essay exam fails to provide meaningful feedback to students. We applaud the subcommittee’s proposal urging law schools to adopt other forms of assessment with the goal of offering meaningful feedback.

However, ALWD cautions that the plain language of Standard 304, as currently written, would allow a law school to adopt a variety of assessment methods that are summative only, which inherently fail to offer students a meaningful opportunity for mid-semester feedback. The language allows law schools to rely on its legal writing and other skills faculty exclusively to meet the requirement, and offers little if any incentive for casebook and doctrinal law faculty to incorporate formative assessment methods. We urge the subcommittee to strengthen the language of Standard 304 to ensure that the burden of additional formative assessment methods is not shouldered exclusively by legal writing faculty, who generally lack parity in security of position, status, and governance rights compared to other faculty members.

10. ALWD supports the addition of Standard 305, which requires law schools to regularly engage in self-assessment of institutional effectiveness, including the degree to which the curriculum facilitates students in attaining competency in learning outcomes. In particular, ALWD supports the variety of assessment methods enumerated in Interpretation 305-2.

II. Security of Position, Academic Freedom, Governance, and Attracting and Retaining Competent Faculty.

As SRC considers the proposed changes to the accreditation standards relating to governance in Chapter 2, and those relating to security of position and academic freedom in Chapter 4, we ask that you carefully consider the disproportionate impact those changes will undoubtedly have on two specific categories of law faculty: legal writing and clinical faculty. These are classifications the standards themselves expressly acknowledge.¹⁴ Moreover, the high proportion of women in legal writing and clinical positions means that any move to decrease security of position could have a disproportionate adverse impact on female law faculty, which runs counter to the ABA's history and goals.

The ABA has long enjoyed a strong reputation for justice and equity by its leadership in eliminating discrimination in the profession on the basis of gender and race. For example, the mission of the ABA Commission on Women in the Profession, established in 1987, is "[t]o secure full and equal participation of women in the ABA, the profession, and the justice system."¹⁵ The ABA accreditation standards themselves encourage diversity on law faculties,¹⁶ and for good reason: Law students learn the values of the legal profession by observing how ABA-accredited law schools model the norms of gender and racial equality.¹⁷ For all of these reasons, the accreditation standards have a direct impact on how the American legal profession as a whole treats women and racial/ethnic minorities as equal participants in our system of justice.

For more than a decade, ALWD and LWI have gathered annual data from law schools pertaining to various features of legal writing programs, including the terms and conditions of employment for legal writing faculty. Survey participation is consistently high; in 2010, for

¹⁴ See ABA Standard 405(c), (d); see generally Kent D. Syverud, *The Caste System and Best Practices in Legal Education*, 1 J. ALWD 12, 13 (2002) ("[I]n American Legal Education, caste was calcified and embodied to only a minor degree in the American Bar Association accreditation standards for law schools, which specify different terms and conditions of employment for at least six different types of legal educators.").

¹⁵ See Brochure, ABA Commission on Women in the Profession (available at http://www.americanbar.org/content/dam/aba/migrated/2011_build/women/cwp_brochure_2010_11.authcheckdam.pdf).

¹⁶ ABA Standard 212(b) requires accredited law schools to "demonstrate by concrete action a commitment to having a faculty and staff that are diverse with respect to gender, race, and ethnicity."

¹⁷ See Syverud, *supra* n. 12, at 15 ("[A] future professional learns from the entire professional environment that he or she sees every day.").

example, our response rate was 96 percent, representing 191 law schools.¹⁸ Over the past several years, the annual survey data consistently show that 70 percent of full-time legal writing faculty members are women. According to the most recent AALS data, the comparable proportion of women among clinical faculty is 50.6 percent,¹⁹ and as a proportion of law faculty as a whole, women comprise 37.3 percent.²⁰ The statistical data clearly demonstrate that the proportion of women among those who teach legal writing vastly exceeds the relevant proportion of women who teach other major subjects in the legal academy.

Federal statutes, specifically Title IX of the Education Amendments of 1972, specifically prohibit discrimination on the basis of sex by educational institutions that receive federal financial assistance.²¹ Department of Education regulations adopted by the Office of Civil Rights explicitly interpret the statute to prohibit federally subsidized educational institutions from discriminating on the basis of sex in employment—or in the terms, conditions, or privileges of employment.²² Nor may educational institutions that receive federal financial assistance “[c]lassify a job as being for males or for females; . . . or [m]aintain or establish separate lines of progression, seniority systems, career ladders, or tenure systems for similar jobs, position descriptions, or job requirements which classify persons on the basis of sex, unless sex is a bona-fide occupational qualification for the positions in question”²³

Moreover, consistent with federal law, the ABA standards themselves expressly prohibit accredited law schools from discriminating in employment. Standard 211(a) specifically provides, “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.”²⁴ Furthermore, Standard 212(b) requires law schools to “demonstrate by concrete action a commitment to having a faculty and staff that are diverse with respect to gender, race, and ethnicity.”²⁵

¹⁸ See e.g. *Report of the Annual Legal Writing Survey* (Assn. of Legal Writing Dirs. & Legal Writing Inst. 2010) (available at http://www.alwd.org/surveys/survey_results/2010_Survey_Results.pdf).

¹⁹ Table, *Gender Distribution of Law Faculty, 2008-2009 AALS Statistical Report on Law Faculty* (available at <http://www.aals.org/statistics/2009dlt/gender.html>).

²⁰ *Id.*

²¹ 20 U.S.C. § 1981(a) (“Title IX”). “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance” *Id.*

²² 34 C.F.R. § 106.51(a); *id.* at § 106.51(b)(10) (2010).

²³ *Id.* at § 106.55 (emphasis added).

²⁴ Standard 211(a) (emphasis added).

²⁵ Standard 212(b).

Although SRC is considering amendments to other standards in Chapter 2, we are not aware that SRC has identified a need to revise either Standard 211(a) or 212(b). Nevertheless, they should certainly be considered as SRC proposes amendments to other standards, in order to avoid internal inconsistencies within the Standards when considered and applied as a whole.

Seventy percent of legal writing faculty are women. Fifty percent of clinicians are women, but even clinicians as a group represent a much higher percentage of women than teachers of non-skills subjects. These two groups statistically comprise a higher proportion of women than are represented among other law school faculty, and they are also the *only* faculty groups hired in significant numbers off the tenure track. Systemic disparate impact throughout legal education has not been remedied by anything Standards 211 and 212 can provide. If those two standards were capable of doing so, off-tenure-track faculty would not be disproportionately female.

Not only have Standards 211 and 212 failed to prevent this situation, but if the subcommittee's draft revision of 405 is adopted, it will only get worse. At most schools, legal writing teachers and clinicians are employed off-tenure-track, and they are overwhelmingly outnumbered by other faculty members who, because of their greater power in governance, are able to reduce and remove the job security of faculty members off tenure track. Schools have had an historical tendency to do exactly that—which is why Standards 405(c) and (d) exist.

Historically, legal writing and clinical education—as subject matter areas—have been under-resourced, with a disparate impact on the faculty who teach them. Without Standards 405(c) and (d), the disparate impact would have been even greater than it is now. Setting aside, for the moment, the question of liability under federal law, the Council on Legal Education—as *a matter of equity*—ought not amend the Standards in a way that would leave schools free to make this unacceptable situation even worse. To do so would violate the core values of the American Bar Association.

With these general considerations in mind, ALWD offers the following specific comments on the April 2011 proposed drafts addressing these subtopics:

1. ALWD supports the proposed change to Standard 405(a) that acknowledges the important role of part-time faculty in offering a program of high-quality legal education. While we support the appropriate use of part-time faculty to supplement full-time faculty and to provide flexibility in course offerings, ALWD cautions that the proposed standards do not require a law school to maintain a core full-time faculty in any meaningful proportion to the number of enrolled students. Thus, the proposed standard might allow a law school to avoid

the obligation to provide academic freedom and security of position simply by shifting its faculty resources primarily to adjuncts and other part-time faculty.²⁶

2. ALWD continues to strongly oppose the elimination of current Interpretation 402-1, which explicitly considers a law school's student-teacher ratio as a factor in evaluating whether a law school complies with the standards for maintaining a high-quality faculty. Without an explicit standard that fairly measures a law school's complement of full-time faculty relative to the number of enrolled students, ALWD is concerned that prospective law students will lack comparable data with which to make informed decisions about a law school's commitment to maintain a long-term core of full-time faculty.

3. As currently worded, Standard 405(b) unambiguously requires every ABA-accredited law school to have a policy providing for both academic freedom and tenure. Appendix 1 is simply an example of a policy that complies with that dual requirement. ALWD has previously commented on the July 2010 draft of Chapter 4. We once again reject the argument that the current standard does not require an accredited law school to have an established and announced *tenure* policy.

Other knowledgeable observers have thoroughly documented the legislative history of the standards. But ALWD submits that the language of the standard is plain and unambiguous, so it is simply unnecessary to consult the legislative history. The key language simply states, "A law school shall have an established and announced policy with respect to academic freedom and tenure . . ." ²⁷ The modifying prepositional phrase, "of which Appendix 1 herein is an example but is not obligatory," does not undercut either requirement.

²⁶ With respect to part-time faculty, the April 2011 subcommittee draft requires a law school only to "establish and maintain conditions that are adequate . . . to maintain a part time faculty *sufficient to accomplish its mission.*" Standard 405(a) (emphasis added) (subcommittee draft). While the January 2011 draft had proposed adding a definition of "faculty" to Standard 106 that would have expressly included part-time instructors, the April 2011 draft deletes that definition and instead adds a new definition of "full-time faculty member." Further, the April 2011 subcommittee draft of Standard 405(b) and (d) extends academic freedom and governance rights only to "full time faculty." While the subcommittee and minority drafts would each require a law school to provide "similar protections, as applicable [or appropriate], for part-time faculty," it is difficult to imagine how an accreditation site team would enforce such vague language with respect to part-time faculty. See Standard 405(b) (subcommittee draft); Standard 405(d) (minority draft). None of the interpretations in either proposed draft specifically addresses the rights of part-time faculty.

²⁷ Standard 405(a) (emphasis added). Both "academic freedom" and "tenure" are required by virtue of the conjunctive use of the word "and." ALWD observes that every first-year legal writing textbook in print teaches law students to carefully distinguish the conjunctive "and" from the

Whether or not the standards *should* require a tenure policy is an issue worthy of serious consideration on its merits. But it is inappropriate and misleading for some to attempt to shroud this critical policy issue in editorial rhetoric. The latter approach is also directly contrary to the open discussion with relevant constituencies clearly required by the federal regulations before proposing such a fundamental policy change. To argue that Standard 405(b) simply needs “clarification,” when the proponents’ real purpose is to abolish a fundamental term of employment the great majority of law faculty have relied upon in making career decisions, casts a cloud on the credibility of the entire comprehensive review process.

ALWD urges SRC as a whole to squarely address the pros and cons of tenure on the merits, allowing opportunities for open dialogue with all relevant constituencies to fully air this fundamental policy issue. SRC has been delegated authority to review the standards to decide whether revisions are warranted, subject to review by the Council. ALWD suggests that those who advocate for this fundamental policy change have simply not carried their burden of persuasion, and those who oppose it have not been offered a fair opportunity to address the issue on the merits.

4. Standards relating to faculty governance must be considered in conjunction with standards relating to academic freedom, security of position, and student learning outcomes. As discussed above, ALWD observes that while legal writing and other skills faculty are most likely to develop and apply a variety of formative assessment methods, they are often the most vulnerable members of the faculty for lack of voting rights and security of position. Legal writing faculty, and to a lesser extent clinicians and other skills faculty, have long been marginalized in the legal academy.²⁸ As Professor Ralph Brill has astutely observed, the current standards require very few specific courses, but those few include two rigorous writing experiences.²⁹ Yet required writing courses are generally taught by the very same faculty members who are afforded the fewest rights and protections of any full-time faculty category.³⁰

Our survey data demonstrate that the great majority of legal writing faculty work in an environment that does not ensure them security of position. Appendix A is an excerpt from the 2010 ALWD/LWI annual survey that illustrates the direct relationship between legal writing faculty status and governance rights. In short, the relatively few law schools that employ

disjunctive “or.” E.g. Linda H. Edwards, *Legal Writing and Analysis* 78 (2d ed., Aspen 2007) (discussing conjunctive and disjunctive legal rules).

²⁸ E.g. Syverud, *supra* n. 12, at 14-15.

²⁹ See Standard 302(a)(3) (current version).

³⁰ Compare Standard 405(a), (b) (faculty generally) and Standard 405(c) (clinical faculty members) with Standard 405(d) (legal writing “teachers”) (2010-2011 version).

tenured and tenure-track legal writing faculty are much more likely to give them a voice in faculty governance. Yet even that select group of legal writing faculty does not always have a vote in faculty meetings. In contrast to those on tenure-track, legal writing faculty on short-term contracts (one to three years), who represent the great majority of law schools, generally lack the same voting rights and may even be excluded entirely from faculty meetings.

ALWD agrees with the comments of Professor Ralph Brill that SRC's laudable efforts to revamp accreditation standards to encourage flexibility and innovation simply will not succeed unless the faculty who already have the expertise to move that agenda forward have a meaningful voice in curriculum reform and all other issues of faculty governance.

5. ALWD supports standards that ensure academic freedom, security of position, and equal governance rights to all full-time faculty, without discriminating on the basis of a faculty member's field of teaching, scholarship interests, or teaching method. The subcommittee's April 2010 draft of Standard 405(b) requires academic freedom for full-time faculty with respect to teaching, research, governance, and public service related to legal education. Proposed 405(d) also explicitly provides for the participation of all full-time faculty members in faculty governance. ALWD supports the proposed standard to the extent that it erases the present unjustifiable classifications among faculty to the serious disadvantage of legal writing faculty in particular.³¹ That said, a policy that simply eliminates tenure for all faculty will have a disproportionately adverse impact on teachers of writing and skills courses: the faculty with the least status, the least security of position, and the least governance rights of all—in other words, the faculty with the least power in the legal academy.

Moreover, we oppose the draft's renewed and persistent attempt to abolish the requirement that accredited law schools have a policy protecting both tenure and academic freedom. As others have noted, the concepts are not the same. Tenure is much broader than academic freedom. For example, academic freedom does not protect against discriminatory treatment based on factors unrelated to classroom teaching, such as a faculty member's position on educational policy. Tenure policies are essential to attract, develop, and retain a core of long-term faculty, the hallmark of a quality legal education. Professor Brill aptly observes in his recent written statement that abolishing tenure would *increase* the cost of legal education, assuming law schools continue to value the model of offering legal education with full-time faculty.

While the number of law schools that offer tenure or long-term contract status to legal writing professors has grown incrementally over time, the great majority of us began our

³¹ See e.g. Standard 405(d).

teaching careers as contract employees. And even now, the great majority of law schools still offer legal writing faculty nothing more than the minimal “protections” of 405(d) status. ALWD fears that the subcommittee’s proposal could very well lead to similarly weak conditions for newly-hired law school faculty. The content of faculty contracts would be left to the law school administration, with only hollow assurances of academic freedom and participation in faculty governance. In the meantime, faculty members who already have tenure protection will presumably not be affected. The proposed standard would drive an even larger wedge between the “haves” and the “have nots” in the legal academy. Given the harsh reality of the existing caste system in legal education, it is impossible to fairly or realistically assess the negative effects of the proposed revisions in the abstract.

Based on our collective experiences, many of us can predict for you what the academy's future will look like under the subcommittee’s proposal. Without tenure or tenure-like job security, academic freedom means that others get to dictate the text you must use in class. It means that others decide what your syllabus looks like. It means your scholarship will address topics others find compelling or interesting, even if you do not. In other words, academic freedom cannot exist under these conditions. Without tenure or tenure-like job security, participation in faculty governance means working on committees without voicing your own opinion, especially if it would contradict the opinion of those holding the power to terminate—or refuse to renew—your teaching contract. It means not speaking up at faculty meetings if your ideas run counter to the mainstream for fear that your contract will not be renewed or you will be denied a promotion.

Certainly, some law schools provide both academic freedom and faculty governance rights to legal writing teachers even with only 405(d) status. But the status of any faculty member should not depend on the whims of the law school administration rather than well-crafted policies embodied in accreditation standards that are designed to ensure high-quality, relevant legal education. It is unlikely that law schools would eliminate tenure for professors of traditional courses. Instead, legal writing and other skills professors are most likely to be denied the rights enjoyed by other members of the academy. The result would be incongruous with the standards’ movement to outcome measures, which legal writing and clinical faculty are best equipped to develop and implement.

6. ALWD supports the language of Standard 405(c) as worded in the Wolff/Barry subcommittee proposal, which prohibits discrimination among full-time faculty members based on field of study or method of teaching. ALWD supports the language proposed by SRC members Wolff and Barry, which echoes the prohibition of Standard 211 against discrimination in faculty employment.

7. Neither of the proposed versions of Standard 405 adequately resolves the existing disparities among faculty classifications with regard to security of position and faculty governance. Even the minority proposal suggests that classifications are permissible in faculty governance. Specifically, Interpretation 405-2, as proposed by the minority report, would not preclude limitations on voting rights of faculty members with respect to governance matters “outside their field of study or method of teaching.” The Interpretation appears inconsistent with the language proposed in the minority report’s proposed Standard 405(c), which ALWD supports.

8. Any system that requires the same credentials but carves out categories of people that have different salary and job security is likely to have a disparate impact on women and minorities.³² The April 2011 draft of Standard 405 would still allow law schools to create a faculty underclass. As our survey data demonstrate, women are disproportionately represented in these lower-status positions, even though they have the same educational credentials as other faculty members.³³

III. All Other Standards, Interpretations, and Rules of Procedure.

ALWD reiterates its concerns regarding the process undertaken by SRC in its comprehensive review of the accreditation standards. While ALWD appreciates the repeated invitations to submit written comments to SRC as it releases revised drafts of the standards, we are not persuaded that this process has allowed for the genuine give-and-take among relevant constituencies called for by the applicable regulations.

A review process that overhauls longstanding accreditation standards without appropriate dialogue with affiliate organizations and other stakeholders, even with the best of intentions, seriously diminishes the credibility of the review process as well as the standards themselves. Moreover, Council affiliates and other relevant constituencies cannot be expected

³² That gender and race discrimination continue to be the subject of frequent litigation is illustrated by the ongoing class action against Wal-Mart alleging gender discrimination on the basis of pay disparity. *Wal-Mart Stores, Inc. v. Dukes*, No. 10-277 (argued Mar. 29, 2011); see also Ariane Hegewisch et al., *Ending Sex and Race Discrimination in the Workplace: Legal Interventions That Push the Envelope* (Inst. for Women’s Policy Research, Mar. 2011), available at http://www.iwpr.org/publications/pubs/ending-sex-and-race-discrimination-in-theworkplace-legal-interventions-that-push-the-envelope-1/at_download/file).

³³ E.g. Susan S. Liemer & Hollee S. Temple, *Did Your Legal Writing Professor Go to Harvard?*, 46 U. Louisville L. Rev. 383, 426-428 (2008) (summarizing survey data showing credentials of many legal writing professors without tenure-line appointments are equal to those of many professors with doctrinal, tenure-line appointments, and observing the “arbitrary gender divide in teaching areas and faculty status”).

to embrace and support the revised standards unless SRC undertakes the genuinely collaborative process that the federal regulations envision.

Our written remarks, while extensive, do not attempt to address every aspect of the April 2011 proposals that cause us concern. We trust that this summary provides an overview of our primary concerns at this stage of the process, and we pledge our continued cooperation with SRC and the Council.

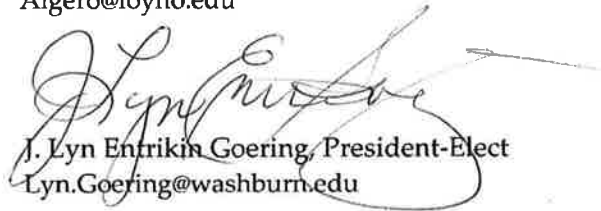
Conclusion

Once again, ALWD acknowledges the substantial investment of time SRC members have voluntarily devoted to the comprehensive review process over the last two and a half years. As the process moves forward, we urge you to continue providing all stakeholders an opportunity for meaningful collaboration and input.

Respectfully,



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Appendix A

Excerpt from ALWD/LWI Annual Legal Writing Survey (2010)³⁴
 Number of Law Schools Reporting Faculty Status and Governance Rights

LRW Faculty Status and Faculty Meeting Attendance and Voting Rights

	Year	Attend and Vote on All Matters	Attend and Vote on All Matters Except Hiring, Promotions, and Tenure	Attend but Do Not Vote	Do Not Attend or Vote
Tenure or tenure-track	2010	28	7	1	0
	2009	25	6	1	0
	2008	24	8	3	0
	2007*	21	7	2	0
ABA Standard 405(c) and 405(c) track	2010	9	36	2	0
	2009	5	30	5	0
	2008	4	31	1	1
	2007*	5	27	1	1
Contracts of 3 years or more	2010	3	20	16	6
	2009	3	13	19	4
	2008	3	12	23	5
	2007*	4	15	21	2
Contracts of 2 years	2010	0	3	2	3
	2009	0	4	3	1
	2008	0	3	3	1
	2007*	0	3	5	3
Contracts of 1 year	2010	1	5	13	2
	2009	2	6	12	3
	2008	3	6	16	3
	2007*	3	3	18	4

* 2007 answers were incorrectly reported in the 2007 report; these are corrected figures.

³⁴ Report of the Annual Legal Writing Survey B-17 (Assn. of Legal Writing Dirs. & Legal Writing Inst. 2010) (available at http://www.alwd.org/surveys/survey_results/2010_Survey_Results.pdf).