

**QUALITY LEGAL WRITING INSTRUCTION  
AND  
ABA ACCREDITATION STANDARD 405:  
REPORT AND RECOMMENDATIONS**

to the

**ABA STANDARDS REVIEW COMMITTEE**

and the

**COUNCIL OF THE ABA SECTION OF  
LEGAL EDUCATION AND ADMISSIONS TO THE BAR**

from the

**ASSOCIATION OF LEGAL WRITING DIRECTORS**

and the

**LEGAL WRITING INSTITUTE**

**January 21, 2000**

## CONTENTS

Introduction.....	1
-------------------	---

### REPORT

Standard 405's Current Provisions on Legal Writing Are a Disservice to Students, the Legal Profession, and the Public.....	2
A. Outcomes Assessment Studies Concerning Legal Writing .....	3
B. To Teach Writing Is To Teach Reasoning.....	9
C. The Appearance of Sex Discrimination.....	10

### RECOMMENDATIONS

Overview.....	13
Proposal 1: Include Full-Time Legal Writing Faculty in Standard 405(c).....	14
Proposal 2: In the Alternative, Add the Words "and retain" to 405(d) and Include Legal Writing Directors in 405(c).....	16
A. Adding "and retain" to 405(d).....	16
B. Extending 405(c) to Legal Writing Directors.....	18

## INTRODUCTION

In the spring of 1999, the Standards Review Committee proposed rewriting Standard 405 to eliminate the assumption that the Standards require a system of tenure, to reduce the protection of clinicians in certain ways, and to increase the protection of Legal Writing faculty in other ways. In the autumn of 1999, the Standards Review Committee reiterated its proposal, with some changes. In December, the Council voted not to send this proposal out for notice and comment, leaving the prior Standard 405 in place. At both the August and December meetings of the Council, most of the discussion was addressed to the system-of-tenure and clinical issues. The Legal Writing issues remain unresolved.

The Association of Legal Writing Directors has over 240 members, primarily current and former Legal Writing directors from more than 150 law schools in the United States. ALWD's goals include improving the quality of law school Legal Writing programs, encouraging research and scholarship on the educational responsibilities of Legal Writing directors, collecting and disseminating data relevant to directing Legal Writing programs, and improving understanding about the field of Legal Writing. ALWD holds annual conferences and supports scholarship and publications in the field of Legal Writing.

The Legal Writing Institute has over 1,200 members, representing virtually all the ABA-accredited law schools, as well as law schools in other countries, English departments, consulting organizations, and the practicing bar. LWI's purpose is to provide a forum for research and scholarship about Legal Writing and legal reasoning. LWI publishes a scholarly journal and a newsletter and holds a national conference every other year.

## REPORT

### **STANDARD 405's CURRENT PROVISIONS ON LEGAL WRITING ARE A DISSERVICE TO STUDENTS, THE LEGAL PROFESSION, AND THE PUBLIC**

In regard to Legal Writing, current Standard 405 provides only the following -- in 405(d):

Under Standard 405(a), law schools employing full-time legal writing instructors or directors shall provide conditions sufficient to attract well-qualified legal writing instructors or directors.

This is the lowest form of protection given to any subject matter in the law school curriculum, even though Legal Writing is a required course at virtually every law school. Teachers of doctrinal subjects are invariably on tenure track. Clinicians are provided at least the protections of Standard 405(c) and its Interpretations, although many are on tenure track.<sup>1</sup> Two-thirds of Legal Writing teachers, however, are excluded from these forms of security.<sup>2</sup> That harms their teaching, and given the central role of writing in modern law practice, it is also a disservice to law students, the bench, the bar, and the public.

---

1. NEWSLETTER OF THE AALS SECTION ON WOMEN IN LEGAL EDUCATION 5 (Nov. 1999).

2. *Id.*

## A. Outcomes Assessment Studies Concerning Legal Writing

Studies that explore outcomes assessment show that legal education is failing in the field of Legal Writing. As an academic discipline, Legal Writing has developed the ability to teach students how to express themselves well in writing and how to use the writing process as a tool for thinking. But many law schools treat this field and the faculty who specialize in it in ways that damage teaching and learning.

This has already been explained in a memo from the ABA Communications Skills Committee to the Standards Review Committee dated January 12, 1999. We reproduce below excerpts from that memo. (The footnotes are from the original but are renumbered here.)

Everyone complains about how lawyers write. "Most lawyers write poorly," noted the authors of a text on the subject.<sup>3</sup> "Leading lawyers across the country agree legal writing is flabby, obscure, opaque, ungrammatical, boring, redundant, disorganized, dense, unimaginative, impersonal, foggy, confused, heavy-handed, [and] cliché-ridden."<sup>4</sup>

The MacCrate Report noted "the continuing complaints . . . concerning law graduates' writing skills" and "the widely held perception that new lawyers today are deficient in writing skills."<sup>5</sup> The authors of the MacCrate Report recommended that legal education "teach writing at a better level than is now generally done."<sup>6</sup>

A study by a director and assistant director of the American Bar Foundation sought to discover, among other things, the skills hiring partners look when making hiring decisions.<sup>7</sup>

---

3. Tom Goldstein & Jethro Lieberman, *THE LAWYER'S GUIDE TO WRITING WELL* 1 (1989).

4. *Id.*

5. REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 264 (1992).

6. *Id.* at 332.

7. Bryant Garth & Joanne Martin, *Law Schools and the Construction of Competence*, 43 J. LEGAL EDUC. 469 (1993). . . .

When hiring partners in urban law firms were asked which skills they expected to be fully formed in new lawyers – without any need for further development on the job – the most frequent answers were written communication (90%), oral communication (91%), and library research (92%);<sup>8</sup> those skills are taught in every school's legal writing program. Every other skill was of far lesser importance to the firms' hiring partners.

The hiring partners ranked the quality of an applicant's writing sample as one of the top five factors in the initial hiring decision, approximately as important as the law school the applicant attended.<sup>9</sup> In fact, the only direct evidence of competence that an applicant can offer to an employer is a writing sample.

The ABF study also questioned young urban lawyers about how they learned what they need to know to practice law. These lawyers believed that, of all the skills and areas of knowledge they use in practice, the ones that can be most effectively taught in law school are, in fact, writing and research.<sup>10</sup> When asked to identify their most important source of learning for writing skills, only 19% of young urban lawyers and 18% of the young rural lawyers chose the "general law school curriculum" or "moot court."<sup>11</sup> In contrast, 22% of the young urban lawyers and 15% of the young rural lawyers chose "observation of or advice from other lawyers in your law office," and 37% of the young urban lawyers and 40% of the young rural lawyers chose "your own repeated experience."<sup>12</sup> In other words, twice as many young lawyers teach themselves how to write as are taught by their law schools.

The ABF study concluded that

(1) Oral and written communication skills are deemed to be the very most important skills necessary for beginning lawyers. They outrank other practical skills and more specifically legal skills such as substantive legal knowledge, legal reasoning and legal research.

---

8. *Id.* at 490.

9. *Id.* at 489.

10. *Id.* at 479. When asked what skills are teachable in law schools, young rural lawyers placed written communication after knowledge of the law and legal reasoning but ahead of all the usual practice skills. *Id.* at 481.

11. *Id.* at 483, 484.

12. *Id.*

(2) There are substantial gaps in what the recent graduates think could be taught in law school in the practical areas, including especially oral and written communication, and legal drafting. . . .

*[(3) through (6) omitted]*

(7) The expectations of partners in the law firm settings provide strong support for the importance of oral and written communication. The partners expect those skills to be possessed by the associates who come to work in the firms, even though they are not much taught in the law schools.<sup>13</sup>

These conclusions did not come from legal writing teachers. They were reached by a director and assistant director of the American Bar Foundation and were based on views among the practicing bar that legal education has, in this respect, failed in its responsibility to the profession and to the public served by the profession. One of the proper functions of an accreditation process is the prevention of this kind of widespread failure.

A second study points out how legal education has failed similarly to teach legal research adequately. One critic noted:

No one seems happy these days with either the quality of the legal research instruction provided by law schools or the quality of the legal research being conducted by law students and recent law graduates. Practitioners complain about new associates who do not possess even the most rudimentary legal research skills. These practitioners worry when they have to "write off" portions of an associate's billable hours because the time sheets submitted reflect research time far in excess of the reasonable cost of the final bill.<sup>14</sup>

---

13. *Id.* at 508-9.

14. Donald J. Dunn, *Why Legal Research Skills Declined, Or When Two Rights Make A Wrong*, 85 LAW LIBR. J. 49 (Winter 1993).

Empirical evidence demonstrates that the graduates of the most prestigious law schools enter law practice with extremely poor legal research skills. One study,<sup>15</sup> for example, surveyed law librarians in eight metropolitan areas throughout the United States about the legal research competency of summer clerks and first year associates. Seventy percent of the clerks and associates came from the top 15 rated law schools in the country. "Eighty percent of the respondents found summer clerks less than satisfactory in their ability to attack a legal research problem efficiently. First-year associates were found to be less than satisfactory in this area by sixty-five percent of the respondents."<sup>16</sup> One librarian told the researchers, "Our attorneys are smart and can spot the issues in any assignment with little difficulty. However, when it comes to researching these issues they are really quite lost. They have no idea how to design a research strategy and usually just jump into a variety of sources without any direction. *The inefficiency and waste of the clients' money is incredible.*"<sup>17</sup> Another librarian stated, "The average beginning attorney . . . wanders through a myriad of legal research tools, and because they do not understand the sources themselves, there is no method to their madness. *It's often pure serendipity if they find the answer.*"<sup>18</sup>

\* \* \*

Some schools still limit the number of years a legal writing teacher can be employed. This is referred to as an employment cap. The usual justification given for caps is financial. If legal writing instructors continue in employment, their salaries will rise. They can easily be replaced by new instructors at or below the salaries the terminated instructors were earning. Sometimes, a psychological explanation is added: the faculty feels uncomfortable having teachers continue at the school when they clearly are second-class citizens, and it is better to think of them as temporary teaching fellows who move on after a short stint at the school.

These short-sighted attitudes may be the single most important reason why law school legal writing instruction at many schools fails to satisfy the bench and bar. The education

---

15. Joan Howland & Nancy Lewis, *The Effectiveness of Law School Legal Research Training Programs*, 40 J. LEG. EDUC. 381 (1990).

16. *Id.* at 383.

17. *Id.* (emphasis added).

18. *Id.*

and professional training of lawyers inevitably suffers when teachers are forced to leave their institutions as soon as they become capable pedagogically.

A legal writing program is effective only if directors and teachers are provided with adequate job security. A school cannot provide quality or success in any instructional activity unless it guarantees continuity, professionalism, and resources for those who administer and teach. Everyone knows that it takes time -- at a bare minimum two to three years -- to develop basic pedagogical expertise. In the legal writing field, it is not uncommon for teachers to be forced to leave just as they are beginning to acquire the skills that would make them valuable to their schools and to the legal profession. . . .

These people teach and administer a required course in a subject the bench and bar expect to be learned completely in law school. One director noted that his or her writing program works well "only because I have been in the position long enough to get it right; as long as legal writing positions are temporary and less than fully professional, law schools are not going to get excellent writing programs. Or if they do, it's by chance and probably won't last."<sup>19</sup>

In addition, many legal writing programs increasingly teach other things of value. At the heart of all writing courses is direct and individualized instruction in legal reasoning skills. Although classroom repartee in doctrinal courses can teach students how to dissect what others have written or said, the most effective method of teaching synthesis and other forms of constructive reasoning is to have students solve complex problems and reduce their solutions to writing that can be critiqued by a teacher. There is no other place in the required portion of the curriculum where the thought processes and expression -- necessary elements of problem-solving and reasoning -- are the primary focus of instruction.

A major part of the ABA's effort to assess outcomes involves bar passage rates. Among other things, the Multistate Performance Test examines the skills covered in virtually all modern Legal Writing courses. In fact, many MPT questions bear a startling resemblance to the assignments typically given to students in Legal Writing courses. We know of no

---

19. Quoted in Jan M. Levine, *Voices in the Wilderness: Tenured and Tenure-Track Directors and Teachers in Legal Research and Writing Programs*, 45 J. LEGAL EDUC. 530, 550 (1995).

research into the link between the quality of Legal Writing instruction and bar passage rates, but the connection is obvious.

## **B. To Teach Writing Is To Teach Reasoning**

The Legal Writing field has travelled an enormous distance in the last decade in developing methods through which thought and expression can be taught. An impression of the field based on observation predating 1990 has a high likelihood of inaccuracy. The amount of reasoning now being taught in Legal Writing courses invariably surprises teachers of other subjects, although Legal Writing students themselves know first-hand the analytical focus and rigor required in modern courses taught or designed by Legal Writing professionals.

It is a myth that Legal Writing courses exist only or even primarily to remedy the failure of undergraduate education to teach grammar and composition. The first-year course in Legal Writing plays a central role in teaching legal thinking because it is a laboratory in which students learn to use legal reasoning in the context of problem-solving. Teaching legal reasoning is a large part of what Legal Writing faculty do because understanding the applicable law is essential to articulating it effectively.

For example, one of the most important tasks of a Legal Writing course is to teach students how to construct an argument. Most doctrinal teaching focuses on analysis (how to take apart authority to find meaning). There is very little room in the doctrinal classroom for teaching synthesis (the construction of a comprehensive argument from disparate ideas, authority, and facts). In fact, the ever-increasing complexity of doctrine itself makes it harder as time goes on to teach thinking skills in a doctrinal course.

The best way to teach students how to construct an argument is to ask them to do it in writing, then critique what they do, and then have them rewrite it. Oral student work, such as discussion in a doctrinal classroom, barely scratches the surface of argument construction. Any work done without detailed individual critique followed by rewriting will not produce a lasting lesson. Legal writing faculty do this work frequently, and it is the major reason why teaching in this field consumes so much effort.

### C. The Appearance of Sex Discrimination

"Women's work," Sue Ellen Holbrook has written, "has four related characteristics: It has a disproportionate number of women workers; it is service oriented; it pays less than men's work; it is devalued."<sup>20</sup> Much of the devaluing of Legal Writing can thus be explained.

The Legal Writing field is overwhelmingly female, and it holds the lowest status in legal education. Of the Legal Writing faculty identified in responses to the ABA's fall 1998 annual questionnaire, 70% were female.<sup>21</sup> During the same academic year, 28% of assistant, associate, and full professors and 10% of law school deans were female.<sup>22</sup> The ABA Standards protect the status of the overwhelmingly male components of the profession (deans and the tenured and tenure-track professoriat). But the Standards do not protect the status of the overwhelmingly female Legal Writing faculty.

The ABA Commission on Women in the Profession has included Legal Writing in the category of a "pink ghetto."<sup>23</sup> A number of commentators have agreed that teaching Legal Writing is being treated as "women's work."<sup>24</sup> Here is a typical example:

The dramatic appearance of large numbers of women in contract legal writing positions suggests that a historically typical "women's job" pattern is emerging. . . . The lower pay and prestige of the contract legal writing slots, together with the low rate of hiring for traditional teaching positions, creates an impression that some schools "track" women into lower status legal writing jobs rather than into classroom or clinical work, pay them less

---

20. Sue Ellen Holbrook, *Women's Work: The Feminizing of Composition*, 9 RHETORIC REV. 201, 202 (1991).

21. NEWSLETTER OF THE AALS SECTION ON WOMEN IN LEGAL EDUCATION 5 (Nov. 1999).

22. ASSOCIATION OF AMERICAN LAW SCHOOLS, STATISTICAL REPORT ON LAW SCHOOL FACULTY AND CANDIDATES FOR LAW FACULTY POSITIONS, 1998-99, Tables 1A and 2A.

23. AMERICAN BAR ASSOCIATION, COMMISSION ON WOMEN IN THE PROFESSION, ELUSIVE EQUALITY: THE EXPERIENCES OF WOMEN IN LEGAL EDUCATION 32-33 (1996).

24. Pamela Edwards, *Teaching Legal Writing as Women's Work: Life on the Fringes of the Academy*, 4 CARDOZO WOMEN'S LAW J. 75 (1997).

than they are worth, and then let them go.<sup>25</sup>

And another:

Whereas we say "law professor" and "female law professor," "nurse" and "male nurse," the [legal writing] field has become so feminized that we are close to the point of saying "Legal Research and Writing instructor" and "male Legal Research and Writing instructor." . . . [I]t is not clear whether women are steered into Legal Research and Writing because it is low status, or it is low status because it is done by women.<sup>26</sup>

Even within the Legal Writing field, women are treated worse than men. Female Legal Writing faculty are tenure-tracked at half the rate that male Legal Writing faculty are.<sup>27</sup> Female Legal Writing faculty are also tenured at half the rate that male Legal Writing faculty are.<sup>28</sup> And female Legal Writing directors are titled "professor" only about two-thirds as often as male Legal Writing directors are.<sup>29</sup>

The consent decree does not forbid the ABA from considering salary levels in connection with allegations of discrimination, although the consent decree explicitly authorizes that only in regard to complaints about specific schools.<sup>30</sup> Discrimination spread throughout legal education could be addressed on the basis of school-by-school complaints. Or it could be addressed systemically through amendment to Standard 405(c). Our strong preference is for the latter. We offer the following to corroborate the

---

25. Richard H. Chused, *The Hiring and Retention of Minorities and Women on American Law Faculties*, 137 U. PA. L. REV. 537, 553-54 (1988).

26. Christine Haight Farley, *Confronting Expectations: Women in the Legal Academy*, 8 YALE J. LAW & FEMINISM 333, 353-54 (1996).

27. NEWSLETTER OF THE AALS SECTION ON WOMEN IN LEGAL EDUCATION 5 (Nov. 1999). According to results of the fall 1998 ABA annual questionnaire, 12% of female Legal Writing faculty were on tenure-track; 22% of males were. *Id.*

28. *Id.* According to results of the fall 1998 ABA annual questionnaire, 7% of female Legal Writing faculty were tenured; 16% of males were. *Id.*

29. ASSOCIATION OF LEGAL WRITING DIRECTORS & LEGAL WRITING INSTITUTE, 1999 SURVEY RESULTS V (57% of female directors; 80% of male directors).

30. Where a specific school is alleged to have discriminated in violation of the Standards, the ABA is permitted to "collect[] and consider[] compensation information that is relevant to the allegations of discrimination," although the ABA may not collect or consider compensation from schools not alleged to have discriminated. *United States v. American Bar Ass'n*, 934 F. Supp. 435, 436 (D.D.C. 1996).

discriminatory pattern outlined above: Female Legal Writing directors are paid less than male Legal Writing directors are, and Legal Writing faculty in programs directed by women are paid less than Legal Writing faculty in programs directed by men.<sup>31</sup> And it is inherently true that faculty who are off tenure track and lack 405(c) protections are paid less generally.

The pay gap can be shocking. Many of the members of our organizations, people with long experience in legal education and overwhelmingly female, are able to testify that their salaries are a fraction -- often *half or less* -- of the salaries paid to newly hired tenure-track faculty with no teaching experience who might have graduated from law school only a few years before.

These issues are not limited to fairness for Legal Writing faculty. When teaching is devalued the way Legal Writing has been, students, the bench, the bar, and the public suffer as well.

---

31. ASSOCIATION OF LEGAL WRITING DIRECTORS & LEGAL WRITING INSTITUTE, 1999 SURVEY RESULTS iv-v (1999). Reported female Legal Writing director salaries average 84% of reported male director salaries.

## RECOMMENDATIONS

### OVERVIEW

We offer two proposals. The first would amend Standard 405(c) and its Interpretations to extend their coverage to full-time Legal Writing faculty and directors, who at most schools are responsible for the only required skills-related course in the curriculum (Proposal 1, pages 14-16 below). The second, in the alternative, would amend Standard 405(d) to prohibit employment caps; it would also amend Standard 405(c) and its Interpretations to extend their coverage to Legal Writing directors, (Proposal 2, pages 16-19 below).

Proposal 2 will *not* solve the problems outlined in the Report above (pages 2-12). We offer it only to show how any alternative to Proposal 1 would be inadequate.

These recommendations are fully consistent with the flexibility desirable in accreditation. They would not require schools to employ Legal Writing faculty or even Legal Writing directors. If a school is able to teach the subject appropriately without full-time Legal Writing faculty, it would be perfectly free to do so. Some schools do not have directors, and that could continue. These recommendations would require only that if a school employs full-time Legal Writing faculty, the conditions of their employment be adequate to serve the interests of students, the profession, and the public.

## PROPOSAL 1

### INCLUDE FULL-TIME LEGAL WRITING FACULTY IN STANDARD 405(c)

Based on responses to the ABA's fall 1998 annual questionnaire, of the 508 Legal Writing faculty nationally, 66 are tenured or on tenure track, and 101 are being given 405(c) treatment by their schools, even though that is not required by the Standards.<sup>32</sup> Most, but not every one, of the remaining 341 people would be affected by this proposal. Of the 782 professional skills faculty (clinicians) identified through the same ABA annual questionnaire, 611 are tenured or on tenure track or have 405(c) treatment. The remaining 171 (22% of the total) have none of these protections.<sup>33</sup> (That 405(c) protections have eluded so many clinicians is startling, although that is not the point of our Report and Recommendations.)

Proposal 1 would change Standard 405(c) and its Interpretations in the following ways:

#### ***Standard 405(c)***

A law school shall afford to full-time clinical and legal writing faculty members a form of security of position reasonably similar to tenure, and non-compensatory perquisites reasonably similar to those provided other full-time faculty members. A law school may require these faculty members to meet standards and obligations reasonably similar to those required of other full-time faculty members. However, this Standard does not preclude a limited number of fixed, short-term appointments in a clinical or legal writing program predominantly staffed by full-time faculty members, or in an experimental program of limited duration.

#### ***Interpretation 405-6***

A form of security of position reasonably similar to tenure includes a separate tenure track or a renewable long-term contract.

---

32. NEWSLETTER OF THE AALS SECTION ON WOMEN IN LEGAL EDUCATION 5 (Nov. 1999).

33. *Id.*

Under a separate tenure track, a full-time clinical or legal writing faculty member, after a probationary period reasonably similar to that for other full-time faculty, may be granted tenure. After tenure is granted, the faculty member may be terminated only for good cause, including termination or material modification of the clinical or legal writing program.

A program of renewable long-term contracts should provide that, after a probationary period reasonably similar to that for other full-time faculty, the services of a faculty member in a clinical or legal writing program may be either terminated or continued by the granting of a long-term contract that shall thereafter be renewable. During the initial long-term contract or any renewal period, the contract may be terminated for good cause, including termination or material modification of the professional skills or legal writing program.

#### ***Interpretation 405-7***

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

#### ***Interpretation 405-8***

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

If these amendments are adopted, Standard 405(d) can be deleted.

## PROPOSAL 2

### IN THE ALTERNATIVE, ADD THE WORDS "AND RETAIN" TO 405(d) AND INCLUDE LEGAL WRITING DIRECTORS IN 405(c)

These measures would not solve the problems outlined in the Report above (pages 2-12). The numbers of schools that would be affected by Proposal 2 are simply too few to have a significant effect. We offer Proposal 2 only to illustrate the inadequacy of any relief other than Proposal 1.

#### A. Adding "and retain" to 405(d)

To prohibit employment caps that cripple Legal Writing programs, Standard 405(d) could be amended to include the words "and retain":

#### *Standard 405(d)*

Under Standard 405(a), law schools employing full-time legal writing ~~instructors or directors~~ teachers shall provide conditions sufficient to attract and retain well-qualified legal writing ~~instructors or directors~~ teachers.

Directors would be deleted from Standard 405(d) in line with Proposal 2(b) (below). The word *instructors* should be changed to *teachers*. An instructorship is a job title and an academic rank, and many Legal Writing teachers have other titles and ranks, a fair number of them including the word *professor*.

Twenty-five schools impose employment caps on legal writing teachers.<sup>34</sup> At several of those schools the question of abolishing the cap is under study.<sup>35</sup> At four of them, the

---

34. Jan M. Levine, *Legal Research and Writing Professors: Who We Are and Where We Teach*, 6 SCRIBES J. LEG. WRITING \_\_ (forthcoming 2000).

35. *Id.*

capped teachers are titled "fellows" and might or might not have genuine fellowships.<sup>36</sup>

Teaching expertise develops over time. In any subject, very few teachers are fully effective in their first or second year of teaching, and sustained superb levels of teaching are not usually reached before the third or fourth year. If one wanted to design failure into education, an employment cap -- which disposes of faculty as soon as they have learned to teach well -- is an excellent foundation.

For that reason, employment caps harm students, the legal profession, and the public, particularly in an era when lawyers and judges depend more than ever on the effectiveness of writing. As the ABA Sourcebook on Legal Writing Programs observes, "It is not in the students' best interest to be taught by people who spend their first year learning how to do the job and their second year looking for their next job. Students benefit the most by learning from experienced faculty who feel invested in the writing program and are committed to excellence in teaching Legal Writing."<sup>37</sup>

Law schools treat no other class of employees this way. No accredited law school can adopt a similar policy regarding clinicians. Assistant deans, development officers, librarians, placement officers, admissions directors, and academic support teachers are not asked to leave at the point where they reach a level of expertise. Nor are non-professional employees such as secretaries or janitors. There is no justification for some schools' singling out legal writing faculty and legal writing courses for this kind of treatment, particularly where it falls disparately on women and damages instruction in a field that the bench and the bar consider essential.

---

36. *Id.*

37. AMERICAN BAR ASSOCIATION, SOURCEBOOK ON LEGAL WRITING PROGRAMS 74-75 (1997).

## **B. Extending 405(c) to Legal Writing Directors**

This would affect the directors at only 44 schools.<sup>38</sup> Another 132 schools would be unaffected because their directors are already tenured or tenure-tracked or have 405(c) protection, or because they have no director.<sup>39</sup> The remaining six schools have situations unknown to us or situations too ambiguous to categorize.

Proposal 2 would change Standard 405(c) and its Interpretations in the following ways:

### ***Standard 405(c)***

A law school shall afford to full-time clinical faculty members and legal writing directors a form of security of position reasonably similar to tenure, and non-compensatory perquisites reasonably similar to those provided other full-time faculty members. A law school may require these faculty members and legal writing directors to meet standards and obligations reasonably similar to those required of other full-time faculty members. However, this Standard does not preclude a limited number of fixed, short-term appointments in a clinical program predominantly staffed by full-time faculty members, or in an experimental program of limited duration.

### ***Interpretation 405-6***

A form of security of position reasonably similar to tenure includes a separate tenure track or a renewable long-term contract. Under a separate tenure track, a full-time clinical faculty member or legal writing director, after a probationary period reasonably similar to that for other full-time faculty, may be granted tenure. After tenure is

---

38. The figures given in this paragraph and in footnote 39 are derived from a comparison of four databases: one generated by the ALWD/LWI 1999 annual survey; another to be reported at Jan M. Levine, *Legal Research and Writing Professors: Who We Are and Where We Teach*, 6 SCRIBES J. LEG. WRITING (forthcoming 2000); still another generated by Richard K. Neumann Jr. for a forthcoming article on sex discrimination in law faculty hiring and promotion; and, finally, the responses to the ABA annual questionnaire for fall 1998. The figures include status changes that will take effect in summer 2000.

39. Of the 68 directors who are tenured or tenure-tracked, 49 are career Legal Writing professionals, and the remaining 19 specialize elsewhere in the curriculum and direct part-time. Forty directors already have 405(c) treatment, and 24 schools have no director.

granted, the faculty member may be terminated only for good cause, including termination or material modification of the clinical or legal writing program.

A program of renewable long-term contracts should provide that, after a probationary period reasonably similar to that for other full-time faculty, the services of a faculty member in a clinical program or a legal writing director may be either terminated or continued by the granting of a long-term contract that shall thereafter be renewable. During the initial long-term contract or any renewal period, the contract may be terminated for good cause, including termination or material modification of the professional skills or legal writing program.

#### ***Interpretation 405-7***

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

#### ***Interpretation 405-8***

A law school shall afford to full-time clinical faculty members and legal writing directors an opportunity to participate in law school governance in a manner reasonably similar to other full-time faculty members. This Interpretation does not apply to those persons referred to in the last sentence of Standard 405(c).