

ALWD

ASSOCIATION OF LEGAL WRITING DIRECTORS

January 29, 2014

The Hon. Solomon Oliver, Jr., Council Chairperson,
Barry A. Currier, Managing Director of Accreditation and Legal Education
Section of Legal Education and Admissions to the Bar
American Bar Association
321 N. Clark Street, 21st Floor
Chicago, IL 60654-7958
via email to JR Clark, jr.clark@americanbar.org

Dear Chairman Oliver and Mr. Currier:

We are writing to address proposed Standards 205, 206, 303, and 405. We encourage you to review our comments, highlighting the disparate impact the proposals would have on women and minority faculty members in the academy.

Re: Proposed ABA Standards 205 and 206.

I. The Goals of Diversity and Inclusion in Legal Education for Faculty Require the Council to Acknowledge and Address the Longstanding Disparities in Security of Position and Academic Freedom for Women and Minorities in Legal Writing and Clinical Faculty Positions.

ALWD supports proposed new Standard 205(b), which continues the current requirement in Standard 211 that an accredited law school “foster and maintain equality of opportunity for students, faculty, and staff, without discrimination or segregation on the basis of race, color, religion, national origin, gender, sexual orientation, age or disability.” ALWD also supports proposed new Standard 206(b), which continues the current requirement in Standard 213 that an accredited law school, “[c]onsistent with sound educational policy and the Standards, . . . demonstrate by concrete action a commitment to diversity and inclusion by having a faculty and staff that are diverse with respect to gender, race and ethnicity.”

In ALWD’s previous oral and written testimony to the Standards Review Committee, we have carefully documented the existing gender and racial disparities among faculty who teach legal writing

and clinical courses.¹ These disparities undermine the stated goals of diversity, inclusion, and equal opportunity in Chapter 2 of the standards. Yet they have been expressly *permitted* by Standards 405(b), (c), and (d), which together allow accredited law schools to openly discriminate among full-time faculty members solely based on the nature of their teaching responsibilities.

As we documented in our written testimony to SRC in December 2011, more than two-thirds of full-time legal writing faculty members are women, while less than ten percent represent racial minorities.² These disparities are the direct result of the longstanding *de jure* classifications permitted by Standard 405 among legal writing, clinical, and traditional tenure-track substantive law faculty. On law faculties, as in many professions, similarly-credentialed women end up in lower-status, lower-security positions. Meanwhile, faculty of color hesitate to teach legal writing, or are actively discouraged from doing so because of the lower-status, lower-security nature of the positions. If the ABA believes that gender and racial integration are important, they are important for all fields. Current policies have turned legal writing into a field that is overwhelmingly white, and overwhelmingly female. It is difficult to believe that this result complies with the diversity standards.

ALWD has asked the Standards Review Committee to consider these negative effects of classifying faculty on the basis of their teaching responsibilities in conjunction with its review of the standards in Chapter 2 that embrace the federally-mandated goals of diversity and inclusion. Regrettably, our request was ignored. The Committee completed its work on the four alternative versions of Standard 405 and sent them to the Council for review long before it took up the diversity and equal opportunity standards in Chapter 2. By doing so, the Committee ignored the Council's regulatory mandate to review the accreditation standards *as a whole*, not just piecemeal.³ Because SRC failed to review the proposed revised standards as a whole, the Council has not only the legal responsibility to do so, but also the moral responsibility.

The Council has the ultimate responsibility of ensuring that all of the accreditation standards, as a whole, achieve the goals of diversity and inclusion – not only for students, but also for faculty, who serve as role models for our students. If the Council, as the accrediting body for legal education, ignores the disparities in diversity and equality of opportunity that Standard 405 has created, then new Standards 205(b) and 206(c) are at best empty promises, and at worst disingenuous.

¹ See Letter from ALWD to Standards Review Committee dated December 16, 2011, and attachments, available at http://www.americanbar.org/content/dam/aba/migrated/2011_build/legal_education/committees/standards_review_documents/20111220_comment_security_of_position_alwd.authcheckdam.pdf.

² *Id.* at 19-21.

³ 34 C.F.R. § 602.21(b)(3). "The agency determines the specific procedures it follows in evaluating its standards, but the agency must ensure that its program of review-- . . . (3) Examines each of the agency's standards *and the standards as a whole* . . ."

Re: Proposed Alternative Standard 303(a)(3)

II. Expanding Experiential Learning Requirements to 15 Credit Hours Advances the Goals of Ensuring that Graduates of ABA-Accredited Law Schools are Practice-Ready.

A. Proposed Standard 303(a)(3) should clarify that upper-level legal drafting courses qualify as experiential learning.

B. In the alternative, experiential course requirements in Standard 303(a)(3) should emphasize upper-level drafting and practice-oriented written communication skills as part of each experiential learning alternative.

The ABA Task Force on the Future of Legal Education has appropriately focused attention on the need to enhance the focus of legal education on practice-ready professional skills. The economics of law practice have dramatically changed, and legal education must evolve accordingly. If the United States is to continue as a global leader in legal education, accreditation standards must acknowledge the need for enhanced opportunities in professional skills, including legal writing, legal drafting, simulations, and live-client clinical courses. While on-the-job learning will continue to be necessary, recent changes in legal education demonstrate that law schools are capable of effectively preparing graduates for law practice.

ALWD supports expanding the number of credits required in experiential learning to a minimum of fifteen, which would be a very positive development in legal education. However, ALWD urges the Council to clarify the proposed definitions of experiential learning in Standard 304 that focus on simulations and externships. Both should clarify that written legal communication should be a required component of expanded experiential learning requirements. Indeed, the most recent 2010 ABA Curriculum Survey identified upper-level legal drafting courses as the category of greatest growth since the 2002 Survey.⁴ Student demand for these kinds of experiential learning courses has never been higher.

If the Council is serious about expanding experiential learning opportunities for law students, upper-level drafting courses should be included along with simulations, clinical courses, and field placements. Specifically, we urge the Council to revise the definition of “simulation” courses to explicitly include drafting courses.

⁴ Executive Summary, ABA, *A Survey of Law School Curricula: 2002-2010*, at 16 (“Transactional Drafting courses and upper division Legal Writing courses experienced the greatest growth in offerings.”), available at http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2012_survey_of_law_school_curricula_2002_2010_executive_summary.authcheckdam.pdf.

Re: Proposed ABA Standard 303

III. The Two Legal Writing Experiences Currently Required by Proposed Standard 303(a)(2) Will Not Meaningfully Contribute to Practice-Ready Graduates unless the Standards Continue to Specifically Require At Least Two *Rigorous* Writing Experiences.

For several years, ABA Standard 303 has required at least two “rigorous” writing experiences – one in the first year and the second after the first year.⁵ Interpretation 303-1 outlines the factors in evaluating whether a writing experience is sufficiently “rigorous” to meet the standard. Those factors include (1) the number and nature of writing projects assigned to students; (2) the form and extent of individualized assessment of student writing projects; and (3) the number of drafts a student must produce for each writing experience.

While SRC’s recommended revisions to Standard 303 would require a “rigorous” program of legal education, it would no longer expressly require that the two legal writing experiences be “rigorous.” ALWD strongly opposes elimination of the word “rigorous” in defining the nature of the two required writing experiences. The unintended consequence could be that the entire program of legal education might be considered sufficiently rigorous without requiring rigorous writing experiences.

SRC has retained the essence of the definition of rigorous in the Interpretation, but not the standard itself. Reinstating the word “rigorous” in Standard 303(a)(2) is essential to ensure that law schools do not reduce the minimum emphasis on rigorous writing instruction required by the current standards.

ALWD has previously communicated this concern to SRC, and we have been assured that the Committee did not intend to weaken the rigor of legal writing instruction currently required by the standards. If the word “rigorous” is not reinstated in the standard specific to legal writing instruction, some law schools will no doubt interpret the amendment to allow *less* rigor in legal writing instruction. That result would be directly contrary to the ABA’s focus on enhanced experiential and skills education.

Re: Proposed ABA Standard 405.

IV. Eliminating the Tenure Policy Requirement from the Current Standards Means that Faculty Members Who Are Most Able to Assist with Meaningful Curriculum Reform, Including Experiential Learning and Formative Assessment, Are the Most Vulnerable, and Therefore, are Less Able to Have a Meaningful Impact on Improving the Teaching of Skills in Legal Education.

ALWD strongly opposes any alternative to current Standard 405 that would eliminate tenure as an accreditation requirement. SRC proposed four alternative variations to the current standard, but the Council has formally published only two of them for Notice and Comment. To the legal academy, the

⁵ ABA Standard 302(a)(3) (2013-14).

failure to invite comments on the other two proposals suggests that the Council has all but decided a momentous policy decision – to eliminate the longstanding tradition of tenure – *before* anyone has had an opportunity to formally respond to that proposal. That decision reflects poorly on the appropriate, lawyerly process for inviting public comment on proposed changes to the accreditation standards.

ALWD has previously endorsed subsection (d) of SRC’s proposed Alternative C, which would expressly preclude discrimination among full-time faculty based on teaching specialty.⁶ That is the only one of the four SRC alternatives that would eliminate the caste system⁷ in legal education. In contrast, both alternatives the Council published for notice and comment would eliminate tenure as an accreditation requirement, and would have the effect of ossifying the discriminatory effects of current Standard 405. While eliminating tenure for all may superficially eliminate distinctions among full-time faculty members, it would certainly not have that effect. The elimination of tenure cannot address the discriminatory effects of the past, because those faculty members who have already enjoyed the benefits of tenure (overwhelmingly teachers of substantive law courses) will retain them, while faculty members who teach skills courses, and who are therefore in the best position to facilitate meaningful reform in legal education, will never be able to achieve equality.

If tenure is eliminated as an accreditation requirement, faculty members who already have tenure (mostly men and substantive law faculty) are least likely to lose it. For that reason, eliminating tenure for those who have never had an opportunity to achieve it – by virtue of current Standard 405(b), (c), and (d) – virtually guarantees entrenchment of those faculty members who are *least likely* to facilitate the reforms that the ABA Task Force has envisioned for legal education.

ALWD does not support the current version of Standard 405. The current standard has created and fostered retention of academic hierarchies that are inconsistent with the goals of gender and racial equality long championed by the ABA. As explained above, current Standard 405 ossifies academic status hierarchies and implicitly endorses *de facto* gender and racial segregation in the academy. The Council has the opportunity to address this longstanding inequity in legal education. After years of overseeing the comprehensive review process, it is up to the Council to set the right course by eliminating all forms of discrimination in ABA-accredited law schools, root and branch.

Gender and racial hierarchies in legal education are inconsistent with ABA accreditation standards that have always required gender and racial equality of opportunity for law school faculty, as

⁶ See Alternative C to Standard 405, July 13, 2013 SRC Meeting Materials, *available at* http://www.americanbar.org/content/dam/aba/migrated/2011_build/legal_education/committees/standards_review_documents/july_2013_meeting/201307_src_meeting_materials.authcheckdam.pdf (“(d) . . . A law school shall accord all of its full-time faculty members the same rights with respect to security of position, participation in law school governance, and other rights or privileges of full-time faculty membership, irrespective of a full-time faculty member’s academic field or teaching methodology.”)

⁷ See Kent D. Syverud, *The Caste System and Best Practices in Legal Education*, 1 J. ALWD 12, 13 (2002). “In . . . American Legal Education, caste was calcified and embodied . . . 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.” *Id.*

required by federal higher education law. Standard 405, as currently written, imposes constructive barriers to race and gender equality in the academy. With respect to legal writing faculty positions, the terms and conditions of employment are so discriminatory as a result of Standard 405(d) that people of color are actively *discouraged* from applying for legal writing positions because these positions lack the potential for tenure, and because of the stigmatizing effect of holding non-tenured positions with unequal security of position, research support, salary, and governance rights.

In summary, ALWD endorses the written comments pertaining to Standard 405 dated September 27, 2013, by the Society of American Law Teachers (SALT).⁸ ALWD also supports the provisions of all four alternatives to Standard 405 that guarantee an equal voice for all full-time faculty in law school governance.

Of the two alternatives to Standard 405 the Council has published for notice and comment, Alternative 1 is the lesser of the two evils because it at least requires some form of security of position for full-time faculty members. Any further revision of this Alternative should re-introduce at least an interpretation that clarifies the type of security that is contemplated by the Standard. However, ALWD cannot endorse any proposed standard that eliminates tenure as an accreditation requirement.

We have attached to these written comments the exhibits ALWD submitted to SRC in late 2011 along with our written and oral testimony. We respectfully ask for your careful consideration of these exhibits as you deliberate on the proper course for the future of legal education in the United States.

Thank you for your attention; we are glad to answer any questions you may have about these concerns.

Very truly yours,


Kathleen Elliott Vinson
ALWD President


Anthony Niedwiecki
ALWD Immediate Past President


Mary-Beth Moylan
ALWD President-Elect

⁸ Letter from SALT to ABA Council, Section of Legal Education and Admissions to the Bar, Sept. 27, 2013, *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/comments/201309_comment_ch_4_salt.authcheckdam.pdf.