The Problem with ABA Standard 405(c)

Kathryn Stanchi

I find myself in a difficult position, having been tasked with commenting on a "best practices" model for ABA Standard 405(c).[1] I believe Professor Melissa Weresh's guidelines,[2] as well-thought-out and well-meaning as they are, give Standard 405(c) a dignity and legitimacy it doesn't deserve. Standard 405(c) is a pale substitute for tenure and a damaging double standard. And, as a practical matter, the power to administer Standard 405(c)—and implement these "best practices"—will likely be in the hands of those who fought what little security it gives. The sad truth is that Standard 405(c), at least as it is currently implemented, can't be fixed.

Of course, I understand the practical reasons that clinicians and legal writing faculty would accept or even fight for Standard 405(c), and I certainly don't blame us for grabbing it. After years of job insecurity, intellectual disparagement, and pay inequity, Standard 405(c) looks not too bad.

But this essay takes the position that clinicians and legal writing faculty deserve better than "not too bad." Standard 405(c) needs to be called out for what it is: an institutionalized bar to professional advancement divorced from any reasonable measure of merit.

If all law faculty members, regardless of subject matter taught, were hired on the same track, whether tenure or Standard 405(c), that would be different. Or if all faculty members, regardless of subject taught, were given the option of tenure or Standard 405(c), that would be different. Or if all law faculty members were hired on Standard 405(c) with tenure awarded to the most accomplished and productive, the standard would at least have some claim to surface fairness. But this isn't how Standard 405(c) currently works. Instead, Standard 405(c) singles out certain faculty for lesser status based purely on what subject they teach. It enshrines the discriminatory notion that, regardless

Kathryn Stanchi is the Jack E. Feinberg '57 Professor of Litigation at Temple University's Beasley School of Law. She expresses many thanks to Sarah Katz, Ellie Margolis, and Kristen Murray for insightful edits on prior drafts. Sara Mohamed provided excellent research help.

1. Section on Legal Educ. and Admissions to the Bar, Am. Bar Ass'n, ABA Standards and Rules of Procedure for Approval of Law Schools 2016–2017, at 29 (2016).

2. *Best Practices for Protecting Security of Position for 405(c) Faculty*, 66 J. Legal Educ. 538 (2017).

of merit or accomplishment, "your kind" can go only so far. This kind of categorical double standard is not defensible.

Suppressing Growth and Potential

Like many categorically biased rules, Standard 405(c) is irrational. It artificially suppresses the growth and potential of certain faculty by discouraging them from behavior that might enhance their teaching and the reputations of their institutions. Standard 405(c) categorically excludes clinical and legal writing faculty from tenure, regardless of meritorious performance. Regardless of how much they publish, how well they teach, or how laudatory their service to the institution, they do not get tenure. Standard 405(c) brands clinicians and legal writing faculty as "other" and "lesser"—and as with most branding and categorization it is persistent. Standard 405(c)'s branding, therefore, discourages upward movement and embeds the existing hierarchy. Although psychologists may disagree about the value of status hierarchies within an institution, there is no support for hierarchies that "do *not* reward based on performance."[3]

Under Standard 405(c), clinicians and legal writing faculty do not even get to compete for tenure. This institutionalized bar on advancement is based not on merit but on a broad categorization. Although, as noted below, this ceiling on advancement can inhibit excellence in all aspects of the academic job, it likely has the greatest inhibitory effect on scholarly production. Scholarship is time-consuming and difficult, particularly for clinicians and legal writing faculty, whose teaching duties are labor- and time-intensive. Standard 405(c) does not offer the kind of institutional reward required for the production of scholarship, especially with the teaching loads of most clinicians and legal writing faculty. Moreover, Standard 405(c) gives law schools an explicit reason not to support clinical and legal writing scholarship. In addition, Standard 405(c) doesn't offer nearly the same employment protection as tenure for faculty who wish to say something provocative or controversial.

This is particularly illogical as scholarship is considered to be the faculty responsibility most connected to the prestige and reputation of the institution. Why wouldn't we want a system where all players had the incentive to produce the most rigorous, original or analytically cogent work? But under Standard 405(c), that is not what we have.

Clinicians and legal writing faculty cannot even compete fairly with our peers. As with most discriminatory practices, Standard 405(c) raises the question of why, given our obvious inferiority, everyone is afraid to let us compete. Why the need to legislate our second-class status if it is a given? The answer is that at some point it was decided, without a shred of support, that legal writing and clinics were not as rigorous, intellectually challenging, or valuable as other subjects. And so a vicious hierarchical cycle began.

3. Jeffrey Pfeffer & Nancy Langton, *The Effect of Wage Dispersion on Satisfaction, Productivity, and Working Collaboratively: Evidence from College and University Faculty*, 38 Admin. Sci. Q. 382, 388 (1993) (discussing wage dispersion among faculty in the academy) (emphasis in original).

The Category Problem

Standard 405(c) is reserved for clinical teachers and some legal writing faculty. Thus, at the outset, a determination is being made that certain subjects are less worthy of tenure, categorically. Faculty who teach "substantive" subjects[4] are presumed to deserve tenure; clinicians and legal writing faculty are presumed not to deserve it.

In reality, of course, as with all categorical thinking, Standard 405(c) is both under- and over-inclusive. Many clinicians and legal writing faculty—including those who continue to be excluded from tenure—have proved themselves, against all odds, to have met or exceeded the standards for tenure.[5] And many faculty members who teach "substantive" courses—despite every advantage—have proved themselves to be substandard or unproductive scholars, poor teachers, or both. I think some, perhaps many, clinicians and legal writing faculty have something to say that is worth listening to. And some tenure-track or tenured faculty may not. Isn't the better system the one that divides people based on what they have to say, not one that assumes that one group does have something to say and the other group, categorically, does not?

Of course, all categorical thinking, based as it is on heuristic thinking, is susceptible to this criticism. That doesn't necessarily make it a bad thing. The mental shortcut that categories provide is necessary to keep the world from being overwhelmingly complicated. But here, the categorical thinking fosters harmful stereotypes by treating a class of people differently for arbitrary reasons.

The categorical thinking underlying Standard 405(c) makes no institutional sense. Because Standard 405(c) suppresses advancement for certain groups, the academy is depriving itself of potential excellence.[6] Empirically, there is

4. The logic of this distinction has always eluded me. Apparently, I'm not alone in my confusion. Hence the scare quotes. *See generally* Linda H. Edwards, *Legal Writing: A Doctrinal Course*, 1 Savannah L. Rev. 1 (2014); Linda H. Edwards, *The Trouble with Categories*: *What Theory Can Teach Us about the Doctrine-Skills Divide*, 64 J. Legal Educ. 181 (2014).

5. Despite the lack of support and encouragement fostered by the double standard of Standard 405(c), many clinicians and legal writing faculty have refused to be silenced and are busy developing and expanding their scholarly voices. This scholarship runs the gamut from theoretical to practical, and covers diverse subjects including pedagogy and beyond. *See, e.g.,* Terrill Pollman & Linda H. Edwards, *Scholarship by Legal Writing Professors: New Voices in the Legal Academy,* 11 Legal Writing: J. Legal Writing Inst. 3 (2005); Linda L. Berger et al., *The Past, Presence, and Future of Legal Writing Scholarship: Rhetoric, Voice, and Community,* 16 Legal Writing: J. Legal Writing Inst. 521 (2010); Elizabeth Mertz, The Language of Law School: Learning to "Think Like a Lawyer" 27 (2007) ("some of the most innovative ideas about improving law teaching can be found in the scholarship of clinical and legal writing law professors."). In part, this is due to supportive entities like the Association of Legal Writing Directors, which provide scholarship support to those faculty denied it by their own institutions, and the *Clinical Law Review*, which provides a peer-edited outlet for clinical scholarship.

6. *See* Cameron Anderson & Courtney E. Brown, *The Functions and Dysfunctions of Hierarchy*, 30 Res. Org. Behav. 55, 76 (2010) (when lower-ranked people in a status hierarchy feel they are treated unfairly, they lose motivation to contribute and become less productive).

no question that arbitrary hierarchies (those unrelated to performance) inhibit productivity.[7] The opportunity to fairly compete might not only inspire clinicians and legal writing faculty to excel, but might spur other faculty to be better as well.[8]

The argument that clinical and legal writing faculty are hired based on "different" criteria only supports my point that Standard 405(c) enshrines and supports an arbitrary and categorical distinction. First, it presumes that different hiring criteria are appropriate, which I'm not sure is true. I think law schools, especially in these difficult times, should be seriously rethinking their standard hiring criteria to get a little more diversity of all kinds in our institutions (experiential diversity; educational diversity; and racial, class, and gender diversity). But more important, the "different criteria" argument is really a "lesser merit criteria" argument. It is another (perhaps politer) way of saying certain subjects are not as worthy and the people who teach them are not as excellent. This is logically fallacious. Beyond that, it is simply wrong to treat other human beings in such a disparaging and dismissive way.

Clinicians and legal writing faculty have much of value to impart to our institutions—in their scholarship, in teaching, in their connections to the practicing bar. And I believe that, especially in these times, when law schools are increasingly called upon to connect with the practicing bar, we need to expand our view of what good scholarship is. But Standard 405(c) allows us to remain stagnant, doing things just as we have always done.

But while the institutional cost of Standard 405(c) is worth noting, it isn't what makes Standard 405(c) such an embarrassment. Making broad categorical judgments about human beings—and their value—should be something we do only in rare instances because of the risk of bias and damage. We should interrogate ourselves carefully when we are tempted to do this to make sure that it is a moral choice free from discriminatory effect. While it may be easier to generalize about people, lazy thinking is simply never a good enough reason to discriminate.

Similarly, institutional autonomy, a rationale frequently raised against ABA rules about treatment of faculty status, is not a persuasive argument in favor of Standard 405(c).[9] We should be honest with ourselves about what this autonomy really entails: the freedom to institutionalize a discriminatory hierarchy. Opponents of the 1964 Civil Rights Act made similar arguments about that bill's potentially devastating effect on the freedom of private

7. *See, e.g.*, Pfeffer & Langton, *supra* note 3, at 396 (wage dispersion negatively affects faculty productivity).

8. *See, e.g.*, *id.* at 387 (tying job wages to productivity serves as an incentive for all employees to work harder).

9. *See* Peter A. Joy & Robert R. Kuehn, *The Evolution of ABA Standards for Clinical Faculty*, 75 Tenn. L. Rev. 183, 197 (2008).

businesses.[10] The argument here is similar, and the answer should be the same. There is, or should be, no freedom to discriminate.

The Human Costs

The human cost of Standard 405(c) is real and harmful. When they are arbitrary or discriminatory, status hierarchies exact a serious toll on those upon whom they are imposed.[11] Institutionalizing status also tends to be a self-fulfilling prophecy, making movement from lower to higher ranks exceptionally difficult.[12] As one study put it:

> [O]nce a hierarchy gets established, a number of organizational and psychological processes conspire to create different degrees of opportunity to . . . acquire more power and status for individuals and groups at different levels of the hierarchy . . . . [T]hese processes affect all members of the hierarchy in ways that perpetuate the established order.[13]

For example, when a faculty member is hired on the tenure track, he is hired with the strong presumption that he will succeed. It is almost unheard of that he would be "demoted" to Standard 405(c) status. The difference this makes on a human level cannot be overstated; it simply feels different (and better) to be hired with the enthusiasm and energy of that presumption of achievement. The confirmation bias attending this is also real.[14] The presumption of success means work—both scholarship and teaching—is viewed through that lens, by other faculty, by students, and by others. It gives a faculty member the real support of colleagues and the confidence to succeed. That usually translates into more productivity and investment in the institution. I'm not saying that tenure-track faculty do not deserve this presumption, but rather that all faculty deserve it. And that our institutions and students deserve the kind of camaraderie and work that is encouraged by this presumption.

The opposite occurs for those hired on the "lesser" track of Standard 405(c). The performance of those in the lower ranks will be viewed through the lens of their inferior status. What scholarship is produced will likely be viewed skeptically and critically—confirmation bias is at work here as well. Students

10. *See generally* Todd S. Purdum, An Idea Whose Time Has Come: Two Parties, Two Presidents and the Battle for the Civil Rights Act of 1964 (2014); Donald T. Critchlow & Nancy MacLean, Debating the American Conservative Movement: 1945 to the Present 26–27 (2009) (outlining Barry Goldwater's objections to the Civil Rights bill).

11. Across the board, empirical studies have shown that hierarchical structures led to lower satisfaction and morale and higher stress and anxiety. Anderson & Brown, *supra* note 6, at 64. The evidence of this is "robust." *Id.*; *see also* Pfeffer & Langton, *supra* note 3, at 398, 402 (study of faculty wage disparity predicted lower productivity and lesser satisfaction).

12. Joe C. Magee & Adam D. Galinsky, *Social Hierarchy: The Self-Reinforcing Nature of Power and Status*, 2 Acad. Mgmt. Annals 351, 365 (2008).

13. *Id.*

14. Indeed, research shows that people tend to *overestimate* the skills and abilities of those at the top of the hierarchical structure. Anderson & Brown, *supra* note 6, at 67.

also absorb the message. Since students run the law reviews, clinicians and legal writing faculty likely won't get a fair hearing from the highest-ranked law reviews. As a result, the skeptical views created by the hierarchy will be reinforced. In the classroom, students will tend not to give the benefit of the doubt and may even be disrespectful or challenging, leading to poor evaluations and yet more "objective" evidence that inferior status is deserved. Again, this is so damaging on a human level, but also so damaging to the institution and its students.

Standard 405(c) also has serious emotional costs. It institutionally entrenches a group of people as "less than" their colleagues. This constant reminder that the workplace has decided that certain faculty aren't as good, and never will be, damages self-conception. Faculty members on this track may begin to believe that they are less valuable. They may begin to believe they have nothing worth writing in scholarship, so they don't try.[15] They may not speak up at faculty meetings or committee meetings because they question the worth of their input.[16] This is a real problem with entrenched hierarchies.[17] And it robs the institution of so much valuable input while also robbing the employees of their dignity and self-respect.

The discriminatory aspect of this hierarchy is even more troubling when we consider its intersection with race and gender, topics covered ably in other essays by my colleagues Mel Weresh, Kristen Tiscione, Ann McGinley, and Teri McMurtry-Chubb. Indeed, given what we know about the gender and race composition of law faculties, upon close inspection it gets harder and harder to justify that "different hiring criteria" argument. Professors Weresh, McGinley and McMurtry-Chubb make clear that Standard 405(c) takes advantage of and perpetuates the structural sexism and racism of our society. This should make us very, very uncomfortable.

Standard 405(c) is also damaging to those at the top of the hierarchy.[18] Power "fundamentally transforms how an individual construes and approaches the

15. *Id.* at 66 (aggregating studies showing hierarchy suppressed input by low-ranking group members and overvalued input by higher-ranking group members); *id.* at 76 (lower rank reduces self-perception and makes people feel they have less to contribute) (aggregating studies).

16. Studies have "consistently shown" that lower-ranked employees stay silent instead of raising important issues. Psychologists describe what they call "paranoid social cognition" among those in the lower ranks of an organizational hierarchy. This is evidenced by anxiety, mistrust, and suspiciousness, especially of those in the higher ranks. The result is a reluctance to communicate. *Id.* at 78.

17. Magee & Galinsky, *supra* note 12, at 370–71. In a study of interactions between tenured and untenured faculty, tenured professors were less accurate in assessing and interpreting the comments of their untenured colleagues (citing Dacher Keltner & Robert J. Robinson, *Defending the Status Quo: Power and Bias in Social Conflict,* 23 Personality & Soc. Psychol. Bull. 1066, 1075–76 (1997)).

18. Anderson & Brown, *supra* note 6, at 74 ("giving individuals power can make them less accurate in perceiving others and more likely to rely on stereotypes" and biased thinking when judging others) (citing studies).

world." Specifically, those in the higher ranks are more likely to view those in the lower ranks less as individuals and more in terms of group characteristics or stereotypes.[19] This is not to say that tenured faculty are bad people or bigoted, but that we are all human.[20] And hierarchy, especially if based on categorical structures, is "sneaky." It affects our worldview in many ways without our even realizing it.[21] It changes our mind-sets in ways that I think all of us can agree is not anything to aspire to.

Standard 405(c) also makes intrastatus friendships and collaboration difficult.[22] It creates a system in which tenured faculty, however well-intentioned or kind, may treat contract faculty differently. I confess that I have been guilty of this on occasion myself since I've received tenure. It is just so hard not to when you are at meetings others cannot attend or privy to decision-making that others are not part of.

The bottom line is that Standard 405(c) fosters exclusionary thinking. People may say hurtful things and not even notice that the statements are inappropriate.[23] For example, I have seen well-meaning tenured faculty simply forget that clinicians or legal writing faculty are faculty and thus not include them when speaking about what faculty do or teach. Or leave them out of email discussions. I don't think this is malicious. It is just the natural human result of the divisiveness created by a status hierarchy like Standard 405(c).

Conclusion

For all these reasons, I think Standard 405(c) as it is currently implemented is a very flawed rule, damaging to law schools, students, and all faculty, tenured and nontenured. We simply shouldn't have a faculty hierarchy based on generalizations and stereotypes. We especially shouldn't have such a thing if there is any chance that such a hierarchy reinforces or takes advantage of structural racism or patriarchy.

I recognize that status evolution is a gradual process starting with small steps. And I laud Professor Weresh for a thoughtful and commendable step

19. Magee & Galinsky, *supra* note 12, at 370–71.

20. Indeed, many tenured law professors are not only wonderful people, but committed to social justice and eradicating discrimination. In some ways, this can exacerbate the problems created by Standard 405(c)—if we are committed to social justice and are confronted with a discriminatory status hierarchy, we might be more likely to look for justifications to legitimatize that hierarchy so we can live with ourselves. *See, e.g.,* Eddie Harmon-Jones, *A Cognitive Dissonance Theory Perspective on Persuasion*, *in* The Persuasion Handbook: Developments in Theory and Practice 99, 102–03 (James Price Dillard & Michael Pfau eds., 2002); Kathleen Kelley Reardon, Persuasion: Theory and Context 68–69 (1981).

21. Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 Stan. L. Rev. 1161, 1188 (1995).

22. *See* Anderson & Brown, *supra* note 6, at 57, 77-78; Pfeffer & Langton, *supra* note 3, at 382, 388 (wage dispersion negatively affects cooperation and collaboration).

23. Anderson & Brown, *supra* note 6, at 74 (people in higher-ranking positions less likely to be polite and more likely to violate social norms).

forward. But even with a "best practices" document, I cannot defend ABA Standard 405(c) the way it is implemented now. I think we can, and should, do better.