

“*Best Practices*”:¹ A Giant Step Toward Ensuring Compliance with ABA Standard 405(c), a Small Yet Important Step Toward Addressing Gender Discrimination in the Legal Academy

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In March 2014, the American Bar Association (ABA) voted to leave Accreditation Standard 405 undisturbed.² The ABA’s decision required law schools to continue to grant tenure to traditional law faculty, yet permitted them to continue to deny tenure to clinical and legal writing faculty.³ At the same time, recognizing the need for increased professional skills training, the

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1. See Melissa H. Weresh, *Best Practices for Protecting Security of Position for 405(c) Faculty*, 66 J. LEG. EDUC. 538 (2017) [hereinafter Weresh, *Best Practices*].
2. See Karen Sloan, *ABA Council Abandons Bid to Drop Tenure Requirement*, NAT’L L.J., Mar. 17, 2014, at 3.
3. SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, AM. BAR ASS’N, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS, 2015-2016, § 405(c)-(d) at 29 (2015) [hereinafter 2015 STANDARDS AND RULES]. Standard 405(c) reads:
 A law school shall afford to full-time clinical 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 program predominantly staffed by full-time faculty members, or in an experimental program of limited duration.
 Standard 405(d) requires law schools to “afford legal writing teachers such security of position and other rights and privileges of faculty membership as may be necessary to (1) attract and retain a faculty that is well qualified to provide legal writing instruction . . . and (2) safeguard academic freedom.” *Id.*

ABA voted to increase the number of experiential credits law students must complete from one to six.⁴ As explained to the ABA Council in advance, these two decisions work together to increase the demands on skills faculty, who are predominantly female, yet keep them at a lower professional status with less security of position.⁵ And it is not clear that law schools are hiring additional, full-time skills faculty to meet these demands.

During the six years of review and debate that led to the 2014 vote, the Society of American Law Teachers (SALT)⁶ and the Association of Legal Writing Directors (ALWD)⁷ urged the ABA Council to continue to require tenure to ensure academic freedom.⁸ Along with the Clinical Legal Education Association (CLEA),⁹ they further urged the Council to adopt a standard that would not discriminate against full-time faculty on the basis of subject matter.¹⁰

4. *Id.* Standard 303(a)(3) at 16. Experiential courses include simulation courses, law clinics, and field placements. *Id.*
5. *See, e.g.*, Letter from Kathleen Elliott Vinson, President, Am. Ass’n of Legal Writing Dirs., et al., to Solomon Oliver, Jr., Council Chairperson, Section of Legal Educ. and Admissions to the Bar, Am. Bar Ass’n, on Proposed Standards 205, 206, 303, and 405, at 1 (Jan. 29, 2014) <http://www.alwd.org/wp-content/uploads/2014/02/ALWDABA-Letter12914.pdf> [https://perma.cc/36HN-YYZ4] (“highlighting the disparate impact the proposals would have on women and minority faculty in the academy”) [hereinafter ALWD Letter on Proposed Changes]; Memorandum from Richard K. Neumann, Jr., Professor, Hofstra Univ. Maurice A. Dean Sch. of Law, & J. Lyn Entrikin, Professor, Univ. of Ark. at Little Rock, William H. Bowen Sch. of Law, to Council of the Am. Bar Ass’n. Section of Legal Educ. and Admissions to the Bar, on Standard 405 (Notice and Comment) 15 (Jan. 30, 2014) <http://www.alwd.org/wp-content/uploads/2014/02/Standard-405-Neumann-Entrikin.pdf> [https://perma.cc/5P77-FJGL] (noting the “enhanced and expanded skills teaching required by the proposed revisions to Chapter 3 would be done by the very law teachers against whom ABA-accredited law schools are currently permitted to discriminate: clinicians and legal writing professors”).
6. For information about SALT, *see* <https://www.saltlaw.org/>.
7. For information about ALWD, *see* <http://www.alwd.org/>.
8. *See, e.g.*, ALWD Letter on Proposed Changes, *supra* note 5, at 4 (“strongly oppos[ing] any alternative to Standard 405 that would eliminate tenure as an accreditation requirement”); Soc’y of Am. Law Teachers, April 24, 2013 SALT Statement on Standards 405 & 315, at 1 http://www.americanbar.org/content/dam/aba/migrated/2011_build/legal_education/committees/standards_review_documents/20130425_comment_multiple_topics_salt_authcheckdam.pdf [https://perma.cc/P9D9-GLXT] (acknowledging that “only a tenure system can adequately protect faculty rights to academic freedom and full participation in governance”) [hereinafter SALT Statement on Standards]. All comments on the ABA’s proposed changes to Standard 405 are available at Comments, Am. B. Ass’n, http://www.americanbar.org/groups/legal_education/committees/standards_review/comp_review_archive/comments.html (last visited Nov. 21, 2016).
9. For information about CLEA, *see* <http://www.cleaweb.org/>.
10. ALWD Letter on Proposed Changes, *supra* note 5, at 5 (explaining that retaining tenure for doctrinal faculty only would “ossif[y] academic status hierarchies and endorse[] *de facto* gender and racial discrimination in the academy”); Clinical Legal Educ. Ass’n, Comment . . . on the Importance of Faculty Security of Position to Clinical Legal Education 1 (June 24, 2013) http://www.americanbar.org/content/dam/aba/migrated/2011_build/legal_education/committees/standards_review_documents/20130625_comment_security_position_clea.

The only proposal the Standards Review Committee made that came close to the joint recommendations was Alternative C. Although it did not require tenure, Alternative C proposed that law schools accord all full-time faculty members the same rights as other full-time faculty “irrespective of a full-time faculty member’s academic field or teaching methodology.”¹¹ The Council rejected Alternative C and chose not to publish it for notice and comment.¹²

Regrettably, the long and tortured history of Standard 405 suggests that the vision of equal opportunity for all law faculty—traditional, clinical, legal writing, academic support, and teaching librarians—is not going to be realized anytime soon.¹³ The highest and best security of position most professional skills faculty can likely hope for in the near future is that embodied in current Standard 405(c).¹⁴ Thus, law schools’ adherence to established best practices is necessary if “reasonably similar to tenure” is to mean something for those who struggle to and ultimately achieve 405(c) status.

Within a year of the ABA’s decision, several legal writing faculty members with 405(c) status had already experienced or were beginning to experience significant problems with their contract renewals. Whether because of a downturn in student applications or other financial strain, law schools had begun (once again) to violate the letter and spirit of 405(c).¹⁵ As these events unfolded, some legal writing faculty began to report them to individual members of the Board of Directors of the Legal Writing Institute (LWI), the second-largest organization of law professors in the United States, with nearly 3,000 members in thirty-eight countries. In response, LWI formed a Professional Status Committee to act as a resource for employment or

authcheckdam.pdf [https://perma.cc/NA8D-TRSY] (opposing any change that allowed law schools “to consign some faculty members to at-will employment while preserving tenure for others”); SALT Statement on Standards, *supra* note 8, at 2 (arguing that “making artificial distinctions between doctrinal, clinical and legal writing faculty undermines the legal education mission”).

11. *Standards Review Committee Meeting Materials*, AM. BAR. ASS’N 90 (July 13, 2013), http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards_review/201307_src_meeting_materials.authcheckdam.pdf [https://perma.cc/XX76-UNJK].
12. See Memorandum from Solomon Oliver, Jr., Council Chairperson, Section of Legal Educ. and Admissions to the Bar, Am. Bar Ass’n, to Interested Persons and Entities, Comprehensive Review of the ABA Standards for Approval of Law School Matters for Notice and Comment 57 (Sept. 6, 2013), http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/20130906_notice_comment_chs_1_3_4_s203b_s603d.authcheckdam.pdf [https://perma.cc/G6JU-7GGS].
13. See, e.g., Peter A. Joy & Robert R. Kuehn, *The Evolution of ABA Standards for Clinical Faculty*, 75 TENN. L. REV. 183 (2008); Weresh, *Best Practices*, *supra* note 1, at 539-41.
14. Although some law schools accord professional skills faculty a security of position in excess of that required by Standard 405, most do not. See *infra* notes 32 and 35.
15. See *infra* page 570 and accompanying notes 24-26.

professional development issues and gather information about status issues and challenges facing its membership.¹⁶

Having spoken directly with these faculty, LWI is now aware of at least several cases across the country in which legal writing faculty with long-term, presumptively renewable contracts have been terminated without notice, explanation, or an opportunity to be heard.¹⁷ Their positions have not been filled, and often the legal writing faculty who remain are required to teach more students without additional compensation. In other cases, schools have threatened to replace full-time legal writing faculty with adjuncts or to restrict or eliminate their current voting rights. Quite recently, one school demanded that its clinical and legal writing faculty sign new contracts requiring—for the first time—two reviews within a five-year period and making contract renewal contingent on a positive formal evaluation. The faculty were told that if they failed to sign these contracts, they would stop receiving their paychecks.

As Weresh points out in *Best Practices*, this is not the first time law schools have played fast and loose with Standard 405(c). In 2004, CLEA reported that many law schools were “reducing the plain meaning of the words ‘reasonably similar’ in Standard 405 to something quite unlike the treatment of other faculty.”¹⁸ In some cases, clinical faculty were being terminated without any showing of good cause,¹⁹ and in other cases, law schools were exploiting the fact that 405(c) permits “a limited number of fixed, short-term appointments.”²⁰ Law schools were “continuing faculty on one-year contracts for as many as fifteen to twenty years and claiming that the clinical faculty fit the exception of being ‘fixed, short-term appointments.’”²¹

Then the ABA construed 405(c) to permit at-will contracts for clinical faculty “as long as the law school has some process in place to protect academic freedom.”²² Interpretation 405-6 states that “reasonably similar to tenure”

16. See *LWI Professional Status Committee*, LEGAL WRITING INST., http://lwionline.org/LWI_Professional_Status_Committee.html [<https://perma.cc/H7EJ-NC46>] (last visited Nov. 21, 2016).

17. Faculty who report these problems to LWI insist on remaining anonymous to protect themselves or their colleagues. The author is co-chair of the Professional Status Committee and has direct knowledge of these cases.

18. *Proposed Changes to Chapter 4 of the ABA Standards for Approval of Law Schools*, CLINICAL LEGAL EDUC. ASS’N 1 (Aug. 2004), <http://www.cleaweb.org/Resources/Documents/2004-08%20comments%20on%20proposed%20changes%20to%20Chp%204.pdf> [<https://perma.cc/NV78-KDCL>] [hereinafter CLEA, *Proposed Changes to Chapter 4*].

19. See *id.*

20. 2015 STANDARDS AND RULES, *supra* note 3, at 29.

21. CLEA, *Proposed Changes to Chapter 4*, *supra* note 18, at 4.

22. *Clinical Legal Education Association’s (CLEA) Historical Background on Clinical Faculty Accreditation Standards*, CLINICAL LEGAL EDUC. ASS’N 4 (June 2010), <http://www.cleaweb.org/Resources/Documents/CLEA%20History%20of%20405c%20Comments%20to%20ABA%20Stds%20Review.pdf> [<https://perma.cc/NH2D-ASYW>], submitted with accompanying cover letter, June 18, 2010, http://www.americanbar.org/content/dam/aba/migrated/2011_build/

includes renewable long-term contracts, and “long-term contract” means at least a five-year contract that is presumptively renewable *or other arrangement sufficient to ensure academic freedom*” (emphasis added).²³ In 2004, the Accreditation Committee had cited Northwestern University School of Law for giving one-year employment contracts to most of its clinical faculty and denying them governance rights, in violation of 405(c).²⁴ Two years later, the Accreditation Committee reversed itself, interpreting “other arrangement sufficient to ensure academic freedom” to allow a separate avenue for complying with 405(c).²⁵ As CLEA pointed out to the ABA at the time, the Accreditation Committee had essentially equated short-term contracts with long-term contracts.²⁶

The most disturbing aspect of the continued discrimination against skills faculty and the abuse of Standard 405(c) is its disparate impact on women.²⁷ Women represent roughly forty-three percent of all full-time law faculty, yet, according to 2013 statistics available from the ABA, only thirty-six percent of tenured or tenure-track faculty are female.²⁸

legal_education/committees/standards_review_documents/clea_history_of_405c_cover_letter_6_17_10.authcheckdam.pdf [https://perma.cc/K6B3-PAPJ].

23. 2015 STANDARDS AND RULES, *supra* note 3, at 29–30.

24. Joy & Kuehn, *supra* note 13, at 183 n.2.

25. *Id.* at 225.

26. *Id.*

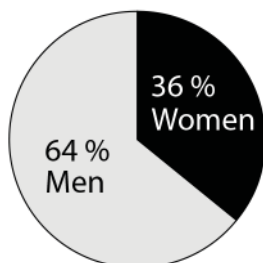
27. See, e.g., Maureen J. Arrigo, *Hierarchy Maintained: Status and Gender Issues in Legal Writing Programs*, 70 TEMP. L. REV. 117, 118 (1997); Ann C. McGinley, *Reproducing Gender on Law School Faculties*, 2009 BYU L. REV. 99, 102–03; Kathryn M. Stanchi, *Who Next, the Janitors? A Socio-Feminist Critique of the Status Hierarchy of Law Professors*, 73 UMKC L. REV. 467, 477 (2004); Melissa H. Weresh, *Stars upon Thars: Evaluating the Discriminatory Impact of ABA Standard 405(c) of “Tenure-Like” Security of Position*, 34 LAW & INEQ. 137 (2016).

And, as Teri McMurtry-Chubb forcefully illustrates, the impact on women of color is greater and often invisible, even to their white colleagues. See Teri McMurtry-Chubb, *On Writing Wrongs: Legal Writing Professors of Color and the Curious Case of 405(c)*, 66 J. LEG. EDUC. 575 (2017).

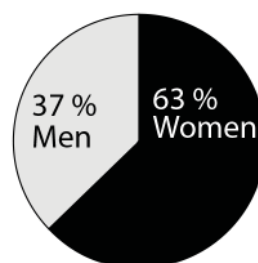
28. In 2013, the ABA reported there were 5186 male law faculty (tenured, tenure-track, 405(c), and full-time skills and writing), 4410 of whom were tenured or on the tenure track. As for female law faculty (same categories), there were 3871, 2497 of whom were tenured or on the tenure track. Another category called “Other Full Time” exists, but it is not clear whom that includes. See Section of Legal Educ. and Admissions to the Bar, *Law School Faculty & Staff by Ethnicity and Gender*, AM. BAR ASS’N (2013), http://www.americanbar.org/groups/legal_education/resources/statistics.html (scroll down to “Longitudinal Charts”; then click on “Law School Faculty & Staff by Ethnicity and Gender” to open the spreadsheet) [hereinafter *ABA 2013 Data*].

Data on law faculty by status and gender have become increasingly difficult to obtain. These figures are almost three years old. At present, the only data of this nature published on the websites of the ABA and the Association of American Law Schools (AALS) are these 2013 data. See *id.*; Data Resources, ASS’N OF AM. L. SCHS., <http://www.aals.org/data-resources/> (providing a link to the ABA data on ABA’s website). Similar data compiled by AALS for academic year 2008–09 were formerly available on its website (and would be useful for comparison purposes) but are no longer posted.

Percentage of Tenured or Tenure-Track Faculty by Gender



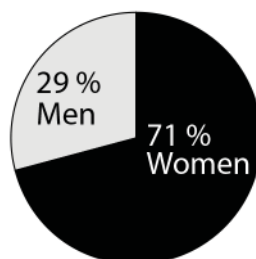
Percentage of Faculty with 405(c) Status



In stark contrast, sixty-three percent of 405(c) faculty are women (an increase from fifty-six percent in 2008).²⁹ Because this number may not include legal writing faculty with 405(c) status, the overall percentage of women with 405(c) status may be even higher. This means that, to the extent law schools fail to comply with Standard 405(c), they are nearly twice as likely to disadvantage a woman as a man.

Even more shocking is that seventy-one percent (and holding steady since 2001) of legal writing faculty are women,³⁰ which usually means they have the least security of position under ABA Standard 405(d).³¹ To the extent law schools fail to renew legal writing contracts in a manner inconsistent with 405(d), they are almost 2½ times as likely to disadvantage a woman.

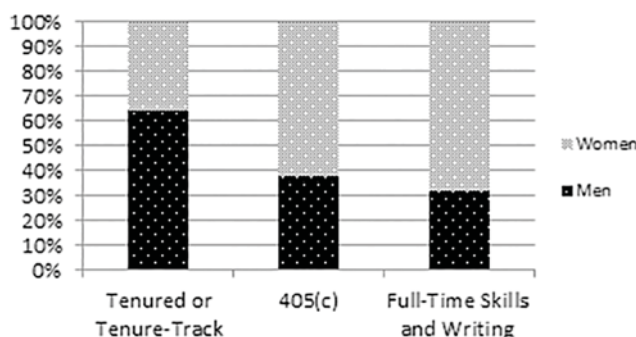
Percentage of Legal Writing Faculty by Gender



29. ROBERT R. KUEHN & DAVID SANTACROCE, 2013-14 SURVEY OF APPLIED LEGAL EDUCATION 39 (2014), http://www.csale.org/files/Report_on_2013-14_CSALE_Survey.pdf [https://perma.cc/K688-CJHK] [hereinafter CSALE 2013-14 SURVEY]; DAVID A. SANTACROCE & ROBERT R. KUEHN, REPORT ON THE 2007-2008 SURVEY 28 (2008), <http://www.csale.org/files/CSALE.07-08.Survey.Report.pdf> [https://perma.cc/58UK-BEW6]. In 2013, 1046 out of 1669 faculty with 405(c) status were women. See *ABA 2013 Data*, *supra* note 28.
30. See ALWD/LEGAL WRITING INST., REPORT[S] OF THE ANNUAL LEGAL WRITING SURVEY, Question 57 (2000-2014) [hereinafter ALWD/LWI SURVEYS], <http://www.lwionline.org/surveys.html> [http://perma.cc/D55S-SHL5].
31. See 2015 STANDARDS AND RULES, *supra* note 3, at 29.

I have long advocated for tenure eligibility for all law faculty regardless of subject matter. That said, ensuring fair compliance with Standard 405(c) is at least a beginning to the work that needs to be done to improve the status of a predominantly female professional skills faculty. Ostensibly, 405(c) protects clinical faculty, but law schools often fail to comply with it, and, as Professor Kathryn Stanchi points out, it acts in practice to cabin faculty and discourage academic freedom. Despite the aspirations of Standard 405(c), only sixty-one percent of clinical faculty even have 405(c) status or better.³² The remaining thirty-nine percent are on short-term contracts.³³ As for legal writing faculty, perhaps as many as forty-one percent of law schools have some legal writing faculty with 405(c) status or on that track,³⁴ but as one would expect, the vast majority of schools—seventy-eight percent—employ some or all of their legal writing faculty on short-term contracts.³⁵

Percentage of Law Faculty in 2013 by Security of Position and Gender



As faculty status decreases, the percentage of women faculty increases.³⁶ Although salary data are also difficult to obtain, there is evidence that women earn significantly less than their male counterparts regardless of faculty status. In 2014, female tenured or tenure-track faculty likely earned, on average, seventy-seven to eighty cents on the dollar compared with tenured and tenure-track men. Legal writing faculty with 405(c) or short-term contracts likely earn fifty-five cents or less on the dollar.³⁷

32. CSALE 2013-14 SURVEY, *supra* note 29, at 39-40 (indicating that 31.4% of clinical faculty have some form of tenure and 29.5% have presumptively renewable contracts).

33. *Id.*

34. 2014 ALWD/LWI SURVEY, *supra* note 30, Question 65 at 64.

35. *Id.* at x (indicating that 138 out of 178 responding schools reported having legal writing faculty on short-term contracts). Only seven percent report having tenured or tenure-track faculty hired specifically to teach legal writing. *Id.*, Question 10 at 5.

36. See ABA 2013 Data, *supra* note 28.

37. Author used information from the following sources to calculate this figure. Calculations on file with the author. ANDREW CHAMBERLIN, DEMYSTIFYING THE GENDER PAY GAP 2 (Mar.

As a result of Standard 405 (and the ABA’s interpretation of its language), the bulk of professional skills faculty—clinical and legal writing—will continue to be on short-term contracts. Even though clinical faculty are entitled to 405(c) status, only sixty-one percent have it. Clinical and legal writing faculty who do have 405(c) status have no guarantee that law schools will afford them a security of position “reasonably similar to tenure.” Women are overrepresented in this group of faculty, and notable efforts to enforce compliance with 405(c) have failed.

Best Practices takes a giant step toward improving this situation by establishing what “reasonably similar to tenure” ought to mean for purposes of 405(c) and will take a smaller, yet important step toward addressing gender discrimination in the legal academy. Consistent with American Association of University Professors regulations, no faculty member with a presumptively renewable long-term contract could be terminated without the law school showing just cause, a legitimate financial exigency, or a bona fide programmatic discontinuance.³⁸ As Weresh acknowledges, 405(c) status need not be identical to tenure (although it could be). Nor do I read *Best Practices* to require that. It goes only so far as to require that faculty who “meet standards and obligations

2016), <https://research-content.glassdoor.com/app/uploads/sites/2/2016/03/Glassdoor-Gender-Pay-Gap-Study.pdf> [<https://perma.cc/KS3H-HG66>] (indicating that in the United States, women earn seventy-five to eighty cents per dollar earned by men); Thomas E. Perez, Jenny R. Yang & Valerie Jarrett, *Better Data Equals Better Pay Equality*, THE HUFFINGTON POST (Jan. 29, 2016, 11:56 AM), http://www.huffingtonpost.com/thomas-e-perez/better-data-equals-great-b_9112184.html?1454086669 [<https://perma.cc/M7K4-K3UF>] (indicating that women earn seventy-nine cents for every dollar a man earns); *Gender and Salary Study: Academic Year 2011-2012*, CASE WESTERN RES. U. 19-20, <http://www.case.edu/provost/ideal/doc/facsalanalysis2011-2012Finalv5%282%29.pdf> [<http://perma.cc/HSJ6-Q8BS>] (self-reporting significantly lower salaries for female law faculty, particularly those without tenure); ELIZABETH MERTZ ET AL., AFTER TENURE: POST-TENURE LAW PROFESSORS IN THE UNITED STATES 51 (2011), http://www.americanbarfoundation.org/uploads/cms/documents/after_tenure_report_final_abf_4.1.pdf [<http://perma.cc/BM2C-NZ6Z>] 51 (indicating that tenured male law faculty earn twice what females earn at the high end of the pay scale); 2014-15 SALT Salary Survey, 2015 SALT EQUALIZER 1 (June 2015), <https://www.saltlaw.org/wp-content/uploads/2015/10/SALT-salary-survey-2015-REVISED-final.pdf> [<https://perma.cc/DP2G-7P9V>] (reporting the median base salary for tenured law faculty at eighty-two law schools nationwide, the average of which is about \$148,398); 2014 ALWD/LDI SURVEY, *supra* note 30, Question 75 at 71 (indicating the average salary for legal research and writing faculty to be \$82,007, and \$82,007 is 55 percent of \$148,398); Appendix A, at 98 (indicating that the average salary of female LRW directors is seventy-seven percent of the average salary of male LRW directors).

38. See Weresh, *supra* note 1, at 544. *Recommended Institutional Regulations on Academic Freedom and Tenure*, in AM. ASS’N OF UNIV. PROFESSORS, POLICY DOCUMENTS AND REPORTS 81-84 (11th ed. 2015). Although the entire book is not freely available on the Internet, the *Recommended Regulations* section is available at <https://www.aaup.org/file/RIR%202014.pdf> [<https://perma.cc/N8YY-NVED>].

reasonably similar to those required of other full-time faculty members³⁹ enjoy the same substantive and procedural protections.

Make no mistake; affording these protections will not transform 405(c) status into tenure (with all the rank, privileges, and rights that flow therefrom) or improve job security for our colleagues on short-term contracts. It will take open hearts and minds to do that.

39. 2015 STANDARDS AND RULES, *supra* note 3, at 29.