Standard 405 and Terms and Conditions of Employment: More Chaos, Conflict and Confusion Ahead?

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In 2008, the Section on Legal Education and Admissions to the Bar of the American Bar Association commenced a comprehensive review of the accreditation standards for American legal education.[1] According to U.S. Department of Education policy, all official educational accreditation organizations are required to periodically evaluate and update their policies and procedures through a public and transparent process intended to ensure the pertinence and currency of accreditation norms. Initially, it appeared that there was nothing exceptional about the review process at that time—the section had performed such reviews in the past—except that legal education was experiencing a difficult set of challenges imposed by the national economic recession. Indeed, the ABA subsequently acknowledged the

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1. *See* Memorandum from Randy Hertz, Chair, Council, Section of Legal Educ. and Admissions to the Bar, Don Polden, Chair, Standards Review Comm. & Hulett H. Askew, Consultant on Legal Educ., to Deans of ABA-Approved Law Schools et al., on Comprehensive Review of the ABA Standards for the Approval of Law Schools (Aug. 15, 2008), http://www.americanbar.org/content/dam/aba/migrated/2011_build/legal_education/committees/standards_review_documents/2008_comprehensive_review_memo_for_web_site.authcheckdam.doc.

   The Section on Legal Education and Admission to the Bar is one of several sections of the American Bar Association. However, what is unique is that the section, through its Council on Legal Education, has been approved by the U.S. Department of Education to serve as the official accreditation agency for American legal education. Thus, the section acts as both the official accreditation agency for legal education and as a nonprofit organization supporting the advancement of legal education, law schools, and similar organizations. For a description of how the section fulfills these objectives while separating its two main functions, see Section of Legal Educ. and Admissions to the Bar, *About Us*, Am. Bar Ass'n, http://www.americanbar.org/groups/legal_education/about_us.html (last visited Dec. 29, 2016).

financial constraints and economic pressures on legal education and produced a task force report addressing the consequences of those pressures, including growing student debt.[2] Additionally, it was soon learned that the ABA's accreditation policies were outdated and lagging behind other professional education accreditation organizations' policies in a few key areas.

By July of 2011, most of the revised standards and rules of procedure had been drafted, discussed and approved by the section's Standards Review Committee ("SRC") and were ready for submission to the council.[3] However, the SRC's revised accreditation policies were not submitted for action by the council until 2014, more than six years after the review process began, as a result of decisions made by section leaders. Notwithstanding the delay in approving and implementing the proposed standards, the revisions to the existing accreditation policies were responsive to many of the needs of American legal education and designed to improve the ABA's accreditation processes.

The revised standards were particularly noteworthy for addressing several of the most significant accreditation issues facing legal education and higher education nationally, including: the need for greater focus on student learning outcomes and assessment of student learning; the utility of a common admission examination; a greater focus on educating for lawyering skills and competencies; and a sufficiently ambitious minimum bar success rate applicable to all law schools. In nearly all respects the review was both comprehensive and successful. However, at the end of the lengthy process, the council was unable to approve a few highly important provisions. Those provisions, referred to as policies pertaining to "terms and conditions of faculty employment" (T&CE) and protection of academic freedom, are the subject of this article.

The article provides a look at the history of the efforts undertaken during the comprehensive review to revise and improve the accreditation policies concerning T&CE and faculty academic freedom and describes why, at the conclusion of the comprehensive review, the council failed to address them. In particular, the article describes the constituencies consulted and the factors considered by the SRC in drafting revised T&CE standards and how the proposed revisions addressed complex issues concerning rights, duties, and

2. *See* Memorandum from Dennis W. Archer, Chair, ABA Task Force on Financing Legal Education, to Interested parties (June 17, 2015), http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/reports/2015_june_report_of_the_aba_task_force_on_the_financing_of_legal_education.authcheckdam.pdf [https://perma.cc/N77A-L9BC] [hereinafter ABA Task Force Report].

3. The Section on Legal Education and Admissions to the Bar of the American Bar Association performs the official accreditation of the American legal education through the council. The council exercises the powers of the section, including the accreditation of law schools, and comprises officers of the section and at-large members sufficient to satisfy the U.S. Department of Education requirements applicable to the accreditation of professional schools. *Section Bylaws*, Art. IV (Aug. 7, 2010), *in* Section of 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 109, 112–14 (2016) [hereinafter 2016–17 ABA Standards].

status of all law faculty. The article contends that the council failed its leadership responsibilities by refusing to make a decision among several options that it had requested when confronted by competing interest-group preferences. The article concludes with some encouragement to the council to take the leadership initiative and address the perplexing, and likely to be enduring, difficulties of the T&CE policies, given the likelihood that, in the future, the current standards will need to be amended to resolve their ambiguities.

I. The Comprehensive Review Process

Periodic comprehensive reviews of accreditation policies are required by federal law; all official accreditation agencies recognized by the U.S. Department of Education (DOE) must, periodically, reassess their policies and procedures, and the assessment process is factored into the DOE's decision about whether to continue the agency's authority to serve as accreditation agency for the field or discipline.[4] These periodic re-examination processes are intended to assure the DOE that each agency is maintaining and enforcing pertinent and contemporary accreditation requirements applicable to all accredited programs. The DOE is particularly interested that all agencies' accreditation policies and processes serve the core functions of protection of consumers (such as students), student loan providers, and other stakeholders in higher education.

The ABA's comprehensive review was performed by the Standards Review Committee (SRC) and, to assist it in fulfilling its obligation to conduct a comprehensive review of the standards, the SRC developed a statement of accreditation policies and accreditation goals that were intended to serve as a guide and set of aspirational goals.[5] With these foundational structures for the accreditation review in place, the SRC began its consideration of the standards and procedural rules in fall of 2008. The SRC, at the encouragement of the Consultant on Legal Education, was particularly interested in designing a review process that was transparent and open to all constituencies of legal education. Therefore, the SRC developed new, and utilized existing, channels for gathering input of perspectives, concerns, and recommendations from

4. National accreditation by the U.S. Department of Education is governed by 34 C.F.R. Part 602. For a narrative description of the policies and processes, see *Accreditation in the United States*, U.S. Dep't of Educ., http://www2.ed.gov/admins/finaid/accred/accreditation.html [https://perma.cc/NF7V-UQ3K] (last modified Dec. 15, 2016).

5. Donald J. Polden, Chair, Standards Review Comm., Statement of Principles of Accreditation and Fundamental Goals of a Sound Program of Legal Education (May 6, 2009), http://www.americanbar.org/content/dam/aba/migrated/2011_build/legal_education/committees/standards_review_documents/principles_and_goals_accreditation_5_6_09.authcheckdam.pdf [https://perma.cc/6JLA-PDCG] [hereinafter SRC Statement of Principles of Accreditation]. This statement was developed to assist the SRC in faithfully and objectively performing its duties during the comprehensive review and to assist legal education in joining a discussion on the proper objectives and goals of accreditation in legal education. The SRC, from 2008 to 2011, frequently consulted the statement in drafting and approving revisions to the standards and moving the comprehensive review ahead, and the document remains a useful guide to the accreditation of American legal education.

diverse stakeholders in legal education. As the committee prepared drafts of potential revisions to the standards, with underlying explanations of the proposed changes, it disseminated the drafts and solicited comments and reactions to the drafts. The SRC conducted open meetings at which constituent group representatives and stakeholders could advocate for their positions on the draft revisions, submit materials to the SRC and pose questions. As the drafts of standards were completed, they were voted upon by the SRC and prepared for submission to the council for its consideration and approval. By July of 2011 approximately ninety percent of all the revised standards had been discussed, exposed to public comment and recommendations, debated, and approved.[6] However, because of a decision to delay consideration of the proposals made within the section's leadership, the council was not presented with concrete proposals for revisions to the standards until spring 2014.[7]

II. The Role of Standard 405: Terms and Conditions of Employment and Protection of Academic Freedom

The principal focus of this article concerns several standards generally referred to as pertaining to the "terms and conditions of employment" of law school faculty. The concept of "terms and conditions of employment" has been embedded in the accreditation policies since 1973 and refers to key aspects of the standards concerning the hiring and retention of full-time teachers, notably: protection of academic freedom of faculty members; the need for clearly articulated policies extending faculty members protections against wrongful termination; and the notion that some faculty members get greater job protection rights than other faculty members. These provisions, collectively, are also sometimes referred to as security-of-position provisions because they implicate the use of tenure and other employment contracts as a method of ensuring continuing employment for faculty.

Three standards comprise the "terms and conditions of employment" (T&CE) standards: Standard 405,[8] which pertains to full time faculty;

6. Standards Review Comm., Am. Bar Ass'n Section on Legal Educ. & Admissions to the Bar, Minutes, July 9-10, 2011, http://www.americanbar.org/content/dam/aba/migrated/2011_build/legal_education/committees/standards_review_documents/minutes/20111102_src_july11_meeting_minutes.authcheckdam.pdf [https://perma.cc/6HDW-VHYD].

   Due to the ABA's policies on length of service on its committees, the chair and several members of the SRC rotated out of the chair position and off the committee after the July 2011 meeting, and several new SRC members began service beginning with the next SRC meeting.

7. The decisions of the section leadership to delay completion of the comprehensive review are described in Donald J. Polden, *Leading Institutional Change: Law Schools and Legal Education in a Time of Crisis*, 83 Tenn. L. Rev. 949, 965-66 (2016).

8. Standard 405 states:
   (a) A law school shall establish and maintain conditions adequate to attract and retain a competent faculty.
   (b) A law school shall have an established and announced policy with respect to academic freedom and tenure of which Appendix 1 herein is an example but is

Standard 203,[9] which pertains to the dean of the law school; and Standard 603(d),[10] which pertains to the director of the school's library. During SRC's comprehensive review of the standards, these three standards were bundled together for purposes of SRC analysis and drafting of amendments because they shared the attributes described above and because of the prior analysis and recommendations of other ABA committees and task forces, as described below.

The T&CE standards presented the SRC with one of its most challenging endeavors in attempting to modernize and clearly articulate underlying accreditation policy, for reasons including that tenure and security-of-position policies were not commonly required by other accreditation agencies, that the ABA provisions had been supplemented and amended many times but without comprehensive editing, and that increasing numbers of law schools seeking approval were not affiliated with universities with longstanding tenure policies. These challenges require a bit of explanation and background information.

First, the policies in the T&CE standards are *sui generis*: No other professional accreditation agencies have comparable "terms and conditions of employment" standards;[11] rather, they are unique to law schools and legal

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not obligatory.

(c) 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.

(d) A law school shall 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 as required by Standard 303(a)(2), and (2) safeguard academic freedom.

2016–17 ABA STANDARDS, *supra* note 3, at 29. In addition, Standard 405 has several interpretations that are intended to add clarification and guidance on the text of the standard. They include, for example, interpretations that state that law faculty "should not" be required to be part of a university collective bargaining unit, that any policy that caps the percentage of law school faculty on tenure track "violates the Standards," that it may be a violation of principles of academic freedom for a faculty member to be required to adhere to an examination schedule, and various provisions articulating contractual rights of clinical and legal writing faculty. *Id*. at 29–30.

9. Standard 203(b) states: "Except in extraordinary circumstances, a dean shall also hold appointment as a member of the faculty with tenure." *Id*. at 10. At the time of the comprehensive review, this was Standard 206 and it was later renumbered.

10. Standard 603(d) states: "Except in extraordinary circumstances, a law library director shall hold a law faculty appointment with security of faculty position." *Id*. at 40.

11. *See, e.g.*, Liaison Committee on Medical Education, Functions and Structure of a Medical School, Standards for Accreditation of Medical Education Programs Leading

education. At the inception of the comprehensive review, the SRC interviewed key actors in accreditation processes of other professional education groups, notably medicine and pharmacy, and the SRC learned that those accreditation agencies did not have employment policies that required tenure-earning rights or articulated the length and scope of employment contracts. Commonly, according to the chief accreditation officers of those agencies, the decisions on how to protect academic freedom and whether to create and maintain a system of academic tenure for full-time faculty members were made by the university of which the medical or other professional school was a part. According to these experts, the specific terms of academic appointments of faculty are not considered to be normal functions and purposes of accreditation in those disciplines, but rather those decisions are left to the individual institutions.

Second, the standards for T&CE have a long history in the ABA's accreditation of legal education. According to a memorandum on the history of the T&CE provisions[12] by James P. White, former Consultant on Legal Education, the first reference to tenure in the accreditation standards occurred in the 1968 statement of the Standards, when it was stated that "[a] law school should have a policy with respect to academic freedom and tenure, such as the policy reflected in the 1940 Statement of Principles of the American Association of University Professors."[13] Beginning in 1973, the ABA's language concerning requirement of a policy on academic freedom and tenure—"The law school shall have an established and announced policy with respect to academic freedom and tenure of which Annex I herein is an example but is not obligatory"—was first introduced to the standards.[14] As Professor White's memo points out, the initial standard requiring schools to have a policy on academic freedom and tenure has remained in the standards since the 1973, but many additional requirements (for example, for faculty governance rights and duties, for contractual rights for clinicians, and for some recognition of a separate version for legal writing teachers) were added from time to time since then.

The language and meaning of Standard 405 began to be scrutinized in recent years as the number of approved law schools grew exponentially,

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to the M.D. Degree (effective July 1, 2016) https://medicine.cnsu.edu/shareddocs/LCMEFunctionsAndStructureOfAMedicalSchool.pdf [https://perma.cc/WA6M-3VYA]; Accreditation Council for Pharmacy Educ., Accreditation Standards and Key Elements for the Professional Program in Pharmacy Leading to the Doctor of Pharmacy Degree ("Standards 2016") (Jan. 25, 2015), https://www.acpe-accredit.org/pdf/Standards2016FINAL.pdf [https://perma.cc/G3F5-HM4V].

12. Statement of James P. White on Law School Tenure, http://www.americanbar.org/content/dam/aba/migrated/2011_build/legal_education/committees/standards_review_documents/20110613_comment_security_of_position_james_p_white.authcheckdam.PDF [https://perma.cc/F9TM-QLTY].

13. *Id.* at 3–4.

14. Approval of Law Schools: American Bar Association Standards and Rules of Procedure 13 (1973) (Standard 405(d)).

and some law schools seeking approval, such as stand-alone or for-profit law schools, were not part of traditional university structures. Those schools were interested in more flexible faculty hiring and retention models that were quite dissimilar from traditional tenure models at universities. These schools argued that a faculty employment arrangement that did not include lifetime tenure constituted a "policy concerning academic freedom and tenure" and, therefore, complied with Standard 405, even though it did not resemble traditional tenure-earning rights awarded by universities. Essentially, they contended that Standard 405 required a policy but did not articulate or specify what that policy was, and that, in fact, an approved school's policy could exclude the practice of tenure altogether.

The section had not been a stranger to discussions about the meaning of T&CE, especially after some of the above-mentioned law schools began to seek accreditation without offering traditional tenure-earning contract rights. Just before the comprehensive review, the section convened two "blue ribbon" groups to consider the topics of T&CE and academic freedom. One group, the Accreditation Policy Task Force, acknowledged in May of 2007 that, apparently, legal education is the only accreditation body to use its accreditation requirements to promote security-of-position provisions for faculty but that the existing policies had been in effect for a long period.[15] The task force also suggested that, if the members were to write on a blank slate, they would endorse the important rights and protections of academic freedom but propose "mechanisms more direct and concrete than the existing provisions on 'security of position.'"[16]

Following the report of the Accreditation Policy Task Force, the section appointed another group, the Special Committee on Security of Position, to study the issues of T&CE and academic freedom of faculty members, especially as they relate to the security-of-position provisions. In its thoughtful report, the special committee continued the task force's consideration of the complicated T&CE provisions and offered alternative approaches to the issues of faculty contractual protections as accreditation requirements of American legal education.[17]

The task force and the special committee reports preceded the initiation of the comprehensive review, but their attempts to articulate coherent positions on faculty rights of tenure, faculty governance, and law schools' institutional commitments to secure and maintain a competent faculty were closely

15. Section of Legal Educ. and Admissions to the Bar, Am. Bar Ass'n, Report of the Accreditation Policy Task Force 21 (May 29, 2007), http://www.americanbar.org/content/dam/aba/migrated/legaled/actaskforce/2007_05_29_report_accreditation_task_force.authcheckdam.pdf [https://perma.cc/7KSY-AY9Q].

16. *Id*. at 22.

17. Report of Special Committee on Security of Position (May 5, 2008), http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/reports/2008_security_of_position_committee_final_report.authcheckdam.pdf [https://perma.cc/P8MS-NPFG].

studied by SRC as it began the comprehensive review. Those study groups struggled to explain the rationale of T&CE accreditation policies embedded in the standards when other professional accreditation groups had no similar accreditation requirements and some legal education stakeholders (such as ALDA, the newly emerging law deans' group, university presidents, and some nontraditional law schools) were increasingly challenging the T&CE provisions. The council did not act on the concerns expressed in and the recommendations of the task force and special committee.

III. The SRC's Analysis of T&CE Standards

As the SRC began its analysis of the T&CE standards, the consultant[18] suggested that the council would benefit from receiving a range of options or approaches concerning the T&CE rights and duties of faculty, dean and library directors. It made sense to the SRC that the ultimate policy-setting entity for legal education would wish to consider not only the current approach but also alternative approaches, especially ones that would address the textual infirmities of the existing rules and were responsive to the major concerns with the existing policies. The SRC identified a couple of alternative approaches and created subcommittees to draft alternative versions of the standards that would address those approaches. The SRC was particularly interested in how it could draft new approaches that could clearly articulate an accreditation standard that had to do so much—i.e., protect academic freedom, ensure law schools are doing enough to provide a supportive environment for faculty teaching and scholarship, and guarantee security of position for some faculty members. In the end, the SRC did do just that.

One of the SRC's first tasks when taking up security-of-position provisions was to understand the strengths and weaknesses of the existing T&CE. The SRC identified several major concerns, as expressed by various constituencies, with the existing standards:

Overprescriptiveness. A substantial cohort of legal educators, especially law school deans, viewed the "terms and conditions" standards as unnecessary and intrusive into decanal and university decision-making. The group argued that the T&CE provisions were created because of interest group politics played by some groups (such as clinical, law library, and legal writing faculty members) to effectively secure the same guarantees of lifetime employment currently possessed by "doctrinal" faculty members. According to this group, the prolix accreditation requirements extending job protections to an increasingly large segment of a law school's faculty would hamstring law schools' budget planning and constrain flexibility in hiring and retention as well as in academic programming. This group was concerned that the existing policies limited

18. The Consultant on Legal Education was the title given to the administrative leader of the section at that time. At the time of the comprehensive review, the consultant was Hulett ("Bucky") Askew, a well-regarded administrator and legal professional who consistently supported the SRC and its work during the comprehensive review and was a thoughtful and helpful intermediary between the council and SRC.

institutional flexibility and created procedural complexities concerning hiring and retention of faculty that impeded work force management, complicated the administration of law school budgets, and required law schools to have job security policies that conflicted with their universities policies.

Underinclusiveness. Several groups (notably, clinical and legal writing faculty and law library directors) viewed the T&CE standards as perpetuating a caste-like system where tenured and tenure-earning faculty drove governance and policymaking at ABA- accredited law schools. Proponents of this approach argued that they taught increasingly larger segments of the curriculum—the "professional skills" and "experiential learning" segments—that were growing in importance and relative size. This group often expressed unhappiness that they did not enjoy as full a range of duties, responsibilities and rights (including, especially, guaranteed employment at higher salary levels enjoyed by doctrinal faculty) as their tenured and tenure-track colleagues. They further argued they felt they were being treated as "second-class citizens." The history of the growth in American law school faculties suggested that, despite significant differences between doctrinal and other faculty, this group of faculty members was correct; there had been a significant growth in clinical and experiential learning courses and programs at law schools, and there was a significant disparity between the two groups of full-time faculty members in terms of their compensation, rights to participate in institutional governance, and tenure protections.

Protection of academic freedom. Nearly all the stakeholders (and SRC members at the time) agreed that the protection of academic freedom was important to all faculty members. The legal academy believed that history has taught that protection of job and position is critically important in enabling faculty members to author controversial and unpopular articles and books and to take on unpopular causes, clients, and public interest litigation. They were able to clearly link these activities with examples of political repression by state officials, university donors, and boards of trustees aimed at non-tenured (and, in some instances, tenured) law faculty members. Several constituencies of the legal academy expressed the belief that the granting of academic tenure was the best and most effective method of protecting faculty members' academic freedom, although others argued that universities often guaranteed the protection of academic freedom to all faculty members, irrespective of whether or not they were tenured.

Rights to full participation in institutional governance. A substantial group of legal academics (notably, again, legal clinic and writing faculty) contended all full-time faculty have a core right to participate in institutional governance, including hiring decisions, curricular and programmatic decision-making, and other key decisions affecting the law school. At many schools, these faculty members had no, or limited, rights to participate in institutional governance, and the standards did an insufficient job of guaranteeing them these participatory rights.

The language of the standards. Standard 405 is not a clear, unambiguous statement of accreditation policy, but that condition is not for lack of trying. The sometimes unclear and gap-riddled language of Standard 405 evolved through many amendments grafted into the standard over its life span, including some that were added to patch over problems created by an earlier amendment. So, for example, at various times, legal education interest groups would gain favor or power on SRC and/or the council and promote their viewpoints on the appropriate treatment of their group. Section (d) of Standard 405[19] was created expressly to require law schools to articulate policies that give legal writing faculty members some unspecified "security of position" and "other rights and privileges" enjoyed by clinical and "doctrinal" faculty as specified in other sections of 405. What do those terms in section (d) mean? Read together with other sections of Standard 405, the various amendments to Standard 405 resulted in clinical faculty getting more clearly defined job protections in subsection (c) than legal writing faculty do in (d) and tenure and tenure-earning faculty members getting the most. The SRC attempted to be mindful of the standard's history, but it was also interested in creating a fair and appropriate statement of alternative approaches that could be acted upon by the council in the best interest of legal education.

Another curious artifact in Standard 405 is the requirement that approved schools "have an established and announced policy with respect to academic freedom and tenure of which Appendix 1 herein is an example but is not obligatory." This is not masterful drafting for several reasons. First, Appendix 1 is an antiquated document that parrots the AAUP's 1940 Statement of Principles on Academic Freedom and Tenure, which has been amended and modified countless times, while Appendix 1 has not. Moreover, Standard 405 explicitly states that approved law schools must have a policy "with respect to academic freedom and tenure," but the standards do not state what that policy must be or even indicate the contents of that policy and, in fact, do not define the key term "tenure." Indeed, the Council and Accreditation Committee had approved schools that lacked a traditional or commonly recognized tenure system; those schools demonstrated that they did, in fact, have a policy, and that is all that Standard 405 requires.[20]

19. 2016–17 ABA Standards, *supra* note 3, at 29.

20. During the comprehensive review process, the chair (one of the authors of this article) asked the consultant if the council had ever approved a law school that did not provide traditional tenure-like protections to some part of its faculty. The chair then examined an application file for a newly approved school (one that was not part of a university system) that had provided only renewable-term employment contracts for its faculty, although the school referred to its contractual policy as "tenure." The school did have a provision promising the protections of academic freedom. The council had approved the application for approval, thereby permitting the inference had it met the requirements of Standard 405. The example illustrates two key aspects of Standard 405: It does not define the attributes and requirements of "tenure and academic freedom" and, second, it only requires a school to have a policy on tenure and academic freedom, but it does not specify what must be included in that policy.

Status of law school deans and library directors. The standards clearly and affirmatively state that one person at each approved law school must have tenure: the school's dean.[21] The irony that the only member of a school's faculty who must hold tenure is the chief administrative officer was not lost on the SRC. That the dean should be hired as a member of the faculty and receive the same rights and privileges as other members of the faculty made good sense to most members of the SRC, but it was difficult to understand the meaning of the required grant of tenure in Standard 203 (that, except in "extraordinary circumstances," the dean "shall also hold appointment as a member of the faculty with tenure"). Did it mean that the dean was tenured in the position as dean? That is most unlikely. Most deans hold their decanal positions as a sort of "employee at will," serving at the pleasure of the university president. Some law deans stated their belief that it is important for them to hold tenure as a member of the faculty in order to courageously and zealously represent the law school in dealings with university administrations. But, as the SRC examined the anomalous language in Standard 203 requiring tenure for the law dean, it considered a related but overarching question: If the standards can affirmatively and unambiguously require tenure for the law dean, why can't Standard 405 clearly and affirmatively state who among approved law schools' faculty are equally deserving of tenure? The SRC hoped to clarify this mystery through the alternatives prepared and presented to the council.

Standard 603(d) attempts to articulate the T&CE rights of law library directors in stating that "[e]xcept in extraordinary circumstances, a library director shall hold a law faculty appointment with security of faculty position." The standard nowhere described what those "extraordinary circumstances" might be, and further fails to describe what is meant by "security of faculty position." Does that mean tenure? Does it mean a long-term contract? Does it mean a renewable long-term contract? Again, the SRC hoped to clarify this incomplete and ambiguous provision with a provision linking library directors' T&CE rights and duties to those of other members of the faculty.

The foregoing description of the existing T&CE standards is intended to describe the increasing conflict between law faculty groups over their status and to identify the principal issues, concerns, and controversies associated with those standards and to set the stage for the approaches purposed by the SRC to the council. These issues and concerns generating the conflict over employment status are quite real and, following the council's failure to resolve those textual and contextual problems, continuing.

IV. The SRC's Development of Alternative Approaches to the Existing Standards and Their Infirmities

The SRC fulfilled the request of the council that it receive substantive, meaningful options to evaluate in considering improvements to standards 405, 203, and 603. Accordingly, the SRC submitted alternative approaches that

21. 2016–17 ABA Standards, *supra* note 3, at 10 (Standard 203).

would make the fundamental statement of faculty rights and duties clearer and, equally important, provide the council with clear and unambiguous statements of the reasons for changing, or not changing, the existing language of the T&CE standards.

The SRC developed essentially three alternative approaches to the existing T&CE standards.[22] The alternatives were publically vetted and discussed at several meetings of the SRC, and they generated many comments and reactions, primarily from legal education interest groups, such as the Association of American Law Schools (AALS), the legal writing and clinical faculty groups, and the law library directors organizations (American Association of Law Libraries and Society of Academic Law Library Directors), but also from lawyers, individual law faculty members and the general public. The alternative approaches prepared by SRC for the council incorporated many of the recommendations and viewpoints of the interest groups and, more important, represented the best efforts of the SRC to provide some coherence and clarity to what were (and today remain) messy and divisive policies on job protections and faculty status.

The essential similarities and differences between the alternative approaches are as follows:

- All of the proposed drafts had clear statements affirming the integral role of protection of academic freedom for all members of all approved schools' faculty.[23]

22. At its July 2011 meeting, the SRC published three possible approaches that could be taken with respect to the "terms and conditions of employment" provisions. *See* Comparative Analysis: Terms and Conditions of Employment Options, http://www.americanbar.org/content/dam/aba/migrated/2011_build/legal_education/committees/standards_review_documents/july2011meeting/20110705_ch_4_faculty_terms_conditions.authcheckdam.pdf [https://perma.cc/U3D6-VZA2].

    The first approach would simply be to take the existing standards and provide some editing to clarify. The remaining two alternatives were much more substantive and were designed by SRC to provide starkly contrasting approaches to the T&CE standards to be in line with the competing viewpoints on the purposes served by those provisions. These SRC's 2011 alternative approaches were essentially the same draft provisions that were submitted to the council in 2014. *See* Standards Review Committee Meeting Agenda, October 11–12, 2013, http://www.americanbar.org/content/dam/aba/migrated/2011_build/legal_education/committees/standards_review_documents/201310_src_meeting_materials.authcheckdam.pdf [https://perma.cc/QBC8-MQRR].

23. These provisions stated: "A law school shall have a written policy and procedures that provide protection for the academic freedom of its full time faculty in exercising their teaching responsibilities, including those related to client representation in clinical programs, and in pursuing their research activities, governance responsibilities, and law school related public service activities." *See*, *Standards and Interpretations on Faculty–Terms & Conditions*, ABA, p. 3 (July 10, 2011), http://www.americanbar.org/content/dam/aba/migrated/2011_build/legal_education/committees/standards_review_documents/july2011meeting/20110711_ch_4_faculty_terms_and_conditions_july_10_2011_discussion_draft.authcheckdam.pdf [https://perma.cc/BVB7-7DQL] [hereinafter 2011 ABA *Standards and Interpretations on Faculty*].

- The proposed drafts also included a provision requiring schools to "establish and maintain conditions that are adequate to attract and retain a competent full-time faculty sufficient to accomplish its mission."
- The proposed drafts affirmed the importance of more widespread participatory rights to all full-time faculty and included a provision that stated: "A law school shall have a policy that provides for meaningful participation of all full-time faculty members in the governance of the school."
- One of the drafts provided that all approved law schools must have "an announced and written comprehensive system for evaluating candidates for promotion, termination, tenure and renewal of contracts or other forms of security of position." This approach included an important clarifying and amplifying interpretation that imposed obligations on schools that decided to use multiple methods of hiring, evaluating, and retaining faculty members, but had no requirement that all faculty members be eligible to earn tenure.[24]
- The second alternative would require approved schools to "afford all full-time faculty members a form of security of position sufficient to ensure academic freedom and meaningful participation in law school governance" and "have a written comprehensive system for evaluating candidates for all positions for renewal, promotion and termination."
- On the issues of security of position for deans and law library directors, the draft alternatives essentially linked those two positions' status to that of the faculty of his or her school. In other words, the dean and law library directors must hold appointment as members of the full-time faculty and "with the rights and protections accorded to other members of the full-time faculty under Standard 405."

Fundamentally, the council was presented with two alternative approaches to the issue of security of position for all faculty members. The two fundamentally oppositional perspectives on security of position were: that all full-time faculty members have some form of security of position (by tenure or long-term contract) or, alternatively, that each school determine the best forms and arrangements of faculty appointment for that school and faculty. While

24. Interpretation 405-1 to Alternative 1 states: "A system of tenure earning rights can be an effective method of attracting and retaining a competent full time faculty. For full-time faculty positions that do not include the possibility of a tenured appointment, the law school bears the burden of showing that it has established sufficient conditions to attract and retain competent faculty in those positions. In assessing whether the school has met that burden, the following should be considered: evidence of turnover in full time faculty members, history of successful hiring of full time faculty members, evidence of a system that permits full time faculty members in those positions to be appointed with long-term, presumptively renewable contracts, evidence of full-time faculty members ability to participate in governance of the law school, and evidence of other perquisites similar to tenured faculty, such as participation in faculty development and support programs." *See supra* note 23, 2011 ABA *Standards and Interpretations on Faculty*, at 1.

there were strongly held views among members of the SRC on which security-of-position approach the council should adopt, other key areas in the drafts generated a strong consensus. In particular, the SRC members agreed that all full-time faculty should be able to participate in institutional governance, that the protection of all faculty members' academic freedom was an overarching obligation for all schools and should be clearly expressed, that deans and library directors should not be treated any differently from other members of their faculties, and that all approved schools should have an affirmative obligation to create and maintain an educational and professional environment that would sustain and support all faculty members. The only area of disagreement among the SRC members at the time was the appropriate articulation of an accreditation policy governing security of position, including, importantly, who gets tenure rights and, if not tenure rights, then what contractual or other protections for all faculty. In this regard, the SRC was not different from the preceding task force and special committee.

The options developed by the SRC received widespread criticisms from a variety of interest groups. For many of the groups the criticism was simply disagreement with one option (or strong preference for another alternative); for example, the legal writing and clinical faculty groups strongly endorsed the alternative that would require tenure or tenure-like protections for all full-time faculty members, including themselves. This is understandable self-interested group politics. Some groups expressed the view that the ABA should cease efforts to impose employment standards as a matter of accreditation, other than requiring approved schools to have faculty qualified to teach students and prepare them for the practice of law. Some of the criticism was more troublesome and evidenced a fear that the ABA would change its accreditation role by getting out of the business of awarding employment rights to and imposing employment limitations on various legal education faculty groups. The AALS was an interest group that seemed to most fear such a change in ABA policy by eliminating the Standard 405 language concerning tenure rights.[25] The AALS leadership engaged in a particularly vocal and, at times, unprofessional effort to prevent a change in the tenure "requirement" of Standard 405. It appeared that the organization's fear was that without such a requirement in the ABA accreditation policies, the AALS would need to consider implementing such a requirement in its membership policies.[26] That could have led to an exodus of schools from AALS membership, because many universities have

25. *See*, *for example*, Letter from Michael Olivas, President, Ass'n of Am. Law Schs, to Hulett H. Askew (Mar. 28, 2011, http://www.americanbar.org/content/dam/aba/migrated/2011_build/legal_education/committees/standards_review_documents/20110328_comment_multiple_topics_aals.authcheckdam.pdf [https://perma.cc/JL3T-9QQV].

26. The AALS membership policies do not require that faculty at member schools hold or be eligible to earn tenure or any other employment contractual terms. They do require that faculty members have protections of academic freedom in accordance with AAUP policies. See *Membership Requirements*, Ass'n of Am. Law Schs., https://www.aals.org/about/handbook/membership-requirements/ (Bylaw section 6-6(d).

tenure policies that do not accommodate nondoctrinal or research-active faculty. AALS membership is not tantamount to accreditation for purposes of federally guaranteed student loans and graduates' ability take the bar exam in every state. ABA-approved law schools can function successfully without AALS membership, but they certainly could not without ABA accreditation.

V. The Council's Failure to Address Problems with "Terms and Conditions of Employment" Standards

Peter Drucker, a leading thinker on leadership, commented, "Only three things happen naturally in an organization: friction, confusion and under-performance. Everything else requires leadership."[27] Nowhere is this sage observation more evident that in the council's handling of the SRC's recommendations concerning the T&CE proposals. How will the council be judged on its leadership of legal education during its most challenging historical moment?

The revisions of and alternative options for Standard 405 and the other T&CE standards ultimately went before the council in April of 2014 as a part of its consideration and approval of the revisions to the standards submitted by SRC. The council evaluated and approved nearly all the revisions to the standards proposed by SRC, including significant and important new standards requiring law schools to articulate student learning outcomes and periodically assess their graduates' attainment of those learning goals. Although the obligation of schools to articulate and assess attainment of student learning outcomes was vociferously fought by AALS and some other groups, legal education had swung toward greater concern about educational goals for student success, especially given the effects of the economic recession on law schools and their students. The council's approval of new standards requiring the articulation of student learning goals and greater attainment of student success were important steps in modernizing its accreditation standards to be more in line with contemporary objectives of professional education accreditation. The council approved other important revisions to the standards that dealt with the transparency of graduate employment outcomes, the continuing requirement of a national admission examination, heightened requirements for student engagement in clinical and experiential learning opportunities, and provisions for greater flexibility for law schools in administering their programs of legal instruction.

In the end, however, the council was unable to arrive at a decision concerning the terms and conditions of employment standards. Following a

27. *Leadership Institute*, The Inst. of Applied Hum. Excellence, http://www.theiahe.com/services/seminars/leadership-institute/ [https://perma.cc/3RPX-G62F]; Greg Story, *Peter Drucker on Leadership*, The Journal, May 2016, https://journal.accj.or.jp/peter-drucker-on-leadership/ [https://perma.cc/24LX-2SVT].

lengthy discussion at a council meeting set aside to decide the SRC's proposed alternative approaches, the section issued the following summary:

> The proposed alternatives generated significant public comment. A majority of the Council expressed dissatisfaction with current Standard 405. However, neither of the alternative proposals that the Council had circulated for Notice and Comment were acceptable to a majority of the Council. Both of those proposals were loudly criticized by law school faculty during the comment period. Because no proposal for change garnered a majority of the Council, current Standard 405 was not amended.[28]

The council's concession statement reflects many things, including how it views its decision-making and leadership responsibilities for the section and for legal education. Implicit in its statement, the council seemed to say that because legal education constituency groups achieved no consensus on which approach to move forward with, the council could not arrive at an appropriate decision. This reasoning permits a troubling notion of the council's leadership responsibilities. It suggests that the council is merely a reflector or transmitter of what key constituencies believe to be the proper path forward rather than its institutional (and DOE-imposed) responsibility for making hard decisions on the merits. This perspective reflects additional concerns: First, the section's longtime use of representation quotas for the major constituency groups (plus a few "independent" appointees) has enshrined interest group politics at the council level and, unfortunately, has at times hampered the council in serving as an independent decision-maker for legal education. Second, the statement suggests that the "loudly" critical comments of some law school faculty negated the possibility of selecting one of the two alternatives and, thus, suggests that the council, again, misperceived its leadership responsibilities in making a decision about the T&CE standards.[29]

A more principled perspective on the role of the council is that its duties are to legal education, including its consumers (students and employers), producers (such as law schools), and, most significantly, the public. The council's concession of failure to resolve the T&CE provisions describes an abnegation of its responsibilities to make a decision and to make one that serves to enhance legal education by addressing the policy implications of employment rights and resolve the growing conflict between groups of faculty and not just defer to one or more constituencies within the groups interested in the success of legal education. Finally, one has to ask what the council expected when it opened the statement of T&CE options for public discussion. The preceding public commentary on the reports of the special report and the Task

28. Section of Legal Educ. and Admissions to the Bar, Am. Bar Ass'n, Explanation of Changes 16 (Apr. 2014), http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/201404_src_meeting_materials_proposed_standards.authcheckdam.pdf [https://perma.cc/G3WV-DTZX].

29. *See* Judith Areen, *Accreditation Reconsidered*, 96 Iowa L. Rev. 1471 (2011) (arguing that DOE governance requirements for accreditation agencies has made the section's task of regulating legal education more difficult).

Force on Accreditation indicated that public comment would involve a hotly contested battle of special interest groups but lack clear consensus by legal education

It is likely that the issues of the requirements and language interpretations of Standard 405 (and its related T&CE provisions) will need to be visited again in the future. There are many possible situations in legal education that might trigger the next battle over accreditation regulation on the one hand and, on the other hand, the various interest group positions. It could occur, for example, when law school accreditation findings are more publicly reported and a law school seeking ABA accreditation but lacking a tenure-like policy is approved. Then, the Accreditation Committee and the council will need to defend their decisions to approve that new law school even though it provides no job security for its faculty members. Or decisions by a financially strapped law school to downsize its faculty irrespective of any promised job security protections will result in litigation or complaints to the AALS Committee on Academic Freedom. Or a university administrator will refuse to tenure a new dean at its law school and claim that the ABA's attempt to enforce Standard 203 (requiring that deans be granted tenure) amounts to a restraint of trade. Those potential situations, and others, will require that the council re-examine its provisions on academic freedom and security of position and come to terms with the ultimate decisions that an accreditation agency must make: Are protections of job security for faculty members the sort of policy judgments that accreditation agencies should be making, or should such employment decisions be left to their member institutions? The likelihood of the council having to address the meaning of the T&CE provisions in the context of a contested case is very high, and the key question for the council in the aftermath of its failure to resolve the issues at the conclusion of the comprehensive review is: Does it want to be proactive and return to the task of resolving the confusion and uncertainty of the T&CE standards, or simply wait till the case appears?

VI. The Council's Next Steps?

The controversies surrounding the T&CE discussion reveal a tension running deep throughout both the standards and a broader discussion of legal education. On the one hand, American legal education has earned an international reputation for its high quality of teaching and scholarship. Indeed, countries throughout the world emulate its program. On the other hand, the calls for more "skills training" and experiential learning opportunities have never been louder. Given the reality that during the past four decades law schools have adopted a remarkable array of clinical skills education, the demand for more skills training is anomalous if not counterproductive. It is simply a fantasy to imagine that law schools can actually graduate practice-

ready lawyers to fill the needs of the law firms, government agencies, and corporations that hire them.[30]

Clinical and skills education opens up a world of educational opportunities and insights into law practice. Both types of programming should be not only made available for law students but offered on a regular basis. These facts were perceived and adopted by the council as a result of the comprehensive review's re-articulation of essential curricular obligations for approved law schools. The problem, however, with pushing for more such programming is that it comes at a cost. Standards that require all students to take skills-based courses necessarily restrict the number of academic courses in a student's three-year curriculum. Ironically, T&CE pushes this agenda further by imposing costs on most law schools in a soft economy.[31] Instead of hiring more expensive tenure-track (or doctrinal) faculty, law schools can hire non-doctrinal-track faculty for their skills program. Thus, the basic anomaly is that skills and experiential training has gained in importance at the expense of education by way of doctrinal curricula and instruction. The basic question is whether the ABA is in a better position to make this decision on academic program budgeting than each law school.

The current T&CE standards directly contribute to that anomaly by requiring law schools to shift resources away from doctrinal faculty to other groups of faculty ("non-doctrinal"). An example of this inducement includes schools that have five-year presumptively renewable contracts that are now in the awkward position of virtually guaranteeing employment to non-doctrinal faculty, most of whom have no scholarship requirement. Given financial pressures, schools often will satisfy their non-doctrinal faculty ranks locally rather than engage in national searches. Similarly, non-doctrinal faculty are generally paid at a lower rate than doctrinal faculty, but, given the security of position now afforded non-doctrinal faculty, that group of employees may be taking an increasing portion of a law school's budget. This may be a good policy or not; the fundamental policy issue is who is best prepared to make the status and terms of employment decisions—the national accreditation agency or the law school and its university.

In short, current Standard 405 and the other T&CE provisions operate in an interest-group fashion rather than a pedagogically driven manner. Given the varying rights and protections of those standards, it is unclear which groups they protect or are intended to protect; at the same time, they reduce flexibility of law schools to design a curriculum that fits more closely with each school's individualized mission. Law schools, rather than the ABA or the DOE, should have the freedom and responsibility for hiring, promoting, and firing their academic talent. This is a fundamental issue that explains why no other professional accreditation agency requires tenure or other forms of

30. *See, e.g.*, Robert J. Condlin, *"Practice Ready Graduates": A Millennialist Fantasy*, 31 Touro L. Rev. 75 (2014).

31. This is a key point of the recent report of the ABA Task Force on the Financing of Legal Education. ABA Task Force Report, *supra* note 2.

security of position and builds the elaborate latticework of faculty rights and law school duties that we see in the current standards.

One of the guiding principles of the accreditation review process was to reduce the institutional cost of accreditation compliance and participation.[32] The recent financial moves made by law schools from mergers to new programming and from certificates to new degrees were all in reaction to financial pressures that have been largely (but not completely) untethered to pedagogy or to the quality of legal education. So, one great challenge facing the council is to reaffirm a commitment to reduction of costs associated with accreditation while enhancing the flexibility of approved law schools to innovate with their missions and curricula. One of the most significant institutional costs is academic talent, so the way forward to the improvement of legal education accreditation requires the council to solve the persistent riddle of status, rights, and benefits of the extraordinary talent that is committed to educating today's law students.

The current standards, then, contain a fundamental tension. Standards directed to learning outcomes and assessments, bar readiness, and the like are student-centered and encourage law schools to think more deeply about the delivery of their programs of legal education. The current T&CE standards, however, push in the opposite direction and in doing so exacerbate the tensions within many law schools' faculties. Additionally, the T&CE standards focus on employee job and status protection in ways that are not directly connected to the pedagogical mission of law schools or necessarily to the direct benefit of their students. Clearly, then, the council must make a hard choice; however, the choice is a necessary one given the uncertainty of the current standards in the tension between pedagogy job protection.

The authors favor an approach that accords greater flexibility and decision-making to individual law schools. However, compelling arguments—perhaps expressed in other articles in this symposium—may be made for an accreditation policy that requires all full-time faculty to have security of their positions and spells out those rights and duties with clarity. Those alternative views and approaches were provided to the council and remain viable and appropriate ways to move legal education forward. It is hoped that the ideas and suggestions elaborated in the SRC's statement of alternative approaches to governance of faculty hiring and retention will ultimately be helpful to the council and to legal education.

32. *See* SRC Statement of Principles of Accreditation, *supra* note 5, at 4.