

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

to the

ABA STANDARDS REVIEW COMMITTEE

of the

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

from the

ASSOCIATION OF LEGAL WRITING DIRECTORS

And the

LEGAL WRITING INSTITUTE

October 28, 2003

INTRODUCTION

The Association of Legal Writing Directors (ALWD) and the Legal Writing Institute (LWI) submit this report in support of their recommendations that the ABA eliminate current Standard 405(d) and Interpretation 405-9, and include full-time legal writing faculty within Standard 405(c). Alternatively, ALWD and LWI recommend that the ABA at a minimum modify Interpretation 405-9 to apply only to bona fide fellowship programs.

ALWD is comprised of more than 240 law professors, primarily current and former legal writing program directors. ALWD represents more than 90% of ABA-accredited law schools in the United States, as well as several law schools in Canada and other nations. ALWD's bylaws set out the goals of the organization:

[T]o organize conferences of legal writing directors for the purpose of improving the educational quality of law school legal writing programs; to advise and assist individual directors in the administration of law school legal writing programs and in other aspects of the work of individual directors; to encourage and facilitate research and publications on subjects unique to the educational responsibilities of legal writing directors; to collect and disseminate data relevant to directing legal writing and research programs; and to promote rigor in legal analysis, legal writing, and legal research and to improve understanding among legal educators, students, and the bench and bar about the field of legal writing.

ALWD holds biennial conferences, has prepared a widely-adopted and praised citation manual, and supports scholarship in the field of legal writing, via issuance of research grants and publication of a scholarly legal journal.

LWI has over 1,200 members, representing virtually all the ABA-accredited law schools, as well as foreign law schools, university departments of English, judges, and the practicing bar. LWI's bylaws state that:

The purposes of the Legal Writing Institute are to improve legal writing, to promote and improve legal writing instruction, and to educate the public and the members of the bar about legal reasoning, research, and writing.

LWI publishes a scholarly journal and a newsletter, and holds a national biennial conference.

These two organizations are deeply committed to legal education and are deeply concerned about the negative effect of ABA Standard 405(d) on the effective delivery of that education in the field of legal writing and legal reasoning. Current ABA Standard 405(d), as interpreted by Interpretation 405-9, reflects neither current best practices nor even current standard practices relating to the delivery by full-time professionals of legal writing and legal reasoning training in American law schools. Thus, ALWD and LWI strongly recommend that: (1) the ABA eliminate Standard 405(d), and bring full-time legal writing faculty within Standard 405(c); or as an alternative minimum, that (2) the ABA modify Interpretation 405-9 to make clear that the Interpretation applies only to bona fide fellowship programs that produce future tenure track or clinical law professors as defined in the proposed modification.

CURRENT ABA STANDARDS 405(c) AND 405 (d) AND INTERPRETATION 405-9

The current texts of the two standards discussed in this report, along with the current text of Interpretation 405-9, are as follows:

Standard 405(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.

Standard 405(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 302(a)(2), and (2) safeguard academic freedom.

Interpretation 405-9

Subsection (d) of this Standard does not preclude the use of short-term or non-renewable contracts for legal writing teachers.

RECOMMENDATION

Recommendation No. 1: ALWD and LWI recommend that the ABA eliminate current Standard 405(d) and accompanying Interpretation 405-9, and amend current Standard 405(c) to provide:

A law school shall afford to full-time clinical and legal writing faculty members a form of security of position reasonably similar to tenure, and non-compensatory perquisites reasonably similar to those provided other full-time faculty members. A law school may require these faculty members to meet standards and obligations reasonably similar to those required of other full-time faculty members. However, this Standard does not preclude

a limited number of fixed, short-term appointments in a clinical or legal writing program predominantly staffed by full-time faculty members, or in an experimental clinical program of limited duration, or in a bona fide fellowship program. (Underlined language is new.)

Amendment of Standard 405(c) will require concomitant changes to Interpretations 405-6, 405-7, and 405-8, and a new interpretation (that will define the term bona fide fellowship program). These proposed changes are reflected in Attachment No. 1 to this report.

Alternative Minimum Recommendation No. 2: ALWD and LWI alternatively recommend at a minimum that the ABA modify Interpretation 405-9 in interpreting current Standard 405(d), so that the interpretation applies only to bona fide fellowship programs:

Subsection (d) of this Standard does not preclude the use of short-term or non-renewable contracts for legal writing teachers who are fellows within a bona fide fellowship program. For purposes of this Interpretation, a bona fide fellowship program is a program that produces candidates for the full-time tenure track or clinical teaching markets by offering those candidates supervised teaching experience, financial and other support for scholarship production, or both. The fellowship program may, but is not required to, culminate in the award of an advanced degree. (Underlined language is new.)

EXPLANATION OF THE REASONING IN SUPPORT OF THE RECOMMENDATIONS

The preamble to the ABA Standards states:

The Standards for Approval of Law Schools of the American Bar Association are founded primarily on the fact that law schools are the gateway to the legal profession. They are minimum requirements designed, developed, and implemented for the purpose of advancing the basic goal of providing a sound program of legal education. The graduates of approved law schools can become

members of the bar in all United States jurisdictions, representing all members of the public in important interests. Therefore, an approved law school must provide an opportunity for its students to study in a diverse educational environment, and in order to protect the interests of the public, law students, and the profession, it must provide an educational program that ensures that its graduates:

- (1) understand their ethical responsibilities as representatives of clients, officers of the courts, and public citizens responsible for the quality and availability of justice;
- (2) receive basic education through a curriculum that develops:
 - (i) understanding of the theory, philosophy, role, and ramifications of the law and its institutions;
 - (ii) skills of legal analysis, reasoning, and problem solving; oral and written communication; legal research; and other fundamental skills necessary to participate effectively in the legal profession;
 - (iii) understanding of the basic principles of public and private law; and
- (3) understand the law as a public profession calling for performance of pro bono legal services.

ABA Standard 302 expressly provides that:

- (a) All students in a J.D. program *shall* receive:
 - (1) instruction in the substantive law, values and skills (*including legal analysis and reasoning, legal research, problem solving and oral and written communication*) generally regarded as *necessary* to effective and responsible participation in the legal profession; and
 - (2) substantial *legal writing* instruction, including *at least* one rigorous writing experience in the first year and *at least* one additional rigorous writing experience after the first year. (Emphasis supplied).

Despite these fundamental statements about the importance of writing in the law school curriculum, the persons who are charged at most law schools with meeting these essential obligations, the full-time legal writing faculty, are treated as lesser citizens. Full-time legal writing faculty have the least job security of any members of the nation's law faculties and the most limited role in law school governance under the same

Standards.¹ As matters now stand, ABA Interpretation 405-9 permits law schools to hire under short-term, non-renewable contracts full-time legal writing faculty, charged with fulfilling a law school's essential obligations under Standard 302. Interpretation 405-9 should be repealed because it does not reflect best practices or even prevailing norms in attracting and retaining qualified full-time legal writing faculty.

Short-term, non-renewable employment contracts for legal writing teachers are vanishing because law schools have learned that a revolving door for full-time faculty teaching such a critical course is a disservice to students and the profession. The ABA standards regarding attraction and retention of full-time qualified teachers in such a core subject area as legal reasoning and writing should recognize the profound and continuing evolution in educational norms.

Arguments against the placement of full-time legal writing faculty within Standard 405(c) and repeal of Interpretation 405-9 fail for several reasons. First, certain schools may wish to hire full-time legal writing professionals on short-term, non-renewable contracts to maintain staffing flexibility. Second, certain schools may fear that placing full-time legal writing faculty within Standard 405(c) and/or eliminating Interpretation 405-9 will eliminate their current fellowship programs.

Neither of these reasons is acceptable. Staffing flexibility is not a sufficient basis for categorically treating full-time legal writing faculty as lesser citizens within the academy, for several reasons, including:

- Staffing flexibility may be “expedient,” but still not “right” for purposes of attracting and retaining well-qualified full-time teachers of subjects the Standards and lawyers view as essential.
- If staffing flexibility were a valid underpinning of the ABA 400-series Standards, then the Standards would authorize the employment of *all* faculty on short-term, non-renewable contracts, but of course the Standards do not. Instead, the Standards presume that faculty should be eligible for tenure or other forms of job security.

¹ At some schools that employ full-time legal writing faculty on short-term, non-renewable contracts, the legal writing faculty members are not even allowed to attend, let alone vote in, faculty meetings.

- Long-term uncapped employment contracts are the predominant form of employment for full-time legal writing faculty under current norms. This would not be true if most law schools were satisfied with the results of having such teachers on short-term, non-renewable contracts. ALWD's and LWI's current best information is that only twelve law schools in the United States now use short-term, non-renewable contracts for their full-time legal writing faculty.²

A handful of schools continue to combine legal writing instruction with a high-quality fellowship program. The recommendations in this report clarify that those schools should be permitted to continue to teach writing through fellows who receive genuine assistance in preparing for and entering tenure-track and clinical faculty positions. The existence of a handful of bona fide fellowship programs is not a sufficient basis for treating full-time legal writing faculty as lesser citizens within the academy, for several significant reasons:

- Bona fide fellowship programs designed to prepare teachers to enter the tenure track or clinical teaching markets can be legitimately addressed through language in Standard 405(c). Standard 405(d) and Interpretation 405-9 do not need to exist to preserve bona fide fellowship programs, and by failing to comment specifically upon such programs, leave their status ambiguous.
- Interpretation 405-9 as currently drafted is overbroad. If it is simply protection for bona fide fellowship programs, the Interpretation is improperly drafted because it currently permits short-term, non-renewable contracts in *any* legal writing program. ALWD's and LWI's current best information is that there are only six law schools in the United States that use "fellows" to teach legal reasoning and writing. For purposes of the vast majority of the nation's law schools, the Interpretation significantly

² Note that the ALWD and LWI recommendations for present purposes apply only to full-time faculty, and not to adjunct legal writing teachers who are not full-time employees. *If* schools believe that a full-time legal writing faculty is better for students and the profession, then schools may not treat such faculty members as lesser citizens.

undercuts the “attract and retain” language in the Standard itself, without any impact whatsoever on a fellowship program.

There are at least four additional reasons for eliminating Standard 405(d) and placing full-time legal writing faculty within Standard 405(c).³

- Students and the legal profession suffer when law students are trained by a revolving stream of full-time teachers who are nonetheless novices on short-term, non-renewable contracts.
- Teachers on short-term, non-renewable contracts have no time to improve their teaching skills or to engage in scholarship.
- Short-term non-renewable contracts impede efforts by legal writing programs to engage in programmatic self-improvement to meet the demands of the courts and the practicing bar for more accomplished law school graduates.
- Roughly 70% of full-time legal writing faculty members are women. The codification of permission for short-term, non-renewable contracts for a predominantly female segment of the academy is out of sync with the rest of the Standards and prevailing norms.⁴

CONCLUSION

Standard 405(d), as interpreted by Interpretation 405-9, is out of step with best practices for teaching legal reasoning and writing within our nation’s law schools. It is out of step even with mainstream norms. It should be eliminated in favor of appropriate modifications to Standard 405(c), or at a minimum Interpretation 405-9 should be modified so that it applies only to bona fide fellowship programs.

³ For more background, see the ALWD web site, alwd.org. Under Resources, ALWD Publications, is the ALWD position paper on ABA accreditation standards, “Quality Legal Writing Instruction and ABA Accreditation Standard 405: Report and Recommendations,” Jan. 21, 2000.

⁴ This topic has been treated extensively in legal publications and law journals, *see, e.g.* Jenny B. Davis, *Writing Wrongs*, 87 A.B.A. J. 24 (2001); Jo Anne Durako, *A Woman’s Place: Employment Patterns in Legal Writing, Labor and Employment in the Academy – A Critical Look at the Ivory Tower: Proceeding of the 2002 Annual Meeting of the Association of American Law Schools*, 6 Employee Rts. & Emp. Pol’y J. 129 (2002); Jan M. Levine & Kathryn M. Stanchi, *Women, Writing & Wages: Breaking the Last Taboo*, 7 Wm. & Mary J. Women & L. 551 (2001); Kathryn M. Stanchi & Jan M. Levine, *Gender and Legal Writing: Law Schools’ Dirty Little Secrets*, 16 Berkeley Women’s L.J. 3 (2001).

ATTACHMENT NO. 1
TO REPORT OF ALWD AND LWI
TO THE ABA STANDARDS REVIEW COMMITTEE
Proposed modifications to Interpretations of Standard 405(c)

Interpretation 405-6

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

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

Interpretation 405-7

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

Interpretation 405-8

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

New Interpretation to 405

A bona fide fellowship program for purposes of Standard 405(c) is a program that produces candidates for the full-time tenure track or clinical teaching markets by offering those candidates supervised teaching experience, financial and other support for scholarship production, or both. The fellowship program may, but is not required to, culminate in the award of an advanced degree.