

**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

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INTRODUCTION

The Association of Legal Writing Directors (ALWD) and the Legal Writing Institute (LWI) ask the ABA to revise its Standard 405 to provide full-time professors of legal writing with at least the same level of job security as full-time clinical professors possess. The revision will encourage law schools to implement changes in legal writing instruction that will result in educational enhancements similar to those that have occurred in clinical skills instruction. The Curriculum Committee of the ABA Section on Legal Education just completed its sixty-eight page document “A Survey of Law School Curricula 1992-2002.” At page 64, the Committee makes the following observation:

From the perspective of curricular changes or innovations, the most pervasive curricular change reported by respondents was the increased commitment to clinical education

This commitment has taken a variety of forms. Additional clinics were established and externship opportunities were expanded. The instruction in clinics was also enhanced. In response to changes in the ABA Accreditation standards, respondents reported that clinical faculty members were, at least, awarded long term contracts, while other schools have devoted tenured or tenure track positions to clinical education. Respondents reported that the change in status raised the importance and value of the clinical experience, and thus the clinical experience were [sic] thus enhanced. (footnote omitted) (emphasis added)

The delivery of legal writing education would be similarly enhanced if full-time legal faculty members also were eligible for tenure or at least long term contracts. Thus, ALWD and LWI submit this additional report¹ 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 the same Standard 405(c) that pertains to clinical faculty members. Alternatively, ALWD and LWI renew their recommendation that the ABA at a minimum modify Interpretation 405-9 to apply only to bona fide fellowship programs. The current Standard restrains the academic freedom of legal writing professors in a manner that directly affects the education of the students they teach.

¹ ALWD and LWI have previously submitted position statements regarding Standard 405. The most recent statement is dated October 28, 2003, and is attached for convenient reference. The statement may also be found electronically at the ALWD website, www.alwd.org. ALWD and LWI do not intend in this current position statement simply to repeat material from prior submissions but instead incorporate them by reference. The purpose of this current statement is to supplement the prior submissions with a discussion of the problematic relationship between Standard 405(d) and matters of academic freedom.

EXPLANATION OF THE REASONING IN SUPPORT OF THE RECOMMENDATIONS

The ABA Standards have long reflected the importance of training in legal reasoning and writing. ABA Standard 302 in its current form 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 added)

ABA Standard 302 in the form the Council approved on August 6, 2004, would expressly provide in relevant part that:

- (a) A law school shall require that each student receive substantial instruction in:
1. the substantive law generally regarded as necessary to effective and responsible participation in the legal profession;
 2. legal analysis and reasoning, legal research, problem solving, and oral communication;
 3. writing in a legal context, including at least one rigorous writing experience in the first year and at least one additional rigorous writing experience after the first year;

(emphasis added)

Despite these fundamental statements about the importance of writing in the law school curriculum, the full-time legal writing faculty professors who are charged with meeting these essential obligations are treated as lesser citizens. This treatment seriously restrains their academic freedom to deliver quality instruction in the best ways they can.

At this Committee's May 19, 2004, hearing in Washington, D.C., the Committee heard testimony from legal writing professors who testified that:

- some professors are not free to choose the textbooks they believe best for teaching their courses;
- some professors have been "advised" not to pursue legal writing scholarship;

- some professors experience revisions in their contract renewal and voting rights after they have already been teaching;
- some professors experience routine scrutiny of their course syllabi.

At the same hearing, the Committee heard that programs in which full-time writing faculty have tenure saw none of these problems. There were no instances of limitation on academic freedom in writing programs where the faculty had job security.

ALWD and LWI published their 2004 national survey results in July. The survey was sent to the legal writing programs at all AALS member schools and AALS non-member fee-paying schools throughout the nation, and achieved a 93% response rate. The 110-question survey asked a number of questions regarding the academic freedom of legal writing professors. A sample of the narrative end notes follows— edited for brevity where noted²:

We traditionally have been allowed to choose our own texts, but in the wake of concerns about the ALWD/Bluebook dispute, we have been required to use only the Bluebook. There is significant institutional pressure to have almost uniform assignments, and that pressure has increased over the years. ... Since 2002 we have been required to draw our writing topics from one first-year course; that course is assigned by the associate dean. In 2004-2005 that restriction will be loosened to allow instructors to select topics from any first-year course that suits their pedagogical needs at a given time, as long as it is a course the students are taking or have taken.

The legal writing faculty as a whole have a fair degree of academic freedom, but there is significant pressure on us to have considerable uniformity among the members of the legal writing faculty (same textbook, same syllabus, same number of assignments).

At this school, there is pressure for the first-year writing and research course to integrate the topics of assignments with first-year classes, so that legal writing and research teachers will not have complete freedom in creating problems. We are trying to resist this pressure, but it is unclear at the moment where we stand. Doctrinal faculty (particularly junior faculty) want to dictate when the semester must end for the legal writing and research class, what topics we use in our assignments, and what type of writing assignments we do. We currently still use the Bluebook because a change to the ALWD Manual would probably raise complaints.

² Not all survey respondents were willing to have limits on their academic freedom published with the survey data.

The dean has applied explicit but subtle pressure to change the focus of our assignments (to tie in with one of their other classes; i.e., all their assignments would be contracts-related or something). . . .

We haven't tested all of these factors. For example, we've used the ALWD Manual for 3 years, and there have been some complaints, but we haven't felt pressure to change ... yet. We've made various changes to how we use research assistants and how and when we teach citation without any pressure. If we wanted to do something major... who knows?

Assoc Dean sets uniform page requirements.

Yes or No answers are not sufficient here. Many "yes" answers [responding that there is academic freedom] simply mean that I've never tested my "authority." I am quite sure that students and some colleagues would have very strong feelings about certain changes and would make those feelings known. Result would likely be that decisions I thought were mine would be overruled. Similarly, many members of our faculty have definite opinions about what the LRW course ought to do -- and would object strenuously if we did not continue to do some of those things.

The survey collected data as well:

To Question 102 "Do you have the authority to choose or change your legal research and writing textbooks (such as citation manuals)," **six respondents said no;**

To Question 103 "Do you have the authority to choose or change your legal research and writing teaching methods (such as lecture, small group exercises, guest lecturers, joint teaching)," **six respondents said no;**

To Question 104 "Do you have the authority to choose or change your legal research and writing exam methods (such as essay, short answer, Bluebook, "problems" requiring a written memo or brief to be written)," **nine respondents said no;**

To Question 105 "Do you have the authority to choose or change your types of legal research and writing assignments (such as length of assignments, subject area, appellate or trial brief, due dates)," **eleven respondents said no;**

To Question 106 "Do you have the authority to choose or change your scholarship topics (such as legal writing topics, pedagogy topics, doctrinal topics)," **four respondents said no;**

To Question 108 "Do you vote on curriculum matters at faculty meetings," **twenty-four respondents said no;**

To Question 109 "When changes are recommended to the methods and scope of teaching in the required legal research and writing program, who has the

final authority to adopt or reject the changes,” **twenty-nine respondents said “the dean or deans.” Seven respondents said “a faculty committee.” Forty-nine respondents said “the faculty at a full faculty vote.”**

To be sure, not all of the ALWD/LWI data is discouraging. ALWD and LWI understand that eight legal writing professors received tenure this past year. Those eight professors are directors of their schools’ writing programs, and the grant of tenure not only recognizes their achievements in areas of scholarship, teaching, and service, but also carries with it the ability to exercise a faculty member’s academic freedom in matters concerning the writing program.

Additionally, many of the 2004 survey respondents replied “yes” to the academic freedom questions. Mainstream practice is moving towards increased job security and academic freedom for legal writing professors. A number of legal writing professors have reported their individual good fortune in receiving support for their teaching, scholarship, security, and academic freedom from their institutions.

But matters of good teaching and academic freedom in core ABA-required subjects should not depend upon good fortune. Even though ABA Standard 405(d) is supposed to protect academic freedom, it does not work because it does not assure that legal writing faculty members have a voice in faculty governance and does not provide for job security. Where there are no tenure grants or 405(c) contracts, then there may be no faculty member teaching in a school’s writing program who can speak freely about the writing curriculum or on behalf of the writing faculty, without first pausing as a result of the kind of survey data described above.

Nor is the adverse impact on academic freedom the only reason to re-examine Standard 405(d). Four additional reasons are that:

- 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.

CONCLUSION

Standard 405(d) enables law schools to deprive certain full-time faculty of their academic freedom to design and teach courses, to the detriment of the education of our students. The Standard is inconsistent with the recognition of academic freedom that lies at the heart of the Standards, it is inconsistent with the ABA's own admonition that schools offer students substantial and rigorous legal writing instruction, and it is inconsistent with mainstream norms of legal education. ALWD and LWI request that the Standard be changed to provide full-time legal writing professors with at least the same treatment clinical professors receive.