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July 21, 2008

Council of the Section of Legal Education and Admissions to the Bar  
Office of the Consultant (Attn: Becky Stretch)  
American Bar Association  
321 N. Clark Street, 21st Floor  
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*Sent via email to Becky Stretch, [StretchC@staff.abanet.org](mailto:StretchC@staff.abanet.org)*

Dear Members of the Council:

The Legal Writing Institute (LWI) sends this comment in response to the Report of the Special Committee on Security of Position. In sum, LWI appreciates the effort of the Special Committee, which clearly worked hard to develop a possible alternative to existing standards regarding security of position. Nonetheless, the alternative is not better than the existing standards; in fact, it is worse.

The existing standards, despite their inadequacies, are preferable and LWI urges the Council and the Standards Review Committee to continue to work to improve those standards so that students receive the skills education they need and so that the public is served by well prepared attorneys.

### **The Legal Writing Institute**

The Legal Writing Institute has over 2,100 members, making it the second-largest organization of law teachers in the country. LWI members represent all of the ABA-accredited law schools in the United States as well as some foreign law schools. Many LWI members have served on law school accrediting and re-inspection teams. The Report of the Special Committee on Security of Position was discussed at both LWI's Board of Directors meeting and the general membership meeting at LWI's national conference at the Indiana University School of Law-Indianapolis last week. LWI members had the opportunity to review this letter prior to its submission.

### **Report of the Special Committee on Security of Position**

The Special Committee was charged to assume the elimination of current standards, write an alternative standard, and evaluate that alternative approach.<sup>1</sup> The Special Committee's report does *not* recommend adoption of the alternative approach outlined in Section II – Regulatory Alternatives. The Committee instead points out the limited time it had to produce its report and lists several pages of potential downsides and risks associated with the alternative approach discussed by the Committee.

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<sup>1</sup> Special Report at page 2.



Thus, the most prudent next step would be for the Council to send the report to the Standards Review Committee or some other committee without any instructions that would prioritize any one approach over any other. That committee could review available data to balance the advantages and disadvantages of the alternative standard vis-à-vis the current standards. Because the Special Committee only began to evaluate the alternative, it would be premature for the Council to make any assessment without further study and public input. In fact, the Special Committee itself recognized this next step: “If any alternatives are identified that the Council determines merit further consideration, then it was understood that those would be forwarded for study by the Standards Review Committee and, whatever that Committee determined to recommend would go through the normal public comment and hearing process.”<sup>2</sup>

### **1. *Broad Themes and Aspirations of Report***

Everyone would agree with the unanimous recommendation of the Special Committee concerning the three underlying elements of any standards that address security of position: (a) faculty must be assured of academic freedom, (b) law schools must provide mechanisms for attracting and retaining qualified faculty, and (c) faculty must control law school governance. LWI appreciates the aspirations that are driving consideration of new standards: transparency, flexibility to encourage innovation, and equality among faculty positions. The alternative standard discussed by the Special Committee, however, fails to meet those themes and aspirations, and very likely will inhibit schools from achieving them, as outlined in part three of this comment.

### **2. *Importance of Skills Education to Students and the Public***

The Carnegie Report concluded that law schools still give “only casual attention to teaching students how to use legal thinking in the complexity of actual law practice,” pay “relatively little attention to direct training in professional practice,” and fail to provide “effective support for developing ethical and social skills.”<sup>3</sup> American legal education fails to provide adequate skills training to law students, falling short of the benchmarks set by schools of medicine, dentistry, and architecture<sup>4</sup> and by legal education in other countries.<sup>5</sup> As a result, it is common for judges and senior attorneys to work with new lawyers who are unfamiliar with such basic skills as how to conduct a trial, how to write a contract, and how to draft an effective letter to a client. Such unfamiliarity with legal practice does not serve the public well.

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<sup>2</sup> Special Report at page 2.

<sup>3</sup> William M. Sullivan et al., *Educating Lawyers: Preparing for the Profession of Law* (2007).

<sup>4</sup> See *id.*; see also Thomas R. Fisher & Daniel B. Hinshaw, *Models from Other Disciplines—What Can We Learn from Them?*, 1 J. Assn. Leg. Writing Dirs. 165 (2002) (architecture and medical schools).

<sup>5</sup> David Weisbrot, *What Lawyers Need to Know, What Lawyers Need to Be Able to Do: An Australian Experience*, 1 J. Assn. Leg. Writing Dirs. 21 (2002).



### 3. *Skills Education and the Special Committee's Alternative Approach to Security of Position*

For law schools to enhance skills education for students, those who teach skills need to be afforded the same participation in faculty governance, the same possibility for continuing appointment, and the same academic freedom as their colleagues who teach in doctrinal areas. This ideal is not made clear by the existing standards without a close reading, and the alternative approach considered by the Special Committee could reverse progress that has already been made.<sup>6</sup>

#### a. *Curriculum and Faculty Governance*

The best way to ensure appropriate curriculum development to enhance skills education is to include fully in faculty governance those who teach skills. Skills faculty have a wealth of knowledge to share based on their teaching, their scholarship, and their interactions with the practicing bar. These teachers understand the inseparable link between analysis, thinking, writing, and legal practice. Existing Standard 405(c) has been valuable in encouraging schools to welcome more skills faculty to full participation in faculty governance. But even under the existing standards, skills teachers do not always have the opportunity to participate in curriculum development through faculty governance. Even now, faculty who have voting rights sometimes limit which of their colleagues can vote, who can serve on committees, and in some cases even who can attend faculty meetings.<sup>7</sup>

Under the alternative standards, non-skills faculty members who currently have the vote would have little incentive to provide skills teachers more than the bare minimum role in faculty decisions. Alternative interpretation 3-1 begins by recognizing the “traditional tenure system” as the gold standard, the one that presumptively accords adequate faculty participation in law school governance. But alternative interpretation 3-2 does not require the gold standard for all faculty equally. Instead, it says that “participating in faculty meetings, committees, and other aspects of governance exercised by tenured faculty generally may demonstrate compliance with this standard.”<sup>8</sup> Stating that this participation “may” demonstrate a sufficient role in governance is inadequate because voting faculty could argue that other, lesser forms of participation also “may” demonstrate sufficient participation by non-voting colleagues.

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<sup>6</sup> For example, the committee acknowledges the concern that the adoption of the alternative standard could “encourage law schools to return to a situation where some faculty members are more marginalized than others.” Special Report at page 17. The committee concludes that “[e]valuating that risk [is] an important inquiry before making any changes.” *Id.*

<sup>7</sup> In the report’s summary of lessons regarding tenure, academic freedom, and governance, it concludes “it is the faculty that has authority to decide what will be taught and by whom, rather than individual members of the faculty.” Special Report at page 9. If fewer than all members of the faculty are allowed to vote, the select few may determine the curriculum of a school without considering the knowledge or insights of those excluded.

According to a national survey of faculty who teach legal writing, that is happening. Only 34 of 181 responding schools (just under 19%) allow full voting rights for writing faculty, and 12 schools (almost 7%) do not even allow legal writing faculty to attend faculty meetings. At 30 schools (more than 16%), writing faculty cannot serve on committees. 2008 Survey of the Association of Legal Writing Directors and the Legal Writing Institute, questions 83 and 84 (response rate among law schools was approximately 92%).

<sup>8</sup> Special Report at pages 14–15.



Thus, a segment of the faculty could be allowed to attend and speak at meetings—but not vote. The inability to vote limits the ability to directly or indirectly influence curricular decisions because the views of non-voting faculty may be devalued or disregarded simply because of the non-voting status. Only the opportunity to vote ensures an influence in curricular decisions that will provide skills education to students and protect the public from unprepared attorneys.

Additionally, without real job security, faculty members do not feel safe and free to speak out about what they know. Academic freedom is worth little to the colleague who cannot speak with impunity at faculty meetings or vote on issues that will guide the school. Allowing faculty who currently have voting rights the discretion to deny the vote to classes of faculty (or individual faculty members) distorts legal education to favor those who enjoy the “traditional tenure system” of full participation and enfranchisement.

**b. *Attracting and Retaining Faculty***<sup>9</sup>

Alternative standard #2 requires schools to have conditions “designed to attract and retain a competent full-time faculty.”<sup>10</sup> Again, the gold standard is the “traditional tenure system” now enjoyed by almost all doctrinal teachers. Alternative interpretation 2-3 would be effective at keeping skills faculty in a separate category. That interpretation would allow a law school to have “fixed, short-term faculty appointments *in a program*.”<sup>11</sup> Given that no law school has a “program” for traditional, doctrinal subjects, the alternate interpretation strongly suggests that skills faculty—who often work collaboratively in programs—are the class of faculty that would be targeted for less than the “traditional tenure system” that presumptively is successful in attracting and retaining competent faculty. If skills courses are taught by faculty on short-term appointments, students will not benefit from the experience and expertise that teachers develop after years of working with students in classrooms, clinics, and office conferences. Related to the issue of faculty governance, if skills faculty are part of a law school for only short-term periods, they will find it difficult to build the strong, lasting relationships that are so conducive to productive faculty interaction.

**c. *Academic Freedom and Institutional Flexibility***

Given the Special Report’s recognition of academic freedom as paramount to law school faculty, it is not surprising that alternative standard #1 makes a strong statement in favor of academic freedom in teaching, research, governance, and public comments. Interpretation 1-1 defines “faculty” to include “all individuals who have teaching and/or research responsibilities in the law school, *regardless of their titles, their field of study, and*

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<sup>9</sup> The Special Report states its charge as addressing ways to attract and retain “well-qualified” faculty (p.2), but alternative approach standard #2 concerns attracting and retaining “competent” faculty (p.13).

<sup>10</sup> Special Report at page 13.

<sup>11</sup> Special Report at page 14.



*any administrative responsibilities they may bear.*<sup>12</sup> It is surprising, though, that alternative interpretation 1-3 leaves determination of academic freedom to ad hoc decisions by the members of law school faculties who currently have voting rights.

Further, while the alternative approach would provide more flexibility to individual institutions, the existing faculty arrangement at many schools suggests that skills teachers are more likely to be excluded from the “traditional tenure system” that presumptively assures academic freedom, retention, and a meaningful role in faculty governance. Rather, skills teachers are more likely to be in the catchall positions whose protections and participation are yet to be defined.<sup>13</sup>

Thus, while teachers who enjoy voting rights could reasonably expect to have the statutory protections of the alternative standard, those who do not would have to wait and see what type of common law built up from ad hoc visits to the schools that were considered for re-accreditation closest in time to the adoption of the alternative approach. Indeed, in comparing the alternative standard to the existing one, the Special Committee acknowledged “because the current Standards refer explicitly to the need for schools to create some security of position ‘reasonably similar’ to tenure for clinical faculty positions outside that system, some expressed concern that failing to have such an express link between the employment conditions of non-tenure track faculty and tenure track faculty could result in more hierarchy, rather than less, among faculty positions.”<sup>14</sup> So while alternate interpretation 1-1 is facially appealing in eliminating reference to titles, fields of study, and administrative responsibilities, in practice the existing system of granting the most protections to those who teach doctrine and the least protections to those who teach skills is likely to continue.

#### *d. Effect on Female Faculty*

If skills faculty were not included in the “traditional tenure system” at most schools, the result would have a disparate impact on female faculty members. Skills positions in general, and writing positions in particular, have been socialized as jobs held by female faculty members.<sup>15</sup> If the assurances and protections provided by current Standard 405(c) are watered down, even to meet the goal of innovation and flexibility for individual

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<sup>12</sup> Special Report at page 13.

<sup>13</sup> For example, during the past academic year, most legal writing teachers were full-time, non-tenure track teachers (86 schools or 47.5% of those responding). At 17 schools, legal writing teachers were adjuncts (9.3%). At just 9 schools were legal writing teachers solely tenured or tenure track teachers hired specifically to teach legal writing. Other schools had hybrid staffing models, with most tending to be full-time, non-tenure track teachers. 2008 Survey of the Association of Legal Writing Directors and the Legal Writing Institute, question 10.

<sup>14</sup> Special Report at page 18.

<sup>15</sup> Significantly, more women than men are still being hired to teach legal writing. 2008 ALWD/LWI Survey, question 71. See also Kathryn M. Stanchi, *Who Next, The Janitors? A Socio-Feminist Critique of the Status Hierarchy of Law Professors*, 73 UMKC L. Rev. 467 (2004); Susan P. Liemer, *The Hierarchy of Law School Faculty Meetings: Who Votes?*, 73 UMKC L. Rev. 351 (2004); Ann C. McGinley, *Discrimination in Our Midst: Law Schools' Potential Liability for Employment Practices*, 14 UCLA Women's L.J. 1 (2005).

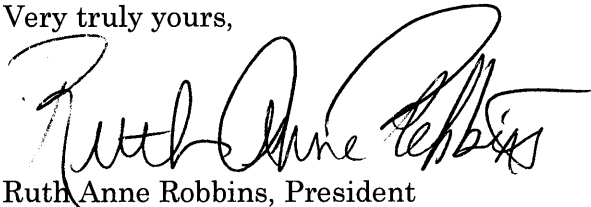


institutions, the affected faculty will be largely female. This segment of the law faculty is already a disadvantaged class; it would become even less well off under the alternate approach.

### **Conclusion**

The Legal Writing Institute does not support the alternative approach to the existing standards concerning security of position. Thank you for this opportunity to participate in this important process.

Very truly yours,

A handwritten signature in black ink, appearing to read "Ruth Anne Robbins". The signature is fluid and cursive, with a large initial "R" and "A".

Ruth Anne Robbins, President  
Legal Writing Institute

