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Article

*Form and Substance: Standards for Promotion and Retention of Legal Writing
Faculty on Clinical Tenure Track*

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Introduction: In 2005 the American Bar Association Standards for Approval of Law Schools (ABA Standards) were amended to more specifically address the form of job security required under Standard 405(c). Standard 405(c) requires that clinical law faculty be afforded a form of job security reasonably similar to tenure.¹ The interpretations to 405(c) were amended to clarify that such form of job security requires one of the following: a separate tenure track; presumptively renewable long term contracts of at least five years; or some other form of security that will ensure the faculty member academic freedom.² Standard 405(d) addresses the minimum level of job security required for legal writing faculty and requires “such security of position and

¹ ABA Standard 405(c) provides:

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.

AMERICAN BAR ASS'N STANDARDS FOR APPROVAL OF LAW SCHOOLS, STANDARD 405(c) (2005-06) [hereinafter ABA STANDARDS], *available at* [http:// www.abanet.org/legaled/standards/chapter4.html](http://www.abanet.org/legaled/standards/chapter4.html).

² ABA Interpretation 405-6 provides:

A form of security of position reasonably similar to tenure includes a separate tenure track or a program of renewable long-term contracts . Under a separate tenure track, a full-time clinical 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 entire clinical program.

A program of renewable long-term contracts shall provide that, after a probationary period reasonably similar to that for other full-time faculty, during which the clinical faculty member may be employed on short-term contracts, the services of a faculty member in a clinical program may be either terminated or continued by the granting of a long-term renewable contract. For the purposes of this Interpretation, "long-term contract" means at least a five-year contract that is presumptively renewable or other arrangement sufficient to ensure academic freedom. 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 entire clinical program.

AMERICAN BAR ASS'N STANDARDS FOR APPROVAL OF LAW SCHOOLS, STANDARD 405(c) (2005-06) [hereinafter ABA INTERPRETATION], *available at* [http:// www.abanet.org/legaled/standards/chapter4.html](http://www.abanet.org/legaled/standards/chapter4.html).

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.”³ Notwithstanding the distinction, a law school that provides its writing faculty long term contracts may elect to treat these faculty as 405(c) faculty. There are a variety of benefits associated with that election which are discussed *infra*.

To the extent that the ABA accreditation standards require that a school utilize written procedures to evaluate the retention and promotion of faculty employed under 405(c),⁴ this article compares the written standards employed by schools with 405(c) status legal writing faculty and concludes that there is no justification for a law school to afford its writing faculty a form of employment which is less secure than that afforded clinical faculty. The standards reviewed for such comparison are included in Appendix A.⁵

³ ABA STANDARD 405(d).

⁴ ABA INTERPRETATION 405-3 requires that a “law school shall have a comprehensive system for evaluating candidates for promotion and tenure or other forms of security of position, *including written criteria and procedures that are made available to the faculty*” and ABA INTERPRETATION 405-7 provides that

[i]n determining if the members of the full-time clinical 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 faculty. *A law school should develop criteria for retention, promotion, and security of employment of full-time clinical faculty.*

ABA INTERPRETATION 405-3 (emphasis added); ABA INTERPRETATION 405-7 (emphasis added).

⁵ In order to obtain standards for comparison, I contacted schools which reported having writing faculty on Standard 405(c) contracts. This information was obtained from a legal writing listserv post, E-mail from Gail Stephenson, Director of Legal Analysis & Writing and Assistant Professor of Law, Southern University Law Center, gstephenson@sulc.edu, to LRWPROF listserv, LRWPROF-L@LISTSERV.IUPUI.EDU, *Law Schools with 405(c)status or tenure track* (June 14, 2006) (on file with author) [hereinafter *Stephenson E-mail*]. Appendix A includes standards from the following law schools: Albany Law School [hereinafter Albany]; American University, Washington College of Law [hereinafter American/WCL]; Cleveland State University, Cleveland-Marshall College of Law [hereinafter Cleveland-Marshall]; University of Dayton School of Law [hereinafter Dayton]; DePaul University College of Law [hereinafter DePaul]; Drake University Law School [hereinafter Drake]; Hofstra University School of Law [hereinafter Hofstra]; Indiana School of Law – Indianapolis [hereinafter Indianapolis]; Loyola Law School

For context, this article first briefly traces the development legal writing programs and the various forms of job security currently afforded to legal writing faculty. It then examines standards for promotion and retention of legal writing faculty eligible for long-term contracts under 405(c), specifically in terms of titles, rank and term of employment contracts, and the categories of criteria applicable to promotion for each term of employment. Finally, the article examines some of the procedural aspects associated with promotion and retention of legal writing faculty under a 405(c) model, particularly in terms of evaluation and objection procedures.

Brief History of LRW professionals:

Legal writing programs have developed considerably in the past 35 years. Like positions of employment for clinical law faculty,⁶ research and writing faculty positions

– Los Angeles [hereinafter Loyola/LA]; Shepard Broad Law Center, Nova Southeastern University [hereinafter Nova Southeastern]; University of Oregon School of Law [hereinafter Oregon]; St. John's University School of Law [hereinafter St. John's]; Southern Illinois University School of Law [hereinafter SIU]; Temple University, Beasley School of Law [hereinafter Temple]; University of Florida, Fredric G. Levin College of Law [hereinafter Univ. of Fla.]; University of Toledo College of Law [hereinafter Univ. of Toledo].

⁶ See Margaret Martin Barry, Jon C. Dubin & Peter A. Joy, *Clinical Education for this Millennium: The Third Wave*, 7 CLINICAL L. REV. 1 (2000). In tracing the development of clinical legal education, the authors note that the “dearth of clinical legal education programs in the first half of the twentieth century” could be attributed to the following conditions:

First, law schools were distinguishing themselves from apprenticeships, and clinical legal education efforts to create "model law offices" as part of law school education did not further this market differentiation. Second, law schools of this era were terribly underfunded and clinical legal education courses with intensive faculty supervision were not as economical as large classes employing the casebook Socratic method. Third, law school teachers of this era disagreed about the value - and feasibility - of teaching lawyering skills other than legal analysis. . . . Fourth, the period from the 1920's to the 1940's was marked by ABA and AALS efforts to create and raise standards for law schools, and none of these standards focused on encouraging or requiring clinical legal education experiences.

Id. at 8-9. However, from the 1960's through the late 1990's:

clinical legal education solidified and expanded its foothold in the academy. The factors that contributed to this transformation included demands for social relevance in law school, the development of clinical teaching methodology, the emergence of external funding to start and expand clinical programs, and an increase in the number of faculty capable of and interested in teaching clinical courses.

(as distinct from employment positions for traditional, tenured, doctrinal faculty) are a relatively new development in legal education. In one of the first studies of legal writing programs in the United States, published in 1973 as a result of what appears to be the first survey of legal writing instruction, Professor Marjorie Rombauer traced the development of legal research and writing courses in legal education.⁷ She noted that the earliest courses in research and writing were “what the name implies, a joinder of bibliography instruction with writing experience, frequently with an added mixture of remedial objectives related to deficiencies in legal education perceived during the post-World-War-II ferment.”⁸ While the bibliography course, which “dealt with the description and use of law books,”⁹ was a firmly established component of the legal education curriculum during the early part of the twentieth century,¹⁰ courses in “legal writing” and “legal method” first appeared as a separate category of instruction in 1947.¹¹ In an effort to examine both the content of first-year research and writing courses, as well as staffing models, Rombauer surveyed law schools. Summarizing her findings with regard to staffing model, she reported that, of the 63 schools responding, 16 used students in combination with faculty members and/or attorneys, 3 relied exclusively on attorney instruction, 12 used “short-term instructors,” and the remaining schools used primarily “faculty members, both regular and library.”¹²

Id. at 12.

⁷ Marjorie Dick Rombauer, *First-Year Legal Research and Writing: Then and Now*, 25 J. LEGAL EDUC. 538 (1973).

⁸ *Id.* at 539.

⁹ *Id.* at 540.

¹⁰ *Id.* at 539-540 (noting that the bibliography course first appeared around the turn of the century).

¹¹ *Id.* at 540-541 (noting that “Legal Writing” and “Legal Methods” were first included as a listed course category in the Association of American Law School’s publication, *Directory of Teachers in Member School*, in 1947).

¹² *Id.* at 543-544.

In the thirty-some years that have passed since Rombauer's study, much has changed in terms of legal writing instruction, both in terms of the content of instruction¹³ as well as the staffing models for instruction. In tracing the development of the legal writing profession, two scholars noted that early writing programs were understaffed and lacked sufficient resources for pedagogical innovation.¹⁴ "[P]rograms were staffed primarily by teachers with low status, low pay, greater teaching responsibilities, and little or no support for scholarship. . . . LRW professors' status has left little time for reflection or exploration."¹⁵ During the last two decades, however, the pedagogical approach has moved from product-oriented to process-oriented, with an emphasis on teaching analysis rather than focusing on correcting student errors of grammar or syntax:

LRW became a course about legal analysis--how to critically analyze legal problems and, most importantly, how to convey the analysis to others in writing, as lawyers are called upon to do in their work. Rather than merely correcting papers after they were written, LRW professors began to intervene in the writing process, giving substantial attention to individual students' drafts through critiques and conferences on work in progress. We now recognize that we are teaching students to write, not merely correcting the writing mistakes they have already made.¹⁶

In terms of staffing models for writing instruction, the profession has similarly evolved. In 2003 Sue Liemer and Jan Levine collected data on the design and staffing of legal writing programs, including data from national surveys of legal writing programs,¹⁷

¹³ Jo Anne Durako, Kathryn M. Stanchi, Diane Penneys Edelman, Brett M. Amdur, Lorray S.C. Brown, & Rebecca L. Connelly, *From Product to Process: Evolution of a Legal Writing Program*, 58 U. PITT. L. REV. 719 (1997) (noting that the traditional form of writing instruction was product-focused, but that, as a result of increased resources devoted to writing instruction in law schools, the more labor-intensive, process-oriented pedagogy is becoming more common); see also J. Christopher Rideout & Jill J. Ramsfield, *Legal Writing: A Revised View*, 69 WASH. L. REV. 35 (1994) (discussing traditional and revised views on legal writing pedagogy).

¹⁴ Ellie Margolis & Susan L. DeJarnatt, *Moving Beyond Product to Process: Building a Better LRW Program*, 46 SANTA CLARA L. REV. 93, 95-96 (2005).

¹⁵ *Id.* at 95-96.

¹⁶ *Id.* at 98-99.

¹⁷ The Association of Legal Writing Directors, together with the Legal Writing Institute, conducts an annual, national survey of legal writing programs. The survey collects data on program design, curriculum,

as well as from listserv requests for information, internet research and individual communication.¹⁸ Liemer and Levine reported that, out of the 190 schools investigated, 133 (70%) employed full-time legal writing professors, 35 (18%) employed adjuncts to teach legal writing, 14 (7%) used doctrinal faculty for legal writing instruction, 5 (3%) relied on student teachers, and 3 (2%) were unknown.¹⁹

In terms of job security associated with long-term legal writing positions, there have been significant advances as well. At this point, there are to be four categories of employment security for legal writing faculty.²⁰ First, writing faculty with tenure or on a tenure track are employed at approximately 25 law schools.²¹ Next are faculty employed under ABA Standard 405(c). Professors who are employed under 405(c) are entitled to a “form of job security reasonably similar to tenure”²² which requires either a separate tenure track, long-term, presumptively renewable contracts of at least five years, or some “other arrangement sufficient to ensure academic freedom.”²³ As of 2006, at least 43 schools employed legal writing faculty under a 405(c) model.²⁴ Third are writing faculty

salary, workload, and status issues and is available at <http://www.lwionline.org/survey/surveyresults2006.pdf> (last visited August 2, 2006) [hereinafter *2006 Survey*].

¹⁸ Susan P. Liemer & Jan M. Levine, *Legal Research and Writing: What Schools are Doing, and Who is Doing the Teaching (Three Years Later)*, 9 SCRIBES J. LEGAL WRITING 113 (2003). The article was an update to an earlier study and article published by Professor Levine, Jan M. Levine, *Legal Research and Writing: What Schools are Doing, and Who is Doing the Teaching*, 7 SCRIBES J. LEGAL WRITING 51 (1998-2000).

¹⁹ Liemer & Levine, *supra* note __, at 120.

²⁰ The four categories noted apply to full-time legal research and writing faculty. According to the *2006 Survey*, most schools report using full-time, nontenure track teachers. *2006 Survey*, question 10. However, at some schools, legal research and writing is taught by students and/or adjuncts, or some hybrid model. For purposes of comparison in this article, however, full-time faculty models are reviewed.

²¹ *2006 Survey*, question 65.

²² ABA STANDARD 405(c)

²³ ABA INTERPRETATION 405-6.

²⁴ *Stephenson E-mail*, *supra* note __. Precise numbers for 405(c) faculty are difficult to obtain from the *2006 Survey* (Question 65), which allows schools to select all staffing models that apply. According to the *2006 Survey*, twenty-eight schools reported their faculty members as 405(c), and another ten reported their faculty as 405(c) track. *2006 Survey*, Question 65 (indicating that schools should mark all that apply). Moreover, in the *2006 Survey*, sixty-three schools reported that, prior to August 2005, the contracts

who are entitled to either long term or continuing short-term contracts, but who do not have 405(c) status. These writing faculty fall generally under ABA standard 405(d) which requires that they be afforded “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.”²⁵ In 2006, 54 schools employed writing faculty on one-year contracts, 20 on two-year contracts, and 53 on contracts of three years or more.²⁶ It should be noted that some of these faculty may be considered 405(c) faculty, if the contract period reported references an initial, probationary contract prior to the award of a 405(c) contract, or if the contract of three years or more is at least five years and presumptively renewable.²⁷

Finally, legal writing faculty at some institutions have been subject to a cap, or a limitation on the number of years they may be employed at a school.²⁸ According to the 2006 survey, there were 11 schools which reported a limit to the total number of years that a writing faculty member might teach.²⁹ These programs, however, must now

provided to writing faculty satisfied ABA Standard 4005(c). *2006 Survey*, HT Question 19. Since the amendments, twenty-one schools are considering changes to the contracts to meet the new standard, sixteen schools have changed their contract length from three to five years to meet the standard, five schools have made their contracts presumptively renewable to meet the standard, and nine schools have made some other modification to ensure academic freedom. *2006 Survey*, HT Question 20. Additionally, four schools changed the status of their writing faculty from 405(c) to tenured or tenure-track faculty, and twenty-one additional schools reported that they were considering changes to the contract status of legal writing faculty. *2006 Survey*, HT Question 20.

²⁵ ABA STANDARD 405(d).

²⁶ *2006 Survey*, Question 65.

²⁷ As noted *supra*, *2006 Survey* Question 65 allows schools to mark all staffing models which apply. Therefore, an initial contract period of one year for a 405(c)-track faculty member would be noted on Question 65. Similarly, schools with 405(c) status would mark the category “Contracts of three years or more.”

²⁸ See Jo Anne Durako, *Dismantling Hierarchies: Occupational Segregation of Legal Writing Faculty in Law School: Separate and Unequal*, 73 UMKC L. REV. 253, n. 99 (2004) (noting that caps were traditionally used at law schools “to keep writing salaries artificially depressed by the need to hire new teachers at low starting salaries”).

²⁹ *2006 Survey*, question 66.

demonstrate that they are legitimate fellowship programs. In 2004, efforts were made by the legal writing community to remove caps at all institutions.³⁰ This effort, in part, resulted in a modification to ABA Interpretation 405-9, which now provides “Subsection (d) of this Standard does not preclude the use of short-term contracts for legal writing teachers, nor does it preclude law schools from offering fellowship programs designed to produce candidates for full-time teaching by offering individuals supervised teaching experience.”³¹ In addressing the amendment, the ABA clarified that the “revision eliminates the reference to non-renewal in Interpretation 405-9, thereby removing what might have been viewed as an endorsement of non-renewable contracts.”³² Consequently, under the current ABA rules, all legal writing faculty at ABA-accredited institutions which do not have legitimate fellowship programs should be afforded, at a minimum, a form of job security necessary to safeguard academic freedom.

Benefits of 405(c) status for writing faculty

There are a variety of benefits to a law school which elects to employ its writing faculty under Standard 405(c) as opposed to 405(d). Because ABA Standard 405(d) requires that legal writing faculty be afforded “such security of position and other rights and privileges of faculty membership as may be necessary to (1) attract and retain a

³⁰ On August 23, 2004, the Legal Writing Institute (LWI) and the Association of Legal Writing Directors (ALWD) released a joint report and recommendation (Report) to the ABA Standards Review Committee and the ABA Section of Legal Education and Admissions to the Bar, available at <http://www.alwd.org/>. In the Report, LWI/ALWD asked that Standard 405 be amended to provide legal writing faculty the same job security afforded clinical faculty, arguing that the revision would give rise to educational enhancements similar to those occurring in clinical legal education. The primary goal of the Report was to eliminate ABA Standard 405(d) and ABA Interpretation 405-9 (which had been used to justify caps in employment for legal writing faculty). Alternatively, the Report asked that the ABA modify ABA Interpretation 405-9 to apply to only bona fide fellowship programs. The 2005 revisions to the standards did expressly limit ABA Interpretation 405-9 to schools with fellowship programs.

³¹ ABA INTERPRETATION 405-9.

³² Memorandum from John A. Sebert, Consultant on Legal Education, to Deans of ABA-Approved Law Schools, et. al. (Dec. 10, 2004) (on file with author) *available at* <http://www.abanet.org/legaled/standards/standardsdocuments/chapter4proposedchanges.doc> [hereinafter *Sebert Memorandum*].

faculty that is well qualified to provide legal writing instruction . . . and (2) safeguard academic freedom,”³³ schools should consider whether their staffing model for writing instruction is market competitive and protective of academic freedom. According to the 2006 ALWD/LWI survey, the full-time, non-tenure track faculty model is the most common staffing model for writing instruction.³⁴ Most of these full time instructors have some form of contract, varying in length from 1 to 7 years.³⁵ To the extent that some form of contract model is the norm of employment for writing faculty,³⁶ a long term contract program model is competitive and therefore likely to attract and retain quality faculty.

Indeed, the enhancements to the required form of job security afforded clinical faculty under Standard 405(c) were deemed necessary, in part, to ensure that a law school could attract and retain quality clinical faculty.³⁷ Lack of genuine, contractual job security is directly related high turnover, which is in turn related to a diminished educational environment. As two scholars have noted,

Staffing models contribute to turnover. The two most popular models for staffing legal writing programs are the full-time non-tenure track model and the adjunct model. . . . In all models except the full-time tenure track model, the turnover is high. Establishing a sound pedagogy is next to impossible under these circumstances, which may explain why so many schools have attempted to

³³ ABA STANDARD 405(d).

³⁴ 2006 Survey, Question 10.

³⁵ 2006 Survey, Question 65 (note that, for schools identifying faculty on contracts of one, two, or three years, it is possible such faculty are eligible for longer term contracts, whether or not such contracts satisfy ABA Standard 405(c)). See also Stephenson E-mail, *supra* note __ (noting schools offering contracts of 6 and 7 years).

³⁶ Emily Grant, *Toward a Deeper Understanding of Legal Research and Writing as a Developing Profession*, 27 VT. L. REV. 371, 379 (2003) (confirming that “The predominant model for hiring full-time LRW instructors involves renewable contracts”).

³⁷ *Sebert Memorandum*, *supra* note __. In the Memorandum the authors contend that the Accreditation Committee practice of finding three year contracts with no presumption of renewal as “reasonably similar to tenure” was inconsistent with the meaning of Standard 405(c). The revisions, which require the provision of presumptively renewable, five year contracts for clinical faculty “reflect[] the pattern for post-tenure review that is evolving at many schools” and “ensure that law schools can attract and retain quality full-time clinical faculty and thereby strengthen the clinical component of the law school curriculum.”

restructure their programs each year. Instead, law schools should consider hiring and training professors who have the job security that allows them to develop programs and generate scholarship in legal writing.³⁸

Consequently, since both Standard 405(c) Standard 405(d) require a form of job security necessary to attract and retain quality faculty and ensure those faculty academic freedom, there is no reason to afford writing faculty a less secure form of employment than that considered necessary for clinical faculty.

There are additional benefits to providing 405(c) status to writing faculty. For example, under Standard 402, an ABA-accredited law school must ensure an adequate ratio between the number of full-time students and the number of full-time faculty members, defined as that faculty “on a tenure track or its equivalent.”³⁹ For purposes of computing the ratios, each member of the full-time faculty count as one while “additional teaching resources,” including “legal writing instructors not on a tenure track or its equivalent,” count as 0.7.⁴⁰ Further, while “[n]o limit is imposed on the total number of teachers that a school may employ as additional teaching resources, . . . these additional teaching resources shall be counted at a fraction of less than 1 and may constitute in the aggregate up to 20 percent of the full-time faculty for purposes of calculating the student/faculty ratio.”⁴¹ Therefore, where a school employs writing faculty on long-term contracts, there is an incentive to afford the writing faculty 405(c) status in order to avoid the 20 percent limitation and take advantage of the full point per faculty member for purposes of ratio calculation.

Standards Review

³⁸ Rideout & Ramsfield, *supra* note ___, at 87-88 (citations omitted).

³⁹ ABA INTERPRETATION 402-1 (1).

⁴⁰ ABA INTERPRETATION 402-1(1)(A)(ii).

⁴¹ ABA INTERPRETATION 402-1(1).

According to ABA Interpretation 405-3, “A law school shall have a comprehensive system for evaluating candidates for promotion and tenure or other forms of security of position, including written criteria and procedures that are made available to the faculty.” Further, under Interpretation 405-7,

In determining if the members of the full-time clinical 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 faculty. A law school should develop criteria for retention, promotion, and security of employment of full-time clinical faculty.

Consequently, for those schools which employ writing professors under a 405(c) model, there should be in place a written procedure for evaluating promotion and retention decisions.

This article will compare several aspects of standards associated with promotion and retention of legal writing faculty. First, the variety of academic titles as well as the rank and term associated with those titles will be examined. Next, the criteria for promotion and retention will be evaluated. Specifically, criteria associated with teaching, service, scholarship and recognition within the field will be compared. Also, a criterion associated more commonly with legal writing faculty than other legal academic faculty, known as “program contributions” or “teamwork,” will be examined. Finally, the article will review procedures for evaluation of faculty, annual reports by faculty, renewal standards and objection procedures.

I. Academic Titles, Rank and Term

Legal writing faculty on long term contracts at some schools carry the same academic title as their doctrinal, tenured colleagues; namely, that of Assistant/Associate

Professor of Law.⁴² Other institutions employ academic titles for legal writing faculty that are distinguishable from the academic titles for tenured, doctrinal faculty. At some schools, members of the legal writing faculty are considered clinical professor and bear that academic designation.⁴³ Many schools delineate legal writing faculty by course content. Faculty members who teach legal writing are known variously as: Legal Writing Professor/Instructor;⁴⁴ Assistant/Associate Professor of Legal Writing⁴⁵/Lawyering Skills;⁴⁶ Instructor of Legal Analysis, Research and Communication (LARC);⁴⁷ and, Legal Rhetoric Instructor.⁴⁸

At most institutions, the rank and term of academic title mirrors that of doctrinal faculty. At these institutions, the academic progression is from Assistant to Associate to full Professor of Law.⁴⁹ The initial employment period – generally associated with the assistant or instructor rank, is typically one year.⁵⁰ The associate level contract may be two⁵¹ to three⁵² years in length and, where used, typically mirrors the rank and term of appointment for members of the tenured faculty.⁵³ Consistent with the modifications to 405(c), once the faculty member earns the final promotion to full Professor of Law, a (minimum) five year, presumptively renewable contract is awarded.⁵⁴ There are some

⁴² Drake, App. 1, No. 6, at ___; Nova Southeastern, App. 1, No. 10, at ___.

⁴³ Loyola LA, App. 1, No. 9, at ___; SIU, App. 1, No. 13, at ___. Note that, where legal writing faculty are also considered members of the clinical faculty, they are categorically covered by ABA Standard 405(c).

⁴⁴ Cleveland Marshall, App. 1, No. 3, at ___; Oregon, App. 1, No. 11, at ___.

⁴⁵ Hofstra, App. 1, No. 7, at ___; St. John's, App. 1, No. 12, at ___; Univ. of Fla., App. 1, No. 15, at ___.

⁴⁶ Dayton, App. 1, No. 4, at ___.

⁴⁷ DePaul, App. 1, No. 5, at ___.

⁴⁸ American/WCL, App. 1, No. 2, at ___.

⁴⁹ See Drake, App. 1, No. 6, at ___; St. John's, App. 1, No. 12, at ___.

⁵⁰ See Drake, App. 1, No. 6, at ___; St. John's, App. 1, No. 12, at ___.

⁵¹ See Hofstra, App. 1, No. 7, at ___.

⁵² See Drake, App. 1, No. 6, at ___; St. John's, App. 1, No. 12, at ___.

⁵³ See Drake, App. 1, No. 6, at ___; Hofstra, App. 1, No. 7, at ___.

⁵⁴ See, e.g. Drake, App. 1, No. 6, at ___. See also ABA STANDARD 405(c) (requiring a minimum five-year, presumptively renewable contract, or some other form of job security that ensures the faculty member academic freedom).

notable variations on the ABA-required model. For example, Georgetown University Law Center and Indiana School of Law/Indianapolis award seven year contracts to full professors⁵⁵ and St. John’s University awards seven year rolling contracts to full professors.⁵⁶ Temple University, James E. Beasley School of Law, awards six year contracts with the final, full professor promotion.⁵⁷ Hamline University awards rolling three year contracts that renew automatically each year.⁵⁸ Finally, Michigan State University College of Law provides continuous contracts after the legal writing faculty member has served six years.⁵⁹

Examination – To the extent that the ABA requires instruction in legal research and writing as an essential component of legal education,⁶⁰ and because it is undisputed that legal analysis and the communication of that analysis is a competency that must be achieved in legal education,⁶¹ there is no justification to distinguish titles between

⁵⁵ *Stephenson E-mail, supra* note ___.

⁵⁶ St. John’s, App. 1, No. 12, at ___.

⁵⁷ *Stephenson E-mail, supra* note ___.

⁵⁸ *Stephenson E-mail, supra* note ___. (Confirm with Hamline standards)

⁵⁹ *Stephenson E-mail, supra* note ___. (Confirm with Michigan State)

⁶⁰ ABA STANDARD 302 addresses the curricular requirements a law school, and provides:

(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;

(4) other professional skills generally regarded as necessary for effective and responsible participation in the legal profession; and

(5) the history, goals, structure, values, rules, and responsibilities of the legal profession and its members.

ABA STANDARD 302 (emphasis added).

⁶¹ According to the MacCrate Report, law students should receive instruction in ten essential skills and values: the report identified ten fundamental lawyering skills and four professional values. The ten essential skills include: 1) problem solving; 2) legal analysis and reasoning; 3) legal research; 4) factual investigation; 5) communication; 6) counseling; 7) negotiation; 8) litigation and ADR resolution procedures; 9) organization and management of legal work; and 10) recognizing and resolving legal dilemmas. AMERICAN BAR ASS’N SECTION ON LEGAL EDUCATION AND ADMISSION TO THE BAR, *Legal*

doctrinal and legal writing faculty. Indeed, because the skills taught in the required legal research and writing curriculum reinforce – if not enhance – those doctrinal and analytical concepts examined in other typical doctrinal courses, equality with respect to titles reinforces, rather than undermines, commonly recognized goals of legal education. Therefore, programs with the opportunity to designate titles for legal research and writing faculty should examine carefully the implications associated with distinct titles, particularly those which might reinforce a nominalization of the subject matter or the professor imparting it.⁶²

Education and Professional Development – An Educational Continuum, Report of the Task Force on Law School and the Profession: Narrowing the Gap (1992) [hereinafter, *MacCrate Report*].

⁶² Many authors have examined the implications of distinct titles for legal writing faculty, both for the faculty member personally and on her ability to achieve credibility in the classroom. See, e.g., Durako, *supra* note __.

Legal writing teachers may wear the badge of segregation through their distinctive academic titles. Their titles may specify the subject they teach by labeling them Professor of Legal Writing. These full-time faculty are not accorded the traditional title of Professor of Law, signaling some limitation on their abilities or inherent inferiority.

Id. at 258. See also Peter Brandon Bayer, *A Plea for Rationality and Decency: The Disparate Treatment of Legal Writing Faculties as a Violation of Both Equal Protection and Professional Ethics*, 39 DUQ. L. REV. 329, 360 (arguing that inferior titles, and particularly the discouragement of the “professor” title, constitutes discrimination against writing faculty); Jo Anne Durako, *Second-Class Citizens in the Pink Ghetto: Gender Bias in Legal Writing*, 50 J. LEGAL EDUC. 562, 575-76 (2000) (noting that legal writing faculty, particularly women professors, have less prestigious titles than their male law faculty counterparts); Kathryn M. Stanchi, *Who Next, The Janitors? A Socio-Feminist Critique of the Status Hierarchy of Law Professors*, 73 UMKC L. REV. 467, 487 (2004) (asserting that the “law school hierarchy has fought to monopolize and keep exclusive the revered title of ‘professor’ for its doctrinal faculty. The overwhelming majority of law schools refuse to give legal writing professors the unqualified title of professor, associate professor or assistant professor of law. Instead, most legal writing professors are given either the lesser title of ‘lecturer’ or ‘instructor’ or are given the qualified title of ‘clinical’ professor or professor ‘of legal writing.’); Suzanne E. Rowe and Susan P. Liemer, *One Small Step: Beginning the Process of Institutional Change to Integrate the Law School Curriculum*, 1 J. ALWD 218 n. 7 (2002) (advocating for an integration law school curricula and noting as one element of the distinction the difference in titles between doctrinal and skills faculty), Jan M. Levine, *Leveling the Hill of Sisyphus: Becoming a Professor of Legal Writing*, 26 FLA. ST. U. L. REV. 1067, 1095 (1991)(noting that the “very titles of the positions proclaim the second-class status of many legal writing jobs”); Grant, *supra* note __ at 392 (noting that “Law schools express hostility toward LRW professors and courses in small, seemingly insignificant, gestures. Such ‘petty indignities’ subliminally encourage the lack of status and respect for LRW as a profession. LRW professors are often not privileged enough to use the title of ‘Professor,’ but rather are addressed as ‘Mr./Ms. So-and-So’ or even by their first names.”)

The Assistant/Associate Professor of Law title has no negative implications for members of the legal writing faculty. To the extent that a law school supports and encourages this essential and required curricular content, and to the extent that rigorous promotion and retention standards are employed to ensure quality of instruction, there is no justification for nominalizing or otherwise distinguishing this category of faculty. With regard to the rank and progression of appointment, there is similarly no reason to deviate from the rank and progression of other faculty members.

II. Promotion Criteria

The primary criteria employed to advance from the initial academic rank (assistant) to the intermediate rank (associate) are teaching and service. Many schools also employ a criterion characterized variously as “Program Contributions,”⁶³ “Team Work,”⁶⁴ “Service to the [LRW] Program,”⁶⁵ or “Institutional Citizenry.”⁶⁶ In order to be promoted to the final academic rank (full professor, or long term contract level), scholarship may be required.⁶⁷

A. Teaching

Most standards explicitly recognize teaching as the primary criterion for promotion, both to the Associate and full Professor rank. American/WCL standards provide “Contribution to law teaching shall be the most important criterion to be assessed in evaluating Legal Rhetoric Instructors, who must meet the standard of high quality in

⁶³ Drake, App. 1, No. 6, at __ (“Program Contributions”); SIU, App. 1, No. 13, at __ (“Lawyering Skills Teaching”); Univ. of Fla., App. 1, No. 15, at __ (“Service to the College of Law”).

⁶⁴ Cleveland Marshall, App. 1, No. 3, at __ (“Team Work”) Hofstra, App. 1, No. 7, at __ (“Working with Other Instructors, Other Parts of the Law School, and the Legal Writing Field Generally”).

⁶⁵ Dayton, App. 1, No. 4, at __ (“Service to the Legal Profession Program”).

⁶⁶ DePaul, App. 1, No. 5, at __.

⁶⁷ See, e.g., Drake, App. 1, No.6, at __.

teaching ability.”⁶⁸ The Cleveland-Marshall standards similarly provide “Teaching skill will be the main consideration for evaluating the performance of a Legal Writing Professor for contract renewal.”⁶⁹ Temple University’s standards provide “The primary criteria for promotion to both ranks are the excellence of the LRW Faculty Member’s teaching of legal research and writing and the LRW Faculty Member’s contribution to the LRW Program.”⁷⁰ The University of Dayton School of Law standards note “Teaching ability is the primary factor to be considered in evaluating lawyering skills staff members for hiring, retention and promotion.”⁷¹ The University of Florida standards provide “Recommendations for renewal of long term contracts shall be based primarily on demonstrated excellence and continuing potential for excellence in teaching.”⁷² The St. John’s standards state “Teaching performance is the primary consideration in evaluating members of the Legal Writing faculty.”⁷³

Most of the standards reviewed attempt to articulate specific indicia that demonstrate excellence in teaching. This serves as a barometer for both the faculty member affected as well as the Director or committee in charge of assessing satisfaction of the standard. Many of the teaching standards reviewed speak directly to excellence in legal writing instruction, as opposed to a more generalized description of teaching excellence. To that end, many standards are directed at specific aspects of legal research and writing instruction, including classroom instruction, development of course materials and writing problems, evaluating student work, and conducting student conferences. The

⁶⁸ American/WCL, App. 1, No. 2, at ___.

⁶⁹ Cleveland-Marshall, App. 1, No. 3, at ___.

⁷⁰ Temple, App. 1, No. 14, at ___.

⁷¹ Dayton, App. 1, No. 4, at ___.

⁷² Univ. of Fla., App. 1, No. 15, at ___.

⁷³ St. John’s, App. 1, No. 12, at ___.

following illustrate more specific and descriptive teaching standards for legal research and writing faculty.

1. Classroom and Individual Instruction

Many standards articulate the benchmark against which the legal writing faculty member's performance in, and in preparation for, the classroom is assessed. Most of the standards are performance-based, meaning they target the performance of the professor. A few standards are outcome-based, meaning they target some measurable assessment of whether the students learned requisite material as a result of the professor's teaching technique. For example, the DePaul standards question whether the professor has demonstrated "[s]uccess in bringing students to an acceptable level of performance with respect to the skills the course is designed to teach [and] [p]roficiency in stimulating students' critical thinking, synthesis ability, analytic reasoning ability, and communication."⁷⁴

In terms of performance criteria, many standards address the level of preparation for, and organization of, classroom instruction.⁷⁵ To that end, the Cleveland-Marshall standards require that the professor demonstrate a "command of legal analysis, legal writing, legal research, and advocacy."⁷⁶ The professor must also be "focused and well prepared for class, organized and effective, [and must] [d]efine[] the goals to be accomplished, [i]ncorporate[] effective methods of conveying those goals to the students relying on techniques appropriate for teaching writing, analysis and research[, and]

⁷⁴ DePaul, App. 1, No.5.

⁷⁵ Cleveland-Marshall, App. 1, No. 3.

⁷⁶ Cleveland-Marshall, App. 1, No. 3.

[o]ffer[] insights to students that they would not get from reading the text alone.”⁷⁷ The St. John’s standards include the following characteristics as exemplifying teaching excellence: “ability to communicate; preparation for class; thoughtful organization of individual class sessions and the overall course content; ability to stimulate student interest and effort; [and] ability to effectively direct a classroom meeting.”⁷⁸

Performance criteria also require professors to demonstrate the ability to inspire students⁷⁹ and stimulate thinking,⁸⁰ and demonstrate an interest in students’ development and welfare.⁸¹

Several of the standards refer to the professor’s obligation to keep current with respect to teaching methodology, requiring that professors “improve[], through refinement, development or new application, legal writing teaching methodology;”⁸² “[k]eep the course updated, based on awareness of trends in the field;”⁸³ “use a range of creative pedagogical methodologies that help students with different learning styles;”⁸⁴ and demonstrate “familiarity with the published scholarship about the teaching of legal writing,”⁸⁵ and a “breadth and depth of knowledge relevant to the field of legal research and writing.”⁸⁶

2. Designing Writing Assignments

⁷⁷ Cleveland-Marshall, App. 1, No. 3, at ___. See also Hofstra, App. 1, No. 7, at ___ (considering an evaluation of “classroom teaching, including defining the goals to be accomplished in a given class, using effective methods of accomplishing those goals, providing in class insights that students would not get from reading the text alone, and preparing thoroughly for class”).

⁷⁸ St. John’s, App. 1, No. 12, at ___.

⁷⁹ See, e.g., Dayton, App. 1, No. 4, at ___.

⁸⁰ See, e.g., Univ. of Fla., App. 1, No. 15.

⁸¹ See, e.g., Drake, App. 1, No. 6.

⁸² Drake, App. 1, No. 6, at ___.

⁸³ Oregon, App., No. 11, at ___.

⁸⁴ Dayton, App. 1, No. 4, at ___.

⁸⁵ Drake, App. 1, No. 6, at ___.

⁸⁶ St. John’s, App. 1, No. 12, at ___.

Because the substance of legal research and writing instruction typically requires the development of effective research and writing exercises to assess competency in course content, many standards specifically require excellence in the development of these teaching resources. The Cleveland-Marshall standards are the most specific with regard to effective writing assignment drafting, and provide the following:

The Legal Writing Professor's assignments and teaching materials should intellectually challenge students. Assignments are appropriate to the students' realistic analytical ability. Problems are factually realistic and, if persuasive writing is required, are well balanced. There are sufficient research exercises during the year to challenge students, expose them to a variety of research methods, and lead them to competence in research performance. The research is organized, and built upon with a clear focus and continuum throughout the year.⁸⁷

Other standards characterize effective writing assignment design as the “[p]roduction and selection of materials for use in teaching, including research and writing problems or exercises, samples, readings and other teaching tools,”⁸⁸ the creation of “challenging writing assignments that require the integration of research, analytical, and writing skills,”⁸⁹ and the design of “assignments that incorporate sufficient intellectual tension to provide adequate challenges to students, test adequately the skills being taught, are appropriate to students' analytical capabilities, and are factually complete and realistic.”⁹⁰ Finally, successful writing assignment drafting has been characterized as the “[c]reation of teaching and assignment materials that are appropriate to students' analytic capabilities and that are balanced, factually complete, and realistic,”⁹¹ and the ability to

⁸⁷ Cleveland-Marshall, App. 1, No. 3, at ___.

⁸⁸ Dayton, App. 1, No. 4, at ___.

⁸⁹ Drake, App. 1, No. 6, at ___.

⁹⁰ Hofstra, App. 1, No. 7, at ___.

⁹¹ DePaul, App. 1, No. 5, at ___.

“[d]esign[] challenging but appropriate course material, drawing from school and national sources.”⁹²

3. Evaluating Student Work

Many standards specifically address the writing professor’s effectiveness in evaluating and commenting on student writing assignments. Indeed, the detail of direction with regard to effective evaluation and feedback specific to a legal writing course identified in the standards is remarkable. In terms of evaluating student work, many standards require that professors be able to clearly recognize the difference between effective and ineffective writing and analysis⁹³ and to conceptualize that difference by explaining to students why one technique works while another does not.⁹⁴ In providing feedback to students, many standards explicitly or implicitly address the cumulative nature of feedback in writing courses. Standards require that professors be able to prescribe solutions to student writing and analysis problems,⁹⁵ to communicate those problems to students in a manner and with a tone that informs and motivates,⁹⁶ and to “stimulate and develop students’ critical, analytical and synthesizing skills.”⁹⁷ Also, in terms of feedback, some standards require that the professor demonstrate selective judgment in prioritizing problems in the document, with the Hofstra standards requiring

⁹² Oregon, App. 1, No. 11, at __.

⁹³ Cleveland Marshall, App. 1, No. 3, at __; Hofstra, App. 1, No. 7, at __.

⁹⁴ Cleveland Marshall, App. 1, No. 3; DePaul, App. 1, No. 5, at __ (further requiring that such critiques include “global or ‘end’ remarks to focus students’ attention on areas for improvement in succeeding assignments.”); Hofstra, App. 1, No. 7, at __.

⁹⁵ Cleveland Marshall, App. 1, No. 3, at __; DePaul, App. 1, No. 5, at __ (noting the following attributes of effective feedback: the “[p]rovision of critiques of student work sufficient to enable students to learn the necessary material and progress from assignment to assignment [and the] [p]rovision of detailed comments on each piece of written work, tailored to the individual assignment that is being critiqued and that prescribe solutions by identifying what students should do to improve”); Hofstra, App. 1, No. 7, at __; Oregon, Appendix 1, No. 11, at __ (requiring that professors provide “meaningful feedback to further student progress.”).

⁹⁶ Cleveland Marshall, App. 1, No. 3, at __; Hofstra, App. 1, No. 7, at __.

⁹⁷ St. John’s, App. 1, No. 12, at __

professors to demonstrate the ability to “triag[e] student problems by determining what to critique without overwhelming the student.”⁹⁸

Grading student papers is also a subject addressed in the standards. Several standards require that the professor demonstrate her ability to grade papers comparatively⁹⁹ and consistent with course goals.¹⁰⁰ Further, many standards require that professors express the evaluation of the student’s work in terms of the document’s practical effectiveness, rather than in terms of the professors personal preferences.”¹⁰¹ The Hofstra standards also include the ability to teach “professional thinking by showing students how to make professional decisions through evaluation of options and choosing the most effective ones.” Finally, many of the standards require effective and efficient course administration requiring, for example, that the professor review “student work in a timely, comprehensive, and professional manner”¹⁰² and “meet deadlines in preparing assignments [and] submitting grades.”¹⁰³

4. Student Conferences

Many of standards relating to the demonstration of teaching excellence speak directly to the writing professor’s ability to conduct effective student conferences. For example, with respect to the organization of an effective conference discussion, the Hofstra standards provide, “in student conferences, organizing the discussion effectively,

⁹⁸ Hofstra, App. 1, No. 7, at __.

⁹⁹ Cleveland-Marshall, App. 1, No. 3, at __ (requiring that professors “[g]rade student papers in a way that accurately reflects on a paper’s quality when compared with that of other student papers”); Hofstra, App. 1, No. 7, at __ (assessing a professor’s ability to “grad[e] in a way that accurately reflects an assignment’s quality as it compares to other students’ work”); Univ. of Fla., App. 1, No. 15, at __ (requiring that professors “grade in a way that accurately reflects an assignment’s quality as it compares to other students’ work”).

¹⁰⁰ Oregon, App. 1, No. 11, at __.

¹⁰¹ Cleveland-Marshall, App. 1, No. 3, at __; Hofstra, App. 1, No. 7, at __.

¹⁰² Drake, App. 1, No. 6, at __.

¹⁰³ Univ. of Fla., App. 1, No. 15, at __.

speaking to students in ways that students can understand and accept both intellectually and emotionally; asking questions designed to provoke reflection and understand.”¹⁰⁴ Similarly, the Cleveland-Marshall standards require professors to demonstrate the “[a]bility to convey important information to students in a manner that they can understand and accept [and the] [a]bility to ask questions designed to provoke thought, and delivered in a sequence that builds on the answers to preceding questions and leads to the teacher’s goal.”¹⁰⁵ Drake’s standards focus on the students’ understanding of the conference goals, requiring that conferences be conducted in a manner that “help[s] students understand their past mistakes and develop strategies for improving their future performance”¹⁰⁶ Some standards require that professors effectively demonstrate an interest in student learning in the context of conferences,¹⁰⁷ and many explicitly require regular and consistent availability for student conferences.¹⁰⁸

5. Evaluation of Excellence in Teaching

Some standards specifically articulate how the teaching criterion is evaluated. This subcategory of standards will be examined on the basis of a variety of factors, including: who (or, in some cases, what group) is responsible for conducting the evaluations; what type of process is employed for evaluation of teaching and recommendation on retention and promotion; and, what materials are reviewed to ascertain teaching excellence.

¹⁰⁴ Hofstra, App., 1, No. 7, at __.

¹⁰⁵ Cleveland-Marshall, App. 1, No. 3, at ____.

¹⁰⁶ Drake, App. 1., No. 6, at ____.

¹⁰⁷ Cleveland-Marshall, App. 1, No. 3, at __ (requiring a “[d]emonstrated interest in students’ development as legal writers, researchers and professionals and consistent availability to students for one-on-one and/or small group consultation regarding writing projects”).

¹⁰⁸ Cleveland-Marshall, App. 1, No. 3, at __ (requiring “consistent availability to students for one-on-one and/or small group consultation regarding writing projects”); Drake, App. 1, No. 6, at __ (requiring “sufficient access to students outside regularly scheduled conferences”).

To the extent that standards speak to the process of evaluation of teaching, some identify the Director's role. In these cases the Director's role is typically more involved during the renewal periods in the initial contract period, as opposed to during the first promotion cycle. In Oregon, for example, the Director must annually read the professor's curriculum vitae, statement of goals and accomplishments, and portfolio containing representative assignments, student papers and syllabi; review the professor's student evaluations; observe one or more of the professor's classes; and meet with the professor.¹⁰⁹ At Drake Law School, during the Assistant Professor contract period, the Director annually visits the professor's classes, reviews student evaluations, and meets with the professor to review progress toward retention or promotion.¹¹⁰ Similarly, at Loyola/Los Angeles, the Director of Legal Writing observes faculty members' classes, reviews instructional material and student evaluations, and meets with faculty members.¹¹¹

At Nova Southeastern, even the newest faculty members are provided peer review. Satisfactory teaching in the first year is based upon both student and peer review. With regard to peer review the standards note:

Peer evaluation should be critical but supportive. The test is whether the faculty member is or can become a quality, effective teacher. Therefore, the critical aspect of the review is whether he/she is capable of achieving the high level of quality teaching we expect from all faculty members. Once the Committee determines the faculty member can achieve that level, the supportive aspect of the review includes making suggestions and helping the first year teacher to reach his/her potential.¹¹²

¹⁰⁹ Oregon, App. 1, No. 11, at __.

¹¹⁰ Drake, App. 1, No. 6, at __.

¹¹¹ Loyola/LA, App. 1, No. 9, at __.

¹¹² Nova Southeastern, App. 1, No. 10, at __.

Similarly, at St. John's University, professors on a one-year contract are assessed via a classroom visit once a semester, while professors on a three-year contract are subject to an annual classroom visit.¹¹³

Additionally, a professor's performance may be reviewed by some form of a promotion and tenure committee.¹¹⁴ This is particularly applicable at the promotion stage. At the promotion stage, it is typical for the Director to prepare a report regarding a promotion decision, and for a committee to independently evaluate the professor's promotion, taking into consideration the Director's report.¹¹⁵ In terms of promotion to Senior Instructor status, the Oregon standards direct that a personnel committee review the following materials in making a promotion recommendation: the Director's recommendation with regard to promotion; the affected professor's curriculum vitae and promotion statement; a representative sampling of the affected professor's student evaluations; and, class visit reports made by members of the committee.¹¹⁶ On the basis of those materials the committee makes a recommendation on promotion to the full faculty.¹¹⁷

Similarly, at Drake, during promotion cycles to Associate and Full Professor, the faculty Promotion and Tenure Committee reviews the affected professor's student evaluations, attends one or more of the affected professor's classes, reviews materials related to service and scholarship, and reviews a recommendation made by the

¹¹³ St. John's, App. 1, No. 12, at ___.

¹¹⁴ American/WCL, App. 1, No. 2, at ___; Drake, App. 1, No. 6, at ___; Oregon, App. 1, No. 11, at ___.

¹¹⁵ See e.g. Drake, App. 1, No. 6, at ___.

¹¹⁶ Oregon, App. 1, No. 11, at ___.

¹¹⁷ Oregon, App. 1, No. 11, at ___.

Director.¹¹⁸ On the basis of those materials the committee issues an independent recommendation regarding promotion to the Dean.¹¹⁹

In terms of materials identified for review, most standards refer to a review of student evaluations,¹²⁰ curricula vitae,¹²¹ and reports of classroom observations.¹²² The American/WCL also contemplate the use of professor self-evaluation responses to questions such as the following:

Do you feel your teaching evaluations fairly reflect your performance? Why or why not?

Based on your teaching evaluations and your own perceptions of your teaching this year, how will you be modifying your teaching in the future?

Describe any substantial new components (e.g. substantial class projects, filed visits, technological innovations, guest speakers, etc.) you added to your classes this year. How would you describe the effectiveness of these innovations?¹²³

Finally, both the Oregon and American/WCL standards refer to professor portfolios containing items such as the foregoing as well as: sample lesson plans and activities; accounts of individual work done with students on writing or research projects; accounts of other teaching and or advising done by the professor; and, video recordings of classes, workshops, labs or other instructional programming.¹²⁴

Examination: Most of the standards reviewed provide some indicia the faculty uses to determine excellence in teaching, and most are directed specifically at excellence

¹¹⁸ Drake, App. 1, No.6, at ____.

¹¹⁹ Drake, App. 1, No. 6, at ____.

¹²⁰ American/WCL, App. 1, No. 2, at ____; Drake, App. 1, No. 6, at ____; Loyola/LA, App. 1, No. 9, at ____; Nova Southeastern, App. 1, No. 10, at ____; Oregon, App. 1, No. 11, at ____; St. John's, App. 1, No. 12, at ____.

¹²¹ American/WCL, App. 1, No. 2, at ____; Oregon, App. 1, No. 11, at ____.

¹²² American/WCL, App. 1, No. 2, at ____; Drake, App. 1, No. 6, at ____; Oregon, App. 1, No. 11, at ____.

¹²³ American/WCL, App. 1, No. 2, at ____.

¹²⁴ See American/WCL, Appendix 1, No. 2, at ____; Loyola/LA., App. 1, No. 9, at ____; Oregon, App. 1, No. 11, at ____.

in research and writing instruction. Common themes include the following: focused, organized classroom instruction; ability to relate to, and inspire students; demonstrated commitment to students' educational experience; accessibility; current awareness of innovations in teaching methodology, and; organized and predictable course administration. Additional attributes of effective research and writing instruction such as designing writing assignments, providing feedback on student papers, and conducting student conferences, are also addressed.

While specificity does provide some objective measurement for both professor and her reviewing body, programs should be cognizant of potential adverse consequences of defining with too much specificity prerequisites for excellence in teaching. To that end, several standards provide a disclaimer noting that identified indicia of teaching excellence are not exhaustive. Indeed, the University of Florida's standards aptly acknowledge, "it is not feasible to specify all of the components of excellence in teaching."¹²⁵ Similarly, the Indiana standards note that "[t]he quality of teaching is admittedly difficult to measure, but it is the responsibility of each candidate to demonstrate a satisfactory level of teaching effectiveness."¹²⁶ The broad characterization of excellence employed by the Indiana standards avoids problems associated with a mutually exclusive list: "The prime requisites of an effective teacher are intellectual competence, integrity, independence of thought, a spirit of constant inquiry, a vital

¹²⁵ Univ. of Fla., App. 1, No. 15, at ____.

¹²⁶ Indianapolis, App. 1, No. 8, at _____. It is noteworthy that the standards applicable to legal writing faculty at Indiana-Indianapolis are the same as those applied to the tenured, doctrinal faculty. They are therefore not specifically modeled to address specific attributes of legal research and writing instruction.

interest in working with and teaching students, and an ability to impart enthusiasm and a sprit of intellectual integrity.”¹²⁷

Specific criteria do assist legal research and writing faculty in assessing the expectations associated with employment. However, to the extent that specific requirements associated with legal research and writing instruction must be satisfied to demonstrate excellence, the standards are more specialized and directed than those imposed upon non-legal writing, doctrinal colleagues. While the specificity may be based upon programmatic objectives, the standards’ requirements may raise issues of academic freedom. One scholar notes that the academic freedom of writing faculty is limited in variety of ways by programmatic directives, such as mandated textbook selection, and directives regarding teaching methodology:

Similarly, pressure both explicit and implicit is exerted on writing faculty regarding teaching methods and materials. Writing teachers report that faculty or deans micromanage the writing curriculum to the extent of prescribing the topics, due dates, and page lengths for legal writing assignments.

* * *

By faculty or committee vote, some writing programs are required to have a high level of uniformity in assignments, due dates, textbooks, exams, and curriculum. This uniformity may be required not just in new programs or with inexperienced teachers, but also in well-established programs with highly experienced teachers in whom the law school demonstrated sufficient confidence to retain as teachers.¹²⁸

Further, proscribing excellence in terms of teaching *legal writing* specifically, rather than more generalized teaching expectations, may discourage innovation, creativity, or individuality among instructors.¹²⁹ Consequently, it is recommended that,

¹²⁷ Indianapolis, App. 1, No. 8, at __.

¹²⁸ Durako, *supra* note __, at 263-64 (citations omitted).

¹²⁹ See, e.g., Pamela Edwards & Sheilah Vance, *Teaching Social Justice Through Legal Writing*, 7 J. LEGAL WRITING 63 (2001). In addressing how a legal writing professor might introduce issues of social justice in

at a minimum, schools consider including a disclaimer in teaching standards noting that the indicia of excellence included are not exhaustive. Notwithstanding this reservation, however, the standards examined do an exemplary job describing attributes of effective research and writing instruction that should accurately be labeled as constituting competence, if not excellence, in teaching.

B. Service/Professional Development:

1. General Service Criterion

Service is a criterion required under many of the standards reviewed,¹³⁰ with the criterion being relevant to retention, promotion to the intermediate level, and promotion to the final rank level. Service standards contemplate contributions to the legal writing program, the law school, the university, and the profession. Contributions to the legal writing program are discussed *infra*.

Some standards explicitly recognize service as less important than teaching in terms of required criteria. For example, the St. John's standards recognize the peculiarly time-consuming nature of writing instruction, noting that the "nature of the legal research and writing program demands that members of the Legal Writing faculty devote a

the legal writing curriculum, the authors examine how such an introduction could be hampered by a lack of academic freedom:

Some legal writing professors may question whether they have the academic freedom, both in the classroom and within the legal writing program, to assign social justice issues to their students, especially if their colleagues fail or refuse to do so . . . There is a question about whether one legal writing professor can really be divergent in her class in legal writing programs that are essentially uniform, using a common syllabus, common textbook, and common due dates for memos and briefs.

Id. at 77-80.

¹³⁰ Albany, App. 1, No. 1, at ___; American/WCL, App. 1, No. 2, at ___; Dayton, App. 1, No. 4, at ___; DePaul, App. 1, No. 5, at ___; Drake, App. 1, No. 6, at ___; Hofstra, App. 1, No. 7, at ___; Loyola/LA, App. 1, No. 9, at ___; Nova Southeastern, App. 1, No. 10, at ___; Oregon, App. 1, No. 11, at ___; St. John's, App. 1, No. 12, at ___; SIU, App. 1, No. 13, at ___; Temple, App. 1, No. 14, at ___; Univ. of Fla., App. 1, No. 15, at ___.

substantial amount of their time to teaching responsibilities.”¹³¹ Similarly, the Loyola/Los Angeles standards note that legal writing faculty “are expected to devote most of all their time to teaching responsibilities,” but that “they are also expected, as are other members of the faculty, to contribute their services to the Law School and the community.”¹³² However, the standards caution that “such service should not impair the Associate Clinical Professor's performance in LRW and EL.”¹³³

The Drake standards note that “[s]ervice may include, but is not limited to, participation and service on Law School or University committees, involvement and work in professional, civic, governmental, and religious organizations, and other forms of public service that benefit the individual, the public, the institution and the profession.”¹³⁴ Further, special consideration is “given to the service related work of the candidate which contributes to enhancing the reputation of the Law School or the University.”¹³⁵ In other standards service to the law school is identified as “serving valuably on committees and advising students,”¹³⁶ contributions “beyond classroom teaching, such as coaching moot

¹³¹ St. John’s, App. 1, No. 12, at _____. Notwithstanding the caveat, the standards do encourage faculty to: endeavor to serve the Law School, the University, the profession, and the public by (a) service to the Law School and the University on committees and otherwise; (b) service to the legal profession through professional organizations, bar association committees, and continuing legal education; and (c) service to the public through legislative drafting and advocacy, work for public advisory commissions and volunteer work.

St. John’s, App. 1, No. 12, at _____.

¹³² Loyola/LA, App. 1, No. 9, at _____.

¹³³ Loyola/LA, App. 1, No. 9, at _____.

¹³⁴ Drake, App. 1, No. 6, at _____.

¹³⁵ Drake, App. 1, No. 6, at _____.

¹³⁶ Hofstra, App. 1, No. 7, at _____.

court teams”¹³⁷ and “[p]articipation at [law school] activities (*e.g.*, Admissions events, [public interest] auction, commencement, etc.).”¹³⁸

Professional development activities are also noted as indicia of service. Recognizing that a “professor’s service to the community and the profession is of long-term value and importance to the Law School,”¹³⁹ standards note the importance of participation in national organizations;¹⁴⁰ attendance and/or presentations at professionals conferences, workshops symposia or meetings;¹⁴¹ “providing pro-bono legal services, government service, public service consulting, legislative drafting, or other forms of voluntary non-compensated service to the community; [and] serving as a resource on legal issues for organizations or the press.”¹⁴²

In measuring the service achievement, the Oregon standards note that items evidencing service excellence are “not exhaustive and other activities may be equally valuable.”¹⁴³ The Albany standards further advise “[i]n measuring contributions to the profession and the community the quality of service and the depth of involvement rather than mere membership or peripheral involvement are the important factors.”¹⁴⁴ Finally, the Temple standards note that the “[e]valuation of the candidate’s service should include

¹³⁷ DePaul, App. 1, No. 5, at ____.

¹³⁸ DePaul, App. 1, No. 5, at ____; Loyola/LA, App. 1, No. 9, at ____ (“contribution to an involvement in the life and mission of the law school”); Nova Southeastern App. 1, No. 10, at ____ (“regular participation in the governance of the Law Center through direct involvement in committee and faculty business”).

¹³⁹ Albany, App. 1, No. 1, at ____.

¹⁴⁰ *See e.g.*, Dayton, App. 1, No. 4, at ____; Drake, App. 1, No. 6, at ____; Hofstra, App. 1, No. 7, at ____; Oregon, App. 1, No. 11, at ____.

¹⁴¹ *See e.g.*, Dayton, App. 1, No. 4, at ____; DePaul, App. 1, No. 5, at ____; Drake, App. 1, No. 6, at ____; Oregon, App. 1, No. 11, at ____.

¹⁴² Drake, App. 1, No. 6, at ____.

¹⁴³ Oregon, App. 1, No. 11, at ____.

¹⁴⁴ Albany, App. 1, No. 1, at ____.

consultation with the Chairs of law school committees on which the candidate has served and others with relevant knowledge of the candidate's performance of service."¹⁴⁵

2. Program Contributions/Collegiality

Many of the standards reviewed include an evaluation of the professor's contributions to, or compliance with, programmatic objectives. Where applicable, a showing of effective or adequate contribution typically appears with the initial promotion stage (Associate rank).¹⁴⁶ In some standards the obligation is an independent requirement,¹⁴⁷ while in other standards the requirement appears as part of the service obligations.¹⁴⁸

Indicia of programmatic citizenship or teamwork include active participation in the legal writing program, evidenced by attendance at, and contributions to meetings,¹⁴⁹ carrying a share of responsibility for drafting assignments,¹⁵⁰ and assisting new faculty in course development.¹⁵¹ Indicia may also deal specifically with the effective operation of the program, and consider whether the faculty member: "[t]imely files grades;"¹⁵² assists and stimulates "colleagues in developing problems, classes, teaching methodologies, and the Program curriculum in general;"¹⁵³ provides "[t]imely responses to . . . director's requests for information and director's inquiries regarding program issues;"¹⁵⁴ provides "[t]imely delivery to LARC director of all proposed assignments, assignment sheets

¹⁴⁵ Temple, App. 1, No. 14, at ____.

¹⁴⁶ See, e.g., Drake, App. 1, No. 6, at ____.

¹⁴⁷ See Cleveland-Marshall, App. 1, No. 3, at ____ (Team Work); DePaul App. 1, No. 5, at ____ (LARC Institutional Citizenry); Drake, App. 1, No. 6, at ____ (Program Contributions).

¹⁴⁸ See, e.g., American/WCL, App. 1, No. 2, at ____; Hofstra, App. 1, No. 7, at ____; Oregon, App. 1, No. 11, at ____.

¹⁴⁹ See, e.g., Drake, App. 1, No. 6, at ____.

¹⁵⁰ See Dayton, App. 1, No. 4, at ____; Drake, App. 1, No. 6, at ____; Hofstra, App. 1, No. 7, at ____.

¹⁵¹ Hofstra, App. 1, No. 7, at ____.

¹⁵² Cleveland-Marshall, App. 1, No. 3, at ____.

¹⁵³ Dayton, App. 1, No. 4, at ____.

¹⁵⁴ DePaul, App. 1, No. 5, at p. ____.

distributed to students, graded papers, and other documents requested by director;”¹⁵⁵ enforces “departmental policies and regulations, including late penalties and word limit penalties;”¹⁵⁶ and, contributes “to the effective administration of the LRW program (e.g., coordinating course-wide events . . .).”¹⁵⁷

Other standards address indicia of interaction within the law school community, such as the St. John’s collegiality standard, which notes:

Members of the Legal Writing faculty should treat colleagues, staff members and students with civility and respect. They should make themselves reasonably available to colleagues for purposes of discussing teaching methods, content of courses, possible topics of scholarship, scholarly work-in-progress and related matters.¹⁵⁸

Additional interactional criteria include “works well with other legal writing teachers,”¹⁵⁹ cooperates “with colleagues in planning and developing problems, classes, and teaching methodologies,”¹⁶⁰ exhibits “appropriate behavior toward colleagues,”¹⁶¹ strikes “an appropriate balance between individual initiative and acceptance of direction,”¹⁶² and “[f]ocuses on compliance with school and Legal Writing Program policies rather than individual preferences.”¹⁶³

Examination: General service criteria appear to be consistent with those applied to tenured faculty. They also represent the trend in allowing – and encouraging – a more

¹⁵⁵ DePaul, App. 1, No. 5, at p. ____.

¹⁵⁶ DePaul, App. 1, No. 5, at p. ____.

¹⁵⁷ Oregon, App. 1, No. 11, at ____.

¹⁵⁸ St. John’s, App. 1, No. 12, at ____.

¹⁵⁹ Cleveland-Marshall, App. 1, No. 3, at ____ (team work).

¹⁶⁰ Loyola/LA, App. 1, No. 9, at ____.

¹⁶¹ DePaul, App. 1, No. 5, at ____ (LARC Institutional Citizenry).

¹⁶² Cleveland-Marshall, App. 1, No. 3, at ____; Oregon, App. 1, No. 11, at ____.

¹⁶³ Cleveland-Marshall, App. 1, No. 3, at ____.

active role in faculty governance by legal writing faculty.¹⁶⁴ However, collegiality provisions may be more controversial.

While legal writing has been historically, and is still generally, taught within a program model, collegiality provisions may be viewed by junior faculty as paternalistic. Similar provisions have been criticized in employment standards.¹⁶⁵ Moreover, sanctions for failure to adhere to the more interactive, rather than programmatic directives, e.g., “works well with others,” as opposed to “promotes consistency in pedagogical goals,” run the risk of sounding in subjectivity,¹⁶⁶ if not an affront to academic freedom.¹⁶⁷

¹⁶⁴ For a discussion of the role of clinical, writing and library faculty in law faculty governance, see Susan P. Liemer, *The Hierarchy of Law School Faculty Meetings: Who Votes?*, 73 UMKC L. REV. 351 (2004).

¹⁶⁵ See, e.g., Sumi Cho, “Unwise,” “Untimely,” and “Extreme”: *Redefining Collegial Culture in the Workplace and Revaluating the Role of Social Change*, 39 U.C. DAVIS L. REV. 805 (2006). Cho argues that the use of collegiality in employment decisions “grossly undervalues the role of positive social change in the workplace.” *Id.* at 809. Cho states:

A traditional, dominant culture definition of collegiality fails to account for institutional sexism, homophobia, racism, etc., and thus endorses and perpetuates existing cultural norms and castes. Under this ‘can’t we all get along’ formulation, those who transgress the cultural norm of gendered and racial hierarchy appear to be ‘impolite’ and ‘uncollegial’ regardless of history, context, or power relations. If, for example, one works in an embedded culture of institutional heteropatriarchy and white supremacy, then even minimal resistance to such a culture will likely result in a seeming breach of collegiality. In this sense, collegiality serves to normalize workplace injuries to outsider groups serving as an effective hegemonic censor of race- and gender-based resistance to oppression.

Id. at 809-10. See also Gregory M. Heiser, “*Because the Stakes are so Small*”: *Collegiality, Polemic, and Professionalism in Academic Employment Decisions*, 52 U. KAN. L. REV. 385 (2004) (discussing criticism of collegiality in employment decisions); Edgar Dyer, *Collegiality’s Potential Chill Over Faculty Speech: Demonstrating the Need for a Refined Version of Pickering and Connick for Public Higher Education*, 119 WEST EDUC. L. REPT. 309 (1997).

¹⁶⁶ Leonard Pertnoy, *The “C” Word: Collegiality Real or Imaginary, and Should It Matter In A Tenure Process*, 17 St. Thomas L. Rev. 201 (2004). Pertnoy argues that collegiality is a legitimate criterion in hiring and retention decisions, but notes the inherently subjective quality of the term (and the pervasiveness of the academy’s reluctance to define collegiality objectively). Subjectivity in defining the standard allows for a discriminatory pretext in evaluation.

Not defining a criterion admittedly used to make a determination permits the use of just about any definition that fits the facts . . . [T]he greater the spectrum of definitions, the more choices exist, and the easier it is to come up with a definition that masks discriminatory intent. Clearly, the result is a greater use of collegiality as pretext to exercise discrimination.

Id. at 203.

Arguing for an objective definition of collegiality, he posits:

Finally, such provisions could be characterized as sexist. Indeed, law schools should be cognizant of potential claims of discrimination arising as a result of such contractual obligations. As one scholar has noted, the collegiality standard

can easily become a mask for race, gender, age, religious, national origin, or disability discrimination [and that] even in the absence of intentional discrimination, the use of collegiality can subtly and adversely affect the chances for tenure of women and members of minority groups . . . [B]ecause there are real differences between the way men and women view the world and relate to others, it is much harder for tenured men to see women faculty as collegial or as "fitting in," and it is much harder for those men to be comfortable mentoring junior female faculty members.¹⁶⁸

Claims of discriminatory pretext are more compelling in the context of contract positions for legal writing faculty, particularly where those faculty are isolated from other faculty and reviewed by a single director. A scholar investigating discriminatory claims specifically in the context of law school contract positions concludes that contract

positions exploit women, particularly women of color, by taking advantage of the women's personal and other responsibilities to create a lower-paid, hard-working group at the bottom of organizations.

While managers make some decisions consciously to discriminate against women in the workplace because of their sex, *a large part of women's inequality exists because of invisible structural barriers, as well as decision making and practices*

an objective definition of collegiality would significantly reduce discriminatory pretext abuse because it would unquestionably decrease any subjectivity, and establish the specific circumstances under which collegiality would or would not exist. Any other circumstances not defined or established would fall outside the objective characteristics, and would thus be unavailable as pretext for discrimination. The fewer subjective opportunities that exist, the harder it becomes to discriminate and the easier it is to detect any parasitical discrimination.

Id.

Admittedly, an objective standard for collegiality would reduce the likelihood of misuse of the standard. Pertnoy concludes that one aspect of his solution is to make the requirement of collegiality explicit and unambiguous, but he ultimately acknowledges that "[c]ollegiality, by nature, will always be very subjective." Thus, to the extent that programmatic measurements of collegiality (legitimized, in part, on the basis of the programmatic nature of legal writing instruction at many institutions) are objective, they may be properly employed in promotion and retention decisions. However, the interactive measurements, more prone to misuse, should be rejected.

¹⁶⁷ Pertnoy, *supra* note __ at 217-19.

¹⁶⁸ Mary Ann Connell & Frederick G. Savage, *The Role of Collegiality in Higher Education Tenure, Promotion, and Termination Decisions*, 27 J.C. & U. L. 833, 847-48 (2001).

*that reflect unconscious stereotypes and gender schemas that accord greater value to masculine traits.*¹⁶⁹

In light of relevant precedent, the law schools should avoid gender stereotyping of legal writing contract positions by ensuring neutral preferences in hiring and evaluation standards.¹⁷⁰ Potentially actionable stereotyping includes

the characterization of legal writing teaching as requiring a "soft touch" in contrast to doctrinal teaching, which requires a person who is "tough" and "demanding" and not a "wimp." These comments tend to be gendered in that they attribute to legal writing teaching traditional feminine characteristics, such as supportiveness, softness, less intellectual interest, and contentment, but attribute to doctrinal teaching traditional masculine characteristics, such as intellectual vigor and toughness.¹⁷¹

Moreover, such collegiality provisions could be construed as further engendering an already overwhelmingly female academy.¹⁷² As one scholar observes, “[g]iven that this level of [gender] segregation exists in academia and the professional world, there would seem to be a compelling case for rooting out gender discrimination in academia, not only because it is a significant realm of professional employment, but also because universities and professional schools are the gateways through which virtually all professionals pass.”¹⁷³ Similarly, Kathryn Stanchi examined the hierarchy in law school faculty, finding compelling evidence of a deliberate “institutionalized and illegitimate status hierarchy operating in American law schools.”¹⁷⁴ Stanchi reveals that the “players in this status hierarchy are the faculties and administrations of American law schools. At

¹⁶⁹ Ann C. McGinley, *Discrimination in our Midst: Law Schools' Potential Liability for Employment Practices*, 14 UCLA WOMEN'S L. J. 1, 3 (2005) (emphasis added).

¹⁷⁰ *Id.* at 37.

¹⁷¹ *Id.* at 45.

¹⁷² In 2004, the ALWD/LWI survey reported that approximately 66% of faculty hired in legal writing positions for the prior five years were female. See 2006 Survey, *supra* note __, Question 71 (noting unreliability in more recent survey responses).

¹⁷³ Scott A. Moss, *Against "Academic Deference": How Recent Developments in Employment Discrimination Law Undercut and Already Dubious Doctrine*, 27 BERKELEY J. EMP. & LAB. L. 1, 14-16 (2006).

¹⁷⁴ Stanchi, *supra* note __.

the top are the tenured "doctrinal" professors, roughly 70 percent of whom are male; at the bottom are legal writing professors, roughly 70 percent of whom are female. This institutionalized status system is based on elitism and gender discrimination."¹⁷⁵ Such discrimination is fostered by the legal writing academy's lack of access to "cultural capital," including scholarship and participation in faculty governance.¹⁷⁶ It is further perpetuated by gender stereotyping the standards associated with performance.¹⁷⁷ To the extent that collegiality provisions in contract standards could be characterized as sexist,

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 476-91.

¹⁷⁷ There is a critical distinction to be drawn between the arguably feminine quality of legal writing pedagogy and the imposition of gendered standards for evaluation. One scholar describes a nexus between legal writing pedagogy and its appeal to female professors:

Pedagogically, the field is dynamic, for it concerns itself not only with substance, but also with process. Assisting a student to become competent in a basic practical skill requires drawing on multiple strategies and techniques. The instruction must be individually tailored for each student and it must blend the practical with the theoretical . . . Another aspect of LRW that could appeal to women is the opportunity it affords for intensive interaction with students in a way that can inject into the students' law school experience key factors that women may have found missing from their own law school experience.

Maureen J. Arrigo, *Hierarchy Maintained: Status and Gender Issues in Legal Writing Programs*, 70 TEMP. L. REV. 117,152-53 (1997).

Kathryn Stanchi argues that discrimination in the market should be exploited for pedagogical reform. *See, e.g.*, Stanchi, *supra* note __, at 488-96. She posits a more feminist pedagogy, rejecting the traditional, doctrinal pedagogy of large classes, limited feedback, and Socratic dialogue. Stanchi notes "In its best forms, legal writing has developed a pedagogical model that embraces cooperative and contextual learning and has rejected the more rigid, combative forms of traditional law teaching."

Thus, legal writing instruction has benefited from this more feminist – or feminine – approach to pedagogy, but evaluating professors on the basis of gendered interactional characteristics perpetuates discriminatory practices within the academy. Indeed, the dichotomy represents the "Two Faces of Eve" – the notion that the feminine characteristics are valuable in the classroom, but gendering and stereotyping in evaluative characterizations perpetuate discriminatory practices. As one scholar observes, "In sharp contrast to the prevailing pedagogy of legal education, Legal Research and Writing has a distinct feel of domesticity. Law schools rely on Legal Research and Writing instructors to provide frequent and informal contact between students and faculty and to monitor students' progress and stress levels." Christine Haight Farley, *Confronting Expectations: Women in the Legal Academy*, 3 YALE J.L. & FEMINISM 333, 356 (1996). Farley concludes:

I do not mean to disparage nurturing traits, but rather to criticize the assignment of these traits a gender and a low value. The expectation, in fact the ideal for Legal Research and Writing faculty, is that they will conduct themselves as we expect women to conduct themselves . . . My project is simply to call for the de-gendering of the assignment of roles in legal education.

Id. at 356-57. I also support the nurturing traits inherent in legal writing pedagogy, but caution against the codification of potentially sexist characterizations in employment standards.

impinging on concepts of academic freedom, and unduly vague so as to constitute a pretext for discrimination, they should be avoided.

C. Scholarship

Many standards address a legal writing professor's responsibility with regard to scholarship. The standards will be compared insofar as they either require or encourage scholarship, how they quantify requisite productivity, and whether they specify the content of requisite scholarship.

At some institutions, scholarship is a required activity for either promotion or retention. At American/WCL, Drake University, Southern Illinois, St. John's University and Temple, scholarship is required for a promotion.¹⁷⁸ However, at other institutions, scholarship is expressly not required, but is encouraged. For example, the Loyola Los Angeles standards provide that "Scholarship is neither required nor expected for the award of a renewal contract" but that scholarship could be considered in the context of evaluating teaching excellence.¹⁷⁹ Also, the Cleveland-Marshall standards note:

A Legal Writing Professor is not expected to engage in published legal scholarship as a part of teaching and Program responsibilities. However, the Dean, Director, and faculty encourage and support Legal Writing Professors who wish to engage in scholarship regarding legal writing, including publications, research and conference presentations. . . . The Dean and law school will support scholarly activity.¹⁸⁰

At institutions which do require scholarship, the quantity of scholarship is often specified. For example, at Southern Illinois, for a promotion to Associate Clinical

¹⁷⁸ Temple and SIU require the production of scholarship for promotion to the intermediate – associate – level. Temple, App. 1, No. 14, at ____; SIU, App. 1, No. 13, at _____. American/WCL and Drake do not require scholarship for the intermediate level promotion (although such scholarship would contribute to the material considered for promotion), but scholarship is required for the promotion to the final academic rank at both of these institutions. American/WCL, App. 1, No. 2, at ____; Drake, App. 1, No. 6, at _____.

¹⁷⁹ Loyola/LA, App. 1, No. 9, at _____.

¹⁸⁰ Cleveland-Marshall, App. 1, No. 3, at _____.

Professor, a professor must have produced “at least three standard-sized writings, or their equivalent, at least one of which must be a published article.”¹⁸¹ A standard-sized writing is defined as “twenty double-spaced, typewritten pages.”¹⁸² To be promoted to Clinical Professor the professor “must have produced at least nine standard-sized writings, or their equivalent, at least three of which must be published articles.”¹⁸³ To be promoted to full Professor at St. John’s University, the faculty member must produce, at a minimum, “a book (which may be a book for practicing attorneys) or two publications consisting of chapters in books which are attributed to the candidate, articles in law reviews or in refereed journals or articles of a similar nature in other publications, or any combination thereof.”¹⁸⁴

At Temple, to be promoted to Associate Professor, the professor “must demonstrate significant achievement in scholarship based on at least one professional work.”¹⁸⁵ To be promoted to Professor at Temple, “the LRW Faculty Member must have achieved professional recognition in the field of Legal Writing through published, original work beyond that required for promotion to Associate Professor.”¹⁸⁶ At Nova Southeastern, to be promoted to Associate Professor, a faculty member must “have demonstrated satisfactory progress in scholarship.”¹⁸⁷ To be promoted to full Professor, the faculty member must have completed at least one piece of scholarship such as a book, or a law review article.¹⁸⁸ Similarly, at Drake University, to be promoted to Associate

¹⁸¹ SIU, App. 1, No. 13, at ____.

¹⁸² SIU, App. 1, No. 13, at ____.

¹⁸³ SIU, App. 1, No. 13, at ____.

¹⁸⁴ St. John’s, App. 1, No. 12, at ____.

¹⁸⁵ Temple, App. 1, No. 14, at ____.

¹⁸⁶ Temple, App. 1, No. 14, at ____.

¹⁸⁷ Nova Southeastern, App. 1, No. 10, at ____.

¹⁸⁸ Nova Southeastern, App. 1, No. 10, at ____.

Professor, the faculty member must demonstrate “solid progress toward” the scholarship requirement associated with the full Professor title.¹⁸⁹ To be promoted to Professor of Law, a Drake University writing professor must produce “a minimum of one work equivalent in length and quality to a traditional law review article.”¹⁹⁰

While traditional law review articles, books and treatises are generally recognized forms of publication under doctrinal, tenure-track standards, the 405(c) standards for legal writing faculty often outline writings other than traditional law review articles which are eligible for consideration under the scholarship standard. For example, the Southern Illinois standards acknowledge that while “[a]ll Lawyering Skills faculty members are expected to engage in high quality writing and publication[, t]his work may differ somewhat from that done by tenure-line Law School faculty.”¹⁹¹ While “highly analytical writing for law reviews is encouraged,” faculty members can also submit for consideration the following:

- (a) articles in bar journals, specialized journals, and those covering clinical or legal education;
- (b) teaching materials for lawyering skills programs;
- (c) briefs or memoranda on significant legal issues;
- (d) practice manuals;
- (e) testimony in support of legislative proposals; and
- (f) continuing legal education materials.¹⁹²

The Drake standards similarly note a variety of eligible scholarly material, including “traditional law review articles, articles about substantive topics or legal education published in professional journals, books, treatises, practice manuals, studies or

¹⁸⁹ Drake, App. 1, No. 6, at ____.

¹⁹⁰ Drake, App. 1, No. 6, at ____.

¹⁹¹ SIU, App. 1, No. 13, at ____.

¹⁹² SIU, App. 1, No. 13, at ____.

reports, revisions, supplements, statutes, course and simulation materials and litigation documents, including briefs and memoranda of law.”¹⁹³

Some institutions also designate the content of publications eligible for consideration under the standards. At Temple, to be considered for promotion to Associate Professor, the one required professional work must be “in research and writing.”¹⁹⁴ “Additional scholarship beyond the foregoing requirement which is not in the field of legal research and writing may be considered as well.”¹⁹⁵ The Drake standards are broader in characterizing the content of eligible scholarship, noting:

*In light of the nature of the legal writing curriculum, the nature and quality of scholarship required of faculty whose primary responsibility is to teach legal writing shall be tailored to reflect the LRW Faculty Member’s special interests and focus but shall be measured by common standards of thoroughness, analytical power, creativity and presentation. Scholarship may be satisfied not only by traditional forms of scholarship, but by written or other permanent works that enrich the legal writing curriculum.*¹⁹⁶

At Cleveland-Marshall, while scholarship is not required, the standards do specify that “Legal Writing Professors may choose to engage in scholarship in subjects beyond the scope of legal research and writing. Nothing prevents Legal Writing Professors from submitting scholarship for favorable consideration in connection with reappointment or promotion.”¹⁹⁷

At some institutions, there are timing restrictions which apply to publications eligible for consideration for promotion. For example, at Temple, a publication is not eligible for consideration under the standards unless it was “written and published, or submitted for publication, after the LRW Faculty Member became a member of the

¹⁹³ Drake, App. 1, No. 6, at ____.

¹⁹⁴ Temple, App. 1, No. 14, at ____.

¹⁹⁵ Temple, App. 1, No. 14, at ____.

¹⁹⁶ Drake, App. 1, No. 6, at ____ (emphasis added).

¹⁹⁷ Cleveland-Marshall, App. 1, No. 3, at ____.

Temple faculty.”¹⁹⁸ Similarly, at Drake, in order to be eligible for consideration, a publication “must have been completed after the faculty member came to Drake.”¹⁹⁹ In contrast, at Southern Illinois, the “Law School will consider writings done at any time, including prior to joining the Lawyering Skills faculty, provided that the Lawyering Skills faculty member has continued to write and publish in recent years.”²⁰⁰

In some instances there are special procedures designated for the evaluation of scholarship. The Temple standards are the most specific in this regard. When a writing professor is considered for promotion, she has the opportunity to identify at least two scholars who are not members of the Temple faculty to review her publications.²⁰¹ The committee considering the professor’s promotion then solicits a written evaluation of the professor’s scholarship from at least one identified scholar.²⁰² The written report solicited “discusses the extent to which the work in question reflects knowledge of the subject matter and makes a positive contribution to the field as well as such other information or commentary as the scholar deems relevant to the LRW Faculty Member’s qualifications for promotion.”²⁰³ Further “[t]he LRW Faculty Member under review shall be entitled to see and respond to any written report prepared by such a scholar, provided that the report is redacted to preserve the scholar’s anonymity.”²⁰⁴

Also, at St. John’s University, in evaluating a faculty member for promotion to full Professor, the committee may elect to have the faculty member’s scholarship subject

¹⁹⁸ Temple, App. 1, No. 14, at ____.

¹⁹⁹ Drake, App. 1, No. 6, at ____.

²⁰⁰ SIU, App. 1, No. 13, at ____.

²⁰¹ Temple, App. 1, No. 14, at ____.

²⁰² Temple, App. 1, No. 14, at ____.

²⁰³ Temple, App. 1, No. 14, at ____.

²⁰⁴ Temple, App. 1, No. 14, at ____.

to an external review.²⁰⁵ In that case, the faculty member may select the publication to be reviewed and may identify potential reviewers.²⁰⁶ In contrast, at Drake, the scholarship review is internal, with the Promotion and Tenure Committee as well as the Director reviewing the scholarship of the faculty member under review.²⁰⁷

Examination: There are a variety of incentives for legal writing faculty to produce scholarship. Engaging in the process of research, analysis, and publication has pedagogical benefits, requiring writing faculty to “practice what they preach (teach).”²⁰⁸ Further, the production of scholarship places legal writing faculty more firmly within the academy. Many scholars have acknowledged that, in the legal academy, scholarship is the “Coin of the Realm.”²⁰⁹ By failing to produce scholarship, legal writing professionals distance themselves from their doctrinal colleagues and forego the opportunity to acquire the “cultural capital”²¹⁰ that gives rise to credibility, influence and prestige within the academy.

²⁰⁵ St. John’s, App. 1, No. 12, at ____.

²⁰⁶ St. John’s, App. 1, No. 12, at ____.

²⁰⁷ Drake, App. 1, No. 6, at ____.

²⁰⁸ See Toni M. Fine, *Legal Writers Writing: Scholarship and the Demarginalization of Legal Writing Instructors*, 5 J. LEGAL WRITING 225 (1999). Fine notes:

Engaging in scholarly endeavors may invigorate one's teaching by imparting a renewed awareness of the process of legal research and writing; by renewing one's sensitivity to the challenges faced in attempting to master new, complex tasks in a systematic way; and in providing inspiration to the teacher in developing new and more interesting projects for students by gaining exposure to timely issues and areas of the law.

Id. at 228.

²⁰⁹ See, e.g., Kathryn M. Stanchi & Jan M. Levine, *Gender and Legal Writing: Law Schools' Dirty Little Secrets*, 16 BERKELEY WOMEN'S L. J. 3, 22 (2001) (stating that “most faculty acknowledge that scholarship is the ‘coin of the realm’); P. Koniak and Geoffrey C. Hazard, Jr., *Teaching Legal Ethics "Mainstreaming" Ethics: The Pervasive Method of Teaching Ethics: Paying Attention to the Signs*, 126 LAW & CONTEMP. PROBS. 117 (1995) (in the context of ethics instruction, arguing “To focus on the production and promotion of quality scholarship is consistent with the goal of improving teaching in ethics and the goal of demanding respect and attention for the subject in the larger law school community. Scholarship is the coin in this realm.”).

²¹⁰ Stanchi, *supra* note ____, at 479-85.

As Kathryn Stanchi has observed, “Scholarship is . . . the primary measurement of law faculty rank; . . . Perhaps for this reason, it is the criterion often used to justify the lower legal writing salaries: legal writing professors do not publish so they should not be paid as much.”²¹¹ Stanchi argues that the institutional realities of law school ensure that writing faculty remain at the bottom of the social structure by prioritizing scholarship as the most valuable cultural capital, then instituting policies that make it impossible for writing faculty to acquire such capital.²¹² These observations are sadly accurate, but suggest that the production of scholarship by writing faculty would be a step toward challenging the status quo.

Notwithstanding the foregoing, the determination of whether scholarship should be required or merely encouraged should reflect the institutional realities of the position. At institutions where legal writing faculty members’ salaries are well below those of their doctrinal colleagues, or where the writing faculty are not eligible for scholarship support in terms of stipends and research assistance, the additional burden of scholarship without the benefits afforded other categories of faculty is inequitable. On the other hand, where such benefits are comparable, the encouragement and/or requirement of scholarship places the writing faculty in a position of productive parity with their peers.

Due to the time-consuming nature of writing instruction, there is a reasonable justification for a less burdensome scholarship requirement than that of the doctrinal faculty. As one scholar notes in the context of standards applicable to clinical law faculty:

²¹¹ *Id.* at 482.

²¹² *Id.* at 482-85 (citing disproportionate workloads and failure to recognize or reward legal-writing related scholarship as policies undermining legal writing faculty scholarship).

In order to write, any law professor needs teaching loads, weekly schedules, annual teaching calendars, leaves, support staff, research assistants, mentors, and other support. If law faculty who teach in the clinic have employment conditions similar to those who do not teach in the clinic, they are as likely to be productive scholars as anyone else. Institutions who deny these resources to specific faculty and argue that they are not productive scholars have created a situation ripe for failure. The worst of all worlds is a system that creates a parallel track for clinic faculty with fewer resources and less status, autonomy, and pay and yet creates an expectation of traditional scholarship for success.²¹³

Similarly, Sue Liemer, a recognized scholar in the field of legal writing, examined the difficulties inherent in producing scholarship while teaching legal writing.²¹⁴ She concludes:

In sum, LRW professors have done everything humanly possible to find the time to write. They have stolen time from other work, they have taken political action seeking better terms of employment, they have funded their colleagues' scholarship to give a few others the time to write, they have written about the problem in their own scholarship, they have discussed it at their own conferences for many years, and they have even lost sleep over it. LRW professionals have proven their commitment to scholarship. Some law schools have recognized and supported this commitment. When will the rest of the legal academy give their writing experts, the LRW professors, the time to write?²¹⁵

Given the demands associated with legal writing instruction, the Hofstra standards appropriately acknowledge

*An applicant's contributions to the field may be less than expected of members of the tenure-track faculty because the applicant's teaching is assumed to be more much more labor-intensive than teaching done by most tenured and tenure-track faculty. But an applicant's contributions to the field should demonstrate intellectual growth and an inquiring, insightful, and intellectually curious mind together with an identifiable benefit to the law or to education outside the Law School.*²¹⁶

²¹³ Nina W. Tarr, *In Support of a Unitary Tenure System for Law Faculty: An Essay*, 30 WM. MITCHELL L. REV. 57, 69 (2003).

²¹⁴ Susan P. Liemer, *The Quest for Scholarship: The Legal Writing Professor's Paradox*, 80 OR. L. REV. 1007 (2001) [hereinafter *The Quest*].

²¹⁵ *Id.* at 1031-32.

²¹⁶ Hofstra, App. 1, No. 7, at ___ (emphasis added).

Also, to the extent that tenure standards do not generally specify required content of scholarship, it is reasonable to allow the faculty member some freedom in publication topic.²¹⁷ To the extent that the standards apply to writing faculty, however, scholarship related to legal writing should be expressly eligible for consideration for promotion of these faculty members.

III. Post Tenure Review and Objection Procedures

To the extent that a 405(c) long term contract constitutes “clinical tenure,”²¹⁸ the procedure under which a 405(c) long term contract is renewed should mimic the procedure under which a tenured faculty member is reviewed (presumably annually). Thus, under the Drake standards, the evaluation regarding renewal mirrors the evaluation of tenured faculty. Once the legal writing professor has earned the Professor of Law title, she follows the post-tenure review procedure of tenured faculty, submitting an annual report to the Dean of the Law School. If, during the fourth year of the five-year, presumptively renewable contract, the Dean or Director has identified any reason not to renew the contract, the Professor must be given notice and the Promotion and Tenure Committee must reconvene to reconsider the Professor’s satisfaction of the standards associated with the professor rank.²¹⁹ A similar procedure applies to the final professor

²¹⁷ However, schools should recognize scholarship in the field of legal writing as satisfying a scholarship standard. It is, after all, legitimate scholarship. See Mary Beth Beazley & Linda H. Edwards, *The Process and the Product: A Bibliography of Scholarship about Legal Scholarship*, 49 MERCER L. REV. 741 (1998).

²¹⁸ See Herma Hill Kay, *UC’s Women Law Faculty*, 36 U.C. DAVIS L. REV. 331 n. 88 (2003) (citing Richard K. Neumann, Jr., *Women in Legal Education: What the Statistics Show*, 50 J. LEGAL EDUC. 313, 336-37 (2000)).

²¹⁹ Drake, App. 1, No. 6, at ____.

rank at Albany²²⁰ and Loyola/Los Angeles,²²¹ and Dayton.²²² At other schools the professor is subject to a committee evaluation for renewal of long-term contract status.²²³

Some standards further address the objection procedures afforded a legal writing faculty member whose presumptively renewable contract has been questioned. Southern Illinois University has the most specific objection procedures and allow a writing faculty member to object to committee findings, request a review meeting, and appear personally at the review meeting.²²⁴

²²⁰ Albany, App. 1, No. 1, at ___ (If in the final year of a professor's long-term contract, the Dean finds that the professor clearly continues to meet the criteria set forth above, the Dean shall so inform the Board of Trustees so that the Board may consider whether to offer the professor another long-term contract. If the Dean does not find that the professor clearly continues to meet the criteria set forth above, the Dean shall recommence the procedure described in this policy by appointing a committee as therein described.)

²²¹ Loyola/LA, App. 1, No. 9, at ___ (Second and Subsequent Renewals of Five-Year Contracts: Second and subsequent renewals of five-year contracts shall be made by the Dean upon recommendation by the Director of Legal Writing. There need not be plenary review by the Skills Committee unless requested by the Director or by any Committee member. If review is requested, the Committee shall proceed with the evaluation and renewal process as set out in sections C and D (1) above.)

²²² Dayton, App. 1, No. 4, at ___ (Subsequent five-year appointment renewals do not require Committee review, but may be made by the Dean in consultation with the Program Director.)

²²³ See, e.g., Oregon, App. 1, No. 11, at ___ (University policy requires two year contracts. Director performs biennial review and recommendation. "Every six years, the personnel committee will conduct reviews to ensure that the senior instructor continues to meet the criteria in Section IIB regarding teaching, service, and professional development. If so, the senior instructor will receive benefits commensurate with a positive post-tenure review."); Hofstra, App. 1, No. 7, at ___.

²²⁴ SIU, App. 1, No. 13, at ___. The standards specifically provide:

Review Procedures On Promotions And Continuing Appointments

1. The Lawyering Skills faculty member may object to the preliminary findings and conclusions within three (3) "business" days (any day that mail is delivered to the law school) of receiving the preliminary report. The faculty member must address the objection to the committee in writing, must demand a review of findings meeting, must specify the grounds for the objection, and must list the names of any witnesses that the faculty member wants to confront or present at the review meeting.

2. The committee shall schedule a review of findings meeting to be held within three (3) "business" days of receipt of the notice of objection. It shall notify the Lawyering Skills faculty member and any requested witnesses at least twenty-four (24) hours in advance of the date, time and place of the review meeting.

3. The Lawyering Skills faculty member has the right to appear personally at the review meeting, to present information concerning relevant matters in the file, and to submit written comments concerning the findings and conclusions. The committee shall allow an oral or written response by anyone who has contributed to the file.

Conclusion: The modifications to 405(c) reinforce the tenure-like quality of 405(c) appointments. To that end, it is not surprising that the standards reviewed bear many similarities to doctrinal tenure standards, particularly insofar as they require excellence in teaching and service for retention and promotion purposes. The standards do differ from doctrinal standards, however, in the manner in which they define indicia of teaching excellence specifically in the context of research and writing instruction. In this regard, however, the 405(c) standards reviewed for this article are similar; they identify similar qualities associated with research and writing instruction and outline – with some specificity – what constitutes excellence.

The most marked difference between the standards reviewed is the emphasis on scholarship. As noted, many standards explicitly note that scholarship is not a required activity for promotion and retention. Other standards expressly require the production of scholarship. For those standards, some require scholarship to focus on a particular subject matter while others do not. Some allow professors to submit scholarship produced prior to employment at the particular institution, while others require that eligible scholarship be produced during employment at the institution. Most standards that require scholarship provide some guidance on the quantity required for promotion.

4. No witness shall be required to appear at the review meeting, and the committee shall have discretion as to what weight should be given to the opinions of a witness who does not appear.

5. The committee shall submit written findings within one week after the completion of the review meeting. These written findings may be the same as the findings filed prior to objection and review but must include the objection and written comments submitted by the Lawyering Skills faculty member being reviewed. These findings may include additional or substitute findings based on the presentation at the review of findings meeting.

6. The findings made by the committee after the review of findings meeting shall become the committee's final findings and shall be distributed under the same provision for distributing preliminary findings.

As discussed *supra*, there are several advantages to providing writing faculty with 405(c) status. Indeed, to the extent that 405(d) mandates competitive terms of employment,²²⁵ long term contracts are the norm, but without 405(c) status the institution gains no real benefit in terms of ratios. Moreover, enhanced security for law faculty who are not on a tenure track has benefits in terms of the preservation of academic freedom and enhanced morale. On the relationship between job security (specifically tenure) and academic freedom one scholar concludes:

Academic freedom allows professionals to seek and discover, teach, and publish absent outside interference. Tenure is a buttress--a guarantor--of academic freedom. It protects academic freedom through the requirement of academic due process before dismissal. An erosion of tenure places academic freedom at risk.

Theoretically, the same academic freedom exists for the most recently hired adjunct or untenured faculty member as for the most senior tenured professor. The tenured faculty should protect the untenured. It is questionable whether that ideal exists. The hierarchical structure of law faculties has created fissures where there should be solidarity and undermined tenure and academic freedom.²²⁶

Thus, law schools should consider employing writing professors with 405(c) status.²²⁷ In so doing, schools will need to adopt written standards applicable to those positions.²²⁸ Schools then have a variety of choices in what to require and how to express those requirements. As noted above, the standards reviewed for this article provide excellent examples of those choices. To the extent they differ from one another,

²²⁵ ABA STANDARD 405(d).

²²⁶ James J. Fishman, *Tenure: Endangered or Evolutionary Species*, 38 AKRON L. REV. 771, 782-85 (2005) (claiming that the hierarchy of employment status at law schools has eroded tenure and undermined academic freedom).

²²⁷ It is the author's hope that the ABA standards will continue to be revised to require this form of job security for legal writing professors. As discussed *supra*, it becomes increasingly difficult to justify distinctions between clinicians and writing faculty, especially insofar as the 2005 standards revisions were based upon a law school's obligation to create job security that would attract and retain quality faculty and preserve academic freedom.

²²⁸ ABA INTERPRETATIONS 405-3 and 405-7.

particularly with regard to scholarship, institutional realities related to status and salary parity between writing and doctrinal faculty should be considered. However, a sound argument can be made for implementing tenure-like standards, which include obligations associated with service and scholarship. These “cultural currencies” equalize faculty obligations across tracks and therefore provide a sound basis for salary and status equality. As one scholar notes in arguing in favor of unified tenure standards for all law faculty,

[A] law school should be a truly integrated model of legal education, one that fully embraces theoretical and doctrinal scholarship, critical legal studies, clinical education, strong involvements with members of the judiciary and practicing bar, a new "global" law component focused on international issues, and powerful support of public interest ventures. Faculty hiring [should be] focused on diversity of perspectives, with no ideological or academic group having favored status. As a result, practical, theory-oriented, and critical legal scholars, along with their clinician counterparts--all with very different interests--[can] flourish in an environment of mutual respect, sharing equal status and prominence on the faculty.²²⁹

Where legal writing professionals perform service and produce scholarship similar to their tenured peers, there is no justification for marginalizations of status and salary. These issues should therefore also be considered when adopting standards associated with the tenure-like security of 405(c).

²²⁹ Tarr, *supra* note __ at 59.