

Ralph L. Brill
Professor of Law
Chicago Kent College of Law
Illinois Institute of Technology
565 W. Adams St.
Chicago, Il. 60605
312-906-5011
rbrill@kentlaw.edu
February 4, 2011

Donald J. Polden, Chair (by email and U.S. mail)
Standards Review Committee
Dean, Santa Clara Law School
Santa Clara University
500 El Camino Real
Santa Clara, CA 95053
dpolden@scu.edu

Hulett H. Askew (by email and U.S.mail)
Consultant
Office of the Consultant on Legal Education
Section of Legal Education and Admissions to the Bar
American Bar Association
321 N. Clark Street, 21st floor
Chicago, IL 60610
Bucky.Askew@americanbar.org

Ms. Becky Stretch
American Bar Association (by email)
StretchC@staff.abanet.org

**RE: COMMENTS ON THE PROPOSED CHANGES TO THE
AMERICAN BAR ASSOCIATION STANDARDS CONCERNING
TENURE AND JOB SECURITY.**

by Professor Ralph L. Brill

INTRODUCTION

I now am completing my 51st year of law teaching, all but one of them at Chicago Kent College of Law, Illinois Institute of Technology. During that time I have held just about every possible position at the law school: Interim Dean; Associate Dean; Director of Legal Research and Writing; Director of Advocacy Training; Instructor; and Assistant, Associate and Full Professor of Law. A long-time member of the ABA, I have chaired two committees-- Individual Rights and Responsibilities, and Communication Skills -- and been a member of six ABA site inspection teams. For the Individual Rights Committee I drafted the ABA's response to President Nixon's proposed S.1, The Official Secrets Act. For the Communication Skills Committee, I joined four other members to draft the ABA's Legal Writing Sourcebook. For the Council on Legal Education, I helped draft the original version of Section 302 of the Standards, as well as the Standards and Interpretations on faculty-student ratios, the formula for counting full-time teachers in that ratio, and the "attract and retain" language in the 400 series.

This past year, I attended two meetings of the Standards Review Committee as an observer, and the presentations by Dean Polden and Dean Matasar at the A.A.L.S. meeting. They presented the arguments favoring the proposed changes on job security. I write to address the arguments made by Deans Polden and Matasar in favor of removing any requirements for tenure or job security from the ABA Standards, thus making it possible for law schools to hire teachers on "at will" contracts only. I also wish to try to portray the probable impact the proposed changes will have on one particular class of law teachers – namely, Legal Writing teachers.

Dean Matasar's Arguments

Dean Matasar has been one of the leaders of ALDA's attempts to eliminate a requirement of tenure or job security from the Standards. His main points have been that:

- (1) The requirement of tenure/job security stifles law schools' abilities to experiment;
- (2) The requirement of tenure/job security for faculty makes law school education too costly for students in today's world;
- (3) Professors abuse tenure after they receive it by becoming unproductive.

1. Dean Matasar asserts that the requirement of tenure/job security stifles law schools' abilities to experiment.

Dean Matasar asserts that a law school should be allowed to experiment with new ideas for legal education, and that the current tenure/job security standards somehow hinder this goal. For example, he says, a school should be able to be a school for legal philosophy, or have a purely religious orientation, or even be a school advocating Marxism or other political viewpoints. Or it should be able to make law school a miniature law firm in place, with practicing lawyers staffing it. He gives other examples of "experimentation," which he claims somehow have been stifled by the necessity of granting tenure to faculty.

I would urge Dean Matasar to read two classic books on the history of legal education, Robert Stevens, Law School: Legal Education America From The 1850's To the 1980's (Univ. of North Carolina Press 1983), and Alfred Antzinger Reed, Training For The Public Profession of the Law (Carnegie Foundation 1926, reprinted William S. Hein 1986). These histories, and experience since they were written, will show that the law schools and teachers have experimented and created more in the 50+ years since the ABA accreditation process began than in the 150+ years of legal education before then, by a factor of many thousands.

Please forgive the broadly painted history that follows.

As everyone knows, before there were law schools, one could become a lawyer simply by hanging out a shingle and declaring oneself to be one. In time, most states required some period of apprenticeship, the candidate studying for a period of time with an existing lawyer. The system produced some great lawyers, such as Lincoln and Webster. It also produced many incompetents, who did great damage to their clients.

While the A.B.A. came into existence in 1878 as an association of American lawyers with the goal of improving the profession, it had very limited enrollment for most of the next century, and any attempts it made to improve legal education were limited by its lack of official status. The A.A.L.S. came into existence in 1900, with membership almost exclusively from law teachers and law schools, and with similar goals. Over the next forty years, both associations attempted to gain improvements by placing higher standards on law schools that sought membership to their organizations. But they had no authority on their own to inspect law schools or to impose standards for graduates who might seek entry into the profession itself, except as a state court or bar incorporated membership in one or the other organizations as a requirement. Few states did.

With no requirements by an accreditation body, the law schools of the time had endless opportunities for experimentation in curriculum, teaching methods, programs, scholarship, philosophy and everything else connected with education of prospective lawyers. However, almost nothing unique was done.

The first law school to open was the Litchfield School, in Massachusetts, a proprietary school, with classes taught in a log cabin. It opened in 1774. In 1779, George Wythe, Jefferson's preceptor, taught law in the first university law department, at William and Mary. From 1774 to 1900, over 180 law schools or university law departments operated for one or more years. Included were private institutions such as Transylvania University, Lexington Ky.; Lafayette College, Easton, Pa; and McKendree College, Lebanon and East St. Louis, Il. Some were one-person operations, such as a law school at Windham, Connecticut, run by Judge Zephaniah Swift, which lasted 8 years. The admission requirement to these schools was a high school education -- or its equivalent.

The early university law programs were not very successful. For the most part, they were not separate degree-granting departments. Neither the L.L.B. nor the J.D. degrees were awarded to students who spent the one or two years taking law courses, until much later. Law was an undergraduate discipline, part of a liberal arts curriculum. Some law departments merely taught the history of law and legal philosophy, and did not offer any real training usable to practice law. Other universities did teach law classes after they took over private schools when they became unprofitable. Thus, for example, Transylvania became the University of Kentucky, and Union College, begun in Chicago in 1873, became Northwestern's law school in 1891.

I repeat: There was ample opportunity for these schools and departments to experiment in the staffing, curriculum, teaching methods, and other aspects of legal education. Neither the ABA nor any other organization was inspecting and requiring they meet any standards. But in fact there was almost no difference among these schools in any of those aspects.

Teachers at the private schools were judges and practicing lawyers, who lectured to the students on the basic body of law, with supplemental readings in the English classics -- Blackstone, Coke and Littleton. Some universities had full-time professors, while others used adjuncts to teach their law courses. However, the teaching method was the same as the private schools used -- lectures. Thus, Chancellor James Kent's and Justice Story's famous lectures were later published as their "Commentaries on the Law." This period was known as the Hessian Period of Law Study, meaning the black letter law was lectured to the students, who wrote them in their notebooks as, in effect, their libraries when they went to practice.

The curricula at the law schools and some law departments were basically the same, with very slight differences. Some strictly followed Litchfield's curriculum, which required lectures on Domestic Relations, Executors and Administrators, Sheriffs and Gaolers, Contracts and actions, Torts, Evidence Pleading, Practice, The Law Merchant, Equity, Criminal Law, Real Property and actions. Some of the universities chose the Harvard/Columbia model, which omitted Domestic Relations, Executors and Administrators, and Sheriffs and Gaolers, but included Corporations, Constitutional Law and Conflict of Laws. (William and Mary's was more esoteric, and included Moral Philosophy and the Law of Nature and Nations; Law and Police; Government). No

electives were taught. Early on, the course of study was one year; later many extended law study to two years long.

To be sure, there were some differences between schools. Some were primarily evening schools. A few had a religious orientation. Most of the private schools were for-profit. There were schools that admitted only women (*e.g.*, Portia). There were schools for “colored people” only. (*e.g.*, Freylinghuysen and Howard). There were law schools run by and located in local YMCAs (*e.g.*, the Boston YMCA Law School).

One innovation did come during this period – namely, the teaching method used. Christopher Columbus Langdell’s appointment as dean of Harvard in 1870 brought about the transition to make that law school’s major purpose to train students for careers in law. Langdell submitted that law was a science, and should be taught as a science. He therefore instituted the Socratic Dialogue as the major method of training students to “think like a lawyer.” Many schools, private or university, adopted the Langdell model, or at least a combination of the Lecture/Socratic methods. Even Oliver Wendell Holmes, who had been a strong advocate of the lecture method, (and whose lectures were published as “The Common Law”), became an advocate for the method.

The method enabled law schools to still offer large classes, taught by one professor, with students studying from casebooks rather than text books. Langdell’s theory was that the students should study the original sources of the law, (the cases and statutes themselves, and not just summaries in textbooks). From their analyses of these original sources the students were to extract an understanding of the basic principles of law and the legal reasoning used to apply that law to various fact situations. This period in legal education history was labeled as the Scientific Period of law study.

Once more, I reiterate, up to this point in legal education history, there were ample opportunities for law schools and law teachers to experiment -- really almost complete freedom to do so -- but there had been little major change, save for the adoption by most schools of some version of the Socratic Method of teaching.

Within the American Bar Association a small movement started to try to do something to make the law schools, private and university, adopt higher standards and offer improved legal education. In 1881, the ABA formed a Committee on Legal Education, and later the first section, The Section on Legal Education and Admissions to the Bar. These entities made unsuccessful attempts to get the ABA House of Delegates to recommend that state courts administer bar examinations, and that a minimum of two years or even three years of law study be required as a prerequisite to taking such exams. However, the most that was accomplished was to induce some states to count time in law school the same as they did for an apprenticeship. No state required attendance at a law school; less than one-half of the members of the practicing bar had attended even one law school class. Several states still did not even require candidates for admission to have graduated high school.

The ABA Section continued to pass resolutions for standard rules for admission to the bar and attendance at law schools. In 1900, it was joined by the new association, the A.A.L.S. The A.A.L.S., largely made up of law school deans and professors, proposed even more stringent requirements for membership, and barred schools with evening classes from membership. However, both the ABA and the AALS were voluntary organizations and could not get legislation enacted affecting admission to practice in the various states. Neither was successful in eliminating lesser law schools or law departments, in spite of trying. By 1928, only West Virginia required graduation from an AALS-approved school, and by 1929, in all states but three, an applicant to the bar need not have graduated from a law school.

Since neither organization had authority to accredit law schools, neither performed any inspection of the law schools that applied for membership, but relied on questionnaires. A law school might decide to seek admission to membership in one or the other organization mainly as a marketing tool, to distinguish itself in the competition for students. At first, not many schools sought admission. Thus, in 1923, the ABA issued its first list of approved schools -- 39 schools out of 168 total law schools and law departments. The AALS did a bit better, with 62 schools AALS- approved in 1925. By 1927, the two organizations were about equal in membership (and the schools on their lists were largely redundant).

In the next few years, each organization took turns adding requirements for membership, so that by 1928, both required a minimum faculty of three full-time instructors and 7,500 volumes in the library. By 1935, both had achieved limited goals of getting some states to require bar exams. The ABA numbers now had increased its law school membership to include 64% of the students in the country.

However, it took World War II to cause most of the lesser, unapproved schools, to cease operating. As young men went off to war, attendance at all schools fell dramatically, and many of the private schools were forced to close.

After the war, however, there was a great influx of former soldiers, aided by the G.I. Bill, who sought entry into law schools. Most chose to apply to the better schools, as indicated by the schools' membership in the ABA or AALS.

Finally, in 1952, the Department of Education certified the ABA as the official accrediting body for law schools. This step enabled nearly every state to adopt the requirement that candidates for admission to the bar, or for taking its bar examination, have graduated from an ABA- approved law school. The AALS continued to approve schools as for a prestige factor.

It was only after the ABA became the official accreditation body that experimentation and innovation in law schools really began. Since 1952, in contrast to the almost two hundred years prior thereto, there have been incredible changes in curricula, in teaching methods, in scholarship, in all other programs. High standards set by the ABA, and

specifically those requiring tenure/job security, did not inhibit in any way the rapid and dramatic changes that have taken place during my 51 years as a law professor.

Change and experimentation started in earnest with the next movements after the Science Period among law teachers and law school curricula. The lecture and case methods formerly utilized still emphasized the inculcation in students of black-letter law. The highest regarded scholarship of law teachers, for the most part, were hornbooks, casebooks and law review articles like “The Fall of The Citadel,” by Prosser, which traced the rise and fall of the doctrine of privity of contract as a requirement in product liability litigation. Stevens describes the next movements: “Faced with what they believed to be a stagnating approach to law and legal education, law professors at Harvard, Columbia and Yale . . . attempted to carry out an assault on the status quo.” This next wave was called the Realist Movement. The movers wrote about how the law actually progressed and changed, and the historical, empirical and justice factors that led courts to adopt rules or legislatures to adopt statutes. Their vantage point was process rather than substance.

Admission to law school now required at least some college education, (and of course would later go all the way to requiring an undergraduate degree). The law school course grew to three years. Educationally sound student-faculty ratios were established. Most of the current Standards had their genesis in this period of time.

The Realist method brought with it, *inter alia*, changes in casebooks from “Cases on X” to “Cases and Materials on X”, containing notes and text that required students to ask questions of what the law should be. New categories of subjects, such as securities law, were added to the existing course in Corporations. Public law subjects increased, as schools added labor law, taxation, trade regulation, and administrative law as new subjects. Students in their second and third years were able to choose from the many electives that were added to the curricula. Seminars, enabling deep consideration of subjects, became popular additions to the curriculum. Some schools added non-lawyers, such as social scientists or economists or psychiatrists (*e.g.*, Michigan), to their faculties. With pressures from the ABA and A.A.L.S, standards, schools predominantly hired full-time teachers, and relied less on adjuncts. Publications became more advocative or analytical and less descriptive.

The 60’s and early 70’s brought even more changes. During this period, combined law and business programs sprung up. (*e.g.*, Yale began a cooperative program with the Harvard Graduate School of Business Administration). Soon “Law and ___” courses and programs were established at many schools. Many schools began to add graduate programs in law. California - Hastings took advantage of other schools’ mandatory retirement requirements, and hired distinguished law professors to teach - the 65 CLUB -, giving its students the opportunity to study under such luminaries as Richard Powell, William Prosser, and Sheldon Tefft.

Experimentation continued in the 1970’s with the Critical Legal Education Movement. Dean Matasar’s example of schools or teachers with unpopular political beliefs was a

reality, with no inhibitions on teachers in their classes or their scholarship due to the requirements of the ABA. Some schools hired professors predominantly of one political or economic philosophy. (*e.g.*, George Mason; University of Chicago).

And then in the 70's, with the aid of grants from C.L.E.P.R., clinical law schools opened (*e.g.*, Antioch, Northeastern), and traditional schools added extensive clinical programs (*e.g.*, C.U.N.Y.; D.C. University). In them, students have helped free innocent prisoners from death row, with programs such as Barry Scheck's Innocence Project. Others are helping domestic violence victims, or aiding taxpayers in filing Income Tax returns. Some are arguing actual cases, under court rules allowing student representation of indigents.

Today, there are Distance Learning law schools (*e.g.*, Concord; Kaplan). There are schools allowing credits for semester-long foreign law study abroad. (*e.g.*, Notre Dame; Wisconsin). Schools offer multiple certificate programs, allowing students to concentrate their studies in specific areas of law. (*e.g.* Health Law; Intellectual Property). There are over one hundred L.L.M. programs, and approximately 35 S.J.D. programs. (see, *e.g.*, latest issue of The National Jurist). There are schools that have established programs to train foreign lawyers in American law. (*e.g.*, Chicago-Kent with China and Thailand). Faith-based law schools have opened, been accredited and have flourished. (*e.g.*, Regent, Liberty, Ave Maria, St. Thomas). There are schools that have reduced the years for graduation to two. (*e.g.*, Northwestern). Northwestern also has limited admission to students who had been in the work force for several years. Some schools now require students to pledge to perform pro bono work. (*e.g.*, California-Irvine). Schools grant loan forgiveness for graduates who go into public interest practices. (*e.g.*, Rutgers; West Virginia). Inter-law school moot court, ADR and trial advocacy competitions abound. Finally, the curricula at most schools would not possibly be recognized by George Wythe, Chancellor Kent, or Langdell, with such subjects as Video Game Law, Genetics and the Law, Entrepreneurial Law, and Cultural Heritage Topics (Chicago Kent) being offered.

All of these experiments have occurred since 1952, when the A.B.A. became the official accreditation body, and since sometime thereafter it adopted Standards that require tenure or job security for its full-time teachers. I am not claiming cause and effect, though I do believe that all those professors on tenure were the ones who were trying out these new ideas. With their jobs secure, it was only natural for teachers to try new programs and methods.

And the changes in curricula or programs do not even begin to illustrate the changes in the methodology used for teaching law courses. Teachers now use problem method, have their students role-play, incorporate drafting assignments in their doctrinal courses, have podcasts, set up course websites, make effective use of power point projection, create electronic tutorials, utilize video, adapt games, have class blogs for discussions, use survey monkey and clickers to immediately test student understanding, incorporate popular videos or You Tube videos of current events, and use a myriad of other technological devices and methods.

And what of the changes that have occurred in faculty publications? There once was a time when most law schools had one law review, which featured a front section containing articles by lawyers, judges and professors, and a student section for case notes and comments. Now, some law schools put out an average of five or six reviews, and they are filled with faculty publications on every possible subject, from every possible vantage point. Every law school course has seven or eight casebooks, and other class books to choose from, with supplementary texts and monographs the teacher might also assign, as well as a whole host of student aids, written by law professors. Have law professors really been stifled by the A.B.A. Standards? The presence of tenure/job security has actually enhanced the ability of law professors to produce important scholarship, rather than inhibiting it.

Needless to say, I believe Dean Matasar's belief that innovation or experimentation has been stifled by the ABA Standards on tenure/job security is without any basis in fact.

2. Dean Matasar Believes The Requirement Of Tenure Makes Law School Education Too Expensive For Today's Students

The factors that have caused a dramatic and unfortunate rise in the cost of legal education are many. But the ABA requirement to afford tenure, tenure track or secure positions to qualified teachers is one of the least significant factors, in my opinion.

As shown above, legal education has changed dramatically since the early 1800's, and even more so since the late 1960's. When classes were taught by lecture or by the Socratic Method, law schools could offer large classes of 100 or more students. When I started at Chicago Kent in 1961, we had 7 full-time teachers, the dean, a librarian and 3 adjunct faculty, and taught to a student body of about 400, day and evening. Tuition was \$17 per credit hour, a total of less than \$1500 for a legal education. Obviously, there were then few elective courses offered. There were no certificate programs, only a modicum of skills training, no clinics. But graduates from that early time have become fine lawyers, some the leaders in their fields. I am not saying we should return to that model, but emphasize that it worked and was cheap and provided opportunity for many.

With the advent of the "Realism," "Critical Thinking" and the "Law and ..." movements, the 1961 Chicago-Kent method of operation is no longer possible, nor desirable, for most law schools. When individual faculty members needed to publish about very specialized subjects, the curriculum needed to be increased to add more and smaller classes on those subjects. If one looks at almost any school's list of courses offered one can't help but be impressed by the depth of subject matter coverage. Again, using myself as an example, when I started at Chicago Kent I taught Real Property, Agency and Legal Writing in the first semester, and Personal Property, Statutes and Legal Writing in the second. Now, I teach one section of Torts in the first semester, and Famous Trials and Advanced Torts in the second. But those aren't all of the Tort-related courses in our curriculum. Other colleagues of mine teach: Product Liability; Medical

Malpractice; Comparative Tort Law; Police Misconduct Law; Civil Rico; Constitutional Torts: 1983; Worker's Compensation; Complex Litigation (and at Dean Matasar's law school, the faculty have added Lawyer Malpractice, and Mass Torts). The same is true of every major subject: a starting survey type course and then a bunch of very specialized courses and seminars on various components. Chicago Kent has grown to a faculty of nearly 60 full-time teachers, as well as many adjuncts, senior lecturers, deans who teach classes, librarians.

Perhaps these additional courses add significantly to a student's ability to analyze, reason and advocate, and possibly even to effectively write if there is a paper assigned. But it is very costly to increase the size of the faculty to accommodate a whole series of these boutique courses. Critics point out that the law studied in them will not be on a bar exam and unlikely will ever be faced by the students who take them when they are in practice.

In addition, the main reason the teachers wish to teach the esoteric subjects is so they can concentrate their scholarship in the narrow niche carved out, on which no other or few other scholars are publishing. Thus, a law school gains a faculty pouring out scholarly articles, (with 200 footnotes each), on the niche subjects of each of its teachers.

And of course law schools want others to read their faculty's scholarship and think highly of their schools because of these impressive pieces. Thus, when given an opportunity to vote for rankings in U.S. News and World Report they may vote highly for the school, and have an effect on the school's position in the rankings. Glossy (and costly) brochures are mailed to law teachers and lawyers and judges, to try to influence their voting. Faculty members are paid well to be good scholars, and are given extra stipends for producing the work, or awarded other perks, like sabbaticals or reduced teaching loads. These become very expensive publications to produce.

I think it is fair to say that just about every faculty in the country could be reduced by half if the boutique courses were eliminated from the curriculum, and teachers went back to the scientific method and wrote casebooks, treatises, and bar journal articles, instead of niche scholarship. **I emphasize that I am not advocating this. I just believe it is a far better explanation for the increased costs of legal education than Matasar's argument that the high cost of law schools is due to the fact that these teachers are given job security through tenure or other means.**

What would the legal education field be like if Dean Matasar had his way, as far as costs of legal education were concerned? If tenure were eliminated for all new hires, the result would be that eventually all faculty at some schools would be "at will" employees. They could be terminated at the end of a contract period, without cause, no matter how good their teaching, no matter how prolific or great their scholarship, or how much service to the school and community they provided. In theory, they then could be replaced by someone at equal or lower salary, thus fulfilling Dean Matasar's premise that it would be cheaper and cost-saving for the students if tenure or job security were eliminated.

However, I doubt that is the way it would work.

If I were a dean in the coming years, I still would want a great faculty to publicize, one that students would appreciate studying under. But without tenure as an incentive, *money* would have to be the way to entice great candidates to start their teaching with us, or to come over from another school. So, I would seek out the best “free agents” on the market and pay them a lot of money. Then, after these great stars have taught for several years, I could let them go elsewhere and replace them with other free agent stars at an equally high or higher salaries for a few years, repeating the process over and over. Of course, if someone were particularly wonderful, I would give that teacher a long-term contract, and seek out others to join her/him, at similar high salaries. Either way, I would need a lot of money to acquire these stars. That would necessitate that I make up the extra money needed by getting rid of some lower paid teachers. (See: comments on Legal Writing below).

I submit that being able to award tenure is actually a cost-saving measure for students, by making it feasible to attract and possibly keep great scholar/teachers. In return, less money can be spent on salaries in return for the assurances to these teachers of continuous job security.

3. Dean Matasar Says Tenured Faculty Sometimes Fail To Continue To Produce Quality Scholarship and Neglect to Improve Their Teaching.

As I mentioned in the first part of this memo, the way the proposed revisions would work would be to make faculty “at will” employees. If terminated, they would have to show some violation of public policy motivated the discontinuance or that they were somehow terminated in violation of their Academic Freedom. But the onus would be on the employee to show such violations, and the costs and distress involved would fall on the employee.

In contrast, at present, tenured or job secured faculty can be removed only for cause. But the onus is placed on the dean and administration to show the cause.

The hesitancy of a dean to do his/her job by starting proceedings to remove a deadweight tenured professor should not be grounds for eliminating the possibility of tenure or other job security from the Standards. That would be like throwing the baby out with the bath water. There are procedures in place for competent administrators to deal with this situation. There are other means to do it as well, such as not giving deadweight faculty salary increases, assigning less desirable teaching schedules, or just having frank person to person conversations.

Dean Polden's Positions

Dean Polden has made four major arguments for the proposed change. He argues:

- (1) The current Standards do not require tenure or security of position, except for deans (as professors) and clinicians.
- (2) The ABA should not be writing contracts of employment for law school faculty.
- (3) No other profession's accreditation standards require tenure/security of position.
- (4) The Draft's requirement that schools safeguard professors' Academic Freedom and their participation in governance are sufficient guarantees against unjust labor practices.

1. Dean Polden Contends The Present Standards Do Not Require Tenure

I believe that the memoranda and arguments presented by Professor Richard Neumann and Professor Carol Chomsky refute Dean Polden's assertion that the present standards do not require faculty tenure/security of position. It seems absurd to think that the group of outstanding professors, judges and lawyers who drafted the standards meant to assure tenure or tenure-like security only to deans (not as deans, but as professors) and to clinical faculty.

Dean Polden relies on the fact that the ABA Council granted accreditation to one law school which provided no tenure or other job security as proof that the standards did not require it. I believe that a mistake made in one previous case by the then Accreditation Committee and the then Council does not demonstrate that tenure is not required by the Standards or override the otherwise clear meaning in the Standards and Interpretations to that effect. I know the information is confidential, but I would like the Committee to seek information on the undoubtedly many times when site teams and the Accreditation Committee held back accreditation approval for law schools that had no acceptable tenure policy or had specific tenure grant or denial issues.

Finally, I know from personal experience on ABA site inspection teams that the ABA Accreditation Manual distributed to ABA inspection site teams specifically asks that each team probe the inspected school's tenure requirements, policies and actions; there would be no need for doing that if a tenure policy were not required by Standards.

2. Dean Polden Argues That The ABA Should Not Be “Writing Employment Contracts For Law Schools.”

Accreditation standards are, by definition, requirements that law schools must meet. They often must be effectuated by making contracts to accomplish them. Thus, for very good reasons, the ABA Standards contain multiple provisions that require law schools to make certain kinds of contracts or prohibit making certain kinds of contracts. As examples: a law school must hire a law library director who has both a law degree and a degree in law library information science; it must provide each full-time faculty member with his/her own office; it cannot make contingent contracts by which the compensation of any employee is tied to the number of students applying for admission, or who actually register.

There are many similar provisions in these Standards. And, I remember that for many years, for what were then good reasons, the Standards mandated school libraries to acquire and maintain a minimum number and specific kinds of library volumes, and also to provide a fixed ratio of student seating in the library. Thus, Dean Polden could validly argue that the ABA was writing the broad terms of contracts law schools had to make.

The question that Dean Polden should ask instead is why do the Standards require tenure or other forms of job security? The provisions in the Standards under current attack have been a part of the ABA Standards for many years. They are there for very good reasons, and Dean Polden, in the sessions I have attended, has not addressed these. Among the reasons, I believe, are the following:

First, tenure/security of position is a very important employee benefit, probably more important than initial salary. With law schools scattered throughout the fifty states, it would be very difficult to induce outstanding candidates to leave a city or a school where they are established and move to another location with no assurance that the new position will last. Selling one's house and taking one's children out of their schools to move to another school without any guarantees of job security would be unthinkable, no matter how large the salary offered to do so. And on the other side of the coin, schools that continue to offer tenure will have an easier time attracting the best teachers from schools that have only at will contracts.

Second, without the job security of tenure, law schools would have to pay much higher salaries or take other measures to attract and retain talented or well-known scholars and teachers. As I tried to elaborate on this point in my discussion of Dean Matasar's views, above, I can envision the replication of Major League baseball if tenure/security of position is eliminated, as rising stars are recruited yearly from school to school by higher and higher salaries.

Third, junior faculty are highly motivated to establish themselves by the high stakes of the tenure decision or the equivalent job security. The tenure requirements provide a powerful incentive for candidates to produce quality and meaningful publications, to adopt creative teaching techniques, and to provide service to the school, their colleagues

and the community. At will employees' motivations are more immediate – doing enough to make sure they are rehired for another year, or will receive a pay raise.

Fourth, tenured faculty are much more likely to invest time in improving the law school where they expect to remain for life. It is hard to expect the at will employee to go the extra mile when her job may not be there the next term. I think I am on firm ground in saying that the many innovations in programs, teaching techniques, publications, development of new courses I referred to above in the section on Dean Matasar's arguments clearly were done by the tenured faculty of the various law schools. I know that to be true at my school.

Fifth, tenured or secure faculty would be more willing to hire, mentor and promote talented junior colleagues, rather than undermine junior colleagues because they feel threatened. (I keep seeing images from the old play and movie, "How to Succeed in Business Without Really Trying" where the existing staff did everything possible to try to prevent the young man on the rise from succeeding for fears of losing their jobs.)

3. Dean Polden Relies On The Fact That No Other Professional School Accreditation Standards Require Faculty Tenure Or Job Security.

I have not researched this statement to see if it is true. I assume it is. But, I don't believe it proves that the ABA is off base for its requirement. (I have read that Dentistry is having immense difficulties in recruiting and retaining full-time faculty because of lack of job security, and as a result the number of schools of dentistry is declining, and dentistry faculty are leaving teaching to go back into practice).

Most of the other professional schools emphasize clinical experience, and many of their faculty continue to work as professional engineers, architects, dentists, doctors. So, naturally they would not hold full-time, tenure track positions at the schools.

In addition, I have taught Torts for many years, and I know that evidence of what is customary is evidence – sometimes strong evidence – of what is reasonable. But it is not conclusive! And a custom followed by a whole industry or the populace as a whole may be found to be completely unreasonable. To cite several mundane examples, we all speed, but that doesn't make it reasonable to do so; we all cross in the middle of the block, but it isn't reasonable to follow that custom; the McDonald's coffee spill case shows that serving coffee at 180-190 degrees because lots of its customers like it hot does not mean it is reasonable to do so, without some precautions being taken, both by the server and the customer. Our country's current economic crisis is in large part due to banks following the customary practices of giving out subprime mortgages and making other unsound financial transactions, with rather disastrous results.

4. Dean Polden Argues That The Guarantee Of Academic Freedom Is A Sufficient Protection For Faculty.

First of all, Professor Neumann and Professor Chomsky have demonstrated why the concept of Academic Freedom is not the broad protection that many, including Dean Polden, think it is. Supreme Court and state decisions have been quite conservative in construing what kinds of acts are included within the concept.

But, in my opinion, there is a major difference between Academic Freedom and the protections of Tenure/Job Security. Academic Freedom may well be sufficient protection for a teacher who advocates non-conformist views, or teaches in a non-traditional manner. But, in my lifetime, I have seen or heard of many cases where faculty members were not rehired for things that did not fall into the categories of differing methods or views. Early on in my own career, our then dean notified a new faculty member that, in spite of a fine job of teaching in his first year, he was not going to be rehired because he was Jewish, and there already were a fair number of Jews on the faculty, and his retention would “upset the cosmopolitan atmosphere of the school.” I have heard of one dean not rehiring a faculty member because the teacher was gay and another because the teacher, who had won the university’s best teacher award that year, was a woman. (She won reinstatement and damages.) Often, no reason at all is given.

I undoubtedly have caused a dean or two to be frustrated with my obstinate opposition to one’s desire to lower credit hours required for graduation, or another’s to institute a distance learning program for the first-year class, or for that one’s terminating a colleague whom the tenure committee had overwhelmingly approved.

Some of these situations might have fallen within the definitions of Academic Freedom. But the onus would have been on the teacher to prove that an Academic Freedom violation had occurred. He/she would have to hire counsel, and probably go through a university grievance procedure, where the members were picked by the dean’s boss, the provost. A great deal of deference would usually be given to the dean’s actions. And then there might have been need for a lawsuit, with attendant costs and aggravation. The AAUP might have assisted, but only if it were sure that the reasons for termination fell within the AAUP’s definition of Academic Freedom; they would not intercede in cases where the reasons were not clear or were just personal animosity between the dean and the faculty member. But if the teacher were on tenure, or its equivalent, or even on tenure track, the burden of proof would have shifted to the dean to show “cause.” A dean would surely be less likely to terminate because of personal prejudice or other non-Academic Freedom reasons if he/she then bore the burden of showing “cause.”

Finally, it Dean Polden has his way, and the only protection that will be given is a required policy on Academic Freedom and a program designed to “attract and keep” qualified teachers, at the very least the Committee should spell out, in plain, unambiguous language, what Academic Freedom is, or that a inspected school must have done do so at the time of hiring new faculty. Standards should require, in plain, unambiguous language, what are conditions that are designed to attract and keep

qualified teachers, or else require the school itself to do so at the time of hiring. Otherwise, the Standard will be fraught with ambiguity, and left to case-by-case disputes when a good teacher is let go, or a site team must decide as it inspects a law school to make sure the school has not just listed an empty word statement....”we guarantee all faculty’s academic freedom! (And we’ll figure what that is when the time comes!)”

The Impact Of The Proposed Changes On Legal Writing Teachers

As I argued above, the school that decides to abolish job security and make all faculty “at will” employees will have some difficult choices to make in carrying out its mission. As I argue above, the replacement for tenure/job security contracts in the hiring process will now be money, pure and simple. To get first-rate doctrinal faculty, a dean will have to pay a larger salary and other perks to make up for the fact that the faculty member is not assured that she/he will be retained, even if she/he does a fantastic job of teaching, writing and service. Deans interested in USNWR rankings will still be trying to get the most productive scholars available. Money will have to do it.

But if the money will be going for the doctrinal faculty hires, and for this year’s new free agent, what will happen to those who historically have been the orphans of the faculty – the legal writing faculty? The money will not be inexhaustible. So, it figures that a dean will conclude that these are the easiest faculty to replace, at low cost. One can revert to staffing legal writing as it was done 50 years ago, when I first started out. A dean can hire young people straight out of law school, provide them one of the many books now available that weren’t in existence when I started, and let them teach for a while. One can even improve employment statistics for the school by hiring one’s own new graduates as legal writing fellows for a year or two, and then sending them on their way to law firms, to be replaced by new graduates. Young lawyers are notoriously unhappy at their jobs, so it should be easy to find competent lawyers from the community to fill in for a few years. Too often in the past, the dean’s of faculty’s theory was, and unfortunately still may be, that any bright law school graduate can teach legal writing, after all.

There has been incredible growth in the legal writing profession. Two major organizations, with thousands of members, hold biennial meetings and assist in annual regional conferences to share ideas, and to help mentor young legal writing teachers, who want to make legal writing their careers. About 70% of them are women. (and frankly, without them, most schools would be in serious difficulty in meeting the Standards on diversity). They are producing very important scholarship on teaching methods, on learning theory, on uses of technology in teaching, on mentoring teachers. They are experts on methods for assessing outcomes, a rather dramatic irony in view of the other proposed changes to the ABA Standards this Committee is dealing with.

Even more ironic is the fact that the Standards really only require several courses to be taught in law schools. Specifically required by Standard 302 are (1) a first-year rigorous

writing experience, (2) an upper-level rigorous writing experience, (3) professional responsibility, and (4) an opportunity for a live-client clinical experience. All other subjects are covered under the wide umbrella of substantive law generally regarded as necessary to effective and responsible participation in the legal profession. Is Criminal Law such a course? Can't someone who works for a governmental agency or does real estate closings practice without any knowledge of Criminal Law? Yet, the teachers of two of the required subjects specifically deemed essential – Legal Research and Writing, -- have typically been treated the worst at law schools.

About one-half of the thousands of Legal Writing teachers currently have tenure or continuous contract job security. But many schools use adjuncts to teach first-year Legal Writing courses; some even resort to graduate students or third-year students. The full-time Legal Writing teachers are paid, on average, about half of the salary paid to a new “substantive law” professor. They are often not given travel or research budgets. They too often are required to try to teach large enrollment classes, in which it is difficult to give the individual attention to students needed for skills training. At too many schools, Legal Writing and those who teach it are still the “orphans of the curriculum.” The abolition of tenure or job security requirements will only exacerbate this situation, and undo many of the tremendous gains that have been made in the last fifteen years.

I think it obvious that since they have historically been treated poorly, in a new era when there is no job security guaranteed, these teachers are sure to be treated poorly again by some schools. Deans and faculty historically have valued doctrinal scholarship more than they have skills training. It figures that schools will continue to value scholars more than those who train students in the skills needed to competently practice law.

The Standards have helped Legal Writing teachers and programs make great gains in the last fifteen years. I fear that those days will be over if the provisions on tenure and job security are eliminated, and that would be a tragedy.

Respectfully submitted,

Ralph L. Brill