



Wednesday, October 30, 2013

Labor/Employment**Barista suit nets lawyers \$1.9M in fees**

Attorneys representing Starbucks workers in wage case had sought \$4.5M

Litigation**Oakland judge skeptical of expedited death penalty challenges**

A new Justice Department rule that would authorize expedited post-conviction proceedings for death penalty defendants has triggered a legal fight.

Appellate Practice**Tactical considerations: effective appellate briefs**

The appellate arena is quite different from the trial court, and counsel must keep this distinction in mind. By **Jerry Clausen, Gregory R. Ellis and George P. Schiavelli**

Corporate**Fenwick helps Nextdoor nail down \$60 million in financing**

The San Francisco-based neighborhood social networking company's fundraiser reportedly values the 3-year-old company at \$500 million.

Criminal**Most accused PayPal hackers expected to accept plea deal**

The 14 defendants are accused of coordinating an attack on the eBay Inc. subsidiary in 2011 because the company refused to process contributions to Wikileaks.

Corporate**Former M job at kids' clothier**

Karyn Smith has landed at San Francisco-based Peek, Aren't You Curious Inc., after leaving her previous post in August.

Bar Associations**Decades ago, bar association's launch filled legal niche**

The statewide Association of Business Trial Lawyers is celebrating its 40th anniversary of bringing together attorneys and judges to discuss business litigation issues.

Tenure proposals before ABA spark alarm among law faculty

By Don J. DeBenedictis

Erez Aloni and Sheldon Bernard Lyke are two brand-new assistant professors at Whittier Law School. Both have advanced degrees beyond their law degrees. Both research and write on controversial issues. Both also joined 504 colleagues around the country in signing a letter this month supporting tenure for law school professors and opposing proposals from the American Bar Association to scale back a requirement that schools offer tenure to most faculty.



Don DeBenedictis / Daily Journal
Erez Aloni, left, and Sheldon Bernard Lyke, new assistant professors at Whittier Law School, say the tenure system at universities helps ensure academic freedom.

"To me, tenure is a guarantee of safety," said Aloni, who writes about alternatives to marriage and has criticized the same-sex marriage movement for "glorifying" marriage.

"I write about things that people don't like to hear," he said.

Lyke has a doctorate in sociology and works in the areas of oppression and affirmative action. He also is working on a piece criticizing claims of a crisis in legal education. People have told him to hold off on that piece until he gets tenure, he said.

To the 500-plus professors who signed the letter, tenure protects their academic freedom and prevents discrimination against minority faculty.

But to some law school deans, ABA leaders and others, ABA rules requiring tenure cause problems. Tenure restricts management flexibility, they say, and contributes to rising tuition.

In August, the leadership of the ABA's accrediting arm sent out for public comment a set of proposals to change current accreditation standards, including two alternate rewrites of the tenure rules. Both would allow tenure, but neither would specifically require it.

The first "includes a requirement that law schools provide full-time faculty members with a form of security of position sufficient to ensure academic freedom and to attract and retain a competent full-time faculty," according to one summary. The second "does not include a provision regarding security of position."

Both would require schools to have policies to guarantee that faculty have academic freedom and can participate in school governance.

The response has been sharp, swift - and negative. Of the seven comments posted on the ABA website so far, six oppose relaxing tenure rules. The seventh says tenure alternatives might be tested out on a case-by-case basis.



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The letter Aloni and Lyke signed is one of the most detailed. It's also remarkable for the support it drew.

"It got 500 signatures within two weeks," said Terry Smith of DePaul University College of Law, who wrote the first draft. Leaders of the minority group section of the Association of American Law Schools contributed to the final draft, and it circulated on online mailing lists, by email and through personal contacts.

The letter contends that tenure is essential to protect professors' freedom to tackle controversial ideas. For instance, critical race theory, it said, "although much celebrated today ... would not have been possible without a system of tenure protection."

"It is unrealistic to expect that the Council recommendation for a vague 'form of security of position' will be adequate to protect outspoken, divergent voices within legal education whose work is important for advancing our understanding of, and possibilities for, the law," the letter states, referring to the leadership committee of the ABA Section on Legal Education and Admission to the Bar.

"We don't know what that means," Smith said about the security-of-position language, "and one suspects the council itself doesn't know what it means."

Smith said even with tenure in place, some schools have tried to push out controversial professors.

Tenure does not guarantee a job for life. It only requires that a professor whose job performance is questioned be given due process rights, including ultimate evaluation by peers, not just administrators, according to Donald J. Polden, the former dean of Santa Clara University School of Law who was involved with drafting the new proposals.

It also does not guarantee a high salary. "Some of us [with tenure] have experienced cuts in our pay," said signatory Raquel Aldana, a professor at University of the Pacific McGeorge School of Law. Aldana said she signed in part because law professors are supposed to do more than teach students how to apply the law. "We're also visionaries about how the law could be."

"Many of us believe that if we didn't have tenure, we'd lose our jobs very quickly," she added.

UC Irvine School of Law Dean Erwin Chemerinsky said he is positive that, but for tenure, he would have been fired in the mid-1990s when he was faculty president at USC and opposed a policy of the university president. He might also have been fired when he handled one of the first cases for a Guantanamo detainee.

"I didn't have to worry about it because I had tenure," he said. Chemerinsky said he would have signed the letter if he had seen it in time.

Some deans, on the other hand, have opposed tenure. During the ABA council's meeting in August, Raymond C. Pierce, formerly dean of North Carolina Central University School of Law, said ending tenure would give deans more flexibility to lead their faculty, according to news reports and the professors' letter.

Council member Maureen A. O'Rourke, dean of Boston University Law School, said schools' main financial concern these days are their fixed costs, which primarily "come from tenured, salaried professors." She said no law faculty should have tenure.

Smith and Aldana countered that it isn't tenure that increases salaries, it's seniority. That correlation would remain with or without tenure.

Barry Currier, the ABA's managing director of accreditation, agreed that no research supports the claim that tenure drives up the cost of legal education. But he did point out that, consistent with the ABA standards, many schools do not give tenure to clinical or legal writing faculty, though they still have still have academic freedom.

The new proposals, like others the council is considering or has adopted, are part of the ABA's regular process of reviewing all its accreditation standards, Currier said.

Litigation

Battle over San Bernardino's bankruptcy heats up

Last week, CalPERS challenged a judge's ruling finding the city eligible for bankruptcy protection. On Monday, San Bernardino fired back in an opposition to the appeal.

Law Practice

Lawyers on TV: let's work on polishing our bad rap

Currently, lawyers' reputation for ethics and honesty lies somewhere between ax murderers and sea plankton. By **Bradley I. Kramer**

Alternative Dispute Resolution

'Desmodromic' settlements

There's no reason a "good settlement" has to mean that both sides leave a little unhappy. By **Robert S. Mann**

Judicial Profile

Gail Dekreon

Superior Court Judge County of San Francisco

Education

Tenure proposals before ABA spark alarm among law faculty

With two proposals before the American Bar Association that could alter the academic tenure system, more than 500 law school professors signed a letter arguing that tenure is essential for protecting academic freedom.

The group is "rethinking what is essential to require a school to do to offer a program that is sound," he said. "Is job security essential?"

One question is whether an accrediting agency of professional schools such as the ABA should require or prohibit employment contract terms, said Polden, who is the immediate past chair of the council's standards review committee. Beyond that, he said, the current standard regarding most full-time law professors isn't clear. In fact, it is so unclear that most people misunderstand it.

According to Polden, current Standard 405(b) does not require law schools to have a tenure system. It only requires schools to have "an established and announced policy with respect to academic freedom and tenure of which Appendix 1 herein is an example but is not obligatory." The appendix is an outdated tenure policy from the American Association of University Professors, Polden said.

"Schools have to have a policy" under the current standard, Polden said. "It doesn't say what the policy is."

He added that one accredited school - he declined to identify it - gives professors medium-term contracts but not the full set of due process rights usually part of tenure.

UC Davis School of Law Professor Rose Cuison Villazor, who helped write the letter, said that is not her understanding of the ABA rule or how it has been interpreted.

People on both sides of the debate generally agree that most law schools, and their universities, would continue to grant tenure even if the ABA changed its standards. Polden said that some new or financially troubled schools might drop tenure, but 85 percent to 90 percent of schools would not.

"In the long term, legal education faculty may look a little different," he acknowledged.

That's what worries Whittier's Aloni.

"You never know," he said. "You never know what changes would come."

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