

1999

**THE CLINICAL LEGAL EDUCATION ASSOCIATION'S  
COMMENTS AND SUGGESTIONS ON CHANGES IN  
STANDARDS IN CHAPTERS 3 AND 4<sup>1</sup>**

**COMMENTS ON THE PROPOSAL TO AMEND STANDARD 405(C)**

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 primarily staffed by full-time faculty members, or in an experimental program of limited duration.

A group of law school deans has proposed that Standard 405(c) be amended to remove the mandatory requirement that clinical faculty be afforded "a form of security of position reasonably similar to tenure." The Clinical Legal Education Association (CLEA) opposes this proposal for the reasons which follow.

**The History of Standard 405(c)**

In order to understand the role and importance of Standard 405(c), one must understand the history behind its enactment. This standard was enacted in 1985. Prior to its enactment, there were no special arrangements for clinical teachers. However, Standard 405(b) was in effect which required law schools to "have an established and announced policy with respect to academic freedom and tenure..." In compliance with Standard 405(b), virtually every law school had a policy which granted tenure to its faculty.

Beginning in the 1960's and 1970's more and more clinical teachers were hired by law schools. However, law schools regularly refused to apply their tenure policies to clinical teachers. Approximately two decades ago, the American Bar Association's accreditation site visit teams began to notice these violations of Standard 405(b) and the matter was brought to the attention of the Accreditation Committee of the Council of the Section on Legal Education and Admissions to the Bar. The Accreditation Committee decided that clinical teachers were entitled to tenure just like other faculty members. However, the Council disagreed and appointed a special committee to study the matter. That committee recommended the creation of a special standard for clinical teachers which was substantially similar to the present standard 405(c).<sup>2</sup> However, in response to heavy special interest lobbying by law school deans, the council changed the mandatory "shall" to the aspirational "should" in the first sentence of standard 405(c). The Council prevailed when this

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<sup>1</sup> Suggestions for added material are underlined and bold, suggestions for deletions are [bracketed]

<sup>2</sup> The special rule for clinical teachers was originally codified at 405(e).

issue was brought to the ABA House of Delegates and the standard was enacted with the aspirational "should" in 1985.

During the debate in the Council over "should" versus "shall" it was argued that law schools should be allowed a transitional period within which to accommodate this change before the ABA mandated security of position for clinicians. That is why there was relatively little controversy attendant to the change from "should" to "shall" in the 1996 Recodification of the Standards. A mandatory standard had been intended from the outset. Moreover, the negative consequences forecast by the opponents had not, in fact, come to pass. That is, schools did not close clinics rather than assuming the burden of giving clinical teachers security of contract. Since the adoption of the "should" standard there has been a steady march toward compliance. However, the long-intended conversion to a mandatory standard was necessary because some schools have continued to deny clinical teachers even the limited protections outlined in 405(c).

This history is important because it undermines the suggestion of many opponents of 405(c) that this standard was created due to "special pleading" by clinical teachers. In fact the rule was created as an exception to the general rule for all law teachers and this exception was crafted by deans not clinicians.

### **Clinical Teaching and Academic Freedom**

Tenure has primarily been justified as necessary to enable faculty members to teach and write freely without fear that their views will result in loss of employment. This goal is no less important for clinical teachers than for traditional academic teachers. To the extent that clinicians engage in traditional legal scholarship, they are no less likely to offend, annoy or embarrass their employers than other faculty members. Moreover, the one thing which separates clinical teachers from others is that much of the work of clinical teachers involves teaching law students how to practice law by having those students engage in litigation and other advocacy under the supervision of the clinical teacher. Recent events have only underlined the obvious point that clinical teaching is quite apt to threaten institutional interests. The recent efforts of the Governor and Supreme Court of Louisiana to restrict the activities of clinical teachers at Tulane Law School are predicated solely upon the content and subject matter of that clinical program. This controversy is not the first. Clinical teachers at many other schools, including the University of Oregon, Rutgers and the University of Chicago have been threatened by outside interests due to the content of their clinical teaching. Thus, if anything, clinical teachers are more in need of security of position than are non-clinical teachers.

### **Clinical Teaching and Institutional Interests**

Another objection to the mandatory nature of Standard 405(c) is that it interferes with legitimate institutional interests, including the right to experiment, and with useful competition and variability among law schools. Unfortunately, this argument proves too much. Mandatory accreditation standards are by definition somewhat inflexible. A proponent of flexibility for clinical teachers must show why such flexibility is uniquely needed with regard to this standard. However, non-clinical teachers comprise the vast majority of law teachers. Thus, Standard 405 (b), which requires tenure for non-clinical teachers, imposes a much greater restriction on the flexibility of law schools. Yet there is no movement to repeal this provision.

Indeed, even with the change from "should" to "shall", Standard 405(c) still affords law schools much greater flexibility with regard to the employment of clinical teachers than other faculty members. Standard 405(c), as interpreted, already provides the following exceptions which

uniquely deprive clinical teachers of protections available to all other faculty and afford law schools flexibility in their employment which does not exist for the employment of non-clinical teachers:

- (10) Tenure is not actually required; just security of position. This allows schools to give clinical teachers long-term contracts instead of the life tenure awarded to other faculty members. Interpretation 405-6.
- (11) Clinical teachers need not be paid the same as other teachers. The standard expressly excludes compensation from the requirement that clinicians be given benefits “reasonably similar” to other teachers.
- (12) A law school may make short-term clinical appointments so long as the “clinical program [is] predominantly staffed by full-time faculty members...”
- (13) A law school may make clinical appointments without security of position “in an experimental program of limited duration.”
- (14) A law school may “afford to clinical faculty members an opportunity to participate in law school governance in a manner **reasonably similar** to other full-time faculty members” (Emphasis added.) Interpretation 405-8. This interpretation notably does not require identical rights of governance.
- (15) A law school need only give clinical teachers “non-compensatory perquisites **reasonably similar** to other full-time faculty members.” Here again the standard does not give clinical teachers the same perquisites as other faculty members.

CLEA is skeptical that any law school can show that this very flexible standard has had any negative effect on its ability to operate a program of legal education which meets the objectives set forth in Standard 301 or in the Preamble to the Standards. Indeed, if changes are to be made in Standard 405(c), CLEA recommends that many, if not all, of the distinctions listed above between the rights of clinical teachers and non-clinical teachers be eliminated. Alternatively, CLEA suggests the adoption of a standard requiring law schools which employ any of the six provisions listed above to demonstrate the necessity for doing so.

### **Clinical Teaching and the Role of Law Schools in Preparing Students to Practice Law Effectively**

Standard 301(a) requires law schools to “maintain an educational program that is designed to...prepare [its graduates] to participate effectively in the legal profession.”

Providing security of position for clinical teachers is necessary in order to insure that law schools serve this primary goal of legal education for a number of reasons.

First, clinical teaching is a difficult endeavor. Unsurprisingly, experience is important to the talent with which it is performed. Requiring law schools to provide security of positions helps insure that law school clinical programs will be “predominately staffed” by experienced clinical teachers and, thereby, improves the quality of clinical teaching.

Second, clinical programs, rooted as they are in the practice of law in specific communities, require time to develop productive relationships to specific legal and other institutions. This is necessary in order to insure that the programs can attract cases and clients which provide a variety of legal experiences with a range of difficulty and sophistication and engage non-clinical teachers and persons from other disciplines in the program. Only in this manner can a clinical program insure that students are learning a broad array of skills and values and are given every more challenging assignments during their clinical experiences. Clinic teachers who are employed for short periods are unlikely to be able to design and implement clinical experiences which provide complex and rigorous experiences for students.

The number of clinical teachers has risen dramatically during the past two decades. As a general matter, the longer one remains in an institution, the more likely that one will have influence within that institution. Standard 405(c) has meant that clinicians have made modest gains in influence within law schools. So long as clinicians have security of position, these gains may continue. Most clinical teachers are of the view that the MacCrate Commission<sup>3</sup> was right in suggesting that law schools need to place greater emphasis on the goal of preparing law students to participate competently, effectively and ethically in the legal profession. On average, clinical teachers are more likely than non-clinical teachers to pursue that goal throughout all of their institutional activities, including work on law school appointments and curriculum committees. The Standards should be drafted and interpreted to enhance the ability of clinicians to advance the primary goal of accreditation. Security of position is an important element of that struggle.

## **STANDARD 301**

### Objectives

- (a) A law school shall maintain an educational program that is [designed] **effective** to qualify its graduates for admission to the bar and to prepare them to participate effectively in the legal profession **in a multicultural, global society.**
- (b) The educational program of a law school shall [be designed] **effectively** [to] prepare the students to deal with both current and anticipated legal problems **and to deal with legal problems of a variety of segments of society .**
- (c) A law school may offer an educational program designed to emphasize certain aspects of the law or the legal profession.

COMMENT: The proposed changes impose no specific requirements. The use of the term "effective" instead of "designed" acknowledges that it is not sufficient for a school to have proper intentions and good plans, but that the school must make sure that the program it offers is actually producing the required result of preparing students for the legal profession. The other added language is a recognition that lawyers who are admitted to the profession are likely to encounter a range of cultures, both among the clients served and the other parties involved in a client's legal affairs. Like the need to prepare for anticipated as well as current legal problems, students need to be prepared to deal with legal problem solving in a variety of cultural contexts and with people

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<sup>3</sup> The ABA Task Force on Law Schools and the Profession: Narrowing the Gap is commonly known as the MacCrate Commission. Its report entitled "Legal Education and Professional Development—An Education Continuum" was released in 1992.