

C L E A

Clinical Legal Education Association

COMMENT OF CLINICAL LEGAL EDUCATION ASSOCIATION ON ALTERNATIVES TO ACCREDITATION STANDARD 405

JANUARY 27, 2014

The Clinical Legal Education Association (CLEA), with more than 1000 dues-paying members the nation's largest association of law professors, offers this comment in connection with the consideration of Accreditation Standard 405 by the Council for the Section of Legal Education and Admissions to the Bar. We write to advise the Council about the unintended consequences to legal education should it eliminate Standard 405's current requirement that schools have a long-term commitment to faculty who teach in clinical programs. We also forward our own proposed amendments to Standard 405, which largely retains the current Standard while addressing its several troublesome aspects.

EXPERIENTIAL LEGAL EDUCATION REQUIRES A SECURE FACULTY

Were the Council building law schools on an empty landscape, many current provisions of the Standards might be different. But law schools exist in their current form, and amendments to the Standards will have impacts in a real world. In this world, only about one-third of law professors who identify themselves as clinical teachers are in tenured or tenure-track positions, while tenure is, of course, the norm for teachers of doctrine. In the current difficult economic environment, law schools are already terminating contract clinical teachers in favor of tenured doctrinal teachers, not for curricular reasons but because the contract positions are just easier to terminate. The inevitable result of eliminating security of position for law faculty, as proposed in the "alternatives" now in the comment process, will be to leave tenured teachers of doctrine in place for a generation and to create immediate instability in many law school clinical programs. We are confident that this is not a result that the Council intends.

For decades, legal education has been the subject of criticism for its failure to graduate students capable of practicing law. As the 2007 Carnegie Foundation Report reminds us, a sound legal education requires that law students acquire a mix of analytical and practical skills.¹ Clinical programs provide the much-needed link between traditional legal education and the practice of law. The Carnegie Report explains that professional students "must learn abundant amounts of theory and vast bodies of knowledge, but the 'bottom line' of their efforts will not be what they know but what they can do."² Faculty who teach doctrine and those who teach in clinical and legal writing programs together provide law students with the analytical, investigative, legal reasoning, moral, client relations, ethical and practice skills necessary to graduate engaged, diligent, reflective and effective attorneys.

Nonetheless, as is well documented, most law schools have two classes of faculty.³ Those who teach only doctrine are presumed to constitute the core faculty and are afforded the

¹ See WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 97 (2007)

² *Id.* at 23.

³ See, e.g., Sullivan et al., *supra* note 1 at 24 (observing that many clinics are "taught by instructors who are themselves not regular members of the faculty").

protections of tenure and inclusion in law school governance. Those who teach lawyering, in contrast, are afforded much less by way of the kind of security of position that is designed to attract and retain competent faculty. This historical divide led the Council in 1996 to adopt current Standard 405(c), which requires that a clinical program be “predominantly staffed” by full-time faculty having a position “reasonably similar to tenure.” Unfortunately, this Standard has been resisted in many law schools.

The Center for the Study of Applied Legal Education (CSALE) has been gathering data since 2007 on the roles of applied legal education and educators in law schools. We attach as Appendix A charts that summarize some of the findings of the CSALE 2010-2011 Survey of Applied Legal Educators. We invite the Council to review the survey’s methodology and to examine all its data at <http://www.csale.org>, and we describe some of its findings below

The CSALE data reveal that in 2010 only 33% of teachers in clinical programs were on any form of tenure track, whether separate from or unitary with other faculty.⁴ Adjunct faculty comprise 13% and contract faculty 43% of clinical educators. Of the contract faculty, 57% are working under contracts of three years or less. Only 61% of all contracts are “presumptively renewable.” These differences in status have profound effects on the ability of clinical faculty to meaningfully engage in governance and to find protection for their academic freedom.

Governance

Participation in law school governance is sharply restricted for most full-time clinical faculty. Only 37% are allowed to vote on all faculty matters (compared to universal participation for doctrinal faculty), 32% cannot vote on any matter, and 12% are not permitted to attend faculty meetings.⁵ At many schools, clinical faculty are not even allowed to serve on committees addressing the hiring and promotion of other clinical faculty, nor are clinical faculty allowed to serve on committees that address curriculum or academic standards.⁶

Even where clinic faculty are allowed to participate in governance, their inferior employment status makes them fearful of joining debates on controversial matters. In a 2008 survey of 332 clinical faculty, their willingness to express dissenting views on law school governance issues closely correlated with their employment status.⁷ While 13% of tenured clinical faculty reported that they could not or avoided expressing dissenting views because of reprisal or the fear of reprisal, 18% of clinic faculty on long-term contracts (5 years or more) reported this fear and 44% of short-term clinical faculty (i.e., on employment contracts of less than 5 years) felt they could not express dissenting views without actual reprisal or fearing there will be reprisal. Security of position, therefore, is essential to ensure that clinical faculty will be able to contribute to matters of law school governance.

In a 2008 report, the Council’s Special Committee on Security of Position expressed doubt “that any comprehensive curricular reform can occur or that faculty governance can

⁴ CENTER FOR THE STUDY OF APPLIED LEGAL EDUCATION: THE 2010-11 SURVEY OF APPLIED LEGAL EDUCATION 27 (2011), *available at* <http://www.csale.org/>.

⁵ *Id.* at 28-29.

⁶ *Id.* at 29 (reporting that 15% of full-time clinical faculty are not allowed to participate in committees addressing clinical hiring and promotion; a similar number are not allowed to serve on committees addressing curriculum matters).

⁷ Robert R. Kuehn & Bridget M. McCormack, *Lessons From Forty Years of Interference in Law School Clinics*, 26 GEORGETOWN J. LEGAL ETHICS 59, 78-79 (2010).

develop in a system where there is no security of position,” and observed that the documented threats to law clinic faculty “demonstrate the clear need for a form of tenure-like security and academic freedom” for clinical faculty.”⁸ Looking back at the history of Standard 405(c), the Special Committee noted that precise rules under Standard 405 for clinical faculty were necessary to move some schools forward in their skills programs. That committee expressed particular concern that, if security of position were removed from the Standards, clinical programs would suffer because “some universities might pressure law schools that have merged many of those faculty into tenure-track or tenure-like appointments to retreat to less secure contract arrangements for those faculty.”⁹

Academic Freedom

Another consequence of eliminating provisions on security of position from Standard 405 will be to put clinical faculty at enhanced risk of interference with their teaching and lawyering responsibilities. There have been more than 35 publicized instances of interference in law clinic casework as a result of external pressures on law schools and universities, including well publicized attacks on clinics at the University of Maryland, Tulane University, and the University of Oregon.¹⁰ The executive director of the AALS observed that for each reported case of interference “there are many dozens of criticisms voiced less formally.”¹¹ A survey of clinical faculty found that 12% had encountered actual interference by other law faculty or administrators in their casework, with 36% saying they worry about the reaction of faculty or administrators to their casework and 15% reporting that the worrying had affected their case selection decisions.¹² As one clinic attorney explained, “there is no question we worry constantly that our willingness to represent unpopular clients and our success in suing government bodies will cost us.”¹³

Consistent with this data, in 2007, the Council’s Accreditation Policy Task Force recognized the “credible argument that there is a particularized need to afford explicit, concrete academic freedom protection for clinical faculty given the long history of attempts at interference,”¹⁴ taking note of “the long history of attempts at outside interference with advocacy by clinics.”¹⁵ While acknowledging that the current system was imperfect, the Task Force concluded that “[i]t seems highly doubtful that having a major part of faculty at-will employees would promote the ABA’s goals of a sound program of legal education, academic freedom, and a well-qualified faculty.”¹⁶

Conclusion

The evidence is clear. Despite their considerable contributions to legal education over the last quarter century, faculty who teach students to practice law have not acquired the same seat at

⁸ ABA SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR REPORT OF THE SPECIAL COMM. ON SECURITY OF POSITION 12 (2008).

⁹ *Id.* at 17.

¹⁰ Kuehn & McCormack. at 74-75, 92-95.

¹¹ *Id.* at 74.

¹² *Id.* at 76-77.

¹³ *Id.*

¹⁴ ABA SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, REPORT OF THE ACCREDITATION POLICY TASK FORCE 22 (2007).

¹⁵ *Id.* at 22.

¹⁶ *Id.*

the legal academy table that is afforded doctrinal faculty. Those schools that have welcomed professors of clinical courses as equal partners in legal education have benefited from the perspectives and experiences of those faculty members and their students have benefited in law practice. In contrast, where they cannot debate, govern, and otherwise fully participate in the intellectual and administrative life of a law school, clinical faculty are limited in their ability to influence and innovate in their institutions.

If law schools are to fulfill their mandate to educate competent practitioners and to advance the profession, teachers and scholars who focus on the profession must be located together with doctrinal teachers and scholars at the core of law faculties. A regulatory system that allows schools to retain security of position only for those who teach doctrinal courses will inevitably cause some, if not many, schools to locate faculty who teach professional skills at the margins.

No one in the legal academy is more aware of the importance of innovation in legal education than CLEA. Clinicians have been at the forefront of innovation over the last quarter century and support a regulatory system which leaves schools free to innovate. But innovation will not be nurtured by embedding tenured doctrinal teachers in place for their lifetimes while marginalizing clinical teachers, who have been chiefly responsible for much of the new thinking in the education of lawyers. We operate in a real world. In that world, doctrinal law professors have and will continue to enjoy the rights of tenure. Clinical law professors largely do not. The Council should consider very carefully the impact on legal education that institutionalizing insecurity and inequality of professional status for those who teach clinics would undoubtedly have.

THE COUNCIL SHOULD RETAIN CURRENT STANDARD 405

The “alternative” formulations of Standard 405 put out for comment in September, 2013, by the Council are, in fact, effectively identical. Although Alternative 1 has at times been misleadingly described as “providing for” security of position, the security of position it requires is actually none at all. Under Alternative 1, as long as the faculty is “competent,” any form of security of position, including at-will or one-year contracts, is sufficient.¹⁷ Alternative 2 forthrightly eliminates faculty security of position from the Standards.

Because they will destabilize experiential faculty, these “alternatives” promise not to promote but instead to impede innovation in legal education. The Council should fix what’s wrong with current Standard 405 and otherwise leave it alone. While as a consequence of its amendments over the past 25 years it may seem awkward, it represents a compromise of competing interests that has been hammered out through years of experience in an imperfect world. We have yet to hear any argument or to see any data that supports the view that a radical elimination of security of position will improve legal education.

Throughout the comprehensive review of the Standards that began back in 2008, CLEA has been proposing modest amendments to current Standard 405 to address its shortcomings.

¹⁷ Alternative 1 provides all faculty with the provisions currently in effect for legal writing faculty. Current Standard 405(d), requiring that legal writing faculty have “such security of position ... as may be necessary to (1) attract and retain a faculty that is well qualified....,” allows schools to provide legal writing faculty with one-year or at-will contracts. Proposed Alternative 1 mirrors this by reading: “A law school shall afford all full-time faculty members a form of security of position sufficient to ensure academic freedom and attraction and retention of a competent full-time faculty.”

Our proposal has never been mentioned or referred to in the deliberations of the Standards Review Committee. We hope that the Council will be willing to consider them. We therefore attach our proposed Standard 405 as Appendix B.

Our proposal differs from current Standard 405 in a few respects. These amendments cure problems that have arisen with the current language. The key proposed modifications are:

- The proposal expresses the longstanding construction of current Standard 405(b) that law schools are required to provide a system of tenure for at least some faculty and that they not only adopt but adhere to an academic freedom policy.
- The proposal no longer identifies “clinical” faculty in Standard 405(c), which provides for long-term contracts for some faculty, and eliminates current Standard 405(d), which governs legal writing faculty. There is no educational justification for treating full-time legal research and writing faculty differently from other full-time faculty. In proposed Interpretation 405-9, a limited number of fixed, short-term appointments within a distinct law school program (e.g., a legal research and writing program or a clinical program) continue to be permitted.
- An amendment to Interpretation 405-6 closes an unintended loophole opened in 2005 that has permitted one-year, non-renewable contracts to be equivalent to “long-term contracts” if coupled with a policy on academic freedom. It is based on language unanimously adopted by the Standards Review Committee in 2007 after being requested by the Accreditation Committee to address this loophole.¹⁸
- The phrase “meaningful participation in law school governance” is added to proposed Standard 405(c) and Interpretation 405-8 to ensure that all full-time faculty members will participate in faculty governance. Interpretation 405-8 differs from Alternatives 1 and 2 in ensuring that faculty members are not excluded from voting on personnel matters, in particular when the person under consideration is within the faculty member’s field of study or teaching methodology. One of the most egregious existing disparities in faculty participation is the practice in some schools of excluding clinical and legal writing professors from voting on the appointment and promotion of faculty members *within their own field of study and teaching methodology*.

The legal academy has been much criticized for being disconnected from law practice, a particular problem in what has been called “the new legal economy.” The Standards should not exacerbate that problem by allowing schools to marginalize precisely the faculty that has an increasingly important role in preparing students for the practice of law. Having worked to move professional skills training out of the basement and into the forefront of American legal education, the Council should not turn back the clock by adopting either of the proposed “alternatives.” The changes to Standard 405 proposed here address the few ongoing concerns about current Standard 405 and otherwise do no harm to the ongoing development of legal education and the preparation of law students for the practice of law.

¹⁸ ABA Standards Review Comm., Revisions to Standards for the Approval of Law Schools and Explanation of Amended Interpretation 405-6 (2008).

APPENDIX A

Employment Status of Clinical Program Faculty in US Law Schools

| <u>Employment Status (Full Time Only)</u> | <u>Percentage</u> |
|---|-------------------|
| Contractual Appointment | 51.6% |
| Tenured / Tenure Track | 28.3% |
| Clinical Tenured/ Clinical Tenure Track | 10.2% |
| Adjunct | 1.1% |
| Other (mostly visitors) | 6.2% |
| Non-Adjunct At Will | 2.2% |
| Fellow | 7.3% |
| <u>Contract Duration</u> | <u>Percentage</u> |
| 1 year contract | 12.3% |
| 2 year contract | 2.6% |
| 3 year contract | 9.5% |
| 4 year contract | 1.1% |
| 5 year contract | 14.7% |
| 6 or more year contract | 4.6% |

Summary of Employment Status of Clinical Faculty

- 62% of clinical faculty nationwide are on contract status, not tenured or tenure-track
- 42% of the 62% of clinical faculty who are on contract status have no form of security of position as defined by current Standard 405(c)
- Including part-time clinicians, approximately 1/2 of all clinical program faculty do not have any form of security of position as defined by current Standard 405

(Source: Center for the Study of Applied Legal Education (CSALE): "Report on the 2010-11 Survey")

Governance Rights of Clinical Program Faculty in US Law Schools

| <i>Matters To Be Voted Upon</i> | <i>% of Respondents Entitled to Vote</i> |
|---|--|
| Vote on All Matters | 36.8% |
| Vote on All Matters Except Classroom/Doctrinal Faculty Hiring, Promotion, and Tenure | 30.5% |
| Vote on Administrative Matters Only | 1.1% |
| No Vote But Can Generally Attend Meetings | 19.1% |
| Not Permitted to Attend Faculty Meetings | 12.4% |

Governance Rights of Clinical Program Faculty by Faculty Status

| | <i>Total</i> | <i>Tenure</i> | <i>Tenure Track</i> | <i>Clinical Tenure</i> | <i>Clinical Tenure Track</i> | <i>4 – 6 yr+ Contract</i> | <i>1 – 3 yr Contract</i> | <i>Staff Attorney</i> | <i>Fellow</i> |
|---------------------------------|--------------|---------------|---------------------|------------------------|------------------------------|---------------------------|--------------------------|-----------------------|---------------|
| <i>All Matters</i> | 31% | 100% | 96% | 29% | 20% | 12% | 11% | | |
| <i>All But Doc. Hiring/Prom</i> | 31% | | 4% | 64% | 70% | 74% | 29% | | |
| <i>Admin Matters Only</i> | 21.5% | | | 4% | | 5% | 5% | | |
| <i>No Vote But Attend</i> | 14% | | | 3% | 10% | 9% | 37% | 71% | 83% |
| <i>Not Attend</i> | 3% | | | | | | 18% | 29% | 17% |

(Source: Center for the Study of Applied Legal Education (CSALE): "Report on the 2010-11 Survey")

APPENDIX B

CLEA PROPOSED REVISIONS TO STANDARD 405 (01/20/2014)

[Strikeouts and underscoring are changes to current Standard 405]

Standard 405. PROFESSIONAL ENVIRONMENT

(a) A law school shall establish and maintain conditions adequate to attract and retain a competent faculty.

(b) A law school shall have and adhere to an established and announced policy ~~with respect to providing for~~ academic freedom and tenure of which Appendix 1 herein is an example but is not obligatory.

(c) A law school shall afford to all full-time ~~clinical~~ faculty members tenure or a form of security of position reasonably similar to tenure, participation in law school governance, and reasonably similar non-compensatory perquisites reasonably similar to those provided other full-time faculty members. A law school may require these faculty members in positions reasonably similar to tenure 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 clinical program predominantly staffed by full-time faculty members, or in an experimental program of limited duration.~~

~~(d) A law school shall afford legal writing teachers 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)(3), and (2) safeguard academic freedom.~~

Interpretation 405-1

A fixed limit on the percent of a law faculty that may hold tenure under any circumstances violates the Standards.

Interpretation 405-2

A law faculty as professionals should not be required to be a part of the general university bargaining unit.

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.

Interpretation 405-4

A law school not a part of a university in considering and deciding on appointment, termination, promotion, and tenure of faculty members should have procedures that contain the same principles of fairness and due process that should be employed by a law school that is part of a

university. If the dean and faculty have made a recommendation that is unfavorable to a candidate, the candidate should be given an opportunity to appeal to the president, chairman, or governing board.

Interpretation 405-5

If the dean and faculty have determined the question of responsibility for examination schedules and the schedule has been announced by the authority responsible for it, it is not a violation of academic freedom for a member of the law faculty to be required to adhere to the schedule.

Interpretation 405-6

A form of security of position reasonably similar to tenure includes a separate tenure track or a program of renewable long-term contracts sufficient to ensure academic freedom. Under a separate tenure track, a full-time ~~elinieal~~ faculty member, after a probationary period reasonably similar to that for other full-time faculty on the tenure-track, 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 on the tenure track, during which the ~~elinieal~~ faculty member may be employed on short-term contracts, the services of ~~the 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 a contract of at least a five-year contract that is presumptively renewable or includes other provisions, such as a requirement of good cause for nonrenewal, 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~~.

Interpretation 405-7

In determining if the members of the full-time ~~elinieal~~ faculty in positions reasonably similar to tenure 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 elinieal the faculty member’s field of study or teaching. A law school should develop criteria for retention, promotion, and security of employment of full-time ~~elinieal~~ faculty in positions reasonably similar to tenure and provide those faculty members non-compensatory perquisites reasonably similar to those provided other full-time faculty.

Interpretation 405-8

A law school shall afford to full-time ~~elinieal~~ faculty members reasonably similar participation in faculty meetings, committees, and other aspects of law school governance involving academic matters such as mission, curriculum, academic standards, methods of instruction, and faculty appointments and promotions. in a manner reasonably similar to other full-time faculty members. This Interpretation does not apply to those persons referred to in the last sentence of Standard 405(c).

Interpretation 405-9

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. This Standard does not preclude a limited number of fixed, short-term appointments within a law school program predominately staffed by full-time faculty members or fellowship programs designed to produce candidates for full-time teaching by offering supervised teaching experience.