July 19, 2008

Letter to the Council of Legal Education and Admissions to the Bar
Regarding Changes Proposed to Standard 405(c)

Dear Members of the Council:

We urge the Council to reject the proposed changes in Standard 405(c) and to enforce it as written. The proposed changes would permit schools to marginalize clinical educators and to exclude them from the informal and formal processes shaping the future of legal education. The point of the standard is to foster the integration of clinical and non-clinical faculty, a process that benefits all legal education. Integration will not occur unless most clinical teachers at a school have formal equality with the rest of the faculty. Unfortunately, despite how much has been accomplished by the clinical professoriate to reshape legal pedagogy and to invent new forms of legal knowledge and scholarship, a number of schools still do not integrate clinicians as full participants into their faculties, unless required to do so.

Most law professors hope that, through what and how we teach our students, we can improve the legal system. Clinical teachers bring a perspective often quite different from non-clinicians about the substance and process of legal education, including what theories and skills to teach, what values to transmit, what perspectives on law and legal practice matter, and how pedagogically to achieve educational objectives. Clinical teachers, by reaching students at the formative moment when they first take responsibility for clients in professional roles, play a particularly critical part in providing students with insights about professional values, professional identities, and the roles of the legal profession in society. At stake in the tiresome status debate are the critical questions whether clinical education will continue to flourish and whether the vantage point that clinical teachers bring to the academy will inform the mission of legal education.

Clinicians, like most other law professors, believe deeply that institutional decisions about what to teach prospective lawyers are a matter of great consequence. All recognize the healthy disagreement within faculties about the content and methodologies of the curriculum, the right qualifications for a person to secure a faculty appointment, and ways to evaluate scholarship. In approaching decision-making about each of these topics, faculty influence each other through full participation in the intellectual life of the institution and in the collective deliberative processes that lead to consensus and action.

In many ways, the daily, regularized inclusion of clinical faculty in the intellectual life and decision-making of a law school is the realization of formal institutional status. Faculty members share scholarly works at various stages of completion and reformulate ideas, drawing on the comments of others. They discuss teaching and attend each other’s classes. They present papers to faculty fora. And through relationships built on a daily basis they influence each other. When clinical teachers are “on the faculty” and considered equal to their colleagues, their ideas are informed by and inform the ideas of the others. This interchange enriches the law schools at which it takes place. At schools where clinicians are unequal, this dialogue occurs much less frequently and carries distortions created by differences in status.
Participation in deliberations over the direction of our law schools and the intellectual communities they constitute is fundamental to our work as law reformers, critical thinkers, legal scholars, and teachers. Invariably disagreement and debate characterize much of law faculty decision-making. Those who advocate for positions that are unpopular with colleagues or disagree with the dean must calculate the risks. To the extent that a participant in these debates is dependent upon the favor of others to retain employment, as are teachers on renewable appointments, he or she lacks the full freedom to advocate for institutional change, particularly important, strongly-contested issues within institutions. Therefore, when faculties make decisions, they can easily marginalize clinicians’ perspectives on law, legal practice, legal institutions, professional responsibility, curricular structure, legal pedagogy, and legal scholarship.

At the same time that faculty members need the protections of tenure to ensure academic freedom vis-a-vis attacks on their views coming from outside the academy, clinicians need that same protection to contend for their positions within their own law schools. Without tenure or its equivalent, such freedom is not possible. Dismantling the status guarantees afforded by Standard 405(c), therefore, effectively denies clinicians the protection of their views in the process of shaping and carrying out the law school’s mission. Debates over curriculum, scholarship, teaching, and service require an equal playing field.

Because clinical teachers supervise students representing poor and disenfranchised people and groups in matters that can be controversial, and because their scholarship is often written from the vantage point of the law’s effects on the lives of the powerless, they are even more likely than other faculty to need the protection of academic freedom. Surely, the claim that clinicians’ academic freedom survives intact without security of position defeats the notion that tenure is necessary to protect anyone.

We ask that members of the Council consider the accomplishments of clinical faculty over the course of the modern history of clinical education. When modern clinical education began to grow during the late 1960’s and early 1970’s, traditional legal educators derided it as a “side show,” a fad that would fail. Instead, as the Carnegie Report, Educating Lawyers, powerfully documents, clinical education has enriched the academy with attention to different and formerly neglected aspects of legal knowledge, including practical understanding and professional judgment, as well as new teaching methods. Furthermore, in the view of the Carnegie Report, law schools’ failure to integrate these forms of legal knowledge constitutes the striking deficit of legal education. As faculty work to balance the teaching of doctrine, practice, and theory in their courses and in the curriculum, the best clinics have become places to integrate seamlessly all three. As noted in the A.B.A. Report of the Task Force on Law Schools and the Profession (the MacCrate Report), "Unquestionably, the most significant development in legal education in the post World War II era has been the growth of the skills curriculum." The Report went on to say that clinical faculty were instrumental in this development and that clinical courses "occupy an important place in the curriculum of virtually all ABA approved law schools."

To transmit the skills and values necessary to legal practice and to supplement the forms of legal knowledge that effective and responsible lawyers require, clinicians have created, as part of their scholarly achievements, theories about lawyering. An extensive bibliography of scholarship produced by clinicians, the successful peer-reviewed Clinical Law Review, and a three-decade-old tradition of vibrant conferences on clinical education, as well as generations of law students who view their clinical courses as central to their lives as lawyers, now help to define legal education. Could any of this have occurred without a permanent cadre of clinical teachers who have the status guaranteed by our existing standards?
With a few exceptions, the intellectual leadership of the clinical field, characterized by pedagogical inventiveness and scholarly boldness, has come from clinicians with tenure or equivalent appointments. Nearly all highly-regarded clinical programs, in the words of 405(c), are “predominantly staffed by” people with such appointments. This history proves the genius of a set of decisions made nearly 30 years ago with the adoption of this standard. The proposed changes take legal education backwards and endanger the achievements of this form of legal education. The Council should reject them.

Respectfully Submitted,

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