C L E A

Clinical Legal Education Association

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CLINICAL LEGAL EDUCATION ASSOCIATION'S (CLEA) HISTORICAL BACKGROUND ON CLINICAL FACULTY ACCREDITATION STANDARDS

For over twenty-five years, the ABA Council of the Section of Legal Education has been refining the role of law school accreditation standards in the clinical education of law students. While some of this process has directly addressed the extent to which experiential education should be required, much of it has concerned the relationship between clinical educators and the law schools they work in. Over this same period, law school professors who have embraced the title of "clinician" have developed their contributions to legal education by closely studying teaching, lawyering, and the delivery of legal services to a broad range of clients and causes. Some clinicians have been welcomed by and nurtured in their law schools; with the support of the academy these clinicians have made significant contributions not only to legal education in their own schools but to the profession they serve nation-wide. Others have been marginalized in the "professional skills" programs of law schools, where they struggle for the acceptance of their teaching goals and find little support for the possibilities of their scholarship. The Clinical Legal Education Association (CLEA) represents more than seven hundred of these clinical educators, some of whom are protected by tenure in their institutions and others of whom work at the will of their law school administrations.

Currently before the Standards Review Committee is a recurring question in legal education: should the Accreditation Standards require that law schools give protection to clinical and other faculty in this uniquely ideological professional educational setting? Like several of the questions the Committee is currently considering, this raises in turn the larger question of whether the Council should deregulate law schools, establishing an entrepreneurial model of legal education that relies on a "market" to determine the content and delivery of legal education. In connection with its consideration of the particular question of the status of law faculty, CLEA submits the following history of the Council's pertinent decisions over the past quarter century.[1] We hope this history will be of interest and help to those members of the Committee who are unfamiliar with it. And we look forward to assisting the Committee in its renewed deliberations on the question when it has before it a proposal to consider.

(CLEA is the nation's largest association of law teachers, representing over 750 dues-paying faculty at over 150 U.S. law schools. CLEA is committed to legal education that trains law students to be competent, ethical practitioners and to promoting access to legal representation. Its membership consists of law professors who teach students in role as lawyers and who devote their energy and attention to identifying, teaching, and assessing proficiency in the skills and values essential to lawyering.)

[1]. This history is abridged from Peter A. Joy & Robert R. Kuehn, *The Evolution of ABA Standards for Clinical Faculty*, 75 TENN. L. REV. 183 (2008), where citations to the sources mentioned in this letter can be found.

The Adoption of the First Standard in 1984 - 405(e)

The ABA first took up the issue of clinical law faculty status in its 1979 report entitled "Lawyer Competency: The Role of Law Schools" (the "Cramton Report"). The Cramton Report identified the many institutional factors inhibiting the preparation of law students for entry into the profession. It recommended that law schools engage students in a range of lawyering competencies and recognize the value of having a faculty that teaches skills in addition to legal reasoning, urging that "law school policies and practice of faculty appointment, promotion, and tenure should pay greater rewards for commitment to teaching, including teaching by techniques that foster skills development." The following year, in 1980, another ABA study, "Law Schools and Professional Education: Report and Recommendations of the Special Committee for a Study of Legal Education" (the "Foulis Report"), observed that "the status of clinicians in the academic setting has not been satisfactorily resolved" and recommended "that appropriate weight be assigned to the effective teaching of legal skills."

The Cramton and Foulis reports were followed by a joint ABA and American Association of Law Schools (AALS) 1980 report, "Clinical Legal Education," which contained specific guidelines for clinical faculty status: "One or more of the faculty who have principal responsibility for the clinical legal studies curriculum should have the same underlying employment relationship as the faculty teaching in the traditional curriculum." In addition, the report advised that any "full-time positions not eligible for tenure should be long-term employment," because "the importance of clinical legal studies to the law school curriculum requires the application of tenure status to individuals principally teaching in the clinical legal studies curriculum." .

Not long after producing these reports, the ABA moved to regulate the status of clinical faculty through the accreditation standards. Prior to the 1980s, the Standards contained only the present requirement of a policy on academic freedom and tenure and a general statement that read, "The law school shall establish and maintain conditions adequate to attract and retain a competent faculty." In 1982, the Standards Review Committee unanimously recommended a provision that schools "shall afford to full-time faculty members whose primary responsibilities are in its professional skills program, a form of security of position reasonably similar to tenure and perquisites reasonably similar to those provided full-time faculty members." An accompanying Interpretation explained that security of position reasonably similar to tenure could be a "separate tenure track" or a "program of renewable long-term contracts . . . that shall thereafter be renewable."

Three law school deans sent a letter opposing the proposal. They took a now-familiar deregulatory position, arguing that the accrediting process should not intrude on the "autonomy and sense of professional responsibility of the institution being regulated," and predicting that "it is unlikely that this standard can improve clinical legal education or legal education generally, and we see a substantial danger that it will make it worse." In 1984, the Standards Review Committee nonetheless forwarded its proposal to the Council. In a letter to law schools, the law deans serving on the Council explained why they supported the providing some measure of employment security for clinical faculty:

> Few have ever questioned the relationship of tenure status to quality of legal education when applied to traditional academic faculty. Tenure, or some equivalent status, provides

the assurance of academic freedom, which has long been regarded as essential for a quality faculty. This is no less true for teachers in a professional skills training program.

Ultimately the Council used the word "should" rather than "shall" in Standard 405(e) and in August, 1984, the House of Delegates adopted it, thus urging that law schools "should afford [clinical professors] a form of security of position reasonably similar to tenure."

The Adoption of the Mandatory "Shall" Standard in 1996 - 405(c)

Because the Standard on clinical faculty status was not mandatory, schools continued to discriminate against clinical faculty in law school governance. In an effort to remedy this, in December, 1988, the Council adopted an Interpretation to the standard providing that law schools should afford to full-time faculty members whose primary responsibilities are in its professional skills program an opportunity to participate in governance in a manner reasonably similar to other full-time faculty members.

In July, 1992, yet another ABA report called on law schools to protect and include their clinical faculty in order to improve the professional training of lawyers. The influential "MacCrate Report," "Legal Education and Professional Development - An Educational Continuum," observed that while status for clinical faculty was improving, "progress has not been uniform, and at some institutions, it has come slowly and without the commitment that is necessary to develop and maintain skills instruction of a quality commensurate with the school's overall educational aspirations."

Data supporting the MacCrate Report's concern was assembled in an ABA study finding that the percentage of full-time "professional skills" faculty holding "tenure eligible slots" dropped by over five percent during the period from 1984 to 1991, while the percentage of clinical faculty with insecure positions declined only slightly from 1985 to 1990. The ABA study concluded that "the data produced by this project does not demonstrate that ABA Accreditation Standard 405(e) has improved the status of full-time teachers of professional skills, nor does the data indicate trends which would suggest a probability of significant future progress." A similar finding was made by the AALS in its 1991 "Report of the Committee on the Future of the In-House Clinic," which noted that the non-mandatory standard had been disregarded entirely in forty percent of schools responding to an Association survey.

In 1994, the Council proposed amending Standard 405 to provide for full inclusion of clinical law teachers in the legal academy. The Standards Review Committee held public hearings, receiving hundreds of written comments dealing with "almost every conceivable position on every subject covered by the Standards . . . advocated pro or con," including the argument for deregulation of faculty standards. Although a decade earlier it had supported the "should" language, the AALS endorsed the proposed changes because law schools had been given sufficient time to adjust. In 1996, the Council amended Standard 405(c) by changing the word "should" to "shall" in the Standard, and mandating that "full-time clinical faculty members must be afforded a form of security of position reasonably similar to tenure, and noncompensatory perquisites reasonably similar to other full-time faculty members." The new Standard also gave law schools flexibility by providing for "a limited number of fixed, short-term appointments in

a clinical program predominantly staffed by full-time faculty members, or in an experimental program of limited duration."

Rejecting Calls in 1999 & 2004 to Weaken or Eliminate the Standards

Consistent with a proposal that the Association of Law Deans of America (ALDA) had been urging for several years, the 1999 Standards Review Committee recommended a radical revision of the Standards to eliminate all references to tenure for any faculty. It proposed that schools simply be required to adopt policies for security of position and academic freedom adequate to ensure a competent faculty and suggested that these policies "may vary with the duties and responsibilities of different faculty members." The AALS opposed the proposal, pointing out that "such a change to such a major core traditional value of the academy [tenure] should not be made without very broad consultation that goes beyond these series of hearings with all types of law faculty and others in the higher education community." The Council declined to send the Committee's recommendation out for public comment. The 1999-2000 Annual Report of the Consultant on Legal Education explained that the Council summarily rejected Standard Review's proposal "[b]ecause of its belief in the important role of tenure in protecting academic freedom."

Four years later, the Standards Review Committee again recommended that any reference to tenure be removed from the Standards and that the definition of academic freedom instead be expanded. As to clinical faculty, the Committee proposed a new Interpretation to "[r]equire that if a school has a system of tenure, full-time clinical faculty must be provided the type of 'similar treatment' that is now provided by 405(c) and Interpretations 405-6, -7 and -8." In February, 2004, the Council again declined to send the proposal to eliminate tenure from the Standards out for comment.

The Standards Review Committee continued to work on Standard 405; later in 2004 it recommended that "long-term contracts" for clinical faculty be defined at least five years in length and renewable to satisfy the "reasonably similar to tenure" requirement for clinical faculty to insure academic freedom. In response, in 2005, the Council added the following to Interpretation 405-6: "For the purposes of this Interpretation, 'long-term contract' means at least a five-year contract that is presumptively renewable or other arrangement sufficient to ensure academic freedom."

This change did not settle the clinical faculty status issue. The Accreditation Committee read the new language to permit at-will contracts for clinical faculty as long as the law school has some process in place to protect academic freedom. Because of the ambiguity of the application of the phrase "or other arrangement sufficient to ensure academic freedom," the Accreditation Committee and Council requested Standards Review to review the Interpretation. In 2007, Standards Review unanimously proposed a revision of Interpretation 405-6 as follows:

> For the purposes of this Interpretation, "long-term contract" means <u>a contract for a term of</u> at least ~~a~~ five-year<u>s</u> ~~contract~~ that is presumptively renewable or <u>includes</u> other <u>provisions</u> ~~arrangement~~ sufficient to ensure academic freedom.

The Committee explained that the proposed amendment was drafted to clarify that "a one year contract plus a policy on academic freedom is not sufficient under this Standard."

Accreditation Review Reports in 2007 & 2008 Find No Consensus to Change the Existing Standards

The Council postponed acting on the Committee's recommendation pending its receipt of a May, 2007 "Report of the Accreditation Policy Task Force." This ABA committee noted that, although tenure is not explicitly required in the standards of other accrediting bodies, clinical law faculty may present a unique case "because of documented history of repeated attempts at outside interference with litigation and other forms of advocacy by law school clinics." The Task Force did not reach a consensus on what system to recommend, but a majority agreed that:

> Even if the existing system is imperfect, it is far from self-evident that adequate alternative mechanisms can be fashioned. The removal of all "security of position" provisions from the Standards would have implications that go far beyond simply allowing law schools to determine for themselves whether to have a tenure system for doctrinal faculty or one that affords "a form of security of position reasonably similar to tenure" for clinical faculty. If the current provisions are deleted, and no other provisions for "security of position" are promulgated, a law school could choose to staff all or a major part of its programs with faculty members who serve as at-will employees or in some similar capacity. . . . It seems highly doubtful that such arrangements would promote the goals of a sound program of legal education, academic freedom, and a well-qualified faculty. In the absence of any specific standard, however, that would have to be determined on a case-by-case basis. If that inquiry were taken seriously, the likely result would be an accreditation process far more intrusive, costly, and labor-intensive than that which currently exists. On the other hand, if that inquiry were not taken seriously, there would be little point in having an accreditation process at all.

The Council then appointed its own Special Committee on Security of Position which produced a report in May, 2008. This report recounts the history of the role of tenure and shared governance in the legal academy and observes that persistent threats to the work of clinical faculty "demonstrate the clear need for a form of tenure-like security and academic freedom." At the Council's direction the Special Committee provided a possible alternative scheme to security of position for securing academic freedom, but it did not recommend that alternative. Instead, it warned that, before adopting any alternative approach to the existing Standards, three issues must be resolved: 1) whether bright lines or precise rules are necessary for compliance and enforcement; 2) whether specific rules about subcategories of faculty capture specific values or concerns that might be lost by an alternative approach; and 3) whether adopting an alternative approach to tenure for all full-time faculty will result in marginalization of some important faculty and increased hierarchy in the academy.

Without expressing a view on the issues, the Council referred the issues raised by the Task Force report to the Standards Review Committee. This referral is now before the Committee, which must once again consider whether to propose to deregulate faculty standards in light of the relationships among the

quality of legal education, the competency of law graduates to enter practice, the development of legal scholarship, the desire of some law school leadership for flexibility and independence, and the governance role and academic freedom of law faculties.

Conclusion

Over the twenty-five years that the Council has been considering and reconsidering these questions, clinical law professors have been doing their jobs. No longer viewed as a ragtag bunch of activists in the basement, clinicians are serious scholars and passionate educators who are committed to the ongoing improvement of the professional judgment and competency of students, a deeper understanding of the lawyering process, and the norms and values of the profession. The Council standards that protect clinical faculty status are premised on the recognition that the continued improvement of legal education requires the full integration of these teachers into the law school through long-term employment relationships and participation in law school governance.

We hope that the Committee will solicit and take account of the views not only of school administrators but also of other stakeholders -- legal educators, law students, lawyers, judges, and the public served by the legal profession -- as it considers the necessity of protecting the security of law professors through the Standards. We look forward to reviewing and commenting on the upcoming proposal on faculty terms and conditions from the Committee and to working with the Committee and the Council to help to devise effective Standards for legal education.