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Clinical Legal Education Association

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STATEMENT OF THE CLINICAL LEGAL EDUCATION ASSOCIATION ON THE REPORT OF THE AMERICAN BAR ASSOCIATION COUNCIL ON LEGAL EDUCATION'S SPECIAL COMMITTEE ON SECURITY OF POSITION JULY 18, 2008

The Clinical Legal Education Association (CLEA) is committed to legal education that trains law students to be competent, ethical practitioners and to promoting access to legal representation. CLEA has approximately 700 annual dues-paying members representing faculty at approximately 140 law schools in the United States. We offer this statement in connection with the Council on Legal Education's consideration of the report of its Special Committee on Security of Position.¹ For the reasons detailed below, we urge that the report not be referred to the Standards Review Committee.

We are mindful that the Special Committee worked hard at its charge to explore alternatives to current security of position standards that might better insure academic freedom, a well-qualified faculty, and faculty governance of curricular decisions. We are grateful for the Committee's thoughtful review of the history and policy issues involved in the questions it considered. And we particularly note that the Committee itself does not recommend the adoption of the alternative approach it developed and was divided on many major, interrelated issues.

In CLEA's view, the alternative approach the Committee describes would not serve the interests of legal education. Because it would permit law schools to consign some faculty members to at-will employment while tenuring others, the approach is likely to further institutionalize the segregation of faculty who teach the clinical and skills curriculum into unequal and lesser professional status. Legal education, and the profession, would suffer.

Law schools must produce graduates who possess a broad array of legal skills, who are poised to protect client interests consistent with the ethical rules, and whose work will ultimately enhance the legal profession. We believe, and we hope that the Council will agree, that equality of treatment of all full-time faculty members of the legal academy, including those whose focus is on professional values and practice, is critical to the continued development of the education of such lawyers. We therefore ask that the Council take no action on the Special Committee's report; we hope instead that the Council will consider what steps it can take to insure that law students receive the sound legal education they need to practice law.

As the 2007 Carnegie Foundation Report, *Educating Lawyers: Preparation for the Profession of Law*, reminds us, a sound legal education requires that law students acquire a mix of analytical and practical skills.² Clinical programs provide the much-needed link between traditional legal education and the practice of law. Indeed, as the Carnegie Report explains, 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.”³ Faculty who teach doctrine and those who teach in clinical programs together provide law students with the analytical, investigative, legal reasoning, moral, client relations and ethical skills necessary to produce engaged, diligent, reflective and effective attorneys.

However, as is well documented, many law schools have created two tiers of faculty. In these schools, doctrinal faculty members are presumed to constitute the core faculty and are afforded the protections of tenure. Faculty teaching practice skills and professional values, in contrast, are afforded little by way of the kind of security of position that is designed to attract and retain competent faculty. Indeed, it was this historical divide that led to the adoption of current Standard 405(c), which uses the term “reasonably similar to tenure” to mandate that clinical legal educators and doctrinal faculty be treated equally. However, continued resistance to this Standard has led to uneven progress among law schools in terms of equality of security of position between those teachers concentrating on doctrine and those concentrating on practice-related skills

At present, the overwhelming majority of legal educators who teach in clinics are still treated as second-class citizens at their institutions.⁴ Data gathered by The Center for the Study of Applied Legal Education’s (CSALE) 2007-2008 Survey of Applied Legal Educators⁵ shows that nationwide only thirty-one per cent (31%) of respondents, all of whom teach in clinical programs, were on any form of tenure track, whether separate from or unitary with other faculty. The remainder is comprised of adjunct faculty (13%), staff attorneys (2%), fellows (2%), and contract faculty (52%). Of the contract faculty, fifty-five percent (55%) are working under contracts of three years or less. Only thirty-one (31%) of the one- or two-year contracts are “presumptively renewable;” fifty percent (50%) of the three-year contracts are. The data also unsurprisingly show that institutional support for scholarly activity correlates with status, as there is a precipitous drop off in support for those with lesser status at their institutions.

The evidence is clear. Despite their considerable contributions to legal education over the last quarter century, on a national level faculty who teach in clinics have not acquired a seat at the table. Those law schools that have welcomed professors of clinical courses as equal partners in legal education have benefited greatly from the perspectives and experiences of those faculty members. In contrast, where they do not debate, govern, and otherwise fully participate in the intellectual and administrative life of a law school, faculty who teach in clinics are constrained in their ability to produce research and scholarship that promote our understanding of the profession and of legal education and are hampered in their ability to engage with other faculty on these same vital issues.

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

By permitting law schools to tenure some of their faculty and to relegate others to at-will employment, the alternative approach described (but not endorsed) by the Special Committee would have just that effect. CLEA is keenly aware of the importance of innovation in legal education. Faculty who teach in clinics have been at the forefront of innovation over the last quarter century and support a regulatory system which leaves law schools free to originate. But innovation will not be nurtured by

marginalizing only and precisely the segment of the legal academy that has been chiefly responsible for original thinking in the education of lawyers. The considerable contributions of faculty who teach in clinics will continue to enrich and inform legal education only to the extent that these teachers have an equal place at the intellectual and administrative centers of their institutions.

At the very least, equality means full governance rights; that long-term contracts can only be terminated or not renewed “for cause;” that faculty who teach in clinics be afforded the same procedural safeguards as doctrinal faculty; and that faculty who teach in clinics enjoy academic freedom. Notably, the Special Committee took particular care to describe the history and importance of academic freedom in law schools. The primary assaults on law professors’ academic freedom in recent years have been directed at legal educators who teach in clinics.⁶ For this reason, as well, it is particularly important to provide for security of position for faculty who supervise students representing clients of clinical programs.

Lastly, stripping the Standards of all job security-related requirements will frustrate law schools’ abilities to diversify their faculty who teach in clinics. As the Report of the Special Committee explains, job security is absolutely crucial to law schools’ ability to attract and retain competent faculty, particularly because “most law-faculty members have attractive alternatives in the world of practice.”⁷ A competent faculty is one that, among other factors, is diverse in many ways, including race. Our law schools are failing in this regard. The Association of American Law Schools Statistical Report on Law Faculty for 2007-2008 reports that 74.40% of faculty identified as White.⁸ Faculty teaching in clinics are even more racially homogeneous; the CSALE data reports that 88.53% of respondents identified as White.⁹ While this problem needs to be addressed on many fronts,¹⁰ it is certain that security of position is critical to attracting a diverse clinical faculty.

In making this statement, CLEA does not suggest that the Council should require that all law schools provide for tenure for all faculty who teach in clinics, nor, indeed, for all law faculty members. Rather, we ask that that Council carefully consider the deleterious impact on legal education that institutionalizing the inequality of professional status for those who teach clinics and professional skills would have. We hope that the Council will turn its attention to encouraging law schools to focus energy on building on the recommendations of the Carnegie Foundation Report and on strategies for diversifying the ranks of law school faculties, including those who teach in clinical programs.

We therefore urge the Council to take no action to further consider the Special Committee’s “alternative approach;” rather, we hope it will resolve to vigorously enforce the existing “substantial equivalency” requirements consistent with the original and intended meaning of ABA Standard 405(c). The effective education of law students, the diversity of the intellectual life of law schools, and the advancement of the profession depend on the full and equal participation of all educators in the legal academy.

¹In separate statements we will also submit comments on the reports of the Special Committees on Outcome Measures and Transparency, prior to the Council’s August meeting.

²See WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 97 (2007) (“To be effective preparation for a variety of legal careers, legal education must provide a foundation in both... [analytical and practical] learning.”).

³*Id.* at 23. See also ROY STUCKEY AND OTHERS, BEST PRACTICES FOR LEGAL EDUCATION 7 (2007) (“Law schools do some things well, but they do some things poorly or not at all. While law schools help students acquire some of the essential skills and knowledge required for law practice, most law schools are not committed to preparing students for practice. It is generally conceded that most law school graduates are not as prepared for law practice as they could be and should be. Law schools can do much better.”)

⁴See, e.g., SULLIVAN ET AL., *supra* note 2, at 24 (observing that many clinics are “taught by instructors who are themselves not regular members of the faculty”).

⁵Taskforce on Clinicians in the Academy, AALS Section of Clinical Legal Education, Preview of the CSALE 2008 Survey of Applied Legal Education (on file with CLEA) (“CSALE survey”). Background information about the survey, including the research methodology, is available at <http://www.csale.org>. The website is still in development; for more information about the study, including the actual questions and the data, contact Professor David Santacroce, University of Michigan Law School, at dasanta.umich.edu.

⁶In just the past few months there have been two additional assaults on clinics. In one, at Rutgers-Newark, a developer, who had previously been sued by the environmental law clinic, is seeking access to clinic files, claiming entitlement under New Jersey’s Open Public Records Act. CLEA has filed an amicus brief discussing legal education, attorney-client privilege, and First Amendment issues. In the second, Denver’s Civil Rights Clinic is currently engaged in a legal dispute with the federal government over the contours of the attorney-client relationship in the context of clinical programs. The government has refused to treat clinic law students as attorneys for the purpose of granting clearance to visit clients at a supermax prison, arguing that, even though paralegals can be granted clearance, law student attorneys can be compelled to rely on the reports of interviews by the supervising clinical faculty in gathering facts from and counseling their clients. See the Rutgers brief at http://www.cleaweb.org/resources/briefs/Rutgers_amicus_brief_and_supporting_docs.pdf.

⁷Report of Special Committee on Security of Position (May 5, 2008), at 11-12.

⁸Association of American Law Schools, Statistical Report on Law Faculty, 2007-2008 at 15, *available at* <http://www.aals.org/statistics/report-07-08.pdf>.

⁹See CSALE survey, *supra* note 5. Of those respondents who identified as a person of color, 4.03% were African-American, 2.17% were Asian-Indian, and 2.17% were Latin/Hispanic.

¹⁰See Sameer M Ashar, *Law Clinics and Collective Mobilization*, 14 CLINICAL L. REV. 355, 380 n.95 (2008) (“In a part of the legal academy that one would expect to be most hospitable to people of color, the numbers [of clinical faculty of color] remain fairly low and there doesn’t appear to be significant change on the horizon....”).