

**Proposed Changes to Chapter 4 of the ABA Standards
for Approval of Law Schools
Submitted by the Clinical Legal Education Association
August 2004**

The Clinical Legal Education Association (CLEA) has carefully reviewed the current Standards and Interpretations in Chapter 4 of the Standards. During the Fall of 2003 and later in the Spring of 2004, CLEA submitted suggestions for changes to some of the Interpretations in Chapter 4 because CLEA has received reports, and there is some empirical evidence, that some of the key language in Standard 405 and some of the Interpretations have been interpreted in ways that are at odds with the express language in Chapter 4. The following comments explain CLEA's concerns, and suggest changes to some of the Interpretations to reaffirm the express language in Standard 405 and the will of the ABA House of Delegates in adopting changes to Standard 405 and the relevant Interpretations in August, 1996.

Proposed Changes to Chapter 4

1. Comparable Treatment of Full-Time Clinical Faculty with Other Full-Time Faculty

CLEA is very concerned about the disparate treatment of clinical faculty despite the express language of Standard 405 and its Interpretations. This disparate treatment persists due to committee interpretations and practices, which some refer to as "common law" of the Standards, that have resulted in reducing the plain meaning of the words "reasonably similar" in Standard 405 to something quite unlike the treatment of other faculty. This erosion of the plain meaning of "reasonably similar" has occurred both in the areas of security of position and in participation in faculty governance. The fact that this erosion has occurred through the application of unwritten common law that is not subject to public comment is particularly disturbing.

A. Security of Position

The express language of Standard 405 states that law schools "shall afford to full-time clinical faculty members a form of security of position reasonably similar to tenure." Interpretation 405-6 states that "the granting of a long-term contract that shall thereafter be renewable" may satisfy this aspect of Standard 405. After the ABA adopted this Interpretation, most law schools appeared to read the Standard and Interpretation to require both (i) that a contract be at least five years in length (and some thought seven years) to satisfy the condition of "long-term"; and (ii) that the contract would have to be renewable except for good cause to satisfy the condition required by Standard 405 that the "form of security of position" is "reasonably similar to tenure." Over time, however, many law schools have not interpreted the language in Standard 405 in that way. CLEA has received reports from members at some law schools that the length of the so-called "long-term" contract at their law school is three years, and that renewals have been denied without any showing of good cause for non-renewal even though other full-time faculty have tenure.

The requirement in Standard 405 that full-time clinical faculty have a form of security of position “reasonably similar to tenure” must mean that they have employment security comparable to tenure even if it is a contract system. Any fair reading of “reasonably similar” should mean simply that. A brief contract of limited duration that does not provide for renewal absent a showing of good cause for non-renewal is not comparable to tenure. In order to provide more guidance to law schools and to committees considering this issue, CLEA recommends that the SRC consider the following proposed amendments (proposed language is underlined and italicized) to Interpretation 405-6:

Interpretation 405-6

A form of security of position reasonably similar to tenure includes a separate tenure track or renewable long-term contract. Under a separate tenure track, a full-time clinical faculty member, after a probationary period reasonably similar to that for other full-time faculty, 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 should provide that, after a probationary period reasonably similar to that for other full-time faculty, the services of a faculty member in a clinical program may be either terminated or continued by the granting of a long-term contract of *no less than five years* that shall thereafter be renewable *except for good cause*. 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.

For the purpose of this Interpretation, each school shall define “good cause” as that term is defined and applied to other full-time faculty members whose tenure or security of position may be withdrawn for good cause.

B. Participation in Faculty Governance

For the past several years, CLEA has received a number of reports of law schools that have resisted implementing Standard 405(c) and specifically Interpretation 405-8 with regard to the guarantee that full-time clinical faculty shall have the “opportunity to participate in law school governance in a manner reasonably similar to other full-time faculty members.” Some law schools do not permit clinical faculty to attend faculty meetings, or do not permit clinical faculty to vote at faculty meetings. At some of these law schools, clinical faculty are only permitted to vote on faculty-student committees, usually giving clinical faculty the same voting rights as law students. These schools then maintain that the clinical faculty are participating in faculty governance in a manner “reasonably similar to other full-time faculty” when any fair reading of the express language would lead to an opposite conclusion. In yet another variation on the voting issue, CLEA has received reports that some schools have systems whereby everyone

votes at faculty meetings but then any tenured faculty member can ask for a "confirmatory" vote of the tenured faculty -- and thereby nullify the votes of clinical faculty. Other variations on this theme include law schools that go into "executive sessions" of non-clinical full-time faculty, or have conditions that any vote implicating an allocation of resources precludes clinical faculty from voting. Still other schools allow clinical faculty to vote on all matters -- except what many would see as the most crucial votes of all: on appointments, on promotions, or on tenure decisions. A meaningful vote is a vote in the body that has the ability to adopt, adopt with modifications, or reject committee recommendations. Anything short of this is not participation "reasonably similar to other full-time faculty."

Although the Accreditation Committee has requested reports back from some of the law schools that construe the current language to deny clinical faculty reasonably similar participation in faculty governance, many law schools continue to disenfranchise full-time clinical faculty without the Accreditation Committee taking any action. A recent study by Professor Sue Liemer, Southern Illinois University College of Law, available at www.alwd.org, indicates that of 159 ABA-approved law schools responding to her survey at 24 law schools (9%) only the clinic director votes, and only some clinical faculty vote at 22 law schools (14%). According to her survey, in 18 law schools (11%) clinical faculty may not vote at faculty meetings. At some of these law schools, clinical faculty may not even be permitted to attend faculty meetings. Interpretation 405-8 has been in existence for eight years, so every law school in the survey has had at least one site inspection during that time. There appears to be the need for the language in Interpretation 405-8 to be more explicit. In order to provide more guidance to law schools and to committees considering this issue, CLEA recommends that the SRC consider the following proposed amendments (proposed language is underlined and italicized) to Interpretation 405-8:

Interpretation 405-8:

A law school shall afford full-time clinical faculty members an opportunity to participate in law school governance in a manner that is reasonably similar to other full-time faculty members. *Participating in a manner reasonably similar to other full-time faculty members means having governance rights equal to other full-time faculty members except that, if the clinical faculty are on a separate tenure-track or renewable long-term contract program, such clinical faculty may be restricted from voting on individual personnel decisions involving other full-time faculty with different classifications, provided other full-time faculty are similarly restricted from voting on individual personnel decisions involving clinical faculty. In matters except for personnel decisions involving individual full-time faculty with different classifications, clinical faculty and other full-time faculty shall have equal opportunity to participate in faculty governance.* This Interpretation does not apply to those persons referred to in the last sentence of Standard 405(c).

2. Standard 405(c): "Limited Number of Fixed, Short-term Appointments

Another area in which some clarification appears needed is in the interpretation of the last sentence of Standard 405(c), which states: “However, this Standard does not preclude 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.” CLEA has received several reports of law schools engaging in practices such as continuing faculty on one-year contracts for as many as fifteen to twenty years and claiming that the clinical faculty fit the exception of being “fixed, short-term appointments.” This interpretation is at odds with the intent of Standard 405(c).

The last sentence in Standard 405 (c) contemplates that a law school may have a program or clinical faculty position that is relatively short, four years or less. This would occur if the school offers a fellowship program (usually two years or less), or a practitioner-in-residence (usually less than four years), or some other, similar short-term faculty position. It may also occur if the law school started a new, experimental clinic that the school was not sure it would continue. After four years, however, the position is no longer a “short-term” appointment.

The last sentence of Standard 405(c) also contemplates that programs that do use short-term appointments would still be “predominantly” staffed by full-time clinical faculty members that have a form of security of position reasonably similar to tenure. The use of the word “predominantly” suggests that something more than a simple majority of the students and credit hours are taught by full-time clinical faculty with tenured, tenure track or long-term appointments. “Predominantly” also suggests that more than a majority of the clinical faculty will be full-time faculty with tenured, tenure track or long-term appointments.

In addition, Standard 405’s reference to “full-time faculty” must be read in conjunction with the policies concerning “full-time faculty” in Standard 402 (c).

4. Standard 401. Qualifications

CLEA proposes a new interpretation to provide guidance to law schools engaging in teacher reviews of faculty teaching live-client clinical courses. In recent years, an increasing number of faculty report that some law school faculties are not sensitive to issues of client confidentiality when conducting teacher reviews of faculty in live-client clinics. Part of this insensitivity may be due to the increasing number of faculty teaching in law schools either who do not have J.D. degrees or who have little or no practice experience. Because this issue arises in the context of teaching reviews, often in connection with questions of awarding clinical faculty long-term contracts or tenure, the clinical faculty are in vulnerable positions concerning their employment security. CLEA believes that the ABA should expressly acknowledge that legal educators and their law schools must respect the ethical duties owed to client rights and respect issues of client confidentiality in conducting teaching reviews in live-client clinical courses.

Interpretation 401-2:

In evaluating faculty teaching live-client clinical courses, due regard to issues of client confidentiality shall be observed and informed client consent obtained if confidential client information is shared with faculty who are not members of the clinical law office.

Conclusion

CLEA appreciates the opportunity to comment on proposed changes, and hopes that the SRC finds the recommendations helpful. With the exception of the recommendation for Interpretation 401-2, which reaffirms the ethical duties of law schools, all of the proposed changes are meant to reinforce or clarify existing language in the Standards and Interpretations.