

**Comment on Proposed Changes to Chapter 4 of the ABA Standards
for Approval of Law Schools
Submitted by the Clinical Legal Education Association
March 9, 2005**

The Clinical Legal Education Association (CLEA) has reviewed the language reported for comment by the Council at its December 2004 meeting, and will focus its attention on proposed changes to Standard 405. CLEA agrees with the Council that changes are needed to harmonize the varied approaches to the treatment of clinical faculty that do not comply with the “reasonably similar” treatment required by Standard 405c.

CLEA previously submitted comments to the Standards Review Committee reflecting the concern that modifications in the Interpretations should reinforce the plain meaning and intent of 405c that “[a] law school shall afford to full-time clinical faculty members a form of security of position reasonably similar to tenure, and non-compensatory perquisites reasonably similar to those provided to other full-time faculty members.” CLEA believes that the proposed amendments to Interpretations 405-6 and 405-8 do not go far enough to achieve that end. Specifically,

1. the proposed change to Interpretation 405-6 does not make it clear that the long-term contracts either must be presumptively renewable or a school must have “good cause” not to renew for the contracts to be reasonably similar to tenure.

2. the proposed change to Interpretation 405-8 does not guarantee that clinical faculty shall have the right to vote on personnel matters involving clinical faculty, a right which is necessary for clinical faculty voting rights to be reasonably similar to other full-time faculty.

Thus, CLEA resubmits its proposed language and arguments submitted to the Standards Review Committee last August, and asks that the Council consider the language CLEA originally proposed as more consistent with the requirement of Standard 405c that full-time clinical faculty shall be treated “reasonably similar” to other full-time faculty.

CLEA submits its comments aware that there is a small but vocal group of law deans who object to any steps that guarantee full-time clinical faculty treatment reasonably similar to that of other full-time faculty, as required by Standard 405. CLEA believes that this resistance has been long-standing and resulted in the so called unwritten “common law” of the Accreditation Committee that largely permitted some law schools to avoid compliance with Standard 405. In 1996, the ABA House of Delegates adopted the current language in Standard 405 over the objection of some of the same deans who oppose the current proposals meant to reaffirm that the plain language adopted by the ABA House of Delegates in 1996 means what it says.

CLEA notes that the resistance to regulation by the ABA was most recently present in 2003 when the Council rejected a proposal to do away with tenure all together. The Council wisely determined that arguments against security of position for all law faculty were outweighed by long-standing principles of the need for security of position to guarantee academic freedom. As with other faculty, those who teach clinical courses hold a variety of views as to how the balance should be struck with regard to tenure. However, one position is clear: to the extent that some faculty have the security and authority that come with tenure, all faculty should have it.

With regard to academic freedom, guaranteed by security of position, the law faculty who have been most visibly vulnerable of late have been clinicians. In the past several years, clinical faculty at Tulane University, University of Pittsburgh, and University of North Dakota have been attacked for making access to the courts available to clients in environmental and civil rights matters. Without security of position reasonably similar to other full-time law faculty, such attacks might persuade clinical faculty that they should not risk their employment by following their ethical obligation to represent even unpopular clients or causes.

The governance issue speaks to the second-class citizenship still prevalent at far too many law schools in an even more fundamental way. Faculty who have little or no say in decisions made about curriculum, grading, admissions, appointments and promotions, budget, and other areas of the law school operation are effectively invisible. Their views do not count because they can be disregarded. This creates a dynamic within schools that makes it difficult to engage in serious dialogue about the role of clinical programs within the curriculum, or for clinical faculty to feel sufficiently related to the educational enterprise that structurally relegates them to the sidelines. Furthermore, students are aware of this inferior status and often view the courses accordingly. They may care about their clients and appreciate the learning that goes on in clinic, but the message from the school that the faculty and therefore the programs are somehow inferior is not lost on them.

Some would argue that because faculty on separate clinical tracks are not always required to publish they are somehow faculty of lesser intellectual depth, thereby justifying distinctions with regard to security and governance. However, if clinical programs are accepted as a valuable part of the law school enterprise and traditional scholarship is not seen by a given school as integral to that form of teaching, it seems disingenuous to then argue that this means the faculty hired are or should be treated as inferior.

CLEA notes that the unequal treatment of clinical faculty at some law schools has a disparate impact on women, who are represented in larger numbers on clinical faculties than on the other full-time faculties at most law schools.¹ Although resistance to treating

¹ Data collected from the AALS indicate that for the 1996-1999 academic years women comprised 26% of conventional tenure and tenure-track faculty but 68% of faculty not on a conventional tenure track. The 1998 ABA annual questionnaire demonstrate that 61% of women and 39% of men teaching in clinical

clinical faculty reasonably similar to other full-time faculty may not be rooted in gender discrimination, it is irrefutable that treating clinical faculty reasonably similar to other full-time faculty with regard to security of position and non-compensatory perquisites, including participation in faculty governance, will do much to end the current disparate treatment of women law faculty at some law schools.

Finally, CLEA notes that the proposed changes reported by the Council do not create new accreditation requirements. What they do is rectify the disjunction between the plain language that law schools “shall afford . . . reasonably similar” treatment for full-time clinical faculty and other full-time faculty and the so called common law of the Accreditation Committee that has permitted law schools to ignore the requirements of Standard 405c. All accreditation Standards are created equally, and the plain language of each Standard must be given full force if there is to be integrity in the accreditation function. CLEA applauds the Council for taking action to put the accreditation process on track by reversing a trend in the creation of “common law” that is direct contradiction with the plain language of Standard 405. Any “common law” that conflicts with the language of a Standard raises serious due process issues and suggests that not all law schools may be treated equally in the accreditation process. By guaranteeing that the plain language of Standard 405 will be followed, the Council will be taking a positive step toward reaffirming that each law school, each law student, each law faculty member, and the public can trust in the regularity and integrity of the ABA accreditation process. American legal education deserves no less.

Proposed Changes

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. 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 shall 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 that shall thereafter be renewable *except for good cause*. For the purposes of this Interpretation, “long-term contract” means at least a five-year renewable contract. 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.

programs are not tenured or tenure-track. See Richard Neumann, WOMEN IN LEGAL EDUCATION: WHAT THE STATISTICS SHOW, 50 J. Legal Educ. 313, tables 7 & 11 (2000).

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.

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).