

**COMMENT OF THE CLINICAL LEGAL EDUCATION ASSOCIATION
ON THE IMPORTANCE OF FACULTY SECURITY OF POSITION
TO CLINICAL LEGAL EDUCATION**

JUNE 24, 2013

The Clinical Legal Education Association (CLEA) is the nation's largest association of law professors, whose more than 1000 annual dues-paying members are committed to legal education in which law students learn to be competent, ethical practitioners. CLEA offers this comment in connection with the review by the Standards Review Committee of Accreditation Standard 405, which governs the status of law faculty. Our purpose here is to provide data to inform the Committee about the consequences to legal education should it recommend the elimination or evisceration of the requirement that law schools have a long-term commitment to their clinical faculty at a time when most faculty who teach doctrine have tenure status.

Some members of the Committee may be unaware of the precarious position of many of the law school faculty who engage in the kind of experiential methods that we know the Committee endorses. Only about one-third of law professors who identify themselves as clinical teachers are in tenured or tenure-track positions, while tenure is, of course, the norm for teachers of doctrine. In this difficult economic environment for law schools, clinical teachers who do not have tenure or presumptively renewable long-term contracts are already being terminated in favor of tenured doctrinal professors who do not engage their students in experiential learning.

Any change to Standard 405 that would give law schools the option to consign some faculty members to at-will employment while preserving tenure for others will inevitably segregate faculty who teach the clinical and skills curriculum into unequal and lesser professional status in many schools, and in some schools will result in the curtailment of clinical education. Legal education, and the profession, would suffer. We ask that the Committee carefully consider the facts as it proposes revisions to Standard 405.

For decades legal education has been the subject of criticism for its failure to graduate students capable of practicing law. Every other profession requires that at least one-quarter, and in some cases one-half, of a student's education be in professional role. Unlike these regulators, the ABA has never required that at least one fourth of a professional students' education be in practice in their field. 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.¹ Clinical programs provide the much-needed link between traditional legal education and the practice of law. The Carnegie Report explains that 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

¹ See 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.").

do.”² Faculty who teach doctrine and those who teach in clinical programs together provide law students with the analytical, investigative, legal reasoning, moral, client relations, ethical and practice skills necessary to graduate engaged, diligent, reflective and effective attorneys.

Nonetheless, as is well documented, most law schools have two classes of faculty.³ Those who teach only doctrinal law are presumed to constitute the core faculty and are afforded the protections of tenure and inclusion in law school governance. Those who teach lawyering, in contrast, are afforded little by way of the kind of security of position that is designed to attract and retain competent faculty. It was this historical divide that led to the adoption of current Standard 405(c) in 1996, which requires that a clinical program be “predominantly staffed” by full-time faculty having a position “reasonably similar to tenure.” Unfortunately, continued resistance to this Standard has led to uneven progress among law schools in terms of equality of security of position between those teachers who focus solely on doctrine and those who teach the application of that doctrine in practice settings.

The Center for the Study of Applied Legal Education (CSALE) has been gathering data since 2007 on, among other things, the role of applied legal education and educators in law schools. We attach as an appendix charts that summarize some of the findings of the CSALE 2010-2011 Survey of Applied Legal Educators. We invite the Committee to review the survey’s methodology and to examine all its data at <http://www.csale.org>, and we describe some of its findings below.

The CSALE data reveals that in 2010 nationwide only 33% of teachers in clinical programs and field placements were on any form of tenure track, whether separate from or unitary with other faculty.⁴ Adjunct faculty comprise 13% and contract faculty 43% of clinical educators. Of the contract faculty, 57% are working under contracts of three years or less. Only 61% of all contracts are “presumptively renewable.”

Participation in law school governance also is sharply restricted for most full-time clinical faculty. Only 37% are allowed to vote on all faculty matters (compared to universal participation for doctrinal faculty), 32% cannot vote on any matter, and 12% are not permitted to attend faculty meetings.⁵ At many schools, clinical faculty are not even allowed to serve on committees addressing the hiring and promotion of other clinical faculty, nor are clinical faculty allowed to serve on committees that address curriculum or academic standards.⁶

² *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.”)

³ *See, e.g.*, Sullivan et al., *supra* note 1 at 24 (observing that many clinics are “taught by instructors who are themselves not regular members of the faculty”).

⁴ CENTER FOR THE STUDY OF APPLIED LEGAL EDUCATION: THE 2010-11 SURVEY OF APPLIED LEGAL EDUCATION 27 (2011), *available at* <http://www.csale.org/>.

⁵ *Id.* at 28-29.

⁶ *Id.* at 29 (reporting that 15% of full-time clinical faculty are not allowed to participate in committees addressing clinical hiring and promotion; a similar number are not allowed to serve on committees addressing curriculum matters).

Even where clinic faculty are allowed to participate in law school governance, their inferior employment status often means they are fearful of speaking up on controversial matters. In a 2008 survey of 332 clinical faculty, their willingness to express dissenting views on controversial law school governance matters closely correlated with their employment status.⁷ While 13% of tenured clinical faculty reported that they could not or avoided expressing dissenting views because of reprisal or the fear of reprisal, 18% of clinic faculty on long-term contracts (5 years or more) reported this fear and 44% of short-term clinical faculty (i.e., on employment contracts of less than 5 years) feel they cannot express dissenting views without actual reprisal or fearing there will be reprisal. Security of position, therefore, is essential to ensure that clinical faculty will be able to contribute to matters of law school governance.

In a 2008 report, the Council's *Special Committee on Security of Position* expressed doubt "that any comprehensive curricular reform can occur or that faculty governance can develop in a system where there is no security of position,"⁸ and observed that the documented threats to law clinic faculty "demonstrate the clear need for a form of tenure-like security and academic freedom" for clinical faculty.⁹ Looking back at the history of Standard 405(c), it noted that precise rules under Standard 405 for clinical faculty were necessary to move some schools forward in their skills programs. The *Special Committee* expressed particular concern that, if security of position were removed from the Standards, clinical and legal writing programs would suffer because "even if law schools generally have embraced skills training, some universities might pressure law schools that have merged many of those faculty into tenure-track or tenure-like appointments to retreat to less secure contract arrangements for those faculty."¹⁰

Another consequence of eliminating provisions on security of position from Standard 405 will be to put clinical faculty at enhanced risk of interference with their teaching and lawyering responsibilities. There have been more than 35 publicized instances of interference in law clinic casework as a result of external pressures on law schools and universities, including well publicized attacks on clinics at the University of Maryland, Tulane University, and the University of Oregon.¹¹ The executive director of the AALS observed that for each reported case of interference "there are many dozens of criticisms voiced less formally."¹² A survey of clinical faculty found that 12% had encountered actual interference by other law faculty or administrators in their casework, with 36% saying they worry about the reaction of faculty or administrators to their casework and 15% reporting that the worrying had affected their case selection decisions.¹³ As one clinic attorney explained, "there is no question we worry constantly that our willingness to represent unpopular clients and our success in suing government bodies will cost us."¹⁴

⁷ Robert R. Kuehn & Bridget M. McCormack, *Lessons From Forty Years of Interference in Law School Clinics*, 26 GEORGETOWN J. LEGAL ETHICS 59, 78-79 (2010).

⁸ ABA SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR REPORT OF THE SPECIAL COMM. ON SECURITY OF POSITION 12 (2008).

⁹ *Id.* at 11.

¹⁰ *Id.* at 17.

¹¹ Kuehn & McCormack, at 74-75, 92-95.

¹² *Id.* at 74.

¹³ *Id.* at 76-77.

¹⁴ *Id.*

Consistent with this data, in 2007, the ABA's *Accreditation Policy Task Force* recognized the "credible argument that there is a particularized need to afford explicit, concrete academic freedom protection for clinical faculty given the long history of attempts at interference,"¹⁵ taking note of "the long history of attempts at outside interference with advocacy by clinics."¹⁶ While acknowledging that the current system was imperfect, the Task Force concluded that "[i]t seems highly doubtful that having a major part of faculty at-will employees would promote the ABA's goals of a sound program of legal education, academic freedom, and a well-qualified faculty."¹⁷

The evidence is clear. Despite their considerable contributions to legal education over the last quarter century, on a national level faculty who teach students to practice law have not acquired the same seat at the legal academy table that is afforded doctrinal faculty. Those law schools that have welcomed professors of clinical courses as equal partners in legal education have benefited from the perspectives and experiences of those faculty members and their students have benefited in law practice. In contrast, where they cannot debate, govern, and otherwise fully participate in the intellectual and administrative life of a law school, clinical faculty are limited in their ability to influence and innovate in their institutions.

If law schools are to fulfill their mandate to educate competent practitioners and to advance the profession, teachers and scholars who focus on the profession 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 continue to locate their faculty who teach professional skills at the margins.

CLEA members are acutely aware of the importance of innovation in legal education. Clinicians have been at the forefront of innovation over the last quarter century and support a regulatory system which leaves law schools free to innovate. But innovation will not be nurtured by marginalizing 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, the Standards must continue to ensure that clinical faculty are provided long-term contracts that can only be terminated or not renewed "for cause;" that faculty who teach in clinics be afforded the same governance rights as doctrinal faculty; and that faculty who teach in clinics enjoy academic freedom. We operate in a real world. In that world, doctrinal law professors have and will continue to enjoy the rights of tenure. Clinical law professors largely do not. The Committee should consider very carefully the impact on legal education that institutionalizing the inequality of professional status for those who teach clinics and professional skills would undoubtedly have.

¹⁵ ABA SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, REPORT OF THE ACCREDITATION POLICY TASK FORCE 22 (2007).

¹⁶ *Id.* at 22.

¹⁷ *Id.*

APPENDIX

Employment Status of Clinical Program Faculty in US Law Schools 2010-11

<u>Employment Status (Full Time Only)</u>	<u>Percentage</u>
Contractual Appointment	51.6%
Tenured / Tenure Track	28.3%
Clinical Tenured / Clinical Tenure Track	10.2%
Adjunct	1.1%
Other (mostly visitors)	6.2%
Non-Adjunct At Will	2.2%
Fellow	7.3%
<u>Contract Duration</u>	<u>Percentage</u>
1 year contract	12.3%
2 year contract	2.6%
3 year contract	9.5%
4 year contract	1.1%
5 year contract	14.7%
6 or more year contract	4.6%

Source: Center for the Study of Applied Legal Education (CSALE): "Report on the 2010-11 Survey"

Summary of Employment Status of Clinical Faculty in US Law Schools:

- 62% of clinical faculty nationwide are on contract status, not tenured or tenure-track
- 42% of the 62% of clinical faculty who are on contract status have no form of security of position as defined by current Standard 405
- The majority of the clinical faculty contracts that have no form of security of position are of 4 year or fewer in duration
- Including part-time clinicians (part-time clinicians are 18% of all clinicians), approximately 1/2 of all clinical program faculty do not have any form of security of position as defined by current Standard 405

Source: Center for the Study of Applied Legal Education (CSALE): "Report on the 2010-11 Survey"

Governance Rights of Clinical Program Faculty in US Law Schools 2010-11

<i>Matters To Be Voted Upon</i>	<i>% of Respondents Entitled to Vote</i>
Vote on All Matters	36.8%
Vote on All Matters Except Classroom/Doctrinal Faculty Hiring, Promotion, and Tenure	30.5%
Vote on Administrative Matters Only	1.1%
No Vote But Can Generally Attend Meetings	19.1%
Not Permitted to Attend Faculty Meetings	12.4%

Source: Center for the Study of Applied Legal Education (CSALE): "Report on the 2010-11 Survey"

Governance Rights of Clinical Program Faculty in US Law Schools by Faculty Status 2010-11

	<i>Total</i>	<i>Tenure</i>	<i>Tenure Track</i>	<i>Clinical Tenure</i>	<i>Clinical Tenure Track</i>	<i>4 – 6 yr+ Contract</i>	<i>1 – 3 yr Contract</i>	<i>Staff Attorney</i>	<i>Fellow</i>
<i>All Matters</i>	31%	100%	96%	29%	20%	12%	11%		
<i>All But Doc. Hiring/Prom</i>	31%		4%	64%	70%	74%	29%		
<i>Admin Matters Only</i>	21.5%			4%		5%	5%		
<i>No Vote But Attend</i>	14%			3%	10%	9%	37%	71%	83%
<i>Not Attend</i>	3%						18%	29%	17%

Source: Center for the Study of Applied Legal Education (CSALE): “Report on the 2010-11 Survey”