

# CLEA

## Clinical Legal Education Association

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January 11, 2013

Jeffrey E. Lewis  
Chair, Standards Review Committee  
Dean Emeritus and Professor  
Saint Louis University School of Law  
3700 Lindell Blvd.  
St. Louis, MO 63108  
By email to [lewisje@slu.edu](mailto:lewisje@slu.edu)

Re: Accreditation Standard 405

Dear Dean Lewis:

The Clinical Legal Education Association writes to assist the Standards Review Committee as it takes up the question of revisions to Standard 405 governing the professional environment of law faculty. We have two purposes.

First, we hope to inform the members of the SRC who may be unaware of the histories both of the development of this standard up until 2008 and of the SRC's deliberations on the standard and the widespread reactions to those deliberations in earlier phases of the 2008 comprehensive review. The provisions of Standard 405 are complex and may seem inexplicable to a reader who is not steeped in its history and in the critical role it has played in the evolution of the law school curriculum over the past thirty years.

Second, we take this opportunity to share a proposal for revisions to Standard 405 which keeps it largely intact while addressing the aspects of it that need to be changed. Were we writing on a blank slate, it is likely we would write something different. But the standard is the product of decades of consideration by the Council as it has increasingly recognized the importance of the clinical method and its outcomes in legal education in a complex historical, political, and economic context.<sup>1</sup>

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<sup>1</sup> A full history of the Standard can be found in Peter A. Joy & Robert R. Kuehn, *The Evolution of ABA Standards for Clinical Faculty*, 75 Tenn. L. Rev. 183 (2008).

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*CLEA is the nation's largest association of law teachers, representing over 1000 dues-paying faculty at over 180 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 their role as lawyers and who devote their energy and attention to identifying, teaching, and assessing proficiency in the skills and values essential to lawyering.*

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## **The Development of Current Standard 405**

The history of Standard 405 tracks the development of clinical legal education itself.<sup>2</sup> In the mid-1960's through the 1970's, as clinical legal education gained its early foothold in the legal academy, few clinicians were actual members of law school faculties. Instead, clinic teachers of the period were typically short-term employees drawn from legal services practice who set up grant-funded programs in law school basements or annexes. They came and went without much notice by law faculties. But by the end of the 1970's clinical legal education was maturing. Clinical teachers had begun to develop a sophisticated methodology encompassing the integration of lawyering theory, practice, and professional values. As this pedagogy matured, clinical professors developed a new body of legal scholarship addressing learning and lawyering in real practice settings. This trend continued into the 1990's and the 21<sup>st</sup> century. Today, clinical professors can no longer be dismissed as a ragtag bunch of activists. They 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 clarification and improvement of the norms and values of the legal profession.

The current standard that protects clinical faculty status is premised on the Council's recognition over the past thirty years that the continued improvement of legal education, and in particular its increasing focus on producing "practice-ready lawyers," requires that clinical teachers participate fully in law school governance and enjoy the academic freedom that comes with security of position, neither of which is realistically possible for teachers employed at will.

The ABA first mandated employment security for clinical law professors in 1982, following a series of studies and ABA reports that documented the connection between the quality of professional skills instruction and the permanence, status, and integration of professional skills teachers into the legal academy.<sup>3</sup> In that year, the SRC unanimously recommended that the ABA mandate that law schools "shall afford" security of position reasonably similar to tenure for all full-time faculty members whose primary teaching was in a professional skills program. After meeting resistance from schools unprepared to take this step, the Council adopted a weaker version of then-existing Standard 405(e), which said only that law schools "should afford" such status to clinical professors.<sup>4</sup>

Because of its "should afford" language, ABA Standard 405(e) did not achieve its goal of better integrating the clinical curriculum into legal education. Indeed, according to an ABA study, between 1984 and 1991 the national percentage of full-time professional skills faculty holding "tenure eligible slots" dropped by over five percent. In 1992, the ABA's MacCrate Report noted that while status for clinical faculty was improving, "progress has not been uniform, and at some institutions, it has come

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<sup>2</sup> A more complete history of the early development of clinical legal education in the United States can be found in Margaret Martin Barry, Peter Joy & Jon Dubin, *Clinical Education for this Millennium: the Third Wave*, 7 Clin. L. Rev. 1 (2000).

<sup>3</sup> These include the ABA's 1979 report, "Lawyer Competency: The Role of Law Schools" (the "Cramton Report"); the 1980 ABA study, "Law Schools and Professional Education: Report and Recommendations of the Special Committee for a Study of Legal Education" (the "Foulis Report"); and the joint ABA/AALS 1980 report, "Clinical Legal Education."

<sup>4</sup> Explicit governance rights for clinical faculty were first inserted in an interpretation to the Standards in 1988, although the Council stated at the time of adoption that it believed Section 405(c)'s "perquisites" language adopted in 1984 was always intended to bestow governance rights on full-time clinical faculty.

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." In order to ensure the ongoing integration of clinical education into the legal academy, in 1996, with the support of the AALS, the Council amended now-Standard 405(c) by changing the word "should" to "shall" 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."<sup>5</sup>

Since its adoption in 1996, Standard 405(c) has come under periodic assault as an inappropriate regulation that inhibits law school flexibility. Over the same period, law school clinics have come under attack by outsiders who object to the work of those clinics. The Council has repeatedly resisted efforts to eviscerate or eliminate Standard 405(c), recognizing the importance to legal education of the long-term, meaningful presence in law schools of committed, experienced teachers, and the potential for interference with their work by outsiders. Thus, in 1999, the Council declined to advance a proposal to eliminate all references to security of position in the accreditation standards, noting that its rejection was based on the "the important role of tenure in protecting academic freedom." In 2004, the Council similarly declined to advance an SRC proposal to eliminate any reference to tenure in the Standards and instead strengthened Standard 405(c) by adopting language in Interpretation 405-6 that "[f]or 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."

While many law schools have embraced and integrated clinical education and its teachers, others continue to resist the Council's efforts to make clinical education an essential part of legal education. In a widely-publicized showdown with Northwestern School of Law, the Accreditation Committee was persuaded to construe (in our view, to misconstrue) the language of Interpretation 405-6 to permit one-year at-will contracts for clinical faculty as long as the school has some process in place to protect academic freedom. In 2007, the SRC unanimously proposed an amendment to Interpretation 405-6 to close this unintended loophole, as follows:

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

The SRC 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." However, the Council postponed acting on this proposal pending its receipt of the report of the ABA Accreditation Policy Task Force. In the wake of the Task Force Report, the Council appointed a Special Committee on Security of Position, which reported back to the Council in May, 2008.

### **The SRC Deliberations on Standard 405 Since 2008 and the Responses to those Deliberations**

When the current comprehensive review of the standards began in 2008, the Council forwarded to the SRC the report of its Special Committee on Security of Position<sup>6</sup> to guide it as it reviewed Standard 405. The report recounts the history of the role of tenure and shared governance in the legal

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<sup>5</sup> Standard 405(c) also gave 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."

<sup>6</sup> The Report is available on the SRC's website at: [http://www.americanbar.org/groups/legal\\_education/committees/standards\\_review/special\\_committee\\_reports.html](http://www.americanbar.org/groups/legal_education/committees/standards_review/special_committee_reports.html).

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.” to protect the often controversial work of law school clinical faculty. The report 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. These questions remain those that the SRC must address in considering amendments to Standard 405.

The 2008 SRC decided, at the Council’s suggestion, to leave its discussion of Standard 405 until it completed its discussion of “outcome measures,” since the question of what outcomes should be required or encouraged implicates the composition of law faculties. Its discussions about Standard 405 took place at its meetings between July, 2010, and July, 2011. Its initial conversation was limited to looking at language contained in a “discussion draft” circulated by a single committee member that proposed to eliminate all mandates for permanent positions for law faculty. By the time of its final discussion of 405 in July, 2011, the proposal contained in the “discussion draft” (eventually styled “Alternative 1”) had little support inside the SRC. In the interim, the AALS, seventy law faculties, many judges, deans, and university presidents, and a broad range of constituent groups in legal education had expressed strong opposition to the proposed elimination of the tenure and security of position mandates proposed in the “discussion draft.”

As the SRC now, more than a year later, takes a “fresh look” at Standard 405, it should be aware and mindful of the intensity of the reaction the “discussion draft” provoked among legal educators nationwide.<sup>7</sup> News about the “discussion draft” began to circulate when it was posted shortly before the July, 2010 meeting of the SRC. Twelve former presidents of the AALS immediately voiced a strenuous objection. The unanimous faculties of seventy different law schools soon followed—all sending resolutions of opposition and resistance to the proposals contained in the “discussion draft” to the SRC. In March, 2011, the deans of 18 law schools, all deans of color, sent the SRC a statement urging rejection of the proposal and stating:

Because tenure and security of position are both critically important to the attainment of diversity in legal education and to the achievement of justice for marginalized communities, we express our grave concern with the current proposals to weaken these traditional practices. Although we welcome efforts to innovate legal education, any approved changes must protect the value of diversity that is essential to freedom of thought, the robust exchange of ideas, pluralistic leadership, and social progress.

Simultaneously, the AALS urged the SRC to “reject the radical proposed changes to the role of the faculty” contained in the “discussion draft,” noting regarding clinical teaching that:

[t]o remove security of position and disrupt one of the fundamental pillars of support for institutional innovations seems especially perverse, just at the moment when many in the clinical community are being embraced by their colleagues as having earned the kind of status that will encourage their long-term commitment to the school and their fuller participation in the faculty.

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<sup>7</sup> Many of the reactions referred to here, and many more, are posted on the SRC’s web site in under “Comments on the Comprehensive Review,” in the section entitled “Terms and Conditions of Employment/ Clinical Faculty,” at [http://www.americanbar.org/groups/legal\\_education/committees/standards\\_review/comments.html](http://www.americanbar.org/groups/legal_education/committees/standards_review/comments.html).

After the SRC received these vigorous reactions to what was “Alternative 1,” a second proposal, labeled “Alternative 2,” emerged in the SRC. This proposal, like Alternative 1, eliminated the requirement that law schools provide some of its faculty with tenure but would require some form of contractual long-term relationship between faculty members and law schools. This alternative did not solve the problems raised by the AALS, the deans of color, the seventy law faculties, and the many others who urge the SRC to maintain the basic structure of Standard 405. It did, however, have more support on the SRC than did Alternative 1.<sup>8</sup>

We hope that all the current members of the SRC will read and discuss the many views, some described here but many others not, from important stakeholders in legal education, which have been voiced in opposition to the draft proposals discussed up to now in the committee. They can be found under the “Comments on the Comprehensive Review” tab on the Committee’s web site at [http://www.americanbar.org/groups/legal\\_education/committees/standards\\_review/comments.html](http://www.americanbar.org/groups/legal_education/committees/standards_review/comments.html).

### **CLEA’s Proposed Revisions to Standard 405**

We attach here CLEA’s proposal for a modification of current Standard 405. Our proposal addresses the serious weaknesses in the current standard while leaving intact the provisions on which law schools and faculties have long relied. Our work on this proposed language occurred against the backdrop of the prior Alternatives 1 and 2, which until yesterday were been the only publicly-available drafts of the SRC since its July 2011 meeting. Our proposal shares some of the characteristics of the most recent alternatives A, B, and C advanced by the Chapter 4 Working Group, which were posted yesterday, January 10, on the Standards Review Committee website. .

Given the outcry over the SRC’s earlier proposed revisions to Standard 405 and the fact that the current standard has not posed any significant problems for law schools, the wisest course is to make only the minimally needed changes to the language of 405. This is the tack attempted in Alternative A; however, although Alternative A is described as making only “stylistic” changes to the current standard, its changes to Standard 405(b) in fact go further. Because of the deep history and complex development of Standard 405, its current language should be retained to the extent possible. The CLEA proposal more closely tracks the current language of 405 than does Alternative A and it differs from Alternative A in four important respects.

First, the proposed revisions to 405(b) in Alternative A significantly change the current standard’s language concerning tenure, which has been the single most controversial aspect of the work of the SRC. This is far from an editorial restyling. The current language requires a law school to have a “policy with respect to academic freedom and tenure;” this provision has long been understood to require that at least some members of the law school faculty be tenured. Alternative A, in contrast, provides for a policy that provides for “tenure *or* a comparable form of security of position for full-time faculty,” thereby eliminating the existing requirement for any tenured faculty. The “comparable form of security of position” language is not defined or further explained in the interpretations that follow. The CLEA proposal leaves the language of existing 405(b) intact, which would avoid the kind of overwhelming negative reaction that the SRC received to its prior efforts, which were perceived as undercutting the tenure system in legal education.

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<sup>8</sup>Karen Sloan, “ABA panel considering boosting job protections for nontraditional faculty,” THE NATIONAL LAW JOURNAL, July 11, 2011, available at [http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202500221368&ABA\\_panel\\_considering\\_boosting\\_job\\_protections\\_f\\_or\\_nontraditional\\_faculty](http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202500221368&ABA_panel_considering_boosting_job_protections_f_or_nontraditional_faculty).

Second, the modified 405(b) language in Alternative A that refers to “a comparable form of security of position” is undefined, unclear, and inconsistent with other sections of Standard 405. Because it is applicable to all “full-time faculty,” the proposed revisions to 405(b) in Alternative A are directly inconsistent with Alternative A’s proposed standard 405(d), which permits law schools to relegate legal writing faculty to a form of security of position not comparable to tenure at all. Under the modified language in Alternative A it is unclear whether standard 405(d) now applies to all legal writing faculty or only to part-time legal writing faculty. The relationship between “a comparable form of security of position” in Alternative A’s 405(b) and the “reasonably similar to tenure” language in 405(c) is similarly unclear. The Interpretations define what “reasonably similar to tenure” means; “a comparable form of security of position” is nowhere defined. The CLEA approach uses the existing “reasonably similar to tenure” language in 405(c) and its existing interpretations to create a baseline standard for all full-time faculty who do not have tenure. CLEA’s proposed amendments to the Interpretations more fully define the phrase “reasonably similar to tenure.”

Third, the CLEA draft provides more workable language to close an unintended loophole in existing Interpretation 405-6, which has occasionally permitted one-year, non-renewable contracts to be judged as providing adequate security of position as long as they are coupled with policies on academic freedom. CLEA’s proposal uses language already adopted by the SRC in 2007 as the starting point for its proposed amendments to Interpretation 405-6. In particular, we note the benefits of the SRC’s choice in 2007 to use the more specific word “provision” instead of “arrangement” to clarify that extra-contractual “arrangements” to protect academic freedom are not a substitute for contractual security of position.

Finally, the CLEA draft adds more specific language to current Interpretation 405-8 to better define the level of participation required for all full-time faculty members in law school governance on academic matters. While Alternatives B and C provide more specific language defining “meaningful participation” in faculty governance, they do so in the context of larger changes to the standard that represent an unwarranted and radical departure from the time-tested status quo. In addition, Alternatives B and C do not require reasonably similar participation for all full-time faculty members in matters of appointment and promotion.

The Committee may be unaware of one of the most egregious existing disparities in faculty participation: the practice in some schools of excluding clinical and legal writing professors from voting on the appointment and promotion of faculty members *within their own field of study and teaching methodology*. While we recognize that there are many complicated issues relating to participation in tenure decisions by non-tenured faculty members, there is no justification for excluding clinical and legal writing faculty members from participation in decisions relating to other faculty members who share their status and teaching methods. By clarifying that participation in appointment and promotion decisions must be “reasonably similar,” the CLEA proposal moves the Standard 405 toward addressing this inequity.

As always we appreciate the opportunity to provide input into the SRC's thinking. We trust you will forward this comment and proposal to the other members of the Committee and look forward to observing your discussion at the upcoming meeting.

Very truly yours,

A handwritten signature in cursive script that reads "Katherine Kruse".

Katherine Kruse  
CLEA President

**CLEA PROPOSED REVISIONS TO STANDARD 405**  
[Strikeouts and underscoring are changes to current Standard 405]

**Standard 405. PROFESSIONAL ENVIRONMENT**

- (a) A law school shall establish and maintain conditions adequate to attract and retain a competent faculty.
- (b) A law school shall have an established and announced policy with respect to academic freedom and tenure of which Appendix 1 herein is an example but is not obligatory.
- (c) A law school shall afford to full-time ~~clinical~~ faculty members tenure or a form of security of position reasonably similar to tenure, participation in law school governance, and reasonably similar non-compensatory perquisites reasonably similar to those provided other full-time faculty members. A law school may require these faculty members in positions reasonably similar to tenure to meet standards and obligations reasonably similar to those required of other full-time faculty members. However, this Standard does not preclude a limited number of fixed, short-term appointments within a clinical distinct law school program as long as that program is predominantly staffed by full-time faculty members with security of position, or in an experimental program of limited duration.
- ~~(d) A law school shall afford legal writing teachers such security of position and other rights and privileges of faculty membership as may be necessary to (1) attract and retain a faculty that is well qualified to provide legal writing instruction as required by Standard 302(a)(3), and (2) safeguard academic freedom.~~

***Interpretation 405-1***

*A fixed limit on the percent of a law faculty that may hold tenure under any circumstances violates the Standards.*

***Interpretation 405-2***

*A law faculty as professionals should not be required to be a part of the general university bargaining unit.*

***Interpretation 405-3***

*A law school shall have a comprehensive system for evaluating candidates for promotion and tenure or other forms of security of position, including written criteria and procedures that are made available to the faculty.*

***Interpretation 405-4***

*A law school not a part of a university in considering and deciding on appointment, termination, promotion, and tenure of faculty members should have procedures that contain the same principles of fairness and due process that should be employed by a law school that is part of a university. If the dean and faculty have made a recommendation that is unfavorable to a candidate, the candidate should be given an opportunity to appeal to the president, chairman, or governing board.*



**Interpretation 405-5**

*If the dean and faculty have determined the question of responsibility for examination schedules and the schedule has been announced by the authority responsible for it, it is not a violation of academic freedom for a member of the law faculty to be required to adhere to the schedule.*

**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 sufficient to ensure academic freedom. Under a separate tenure track, a full-time ~~clinical~~ faculty member, after a probationary period reasonably similar to that for other full-time faculty on the tenure-track, 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 on the tenure track, during which the ~~clinical~~ faculty member may be employed on short-term contracts, the services of the ~~a~~ faculty member ~~in a clinical program~~ may be either terminated or continued by the granting of a long-term renewable contract. For the purposes of this Interpretation, "long-term contract" means a contract of at least a five-year contract that is presumptively renewable or includes other provisions, such as a requirement of good cause for nonrenewal, arrangement sufficient to ensure academic freedom. 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~~.*

**Interpretation 405-7**

*In determining if the members of the full-time ~~clinical~~ faculty in positions reasonably similar to tenure meet standards and obligations reasonably similar to those provided for other full-time faculty, competence in the areas of teaching and scholarly research and writing should be judged in terms of the responsibilities of ~~clinical~~ the faculty member's field of study or teaching. A law school should develop criteria for retention, promotion, and security of employment of full-time ~~clinical~~ faculty in positions reasonably similar to tenure and provide those faculty members non-compensatory perquisites reasonably similar to those provided other full-time faculty.*

**Interpretation 405-8**

*A law school shall afford to full-time ~~clinical~~ faculty members reasonably similar participation in faculty meetings, committees, and other aspects of law school governance involving academic matters such as mission, curriculum, academic standards, methods of instruction, and faculty appointments and promotions. ~~in a manner reasonably similar to other full-time faculty members~~. This Interpretation does not apply to those persons referred to in the last sentence of Standard 405(c).*