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Clinical Legal Education Association

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October 25, 2010

Donald J. Polden,
Chair, Standards Review Committee
Dean, Santa Clara Law School
Santa Clara University
500 El Camino Real
Santa Clara, CA 95053

By Email and United State Mail

Re: ABA Standards Review Committee's Consideration of Accreditation
Standard 405

Dear Dean Polden:

As the ABA Standards Review Committee continues its review of Accreditation Standard 405, the Clinical Legal Education Association offers the following comment. We hope it will prove useful as the Committee continues its important work. We ask that a copy of this comment be promptly distributed to all other members of the Committee and included in the materials provided to Committee members for its November 2010 meeting.

The Important Purposes of Regulation

The ABA's Council of the Section of Legal Education and Admissions to the Bar, is recognized by the U.S. Department of Education as the accrediting body for law schools and has the responsibility to ensure that quality legal education and training for practice in the legal profession are offered by the institutions it accredits. The ABA has expertise that the public lacks -- expertise in the necessary components that comprise quality education and training and in the structures within law schools that will produce capable, reflective, ethical practitioners.

The Committee's current comprehensive review of the ABA Accreditation Standards has largely avoided discussion of the role of accreditation in protecting the public's interest in legal education. Instead, it is proceeding on the basis of several unwritten premises that favor deregulation. The first is that quality legal education will best be promoted by providing law schools with maximum

(CLEA is the nation's largest association of law teachers, representing approximately 800 dues-paying faculty at over 160 U.S. 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 role as lawyers and who devote their energy and attention to identifying, teaching, and assessing proficiency in the skills and values essential to lawyering.)

flexibility to experiment with different approaches to curricular programming and staffing. A second is that law school deans need little guidance and have the necessary independence and commitment to make decisions about curriculum and staffing that will best promote the highest quality legal education, enhance the quality of legal services, and protect the public. A third is that the discipline of the market will mitigate the harm of bad ideas and ill-considered experiments in legal education. The law school is thus conceived as the commercial product of an innovative, competitive, and unfettered educational entrepreneur.

These premises have never been adopted or endorsed by the Council. Nonetheless, the Committee appears to embrace them and seems intent on proposing the wide-scale deregulation of law schools. Its favored approach is “hands-off” regarding the content of the curriculum; the governance role, security of position, and academic freedom of faculty; the qualifications for admission; and even the facilities and libraries that support a student’s education. Little, if any, evidence or experience support the notion that individual school innovation coupled with market controls are adequate substitutes for regulation or have informed the Committee’s deliberations. The prevailing operating premises of the Committee are unsound and worrying.

First, as a general matter, the Department of Education depends on all of its accrediting agencies to protect the public by distinguishing accredited schools from for-profit “diploma mills” that are designed more for monetary gain than for the good-faith provision of education and training. Consistent with its responsibility, the ABA must ensure that every school it accredits is providing a sound legal education. The Committee’s current deregulatory proposals appear to assume, without evidence, that all schools that might seek accreditation operate in good faith, share basic norms of what good legal education requires, and can be trusted to resist the temptations of profit and to place the public trust above their own self-interest. Although it is important to consider the impact of regulation on schools that do operate in good faith, every Standard must also be evaluated with an eye toward how it might be abused by institutions that are interested primarily in profit rather than quality education. There has, to our knowledge, been no scrutiny of this kind in the comprehensive review process thus far.

Second, and more specific to clinical legal education, the Committee has entirely disregarded without any discussion the role that ABA accreditation has played historically in pushing reluctant schools to develop and integrate professional skills training and clinical legal education into their curricula. The ABA has had considerable success in this regard, despite the overwhelming capture of law school governance by faculty members whose scholarly work and teaching do not reflect a practice orientation and many of whom lack experience as a lawyer. Every time the ABA (or any other organization) has studied legal education, the same deficiencies are apparent: there is too much focus on and repetition of cognitive skills of legal analysis and too little teaching of other lawyering skills that will prepare students for the ethical and effective practice of law.¹

¹ See, e.g., ALFRED ZANTZINGER REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW: HISTORICAL DEVELOPMENT AND PRINCIPAL CONTEMPORARY PROBLEMS OF LEGAL EDUCATION IN THE UNITED STATES WITH SOME ACCOUNT OF CONDITIONS IN ENGLAND AND CANADA (1921) (Reed Report, Carnegie Foundation); Karl Llewellyn, *The Place of Skills in Legal Education*, 45 COLUM. L. REV. 345 (1945) (reprinting the body of the

Our society's recent experiences with the costs and consequences of ill-considered deregulation should give pause to all involved with the standard-setting process for American legal education. We urge the Committee to put the brakes on its drive to deregulate and instead to consider the public's interest in an accreditation process which uses its regulatory authority to develop substantive, structural requirements which protect and advance the quality of American legal education.

The Current Position of Clinical Faculty in the Academy

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. Equality of treatment for all full-time clinical faculty members is critical to the continued development of the education of lawyers. As the Carnegie Foundation Report, *Educating Lawyers: Preparation for the Profession of Law* (the "Carnegie Report") reminds us, a sound legal education requires that law students acquire a mix of analytical and practical skills.²

Clinical education provides the critical 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. Unfortunately, as lawyers know, there is a wide gulf between traditional legal education and the realities of law practice. Legal education still lags behind the education offered in other professional fields with regard to imparting to students the multifaceted skills necessary to effective practice.⁴

Despite their considerable contributions to legal education over the last quarter century, clinical faculty nationally have not acquired a seat at the head table. Those law schools that have welcomed clinical professors 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,

Llewellyn Report, AALS); ABA SECTION ON LEGAL EDUCATION AND ADMISSIONS TO THE BAR, REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON LAWYER COMPETENCY: THE ROLE OF THE LAW SCHOOLS (1979) (Cramton Report, ABA); REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT - AN EDUCATIONAL CONTINUUM (1992) (MacCrate Report, ABA); LAW SCHOOLS AND PROFESSIONAL EDUCATION: REPORT AND RECOMMENDATIONS OF THE SPECIAL COMMITTEE FOR A STUDY OF LEGAL EDUCATION OF THE AMERICAN BAR ASSOCIATION (1980) (Foulis Report, ABA); WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007) (Carnegie Report, Carnegie Foundation).

² SULLIVAN ET AL., *supra* note 1, at 97 ("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.

⁴ *Id.* at 27 ("Compared with the centrality of supervised practice, with mentoring and feedback, in the education of physicians and nurses or the importance of supervised practice in the preparation of teachers or social workers, the relative marginality of clinical training in law schools is striking.").

govern, and otherwise meaningfully participate in the intellectual and administrative life of a law school, clinical faculty 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 doctrinal faculty on these same vital issues.

At present, the overwhelming majority of clinical professors are treated as second-class citizens in their institutions. Data gathered by The Center for the Study of Applied Legal Education's 2007-2008 Survey of Applied Legal Educators shows that nationwide, only 34% of the respondent clinical law teachers are on any form of tenure track, whether separate from or unitary with other faculty.⁵ Twenty per cent of the teachers in clinical programs have no permanent faculty status at all -- they are adjunct faculty (12%), staff attorneys (2%), fellows (2%), and visitors (4%). The rest are contract faculty (46%). Of the contract faculty, 56% are working under contracts of three or fewer years, the majority of which are not presumptively renewable. The data unsurprisingly show that institutional support for scholarly activity correlates with status.

If law schools are to fulfill their mandate to educate competent practitioners and to advance the profession, clinical teachers and scholars must be located together with doctrinal teachers and scholars at the core of law school faculties. The dominant faculty in law schools remains the doctrinal faculty. Until 1996, Standard 405 freely permitted discrimination against clinical teachers, with the result that the teaching of lawyering was devalued in most institutions. A regulatory system that reverts to the situation of a generation ago and 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 relocate their clinical faculty at the margins.

As Unanimously Recommended by Standards Review in 2007, Section 405(c) Should Be Strengthened, Not Abandoned.

Over the past thirty years, the ABA has worked diligently to integrate clinical legal educators into law school faculty.⁶ As the members of the Committee well know, clinical legal educators began their work at the margins of the legal academy, relegated to the basements of their law schools with little -- and, in many instances, no -- job security or participation in governance. In the years that led to the passage of ABA Standard 405(c), the ABA increasingly recognized that security of position for clinical faculty was necessary to the advancement of legal education.

Today, Standard 405(c) recognizes that clinical instruction is a cornerstone of legal education. It does so by providing to clinical legal educators a form of security of position that is "reasonably similar to" that afforded to traditional doctrinal tenure-track faculty. The Standard helps the ABA fulfill its mandate of having a highly-qualified law faculty that provides a sound

⁵ Center for the Study of Applied Legal Education, Report on the 2007-2008 Survey, <http://www.csale.org/files/CSALE.07-08.Survey.Report.pdf>

⁶ For a discussion of the history that led to the passage of Standard 405(c) see CLEA's "Historical Background on Clinical Faculty Accreditation Standards" submitted to the Standards Review Committee on June 4, 2010.

program of legal education. The same, or reasonably similar, protections as those afforded to doctrinal faculty -- retention, governance, and academic freedom⁷ -- as well as the reasons for those protections -- to develop an intellectual voice, to take positions on issues freely, to innovate, and to otherwise question and probe -- apply to clinical faculty.

The clinical experience is the inaugural moment for law students to engage the profession by assuming the professional responsibility for clients. The lessons students learn, the insights they gain, and the values they develop set the stage for their professional careers. Any evisceration of 405(c) would compromise the ability of law schools to produce graduates with the skills to engage the legal profession meaningfully and would turn the clock back to the not-so-distant past, when clinical education was regarded as a fleeting fad in legal education. Moreover, it would exacerbate the disjunction between our professional schools and our profession, one that the advancement of clinical education has uniquely addressed and ameliorated.

The “disconnect” with law practice still characterizes the legal academy. Despite the advancement of clinical legal education, the general acknowledgment that integrating the theoretical and practice components of law curricula are necessary to a sound legal education, and the flexible protections afforded by 405(c),⁸ most clinical faculty are still not on an equal footing with their doctrinal peers. As noted in the Carnegie Report, clinics are “typically...taught by instructors who are themselves not regular members of the faculty.”⁹

Many law schools continue to maintain a hierarchy with 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 lawyering 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. It was this kind of marginalization that led to the adoption of current Standard 405(c). Continued resistance to 405(c) has led to uneven progress among law schools in integrating clinical teaching into their curricula. Just three years ago, the then-Standards Review Committee understood that 405(c) actually needed to be strengthened, and it unanimously approved and forwarded to the Council revisions to Interpretation 405-6 that would have clarified the ambiguous language that led to the 2005 Accreditation Committee decision

⁷ Indeed, as the ABA’s Accreditation Policy Task Force noted in its May 2007 Report: “Supporters of [Standard 405(c)] make a credible argument that there is a particularized need to afford explicit, concrete protection of academic freedom for clinical faculty given the long history of attempts at outside interference with advocacy by clinics as part of the students’ coursework.” ABA, SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, REPORT OF THE ACCREDITATION POLICY TASK FORCE 21 (2007)

⁸ As CLEA noted in 1999 comments submitted to the ABA in response to a proposed amendment to remove Standard 405(c), this Standard “still affords law schools much greater flexibility with regard to the employment of clinical teachers than other faculty members.” Law schools can meet the requirements of Standard 405(c) even if they choose not to provide tenure to clinical faculty, pay clinical faculty less than traditional faculty, provide lesser governance rights to clinical faculty, use fixed, short-term appointments in a clinical program predominantly staffed by full-time faculty, and use similar short-term appointments in an experimental program of limited duration.

⁹ SULLIVAN ET AL., *supra* note 1 at 24.

involving Northwestern Law School, equating one-year, at-will contracts for clinicians with the phrase “long-term contract.”¹⁰

Neither the distant nor the more recent history of 405(c) should be ignored as this Committee considers proposing its elimination from the Standards. As noted by the ABA’s Accreditation Policy Task force, 405(c) is “the product of difficult and prolonged negotiation and compromise over many years,” which “arose in the context of real disputes in legal education and real problems at member schools.”¹¹ It has evolved as the best way to serve the various components of legal education. Law schools have complied with and relied on it as they have hired and made long-term commitments to their clinical faculty. Removing 405(c) from the Standards would be a drastic step, one that should only be taken on a strong consensus that it is absolutely necessary. There is no evidence that 405(c) has harmed legal education; nor is there any reason to believe that its elimination would benefit legal education.

The Accreditation Policy Task Force explained three years ago that removing 405(c) without providing alternatives that protect security of position would allow a law school “to staff all or a major part of its programs with faculty members who serve as at-will employees or in some similar capacity.”¹² As the Task Force expressed, “[i]t seems highly doubtful that such arrangements would promote the goals of a sound program of legal education, academic freedom, and a well-qualified faculty.”¹³

At a Minimum, the Standards Must Prohibit Discrimination Against Clinical Faculty and the Experiential Legal Education They Teach.

It is imperative for the quality and development of legal education that, at a minimum, the accreditation standards mandate that clinical faculty not suffer discrimination in employment status. The July 2010 draft’s proposed abandonment of all standards related to faculty status would permit law schools to consign some faculty members to at-will employment while tenuring others, resulting in the re-segregation of clinical faculty into unequal and lesser professional status and the diminishment of legal education.

By permitting law schools to tenure some of their faculty and to relegate others to at-will employment, the proposal currently before the Committee would have just that effect. And it would stifle 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 originate curriculum changes. 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 clinical faculty 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.

¹⁰ ABA Standards Review Comm., Draft Revisions and Explanation of Amended Interpretation 405-6 (2007).

¹¹ REPORT OF THE ACCREDITATION POLICY TASK FORCE, *supra* note 7, at 22.

¹² *Id.*

¹³ *Id.*

In the absence of a strengthened 405(c), a sound education for law students will require an accreditation standard that mandates full participation in institutional governance, including the appointments and review processes; guarantees job security and other essential aspects of scholarly employment; and ensures real academic freedom -- and does so for *all* full-time teaching faculty. That is how to attract and retain the best legal educators, both clinical and doctrinal. The accreditation standards must make clear that a school cannot afford faculty members lesser security of position or other rights and privileges of faculty membership based on field of study or method of instruction; such differences undermine the educational goal of preparing students for admission to the bar and for effective and responsible participation in the legal profession.

We join with the AALS, the AAUP, SALT, and the dozens of distinguished commentators who oppose the elimination of the requirement of tenure from the standards.¹⁴ But should the Committee propose this unwise course, we urge that, at the very least, the Standards should mandate that there be no discrimination in faculty status based on the program in which law professors teach. If the majority of the doctrinal faculty are eligible for tenure, then the clinical faculty must have equivalent job security: full governance rights; termination after a probationary period only “for cause;” and, consequently, genuine academic freedom to withstand the increasing assaults on their curricular choices from powerful interests outside the academy.¹⁵ Only if the majority of the rest of the faculty are at-will or under short-term contracts should clinical faculty ever be consigned to this relationship to their school.

Problems with the July Discussion Draft

Finally, the particular proposals currently before the Committee bear specific mention. The most recent proposal made available to the public is the July, 2010 “discussion draft” (not, apparently, a recommendation) on security of position from the subcommittee on Standard 405. We were present at the Committee meeting at which this draft was discussed and were dismayed that neither the draft itself nor the Committee’s ensuing discussion revealed any familiarity with, much less consideration of, the many comments the Committee has already received on this very issue. The views of major organizations such as the AALS, the AAUP, and SALT were entirely ignored. And the comments of the dozens of individuals, including judges, university presidents, deans, and law faculty, went unmentioned as well.

¹⁴ The current Standards have long been interpreted to require a tenure system of some sort. See Memorandum from Professor Richard K. Neumann, Jr., to the Standards Review Committee (October 25, 2010).

¹⁵ In a July 5, 2010 letter to the Standards Review Committee, later endorsed by many former presidents of the AALS and AAUP, university presidents, deans, and judges, Professor Robert Gorman makes this point eloquently:

It is precisely the clinical faculty member for whom academic freedom is a vital concern and not merely an abstract slogan, and for whom tenure provides a crucial guarantee that instruction can be carried out in the best interests of our students, and of the public. The “security of position” language set forth for clinical law faculty in Standard 405(c) is, I would urge, the least acceptable fall-back in the event that full-fledged tenure is not accorded them; but to dilute or weaken that Standard in any material way would reflect a flawed understanding of legal education and law schools today, and would fail to assure protections for academic freedom for those who need them the most.

The discussion draft proposes that the revised standards explicitly state that tenure rights are not required, and move away from so-called “intrusive mandates” about employment contracts and rights, substituting latitude and flexibility on such matters to approved schools. The accompanying report does not explain how these provisions further the principles of accreditation review the Committee announced in March, 2009, that is, to assure educational quality, advance the core mission of legal education, and provide clear and precise standards and requirements.¹⁶ Nor does it refer to, much less resolve, the important concerns raised by those who have submitted comments. We address some of the specific shortcomings of the July draft below.¹⁷

First, the development of the July draft and the ensuing discussion have thus far taken place in an historical and conceptual vacuum. In May, 2007, the Report of the Council’s Accreditation Policy Task Force noted the need to consider the reasons behind Standard 405 before proposing any changes.¹⁸ Soon after, the May, 2008, Report of the Council’s Special Committee on Security of Position stated that three factors are necessarily involved in any proposed alternative to existing Standard 405: that bright lines and precise rules are easier to comply with and to enforce equally; that the current rules evolved because earlier, general language had been inadequate to the necessary goal of moving experiential learning into the law school curriculum; and that abandoning specific faculty categories might result in universities constraining law schools in their treatment of clinical and legal writing faculty.¹⁹ Neither the July draft nor the Committee discussion raised a single one of these factors.

Second, for all law faculty, whether or not teaching in a clinical program, the July draft astonishingly fails completely to require any role for the faculty in the governance of a law school, leaving it to individual schools to include the faculty (or not) in any decision-making. Oddly, although the July draft purports to rely on the Report of the Council’s Special Committee on Security of Position, it ignores that Special Committee’s unanimous view that the Standards must in all events retain provisions that ensure the faculty’s role in the school’s governance of academic matters.²⁰ The July draft intentionally omits any reference to these issues.²¹ The Committee thus suggests that the governance role, if any, of the faculty should be left up to individual law school leadership. Certainly, it is not enough to require that a law school have “a policy” on faculty governance, since “a policy” may mean little if any faculty role. Faculty

¹⁶ ABA Standards Review Committee, “Statement of Principles of Accreditation and Fundamental Goals of a Sound Program of Legal Education” (March 10, 2009).

¹⁷ Of course, it is not possible to predict exactly what provisions will be in front of the Committee at its November, 2010, meeting, since most proposals are posted to the Committee’s web site far too close to the meeting date to allow for comment.

¹⁸ Report of the Accreditation Policy Task Force, *supra* note 7, at 22.

¹⁹ ABA, Section of Legal Education and Admissions to the Bar, Report of the Special Committee on Security of Position 16-17 (2008).

²⁰ *Id.* at 15-16.

²¹ The July draft asserts that “[o]ther Standards repose the responsibility for governance ... in the law school faculty.” But “other standards” do no such thing. Proposed Standard 205 (current 207) leaves this as “a matter for each institution” and simply requires that faculty “have a significant role.” Proposed 404(a) expressly allows non – uniformity among faculty members on this vital issue.

governance policies should have prescribed content through the Standards that assures the public that a competent faculty is responsible for developing and implementing a sound legal education.

Third, the July draft does not account for the role of the faculty in curricular development and the relationship between that role and a secure and committed relationship between the faculty and the school. As the Committee concurrently considers proposals that individual law schools be free to determine the educational outcomes that they wish to achieve, the role, if any, of the faculty of those schools in those determinations of mission, outcomes, and outcome measures, becomes all the more important. As the Special Committee noted, “[i]t is highly doubtful that any comprehensive curricular reform can occur or that faculty governance can develop in a system where there is no security of position.”²²

The particular effect of lack of security of position on the ability of clinical faculty to contribute to deliberations about the direction of a law school has been documented. In a survey of over 300 clinical faculty, 29% reported either not being able to express dissenting views or avoided expressing dissenting views on controversial law school governance issues for fear of reprisal.²³ The survey also found a direct correlation between security of position within the law faculty and the freedom a clinical professor feels to speak up on matters of governance -- 44% of short-term contract clinical faculty responded that they either could not express or avoided expressing dissenting views, compared to 18% of long-term contract clinical faculty and 13% of tenured clinical faculty. In addition, the ABA’s most recent survey of law school curricula noted that law schools “reported that the change in status [for clinical faculty] raised the importance and value of the clinical experience, and thus the clinical experience was enhanced.”²⁴

Fourth, the July draft is flawed by failing to acknowledge the particular need for protection for clinical faculty, a need that is all the more urgent in light of recent attacks on their programs. The Special Committee’s Report noted that the vulnerability of clinical positions and documented instances of attacks on clinical programs “demonstrate the clear need for a form of tenure-like security and academic freedom for clinical faculty.”²⁵ The earlier Report of the Accreditation Policy Task Force also noted that the documented history of attempts to interfere in law clinics heightened the need explicitly to address security of position for clinical faculty.²⁶ These assaults on the academic freedom of clinical teachers from outside the academy have only intensified in recent years, and the ABA has decried them.

Contrary to the assumption in the July draft, academic freedom needs more than “burdens,” “presumptions,” and a complaint procedure. Process can be manipulated and motivations are always obscure. Academic freedom requires that a faculty member have the security to take on controversial cases in clinic courses, engage in unpopular research, and speak

²² Report of the Special Committee on Security of Position, *supra* note 19, at 12.

²³ Robert R. Kuehn & Bridget M. McCormack, *Lessons From Forty Years of Interference in Law School Clinics*, 24 GEORGETOWN J. LEGAL ETHICS (forthcoming 2010).

²⁴ ABA, SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, A SURVEY OF LAW SCHOOL CURRICULA 43 (2004).

²⁵ Report of the Special Committee on Security of Position, *supra* note 19, at 11.

²⁶ Report of the Accreditation Policy Task Force, *supra* note 7, at 21-22.

out on disputed matters of faculty governance. The July draft would return legal education to the state of affairs that existed before 1996 for clinical teachers -- and, indeed, before 1940 for all university teachers -- by making security of position discretionary through the use of the term “should,” just as the pre-1996 old Standard 405(e) allowed law schools to relegate clinical legal education to the basement and clinical faculty to at-will status.²⁷

Finally, as the chair of the Council noted during the July, 2010, Committee meeting, many of the contemplated changes to the current standards are so vague as to be unenforceable. The “attract and retain a competent faculty” provisions of the July draft are a paradigm example of an unmanageable standard. It requires that the Council evaluate individually the “evidence” of the faculty’s competence without any specific determinants. As the 2007 Report of the Accreditation Policy Task Force warned:

In the absence of any specific standard, ...[whether the faculty is well-qualified] would have to be determined on a case-by-case basis. If that inquiry were taken seriously, the likely result would be an accreditation process far more intrusive, costly, and labor-intensive than that which currently exists. On the other hand, if that inquiry were not taken seriously, there would be little point in having an accreditation process at all.

To be workable, for any faculty position that does not provide an opportunity for a tenured appointment, the law school “shall” (not “should”) be required to demonstrate compliance with measurable standards that include a separate form of tenure or long-term, presumptively renewable contracts that can only be terminated for good cause; the ability to participate in law school governance in a manner similar to other full-time faculty members; and perquisites similar to tenured faculty, such as participation in faculty development and support programs.²⁸

Conclusion


Current ABA Standard 405(c) reflects the Council's historical commitment to strengthening legal education by insisting that law schools provide clinical faculty with a meaningful role in law school governance, coupled with a form of job security “reasonably similar” to those held by tenured “doctrinal” faculty. This is a flexible approach, balancing the need for experimental flexibility in clinical programs with a need for stability, longevity,

²⁷ In 1996, the Council, with relatively little controversy, mandated security of position for clinical faculty by replacing the word “should” with the term “shall.” ABA and AALS studies on the effect of the “should” language in then Standard 405(e) both concluded that it had not significantly improved the status of full-time professional skills faculty. ABA, OFFICE OF THE CONSULTANT ON LEGAL EDUC., FINAL REPORT: RESULTS OF SURVEYS AND QUESTIONNAIRES REGARDING THE STATUS OF PROFESSIONAL SKILLS TEACHERS 1984-91 5 (1991); AALS, *Report of the Comm. on the Future of the In-House Clinic*, 42 J. LEGAL EDUC. 508, 556 (1992).

²⁸ We are skeptical that data on faculty retention rates demonstrates that a school has a system comparable to tenure. As those involved in the accreditation review process know, retention rate data, because it can reflect so many reasons for faculty turnover, rarely explains a school’s commitment to academic freedom or security of position.

protection of academic freedom and inclusion in law school governance for long-term clinical faculty. Standard 405(c) is a necessary constraint on market forces and internal faculty governance that may devalue the importance of professional skills training to overall legal education; that is why it needs to be preserved, indeed strengthened, not eliminated from the Standards. At a minimum, whatever choices a law school makes about the job security of its faculty, its clinical faculty must be included in faculty governance on a basis that is equal to other faculty members, so that their expertise is included in important decisions about the future of legal education in their own institutions and nationwide. If governance is to work, clinical teachers also require real protection of their academic freedom and job security. The July discussion draft's proposal to eliminate all requirements for faculty governance and security of position accomplishes none of these goals.

Very truly yours,

A handwritten signature in black ink, appearing to read "Robert Kuehn", with a long horizontal flourish extending to the right.

Robert Kuehn, President

cc: Hulett H. Askew, Consultant on Legal Education (by email)
Charlotte Stretch, Assistant Consultant (by email)
Professor Margaret Martin Barry, Vice-Chair, Standards Review Committee (by email)