

# C L E A

Clinical Legal Education Association

<http://cleaweb.org>

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*CLEA is the nation's largest association of law teachers, representing over 900 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.*

March 25, 2011

## VIA EMAIL AND FIRST CLASS MAIL

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

Re: Proposed Revised Accreditation Standard 405

Dear Dean Polden:

I write on behalf of the Clinical Legal Education Association (CLEA) in response to your December invitation to provide the Standards Review Committee (Committee) with specific proposals to address the deficiencies we have noted in draft revisions of Accreditation Standard 405. As you know, CLEA has been critical of the Subcommittee on Security of Position, Academic Freedom and Attract and Retain Faculty's drafts for eliminating security of position for full-time law faculty and for failing to protect the role of faculty in law school governance. We have expressed our dismay over proposed provisions that could exclude entire categories of law school faculty from any meaningful role in governance, even when other faculty have a role, and for failing realistically to protect the academic freedom of law teachers of all kinds.

To address these serious problems with the Subcommittee's proposal, we therefore attach a proposed revision that would retain Standard 405's present structure but address some of the concerns others have expressed about the current standard. We also believe that what is labeled on the Committee's website as "DRAFT - 405 Wolff/Barry 26 February 2011" is a promising approach to the issues of academic freedom, security of position, and faculty governance and look forward to the Committee's discussion of its provisions.

We are encouraged by the Committee's openness to alternative approaches and hope that as it considers our proposal it will appreciate the history of Standard 405 as the product of twenty-five years of work by the Council of the ABA Section of Legal Education and Admissions to the Bar

(Council), law schools, and the profession to advance legal education by ensuring that it trains students not only in legal doctrine but also in the necessary professional values, skills, and identity. Current Standard 405 on the whole has served its purpose, resulting in substantial and critical improvements in the education of new lawyers. The burden is on those who want to radically restructure Standard 405 to demonstrate that their proposal will advance the quality of legal education; that burden has not been met.

We also hope that in considering our proposal the Committee will recognize the contradiction between its work to improve law school curriculum by including stronger requirements for education in professional skills and values and the current proposal to eliminate provisions that ensure the quality of the very people who teach those skills and values. Should the Subcommittee's "DRAFT FOR April 2011 Meeting" be adopted, we have no doubt that decision-making within some law schools about the mission, direction, and purpose of legal education is likely to become even more dominated by doctrinal concerns, rolling back the significant progress schools have made toward including more education in skills and values. This is a particularly troubling prospect when considered within the context of the Committee's larger shift from input standards to outcome measures, which call on faculties to take a greater role in defining the missions and methods of their schools.

The proposal we attach here will achieve the stated goals of the ABA's comprehensive review of accreditation standards -- assuring educational quality, advancing the core mission of legal education, and providing clarity and precision, while also giving schools the flexibility that you believe is important. Because a number of participants in this process have suggested that the best approach to Standard 405 is simply to address its specific issues, and since you told the Council last December that the Committee would be open to providing a less radical revision of 405 than your Subcommittee's proposal, we hope you will give careful consideration to the language we suggest and forward it to the Council for its consideration.

Below is an explanation of some of the provisions in our proposed re-writing of Standard 405:

- The proposal no longer identifies "clinical" faculty in Standard 405(c) and current Standard 405(d) has been eliminated. There is no educational justification for failing to treat full-time legal research and writing faculty like other full-time faculty, which the revised approach to 405(c) would now do. The proposal maintains the flexibility of the current standard as the last sentence retains the language allowing a limited number of fixed, short-term appointments within a distinct law school program (e.g., legal research and writing program, clinical program).
- The proposal does not address the issue of tenure in Standard 405(b) and Interpretations 405-1 and 405-2. As do most others, we believe that current Standard 405 already requires law schools to provide a system of tenure.<sup>1</sup> We would certainly support

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<sup>1</sup> For a comprehensive analysis of the role of tenure in Standard 405, see Memorandum from Richard K. Neumann, Jr. to Standards Review Committee (Oct. 25, 2010) (on file with ABA Standards Review Committee at [http://apps.americanbar.org/legaled/committees/Standards Review documents/Comment - Security of Position - Richard K Neumann Jr October 2010.pdf](http://apps.americanbar.org/legaled/committees/Standards%20Review%20documents/Comment%20-%20Security%20of%20Position%20-%20Richard%20K%20Neumann%20Jr%20October%202010.pdf)). See also the former chairman of Standards Review's statement

proposals to make this matter clearer and to better reflect the 1999 and 2003 actions of the Council in voting down proposals from the Standards Review Committee to abolish Standard 405's requirement of a system of tenure.

- The changes to Interpretation 405-6 should look familiar to the Committee. They reflect the amendments unanimously approved and forwarded by the Committee to the Council in 2008 to make clear that “a one year contract plus a policy on academic freedom is not sufficient under this Standard [405(c)]” to provide security of position, guidance which had been sought by the Accreditation Committee.<sup>2</sup> We agree with the Accreditation Committee that it is essential for the standards to set forth clearly what is acceptable security of position.
- The last clauses in both paragraphs of Interpretation 405-6 are deleted because 405(c) no longer references clinical faculty; this deletion is not meant to change the good cause bases required for termination.
- The edits to Interpretation 405-7 merely make it consistent with the new approach of Standard 405(c). We appreciate that the phrase “in positions reasonably similar to tenure” in this Interpretation and in the second sentence of Standard 405(c) is somewhat wordy. However, we believe the phrase most clearly captures the group of non tenure or tenure-track faculty covered by the first sentence of Standard 405(c).
- The phrase “participation in law school governance” in proposed Standard 405(c) and the edits in Interpretation 405-8 ensure that all full-time faculty members will be afforded participation in faculty governance. This is consistent with the proposal of the May 2008 report of the Council's Special Committee on Security of Position, on which part of the Subcommittee's current draft, but inexplicably not its governance provision, is based. In fact, the language in the first sentence of Interpretation 405-8 on the scope of faculty participation is taken directly from the “Report of the Special Committee on Security of Position” (p. 14).
- Interpretation 405-8 permits schools to preclude certain faculty from voting only on personnel matters when the person under consideration is outside the faculty member's field of study or teaching. This Interpretation directs that all full-time faculty participate in governance relating to curricular matters and ensures that faculty with expertise in a field participate in appointment and promotion decisions in that field. So that this new sentence is not viewed as an effort by the ABA to erode the traditional governance role of faculty with tenure, the ability of a school to restrict the input of some full-time faculty on personnel matters is limited to faculty without tenure.

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regarding the Idaho Bar Association's unsuccessful challenge in the House of Delegates “to the ABA Council's interpretation that the Standards require each law school to provide tenure for its full-time faculty.” Thomas L. Shaffer, *Four Issues in the Accreditation of Law Schools*, 32 J. LEGAL EDUC. 224, 233 (1982).

<sup>2</sup> ABA Standards Review Comm., Revisions to Standards for the Approval of Law Schools and Explanation of Amended Interpretation 405-6 (2008).

- Interpretation 405-9, in conjunction with the last sentence of Standard 405(c), continues to provide schools with the flexibility to maintain some full-time but limited-term faculty positions without security of position and governance rights.

The legal academy has been much and justly criticized lately for being disconnected from law practice, a particular problem in what has been called “the new legal economy.” The Standards should not exacerbate that problem by intentionally marginalizing precisely those faculty groups that play an increasingly important role in preparing students for the practice of law. We believe our proposed changes to Standard 405 address these concerns and will improve the quality of legal education and the preparation of law students for the practice of law.

We appreciate your consideration of the attached proposal.

Sincerely,



Ian Weinstein  
CLEA President

attachment: CLEA Proposed Revised Standard 405 (3/25/11)

cc: Members of the Standards Review Committee (by email)  
Hulett H. Askew, Consultant on Legal Education (by email)  
Charlotte Stretch, Assistant Consultant (by email)

**CLEA PROPOSED REVISED STANDARD 405  
(3/25/11)**

**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 participation in faculty meetings, committees, and other aspects of law school governance involving academic matters such as 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 preclude a law school from determining that faculty members without tenure can have limited voting rights on faculty appointments, retention, promotion, or tenure outside their field of study or teaching. This Interpretation does not apply to those persons referred to in the last sentence of Standard 405(c).*

**Interpretation 405-9**

*Subsection (c) ~~(d)~~ of this Standard does not preclude the use of short-term contracts for legal writing teachers, nor does it preclude law schools from offering fellowship or visiting assistant professor programs designed to produce candidates for full-time teaching by offering individuals supervised teaching experience.*