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The Evolution of ABA Standards for Clinical Faculty

by

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THE EVOLUTION OF ABA STANDARDS FOR CLINICAL FACULTY

PETER A. JOY* & ROBERT R. KUEHN**

I. INTRODUCTION

The value of clinical legal education courses and the faculty teaching those courses has long been contested. A focal point for this opposition has been resistance to the American Bar Association (ABA) accreditation standard that requires law schools to establish long-term employment relationships with clinical faculty and provide them with a meaningful voice in law school governance.¹ By integrating clinical faculty into law schools, the ABA aims to advance the value of clinical legal education and the professional skills and values that it promotes. In the decades since the ABA created the first clinical faculty standard, clinical legal education in the United States has developed as pedagogy and the number of clinical faculty has greatly increased. Despite these trends, a recent decision by the ABA Accreditation Committee approving short-term contracts and the denial of meaningful participation in faculty governance for clinical faculty demonstrates that the debate over the value of clinical legal education and the appropriate status for its faculty continues.² In this debate, there is often little to no mention of the history of

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1. The current standard provides: "A law school shall afford to full-time clinical faculty members a form of security of position reasonably similar to tenure, and non-compensatory perquisites reasonably similar to those provided other full time faculty members." SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, AM. BAR ASS'N, STANDARDS FOR APPROVAL OF LAW SCHOOLS, Standard 405(c) (2007) [hereinafter 2007 STANDARDS].

2. The ABA Accreditation Committee approved the Northwestern University School of Law's practice of restricting most clinical faculty to one-year employment contracts and denying those clinical faculty the participation in law school governance accorded other full-time law faculty. Letter and Decision of the Am. Bar Ass'n Accreditation Comm. from Hulett H. Askew, Consultant on Legal Educ. to the Am. Bar Ass'n, to Dr. Henry S. Bienen, President, Northwestern Univ., and David E. Van Zandt, Dean, Northwestern Univ. School of Law (Nov. 15, 2006) (on file with authors). Accreditation Committee actions are kept confidential by the ABA, but Dean David Van Zandt of Northwestern University School of Law released the decision of the Committee on a law school dean listserv. There is also a report that the Accreditation Committee approved one-year contracts for clinical faculty at St. Louis

the accreditation standard in question, perhaps because no historical account of its evolution exists. In this article, we fill that gap in the literature by tracing the evolution of the ABA standard concerning clinical faculty status.

Part II begins with a discussion of the role of the ABA in legal education and provides a brief history of the development of clinical legal education. In Part III, we discuss the events leading up to the initial adoption in 1984 of a standard addressing clinical faculty and the reasoning that animated the ABA. In Part IV, we discuss the events leading to the strengthening of the standard in 1996 and the arguments opposing the more meaningful integration of clinical faculty into law schools. In Part V we discuss changes to the standard in 2005 and how those changes have revived the debate of the status of clinical faculty. Finally, in Part VI we discuss the current debate over clinical faculty status and the ongoing activities of various ABA groups examining the status of clinical faculty. It is our hope that by surfacing the historical debates and the evolution of the standard for clinical faculty, this article will provide the basis for reasoned, informed decisions by the ABA and the legal academy concerning the value of clinical legal education and the role of clinical faculty in law schools.

II. A BRIEF HISTORY OF THE DEVELOPMENT OF CLINICAL LEGAL EDUCATION

A. ABA's Early Role in Legal Education

The casebook method emerged at the end of the nineteenth century as the most popular way to teach in American law schools.³ Its emphases on appellate decisions and the Socratic method signaled a shift from the applied skills training method inherent in the apprenticeship system that had been the dominant route to entry into the legal profession for more than two hundred years.⁴ As academic legal education expanded rapidly starting in the 1890s,

University School of Law, though no one has publicly released such a decision. Paulette J. Williams, *President's Message*, CLEA NEWSLETTER (Clinical Legal Educ. Ass'n, New York, N.Y.), Feb. 2007, at 1, 2 (on file with authors).

3. See Charles R. McManis, *The History of First Century American Legal Education: A Revisionist Perspective*, 59 WASH. U. L.Q. 597, 598 (1982).

4. In the mid-19th Century, there were three prevailing methods in the United States for teaching law: the applied skills training approach inherent in the apprenticeship system; the general education approach of the European legal education model, adopted by some colleges and universities in the United States such as William & Mary; and "an analytical and systematized approach to law" as interconnected rational principals taught primarily through lectures at proprietary law schools. *Id.* Of these three approaches, the apprenticeship system was the most dominant until the end of the nineteenth century. See RICHARD L. ABEL, *AMERICAN LAWYERS* 42 (1989).

the apprenticeship system essentially disappeared as a way to enter the legal profession.⁵

Around this same time, a small number of lawyers from almost two-thirds of the states founded the ABA, and the organization made advocating for formal legal education to better prepare students for the practice of law one of its founding objectives.⁶ At its fourth annual meeting in 1881, the ABA passed resolutions promoting a three-year course of study of law, a bar examination requirement for admission to practice, and a policy that “time spent in any chartered and properly conducted law school, ought to be counted in such state as equivalent to the same time spent in an attorney’s office in such state, in computing the period of study prescribed for applicants for admission to the Bar.”⁷ These ABA initiatives were largely aimed at tightening entry requirements into the legal profession, which was quickly growing due to the rapid rise of law schools, especially those operated as part-time enterprises.⁸

Into the first decade of the 1900s, the ABA discussed a wide range of topics affecting legal education, including prerequisites for admission to law school, the need for a three-year course of study, the contents of curriculum, and the role of practice experiences in legal education.⁹ To further its efforts toward establishing bar admission requirements and to build alliances with law schools and law professors, the ABA invited delegates from select law schools to attend a meeting in 1900.¹⁰ Thirty-five law schools sent delegates and they formed the Association of American Law Schools (AALS).¹¹ The ABA and the AALS asserted that their common cause was to advance law school

5. The reasons for this transformation are many. Apprenticeships were scarce, especially outside larger urban areas, and many existing lawyers did not welcome apprentices who were from the rising immigrant population with different ethnic, religious, or class backgrounds. ABEL, *supra* note 4, at 43. Lawyers also began to hire permanent clerks rather than take on apprentices. *Id.* Although states started to require bar exams, they often granted admission via a “diploma privilege” for law school graduates. *Id.* The combination of these factors, plus the relative low cost of attending law schools of that era, helps to explain the rapid demise of the apprenticeship system in the United States. *Id.*

6. EDSON R. SUNDERLAND, HISTORY OF THE AMERICAN BAR ASSOCIATION AND ITS WORK 5–10 (1953). The original ABA Constitution required the ABA President to appoint a Committee on Legal Education and Admissions to the Bar consisting of five members. *See Constitution*, 1 ANNUAL REPORT OF THE AMERICAN BAR ASSOCIATION 30–31 (1878).

7. *General Minutes*, 4 ANNUAL REPORT OF THE AMERICAN BAR ASSOCIATION 28 (1881).

8. ABEL, *supra* note 4, at 44. Richard Abel contends that the ABA was motivated by concerns that the number of lawyers was growing too rapidly and the status of lawyers was falling. *Id.* at 47. Abel notes that in addition to pushing for more rigorous law schools, in 1909 the ABA also sought to exclude non-citizens from entering the legal profession, a measure aimed at excluding recent immigrants from southern and eastern Europe. *Id.* at 68.

9. *See* SUNDERLAND, *supra* note 6, at 74–75.

10. Warren A. Seavey, *The Association of American Law Schools in Retrospect*, 3 J. LEGAL EDUC. 153, 157 (1950).

11. *Id.*

education.¹² These organizations primarily focused on classroom-based education that emphasized the teaching of legal doctrine and analysis.¹³

The emphasis on teaching legal doctrine and reasoning grew almost to the exclusion of experiential education. In the late 1890s and early 1900s, only a handful of law schools had established “legal dispensaries”¹⁴ or had programs in which students worked with local legal aid offices, and those programs that did exist were largely non-credit, volunteer experiences.¹⁵

In a 1921 study of legal education, the Carnegie Foundation for the Advancement of Teaching identified three components necessary to prepare students for the practice of law: general education, theoretical knowledge of the law, and practical skills training.¹⁶ The study found that legal education in the United States at the first part of the twentieth century lacked the “clinical facilities or shopwork provided by modern medical and engineering schools” and that there was no “foreign country in which education for the practice of law is so largely theoretical as it is in America.”¹⁷ The study noted that “[t]he failure of the modern American law school to make any adequate provision in its curriculum for practical training constitutes a remarkable educational anomaly.”¹⁸

Despite this critique of legal education, law schools continued to resist practical skills training. From the 1920s to the 1940s, law faculty disagreed about the value and feasibility of teaching lawyering skills other than legal analysis.¹⁹ During this same time period, the ABA and the AALS pushed

12. *See generally id.* at 154–63 (describing the birth and foundational missions of the ABA and AALS).

13. *See id.* at 155–59, 171–73.

14. *See generally* Jerome Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PA. L. REV. 907, 917–18 (1933) (using the term “dispensary” to argue that law schools should offer clinical experiences much like those at work in medical education). Harvard Law School termed its in-house clinic a “legal aid bureau.” *See* John S. Bradway, *The Nature of a Legal Aid Clinic*, 3 S. CAL. L. REV. 173, 174–75 (1930).

15. Law schools with volunteer legal aid bureaus or programs designed to involve law students with legal aid offices included law schools at Cincinnati, University of Denver, Harvard, University of Louisville, University of Memphis, Minnesota, Northwestern, University of Pennsylvania, Southern California, University of Tennessee, Washington University - St. Louis, Wisconsin, and Yale. Bradway, *supra* note 14, at 174; Robert MacCrate, *Educating a Changing Profession: From Clinic to Continuum*, 64 TENN. L. REV. 1099, 1102–03 (1997). A handful of law schools connected their legal aid programs to courses for credit or required participation of all third-year students. *See* Bradway, *supra* note 14, at 175–77.

16. ALFRED ZANTZINGER REED, CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW: HISTORICAL DEVELOPMENT AND PRINCIPAL CONTEMPORARY PROBLEMS OF LEGAL EDUCATION IN THE UNITED STATES WITH SOME ACCOUNTS OF CONDITIONS IN ENGLAND AND CANADA 276–78 (1921). This early Carnegie study of legal education is referred to as the Reed Report.

17. *Id.* at 281.

18. *Id.*

19. *See* ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S

efforts to create and raise accreditation standards for law schools, yet none of the standards encouraged clinical legal education experiences.²⁰

B. Academic Support for Clinical Legal Education From the 1930s–1950s

In spite of the lack of support for clinical legal education by the ABA and AALS early in the twentieth century, some of the most respected members of the legal academy were critical of law schools' exclusive reliance on what became known as the "casebook method" and doctrinal analysis.

In the 1930s and 1940s, Jerome Frank extolled the need for and virtues of clinical legal education.²¹ A 1944 report of the AALS Curriculum Committee, primarily authored by Karl Llewellyn, noted that the casebook method was "failing to do the job of producing *reliable professional competence* on the by-product side *in half or more of our end-product*, our graduates."²² In 1951, Robert Storey, then Dean of Southern Methodist University School of Law, praised the "clinical method" for exposing "the student to actual problems by confronting him with actual people who are in actual trouble."²³

Although some law school deans and faculty saw the potential for clinical legal education to teach students a range of lawyering skills and professional values, only 35 of 126 ABA-approved law schools offered clinical experiences by the late 1950s.²⁴ The clinical experiences offered were typically volunteer activities for both students and faculty. Only fifteen of the thirty-five schools with clinical experiences by the late 1950s awarded limited academic credit to students for their clinical work, and only five law schools gave supervising law faculty teaching credit for their clinical courses.²⁵

C. Expansion of Clinical Legal Education in the 1960s

Fueled by grant support, clinical programs began to grow significantly in the 1960s. From 1968 to 1978, the Council on Legal Education for Professional Responsibility (CLEPR), funded by the Ford Foundation, awarded grants for clinical programs to 107 ABA-approved law schools.²⁶ Professor Charles Miller, who started the University of Tennessee Legal Clinic

TO THE 1980s, at 214 (1983).

20. *See id.* at 172–80.

21. *See* Jerome Frank, *A Plea for Lawyer-Schools*, 56 *YALE L.J.* 1303, 1312–16 (1947); Frank, *supra* note 14, at 917.

22. Karl N. Llewellyn et. al., *Report of the Committee on Curriculum*, 1944 *ASS'N OF AM. LAW SCHS. PROC.* 159, 168, *quoted in* STEVENS, *supra* note 19, at 214.

23. Robert G. Storey, Foreword, *Law School Legal Aid Clinics*, 3 *J. LEGAL EDUC.* 533, 533 (1951).

24. *See* Joseph W. McKnight, *Report of Committee on Legal Aid Clinics*, 1959 *ASS'N OF AM. LAW SCHS. PROC.* 121, 121–22.

25. *Id.* at 122.

26. *See* John M. Ferren, *Prefatory Remarks*, 29 *CLEV. ST. L. REV.* 351, 352 (1980).

in 1947,²⁷ noted that the professional responsibility emphasis in CLEPR-funded programs stressed the need for a law student to assume the “lawyer role” as a necessary step to learn how to become an ethical practitioner.²⁸

Funding to develop or expand clinical programs continued through U.S. Department of Education Title IX grants from 1978-97.²⁹ By the end of the Title IX program, there were real-client, in-house law school clinical programs in at least 147 of the 178 ABA approved law schools.³⁰ Today, every ABA-approved law school offers in-house clinical courses, externships, or both.³¹

The growth of clinical legal education programs during the 1970s and 1980s also was paced by the development of clinical teaching methodology. Clinical faculty of this era began to construct a “common vocabulary of discourse on educational issues”³² and saw teaching students how to learn from experience as a primary goal of clinical legal education.³³

D. The Debate Over the Value of Clinical Legal Education and the Status of Clinical Faculty

Despite progress in key areas, proponents of clinical legal education continued to encounter resistance in law schools. The critics’ rationalization was that law graduates would learn lawyering skills and values when they

27. Douglas A. Blaze, *D9jB Vu All Over Again: Reflections on Fifty Years of Clinical Education*, 64 TENN. L. REV. 939, 939 (1997).

28. Charles H. Miller, *Living Professional Responsibility—Clinical Approach*, in CLINICAL EDUCATION FOR THE LAW STUDENT: LEGAL EDUCATION IN A SERVICE SETTING 99, 99 (1973).

29. Margaret Martin Barry, Jon C. Dubin & Peter A. Joy, *Clinical Education for This Millennium: The Third Wave*, 7 CLINICAL L. REV. 1, 19–20 (2000).

30. *Id.*; see Am. Bar Ass’n, Section of Legal Educ. and Admissions to the Bar, ABA-Approved Law Schools by Year (last visited Mar. 24, 2008), <http://www.abanet.org/legaled/approvedlawschools/year.html>.

31. See generally LAW SCHOOL ADMISSIONS COUNCIL & AM. BAR ASS’N, 2008 ABA-LSAC OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS (Wendy Margolis et al. eds., 2007) (listing clinical course offerings for all ABA-approved law schools). ABA accreditation Standard 302(b)(1) requires every law school to offer substantial opportunities for “live-client or other real-life practice experiences, appropriately supervised and designed to encourage reflection by students on their experiences and on the values and responsibilities of the legal profession, and the development of one’s ability to assess his or her performance and level of competence.” 2007 STANDARDS, *supra* note 1, at Standard 302(b)(1). “The offering of live-client or real-life experiences may be accomplished through clinics or field placements. A law school need not offer these experiences to every student nor must a law school accommodate every student requesting enrollment in any particular live-client or other real-life practice experience.” *Id.* at Interpretation 302-5.

32. Gary Bellow, *On Teaching the Teachers: Some Preliminary Reflections on Clinical Education as Methodology*, in CLINICAL EDUCATION FOR THE LAW STUDENT: LEGAL EDUCATION IN A SERVICE SETTING, *supra* note 28, at 374, 375.

33. See Barry, Dubin & Joy, *supra* note 29, at 17.

entered practice,³⁴ an argument that some still make today. This attitude belied the reality that most law graduates were not receiving postgraduate mentoring and that “even in the best settings and with the best of tutors . . . certain commercial or institutional forces” interfered with the learning process.³⁵ As a result, CLEPR and its supporters viewed law schools as the best venue for future lawyers to learn lawyering skills and the professional responsibilities of the legal profession.³⁶ An early CLEPR newsletter explained: “In the law school, removed from the necessity to earn a fee, the law student has [the] best and possibly [the] only opportunity to learn about managing a proper commitment to a client and his cause.”³⁷

At a CLEPR workshop in 1971, participants discussed the challenges of starting and running clinical programs.³⁸ They concluded that in consideration of the indifference or resistance of many traditional faculty members, a good clinical program required that a clinical faculty member have “security at the law school and . . . prestige among his colleagues.”³⁹ Without the security of a continuing employment relationship with the law school and a voice in law school governance, clinical faculty and the courses they taught were marginalized.

By the mid-1970s, CLEPR sought to enhance the status of faculty teaching clinical courses by a series of grants to raise clinical faculty salaries “to parity with classroom teachers” as a step to “eliminate one of the most serious handicaps in recruitment and retention of qualified clinical supervisors”⁴⁰

34. William Pincus, *Educational Values in Clinical Experience for Law Students*, CLEPR NEWSLETTER (Council on Legal Educ. for Prof. Resp., Inc., New York, N.Y.), Sept. 1969, at 1–2.

35. *Id.* at 2.

36. *See id.*

37. *Id.* at 3.

38. *See CLEPR Holds Workshops on Life and Times of the Clinical Law Professor*, CLEPR NEWSLETTER (Council on Legal Educ. for Prof. Resp., Inc., New York, N.Y.), Nov. 1971, at 1.

39. *Id.* at 3.

40. *Parity between Clinical and Academic Salaries Supported by New CLEPR Grants to Two Law Schools*, CLEPR NEWSLETTER (Council on Legal Educ. for Prof. Resp., Inc., New York, N.Y.), Jan. 1977, at 1. In January 1977, CLEPR awarded a grant to Northwestern University, which was matched by law school funds, to increase the salaries of five-tenure track clinical faculty to establish salary parity with non-clinical faculty. *Id.* at 1. Northwestern pledged to maintain the salary parity in future budgets, and CLEPR noted Northwestern’s “pioneer role in establishing new promotion and tenure criteria which take into account the special demands of clinical teaching.” *Id.* at 1–2. It is ironic that today Northwestern has relegated most clinical faculty to short-term contracts and pushed the ABA Accreditation Committee for a ruling approving of this inequitable treatment of clinical faculty compared to non-clinical faculty. *See supra* note 2. The other school to receive a salary parity grant in January 1977 was the University of Tennessee, which received funds to increase the salaries of twelve attorney/instructors. *Id.* at 2. In May through July 1977, CLEPR awarded additional salary parity grants to Hofstra (for six full-time clinical supervisors), University of New Mexico

At a series of conferences held by CLEPR in 1978, ineligibility for tenure emerged as the most fundamental difference between clinical and non-clinical faculty.⁴¹ The participants saw the questions of status and working conditions “inextricably tied to the law school’s basic perception of and commitment to clinical education.”⁴² As long as law schools granted tenure to academic teachers, the participants at the conference “agreed that if clinicians are to be truly equal members of the law school community . . . they should be considered for and granted tenure on the basis of demonstrated excellence”⁴³

As clinical programs became more prevalent in the 1970s, the status of faculty members teaching clinical courses became a matter of some debate, not just among clinical faculty, but also within the legal academy and ABA. By the end of the decade, many outside the legal academy were calling for law schools to establish long-term employment commitments to clinical faculty and to integrate clinical faculty into the governance of the law school as a means to further the development of clinical courses. The following section discusses the development of ABA Accreditation Standard 405(e), the first standard directed toward the status of clinical teachers.

III. ADOPTION OF THE INITIAL ACCREDITATION STANDARD 405(E)

Long before the ABA first adopted an accreditation standard on the status of law school faculty teaching clinical courses, leaders of the legal profession and reports on legal education repeatedly expressed concerns over what they considered the unfair treatment of clinical faculty and its negative effects on the development of clinical legal education.

A. Reports on Legal Education Favored Improved Status for Clinical Faculty

The first ABA report to identify the importance of clinical faculty status in legal education was the 1979 report “Lawyer Competency: The Role of Law

(for five clinical faculty), New York University (for twelve clinical faculty), Rutgers University-Newark (for four clinical faculty), and Yale University (for four clinical positions). *New CLEPR Grants Give Priority to Parity for Clinicians and to a Study for Clinic Guidelines*, CLEPR NEWSLETTER (Council on Legal Educ. for Prof. Resp., Inc., New York, N.Y.), Sept. 1977, at 1.

41. Laura Sager, *Career Perspectives for Clinical Teachers (A First Report)*, CLEPR NEWSLETTER (Council on Legal Educ. for Prof. Resp., Inc., New York, N.Y.), Apr. 1978, at 2.

42. *Id.* at 4. A CLEPR report on the second and third conferences noted that “the question of tenure for clinicians is a difficult and controversial one” because “[t]he tenure system itself is now under attack from many quarters and may ultimately be abandoned by the universities and law schools.” Laura Sager, *More on Career Perspectives for Clinical Teachers*, CLEPR NEWSLETTER (Council on Legal Educ. for Prof. Resp., Inc., New York, N.Y.), Oct. 1978, at 2.

43. *Id.* at 2–3.

Schools” (known as the “Cramton Report”).⁴⁴ The Cramton Report identified a series of institutional factors inhibiting improved law school training for the legal profession and recommended that law schools place greater value on skill development and on the faculty teaching lawyering skills, arguing:

Law school policies and practice of faculty appointment, promotion, and tenure should pay greater rewards for commitment to teaching, including teaching by techniques that foster skills development. Experimentation with and creation of new teaching methods and materials that focus on the improvement of such fundamental lawyer skills as legal writing, oral communication, interviewing and counseling, or trial advocacy should be valued no less highly than research on legal doctrine.⁴⁵

In 1980, another ABA study on legal education, the Foulis Report, observed that “the status of clinicians in the academic setting has not been satisfactorily resolved” and recommended “that appropriate weight be assigned to the effective teaching of legal skills.”⁴⁶

While these two independent reports on legal education were reaching similar conclusions that the status of clinical faculty should be improved to secure the development of clinical legal education, a joint committee of the ABA and the AALS was developing law school guidelines for clinical legal education that were based on similar conclusions.⁴⁷ This study resulted in the 1980 joint ABA and AALS report “Clinical Legal Education,” which included “guidance to law school faculties wishing to initiate clinical training programs or to evaluate existing programs.”⁴⁸ The committee was independent and highly respected, and its conclusions were far reaching. The ABA and the

44. SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, AM. BAR ASS'N, REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON LAWYER COMPETENCY: THE ROLE OF THE LAW SCHOOLS (1979). The report is named after the chair of the twelve-person task force, Dean Roger C. Cramton of Cornell Law School. The task force included three judges, one university president, two law school deans, a law professor, and five attorneys. Nine members of the task force were present or former members of the ABA Section of Legal Education and Admissions to the Bar. *Id.* at vii. Three members of Committee were later Chairs of the Council of the ABA Section on Legal Education and Admissions to the Bar: Willard L. Boyd, 1980–81; Gordon D. Schaber, 1981–82; and Robert B. McKay, 1983–84.

45. *Id.* at 26.

46. AM. BAR ASS'N, LAW SCHOOLS AND PROFESSIONAL EDUCATION: REPORT AND RECOMMENDATIONS OF THE SPECIAL COMMITTEE FOR A STUDY OF LEGAL EDUCATION OF THE AMERICAN BAR ASSOCIATION 9, 105 (1980). This report is referred to as the “Foulis Report” after Ronald J. Foulis, the chair at the time the report was issued. The report was the final product of a seven-year study of legal education. *Id.* at vii, 1.

47. *See generally* AM. BAR ASS'N & ASS'N OF AM. LAW SCHS., CLINICAL LEGAL EDUCATION: REPORT OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS/AMERICAN BAR ASSOCIATION COMMITTEE ON GUIDELINES FOR CLINICAL LEGAL EDUCATION (1980) [hereinafter CLINICAL LEGAL EDUCATION GUIDELINES] (providing new guidelines that emphasized the importance of clinical legal education).

48. *Id.* at iii.

AALS selected the members of the committee and no member was on the clinical faculty of a law school.⁴⁹ The committee chair was former law school dean Robert McKay, and the remaining members were a university president, two law school deans, two tenured non-clinical law school faculty members, and one member of the public.⁵⁰ The ABA and AALS issued guidelines providing law school deans and faculties with useful suggestions for the elements of sound clinical legal education programs and the reasoning for each guideline.⁵¹

The guidelines concerning faculty status for clinical faculty provided: "One or more of the faculty who have principal responsibility for the clinical legal studies curriculum should have the same underlying employment relationship as the faculty teaching in the traditional curriculum."⁵² Further, the guidelines noted that in addition to clinical faculty with equal status, some "individual schools may wish to have some principal clinical teaching responsibilities fulfilled by individuals not eligible for tenure" due to "budgetary considerations" and "the experimental nature of clinical legal studies [at this time]," but "full-time positions not eligible for tenure should be long-term employment" if the non-tenure track clinical faculty were to develop expertise in clinical teaching, develop components of the curriculum, or supervise the training of other faculty who were also teaching clinical studies.⁵³

49. *See id.* at 3. Two non-voting staff members for the Committee were clinical faculty: Steven H. Leleiko, Assistant Dean and Associate Clinical Professor at New York University School of Law, served as Project Director; and David Barnhizer, Professor of Law at Cleveland-Marshall College of Law and Chair of AALS Section on Clinical Legal Education, served as Special Consultant. *Id.* at 4.

50. *Id.* at i, 3. At the time he served as committee chair, McKay, former dean of New York University School of Law, was Director of the Justice Program of the Aspen Institute. *Id.* at 3. The university president was Willard L. Boyd, University of Iowa. *Id.* at 3. The law school deans were David J. McCarthy, Jr., Georgetown University Law Center, and Gordon D. Schaber, McGeorge School of Law. Henry W. McGee, Jr., University of California School of Law - Los Angeles, and Norman Penney, Cornell University School of Law, were the non-clinical faculty members. *Id.* The public member was Thomas B. Stoel, Jr., an attorney with the Natural Resources Defense Council. *Id.*

51. *See id.* at 6.

52. *Id.* at 33 (noting that "[a]t most schools eligibility for tenure is the basic employment relationship").

53. *Id.* The guidelines stated:

Long-Term Employment Positions: In addition to the foregoing faculty, individual schools may wish to have some principal clinical teaching responsibilities fulfilled by individuals not eligible for tenure. Reasons for having such nontenure-eligible positions include, but are not limited to, budgetary considerations, the experimental nature of the clinical legal studies curriculum, and the professional responsibility to live clients. Such full-time positions not eligible for tenure should be long-term employment if the occupants are required to: (1) possess or develop an expertise in the theoretical and empirical literature related to the issues covered in the clinical studies curriculum and engage in the related teaching; (2) develop or teach classroom components of the clinical legal studies

The guidelines explained that addressing the status issue was necessary because “the importance of clinical legal studies to the law school curriculum requires the application of tenure status to individuals principally teaching in the clinical legal studies curriculum.”⁵⁴ The guidelines recommended that at least one faculty member principally teaching in the clinic should have the same status as other faculty to satisfy the educational needs of the clinical program.⁵⁵ The guidelines anticipated that one reason law schools might want some clinical faculty on long-term contractual relationships rather than tenure was due to “the experimental and innovative nature of clinical legal studies, [and] schools considering or participating in its early development may not wish to commit themselves to a large number of tenure-track relationships.”⁵⁶

In drafting and explaining these guidelines, which were not designed as accreditation standards but rather to provide guidance for creating sound educational programs,⁵⁷ the drafters studied the state of clinical legal education in the late 1970s. The drafters expressed their belief that status equivalency between clinical and non-clinical faculty was important for the development of clinical legal education and that only the experimental nature of clinical legal education at many law schools justified the unequal security of position for some clinical faculty.⁵⁸ Even then, the guidelines stated that law schools should provide clinical teachers with long-term contractual relationships.⁵⁹

In addition to the issue of security of position, the guidelines contemplated that the integration of clinical legal education into the curriculum required law schools “to avoid any isolation of clinical legal studies” and to provide clinical

curriculum; and (3) supervise the training or teaching of other faculty or professional staff engaged in teaching the clinical legal studies curriculum.

Decisions Regarding the Status of Supervising Attorneys: Decisions regarding the status of full-time supervising attorneys should be made no later than the third year of their employment. During that year the law school should decide on one of the following as to each supervising attorney: (1) termination; (2) long-term appointment with change of status to an appropriately titled position (e.g., assistant clinical professor); or (3) placement on the tenure track.

Id. at 33–34.

54. *Id.* at 113.

55. *Id.*

56. *Id.* at 114. The reasoning was further explained in this way:

The Committee concluded that law schools must balance their concern for committing tenure-track slots to individuals in a field which is still young, comparatively underdeveloped, and experimental with the need to develop within the faculty individuals who have the expertise and experience necessary to successfully teach in the clinical legal studies curriculum. The Committee felt, therefore, that to help accomplish this, law schools wishing to limit the number of tenure track positions in the clinical legal studies curriculum could establish long-term employment positions.

Id. at 115.

57. *Id.* at 6.

58. *Id.* at 114.

59. *Id.*

faculty “with the opportunity to participate in and contribute to such decision-making processes.”⁶⁰ The guidelines stated that clinical courses and faculty should be treated on par with other law school courses and faculty, and “the failure to consider clinical legal studies in the context of the overall curriculum leads to a second-class status for clinical legal studies.”⁶¹ The guidelines stressed that the full integration of clinical studies into legal education required the full integration of clinical teachers into law faculties.⁶² Not long after the clinical guidelines and two influential ABA reports favoring improved status for clinical faculty were issued, the ABA began to address the status of clinical faculty through accreditation standards.

B. The ABA's First Standard on the Status of Clinical Faculty

Starting in the late 1970s, ABA site inspection teams began “reporting to the accreditation committee that many schools were not providing their clinicians an opportunity to achieve tenure or any other form of job security.”⁶³

Prior to the 1980s, ABA law school accreditation standards included a general standard on the competence of all members of the faculty but nothing that specifically addressed clinical faculty: “The law school shall establish and maintain conditions adequate to attract and retain a competent faculty.”⁶⁴ At the time, Standard 405(d) provided that each law school “shall have an established and announced policy with respect to academic freedom and tenure of which Annex I herein is an example but is not obligatory.”⁶⁵ The ABA became concerned over site inspection reports indicating that some law

60. *Id.* at 55.

61. *Id.* at 59. The guidelines further stated: “[C]linical legal studies should be considered in relation to the law school’s overall educational objectives. To view clinical legal studies as part of an integrated law school curriculum requires an institutional perspective in which . . . individuals responsible for traditional and clinical studies are viewed and treated as members of the law school community . . .” *Id.* at 17.

62. *Id.* at 59. The guidelines stated:

Individuals teaching clinical legal studies are part of the law school community. They are entitled to the respect and collegiality traditionally accorded members of the law faculty. The importance of this to the development of good relations within the faculty is recognized in law school analyses of the role of the clinical teacher in the law school. The Committee intended to emphasize the importance of integrating those who teach clinical legal studies into traditional collegial activities.

Id.

63. Roy Stuckey, A Short History of Standard 405(e), at 1 (Apr. 1994) (unpublished manuscript) (on file with authors).

64. SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, AM. BAR ASS’N, STANDARDS FOR APPROVAL OF LAW SCHOOLS, Standard 405 (1983) [hereinafter 1983 STANDARDS].

65. See Memorandum 7980-13 from James P. White, Consultant on Legal Educ. to the Am. Bar Ass’n, to Deans of Approved Law Schools (Sept. 26, 1979) (on file with authors).

schools did not consider clinical faculty covered by the academic freedom and tenure standard.⁶⁶

In July 1980, the Council of the ABA Section of Legal Education and Admissions to the Bar (Council) acted on these reports that schools were not providing tenure opportunities for clinical faculty and adopted Interpretation 2 of Standard 405(d):

Individuals in the “academic personnel” category whose full time is devoted to clinical instruction and related activities in the J.D. program constitute members of the “faculty” for purposes of Standard 405, and denial to them of the opportunity to allow tenure appears to be in violation of Standard 405(d).⁶⁷

This Interpretation was suspended shortly thereafter “following a negative reaction from some law schools, and [the Council] created a subcommittee of the accreditation committee, chaired by Gordon Shaber, to consider how the problem should be resolved.”⁶⁸

In 1982, the ABA's Accreditation Committee and Clinical Legal Education Committee proposed to the Council that it adopt and submit to the House of Delegates a new Standard 405(e) and Interpretations.⁶⁹ The proposed Standard from the Accreditation Committee provided that “[f]ull-time clinical faculty members shall be entitled to an employment relationship substantially equivalent to that required for other members of the faculty under Standard 405.”⁷⁰ The Interpretation explained that the employment relationship could be satisfied in one of three ways: (1) the same tenure track as the other members of the faculty; (2) a separate tenure track; or (3) “an approach that

66. Memorandum D8384-51 from James P. White, Consultant on Legal Educ. to the Am. Bar Ass'n, to Deans of ABA-Approved Law Schools 4 (May 22, 1984) [hereinafter Memorandum D8384-51] (on file with authors).

67. SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, AM. BAR ASS'N, STANDARDS FOR APPROVAL OF LAW SCHOOLS, Interpretation 2 of Standard 405(d) (1981) [hereinafter 1981 STANDARDS]. During this time period, the ABA House of Delegates had delegated to the Council the power to interpret accreditation standards. Dean Rivkin & Roy Stuckey, *Update on 405(e)*, CLINICAL LEGAL EDUCATION NEWSLETTER (Ass'n of Am. Law Schs., Wash., D.C.), June 1984, at 2–3.

68. Stuckey, *supra* note 63, at 1. The ABA Standards contained the Interpretation in 1981. See 1981 STANDARDS, *supra* note 67, Interpretation 2 of Standard 405(d). But by 1983 the Interpretation was no longer included in the published Standards. See 1983 STANDARDS, *supra* note 64, Interpretation 1 of Standard 405(d). The ABA did not publish a 1982 version of the Standards. Telephone Interview with Maxine A. Klein, Executive Assistant to the Consultant on Legal Educ. to the Am. Bar Ass'n (July 17, 2007).

69. Memorandum from Frederick R. Franklin, Staff Director, Am. Bar Ass'n Section of Legal Educ. and Admissions to the Bar, to Members of the Clinical Legal Educ. Comm. (April 28, 1982) (on file with authors); Memorandum D8384-51, *supra* note 66.

70. Memorandum from Frederick R. Franklin, *supra* note 69, at 1.

provides features substantially equivalent to tenure.”⁷¹ The Council considered the proposed Standard and Interpretation at its May 1982 meeting but chose not act on them.⁷²

At its July 1982 meeting, the Accreditation Committee recommended that the Interpretation be revised to define employment relationships substantially equivalent to tenure as “[e]mployment contracts, such as successive renewable, long-term contacts that provide features substantially equivalent to tenure. The approach chosen shall also include terms and conditions of employment substantially equivalent to those offered to non-clinical, full-time members of the faculty.”⁷³ The next month, the Council referred the new proposed Standard and Interpretation to the Standards Review Committee for consideration and recommendation.⁷⁴ The Committee then sought comments and held public hearings on the proposed language.⁷⁵

In response, then President of the AALS, Berkeley Law School Dean Sanford H. Kadish, reported in November 1982 that the AALS “Executive Committee has been studying the proposal [for Standard 405(e)] for several months We see the issues as having considerable importance for the law schools of the country and we intend to participate actively in their consideration and resolution.”⁷⁶ In addition, *The Chronicle of Higher Education* reported that at the 1983 AALS Annual Meeting “[t]he academic

71. The Interpretation of proposed Standard 405(e) stated:

Full-time clinical faculty members are entitled to an employment relationship substantially equivalent to that enjoyed by other members of the full-time faculty. This Standard may be satisfied by: (1) the inclusion of full-time clinical faculty on the same tenure track as the other members of the faculty; (2) a separate tenure track; or (3) an approach that provides features substantially equivalent to tenure. The law school bears the burden of establishing that its approach is substantially equivalent. This Standard is not meant to preclude employment of full-time clinical teachers on fixed, short-term employment relationships, for example, in situation where a law school receives a short-term grant to fund a clinic in a specific subject matter.

Id.

72. See Memorandum D8283-17 from James P. White, Consultant on Legal Educ. to the Am. Bar Ass’n, to Deans of ABA-Approved Law Schools (Dec. 8, 1982) (on file with authors).

73. *Id.* at 2–3. The revised Interpretation to Standard 405(e) provided:

Full-time clinical faculty members are entitled to an employment relationship substantially equivalent to that enjoyed by other members of the full-time faculty. This Standard may be satisfied by: (1) the inclusion of full-time clinical faculty on the same tenure track as the other members of the full-time faculty; (2) a separate tenure track; or (3) Employment contracts, such as successive renewable, long-term contacts that provide features substantially equivalent to tenure. The approach chosen shall also include terms and conditions of employment substantially equivalent to those offered to non-clinical, full-time members of the faculty.

Id. (underscores in original).

74. *Id.* at 3.

75. *Id.*

76. Sanford H. Kadish, *President’s Message*, AALS NEWSLETTER (Ass’n of Am. Law Schs., Wash., D.C.), Nov. 1982, at 2.

status of the clinical faculty members—and what to do about it—commanded the attention of members of the law-school association for much of their meeting.”⁷⁷ Professor Elliott Milstein, then Director of the Clinical Program at American University, argued:

. . . law schools treat clinicians with something approaching disdain
[T]he law schools withhold the symbols and perquisites of the profession from us. They deny us promotions and titles. They deny us voting rights and salaries of other faculty members. This leads to the myth that teaching lawyering skills is beneath the law schools.⁷⁸

Professor Clinton Bamberger, who was then the Co-Director of Clinical Education at the University of Maryland, argued that the effort to propose alternatives to tenure for clinical faculty was “an effort to hold clinical faculty ‘outside,’ so the changes in the method of law-school teaching that we have encouraged will not be successful.”⁷⁹

Opposing the measure, the new President of the AALS Professor David H. Vernon of the University of Iowa characterized the ABA proposal as “premature,” arguing that “the proposed standard is an invasion of traditional law-school territory. It is an expression of lack of confidence in the law schools. It implies that we are unfit to govern ourselves.”⁸⁰ Vernon’s opposition did not address the merits of clinical education or the necessity of giving job security as a means of both advancing the acceptance of clinical legal education and ensuring academic freedom for clinical faculty. Rather, Vernon cast the proposed accreditation requirement as an intrusion into law school self-governance and sought to reframe the debate to focus on law school autonomy versus the accreditation process and standards.

At its business meeting during the AALS 1983 Annual Meeting, the Clinical Education Section of the AALS passed the following resolution and forwarded it to the AALS Executive Committee:

That the question of status of clinicians at the nation’s law schools is an appropriate matter for an ABA Accreditation Standard; and that such a Standard should provide for the preservation and enhancement of high quality programs of clinical legal education by assuring clinicians academic freedom, appropriate job security and equality of treatment with non-clinical law school faculty.⁸¹

77. Beverly T. Watkins, *Teachers of Clinical Law Seek Recognition, Better Treatment*, CHRON. HIGHER EDUC., Jan. 19, 1983, at 14.

78. *Id.*

79. *Id.*

80. *Id.*

81. Memorandum from Kandis Scott, Chairperson, Ass’n of Am. Law Schs. Clinical Educ. Section, and Rodney Jones, Chairperson of Faculty Status Comm., Ass’n of Am. Law Schs. Clinical Educ. Section, to Members of the Ass’n of Am. Law Schs. Clinical Educ. Section

In February 1983, the ABA Standards Review Committee met to consider the comments from several public meetings.⁸² A memorandum to deans of ABA-approved law schools from James White, Consultant on Legal Education to the ABA, stated:

[I]n light of the comments and views which were expressed by constituencies, the Committee did not formulate a recommendation at this time, but determined to continue to study the matter and request further assistance from law schools in developing a recommendation concerning the proposed amendment to the Standards relating to the status of clinical law teachers.⁸³

At a July 1983 meeting, the Council deferred consideration of proposed Standard 405(e) until its December 1983 meeting, upon the recommendation of the Standards Review Committee.⁸⁴ The Committee planned to continue studying the issue and to present a report and recommendation to the Council at its December 1983 meeting.⁸⁵ At the Council meeting in July, Professors Dean Rivkin and Joe Harbaugh, both Council members and clinical teachers, expressed concerns over the delays in considering this issue.⁸⁶

In the midst of the prolonged debate over the adoption of a clinical faculty accreditation standard, yet another independent ABA report expressed support for greater recognition of the contributions of clinical faculty. The ABA Task Force on Professional Competence, known as the Friday Report, stated:

Consistent with the Foulis Report, we believe that the contributions of clinical teachers should receive greater and more appropriate weight than is now often the case. We believe that the distinctive role and workload of the clinical teacher should be recognized as a desirable and acceptable substitute for the traditional scholarship of a law faculty member in tenure and promotion criteria.⁸⁷

The Friday Report recommended that “[c]linical teachers should receive greater support for successful teaching in clinical settings than is now often the

(Jan. 24, 1983) (on file with authors).

82. Memorandum D8283-26 from James P. White, Consultant on Legal Educ. to the Am. Bar Ass’n, to Deans of ABA-Approved Law Schools (Feb. 21, 1983) (on file with authors).

83. *Id.* In his memorandum, White requested more comments and “information from law schools which have adopted, or are considering adopting, policies or practices regarding the appointment of clinical faculty.” *Id.*

84. Memorandum D8384-6 from James P. White, Consultant on Legal Educ. to the Am. Bar Ass’n, to Deans of ABA-Approved Law Schools (Aug. 12, 1983) (on file with authors) (referring to an attached excerpt of draft minutes of the Council’s July 1983 meeting).

85. *Id.*

86. *Id.*

87. TASK FORCE ON PROF’L COMPETENCE, AM. BAR ASS’N, FINAL REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON PROFESSIONAL COMPETENCE 12 (1983). This ABA report is sometimes referred to as the Friday Report, after its chair Herschel H. Friday.

case”⁸⁸ and that the ABA should adopt a policy of including clinical law faculty on law school accreditation inspection teams.⁸⁹

The Standards Review Committee met again in November 1983 and considered the proposals and comments concerning Standard 405(e).⁹⁰ The Committee unanimously recommended a version of Standard 405(e) that law schools “shall afford to full-time faculty members whose primary responsibilities are in its professional skills program, a form of security of position reasonably similar to tenure and perquisites reasonably similar to those provided full-time faculty members.”⁹¹ The accompanying Interpretation explained that security of position reasonably similar to tenure could be a “separate tenure track” or “[a] program of renewable long-term contracts . . . that shall thereafter be renewable.”⁹²

In addition, the Standards Review Committee proposed two additional Interpretations. First, law schools “should develop criteria for retention, promotion and security of employment of full-time faculty members in its professional skills program.”⁹³ Second, proposed “Standard 405(e) does not

88. *Id.* at 29.

89. *Id.*

90. Memorandum D8384-51, *supra* note 66, at 5.

91. *Id.* at 1. Proposed Standard 405(e) stated:

The law school shall afford to full-time faculty members whose primary responsibilities are in its professional skills program, a form of security of position reasonably similar to tenure and perquisites reasonably similar to those provided other full-time faculty members by Standards 401, 402(b), 403 and 405. The law school shall require these faculty members to meet standards and obligations reasonably similar to those required of full-time faculty members by Standards 401, 402(b), 403 and 405.

Id.

92. *Id.* at 2. Interpretation A of proposed Standard 405(e) stated:

A form of security of position reasonably similar to tenure includes a separate tenure track or a renewable long-term contract. Under a separate tenure track, a full-time faculty member, after a probationary period reasonably similar to that for other full-time faculty, may be granted tenure as a faculty member in a professional skills program. After tenure is granted, the faculty member may be terminated only for good cause, including termination or material modification of the professional skills program.

A program of renewable long-term contracts should provide that, after a probationary period reasonably similar to that for other full-time faculty, the services of the faculty member in a professional skills program may be either terminated or continued by the granting of a long-term contract that shall thereafter be renewable. During the renewal period the contract may be terminated for good cause, including termination or material modification of the professional skills program.

Id.

93. *Id.* at 3. Interpretation B of proposed Standard 405(e) stated:

In determining if full-time faculty members in a professional skills program 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 the faculty member in the professional skills program. Each school should develop criteria for retention, promotion and security of employment

preclude fixed, short-term appointments in a professional skills program such as full-time visiting faculty members and full-time supervising attorneys.”⁹⁴

The ABA Standards Review Committee sent its report and recommendation to the Council along with additional materials consisting of a detailed analysis of the proposed Standard 405(e) prepared by Council member Rivkin, a copy of standards and procedures governing the status of clinical teachers at the Georgetown Law Center, and a background paper on the status of clinical faculty endorsed by the clinical faculty group at New York University Law School.⁹⁵ These documents provided examples of law schools establishing successful systems for integrating clinical faculty into law schools consistent with the proposed Standard 405(e).

At its December meeting, the Council decided to give notice of its intent to adopt Standard 405(e) and Interpretations substantially as proposed, including the “shall” language relative to “security of position reasonably similar to tenure.”⁹⁶ As part of the process, the Council scheduled additional public hearings and solicited comments on the proposed Standard.⁹⁷ Among the comments submitted was a letter written by Dean Paul D. Carrington and signed by two other law school deans voicing opposition to the proposed clinical security of position standard.⁹⁸ The three deans argued that the accrediting process should be “lean” and should not intrude on the “autonomy

of full-time faculty members in its professional skills program.

Id.

94. *Id.*

95. Memorandum C8483-16 from James P. White, Consultant on Legal Educ. to the Am. Bar Ass’n, to the Council of the Section of Legal Educ. and Admissions to the Bar (Nov. 22, 1983) (on file with authors).

96. Memorandum D8384-27 from James P. White, Consultant on Legal Educ. to the Am. Bar Ass’n, to Deans of ABA-Approved Law Schools, at 1 (Dec. 7, 1983) [hereinafter Memorandum D8384-27] (on file with authors); Memorandum from Roy Stuckey, Professor, Univ. of S.C. Sch. of Law, to Clinical Colleagues (Dec. 5, 1983) (on file with authors).

97. Memorandum D8384-27, *supra* note 96, at 7.

98. Letter from Paul D. Carrington, Dean, Duke Univ. Sch. of Law, et al., to Am. Bar Ass’n Section of Legal Educ. and Admissions to the Bar (April 27, 1984) (on file with authors). The two other deans were Gerhad Casper, University of Chicago Law School, and Terrance Sandalow, University of Michigan Law School. Ironically, just a few years earlier, Dean Sandalow, as one of two people on an American Association of University Professors (AAUP) subcommittee investigating the increasing use of non-tenure-track teaching staff, argued that only with “very limited exceptions” should universities make academic appointments with anything other than tenure. Judith J. Thompson & Terrance Sandalow, *On Full-Time Non-Tenure-Track Appointments*, AAUP BULLETIN, Sept. 1978, at 267, 273. Sandalow argued that “administrators and faculty members who support institutional arrangements of the kind we have been surveying [namely, full-time non-tenure-track appointments] should recognize clearly that they are supporting practices which are inequitable, harmful to morale, and a threat to academic freedom.” *Id.*

and sense of professional responsibility of the institution being regulated.”⁹⁹
They also argued:

The proposed standard does nothing to encourage those law schools without clinical programs to develop them; it affects only law schools with a commitment to clinical legal education More important, we think it likely that the proposed standard would deter schools from starting new clinical programs or expanding ones they already have.¹⁰⁰

They concluded that they thought “it unlikely that this standard can improve clinical legal education or legal education generally, and we see a substantial danger that it will make it worse.”¹⁰¹

The leadership of the AALS also continued to oppose the proposed standard. In May 1984, the AALS Executive Committee, which included Dean Paul Carrington who had already registered his personal opposition to the proposed Standard 405(e), issued a statement arguing that law schools should have the freedom to establish a variety of employment approaches for clinical faculty and echoing the argument raised by Carrington and other deans that the proposed Standard “may well impede instead of support the development of clinical legal education.”¹⁰² After considering all of the comments, the Standards Review Committee rejected the position of the AALS leadership and recommended that the Council adopt the “shall” language for full-time faculty members whose primary responsibilities are in professional skills programs.¹⁰³

The debate over the proposed Standard nevertheless continued. At the May 1984 Council meeting, Professor Joseph Julin, former Dean at the University of Florida School of Law and the President of the AALS, “gave a lengthy and passionate speech in opposition to adoption of the standard.”¹⁰⁴ He argued that a study was needed to see if the Standard was necessary and that opponents would fight the proposal at the ABA House of Delegates.¹⁰⁵

99. Letter from Paul D. Carrington to Am. Bar Ass’n Section of Legal Educ. and Admissions to the Bar, *supra* note 98, at 1.

100. *Id.*

101. *Id.*

102. Statement of the Executive Comm. of the Ass’n of Am. Law Schs. on Proposed Standard 405(e), Am. Bar Ass’n Standards for Approval of Law Schools 3–4 (May 17, 1984) (on file with authors).

103. See Memorandum D8384-51, *supra* note 66, at 5. The Consultant’s May 1984 memo traces the genesis of the 1984 adoption of Standard 405(e) back to the January 1980 Report of the AALS/ABA Joint Committee on Clinical Legal Education Guidelines. *Id.* at 3–6.

104. Memorandum from Dean Hill Rivkin, Professor, Univ. of Tenn., to Colleagues 2 (May 23, 1984) [hereinafter Rivkin Memorandum] (on file with authors).

105. Statement of the Executive Comm. of the Ass’n of Am. Law Schs., *supra* note 102, at 3. The ABA Consultant on Legal Education later explained some of the opposition to Standard 405(e): “Many of the opponents of the Standard argued that improvements were occurring and would continue at an appropriate rate, with or without the issue being addressed

Arguing in favor of the proposed Standard, Robert McKay, former Dean of New York University School of Law and Chair of the Section of Legal Education and Admissions to the Bar, stated that “equity, fairness, and educational necessity underpin this issue.”¹⁰⁶ Norman Redlich, Dean of New York University School of Law and a member of the Council, stated the issue of status for clinical faculty was the “most important that he has faced in the accreditation of law schools,” and Judge Henry Ramsey, another Council member, argued “that it was grossly unfair to discriminate against law teachers on the basis of what they teach.”¹⁰⁷

After three years of review and public hearings, and in light of several independent ABA reports recommending the necessity of improving the status of clinical faculty to advance clinical legal education, the Council adopted Standard 405(e) with the “shall” language on “security of position reasonably similar to tenure” by a unanimous vote.¹⁰⁸ The report accompanying the proposed Standard and Interpretations for consideration by the ABA House of Delegates stated the following as the reason for requested action: “The employment status of clinicians and other professional skills teachers has been debated for years and thoroughly studied by the Legal Education Section since 1981. Two rounds of hearings (for a total of four hearings) have been held. The matter is ripe for decision.”¹⁰⁹

Although the Council unanimously recommended the adoption of Standard 405(e) before sending it to the ABA House of Delegates, some within the leadership of the AALS still opposed the Standard. In an effort to counteract the opposition, the law school deans on the Council—Richard Huber of Boston College Law School, Norman Redlich of New York University School of Law, and Gordon Schaber of McGeorge School of Law—and three other members sent a five-page letter to the deans of all law

directly by an accreditation standard.” Memorandum D9091-25 from James P. White, Consultant on Legal Educ. to the Am. Bar Ass’n, to Deans of ABA-Approved Law Schools (Nov. 12, 1990) (on file with authors).

106. Rivkin & Stuckey, *supra* note 67, at 4.

107. *Id.*

108. Memorandum D8384-51, *supra* note 66, at 1; Rivkin & Stuckey, *supra* note 67, at 4. In recommending that the House of Delegates adopt Standard 405(e), the Council also adopted a resolution stating that “[f]ull compliance with this Standard shall be required with the commencement of the 1986–87 academic year. In the intervening two years, each approved law school shall develop a plan, in conformity with this Standard.” Memorandum D8384-51, *supra* note 66, at 1–2.

109. General Information Form submitted by Robert B. McKay, Chairman, Am. Bar Ass’n Section of Legal Educ. and Admissions to the Bar (Summer 1984) (on file with authors). The report of the Section of Legal Education and Admissions to Bar to the House of Delegates noted: “Equal treatment of clinical teachers and other skills teachers has been advocated by numerous ABA committees and task forces . . .” Robert B. McKay, *Report of the Section of Legal Education and Admissions to the Bar*, 109 ANNUAL REPORT OF THE AMERICAN BAR ASSOCIATION 894, 895 (1984) (referencing the 1979 Cramton Report, 1980 Foulis Report, and 1983 Friday Report).

schools explaining why they favored Standard 405(e) with “shall” language.¹¹⁰

Their letter noted that in the prior two years there had been a series of public hearings, yet no law school dean, including those now urging defeat of Standard 405(e), had appeared in opposition to the proposed Standard.¹¹¹

The letter also stated that tenure or its equivalent was necessary to ensure both the quality of legal education and the academic freedom of clinical faculty:

Few have ever questioned the relationship of tenure status to quality of legal education when applied to traditional academic faculty. Tenure, or some equivalent status, provides the assurance of academic freedom, which has long been regarded as essential for a quality faculty. This is no less true for teachers in a professional skills training program. The assurance of academic freedom affects quality in at least two ways: (a) it permits teachers to perform their academic responsibilities, in the classroom and in scholarship, without fear of reprisal; and (b) it helps to recruit high-quality faculty since potential teachers of distinction are more likely to be attracted to academic life if they can be assured of permanent status on a law school faculty.¹¹²

With regard to the argument that Standard 405(e) was “an example of over-regulation,” the Council members noted that “it has never been suggested that a requirement of a tenure system for full-time faculty was an instance of over-regulation.”¹¹³ They also stated that tenure was not required, but security of position and “benefits and obligations . . . reasonably equivalent to those of other faculty members” were required.¹¹⁴

In June 1984, the AALS Executive Committee held a special meeting to reaffirm its opposition to the proposed Standard and promised that there would be a contested vote in the ABA House of Delegates.¹¹⁵ The AALS opposition

110. Letter from Richard Huber, Dean, Boston Coll. Law Sch., et. al., to Deans of ABA-Approved Law Schools (June 18, 1984) (on file with authors).

111. *Id.* at 1.

112. *Id.* at 2.

113. *Id.*

114. *Id.* at 3. They explained:

We believe that Standard 405(e) is important not only as an assurance of high-quality professional skills teaching, but also as a matter of elemental fairness and decency. There should be no second class citizens among the full-time members of an academic faculty. Persons who are dedicating their professional careers to teaching our students the essential ingredients of lawyering skills should not be forced to tolerate a status which the rest of us would find wholly unacceptable. They should be carefully evaluated by whatever standards the faculty establishes, but once they meet those standards, they have as much right to full membership in the academic community as does anyone else. In academic life, such full membership means tenure, or the substantial equivalent thereof.

Id. at 4–5.

115. Letter from Roy Stuckey, Professor, Univ. of S.C. Sch. of Law, et al., to Colleagues 1–2 (June 29, 1984) (on file with authors); *see also* Memorandum from Joseph R. Julin, President, Ass’n of Am. Law Schs., to Deans of Member Schools and Members of the Am. Bar

prompted second thoughts by the ABA. The Council conducted a mail ballot of its members in July and voted to change the language in Standard 405(e) from “shall” to “should.”¹¹⁶ In explaining the reason for the retreat, McKay wrote that “all of us would have preferred the ‘shall’ language; but there was at least some risk that we would lose the entire proposal, since many law schools (including some of the most influential, although often inactive in the section) would vigorously oppose a mandatory standard.”¹¹⁷

In addressing the ABA House of Delegates prior to its vote on Standard 405(e) in August 1984, McKay explained that he originally supported the “shall” language but that he was

now fully persuaded that we should not move that fast because a number of American law schools want still to be persuaded that the time has now come. . . . But we believe that the good sense of it would persuade schools[,] even though they are told only should and not shall[,] to adopt the kind of tenure qualifications that we believe are important. It is [a] question of fairness, equity and equality that there should be such a recognition.¹¹⁸

Speaking on behalf of the Law Student Division of the ABA, a delegate urged reinserting the “shall” language in order to attract and retain better clinical faculty and to promote clinical legal education in law schools.¹¹⁹ Another

Ass’n House of Representatives 1 (June 29, 1984) (arguing that the ABA standards should not be amended such that a mandatory relationship would exist between a law school and its clinical faculty).

116. Memorandum from Robert B. McKay, Chairman, Am. Bar Ass’n Section of Legal Educ. and Admissions to the Bar, to Am. Bar Ass’n Board of Governors (July 26, 1984) (on file with authors).

117. Letter from Robert B. McKay, Chairman, Am. Bar Ass’n Section of Legal Educ. and Admissions to the Bar, to Roy T. Stuckey, Professor, Univ. of S.C. Sch. of Law (July 30, 1984) (on file with authors).

118. Transcript of Am. Bar Ass’n House of Delegates Debate on Standard 405(e), at 4–5 (Aug. 7, 1984) (unedited transcript of tape 4, attached to Memorandum from Fred Franklin, Staff Director, Am. Bar Ass’n Section of Legal Educ. and Admissions to the Bar, to Marilyn V. Yarbrough, Council Member, Am. Bar Ass’n Section of Legal Educ. and Admissions to the Bar, and Roy T. Stuckey, Professor, Univ. of S.C. Sch. of Law (Nov. 26, 1984)) [hereinafter Transcript of Am. Bar Ass’n House of Delegates 1984 Debate] (on file with authors).

119. Transcript of Am. Bar Ass’n House of Delegates 1984 Debate, *supra* note 118, at 6–7. The delegate stated:

It is the position of the Law Student Division that there is nothing to be gained from a legal education which affords inferior status to clinical law teachers. Clinical training is an essential component to legal education. . . . There is no room for second class faculty in our law schools. Law schools need to attract better teachers to clinical education programs. By affording similar status and some sort of job security to these individuals not only will law schools attract these kinds of teachers but they will also be able to keep them. . . . An aspirational goal utilizing the language of *should* does recognize the problem but does not solve it. A standard of accreditation utilizing the language of *shall* not only recognizes the problem but affords a remedy.

delegate, identifying herself as not an educator but a “small firm practitioner with a heavy courtroom practice,” stated that clinical law professors should not be “relegated to second class status as teachers when they provide such a valuable service to the actual practicing bar across the country.”¹²⁰

Responding to these and other comments, the President of the AALS urged the adoption of the “should” proposal by pledging that the AALS would “encourage and assist our member schools to develop and adopt appointment and governance policies which ensure and enhance the quality of the profession[al] skills education. Our responsibility to the public permits us to do no less.”¹²¹

The House of Delegates adopted the revised version of Standard 405(e) at its annual meeting in August 1984 with the “should” language.¹²² In addition to adopting Standard 405(e), the House of Delegates adopted the three Interpretations proposed by the Council in May.¹²³ The 1984 version of

Id. (emphasis added).

120. *Id.* at 9–10. The delegate stated:

I don't understand this discrimination against clinical law professors. I fail to grasp why they are relegated to a second class status as teachers when they provide such a valuable service to the actual practicing bar across the country. . . . But what I ask you as a practical matter is to recognize without a doubt and with no uncertainty that clinical law professors ought to be given the status they deserve and to support the shall standard.

Id.

121. *Id.* at 12.

122. Memorandum D8485-6 from James P. White, Consultant on Legal Educ. to the Am. Bar Ass'n, to Deans of ABA-Approved Law Schools (Aug. 10, 1984) [hereinafter Memorandum D8485-6] (on file with authors). Standard 405(e) provided:

The law school should afford to full-time faculty members whose primary responsibilities are in its professional skills program a form of security of position reasonably similar to tenure and perquisites reasonably similar to those provided other full-time faculty members by Standards 401, 402(b), 403 and 405. The law school should require these faculty members to meet standards and obligations reasonably similar to those required of full-time faculty members by Standards 401, 402(b), 403 and 405.

Id.; see SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, AM. BAR ASS'N, STANDARDS FOR APPROVAL OF LAW SCHOOLS, Standard 405(e) (1986) [hereinafter 1986 STANDARDS]; see also Grant H. Morris & John H. Minan, *Confronting the Question of Clinical Faculty Status*, 21 SAN DIEGO L. REV. 793, 793–94 (1984) (discussing the implementation of Standard 405 (e)).

123. The Interpretations stated:

A. Interpretation

A form of security of position reasonably similar to tenure includes a separate tenure track or a renewable long-term contract. Under a separate tenure track, a full-time faculty member, after a probationary period reasonably similar to that for other full-time faculty, may be granted tenure as a faculty member in a professional skills program. After tenure is granted, the faculty member may be terminated only for good cause, including termination or material modification of the professional skills program.

A program of renewable long-term contracts should provide that, after a probationary period reasonably similar to that for other full-time faculty, the services of the faculty member in a professional skills program may be either terminated or continued by the

Standard 405(e) remained the applicable accreditation provision on the status of clinical faculty until continued lack of improvement in the status of clinical faculty led the ABA to revisit the “should” versus “shall” issue in 1996.

IV. EVENTS LEADING TO THE ADOPTION OF STANDARD 405(C) IN 1996

After the adoption of Standard 405(e) in 1984, ABA committees and reports continued to express concern about the treatment of clinical law faculty. Evidence indicated that law schools were slow to adopt the appointment and governance policies for clinical faculty that the AALS had pledged to support in order to “ensure and enhance the quality of the professional skills education,” which is what those arguing in favor of the “should” language claimed would occur.¹²⁴ Some law schools also were terminating clinical faculty with little or no notice, and many law schools did not permit clinical faculty to participate meaningfully in faculty governance.¹²⁵

A. *Studies on the Effects of the "Should" Language*

The first report to discuss the impact of the “should” language was a report of the ABA Skills Training Committee in 1986, and its conclusions were mixed. At its April 1986 meeting, the Skills Training Committee expressed its

granting of a long-term contract that shall thereafter be renewable. During the initial long term contract or any renewal period, the contract may be terminated only for good cause, including termination or material modification of the professional skills program.

B. Interpretation

In determining if the members of the full-time faculty of a professional skills program 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 faculty members in the professional skills program. Each school should develop criteria for retention, promotion and security of employment of full-time faculty members in its professional skills program.

C. Interpretation

Standard 405(e) does not preclude a limited number of fixed, short-term appointments in a professional skills program predominantly staffed by full-time faculty members within the meaning of this Standard, or in an experimental program of limited duration.

See 1986 STANDARDS, *supra* note 122, at Standard 405(e) and Interpretations; Memorandum D8485-6, *supra* note 122, at 2–3; see also Stephen F. Befort, *Musings on a Clinic Report: A Selective Agenda for Clinical Legal Education in the 1990s*, 75 MINN. L. REV. 619, 629 (1991) (discussing how Standard 405(e) was adopted by the ABA to help remedy the “second-class treatment” of clinicians); Marjorie Anne McDiarmid, *What's Going on Down There in the Basement: In-House Clinics Expand Their Beachhead*, 35 N.Y.L. SCH. L. REV. 239, 274–75 (1990) (stating that the ABA House of Delegates added Standard 405(e) in 1984).

124. Transcript of Am. Bar Ass'n House of Delegates 1984 Debate, *supra* note 118, at 12.

125. See *infra* notes 127–33 and accompanying text.

“sense that the 1984 amendments are having the intended effect of improving the overall quality of professional skills training programs in law schools.”¹²⁶ However, the Skills Training Committee expressed concern about the manner in which law schools were terminating clinical professors and recommended that the Council adopt a statement concerning early notification of professional skills faculty about non-retention decisions.¹²⁷ Responding to this concern, the Council issued a special memorandum in August 1986 calling on law schools to provide sufficient notice of non-retention of professional skills faculty to allow them the opportunity to seek other positions.¹²⁸

After the adoption of the “should” language, the Council realized that many law schools were still denying professional skills faculty opportunities to participate in law school governance. At its June 1988 meeting, the Council approved a Standards Review Committee recommendation to circulate for comment a proposed Interpretation suggesting that law schools should permit faculty teaching in the professional skills programs to participate in law school governance.¹²⁹ In December 1988, after receiving comments, the Council adopted an Interpretation of Standards 205, 403 and 405(e).¹³⁰ This new Interpretation on governance rights for clinical faculty provided:

126. Memorandum from Roy Stuckey, Chair, Skills Training Comm., Am. Bar Ass’n Section of Legal Educ. and Admissions to the Bar, to Members of the Council, Am. Bar Ass’n Section of Legal Educ. and Admissions to the Bar 1 (Apr. 24, 1986) (on file with authors).

127. *Id.* at 1–2.

128. Memorandum from Kathleen S. Grove, Office of the Consultant on Legal Educ., Am. Bar Ass’n Section of Legal Educ. and Admissions to the Bar, to Members of the Skills Training Comm., Am. Bar Ass’n Section of Legal Educ. and Admissions to the Bar (Aug. 14, 1986) (on file with authors); Memorandum D8586-6 from James P. White, Consultant on Legal Educ. to the Am. Bar Ass’n, to Deans of ABA-Approved Law Schools (Aug. 15, 1986) (on file with authors). The statement read as follows:

The Council is informed that, during the process generated by the August, 1984 amendment of Standard 405(e) of the ABA Standards for Approval of Law Schools, certain law schools may have replaced or otherwise terminated the employment of professional skills teachers who were hired prior to the adoption of amended Standard 405(e) with little notice.

The Council encourages any school that decides not to continue in service a professional skills teacher hired prior to the adoption of amended Standard 405(e) to provide sufficient notice to the teacher to allow a fair opportunity to seek another position. OFFICE OF THE CONSULTANT ON LEGAL EDUC., AM. BAR ASS’N, 1986–1987 ANNUAL REPORT OF THE CONSULTANT ON LEGAL EDUCATION TO THE AMERICAN BAR ASSOCIATION 38 (1987).

129. Memorandum D8788-70 from James P. White, Consultant on Legal Educ. to the Am. Bar Ass’n, to Deans of ABA-Approved Law Schools (June 10, 1988) (on file with authors).

130. OFFICE OF THE CONSULTANT ON LEGAL EDUC., AM. BAR ASS’N, 1988–1989 ANNUAL REPORT OF THE CONSULTANT ON LEGAL EDUCATION TO THE AMERICAN BAR ASSOCIATION 37 (1989); Memorandum D8889-33 from James P. White, Consultant on Legal Educ. to the Am. Bar Ass’n, to Deans of ABA-Approved Law Schools, at 1 (Dec. 15, 1988) [hereinafter Memorandum D8889-33] (on file with authors).

A law school should afford to full-time faculty members whose primary responsibilities are in its professional skills program an opportunity to participate in law school governance in a manner reasonably similar to other full-time faculty members. This Interpretation does not apply to those persons referred to in Interpretation 3 of Standard 405(e) [that is, those with fixed, short-term appointments or in an experimental program of limited duration].¹³¹

The action of the Council was later explained as necessary “to make it clear that the ‘perquisites’ and ‘obligations’ language in S405(c) [then as S405(e)] includes participation in governance by full-time professional skills teachers.”¹³² Although the Council thought that participation in faculty governance was apparent from the language of the Standard, the Council explained that it adopted the new Interpretation because some law schools did not believe that the Standard covered governance.¹³³

In July 1992, yet another ABA report called on law schools to provide appropriate status to clinical faculty. The influential report “Legal Education and Professional Development—An Educational Continuum,” known as the MacCrate Report, observed that while status for clinical faculty was improving and the number of full-time professional skills faculty was increasing, the “progress has not been uniform, and at some institutions, it has come 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.”¹³⁴

131. SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, AM. BAR ASS’N, STANDARDS FOR APPROVAL OF LAW SCHOOLS, Interpretations to Standard 405 (1990); Memorandum D8889-33, *supra* note 130, at 1.

132. Memorandum from Roy Stuckey, Professor, Univ. of S.C. Sch. of Law, to Members of the Council, Am. Bar Ass’n Section of Legal Educ. and Admissions to the Bar 1 (May 17, 1996) (on file with authors). Professor Stuckey was a member of the Council from 1988–1994, a member of the Skills Training Committee from 1984–1996, and a member of the Standards Review Committee from 1991–1995.

133. The Council’s action was explained as follows:

In December of 1988, the Council adopted this Interpretation to make it clear that the “perquisites” and “obligations” language in S405(c) [then as S405(e)] includes participation in governance by full-time professional skills teachers. There was no uncertainty among members of the Council about this. The only question was whether an Interpretation was needed or whether it was sufficiently apparent from the language of the Standard. After hearing evidence that not every school understood that S405(c) includes governance, Rosalie Wahl [Justice, Minnesota Supreme Court, and Chair of the Council 1987–88] brought the discussion to an end by commenting that “if that is what we mean, we should not hesitate to be clear about it.” I do not believe that there was a dissenting vote.

Id.

134. SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. BAR ASS’N, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992).

Data supporting the MacCrate Report's concern was assembled in a 1991 study for the ABA Office of the Consultant on Legal Education.¹³⁵ It reported the results of seven years of questionnaires to law schools on "the status of professional skills teachers."¹³⁶ The purpose of the study was "to assess both the quality and quantity of changes being made" on the status of clinical faculty.¹³⁷

The study found that the percentage of full-time professional skills faculty holding "tenure eligible slots" actually dropped by over five percent during the seven-year period from 1984 to 1991.¹³⁸ An interim report theorized that the drop could be because "as the number of professional skills teachers has expanded, the number of slots eligible for job security under Standard 405(e) has remained relatively static. A disproportionate number of new teachers is being put in temporary slots with little or no job security."¹³⁹ Additionally, the percentage of professional skills teachers holding positions that did not meet the requirements of Standard 405(e) declined only slightly from 1985 to 1990, leading the study's author to explain that "S405(e) may have had no impact on the job security of the people it was primarily intended to assist."¹⁴⁰ The ABA study concluded: "In sum, the data produced by this project does not demonstrate that ABA Accreditation Standard 405(e) has improved the status of full-time teachers of professional skills, nor does the data indicate trends which would suggest a probability of significant future progress."¹⁴¹ At a minimum, the seven-year study refuted the claim of opponents of an ABA standard for the job security of clinical faculty that improvements in status would occur without a mandatory accreditation standard.

Around the same time as the release of the MacCrate Report on the status of professional skills teachers, the ABA's Skills Training Committee raised

135. ROY STUCKEY, OFFICE OF THE CONSULTANT ON LEGAL EDUC. FOR THE AM. BAR ASS'N, FINAL REPORT: RESULTS OF SURVEYS AND QUESTIONNAIRES REGARDING THE STATUS OF PROFESSIONAL SKILLS TEACHERS 1984-1991 (1991) [hereinafter STATUS OF SKILLS TEACHERS FINAL REPORT].

136. *Id.* at 1.

137. *Id.* The memorandum accompanying each questionnaire explained:

Throughout the process leading up to the adoption of ABA Accreditation Standard 405(e) in August, 1984 many legal educators and bar leaders felt that the status of full-time teachers of professional skills should be improved. Many opponents of the Standard argued that improvements were occurring and would continue at an appropriate rate, with or without the issue being addressed directly by an accreditation standard.

The Council wishes to obtain an overview of this process so it will be able to assess both the quality and quantity of changes being made.

Id.

138. *Id.* at 3.

139. ROY STUCKEY, OFFICE OF THE CONSULTANT ON LEGAL EDUC. FOR THE AM. BAR ASS'N, PRELIMINARY REPORT NO. 3: RESULTS OF SURVEYS AND QUESTIONNAIRES REGARDING THE STATUS OF PROFESSIONAL SKILLS TEACHERS, at ii (1989).

140. STATUS OF SKILLS TEACHERS FINAL REPORT, *supra* note 135, at 4.

141. *Id.* at 5.

concerns over the enforcement of 405(e).¹⁴² The Skills Training Committee's concern echoed a 1987 AALS Section on Clinical Legal Education survey of law school clinical programs that found that a significant percentage of schools were disregarding 405(e).¹⁴³

A 1991 AALS Section on Clinical Legal Education study, "Report of the Committee on the Future of the In-House Clinic," also found that Standard 405(e) was not significantly affecting the status of clinical teachers.¹⁴⁴ The report's survey of law schools with in-house clinics found that at a majority of law schools Standard 405(e) was having no perceptible effect, with forty percent of those schools indicating either that the Standard was "not a factor at their school or that their faculty was disregarding" it.¹⁴⁵ Those reporting some effects from Standard 405(e) indicated that the Standard was more likely to help than to harm their security and they felt that the future effects of the Standard largely would be helpful.¹⁴⁶ This series of reports and studies pointed to the failure of the "should" language and the need for the ABA to address the status of clinical faculty once more.

B. ABA Changes "Should" to "Shall" in Standard 405(c)

In June 1994, the ABA's Council, upon the recommendation of the Standards Review Committee, declared its intention to amend Standard 405 again.¹⁴⁷ Significantly, Millard Rudd suggested that it was time to change the Standard.¹⁴⁸ Rudd, as Executive Director of the AALS, had led that organization's fight in 1984 to make the security of position requirement in Standard 405 "should" rather than "shall."¹⁴⁹ His argument at the time was that clinical legal education was relatively new to many law schools and that law schools needed more time to adjust to providing security of position for clinical faculty.¹⁵⁰ By 1994, Rudd, now a member of the Standards Review

142. OFFICE OF THE CONSULTANT ON LEGAL EDUC., AM. BAR ASS'N, 1992-1993 ANNUAL REPORT OF THE CONSULTANT ON LEGAL EDUCATION TO THE AMERICAN BAR ASSOCIATION 70 (1993).

143. McDiarmid, *supra* note 123, at 276-77 (reporting the results of a questionnaire sent to law schools by the AALS Section on Clinical Legal Education in 1987).

144. *Report of the Committee on the Future of the In-House Clinic*, 42 J. LEGAL EDUC. 508, 556 (1992).

145. *Id.* at 542-43, 556.

146. *Id.* at 543.

147. OFFICE OF THE CONSULTANT ON LEGAL EDUC., AM. BAR ASS'N, 1994-1995 ANNUAL REPORT OF THE CONSULTANT ON LEGAL EDUCATION TO THE AMERICAN BAR ASSOCIATION 41 (1995) [hereinafter CONSULTANT'S 1994-1995 REPORT]; Joseph W. Bellacosa, *Report No. 2 of the Section of Legal Education and Admissions to the Bar*, 120 ANNUAL REPORT OF THE AMERICAN BAR ASSOCIATION 351, 352 (1995).

148. Roy Stuckey, *New ABA Accreditation Standards: An Insider's View*, CLEA NEWSLETTER (Clinical Legal Educ. Ass'n, New York, N.Y.), Sept. 1996, at 10, 13.

149. *Id.*

150. *Id.*

Committee, was convinced that law schools had sufficient opportunity to adjust and that it was time for security of position for clinical faculty to be mandatory.¹⁵¹

After two public hearings, the Council decided not to recommend any substantive changes of Standard 405(e) for approval by the ABA's House of Delegates at its February 1995 meeting.¹⁵² Instead, the Council simply moved the status standard in 405(e) to 405(c); no change was made in the security of position language of old section (e) or its relevant Interpretations.¹⁵³

Although the ABA did not address the status of clinical faculty in 1995, the issue remained unsettled. The ABA was in the midst of a major recodification of the Standards and Interpretations, and this set the stage for further debate over the status of clinical faculty. The Standards Review Committee held four public hearings on proposed changes and received hundreds of written comments dealing with "almost every conceivable position on every subject covered by the Standards . . . advocated pro or con," including the argument for a more laissez faire, deregulatory approach to clinical faculty standards.¹⁵⁴ In contrast to those seeking to roll back standards for clinical faculty, the Clinical Legal Education Association (CLEA) argued that it was time to strengthen the standards. CLEA contended that in 1984, the year when "shall" was changed to "should" after the Council had unanimously recommended the "shall" language, "the change was premised on the idea that the more permissive language would be temporary. Sufficient time has passed to demonstrate the need for the adoption of mandatory language."¹⁵⁵

151. *Id.*

152. CONSULTANT'S 1994-1995 REPORT, *supra* note 147, at 41-42; Bellacosa, *supra* note 147, at 351-53; *General Minutes*, 120 ANNUAL REPORT OF THE AMERICAN BAR ASSOCIATION 24 (showing the approval of the Council's recommendation); *Actions of the House of Delegates*, SYLLABUS (Am. Bar Ass'n Section of Legal Educ. and Admissions to the Bar), Spring 1995, at 15.

153. CONSULTANT'S 1994-1995 REPORT, *supra* note 147, at 42; SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, AM. BAR ASS'N, STANDARDS FOR APPROVAL OF LAW SCHOOLS 36-37, 43-44 (1995); Bellacosa, *supra* note 147, at 352. The February 1995 changes to Section 405 also labeled the existing introductory sentence new subsection (a), deleted the previous language in subsection (a) on compensation, moved the standards in (b) and (c) on research, travel, and secretarial support to Interpretation 3, and moved the requirement to have a policy on academic freedom and tenure from subsection (e) to (b). See CONSULTANT'S 1994-1995 REPORT, *supra* note 147, at 42-43; see also Memorandum D9495-34 from James P. White, Consultant on Legal Educ. to the Am. Bar Ass'n, to Deans of ABA-Approved Law Schools (Dec. 15, 1994) (on file with authors) (providing the proposed amendments); Memorandum D9495-40 from James P. White, Consultant on Legal Educ. to the Am. Bar Ass'n, to Deans of ABA-Approved Law Schools (Feb. 21, 1995) (on file with authors) (providing the amendments as adopted).

154. JAMES P. WHITE, CONSULTANT ON LEGAL EDUC. TO THE AM. BAR ASS'N, 1995-1996 ANNUAL REPORT 25 (1996) [hereinafter CONSULTANT'S 1995-1996 REPORT].

155. Letter from Mark J. Heyrman, Secretary/Treasurer, Clinical Legal Educ. Ass'n, to James P. White, Consultant on Legal Educ. to the Am. Bar Ass'n, enclosure at 3 (Mar. 20,

The Council rejected the call to deregulate the status of clinical teachers and instead decided that the “should” language was not having its desired effect at all law schools. At its meeting in June 1996, the Council voted to amend Standard 405(c) by replacing the words “professional skills” with “clinical” and changing the word “should” to “shall,” and the ABA House of Delegates adopted these changes at its Annual Meeting in August 1996.¹⁵⁶ The ABA explained “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.”¹⁵⁷ The new Standard also explained that it did “not preclude 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.”¹⁵⁸ The ABA made similar changes to the Interpretations to 405(c) and added a sentence to Interpretation 405-7 to address further the security of position of clinical teachers: “A law school should develop criteria for retention, promotion, and security of employment of full-time clinical faculty.”¹⁵⁹

1996) (on file with authors).

156. SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, AM. BAR ASS’N, STANDARDS FOR APPROVAL OF LAW SCHOOLS 43 (1996) [hereinafter 1996 STANDARDS]; Erica Moeser, *Report No. 1 of the Section of Legal Education and Admissions to the Bar*, 121 ANNUAL REPORT OF THE AMERICAN BAR ASSOCIATION 375–76 (1996); see also *id.* at 28 (showing the approval of the Council’s recommendation).

157. *Recodification of Standards Nears Completion*, SYLLABUS (Am. Bar Ass’n Section of Legal Educ. and Admissions to the Bar), Winter 1996, at 1, 14 [hereinafter *Recodification of Standards*].

158. 1996 STANDARDS, *supra* note 156, at 43; Moeser, *supra* note 156, at 375–76.

159. 1996 STANDARDS, *supra* note 156, at 44; Moeser, *supra* note 156, at 377. The changes to the Interpretations included:

Interpretation 405-6:

A form of security of position reasonably similar to tenure includes a separate tenure track or a renewable long-term contract. Under a separate tenure track, a full-time *clinical* faculty member, after a probationary period reasonably similar to that for other full-time faculty, may be granted tenure ~~as a faculty member in a professional skills program~~. After tenure is granted, the faculty member may be terminated only for good cause, including termination or material modification of the ~~professional skills~~ *clinical* program.

A program of renewable long-term contracts should provide that, after a probationary period reasonably similar to that for other full-time faculty, the services of a faculty member in a ~~professional skills~~ *clinical* program may be either terminated or continued by the granting of a long-term contract that shall thereafter be renewable. 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 professional skills program.

Interpretation 405-7:

In determining if the members of the full-time *clinical* faculty ~~of a professional skills program~~ meet standards and obligations reasonably similar to those provided for other full-

The ABA also amended Standard 405(c) by adding the phrase “non-compensatory” before the language requiring that clinical faculty members be afforded “perquisites reasonably similar to those provided other full-time faculty members.”¹⁶⁰ This change reflected the agreement with the U.S. Department of Justice in a 1996 anti-trust consent decree not to adopt or enforce any Standard or Interpretation that had the purpose or effect of imposing requirements as to base salary, stipends, fringe benefits, or other compensation paid to law school employees.¹⁶¹ These 1996 changes remained the applicable ABA Standard and Interpretations on the status of clinical faculty until the ABA amended the Interpretations in the summer of 2005.

V. THE 2005 CHANGES TO STANDARD 405(C) INTERPRETATIONS

Resistance to the “shall” language in Standard 405 requiring reasonably similar treatment of clinical faculty with other faculty continued after the 1996 amendments, though no longer by the AALS. In the years following the amendments, several efforts were made, each unsuccessful, to persuade the ABA to abandon its support for greater integration of clinical faculty and courses in law schools.

A. *The Association of Law Deans of America's Resistance to Status for Clinical Faculty*

In 1999, the Standards Review Committee considered a dramatic restructuring of Standard 405 to eliminate all references to tenure, for both clinical and nonclinical faculty.¹⁶² The Association of Law Deans of America

time faculty, competence in the areas of teaching and scholarly research and writing should be judged in terms of the responsibilities of *clinical* faculty ~~members in the professional skills program~~. A law school should develop criteria for retention, promotion, and security of employment of full-time clinical faculty.

Interpretation 405-8:

A law school ~~should~~ shall afford to full-time *clinical* faculty members ~~whose primary responsibilities are in its professional skills program~~ an opportunity to participate in law school governance 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).

Id. at 376–77 (italics, underscores, and strike-outs in original).

160. 1996 STANDARDS, *supra* note 156, at 43.

161. See Moeser, *supra* note 156, at 349–50; *Informational Report from the ABA Board of Governors to the House of Delegates*, SYLLABUS (Am. Bar Ass’n Section of Legal Educ. and Admissions to the Bar), Spring 1996, at 4; see also CONSULTANT’S 1995–1996 REPORT, *supra* note 154, at app. g (containing the final judgment and consent decree from *United States v. American Bar Association*, 934 F. Supp. 435 (D.D.C. 1996)).

162. *Validation of Standards Chapters 3 and 4—Preliminary Proposals and Request for Comments*, SYLLABUS (Am. Bar Ass’n Section of Legal Educ. and Admissions to the Bar),

(ALDA) urged the changes as early as 1996, arguing that Standard 405(c) should be deleted because requiring a form of security of position for clinical faculty reasonably similar to tenure was inconsistent with the lack of any ABA “requirement that a law school have a tenure system at all.”¹⁶³ ALDA also proposed the elimination of Standard 302(d), which requires law schools to offer some form of live-client or other real-life practice experience.¹⁶⁴ ALDA’s opposition to live-client or other real-life practice experience represented resistance to any accreditation requirement that law schools offer their students clinical legal education and was consistent with ALDA’s opposition to security of position and participation in law school governance by clinical faculty.

After holding public hearings and receiving comments, the Standards Review Committee proposed removing all mention of tenure from Standard 405.¹⁶⁵ Instead, it recommended that law schools be required to adopt such policies for security of position and academic freedom as are necessary to attract and retain a competent faculty and noted that these policies “may vary with the duties and responsibilities of different faculty members.”¹⁶⁶ Standards Review proposed the restructuring to move away from the concept of tenure

Winter 1999, at 1, 17–18 [hereinafter *Validation of Standards*].

163. *Final Commentary on Changes in Chapters Three and Four of the Standards for Approval of Law Schools, 1998–1999*, SYLLABUS (Am. Bar Ass’n Section of Legal Educ. and Admissions to the Bar), Summer 1999, at 8, 10, 15 [hereinafter *Final Commentary*]; see Am. Law Deans Ass’n, Statement of the American Law Deans Association on Proposed Modification of the Standards for the Approval of Law Schools of the American Bar Association 9–10 (attachment to Letter from Ronald A. Cass, President, Am. Law Deans Ass’n, to James P. White, Consultant on Legal Educ. to the Am. Bar Ass’n (Apr. 21, 1997)) (on file with authors). ALDA did not object to the retention of Standard 405(b), which requires law schools to have an established policy with respect to tenure, but only objected to any requirement of security of position reasonably similar to tenure for clinical faculty. See *Final Commentary*, *supra*, at 15.

164. *Final Commentary*, *supra* note 163, at 8–9.

165. See *Validation of Standards*, *supra* note 162, at 16.

166. Memorandum D9899-78 from James P. White, Consultant on Legal Educ. to the Am. Bar Ass’n, to Deans of ABA-Approved Law Schools (July 21, 1999) [hereinafter Memorandum D9899-78] (on file with authors). The entire text of the proposed revisions to Standard 405 provided:

(a) A law school shall establish and maintain conditions adequate to attract and retain a competent faculty.

(b) A law school shall have established and announced policies designed to afford full-time faculty members, including clinical and legal writing faculty, whatever security of position and other rights and privileges of faculty membership as may be necessary to (i) attract and retain a competent faculty, (ii) provide students with a program of legal education that satisfies the requirements of Chapter 3 of these Standards, and (iii) safeguard academic freedom. The forms and terms of security of position and other rights and privileges of faculty membership may vary with the duties and responsibilities of different faculty members.

Id.

and instead focus “on the programmatic objectives that ‘security of position and other rights and privileges of faculty membership’ are designed to achieve”¹⁶⁷ The Committee described such objectives as “ensuring that there is a faculty competent to fulfill the educational missions” of the Standards and “preserving academic freedom.”¹⁶⁸ The Committee, however, did not endorse the ALDA proposal to eliminate the live-client or other real-life practice experience requirement in Standard 302(d).¹⁶⁹

At one of the public hearings in May 1999, Carl Monk, Executive Director of the AALS, testified that the AALS Executive Committee voted to oppose all proposed changes to Standard 405.¹⁷⁰ The AALS Executive Committee opposed removing the tenure policy requirement in Standard 405 because “such a change to such a major core traditional value of the academy should not be made without very broad consultation that goes beyond these series of hearings with all types of law faculty and others in the higher education community.”¹⁷¹ In support of the AALS position, Monk recounted an example of a dean discussing a major dispute on her campus and her belief that “faculty were much more willing to speak up without fear who in fact had tenure.”¹⁷² David Short, Dean of Northern Kentucky University College of Law, spoke in support of Monk’s comments and noted that the elimination of tenure would weaken law schools within their universities.¹⁷³

The Council considered and adopted the Standard Review Committee’s recommendation to preserve live-client and other real-life practice experiences in Standard 302(d), but it did not send the Committee’s recommendation on restructuring Standard 405 out for public comment.¹⁷⁴ The 1999-2000 Annual

167. *Final Commentary*, *supra* note 163, at 15.

168. *Id.* Even though the proposed revisions eliminated references to tenure, proposed Interpretation 405-2 still stated that “[a]ttraction and retention of competent clinical faculty members presumptively requires a form of security of position, appropriate opportunities to participate in law school governance, and other rights and privileges of faculty membership that are reasonably similar to that provided to full-time non-clinical faculty members.” Memorandum D9899-78, *supra* note 166, attachment at 20; *Validation of Standards*, *supra* note 162, at 18.

169. Memorandum D9899-78, *supra* note 166, attachment at 2.

170. Am. Bar Ass’n Section of Legal Educ. and Admissions to the Bar, Standards Review Comm. Hearing on Recodification of Standards, in S.F., Cal., at 7–8 (May 19, 1999) [hereinafter 1999 Standards Review Committee Hearing] (transcript on file with authors) (statement of Mr. Monk).

171. *Id.* at 8.

172. *Id.*

173. *Id.* at 8–9 (statement of Mr. Short).

174. Office of the Consultant on Legal Educ., Am. Bar Ass’n Section of Legal Educ. and Admissions to the Bar, Commentary on the Proposed Changes to Chapters Five, Six and Seven of the Standards for the Approval of Law Schools 1999–2000 (attachment to Memorandum D9900-26 from James P. White, Consultant on Legal Educ. to the Am. Bar Ass’n, to Deans of ABA-Approved Law Schools (Dec. 22, 1999)) [hereinafter Commentary on Proposed Changes 1999–2000] (on file with authors).

Report of the Consultant on Legal Education explained that the Council rejected the call to eliminate language concerning job security “[b]ecause of its belief in the important role of tenure in protecting academic freedom.”¹⁷⁵ In explaining its rejection of ALDA’s call to repeal the requirement for live-client experiences, the Council noted the benefits of such real-life practice experiences and the fact that a law school need not offer the experience to all students.¹⁷⁶

In 2001, the ABA House of Delegates did adopt changes to an Interpretation to Standard 405(c).¹⁷⁷ The changes to Interpretation 405-6 clarified that once a faculty member had clinical tenure or a renewable long-term contract, the clinical faculty member could only be terminated for good cause, which includes termination or material modification of the “entire” clinical program.¹⁷⁸

175. OFFICE OF THE CONSULTANT ON LEGAL EDUC., AM. BAR ASS’N, 1999–2000 ANNUAL REPORT OF THE CONSULTANT ON LEGAL EDUCATION TO THE AMERICAN BAR ASSOCIATION 31 (2000) [hereinafter CONSULTANT’S 1999–2000 REPORT]; see also *Validation of Standards*, *supra* note 162, at 17–18 (indicating that in order to keep a professional environment, law schools must have a policy promoting academic freedom); Commentary on Proposed Changes 1999–2000, *supra* note 174, at 2 (“The council voted not to place the Standards Review Committee’s revised recommendation on Standard 405 out for comment because of its belief that the standard’s current tenure requirement is an important protection of academic freedom.”).

176. *Validation of Standards*, *supra* note 162, at 10; Moeser, *supra* note 156, at 365.

177. *Report No. 2 of the Section of Legal Education and Admissions to the Bar*, 126 ANNUAL REPORT OF THE AMERICAN BAR ASSOCIATION 725–26 (2003); see also *id.* at 50 (showing the approval of the recommendation).

178. *Id.* at 725–26. The new Interpretation adopted by the House of Delegates stated:

Interpretation 405-6: A form of security of position reasonably similar to tenure includes a separate tenure track or a renewable long-term contract. Under a separate tenure track[,] a full-time clinical faculty member, after a probationary period reasonably similar to that for other full-time faculty, may be granted tenure. After tenure is granted, the faculty member may be terminated only for good cause, including termination or material modification of the *entire* clinical program.

A program of renewable long-term contracts should provide that, after a probationary period reasonably similar to that for other full-time faculty, the services of a faculty member in a clinical program may be either terminated or continued by the granting of a long-term contract that shall thereafter be renewable. 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 ~~professional skills program~~ *entire clinical program*.

Id. (italics, underscores, and strike-outs in original); see SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, AM. BAR ASS’N, STANDARDS FOR APPROVAL OF LAW SCHOOLS, Interpretation 405-6 (2001). The ABA explained:

This change clarifies Interpretation 405-6. The Council concluded that the legislative history made clear that Standard 405(c) intended to provide clinic-wide job security for a person who has security of employment under Standard 405(c). A law school may not limit Standard 405(c) protection to the continuation of a particular clinical program. Standard 405(c) continues to provide that it does not preclude a law school from having a

Early in 2003, the Council and the Accreditation Committee asked the Standards Review Committee “to consider the meaning of ‘renewable’ in Interpretation 405-6.”¹⁷⁹ The request noted that:

There is a question and no agreement about whether “renewable” means “presumptively renewable,” so that a person holding such a contract could rely on long-term and continuing employment so long as the person’s work performance was satisfactory, or “capable of being renewed,” meaning that the contract is not subject to a term limit or cap on the length of time that the person could be in such a position. The history of Standard 405(c) suggests that this question was not resolved at the time the Standard was adopted.¹⁸⁰

In September 2003, the Standards Review Committee again recommended, as it had done in 1999, that any reference to tenure be deleted from Standard 405(b) and instead that the definition of academic freedom be expanded, that the minimum protection that must be provided for academic freedom be set forth, and that the Standard should explain who is entitled to the protection of academic freedom.¹⁸¹ As to clinical faculty status, the Committee went beyond its 1999 proposal by drafting a new Interpretation to “[r]equire that if a school has a system of tenure, full-time clinical faculty must be provided the type of ‘similar treatment’ that is now provided by 405(c) and Interpretations 405-6, -7 and -8.”¹⁸² If a school did not have a system of tenure, the proposed Interpretation provided that “clinical faculty shall be afforded reasonably similar treatment to that afforded other full-time faculty.”¹⁸³ After meeting

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.

Comment and review on this change was mixed. A number of law school deans objected on the grounds that the change provides less flexibility for law schools. Other deans and law school faculty, primarily those who teach in clinical programs, supported the change on the grounds that it was consistent with the intent of Standard 405(c) and was good policy.

OFFICE OF THE CONSULTANT ON LEGAL EDUC., AM. BAR ASS’N, 2000–2001 ANNUAL REPORT OF THE CONSULTANT ON LEGAL EDUCATION TO THE AMERICAN BAR ASSOCIATION 24–25 (2001); *see Proposed Revisions to Standards, Interpretations, Rules of Procedure and Bylaws Being Circulated for Comment*, SYLLABUS (Am. Bar Ass’n Section of Legal Educ. and Admissions to the Bar), Summer/Fall 2000, at 8, 10–11.

179. Office of the Consultant on Legal Educ., Am. Bar Ass’n Section of Legal Educ. and Admissions to the Bar, *Commentary on the Changes to the Standards for the Approval of Law Schools and the Work of the Standards Review Committee 2002–2003*, at 14 (Aug. 2003) [hereinafter *Commentary on Changes 2002–2003*] (on file with authors).

180. *Id.* At the time, the Accreditation Committee was using the latter interpretation of the term. *Id.*

181. Standards Review Comm., Am. Bar Ass’n Section of Legal Educ. and Admissions to the Bar, *Revisions to Chapters 3 and 4: Tentative Decisions/Drafting Directions 11* (Sept. 19–20, 2003) (on file with authors).

182. *Id.*

183. *Id.*

again in November 2003, the Standards Review Committee drafted and forwarded to the Council proposed changes consistent with the Committee's initial recommendations.¹⁸⁴ In February 2004, the Council approved proposed changes to Standards 401-404 for public comment but did not include any recommended change to Standard 405 or its Interpretations, thus rejecting the call to delete any reference to tenure from Standard 405 for a second time.¹⁸⁵

The Standards Review Committee continued its other work on Standard 405 and in June 2004 asked the Council to delay sending proposed changes to Chapter 4 to the House of Delegates "until the Committee had the opportunity to consider recommending other revisions to Standard 405."¹⁸⁶ In November 2004, the Committee recommended additional changes to an Interpretation of Standard 405 to specify that "long-term contracts" must be at least five years in length and renewable to satisfy the "reasonably similar to tenure" requirement for employment relationships with clinical faculty.¹⁸⁷

At its December 2004 meeting, the Council approved for notice and comment revisions to Interpretations to Standard 405.¹⁸⁸ With regard to security of position for clinical faculty, proposed Interpretation 405-6 stated that "'long-term contract' means at least a five-year renewable contract."¹⁸⁹

184. Memorandum from Michael J. Davis, Chairperson, Standards Review Comm., Am. Bar Ass'n Section of Legal Educ. and Admissions to the Bar, to Council of the Am. Bar Ass'n Section of Legal Educ. and Admissions to the Bar (Jan. 15, 2004) (on file with authors).

185. Memorandum from John A. Sebert, Consultant on Legal Educ. to the Am. Bar Ass'n, and Michael J. Davis, Chairperson, Standards Review Comm., to Deans of ABA-Approved Law Schools et al. 1, 3 (Feb. 20, 2004) (on file with authors).

186. *Commentary on Revisions to Standards for Approval of Law Schools 2004-05*, SYLLABUS (Am. Bar Ass'n Section of Legal Educ. and Admissions to the Bar), Fall 2005, at 59 [hereinafter *Commentary on Revisions to Standards 2004-2005*]; OFFICE OF THE CONSULTANT ON LEGAL EDUC., AM. BAR ASS'N, 2003-2004 ANNUAL REPORT OF THE CONSULTANT ON LEGAL EDUCATION TO THE AMERICAN BAR ASSOCIATION 54 (2004) [hereinafter CONSULTANT'S 2003-2004 REPORT].

187. OFFICE OF THE CONSULTANT ON LEGAL EDUC., AM. BAR ASS'N, 2004-2005 ANNUAL REPORT OF THE CONSULTANT ON LEGAL EDUCATION TO THE AMERICAN BAR ASSOCIATION 56 (2005) [hereinafter CONSULTANT'S 2004-2005 REPORT]; *Commentary on Revisions to Standards 2004-2005*, *supra* note 186, at 74.

188. *Commentary on Revisions to Standards 2004-2005*, *supra* note 186, at 59; CONSULTANT'S 2004-2005 REPORT, *supra* note 187, at 56.

189. *Proposed Revision of Chapter 4 of the Standards*, SYLLABUS (Am. Bar Ass'n Section of Legal Educ. and Admissions to the Bar), Feb. 2005, at 12 [hereinafter *Proposed Revision of Chapter 4*]. Proposed Interpretation 405-6 stated:

A form of security of position reasonably similar to tenure includes a separate tenure track or a program of renewable long-term contracts ~~a renewable long-term contract~~. Under a separate tenure track, a full-time clinical faculty member, after a probationary period reasonably similar to that for other full-time faculty, may be granted tenure. After tenure is granted, the faculty member may be terminated only for good cause, including termination or material modification of the entire clinical program.

A program of renewable long-term contracts ~~shall~~ ~~should~~ provide that, after a probationary period reasonably similar to that for other full-time faculty, during which the

Proposed Interpretation 405-8 defined participation in faculty governance to be “participation in faculty meetings, committees and other aspects of law school governance in a manner reasonably similar to other full-time faculty, including voting on non-personnel matters.”¹⁹⁰

A memorandum accompanying the proposed changes from the Consultant on Legal Education and Chair of the Standards Review Committee explained: “The proposed revision to Interpretation 405-6 clarifies the circumstances under which a program of long-term contracts will be considered to provide full-time clinical faculty a ‘form of security of position reasonably similar to tenure’ as required by Standard 405(c).”¹⁹¹ The memorandum summarized the history of the debate and explained that the Council was acting because the Accreditation Committee had been approving schools with three-year contracts and no presumption of renewal and that such contracts were “inconsistent with the plain meaning of that Standard [405(c)].”¹⁹²

clinical faculty member may be employed on short-term contracts, the services of a faculty member in a clinical program may be either terminated or continued by the granting of a long-term *renewable* contract ~~that shall thereafter be renewable~~. *For the purposes of this Interpretation, “long-term contract” means at least a five-year renewable contract*. During the initial long-term contract or any renewal period, the contract may be terminated for good cause, including termination or material modification of the entire clinical program.

Id. at 14 (italics, underscores, and strike-outs in original); *see also* Memorandum from John A. Sebert, Consultant on Legal Educ., and J. Martin Burke, Chair, Standards Review Comm., to Deans of ABA-Approved Law Schools et al. 8 (Dec. 10, 2004) (on file with authors) (showing the changes made to Interpretation 405-6).

190. *Proposed Revision of Chapter 4*, *supra* note 189, at 13. Proposed Interpretation 405-8 stated:

A law school shall afford to full-time clinical faculty members *participation [in] an opportunity to participate in faculty meetings, committees, and other aspects of law school governance in a manner reasonably similar to other full-time faculty members, including voting on non-personnel matters*. This interpretation does not apply to those persons referred to in the last sentence of Standard 405(c).

Id. at 15 (italics, underscores, and strike-outs in original).

191. Memorandum from Sebert & Burke to Deans of ABA-Approved Law Schools, *supra* note 189, at 4; *see also Commentary on Revisions to Standards 2004–2005*, *supra* note 186, at 12 (including the same explanation for the proposed revisions by the Council).

192. Memorandum from Sebert & Burke to Deans of ABA-Approved Law Schools, *supra* note 189, at 4. The memorandum explained:

There has been considerable debate regarding the role of the Standards in establishing conditions and terms of employment. Considering, however, that the Standards continue to establish conditions and terms of employment, it was the prevailing view that the practice developed by the Accreditation Committee—that a three-year renewable contract carrying no presumption regarding renewal is a “form of security of position reasonably similar to tenure” within the meaning of Standard 405(c)—is inconsistent with the plain meaning of that Standard. The proposed change . . . makes clear that a “program of renewable long-term contracts” will only be “reasonably similar to tenure” if, following a probationary period during which a full-time clinical faculty could be employed on short-

B. The 2005 Changes to the Clinical Status Interpretation

From January through May 2005, the ABA held a number of public hearings on the proposals to change the Interpretations to Standard 405(c).¹⁹³ ALDA opposed the changes, arguing:

The specific terms of employment at most law schools are already sufficient to secure excellent clinical faculty. There is presently variety in what schools offer to clinical faculty [in terms of security of position and participation in law school governance] This variety has generally been healthy and there is no reason to stifle it with new restrictions on schools.¹⁹⁴

Professor John Elson, a former member of the Accreditation Committee, submitted a letter criticizing the position of ALDA, stating:

[ALDA's] basic justification that 405c is unnecessary to secure excellent clinical faculty ignores the historical circumstances that led to 405c's adoption. In adopting this Standard, the ABA realized that clinical teaching had come to play a critical role in the preparation of law students for practice and that clinical teachers could not become an effective presence in legal education unless a significant number of them were assured some security in their jobs and a significant role in law school governance. . . . [ALDA president Dean Saul Levmore's] counter-factual hypothesis that the free market would be sufficient to attract and retain clinical faculty of the quality and experience needed to provide excellent clinical supervision is not only without factual support and is contradicted by the pre-Standard 405c state of legal education, but it is also contradicted by the prevailing incentive structure in legal education, which rewards faculty excellence in scholarship

term contracts, the employment of the faculty member is either terminated or continued by a granting of a renewable contract at least five years in length. The five-year term reflects the pattern for post-tenure review that is evolving at many schools. By providing greater security of position than the Accreditation Committee's practice, the proposed revision is designed to achieve the goal of Standard 405(c), i.e., to ensure that law schools can attract and retain quality full-time clinical faculty and thereby strengthen the clinical component of the law school curriculum. . . . A proposal that renewable long-term contract carries with it a presumption of renewal was considered and ultimately rejected.

Id.; see also *Proposed Revision of Chapter 4*, *supra* note 189, at 12 (including the same explanation for the proposed revisions by the Council).

193. *Commentary on Revisions to Standards 2004–2005*, *supra* note 186, at 59; CONSULTANT'S 2004–2005 REPORT, *supra* note 187, at 61 (reprinting the ABA Section of Legal Education and Admission to the Bar's "Commentary on Revisions to Standards for Approval of Law Schools 2004–05").

194. Letter from Saul Levmore, Dean, Univ. of Chi. Law Sch., to Stephen Yandle, Deputy Consultant, Am. Bar Ass'n Section of Legal Educ. and Admissions to the Bar (Apr. 28, 2005) (on file with authors).

far more than it does faculty excellence in preparing students for their role as practitioners.¹⁹⁵

After considering all public comments, the Standards Review Committee recommended to the Council that it “adopt without change the proposed revisions to Interpretation 405-6.”¹⁹⁶ The Committee explained that its proposed revisions did not enlarge the security of position for clinical faculty but instead “provide much-needed specific guidance to law schools and the Accreditation Committee regarding the proper interpretation of the language of Standard 405(c).”¹⁹⁷ The Committee noted that long-term contracts not only ensure that law schools can attract and retain quality clinical faculty but also “play a significant role in ensuring the academic freedom of full-time clinical faculty.”¹⁹⁸

At its June 2005 meeting, the Council reviewed the recommendations from the Standards Review Committee.¹⁹⁹ The Council also decided to revisit the issue of whether long-term contracts must be presumptively renewed (which had previously been considered and rejected by Standards Review) and added the following language to Interpretation 405-6: “For 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.”²⁰⁰

The House of Delegates concurred with the proposed changes at its Annual Meeting in August 2005.²⁰¹ The resulting Standard 405(c) and

195. Letter from John S. Elson, Professor, Northwestern Univ. Sch. of Law, to Am. Bar Ass’n Section of Legal Educ. and Admissions to the Bar (May 3, 2005) (on file with authors) (providing his response to Dean Levmore’s call, on behalf of ALDA, for abolition or modification of Standard 405(c)).

196. Memorandum from J. Martin Burke, Chairperson, Standards Review Comm., to Council of the Section of Legal Educ. and Admissions to the Bar 1, 1 (May 22, 2005).

197. *Id.* at 1–2.

198. *Id.* at 2. Standard 405(b) requires that a law school shall have an established and announced policy on academic freedom and tenure and references as an example the 1940 Statement of Principles on Academic Freedom and Tenure of the American Association of University Professors (AAUP). 2007 STANDARDS, *supra* note 1, at Standard 405(b) & app.1. The AAUP Statement explains that tenure is a means to promote freedom in teaching and research and to provide sufficient economic security to make the profession attractive. *Id.* at app.1. It further states that “[f]reedom and economic security, hence, tenure, are indispensable to the success of an institution in fulfilling its obligations to its students and to society.” *Id.*

199. *Commentary on Revisions to Standards 2004–2005*, *supra* note 186, at 59.

200. *Approved Changes to the Standards Approval of Law Schools and Associated Interpretations*, SYLLABUS (Am. Bar Ass’n Section of Legal Educ. and Admissions to the Bar), Fall 2005, at 73–74 [hereinafter *2005 Approved Changes*]; see also *Commentary on Revisions to Standards 2004–2005*, *supra* note 186, at 63 (providing commentary on the adoption of the change).

201. *Commentary on Revisions to Standards 2004–2005*, *supra* note 186, at 59; CONSULTANT’S 2004–2005 REPORT, *supra* note 187, at 16–17.

Interpretations, which are in effect at the time this article is being written, retain the language that “[a] law school shall afford to full-time clinical faculty members a form of security of position reasonably similar to tenure” but note that where a school chooses a system of long-term contracts “‘long-term contract’ means at least a five-year contract that is presumptively renewable or other arrangement sufficient to ensure academic freedom.”²⁰²

202. 2005 *Approved Changes*, *supra* note 200, at 73–74. Current Standard 405(c) and the relevant Interpretations state:

Standard 405(c):

A law school shall afford to full-time clinical faculty members a form of security of position reasonably similar to tenure, and non-compensatory perquisites reasonably similar to those provided other full-time faculty members. A law school may require these faculty members 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 in a clinical program predominantly staffed by full-time faculty members, or in an experimental program of limited duration.

Interpretation 405-6:

A form of security of position reasonably similar to tenure includes a separate tenure track or a program of renewable long-term contracts. Under a separate tenure track, a full-time clinical faculty member, after a probationary period reasonably similar to that for other full-time faculty, may be granted tenure. After tenure is granted, the faculty member may be terminated only for good cause, including termination or material modification of the entire clinical program.

A program of renewable long-term contracts ~~shall should~~ provide that, after a probationary period reasonably similar to that for other full-time faculty, during which the clinical faculty member may be employed on short-term contracts, the services of a faculty member in a clinical program may be either terminated or continued by the granting of a long-term renewable contract ~~that shall thereafter be renewable~~ that shall thereafter be renewable. For 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. 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 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 faculty. A law school should develop criteria for retention, promotion, and security of employment of 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 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).

In commentary on the revisions, the Consultant on Legal Education noted that the initial proposal on Interpretation 405-6 drew a large number of comments, “sparked considerable debate,” and produced an effort “to provide clarity and transparency that reconciled the language of Standard 405(c), requiring that law schools afford to full-time clinical faculty members a form of security of position reasonably similar to tenure, with the special constraints on providing such security as articulated by a number of law school deans.”²⁰³

The Consultant's commentary stated:

The new definition of long-term contract—a contract of at least five years that is presumptively renewable—might be viewed as identifying a clear “safe harbor” that is consistent with the black letter law of Standard 405(c). The alternative avenue might be viewed in part as responsive to concerns of deans that flexibility must be preserved to allow schools to demonstrate that they meet the spirit and intent of the Standard by a route other than a five-year presumptively renewable contract and in part as responsive to expressions by clinical faculty of the importance of protecting academic freedom of clinical faculty.²⁰⁴

Unfortunately, the Council's failure to solicit input from the Standards Review Committee or the public before inserting the phrase “or other arrangement sufficient to ensure academic freedom” into Interpretation 405-6 has resulted in even less “clarity and transparency” about the appropriate means to provide security of position for clinical faculty.

VI. AFTERMATH OF THE 2005 CHANGES TO THE INTERPRETATIONS

The changes to the accreditation Interpretations in 2005 still have not settled the clinical faculty status issue. Since that time, there has been continued resistance to treating clinical faculty reasonably similar to non-clinical faculty, apparent difficulty in applying the new Interpretations, and additional debate over status for clinical faculty.

A. *The Challenges Before the U.S. Department of Education*

Facing difficulty in persuading the ABA to drop efforts to improve the status of clinical faculty and fully integrate clinical legal education in law

Interpretation 405-9:

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

Id. (italics, underscores, and strike-outs in original); *see also* 2007 STANDARDS, *supra* note 1, at 34 (including the same version of Standard 405(c)).

203. CONSULTANT'S 2004–2005 REPORT *supra* note 187, at 61.

204. *Id.*

schools, ALDA has challenged the certification of the ABA as the accrediting agency for legal education.²⁰⁵ In March 2006, the ALDA's board of directors argued in a letter to the U.S. Department of Education, which was considering renewal of the ABA's status as the accrediting agency, that all Standards that presuppose a system of tenure or a tenure-like alternative should be revised or rescinded.²⁰⁶ The ALDA's board focused in particular on security of position for clinical faculty: "Standard 405(c) is an unnecessary intrusion into the economic relationship amongst the law schools and those who run their clinical programs."²⁰⁷ In June 2007, the Secretary of Education "re-recognized" the ABA as the accrediting agency but limited the recognition period to eighteen months because of concerns over Standard 211 and diversity issues.²⁰⁸

B. The Accreditation Committee's New Approach to Clinical Faculty: Short-Term Contracts and No Meaningful Participation in Faculty Governance

In another significant development in the evolution of clinical faculty standards, during the same period that the ALDA board of directors was opposing Standard 405(c), the Accreditation Committee reviewed the results of an ABA site visit and found that Northwestern University School of Law was not in compliance with Standard 405(c).²⁰⁹ The Accreditation Committee's 2004 decision noted three bases for Northwestern's noncompliance:

- (1) full-time clinical faculty members are not afforded a form of security of position similar to tenure; (2) long-term contracts that are renewable are not

205. Public Comment, Am. Law Deans Ass'n, Application of the American Bar Association for Reaffirmation of Recognition by the Secretary of Education as a Nationally Recognized Accrediting Agency in the Field of Legal Education (Mar. 2006) [hereinafter ALDA Public Comment] (on file with authors).

206. *Id.* at 1–2; Leigh Jones, *ABA's Tenure Power is Disputed*, NAT'L L.J., Apr. 3, 2006, at 1, 12 (noting that "[a]lthough ALDA asserts that the ABA should not have a say in the terms and conditions for employment of all law school professionals, the groups' comment focuses on tenure for clinicians and library professionals."). A news item reports that the general membership of ALDA decided in January 2007 not to endorse the position of ALDA's board of directors toward ABA accreditation standards. *Threat to Tenure at Law Schools*, INSIDE HIGHER ED, May 4, 2007, <http://www.insidehighered.com/layout/set/print/news/2007/05/04/abatenure> (last visited Apr. 2, 2008). The same article reports that "at least one member [of the ALDA board of directors] does not recall a formal vote [by the board on the ABA accreditation issues], and another said he doesn't believe it was unanimous." *Id.*

207. ALDA Public Comment, *supra* note 205, at 4.

208. Memorandum from Hulett H. Askew, Consultant on Legal Educ. to the Am. Bar Ass'n, to Deans of ABA-Approved Law Schools et al. 5–6 (Aug. 21, 2007) (on file with authors).

209. Decision of the Am. Bar Ass'n Accreditation Comm., *supra* note 2, at 1–2.

granted after a probationary period reasonably similar to that for all other full-time faculty; and (3) full-time clinical faculty members are not afforded an opportunity to participate in law school governance in a manner reasonably similar to other full-time faculty members.²¹⁰

Northwestern did not appeal the Accreditation Committee's initial decision, and the school was required to report back to the Committee by March 2005 on the steps taken to achieve compliance.²¹¹ In a March 2005 letter, Northwestern reported that it had been able to attract "dedicated and active clinical faculty" under its current system and had not made any changes in response to the Accreditation Committee's action.²¹² At its April 2005 meeting, the Accreditation Committee found that the law school had still failed to demonstrate compliance with Standard 405(c) and ordered it to show cause as to why it should not be placed on probation or removed from the list of ABA-approved law schools.²¹³

The law school sent letters to the Accreditation Committee in September and October of 2006 arguing that although only seven of its thirty-eight clinical faculty had tenure or contracts of more than one year, the remaining thirty-one clinical faculty on one-year contracts had a form of security of position that was reasonably similar to tenure because the university had an academic freedom policy that the law school followed.²¹⁴ The law school argued that it complied with Standard 405(c) because of the August 2005 revision to Interpretation 405-6, which stated that "'long-term contract' means at least a five-year contract that is presumptively renewable or other arrangement sufficient to ensure academic freedom."²¹⁵

The Accreditation Committee agreed. In reaching its decision, the Committee read the provision "other arrangement sufficient to ensure academic freedom" as a completely separate avenue for ensuring security of position reasonably similar to tenure.²¹⁶ The Accreditation Committee's action equates "other arrangement sufficient to ensure academic freedom" with "long-term contract," which the same sentence in Interpretation 405-6 defines first as a "five-year contract that is presumptively renewable." CLEA explained the problem with the Committee's reading:

Northwestern's short contracts have been read by the Committee to be long-term contracts. Essentially, under the Committee's ruling, a law school can have one-day, at will contracts that have academic freedom protections; however, this is not consistent with the "form of security of position

210. *Id.*

211. *Id.* at 2.

212. *Id.*

213. *Id.*

214. *Id.* at 3-4.

215. *Id.*

216. *Id.* at 4.

reasonably similar to tenure” in both Standard 405(c) and Interpretation 405-6.²¹⁷

The Accreditation Committee’s decision also briefly addressed the issue of participation in faculty governance required by Interpretation 405-8. In response to a request from the Committee, Northwestern explained that the vast majority of clinical faculty do not have any vote in faculty governance since participation in governance is accorded only to tenured or tenure-track faculty, although other clinical faculty do serve on faculty committees other than those dealing with appointment and tenure of faculty.²¹⁸ Without explanation, the Accreditation Committee ultimately concluded that Northwestern had demonstrated compliance with Interpretation 405-8 even though the overwhelming majority of clinical faculty has no vote in faculty governance.²¹⁹ This lack of explanation makes it impossible to understand how the Committee interpreted and applied the requirement that clinical faculty members at Northwestern shall be afforded participation in law school governance “in a manner reasonably similar to other full-time faculty members.”

The Accreditation Committee’s approval of Northwestern’s treatment of clinical faculty has rekindled the more than twenty-five year long debate over whether clinical faculty should be treated reasonably similar to other full-time law faculty. Indeed, the Accreditation Committee wrote to the Standards Review Committee in February of 2007 noting “that there continues to be much debate about just what is required to comply with Standard 405(c) with respect to security of position reasonably similar to tenure” and that Interpretation 405-6’s language including “or other arrangement sufficient to ensure academic freedom” creates uncertainty.²²⁰ The Accreditation Committee, and later the Council, requested the Standards Review Committee to review the matter and clarify Interpretation 405-6.²²¹ In addition, the

217. Letter from Paulette J. Williams, President, Clinical Legal Educ. Ass’n, to William R. Rakes, Chair, Am. Bar Ass’n Section of Legal Educ. and Admissions to the Bar (Mar. 5, 2007) (on file with authors).

218. Decision of the Am. Bar Ass’n Accreditation Comm., *supra* note 2, at 2. Interpretation 405-8 states: “A law school shall afford to full-time clinical faculty members participation in faculty participation in faculty meetings, committees, and other aspects of law school governance in a manner reasonably similar to other full-time faculty members.” 2007 STANDARDS, *supra* note 1, at Interpretation 405-8.

219. Decision of the Am. Bar Ass’n Accreditation Committee, *supra* note 2, at 3.

220. Am. Bar Ass’n Standards Review Comm., Draft Revisions to Standards for Approval of Law Schools and Explanation of Amended Interpretation 405-6 (attached to E-mail from Hulett Askew, Consultant on Legal Educ. to the Am. Bar Ass’n, to Michael Pinard, President, Clinical Legal Educ. Ass’n (Feb. 15, 2008)) [hereinafter Draft Revisions and Explanation of Amended Interpretation 405-6] (on file with authors).

221. *Id.*; Memorandum from Richard Morgan, Chair, Standards Review Comm., & Hulett Askew, Consultant on Legal Educ. to the Am. Bar Ass’n, to Deans of ABA-Approved Law Schools et al. (Aug. 21, 2007) (on file with authors) (identifying the Committee’s agenda for

Council voted in August 2007 to form a special committee to look at the issue of security of position and governance rights for clinicians.²²²

After considering the ambiguous language added by the Council in 2005, the Standards Review Committee unanimously approved and forwarded to the Council a revised version of Interpretation 405-6 that provided:

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, 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, during which the clinical faculty member may be employed on short-term contracts, the services of 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 for a term of at least a five-year ~~contract~~ arrangement that is presumptively renewable or includes other provisions ~~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.²²³

The accompanying explanation stated that the proposed amendment makes clear that "a one year contract plus a policy on academic freedom is not sufficient under this Standard [405(c)]."²²⁴

After considering the proposed amendment in February 2008, the Council decided to postpone any action until after the report from the special committee on security of position in the summer of 2008.²²⁵ This postponement means that the Accreditation Committee will likely continue to experience difficulty in applying Standard 405(c) and Interpretation 405-6.

academic year 2007–2008); E-mail from Mark Aaronson to Clinical Legal Educ. Ass'n Board of Directors (May 17, 2007) (on file with authors) (reporting the actions of the Standards Review Committee at its May 16, 2007 meeting).

222. Paulette J. Williams, *President's Message*, CLEA NEWSLETTER (Clinical Legal Educ. Ass'n, New York, N.Y.), Sept. 2007, at 1 (on file with authors).

223. Draft Revisions and Explanation of Amended Interpretation 405-6, *supra* note 220 (underscores in original).

224. *Id.*

225. E-mail from Michael Pinard, President, Clinical Legal Educ. Ass'n, to lawclinic@lists.washlaw.edu (Feb. 14, 2008) (on file with authors) (reporting on ABA actions concerning Interpretation 405-6); E-mail from Dan Freeling, Deputy Consultant on Legal Educ. to the Am. Bar Ass'n, to Peter Joy (Feb. 15, 2008) (on file with authors) (confirming reports of ABA actions concerning proposed amendments to Interpretation 405-6).

*C. The ABA Accreditation Task Force's Statement on Eliminating
"Security of Position" from the Standards*

The continued debate over the status of clinical faculty has not been confined to ALDA's efforts to pressure the ABA through the Department of Education, nor by the Accreditation Committee's uncertain approach in applying the Standard. Recently, a special ABA Accreditation Task Force was charged with looking at accreditation from a policy perspective and over a quarter of the report focused on the "security of position" issue, principally as contained in Standard 405(c).²²⁶ The report noted that although tenure or a form of position reasonably similar to tenure is not explicitly required in standards of other accrediting bodies, clinical law faculty may be distinguishable "because of documented history of repeated attempts at outside interference with litigation and other forms of advocacy by law school clinics."²²⁷

The Task Force was unable to reach a consensus on a recommendation concerning "security of position," but a majority signed on to the following assessment of the issue:

Even if the existing system is imperfect, it is far from self-evident that adequate alternative mechanisms can be fashioned. The removal of all "security of position" provisions from the Standards would have implications that go far beyond simply allowing law schools to determine for themselves whether to have a tenure system for doctrinal faculty or one that affords "a form of security of position reasonably similar to tenure" for clinical faculty. If the current provisions are deleted, and no other provisions for "security of position" are promulgated, a law school could choose to staff all or a major part of its programs with faculty members who serve as at-will employees or in some similar capacity. . . . It seems highly doubtful that such arrangements would promote the goals of a sound program of legal education, academic freedom, and a well-qualified faculty. In the absence of any specific standard, however, that 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.²²⁸

The Task Force's assessment of the issue recognizes the difficulty in seeking to undo, without a demonstrated need for change and a suitable alternative, a Standard that has evolved by a consensus on the Council over more than two decades.

226. SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, AM. BAR ASS'N, REPORT OF THE ACCREDITATION POLICY TASK FORCE I, 17 (May 29, 2007) (on file with authors).

227. *Id.* at 22.

228. *Id.*

The Council agreed with the Task Force's assessment and has appointed a Special Committee on Security of Position, which is scheduled to issue an interim report by May 2008. The Special Committee's charge is to explore whether "security of position" language could be eliminated and some other language be inserted in either the Standards or Interpretations that would protect "academic freedom, attraction and retention of well-qualified faculty, and 'ensur[e] that law school governance decisions that can affect curriculum will have the benefit of the comments of sectors of the law school faculty whose knowledge and perspective otherwise might be unrepresented.'"²²⁹ In its deliberations over new possible language, the Committee is to consider whether the proposed provisions will "serve the interests underlying the existing 'security of position' provisions as effectively, more effectively, or less effectively than the existing provisions[.]"²³⁰ Clearly, the history of clinical faculty standards did not end with the 2005 revisions to Standard 405(c), as more proposed changes may be forthcoming.

VII. CONCLUSION

The history of the ABA Standard addressing the status of clinical faculty demonstrates that the value of clinical legal education and the faculty teaching those courses has long been contested. The historical record indicates that Standard 405(c), originally labeled 405(e), was first and foremost premised on the need, recognized by prominent members of the legal profession and numerous ABA committees and reports, that to further the development of clinical legal education it was necessary to integrate faculty teaching clinical courses into the law school through long-term employment relationships and participation in law school governance. In addition, prominent deans on the ABA Council in 1984 maintained that tenure or a reasonable equivalent was essential to securing academic freedom,²³¹ the AALS added its voice to support tenure as a means of guaranteeing academic freedom in 1999,²³² and the Council reaffirmed this position in 1999 and again as recently as 2004.²³³

In the intervening years since the adoption of Standard 405(c), clinical legal education has become more integrated into the typical law school curriculum. Clinical programs are featured prominently in most law school admissions materials, websites, magazines, and brochures. Commentators writing about the history of legal education in the United States note that, of

229. Memorandum from Chief Justice Ruth McGregor, Chairperson, Council on Legal Educ. and Admissions to the Bar, to Special Committee Appointees and Interested Legal Education Organizations (Oct. 8, 2007), *available at* <http://www.abanet.org/legaled/committees/SpecialCommitteeAppointment.doc> (last visited Mar. 24, 2008).

230. *Id.*

231. *See supra* notes 110–18 and accompanying text.

232. *See generally* 1999 Standards Review Committee Hearing, *supra* note 170 (providing the decision of the accreditation committee).

233. *See supra* notes 175–76 & 181–85 and accompanying text.

all of the curricular developments since the introduction of the casebook method, clinical legal education is the most significant.²³⁴ In the face of this progress of and recognition for clinical legal education, one might expect that the faculty teaching those courses would be fully integrated into today's law schools and that as an accreditation matter, the status of clinical faculty would be well settled.

History demonstrates, however, that no other accreditation issue has been as contentious as the ABA's efforts to secure reasonably similar treatment of clinical faculty with their classroom faculty counterparts. Integration of clinical faculty into the governance life of law schools as a means of encouraging the development of clinical legal education has faced continuous opposition. At first, those opposed to giving security of position and a voice in law school governance to clinical faculty based their arguments on the then newness and experimental nature of clinical programs. Later, the argument against making clinical courses and the faculty teaching those courses integral parts of the law school shifted to an attack on accreditation standards that were perceived to infringe on law school autonomy. Despite the repeated findings of ABA commissions and numerous Standards Review Committee and Council recommendations that law schools fully integrate clinical faculty, their status within the legal academy remains uncertain.

The well-publicized action by the Accreditation Committee concerning its recent application of Standard 405(c) and its Interpretations, particularly Interpretation 405-6, to Northwestern University School of Law initially prompted this investigation into the history and development of Standard 405.

The Accreditation Committee action approving one-year contracts for clinical faculty and no meaningful participation in faculty governance appears to negate more than two decades of work by the ABA's Standards Review Committee and Council on this Standard, as well as the salutary effects of this Standard on the development of clinical legal education. In one sense it can be said that clinical legal education has "come of age." But relative to other law school courses that maturation has been institutionally frozen at a point of permanent adolescence in those law schools that deny equal treatment of clinical courses and faculty.

The last intensive review of Standard 405 and its Interpretations in 2005 responded to requests by the Council for the Standards Review Committee to consider the meaning of "renewable" in Interpretation 405-6's reference to a system of long-term contracts for clinical faculty. It sought to resolve the lack

234. See, e.g., PHILIP G. SCHRAG & MICHAEL MELTSNER, REFLECTIONS ON CLINICAL LEGAL EDUCATION 5 (1998) (stating that clinical legal education is "so often called the most significant change in how law was taught since the invention of the case method that it now sounds trite"); STEVENS, *supra* note 19, at 211 (stating that "[o]f all the renewed interest in skills, the particular interest in the skills embraced in the concept of clinical legal education was to prove the most important").

of agreement about whether “renewable” means “presumptively renewable” or “capable of being renewed.”²³⁵

In the years prior to 2005, the Accreditation Committee had drifted toward approving three-year contracts as long-term contracts.²³⁶ The specific incorporation by the Standards Review Committee of five-year contracts as a definition for long-term contracts marked an effort to provide “greater security of position than the Accreditation Committee’s practice” and was “designed to achieve the goal of Standard 405(c), i.e., to ensure that law schools can attract and retain quality full-time clinical faculty and thereby strengthen the clinical component of the law school curriculum.”²³⁷ The action by the Accreditation Committee approving one-year contracts is in direct conflict with the Council’s longstanding aim of providing greater security of position to clinical faculty and belies any meaningful understanding of the phrase “long-term.” The recent proposal by the Standards Review Committee to amend Interpretation 405-6 to clarify that one-year contracts do not provide security of position sufficient to protect academic freedom and integrate clinical faculty into law schools is a rejection of the Accreditation Committee’s action and affirms the plain language of Standard 405(c).

Not only is the Accreditation Committee’s recent decision at odds with the history of Standard 405, but it reinforces a marginalization of both clinical courses and faculty teaching those courses in legal education. A recent Carnegie Foundation for the Advancement of Teaching report on legal education argues that the failure to fully incorporate clinical faculty and clinical courses into the law school sends a message to law students that such courses are not valued.²³⁸ The report notes that such courses are usually taught by “a faculty that is not typically tenured and that has lower academic status. In many of the schools we visited, students commented that faculty view courses directly oriented to practice as of secondary intellectual value and importance.”²³⁹ The Carnegie finding substantiates the more than twenty-five year concern that unless faculty teaching clinical courses have security of position and participation in faculty governance reasonably similar to that of other full-time law faculty, clinical legal education will never be a truly valued part of law school education and will never achieve its full potential in teaching law students the skills and values of the legal profession.

235. See *supra* notes 191–92 and accompanying text.

236. See *supra* note 192 and accompanying text.

237. Memorandum from Sebert & Burke to Deans of ABA-Approved Law Schools, *supra* note 189, at 4; *Proposed Revision of Chapter 4*, *supra* note 189, at 12.

238. WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 87–88 (2007). This observation is consistent with the observation of other commentators that “although clinical legal education is a permanent feature in legal education, too often clinical teaching and clinical programs remain at the periphery of law school curricula.” Barry, Dubin & Joy, *supra* note 29, at 32.

239. SULLIVAN ET AL., *supra* note 238, at 88.

The history of the Standards for clinical faculty demonstrates that although some in legal education have been resistant, the ABA has long supported the full integration of clinical courses and the faculty teaching those courses into law schools. The history shows an unbroken movement by the ABA toward a system that provides a long-term relationship between the clinical faculty member and the law school so that the clinical faculty member has job security and the ability to participate in faculty governance comparable to other full-time law faculty teaching doctrinal courses. As a majority of the members on the recent ABA Accreditation Task Force concluded, any change to Standard 405(c) should not occur without a demonstrated need for change and a suitable alternative.