



NORTHWESTERN UNIVERSITY SCHOOL OF LAW

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President Henry S. Bienen
Northwestern University, Crown 2-130
633 Clark Street
Evanston, IL 60628

Re: Your letter seeking University Presidents' support for Northwestern's efforts to convince the American Bar Association not to regulate the terms and conditions of clinical law teachers' employment

Dear Henry:

Because your January 22, 2009, letter to University Presidents raises a host of troubling issues, I hope you will find it useful to hear another side of the story. Your letter will surely compound the reputational harm to our clinical program that began when our U.S. News ranking declined sharply because clinical teachers across the country learned that our Dean was trying to organize a national movement of deans to repeal the ABA's standards protecting their security of position. Because your letter has unfortunately been circulated by the Society of American Law Teachers and the Clinical Legal Education Association to clinical and non-clinical law teachers across the country, clinical teachers will now see even less reason to add to the prestige of a School that seems to them to be intent on attacking their rightful place in the academy. In addition, senior clinical faculty from other law schools who have contacted me about your letter are of the uniform opinion that it will make it far more difficult for our program to hire both new and experienced clinical teachers who have opportunities elsewhere for secure faculty positions. This is especially the case they say with respect to teachers of color, who have been extremely reluctant to accept clinical teaching positions at law schools which, like ours, offer only a second class faculty status.

Nevertheless, it is clear from your letter that you see the principle of "institutional autonomy" as of supervening importance. I suggest, however, that in this particular context that principle is misplaced because it fails to recognize the public policy and pedagogical justifications for the ABA's security of position accreditation standard for clinical teachers. Because ABA accreditation makes a law school's graduates eligible to

practice law, it gives accredited law schools a competitive advantage against potential lower cost providers. The *quid pro quo* for this advantage is the accredited schools' duty to demonstrate to the ABA, in its role as proxy for the State Supreme Courts, that the schools are preparing students adequately for the practice of law. When we use the cause of academic autonomy to slight the duties that flow from our acceptance of the advantages of government protection from competition, we become appropriately subject to accusations of rent-seeking and free-riding.

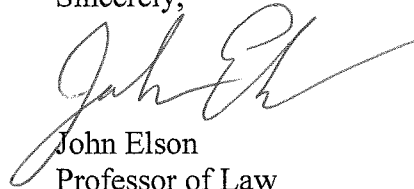
I recognize, of course, that instead of denouncing all ABA regulation, you would limit it to a focus on the quality of instruction. This would make sense if the ABA could find effective measures, such as output assessments, to gauge the quality of law schools' preparation of their students' for practice. Because no one has figured out how to do this in the field of legal education, however, it is entirely appropriate for the ABA to require law schools to ensure that the small portion of their faculties who are most concerned with preparing students for practice, *i.e.* their clinical teachers, have employment conditions that will enable them to develop careers in clinical teaching and to play influential roles in the shaping and execution of their schools' curricula. Moreover, since law schools deem tenure necessary for the bulk of their non-clinical full-time faculty, the ABA is fully justified in presuming that at least some security of position and voting privileges are also needed for the faculty who are most directly involved in fulfilling the ABA's central accreditation mission. Further, given the present trend among elite law schools toward hiring faculty with little or no background in or research focus on the concerns of law practice or even of legal doctrine, the need for the ABA's insistence on clinical teachers' security of position and voting rights will in the future become even more critical to the ABA's fulfillment of its duties to the public and to the Supreme Courts of the States.

Even if you reject entirely the ABA's rationale for its efforts to require law schools to provide some of their clinical law teachers with secure positions and a voice in faculty governance, I hope that for the sake of Northwestern's entire faculty you will reconsider your decision to make our University the national leader of the movement to attack the ABA's efforts in this regard. There can be little doubt that the message your campaign is sending to prospective and existing faculty across Northwestern will hurt our recruitment and retention goals. When you announce publicly to your fellow university presidents that providing tenure-track positions or long-term contracts to clinical law teachers would deny the Northwestern Administration "the flexibility to adjust to changing demands and needs" and "severely constrain() ... our ability to be innovative," the message to all faculty considering coming to or leaving Northwestern will be clear: the Northwestern Administration cannot be counted on as a reliable protector of faculty job security. Indeed, given the fact that, as your letter explains, Northwestern has already won the battle with the ABA to defeat its clinical law teachers' security of position, your letter can be read only as the Administration's attempt to foster our competitors' support for a more general attack on our faculty's security of position. Prudent faculty considering coming to or leaving Northwestern who recognize the Administration's discontent with the constraints of tenure-like positions will naturally be concerned that they will be next in line for the sort of "flexible" and "innovative" treatment accorded

Northwestern's clinical law faculty. From the perspective both of my 34 years on this faculty and of non-Northwestern faculty observers who have contacted me about your letter, this does not appear to be a message likely to attract or retain faculty who have competitive job offers.

I do not know if there is anything that can be done at this stage to ameliorate the reputational damage that has already been done by your January 22 letter, but I hope that my letter at the very least will apprise you of the fact that your own faculty is not united in support of your efforts in this regard, that there are risks in continuing those efforts and, perhaps, it will raise some alarms in your successor about continuing on the same course. Finally and equally important, your letter calls attention to an issue that, as you know, has been of great concern to me and others who have been officers of the General Faculty Committee, which is the need for consultation with faculty representatives before embarking on paths such as this, and such as that exemplified by the Medill faculty disenfranchisement, which can have critical impact on the role and status of all Northwestern faculty members. Perhaps in the future the new structure for faculty governance that my colleagues have been working toward will facilitate a more consultative and cooperative approach toward governance at Northwestern.

Sincerely,



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cc. Morton O. Shapiro, President, Williams College
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