The Dean’s Office: Why The ABA Is Resistant To Change

By David Yellen
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The American Bar Association plays an important, but often misunderstood, role in legal education. Overall, I believe the ABA deserves mixed grades for its response to the current crisis. It did not cause the crisis, and it is implementing some valuable improvements. But its resistance to change stands in the way of a number of needed reforms.

First, some background. The Council and Accreditation Committee of the ABA Section of Legal Education, not the ABA itself, is authorized by the U.S. Department of Education to accredit law schools. DOE rules require an accrediting agency to be separate and independent from a trade association, so the Section operates essentially autonomously from the main ABA. ABA accreditation is critical to law schools because all states authorize graduates of ABA accredited schools to take the bar examination. Recently, the President of the ABA itself created the Task Force on the Future of Legal Education (on which I serve). The Task Force is an advisory group, though, with no accreditation authority.

Two key features of the ABA process are voluntarism and self-regulation….

All members of the Council and the Section’s committees are volunteers. The Section has a small professional staff, but all of the policy decisions are made by the volunteers. No more than half of the members of the Council and the two major committees (the Accreditation Committee, which examines whether schools are in compliance with the Standards and the Standards Review Committee, which recommends changes in the Standards to the Council) can be deans, professors, or other law school employees. The remaining members are judges, lawyers, or public members. Because of their greater interest and expertise, the academics usually have the most influence. Contrary to what one often hears, the academics involved represent a diverse range of law schools, although deans and faculty from the most elite handful of schools infrequently participate.

Law schools must fully comply with the ABA Standards and Rules of Procedure for Approval of Law Schools to receive or retain accreditation. The Standards are intended to identify minimum requirements necessary to ensure a high quality legal education. This is not an easy task. Reasonable people will disagree on which elements of legal education are essential. Almost no individual standard, in isolation, will probably be truly essential. The Standards as a whole should promote excellence in legal education without overly restricting the ability of schools to choose their own paths.
Many of the Standards are sensible and appropriate. In my view, however, there are a number of problems with the Standards. One big issue is that the Standards are too law faculty-centric. They reflect too much of what deans and professors think legal education should be, rather than what is truly necessary to ensure quality. For example, the Standards require that full time faculty teach substantially all first-year courses and a “major portion” of the entire curriculum. Although the language of the rules is murky, there is an expectation that a large percentage of the faculty will be on tenure-track or have long term contracts. Every school must have a scholarly mission and devote resources to that undertaking.

Now, I am not in favor of “abolishing” tenure and I believe that a substantial full-time faculty committed to both teaching and scholarship will continue to be the “gold standard” for law schools. But I think it takes a great deal of self-interest and rationalization to conclude that only a school following this model can provide an adequate legal education. No other major accrediting body takes this approach. If a school can operate effectively with a focus solely on teaching, and with the use of more part-time faculty, it should be allowed to do so.

Similarly, the Standards are overly specific about certain aspects of legal education instruction. Each student must receive at least 58,000 minutes of instruction, of which 45,000 must be classroom-based. This essentially prohibits a school from relying heavily on well supervised internships for the second half of a law student’s education. Some of the rules are just silly: full-time students are theoretically forbidden from working more than 20 hours per week (while there are no limits on part-time students) and schools are required to ensure regular and punctual attendance.

The Standards Review Committee is in what should be the final year of a long comprehensive review of the Standards (I was on the SRC from 2006-2012; the review has been going on since 2009). Some important changes are taking place. The Standards have historically required law schools to maintain large, and expensive, libraries. Happily, the Council seems poised to modernize its approach here, focusing on student and faculty access to information, rather than a school’s ownership of materials. This could lead to major cost savings over time. The SRC proposed, and the Council implemented, new rules requiring dramatic (if still imperfect) transparency in employment outcomes. Groups like Law School Transparency, with whom the SRC worked closely, deserve much credit for advocating for these rules.

Some have suggested that the ABA should take steps to limit the number of law schools and law students. I do not believe that this is a proper accreditation function. There is a good chance that this approach would violate antitrust laws. And as I have written about before, the market is already working to dramatically reduce the number of new law students. The ABA should, however, insist on rigorous instruction and successful outcomes. No fully accredited school has ever lost its accreditation and it is even extremely rare for a school to be placed on probation. The bar passage standard has been a weak one. Although there are risks in raising this requirement, particularly the impact such a move could have on diversity, it may be worth considering. More focus on job outcomes in the Standards might also make sense.

The ABA should also consider drawing from the charter school experience. Charter schools receive significant relief from regulatory rules in exchange for being closely evaluated based
upon a set of agreed-upon goals. The Section should consider allowing a small number of existing or newly created schools to propose a detailed plan for operating a quality law school without being governed by many of the more onerous Standards. The success or failure of these schools could be monitored and studied, and sensible reforms to the Standards could emerge.