

## SEEKING COMPETITION IN LAW SCHOOL ACCREDITATION

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Last night,<sup>1</sup> Justice Alito quoted President Reagan about the impact of the Federalist Society on the legal culture of law schools. The Justice went on to say that, unfortunately, President Reagan may have been wrong in this area; that really the legal culture of law schools has not significantly changed. The reason for the lack of change is the lock that the ABA has on accreditation.

The first thing I want to do is to distinguish between the Section on Legal Education and the ABA more generally. Some in this room may find this difficult to believe, but generally the ABA is more open to diversity of opinion and to different intellectual approaches today than it was some years ago—I would add, the change is due largely to the Federalist Society. I say that based on my experience with the ABA. Although I have spoken at the ABA events a number of times, most recently I did so when the specific request went out for someone from the Federalist Society to address the group. After the address, many people said, “This was wonderful, to have a different opinion. It was the best program.” Now, don’t get me wrong. I do not want to exaggerate the openness of the ABA generally. At the event just mentioned, I was outgunned three to one on the subject of Guantanamo, whereas at this convention this morning,<sup>2</sup> we had a much more balanced panel on that subject. Indeed, this present panel is more balanced. But still we should give credit to the ABA for moving in a more open direction. The Section on

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1. Referring to the Federalist Society’s 2006 National Lawyer’s Convention Annual Dinner, <http://www.fed-soc.org/publications/id.426/default.asp> (last visited Apr. 15, 2007).

2. Referring to the morning panels of the Federalist Society’s 2006 National Lawyer’s Convention, <http://www.fed-soc.org/publications/id.426/default.asp> (last visited Apr. 15, 2007).

Legal Education needs the same kind of competitive challenge in order to open it to the intellectual diversity that is available. Competition is good. The fact is that the Section on Legal Education has responded not to the power of ideas, but to the power of interest groups and more importantly, to the power of the Antitrust Division of the Justice Department. Justice has overseen the ABA Section for the last ten years, during which the changes you heard about have been made.

I want quickly to cover three points: (1) the structure of accreditation, (2) problems with how accreditation actually works, and (3) some possible solutions. State supreme court involvement in accreditation has already been mentioned and is well known. Many of you may not know, however, about the role of the U.S. Department of Education. DOE, through a federal statute, authorizes certain private accrediting agencies to monitor compliance with educational standards for those institutions that receive federal funding in some form—e.g., student aid.<sup>3</sup> I happen to have worked for an accrediting agency that serves as a DOE-approved accrediting agency at the undergraduate level. Although DOE-accreditation is more important at the undergraduate level, the DOE-approved accreditation of the ABA has a bearing on its professional accrediting function. At the undergraduate level, there is not much competition in accreditation. Nevertheless having some alternative competing agency available gives undergraduate institutions an option for obtaining federal funding without regional accreditation and thus provides leverage against being forced to conform to regional accrediting standards based on notions of political correctness. In my view, law schools need competition in accreditation in order to make it possible to distinguish between competence and character on the one hand and ideology on the other. Just imagine if The Federalist Society were given sole authority to accredit law schools. There would be yelling and screaming from the legal establishment about bias. The Federalist Society would not and should not be in that position. Why? Clearly, The Federalist Society is a group of conservative and libertarian lawyers and its membership does not reflect the views of the entire spectrum of the Bar. Those who do not care to join The Federalist Society should be able to

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3. 20 U.S.C. § 1099(b) (2004).

attend or operate law schools that meet basic standards of legal education. Their ability to practice law should not depend on having to attend a law school which adheres to either a conservative/libertarian or a liberal viewpoint. The fact is that the ABA is an ideological organization forcing its ideology into the standards on accreditation.

It is no answer to say that the standards of accreditation are left to state supreme courts and that accreditation is a matter of state autonomy. A national accrediting body serves a coordinating function, so that one state knows the standards for a lawyer education in other states. Suppose a state supreme court filled with Federalist judges decides that it wants to replace the ABA as the accrediting body for law schools in that state, or at least that they wish to have another, alternative accreditor. Say you are the dean of a law school in that state. At present, you cannot afford to lose ABA accreditation because your students would be unable to go to other states which require graduation from an ABA-accredited law school in order to take its bar exam. The ABA, operating under the benefit of the antitrust exception for state entities, has been able to suppress competition in accreditation nationwide. If it were not acting under the umbrella of state supreme courts, this cartel would be called what it is.

John Sebert says that there is great flexibility in these new standards. I disagree. The lack of flexibility applies not just to Standard 212. John has addressed criticisms about Standard 212. He says there is no requirement for quotas, no critical mass required, and no violation of state law is required. But all litigators know one very important thing: the outcome often turns on which party has the burden of proof. The key here is that the school has to demonstrate its commitment to diversity.<sup>4</sup> In other words, the law school bears the burden of proof, which means that without quotas, it may not be able to carry its burden.

Let's consider how, in practice, this process works with respect to another requirement about which you have also heard, the requirement of live-client contact. The standard says a law

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4. See AM. BAR ASS'N SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, 2006-2007 STANDARDS AND RULES OF PROCEDURE at Standard 212 (2006), available at <http://www.abanet.org/legaled/standards/2006-2007StandardsBookMaster.PDF>.

school should provide either clinical or live-client experience.<sup>5</sup> Our law faculty has chosen to offer live-client experience, but not clinical courses. The ABA does not accept this. We report to the ABA our “live client” and simulation offerings. Every time we do, the committee comes back and points to the numbers and concludes that we “do not meet the standard.” As far as the objective criteria are concerned, we are in compliance. But we are told otherwise. In fact, the process is simply a numbers game. The ABA will say it is not a numbers game. But I have copies of the letters from the ABA to show it is a numbers game.

So, whatever the standards say, the reality is evident in the enforcement. The outgoing head of the Section, Steven Smith, has recognized that there are real problems with the ABA’s process. He has written the following: “The current system is . . . a victim of its own success. The ability to enforce meaningful standards has led groups to seek to use accreditation for their own narrow purposes. Such claims are made, for example, about deans, faculty, clinicians, legal writing instructors and librarians.”<sup>6</sup> In other words, the whole process has become very politicized. It results from the lack of adequate competition.

So, what is a possible solution? Well, the ABA is up for reauthorization before the U.S. Department of Education. There is a hearing on December 4.<sup>7</sup> Gail Herriot and Roger Clegg have been involved in this. The issue for decision is whether the Department should reauthorize the ABA as the federally-approved accrediting agency for law schools. It is unlikely that the ABA will be denied reauthorization. But there are other options to simple reauthorization. The Department could look for and encourage a competitor. Or maybe, the Department could extract from the ABA some kind of concession that there would be an A track and a B track of accreditation. On the A track—we might call it the Gold Star track—law schools could choose to comply with all of these controversial standards. But on the B track, law schools might be able to choose simply to be judged in terms of technical competence and leave to the state’s supreme court and local bar associations the issue of character.

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5. *Id.* at Standard 302(b).

6. Steven R. Smith, *The Best System of Accreditation in America*, 2006 SYLLABUS 1.

7. *U.S. Dep’t of Educ., Hearing on Reauthorization of Am. Bar Assoc.* (Dec. 4, 2006).

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Ultimately, however, the best hope of forcing competition may lie with the *Washington Post*. Maybe the *Post* will take up the cause of competition in law school accreditation. Why? The ABA will not accredit Concord Law School, an online law school operating in California, and therefore, its graduates cannot take the bar exam in other states. Concord is owned by a subsidiary of the *Washington Post*. If the Bush administration would move for competition in accreditation, this Administration might finally win praise from the *Washington Post*.