

## IT'S NOT PERFECT, BUT THE ABA DOES A KEY JOB IN STATE-BASED REGULATION OF LAWYERS

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With all due respect to the way Doug set up the problem, I am going to try to set it up just a little differently. One can imagine a world without lawyers. That is, a world without a group of people who are licensed and certified to have a special skill and certain jobs reserved to them. I think there is good reason to believe that in the future, there may be less need for specialized and certified lawyers. Non-lawyers will do many things that lawyers do today. And yet, disappearance of lawyers or people designated as lawyers does not seem to be on the horizon.

Once we concede the existence of a category of people called lawyers, and distinguish them in significant part by the special education they receive, it becomes necessary to define what constitutes that special education and who is certified to satisfactorily provide it. In our system, the responsibility for licensing lawyers and certifying that they have received the appropriate training has fallen not to the ABA, but to the state supreme courts of all the jurisdictions in the country, which is now more than fifty if you include D.C., federal districts, courts of appeals, and so on. I believe, and I suspect many members of the Federalist Society believe, that is a good thing: power over such an important aspect of American life has devolved to state agencies and remains at that level. Some state courts, most notably California, have set up their own bodies to define what constitutes a legal education and what is sufficient for that purpose, and they certify or accredit state law schools located in their jurisdiction.<sup>1</sup> One of the problems with state accreditation, however, is that other states do not necessarily trust each other's

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1. See RULES REGULATING ACCREDITATION OF LAW SCHOOLS IN CALIFORNIA AND SCHEDULE OF LAW SCHOOL FEES R. I-III (2002), available at [http://calbar.ca.gov/calbar/pdfs/admissions/LS-Rules\\_for\\_Accred.pdf](http://calbar.ca.gov/calbar/pdfs/admissions/LS-Rules_for_Accred.pdf).

educational judgment, and indeed, almost nobody trusts California's educational judgment, in terms of state accreditation, other than California. That presents a real collective action problem.

How do we create a world in which lawyers trained in one jurisdiction can practice (i.e., be admitted to the bar) in other jurisdictions when people do not live within ten miles of where they grew up anymore but, rather, in a very vibrant national and, indeed, world economy? Largely by accident, historically each of the state supreme courts has concluded that a law school accredited by the American Bar Association qualifies a graduate to take the bar examination in that state, and thus to become a lawyer in that state. No federal authority compelled the state supreme courts to do this. No one at the ABA had any authority or responsibility to persuade states, or at least to tell states, to do this. Whatever many of us might think about the ABA generally, whatever our particular fights with the organization in other areas, the fact is that fifty state supreme courts, and other jurisdictions as well, concluded independently that graduates of schools accredited by the ABA are appropriate for admission to the bar, and indeed that the quality of those graduates is quite good.<sup>2</sup>

That does not mean that we should accept everything in the current accreditation standards as appropriate. Indeed, I would suggest that two significant questions ought to be applied to the standard that we have. First, is there a correspondence between those standards and the quality of legal training, the background that we believe lawyers should have? And second, do the standards provide enough flexibility for schools to differentiate themselves and to find new, more effective ways to deliver what they see as a quality legal education?

In fairness, in recent years the ABA accreditation standards have become somewhat more flexible and have allowed students greater flexibility than they once did. Perhaps the best illustration of this is the requirement that graduates from an ABA-accredited law school must have 58,000 minutes of legal

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2. See Mathew D. Staver & Anita L. Staver, *Lifting the Veil: An Expose on the American Bar Association's Arbitrary and Capricious Accreditations Process*, 49 WAYNE L. REV. 1, 55-56 (2003).

instruction.<sup>3</sup> A most bizarre standard to anybody reading it for the first time, it sounds like the strangest, most arbitrary requirement of all. And yet, when you think about it, that turns out to be approximately the eighty to eighty-five hours of credit that most schools require and have required for many years. And by stating it in terms of minutes, the requirement allows the school to have the freedom to design many different lengths of classes, lengths of semesters—indeed numbers of semesters—than they formerly did. So that is one area in which the ABA has performed well. I suspect John Sebert will suggest others.

I think there are three main areas of concern, and to some extent Doug Kmiec foreshadowed these. First is the requirement that each law school demonstrate a commitment to having a faculty and student body that is diverse with respect to gender, race, and ethnicity<sup>4</sup>—and to do so even in the face of state law that prohibits consideration of those matters in hiring and admission.<sup>5</sup> There is no time to get into that now, but later I will be prepared to defend that standard, at least in part on the basis that any given state can have any rule it wants, but if the school is ABA-certified, then other states must extend to those graduates admission to their bar. These states should not be entitled to impose their judgments on others. The second area of concern deals with requirements of tenure or tenure-like status for all faculty—including clinical, legal writing faculty, deans, regular faculty, and librarians—without an obvious link as to how that status relates to the performance of the job they are assigned to do. And in the last category are some very specific requirements as to curriculum in ABA-accredited law schools. One of them, for example, is the use of live-client training in clinics, as opposed to simulation or other kinds of training. Another is a specific training in the American Bar Association's Model Rules of Professional Conduct. It is the only book that everybody is specifically required to use as a basis of a particular kind of education.

But the bottom line of my presentation is that the ABA accreditation process is likely here to stay because it meets the

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3. AM. BAR ASS'N SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, 2006–2007 STANDARDS AND RULES OF PROCEDURE at Standard 304(b) (2006), *available at* <http://www.abanet.org/legaled/standards/2006-2007StandardsBookMaster.PDF>.

4. *Id.* at Standard 212.

5. *E.g.*, CAL. CONST., art. I, § 31; MICH. CONST., art. I, § 26.

needs of a decentralized system of actual lawyer regulation. Something better could come along. But the switching costs are enormous. This system that contributes to a free flow of lawyers and free flow of licensing of lawyers has become so important and so central to the country. Until we find some replacement, however, our task should be to try to identify standards that can be improved and then to get to work on changing it.