

THE REPORT AND RECOMMENDATIONS OF THE ABA TASK FORCE ON THE FUTURE OF LEGAL EDUCATION: ITS SIGNIFICANCE FOR BAR ADMISSIONS AND REGULATION OF ENTRY INTO THE LEGAL PROFESSION

by Jay Conison

The American Bar Association created the Task Force on the Future of Legal Education in the summer of 2012 in response to multiple, severe stresses on law schools and a growing loss of public confidence in the legal education system. The Task Force was chaired by former Chief Justice Randall T. Shepard of the Supreme Court of Indiana and composed of representatives from the judiciary, the organized bar, legal education, and legal practice. The Task Force was charged with clarifying the problems in legal education and developing means by which participants in the legal education system could remediate those problems and restore general public confidence. The central problems the Task Force addressed were rising law school tuition; increasing student debt; declining law school applications; rapid, substantial changes in the market for delivery of legal services; and uncertain job prospects for law school graduates. The Task Force addressed other problems as well, including misdistribution of legal services, weaknesses in law schools' preparing students for practice, and impediments to innovation throughout the legal education system.

HOW THE TASK FORCE CONDUCTED ITS WORK

To prepare its Report and Recommendations (hereinafter the "Report"), the Task Force reviewed lit-

erature on problems and solutions; met throughout its term both in subcommittees and as a whole; and solicited views from a wide array of interested parties via written comments, two public hearings, and an invitational mini-conference. The Task Force Chair and I (in my role as Reporter) also met with the ABA Board of Governors and the Council of the ABA Section of Legal Education and Admissions to the Bar (hereinafter the "Section of Legal Education"), and with the leadership of the Association of American Law Schools. Various members of the Task Force also made presentations to, or participated in forums directed toward, stakeholder groups and interested organizations.

The Task Force worked with a short timeline because of the pressing nature of the challenges. It issued a draft report for public comment in September 2013. In January 2014, the Task Force issued its final Report and Recommendations¹, which the ABA Board of Governors accepted and endorsed at the ABA House of Delegates' Midyear Meeting in February 2014.

HOW THE REPORT MAY BE USED

Some recommendations in the Report have already been implemented; other recommendations and points of guidance have been relied on for improvements or proposed improvements in the system

of legal education. In this article, I will discuss the findings, themes, and recommendations of the Task Force Report with particular reference to bar admissions and the regulation of entry into the legal profession.

The Report provides general guidance and several concrete recommendations on those topics but does not treat them extensively. Nonetheless, individuals and organizations responsible for bar admissions and the regulation of entry into the legal profession can build on the Report's framework and findings to advance shared goals for improving the system of legal education. To aid in this use of the Report, I will first provide an overview of key aspects of the Report and then offer seven principles derived from the Report that may be helpful. These principles range from "Anticipate Criticism" to "Innovation Is Possible."

THE FRAMEWORK OF THE REPORT AND RECOMMENDATIONS

Although the Report makes recommendations for concrete action by particular actors and groups, its greatest value lies in the overall framework for improvement that it crafts. There are three aspects of the Report's framework most relevant to the subject of this article.

The Report Emphasizes the Need for Broad-Based Participation in Addressing Problems and Crafting New Solutions

The Task Force recognized that the system of legal education in the United States is "complex and decentralized."² Although most of the criticism that prompted creation of the Task Force was directed toward law schools, their faculties, and the Section of Legal Education, there are many other entities and groups deeply involved in legal education.

The Task Force listed a panoply of additional participants, including universities and other institutions of higher education, state supreme courts, bar admission authorities, the federal government, law firms, media, and prelaw advisors.³

The Task Force further emphasized that each of these entities or groups has a significant interest or role in legal education, although typically one focused on a specialized or limited aspect of the legal education system. And because of the high degree of decentralization in legal education, "[n]o one person, organization, or group can alone direct change or assume sole (or even principal) responsibility for it."⁴

The Report Identifies a Fundamental Tension

The Task Force identified a fundamental tension, underlying all the discussion, argument, and criticism, which participants in the system were ultimately trying to resolve. The Task Force described the tension as follows:

On the one hand, *the training of lawyers provides public value*. Society has a deep interest in the competence of lawyers, in their availability to serve society and clients, in the broad public role they can play, and in their professional values. This concern reflects the centrality of lawyers in the effective functioning of ordered society. Because of this centrality, society also has a deep interest in the system that trains lawyers: it directly affects the competence, availability, and professionalism of lawyers. From this public-value perspective, law schools may have obligations to deliver programs with certain characteristics, irrespective of the preferences of those within the law school. For example, the requirement that law schools teach professional responsibility was long ago imposed on schools under pressure by the larger profession because

of public concern with the ethics of lawyers. The fact that the training of lawyers provides public value is a reason there is much more concern today with problems in law schools and legal education than with problems in education in other disciplines, like business schools and business education.

But the training *also provides private value*. Legal education provides those who pursue it with skills, knowledge, and credentials that will enable them to earn a livelihood. For this reason, the training of lawyers is part of our market economy and law schools are subject to market conditions and market forces in serving students and shaping programs. From this private value perspective, law schools may have to respond to consumer preferences, irrespective of the preferences of those within the law school, at least in order to ensure the continued financial sustainability of their programs.

The fact that the training of lawyers delivers both public and private value creates a constant, never fully resolvable tension regarding the character of the education of lawyers.⁵

Appreciating this fundamental tension was central to the analysis and recommendations contained in the Task Force Report.

The Report Adopts a “Field Manual” Structure Centering on Nine Guiding Themes

The Report is structured as a “field manual for people of good faith who wish to improve legal education in both its public and private respects. It is designed to guide the activities of these participants within the scope of their respective responsibilities and areas of influence.”⁶ The heart of the field manual consists of nine themes that should guide the action of the various participants in legal education as they work

to meet challenges and improve the system within their respective domains. These nine themes are the following:⁷

- A. *The financing of law-related education should be reengineered.* The current system of financing legal education has many deficiencies. Among others, the system promotes constant tuition increases, high student debt, and subsidization of more strongly credentialed students by less strongly credentialed students.
- B. *There should be greater heterogeneity in law schools.* Law schools have adhered to substantially the same model for decades. Uncritical adherence to this model has inhibited innovation, limited educational choice, and made it difficult for law schools to adapt to changing market conditions.
- C. *There should be greater heterogeneity in programs that deliver legal education.* The system of legal education has long centered on the J.D. as the form of law-related education. The J.D. is an expensive degree. This narrow focus has impeded development of other educational programs that could equip individuals to provide limited or specialized law-related services at lower cost, and to provide law-related services to persons who otherwise might not have access to them.
- D. *Delivery of value to students in law schools and in programs of legal education should be emphasized.* Law schools are in the business of delivering legal education services. No business can succeed in the long run unless it pays close attention to the value it is promising and holds itself accountable for delivering that value. Closer attention to value and its delivery by law schools would promote sustainability and better accommodate the goals of delivering quality education while restraining price.

- E. *There should be clear recognition that law schools exist to develop competencies relating to the delivery of legal and related services.* Law schools have a basic societal role: to prepare individuals to provide legal and related services. Many if not most law schools today do not sufficiently develop core competencies that make one an effective lawyer, particularly those relating to representation of and service to clients.
- F. *There should be greater innovation in law schools and in programs that deliver legal education.* Legal education is conservative. What is needed for sustainable progress is (1) a greater willingness of law schools and other entities that deliver legal education services to experiment and take thoughtful risks, and (2) support for the experiments and risk-taking by other participants in the legal education system. Innovation must come from a change in attitude and outlook, and from openness to learning, including from other fields.
- G. *There should be constructive change in faculty culture and faculty work.* The prevailing culture and structure of a faculty in a law school reflect the model of a law school as primarily an academic enterprise. The entrenched culture and structure have promoted declining classroom teaching load and a high level of focus on traditional legal scholarship. They also promote risk-aversion and inhibit the ability of law schools to innovate and adapt to changing market conditions.
- H. *The regulation and licensing should support mobility and diversity of legal and related services.* The primary purpose of legal education today is to prepare individuals to become lawyers admitted to practice in a state and thus subject to state licensing and regulation. The nature of this licensing and regulation can strongly influence the char-

acter and cost of the education of lawyers, and it can promote or impede goals for improving law schools and legal education. Support for mobility and diversity, in particular, can promote or enable improvements in the overall system of legal education.

- I. *The process of change and improvement initiated by the Task Force should be institutionalized.* The Task Force concluded that many of the forces and factors giving rise to the current conditions are either permanent or recurring. Legal education must be able to continually deal with them in a systematic fashion. Thus, it is prudent for the system of legal education to institutionalize the process of managing change and facilitating improvement.

THE IMMEDIATE IMPACT OF THE TASK FORCE REPORT ON REGULATORS OF LAWYERS AND LAW PRACTICE

Although the Report is written for all participants in the system of legal education, greatest attention is given to law schools and their accreditor, the Section of Legal Education. The Task Force had limited time to gather information, develop an analysis, and frame recommendations. Triage required focus on the parts of legal education that are under the greatest stress and that are at the heart of the educational enterprise.

Nonetheless, as is reflected above, one of the core principles of the Report relates directly to bar examiners and other regulators. In addition, the Report contains concrete recommendations directed to “[s]tate and territorial high courts, state bar associations, and other regulators of lawyers and law practice.”⁸ These concrete recommendations were largely intended to complement other

recommendations directed to law schools and the Section of Legal Education.

The first two complement recommendations directed toward promoting experimentation in educational programs, particularly where it could reduce the overall cost of a legal education. These two recommendations are that regulators of lawyers and law practice should proceed as follows:

1. Undertake to develop and evaluate concrete proposals for reducing the amount of law study required for eligibility to sit for a bar examination or be admitted to practice, in order to be able to determine whether such a change in requirements for admission to the bar should be adopted.
2. Undertake to develop and evaluate concrete proposals for reducing the amount of undergraduate study required for eligibility to sit for a bar examination or be admitted to practice, in order to be able to determine whether such a change in requirements for admission to the bar should be adopted.⁹

The third recommendation to regulators also supports ones addressed to other parties. It seeks to remediate problems concerning access to justice, in part by reducing the time and cost for some persons to gain knowledge and certification to deliver legal services:

3. As a means of expanding access to justice, undertake to develop and evaluate concrete proposals to: (a) authorize persons other than lawyers with J.D.s to provide limited legal services without the oversight of a lawyer; (b) provide for educational programs that train individuals to provide those limited legal services; and (c) license or otherwise regulate the delivery of services by those

individuals, to ensure quality, affordability, and accountability.¹⁰

The fourth recommendation stands most alone. It is largely guided by the aim of addressing the high cost of gaining entry into practice by supporting greater mobility:

4. Establish uniform national standards for admission to practice as a lawyer, including adoption of the Uniform Bar Examination.¹¹

The final two recommendations support other recommendations that promote reduction of the cost of gaining entry into practice and promote the ability of law schools to deliver more practice competencies:

5. Reduce the number of doctrinal subjects tested on bar examinations and increase testing of competencies and skills.
6. Avoid imposing more stringent educational or academic requirements for admission to practice than those required under the ABA Standards for Approval of Law Schools.¹²

SUGGESTIONS FOR HOW REGULATORS OF LAWYERS AND LAW PRACTICE CAN FURTHER LEARN FROM THE TASK FORCE REPORT

It would not be difficult to supplement the six specific recommendations directed to “[s]tate and territorial high courts, state bar associations, and other regulators of lawyers and law practice” with other specific recommendations that promote the same goals and themes. For instance, the goal of reducing the cost to individuals seeking admission to practice and employment in the legal services field could be advanced through changes such as shortening the time associated with grading and reporting the results of bar examinations, or eliminating the bar

examination entirely in favor of a diploma privilege. But rather than exploring these possibilities, it will be more useful to provide general assistance to bar examiners and other regulators by helping them better understand how to use the tools in the Report for strategic actions and initiatives.

To that end, I will offer my thoughts about some implications of the Report. Although the observations below are grounded in the Task Force Report, the Task Force did not specifically address all of them, so they should be understood as my recommendations, rather than an official part of the Report itself.

There are, I believe, seven general principles that can guide work by bar examiners and other regulators to improve the system of legal education. Some are obvious; some are not. Some would be widely endorsed; some would not. The principles are as follows:

1. Anticipate Criticism

Legal education has been experiencing intense change in the past five years, and this change has created enormous stress and discomfort. The legal services field has been experiencing transformation for at least that long, and these stresses and discomforts are at least as great as those affecting legal education. As a general matter, discomforts from dramatic change can prompt a climate of blame, in which persons or groups are singled out as causing woe; this can be followed by calls to “do something” about the perpetrators. Several years ago, law schools, faculty members, deans, and the Section of Legal Education were the targets of blame and of demands to “do something” about them; it was in part this climate that led to the creation of the Task Force.

The transformations in legal education and legal services not only continue but in some respects are accelerating. There is no reason to assume that bar

examiners and regulators will escape criticism. The Task Force was created late and had limited time to act. It would be highly beneficial for bar examiners and regulators to launch a process to anticipate potential criticism and blame directed at them—blame for too many lawyers, too few lawyers, too costly legal services, too costly legal education, or anything else—and preempt it, rather than wait to respond.

2. Cost and Efficiency Are Very, Very Important

There is deep and widespread concern with the cost—to individuals and society—of moving individuals through the pipeline from high school into the legal services field. The cost of law school is only one element, albeit a large one, of this more comprehensive concern. The total cost of moving through the pipeline affects access to careers in law, availability of lawyers and legal services, financial commitments of the federal government, the national economy, and more. Yet the pipeline is not an integrated system, so there is little prospect of an integrated solution.

Still, each segment of the pipeline has the potential for process improvement, efficiency increases, and cost containment, which can be brought about by the persons or groups with influence over the relevant section of the pipeline. There are well known, tested tools for achieving such improvements. Law schools are slowly moving to use them; regulators, who are more intimately connected with the business world, are likely in an even better position to use these tools to improve their part of the system for producing new lawyers.

3. The J.D. Education Increasingly Focuses on Developing Practice Competencies

The long-prevailing model of a law school was that of a graduate program in a university, instilling knowledge in a field (law) and a narrow range of

competencies centering on discovering, analyzing, and reasoning about law. The ticket to entry into law school—the LSAT—centered on academic competencies, and the ticket into law practice—the bar examination—likewise centered on knowledge and ability to reason and argue. Years of pressure on law schools have begun to shift the educational model. There is greater recognition that the ultimate purpose of law schools is to prepare individuals to do things, rather than just to know things, and this has led to an increased emphasis on law schools delivering practice-related competencies.

The shift in focus is far from complete but is probably irreversible. Bar examiners and regulators have also begun to shift but have not moved in synchrony with law schools and the Section of Legal Education. As law schools continue to evolve toward a competency-oriented model, the potential arises for frictions and incompatibilities between law schools (and their accreditation system) and bar examiners and regulators. The transition in legal education will be smoother through stronger coordination to manage the evolution.

4. Passing the Bar Examination Is Yet Another Competency

It is easy to yearn for a golden age when a J.D. program by itself was enough to prepare graduates for the bar examination. Those days are long gone. Today, preparing students to pass the bar examination is not just a matter of strengthening classroom-based knowledge of torts and other subjects; it is also a matter of developing distinctive test-taking competencies that involve discrete skills (such as answering MBE-style questions) and test-taking strategy.

As a new and distinctive competency, bar preparation constitutes yet one more addition to the

overall program of educating persons for practice. In this, it is like other competencies that have been added to the program of J.D. education over the past 30 or 40 years, such as writing skills, litigation skills, and career development skills. The nature of the bar examination thus affects more than just the substantive legal topics law schools must teach. As a result, the nature of the bar examination can increase the cost of providing a full law school education and place an additional stress on law schools regarding the allocation of time and resources to the many competencies deemed essential. It can thus have an impact on both the cost of entering the profession and the depth and breadth of knowledge and skills a student can obtain within the three years of law school.

5. First-Time Bar Passage Rates Are High-Value Outcomes for Law Schools

As the Task Force Report explained, law school education (like higher education generally) has increasingly been influenced by the view of higher education as primarily a path to a career, rather than a means to personal growth and fulfillment. This reorientation toward career outcomes reflects the growing view that the relationship between law schools and students is, in essential ways, a consumer relationship. This, in turn, has increased the importance of consumer information, which includes key outcomes, especially first-time bar passage and employment rates. Thus, changes in bar admission requirements or other regulation of admission to the profession in a jurisdiction, which could have an impact on first-time bar passage results, can have a substantial impact on the ability of schools in the jurisdiction to compete for students. The impact on schools is very different today than in an earlier, less market-driven era.

6. *Culture Matters*

A key point made in the Task Force Report is that culture has a profound influence on change in law schools and law school education. The Report described the prevailing culture in law schools and noted that it evolved in very different times and is not well adapted to economic and other conditions today. This old and entrenched culture fosters resistance to change. The Task Force Report emphasized that many recommendations for improvement will have no impact without a change in law school culture, and thus cultural change is essential.

The world of bar examiners and regulators may be less self-contained than that of law schools and may be less thoroughly pervaded by a distinctive culture. But to the extent that there exists such a culture, it needs to be understood, and any plan for the improvement of legal education should seek to remove any cultural impediments to endorsement and implementation of needed change.

7. *Innovation Is Possible*

Innovation is rooted in a willingness to support and engage in experimentation and thoughtful risks. The system of legal education is in great need of improvement, and it is difficult to see how improvement will be achieved without some degree of experimentation and risk. Law schools and the Section of Legal Education are conservative and risk-averse, yet both are moving modestly toward an outlook that accepts innovation and its preconditions of experimentation and risk.

It is equally possible for bar examiners and regulators to move down this path of accepting, if not promoting, innovation, to help ensure that the system of legal education as a whole adapts to, and

even anticipates, changes in the economic, social, and educational environment. On the other hand, because of the interconnections between admission to the profession and law school education and other components of the system of legal education, if bar examiners and regulators are resistant to change, then opportunities for significant innovation elsewhere could be impeded.

CONCLUSION

The Report of the Task Force on the Future of Legal Education details the stresses on and weaknesses of the current system of legal education. It also provides guidance and tools for those with influence in the various parts of the system to act to cure weaknesses and improve parts of the system within their domains. The Report provides concrete guidance for bar admission officials and regulators, mainly to ensure that they support necessary changes and improvements by law schools and by their accreditor.

But there is far more that bar examiners and regulators can achieve within their areas of influence and responsibility, by acting on principles both explicit and implicit in the Task Force Report. By acting on these principles, they can work to remediate problems such as cost of education and caliber of training of lawyers, and strengthen the character of legal education as a systematic, integrated, and continuously improving enterprise. 

ACKNOWLEDGMENTS

I am grateful for helpful comments on earlier drafts from Hon. Randall Shepard, Hulett Askew, Catherine Carpenter, and Nancy Conison.

NOTES

1. AMERICAN BAR ASSOCIATION TASK FORCE ON THE FUTURE OF LEGAL EDUCATION, REPORT AND RECOMMENDATIONS (January 2014), *available at* http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/report_and_recommendations_of_aba_task_force.authcheckdam.pdf.
2. *Id.* at § V.
3. *Id.*
4. *Id.*
5. *Id.* at § II.
6. *Id.* at Overview.
7. *Id.* at § VII.
8. *Id.* at § VIII(C).
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*



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