

Distance Learning: Loosening the Ties that Bind

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Regulation often inhibits change and innovation, as the subjects of regulation capture the regulator. Hence, the articulated public purposes of regulation are subverted to the private interests of the subjects. American law schools are regulated by the American Bar Association.ⁱ A law school usually must be accredited to award degrees that allow the degree holders to sit the relevant bar examination. Unaccredited law school degree holders may sit the California bar exam after an elaborate dual requirement. Some states, like Virginia, still allow persons to “read” law and sit the bar exam. Very few ever take advantage of the process.

ABA regulation has allowed the American university law school model to flourish.ⁱⁱ The proprietary free-standing law school, at the turn of the 20th century a powerful force, faded once regulation favoring the university took a firm hold. All of the top-ranked law schools are parts of public and private universities.

American law schools, regulated by uniform standards, show, unsurprisingly, very little variation. The curriculum, the method of instruction, the structure of the faculty, and the student profiles were set in the late 19th century and have displayed marked resistance to change. The elite schools, in particular, have been impervious. Students and faculty have diversified, the law taught has become more interdisciplinary, and the scholarship more theoretical and prolific. But the pillars have remained in place. And why not? The life of faculty, with its expectation of faculty governance, is a comfortable one. Basking in the warmth of high remuneration in practice,ⁱⁱⁱ a winner-take-all salary economy^{iv} and heavy internal competition fueled by rankings, faculty members have no incentive to change. The rewards are gleaned from maintenance of the status quo.

It is this world of contentment that now meets the dynamic world of the internet and distance learning and, to its credit, the ABA has opened the door to allow a modicum of experimentation with distance learning.^v The capacity of distance learning to uproot faculty prerequisites is substantial. Once, a dean could, in concert with his faculty, claim the need for new faculty to cover newly emerging areas of law. Now, a reply from a Provost may be: “Just have the students do the course by attending distance classes.” And the dean, as empire builder, is endangered. The Dean may rely on a significant commitment to traditional legal education. Great merit is seen by leaders in the legal community – both inside and outside the academy – in delivering the kind of top-flight legal education they received. Legal education in America is of high quality, and it is also high priced. Competition among the elite law schools is increasing the cost of that education.^{vi} It is unsurprising

then that Justice Ginsburg, of the United States Supreme Court, is damning of legal education delivered by distance education technology.^{vii} She sees legal education as an interactive endeavor that demands a physically shared environment.^{viii}

Further treacherous shoals lie in wait for those navigating the waters of distance education. Faculty have been close to the status of independent contractors. The constraints on private practice and personal enrichment often using the universities' assets, have been decidedly loose. In the electronic age, the famous faculty member has the possibility of harnessing his reputation in distance learning exercises that may prove to be lucrative. Richard Posner, if still on the Chicago faculty, would not only have his royalty income from books, but also payments, if he should so decide, for recorded lectures given by Posner for Concord Law School. Richard Posner's name is highly valuable, particularly to a fledgling institution like Concord. Witness the leverage that Hastings, and now many sunbelt schools, derive from having famous retired faculty attached to them.

The quality of the distance learning educational experience for the students can be sustained by supporting the lecturers through tutors who respond to remote students through electronic/interactive links. Education can then be delivered at a fraction of the cost of conventional legal education, and to thus attract students who would otherwise be precluded from a legal education.^{ix}

Technology pays no respect to national boundaries, and we can imagine that famous Indian, German, and Russian professors may be brought into these arrangements, providing a rich menu in comparative law. Interdisciplinary courses will also benefit from the importation of expertise into the electronic classroom.^x

It is little wonder that Sylvan Learning now runs a company that focuses on higher education initiatives. The public company grew sales from 1998 at \$179 mil. to a 2002 figure of \$604 mil.^{xi} The corporation is divided into two parts. One runs its eight campus-based Sylvan International Universities. The other, its Online Higher Education Division that includes three purely virtual schools – National Technological University, Walden University, and Canter – the last, helping more than 12,000 K-12 teachers earn advanced degrees. Sylvan has spent \$80 mil. since 1997 to acquire its online components and served 19,000 students by the end of 2003, generating more than \$100 mil. in revenue. Canter and NTU typically operate by partnering with established universities, offering courses run by them. Vanderbilt and MIT supply engineering courses to NTU.

Kaplan, Inc. has also grown rapidly and launched the first online law school, Concord Law School, in 1998^{xii}. It is not accredited by the ABA. Barry Currier has recently announced he will

join Concord as Dean on June 1, 2004. Currier is a seasoned law school administrator, most recently serving as the Deputy Director of the ABA Section on Legal Education. Concord has grown from 33 students in 1998 to nearly 1,500 presently.

Some well-known legal academics, Dean Rick Matiasar, Donald Lively, and Russell Weaver, among others, formed a consortium, known as the Consortium for Distance Education (CODEC) that will promote the availability of distance education in the traditional law school setting. The scheme is to set up a cooperative arrangement that will enrich curricula by allowing schools to offer courses on a distance learning format. New technologies create greater opportunities for cooperative distance learning ventures. Experts can be virtually brought in to teach aspects of courses like “Doing Business in the Pacific Rim and Asia.” The courses could serve both J.D. and non-J.D. degree students. The goal of CODEC is to “build a platform from which law schools can engage in distance education. . . .” [CODEC website.]

The ABA’s Response

I sit on the ABA’s Section of Legal Education and Admissions to the Bar, Curriculum Committee. We are presently studying a comprehensive law school curriculum survey conducted in 2003. The survey achieved an extremely high response rate, obtaining replies from 193 accredited and non-accredited law schools throughout the nation. The survey was divided into six sections.

1. Requirements for Graduation
2. First Year Requirements
3. Upper Division Curriculum
4. Post and Non-J.D. Degrees
5. Distance Education
6. General Questions

The ABA defines a “distance education course” as “one in which one-third or more of the course instruction is through distance education technology.” The survey examined synchronous distance education, i.e., simultaneous video transmission and asynchronous, online or web-based instruction. In 2002-03, synchronous courses were offered by 49 law schools and were not offered by 104. In 2003-04, 82 law schools offered courses, and 71 answered they did not. The numbers of asynchronous were less. In 2002-03, “yes” – 15; “no” - 138. In 2003-04, “yes” - 23; “no” - 130.

The ABA, as noted, has attempted to plot a careful path in its redrawn rules on Distance Education. The rule is encapsulated in Standard 306:

DISTANCE EDUCATION.

(a) A law school may offer credit toward the J.D. degree for study offered through distance education consistent with the provisions of this Standard and Interpretations of this Standard. Such credit shall be awarded only if the academic content, the method of course delivery, and the method of evaluating student performance are approved as part of the school's regular curriculum approval process.

(b) Distance education is an educational process characterized by the separation, in time or place, between instructor and student. It includes courses offered principally by means of:

(1) technological transmission, including Internet, open broadcast, closed circuit, cable, microwave, or satellite transmission;

(2) audio or computer conferencing;

(3) video cassettes or discs; or

(4) correspondence.

(c) A law school may award credit for distance education and may count that credit toward the 45,000 minutes of instruction required by Standard 304(b) if:

(1) there is ample interaction with the instructor and other students both inside and outside the formal structure of the course throughout its duration; and

(2) there is ample monitoring of student effort and accomplishment as the course progresses.

(d) A law school shall not grant a student more than four credit hours in any term, nor more than a total of 12 credit hours, toward the J.D. degree for courses qualifying under this Standard.

(e) No student shall enroll in courses qualifying for credit under this Standard until that student has completed instruction equivalent to 28 credit hours toward the J.D. degree.

(f) No credit otherwise may be given toward the J.D. degree for any distance education course.

Law schools are required to report each year on the distance education courses that they offer. Site visit teams are directed to pay close attention to the quality of distance education courses. In particular, schools are admonished to provide opportunities for interaction with instructors that go beyond those available in the traditional classroom. Thus, technological capacity and staff resources must be capable of supporting the program, and students must be trained to utilize the technology to allow effective participation. Similarly, the faculty must have the requisite technological skills.

Any law school that offers more than an "incidental amount of credit for distance education

shall adopt a written plan for distance education” and must review the “educational effectiveness of its distance education courses and programs.” (Interpretation 306-8) No doubt, schools offering distance education beyond the incidental will be obliged to devise student and faculty evaluations that satisfy site visit teams. The CODEC consortium just formed would be well advised to devise detailed methods of evaluations at an early stage. The computer/data services offered by the consortium ought to facilitate this. To the extent that foreign schools are involved, there needs to be a concerted effort to introduce quality control and evaluation at a level satisfying the ABA.

One can expect under the new ABA guidelines, some movement to introduce distance learning options in the second and third years of the three-year American J.D. degree. In the unaccredited law school world, law schools like Concord will continue to thrive in their niche of the market. They tap a group of law students who have had difficulty in accessing traditional legal education. A few weeks after this conference, the CALI Conference will be held in Seattle at the University of Washington School of Law. (June 18, 2004) Thereafter, an international meeting will be held of law school faculty and technology people – Subtech. This organization, I am informed, invites about 50 to 70 faculty from around the world. The CODEC representatives will be initiating discussions to broaden and publicize the services that the consortium can offer. These activities ought to speed the development of distance learning.

Although distance learning will likely grow apace, its penetration at present represents a relatively small part of the J.D. curriculum at accredited law schools.

Respondents in the ABA Survey were asked to list those courses offered by distance. Ten offered multiple courses – Idaho (3), Southern Illinois (3), Tulane (2), Nova (2), Vermont (2), William and Mary (2), and West Virginia (2). The courses were eclectic, ranging from core large enrollment electives, e.g., Business Associations, Tax, Agency and Partnership, Intellectual Property, Insurance Law, Admiralty, Federal Jurisdiction, International Law, and Commercial Systems, to small boutique courses and seminars, e.g., Entertainment Law, Medicare/Medicaid, International Civil Litigation, Comparative Indigenous Peoples, Wrongful Convictions, Law of Extinction, and Law of the Internet.

The ABA report will contain further information. However, the important matter will be that this comprehensive survey takes a snapshot of distance learning in its early guise. In ten years, the picture will be entirely different. No conference of international legal educators can afford to ignore the potentially revolutionary potential of distance learning. American law schools, restrained by regulation and comfort at the elite level that has dominated so much educational policy, have been

laggards. They are now poised to catch up and fuel some real change.

ENDNOTES

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- i. George B. Shepard and William G. Shepard, *Scholarly Restraints? ABA Accreditation and Legal Education*, 19 CARDOZO L. REV. 2091 (1998).
- ii. For an example, see Jon W. Bruce and D. Don Welch, *Vanderbilt Law School in the Nineteenth Century: Its Creation and Formative Years*, 56 VAND. L. REV. 497 (2003) (describing the rise of the university law school at the end of the 19th century).
- iii. For a discussion of law firm remuneration and the discontents of practice, see Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871 (1999).
- iv. Robert H. Frank and Philip J. Cook, *The Winner-Take-All Society*, THE FREE PRESS (1995) 147-166 (describing the battle for elite educational credentials and its often baleful results, especially the costs of education).
- v. Harry Haynsworth, *Temporary Distance Education Guidelines Provide Opportunities for Flexibility and Innovation*, 34 IND. L. REV. 47 (2000). Standard 306 was adopted in August 2002 to accommodate “more and better use of technology in schools’ programs of legal education.” The standard is seen as one amenable to change “as necessary.”
- vi. John A. Sebert, *Cost & Financing of Legal Education*, 35 SYLLABUS, Feb. 2004. (Average public tuition over 13 years (1990-2003) has increased 234%; private tuition over the same period, 118%. The CPI increased by 41.5% over the period).
- vii. Referred to by Michael Heise, *Closing One Gap but Opening Another?: A Response to Dean Perritt and Comments on the Internet, Law Schools, and Legal Education*, 33 IND. L. REV. 275, 288 (1999).
- viii. For commentary on Justice Ginsburg’s remarks, see Josh Ard, *Serving Over the Net: Legal Education Over the Internet*, MICHIGAN BAR JOURNAL, 2000.
- ix. Robert E. Oliphant, *Will Internet Driven Concord University Law School Revolutionize Traditional Law School Teaching?* 27 WM. MITCHELL L. REV. 841, 869 (2000) (discussing economic advantage of Concord Law School).
- x. Berg, *Using Distance Learning to Enhance Cross-Listed Interdisciplinary Law School Courses*, 29 RUTGERS COMPUTER & TECH. L.J. 33 (2003).
- xi. Matrix, UNIVERSITY BUSINESS, 7/1/03.
- xii. Andrew S. Rosen, *Concord University School of Law’s On-line Law Degree Program*, 15 ST.

