

Topic I Notes
25 February 2016

Starting Question: *What measures should North Carolina use to ensure a robust supply of legal resources, including people who can represent others competently and efficiently?*

High Level Questions or Problems:

- How do we understand law and its function in society?
 - See Appendix 1 for starting point.
- What are legal and law-related services?
 - See Appendix 1 for starting point.
- Which legal and law-related services should be regulated by governmental organizations and how should they be regulated?
- What should be the means and mechanisms for training individuals to engage in the delivery of legal and law-related services?
- How can the principles of risk management be applied to the need for legal or law-related services?
- What matters relating to the Starting Question are within the influence or control of North Carolina persons or entities?
 - To what extent are state borders a meaningful definer of scope for improving the delivery of legal or law-related services?
- How would one determine whether the implementation of the recommendations of this Report have been successful?
- Who constitute the audience for the recommendations of this Report?

Practical Questions or Problems

- What are the impediments to individuals pursuing work or career in or involving the delivery of legal and law-related services? How can those impediments be lessened?
 - Might a solution be a “Peace Corps” type institution that matches unemployed or underemployed persons in the law-related services field with people who need services at low or no cost?

- Would it be economically feasible?
 - How could such an institution be organized and operated?
- What are the impediments to innovation in the delivery of legal and law-related services? How can those impediments be lessened?
 - Are the rules concerning business models for law firms one such impediment?
- What are the impediments to law school graduates taking positions in the practice of law in a state (one form of the delivery of legal services)? How can those impediments be lessened?
 - See Appendix 1 for starting point.
- What are the impediments to persons who have need of legal or law-related services obtaining service from persons who have the ability to delivery the needed legal or law-related services? How can those impediments be lessened?
 - What is North Carolina's current approach to: (1) out-of-state lawyers; (2) nonlawyer providers of law-related services; and (3) online-only providers? How has this approach changed over time?
 - To the extent that North Carolina limits these providers, do the limits have a favorable cost/benefit profile?
- What methods can be used to remove impediments or bring about improvements?
 - See Appendix 1 for starting point.
 - What opportunities does technology create for the delivery of legal services to those who are underserved?
 - What technology-driven new business models can advance the delivery of legal services, particularly to those who are underserved?

Appendix

From Report and Recommendations of ABA Task Force on the Future of Legal Education

I. LAW SCHOOLS AND THE SUBJECT OF THIS REPORT AND RECOMMENDATIONS

A. *Law and Legal Education in General*

Recent discussions of the problems in legal education have focused on ABA-approved law schools and the J.D. programs they deliver. The Task Force early recognized, however, that in order to comprehensively address the issues and make recommendations for reshaping legal education, it would have to expand its focus to legal education more broadly understood.

Law is the fundamental form of social ordering (including dispute resolution) in reasonably organized societies. The nature and function of law has been subject to extensive investigation and theorizing, which cannot and need not be reviewed here. For purposes of this Report and Recommendations, the functional description just given will suffice.

Given this understanding, we will refer to a *law services provider* (or *legal services provider*) as a person who is skilled in knowledge and application of law. A *legal education program* is a program of education that: (a) is designed to develop knowledge or skills in law or related fields; and (b) prepares individuals to be law services providers.

B. *Law Schools and Legal Education Programs in the United States*

In the United States, a *lawyer* is the primary form of law services provider. A lawyer is a law services provider who has been admitted to practice in a state, territory, or district, through passage of a bar examination or otherwise. A lawyer is potentially a generalist, authorized to provide substantially any form of representation or legal service to a client. Ordinarily, a lawyer must have received a *Juris Doctor* (J.D.) from a law school. In some states, a person holding a foreign law degree may be admitted to practice on the basis of having received a Master of Laws (LL.M.) degree.

In the United States, a *law school* is an institution providing a legal education program that trains lawyers. An *ABA-approved law school* is a law school that has been accredited by the ABA Section of Legal Education and Admissions to the Bar under the ABA Standards for Approval of Law Schools. A graduate of an ABA-approved law school is eligible to be admitted to practice in any state.

The program leading to the Juris Doctor is the principal program of legal education at every ABA-approved law school today. Some ABA-approved law schools also offer legal education programs in addition to the Juris Doctor program.

In the United States, some institutions of higher education other than law schools offer programs of law or related education. None, however, offers an ABA-approved Juris Doctor program.

C. The Context of Legal Education and Participants in Solutions

The relationship between law schools, and legal education, law, social ordering, and society, is elementary, yet key to understanding current problems and their potential solutions. Law schools and legal education do not function in isolation. They function in a larger environment and are affected by changes in many other areas. Current stresses and problems in law schools are caused in part by changes or conditions in the economy, in demographics, in the delivery of legal services, in secondary and college education, and in regulatory systems. For that reason, in developing solutions to the current problems, it is necessary to address actors beyond law schools and their accreditor, and consider how changes in other domains have the potential to improve the present system and induce changes that can preempt the recurrence of similar problems in the future.

II. THE FUNDAMENTAL TENSION

Despite the great breadth of current stresses and criticisms (detailed in Section V), the Task Force has identified a fundamental tension that underlies the current set of problems. An understanding of it must be kept firmly in mind in designing solutions.

The tension is 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. . . .

Another area in which public and private value considerations are in tension is the length of the J.D. program of education. Public value considerations support a longer, rather than shorter, program to ensure that lawyers can deliver the highest quality service to clients. A longer program arguably would develop in graduates greater knowledge of legal doctrine, a greater range of practice-related competencies, greater facility in legal analysis, and deeper acculturation into the values of the legal profession. Private value considerations, on the other hand, would suggest a shorter program. The longer the J.D. program of legal education, the greater is its total cost, in both out of pocket outlay and foregone or deferred earnings. This could adversely affect the economic interest of lawyers.

This tension between the public and private perspectives on the training of lawyers affects a wide range of issues before this Task Force. Any credible set of recommendations must carefully calibrate public and private concerns.

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VI. NATURE OF ACTIONS AND INITIATIVES THAT CAN BE UNDERTAKEN

Many of the suggestions for improving legal education being advanced today consist either of new directives—e.g., proposals that “law schools must do X”—or else elimination of existing directives—e.g., proposals that “organization Z should stop requiring law schools to do Y.” Although there is a place for directives and elimination of directives in any plan, the Task Force finds that place to be more limited than generally assumed.

As explained above, there are many decision-makers and actors in the system of legal education. Each has specialized knowledge; particular relationships with its members or participants, or with persons or other organizations served; and distinctive opportunities to guide or influence the actions of others. The problems in legal education will not disappear simply by telling participants what must or must not be done. Rather, the task in structuring a plan for the improvement of legal

education is to: (a) encourage and facilitate appropriate action by each actor in the legal education system; and (b) to the extent possible, coordinate those actions to achieve large-scale improvement.

In order to achieve that, the Task Force has inventoried the many ways in which the actors in legal education can be addressed and can act in order to promote desired outcomes. These ways are the following:

A. *New or Strengthened Requirements*

The current system of legal education is based in part on requirements. The current ABA Standards are largely prescriptive. Other organizations use prescriptions as well: they are found in bar admission requirements, United States Department of Education regulations, and university and law school faculty handbooks.

Prescriptions, when well crafted, can have the benefit of marking boundaries of what is permissible or obligatory. In doing so, and in appearing to control action, they seem to provide easy solutions. Yet, they only work if they can credibly be enforced. Thus, they require enforcement mechanisms—sometimes complex ones. These can be costly and the costs may be passed on to the regulated parties (here, law schools and ultimately students). Prescriptions, if effective, are also relatively inflexible and so have the disadvantage of requiring periodic updating to adapt to changing conditions. The Task Force generally recommends against new prescriptions as solutions to current problems in the system of legal education.

B. *Eliminated or Lessened Requirements*

Eliminating or relaxing an existing requirement can lower costs in an area of operation, or allow greater opportunity for innovation or experimentation. Because of the potential for such benefits, there is much insistence that current prescriptions in the ABA Standards be moderated or eliminated. Similar arguments can be (and are) made regarding other prescriptions, such as ones in bar admission rules or in rules regulating the practice of law.

The potential benefits of lessening or eliminating a requirement are more likely to be realized when the requirement in question constrains an actor from doing what it would prefer to do absent the requirement. But as this Report and Recommendations has noted, the ABA Standards—the main subject of the demand for lessened requirements—tend to reflect prevailing beliefs and culture regarding how law schools should be structured and operated, and it is not clear that elimination of a prescription in the Standards alone would bring about desired benefits.

The Task Force has concluded that, while removing certain prescriptions in the ABA Standards and elsewhere could be beneficial, particularly as to matters of cost, market orientation, and innovation, many such changes would have to be coupled

with other methods that non-coercively move law schools or other actors toward achieving the desired outcomes or benefits.

C. Incentives

A common and often effective tool for promoting a desired outcome is incentives. For example, law schools typically promote faculty scholarship through a tenure system and financial incentives. If a law school wished to promote, for example, pedagogical innovation, it could use these same types of incentives (or others) to promote that goal. If another organization wished to promote pedagogical innovation in law schools, it could do so, e.g., through offering financial awards or prominent honors to encourage the desired behavior or outcomes.

An advantage of an incentive system is that it can facilitate alignment in goals and attitudes between those promoting the desired outcome and those targeted to be influenced. Incentives also can promote creativity. Potential disadvantages are that they do not always succeed and that an incentive system can be captured by its targets, with a resulting distortion or weakening of the system.

D. Facilitation

Desired outcomes can be promoted through facilitation, i.e., by providing resources that will advance efforts to achieve the outcomes. The resources can be in the form of funds, expertise, physical facilities, logistics, management, mediation, or other services. For example, bar associations may be able to facilitate law school initiatives to control costs and improve processes, by making available members' business expertise and experience. Just as with offering incentives, facilitation can promote alignment.

E. Coordination

Desired outcomes can be promoted through coordination of actors working toward shared goals or outcomes. For example, coordination among law schools, or between law schools and bar organizations, can promote efficiencies, new processes, or new educational initiatives. Coordination can be through a variety of mechanisms, for example: joint ventures of the coordinating parties; facilitation of group efforts by other persons or organizations; or the creation of new associations or organizations. The consortium of law schools collaborating on innovation under the banner "Educating Tomorrow's Lawyers" is an encouraging example of such developments.

F. Enablement or Empowerment

Enabling or empowering an individual or group to take action is another method to promote a desired outcome. This method is used to a limited extent in the ABA Standards for Approval of Law Schools. Enablement or empowerment promotes

flexible implementation of goals by encouraging solutions from persons with a high level of expertise or influence and by allowing solutions to be adapted to changing circumstances or environments. Enablement or empowerment sometimes needs to be coupled with facilitation to assist the empowered person in taking action or implementing an appropriate plan.

G. Leadership

A disadvantage of the highly decentralized character of the legal education system is that, ordinarily, no person or organization is in a position to alone drive rapid change. A related disadvantage is that collective action for the common good can be difficult to achieve, despite general knowledge of its benefits. For example, despite wide understanding of the benefits of collective action against law school ranking systems, a lack of leadership among law school deans has prevented it.

Effective leadership is based on influence, not on command. In the legal education system today, there are many opportunities for persons, organizations, or groups to establish influence in a part of legal education and to promote improvements at least within that part. Opportunities for influence can arise, for example, from holding a position as head of an organization; achieving credibility derived from experience; or (for a group or organization) having as members a large proportion of one segment of legal education.

H. Pilots, Experiments, and Examples

Desired outcomes can be promoted through examples that can be a source of learning by others. In many areas of society and the economy, the efforts of one person or one organization to try something new or achieve something innovative leads others in the field to copy it or improve it, thereby yielding broader progress.

This type of progress can be catalyzed through a pilot project that demonstrates how a desired result can be attained. Or, it can be catalyzed through a small-scale test of a new way of operation, or, through the action by an agent that is willing to take a risk on a new or untried method. This mechanism for progress, like others, may have to be coupled with facilitation.

I. Encouragement

Desired results can be promoted through encouragement, both positive and negative. Encouragement is sometimes underestimated as a method for redressing problems in legal education, but it has significant potential in an environment of good faith. Some of the recent improvements in legal education result from articles in influential publications. Most of this writing has been critical, yet the criticism has served to encourage actors in legal education to respond. As this shows, parties at the center of legal education can be influenced by voices from outside the core.

Those who have been critics can also have influence in a more positive fashion, for example by publicizing improvements and encouraging continued progress.

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VIII. SPECIFIC RECOMMENDATIONS

C. State Supreme Courts, State Bar Associations, and Other Regulators of Lawyers and Law Practice

State and territorial high courts, state bar associations, and other regulators of lawyers and law practice should undertake or commit to the following:

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.*

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.*

4. *Establish Uniform National Standards for Admission to Practice as a Lawyer, including adoption of the Uniform Bar Examination.*

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.*