



University of California
Hastings College of the Law
200 McAllister Street
San Francisco, CA 94102

phone 415.565.4788
fax 415.565.4702
wuf@uchastings.edu
www.uchastings.edu

Frank H. Wu
Chancellor and Dean
William B. Lockhart
Professor of Law

VIA EMAIL

ABA Task Force on the Future of Legal Education

c/o Art Garwin, Deputy Director

ABA Center for Professional Responsibility

futurelegaled@americanbar.org

November 30, 2012

Dear Chief Justice Shepherd and Task Force members:

Thank you for inviting input to the ABA Task Force on the Future of Legal Education. I write to share a few thoughts informally.

Most importantly, I would like to commend this Task Force itself. The serious issues affecting legal education (and higher education more generally) are systemic. They require collective action. No individual institution—whatever its market position—is likely to be effective on these myriad issues. Your initiative is crucial and much appreciated.

I know you are oriented toward practical change, actions that can be implemented. I would encourage you also to consider specifically structures and processes that would bring together multiple institutions, the bench, the bar, and academy, as well as law schools that otherwise might be competitors. The ABA itself, as a regulatory authority, is one of the most significant entities with an ongoing role to play.

There are eight issues I'd highlight for your consideration.

First, there are too many law students training for a J.D. in a market that is already saturated. Every objective indicator shows there is a glut of lawyers at this time. The only question is whether these conditions are temporary or permanent.

Even if they are temporary, they will likely persist for at least some time. And even as a recovery occurs, the types of lawyers required in the future will be different. The profession has always been stratified, but it is becoming hyper-stratified. There is little in common in the responsibilities or the financial rewards, as between the small-town solo practitioner and the "BigLaw" partner. Most law schools and most of their students are not being prepared adequately for the possibilities of serving as contract attorneys, doing highly-specialized but routine work, or adapting to other structural changes.

The ABA is a gatekeeper. The American Medical Association (AMA) likewise is a gatekeeper. The ABA and the AMA appear to have very different attitudes about approval of new institutions. The ABA might follow the AMA as a model, by approving far fewer new institutions. Law schools have opened at an alarming rate that does not correspond to actual need. The Great Recession has made that excess capacity more obvious. But the underlying problems were there before then; they were merely masked by a temporary bubble.

Second, tuition is too high and has risen too quickly. It is too high from several perspectives: measured by "return on investment" for individual students, by what the "market will bear," or by general societal perceptions. The amounts we charge have deleterious effects not only for the persons directly affected, but also for our institutions. It undermines support for rule of law more generally, as disaffected law school graduates encourage others to perceive of the whole structure as fraudulent. The terms that are being used in general discourse are the strongest possible, and they reflect highly negative sentiments being propagated even by bar leaders themselves.

Yet those who demand that class sizes be cut and tuition be reduced do not typically consider how so many of our schools rely heavily on overall tuition revenue. That amount is the product of the number of students enrolled multiplied by the tuition rate (less return to financial aid). There is no realistic proposal of which I am aware that would allow us to reduce both enrollment and tuition, especially for public schools given the sizeable cutbacks in state support. Your task force could have the most positive effect if it developed a feasible means for both reducing class size and lowering tuition.

Third, the first two issues create a great irony. We actually face unmet legal need. Whether in public agencies, through non-profit organizations, or for ordinary citizens who need advice and counsel, for example in rural areas, there is a tremendous quantity of legal work that is not being done. The pipeline has not been built in the right manner to bring new graduates to their potential clients. Aside from issues of student debt, the training our students receive—despite profound changes unnoticed by critics—still does not emphasize skills enough, more than a generation after the McCrate Report (among other prominent studies).

Fourth, the ABA has adopted a restrictive rule regarding online legal education. In an era when both the technology and the pedagogy are proven, and with the most elite institutions of higher education rolling out online curriculum (for credit), there is no good rationale for this provision. The main reasons to enforce a limit of this nature would be to prevent "fly-by-night" low-quality institutions from starting and to ensure high-quality institutions do not "race to the bottom" by compromising the educational experience. The former problem can be taken care of by other means. The latter risk should not be given undue weight given the available empirical evidence about the effectiveness of online learning.

Fifth, *US News & World Report* rankings have a widely recognized deleterious effect, yet are a widely accepted metric for assessing quality; the deleterious effect noted by educators, the metric appreciated by everyone else. It is unrealistic to call on students,

employers, and others to disregard such an influential source of information—however flawed its methodology and whatever its overall consequences. It also is unlikely that any meaningful number of schools will opt out.

Accordingly, perhaps the ABA should consider specific changes to the data it requires that reduce the opportunity for "gaming," meaning not outright cheating but rather permissible, aggressive interpretations. Options include using bright line quantitative data; adding definitions of terms; performing audits; ensuring consistency with other data reporting requirements, such as to the federal government in IPEDS and regional accrediting authorities that use different definitions for the same terms; eliminating factors that do not reflect on the actual quality of legal education; emphasizing pedagogical accomplishments (as a supplement to, not substitute for, scholarly production); and taking into account structural differences among institutions.

Sixth, the public is demanding, and the federal government is starting to insist on, accreditation standards that measure student-learning outcomes. Other accrediting authorities, such as WASC, have begun to implement such measures, in a salutary trend.

Seventh, admission to the bar (of course regulated by states, though the ABA may be able to exert some influence) should be determined by examinations that test actual readiness to practice as best as possible. The efforts by bar examiners to lower admission rates—not to deter unqualified applicants but to protect the market for those already members of the bar, i.e. no different than professional guilds of past eras restricting competition to inflate compensation for current members—should be resisted. There are better means to address the excess supply of lawyers, and arbitrarily failing potential entrants who have reasonable expectations in this regard is unfair.

Eighth, the ABA should, and only the ABA is positioned to, undertake extensive public education about the importance of legal institutions, not only law schools but also an independent judicial system. This ought to be more than reactive to the current negative

press. It should emphasize the role of legal education in preparing leaders and engaged citizens. Within this effort, there could be much more done to set realistic expectations about legal practice, wholly aside from what salaries people might expect to earn upon graduation from law schools. Few people matriculating in law schools have any sense of what lawyers do on a day-to-day basis, other than from television shows.

Finally, related to the need for public education, I have the sense that some of the criticisms of legal education are based on a parody of what professors spend their time doing rather than the reality. Law school leaders, including faculty members, are well aware of the need to train students for actual practice. We do need to reform. We are trying to bring about a revolution in everything from higher education financing to the relationship of our training system to the profession to the curriculum.

Yet the sense that law professors prefer to devote their careers to esoteric issues is misdirected. Many seemingly obscure subjects actually are of tremendous practical consequence; for example, internet law, especially privacy law, was considered fanciful when the courses were introduced not long ago. It is apparent that internet law, including especially privacy law, are central to high-stakes disputes of first impression today. Other obscure subjects are worthwhile, because they serve to teach valuable skills. A student who writes a terrific term paper on the internment of Japanese Americans during World War II for a legal history class in 2000 seems to have done interesting but arcane work, until the events of September 11, 2001 make the topic most timely. Even without the renewed relevance of the constitutionality of wartime measures that target a specific ethnic group, the work, if done well, is exactly what students should be doing in order to learn archival research, public policy analysis, and persuasive writing on highly-charged controversies. A student who has the ability, diligence, and resourcefulness to track down what happened to specific individuals who were interned becomes a lawyer who has the ability, diligence, and resourcefulness to conduct fact investigation as to a criminal defendant.

Many of the ideas in legal education announced with fanfare as new are great marketing efforts to describe what responsible institutions of legal education have been doing for some time. As we improve, we need to do more to communicate better the value of what we already are doing.

Please contact me to discuss any of these matters. I look forward to seeing your work progress. Thank you. Best wishes.

Sincerely,

A handwritten signature in dark red ink, consisting of a stylized 'F' and 'W'.

Frank H. Wu