



How to Fight the ABA's Anticompetitive and Discriminatory Practices

AUG 23, 2017



Allen Mendenhall



3 Comments

Recently I urged top law schools to stand up to the excesses and abuses occasioned by the ministrations of the American Bar Association (ABA). These schools could band together and follow the lead of the journalism schools at Northwestern and Berkeley, which dropped their accreditor, the Accrediting Council on Education in Journalism and Mass Communication, earlier this year because accreditation standards were outmoded and not worth the cost of compliance.

But states can also fight the ABA and are arguably in a better position to do so.

The ABA is a nonprofit organization incorporated in Illinois that operates like a trade union for lawyers. Founded in 1878 by a small group of prominent East Coast lawyers, it has accredited law schools under the authority of the U.S. Department of Education (DOE) since 1952.

Why, exactly, would states want to push back against the ABA? There are two reasons, the first involving economics and the second involving racial diversity in the legal profession. In other words, both the Right and the Left have a standing interest in diminishing the ABA's power.

The Economic Reason

The ABA remains the sole accreditor for legal education in the United States. Its onerous and in many cases outmoded regulations drive up the price of law school, forcing schools to reallocate resources away from students and education and towards regulatory compliance.

As one example, ABA Standard 701 states, "A law school shall have facilities, equipment, technology, and technology support that enable it to operate in compliance with [ABA] Standards and carry out its program of legal education." To address this standard, law schools have furnished computer labs with fancy equipment to give the appearance of technological sophistication. But the labs and equipment often go unused.

The high costs of legal education resulting from ABA regulations are passed off to ordinary consumers over time.

The legal profession is notoriously behind the times on the technology front, and it takes advantage of anticompetitive restrictions regarding the unauthorized practice of law to push out innovative companies like LegalZoom that offer creative and inexpensive services. If the ABA were serious about technological innovation in law schools, it wouldn't burden online and distance education the way it does in Standard 306. It bears noting, as well, that the ABA's official interpretation of Standard 306 includes the "Internet," "video cassettes," "DVDs," and "CD-ROMs" as examples of "technology." Not exactly inspiring or pioneering. No wonder some analysts predict that computers and artificial intelligence will replace lawyers.

The high costs of legal education resulting from ABA regulations are passed off to ordinary consumers over time. They also prevent people with low to modest incomes from attending law school. According to Law School Transparency, the cost of legal education at private schools has risen from an average annual tuition of \$7,526 in 1985 to \$41,985 in 2013. The average cost of legal education for in-state students at public schools rose from \$2,006 in 1985 to \$23,879 in 2013 (for non-residents, tuition increased from \$4,724 in 1985 to \$36,859 in 2013).

These figures suggest that disadvantaged students do not have the financial means to delay or suspend a career to pay for legal education, or to take out student loans with an interest rate that exceeds that of the housing market. Thus, the ABA not only inadvertently drives up legal costs for all consumers, but also prevents many consumers of certain income levels from entering the legal industry to reform it from the inside.

The Diversity Reason

The ABA has an ugly history of targeting ethnic minorities who aspired to become attorneys. For most of the 20th century, it openly discriminated against African Americans, officially excluding them from membership for 66 years.

In 1912, the ABA ousted three African Americans from membership and issued a resolution proclaiming, “it has never been contemplated that members of the colored race should become members of this association.” Recent decades have seen the ABA attempt to make up for its racist past by instituting committees and programs aimed at racial diversity and championing what are widely considered to be leftist social causes.

These efforts, however, seem insincere—just another PR tactic—because the very purpose of the ABA’s accrediting arm (the Council of the Section of Legal Education and Admissions to the Bar) is to *exclude* people from legal education. To this day, the exclusionary policies and practices of the ABA disproportionately impact African Americans and other racial minorities. In other words, the ABA still does precisely what it was *designed* to do: keep African Americans, other minorities, and poor people out of the practice of law.

Law schools that are not ABA-accredited often offer inexpensive, part-time evening or night programs that enable students to work during their studies. Students who cannot afford to take off years of work to pursue legal education can complete these programs in four to five years. This affordable option provides needed access to legal education for low-income students who wish to become lawyers.

The ABA was formed, in part, to segregate the legal profession from ethnic minorities. It can’t be used now to the fix problems it caused and exacerbated.

Under present conditions, however, a graduate from one of these unaccredited schools can sit for a bar exam only in the state in which the school is located—and only if the state allows that. Unaccredited law schools also carry a stigma.

For these reasons, among others, ethnic minorities and disadvantaged students who are able learners with competitive test scores and academic records typically forego affordability and choose to attend ABA-accredited schools with a higher sticker price. These students thus take out massive loans and dig themselves deeper into a financial hole from

which it’s difficult to emerge, even with good jobs coming out of law school.

Critics of unaccredited law schools point to high attrition rates and low success on bar exams to rationalize increased restrictions and stricter standards. But if the ABA no longer accredited law schools, capable students would begin to populate what are now unaccredited law schools, if for no other reason than affordability. Expensive law schools that are currently ABA-accredited would be forced to find cost-cutting measures to remain competitive in the market and attract new students.

The prevailing justification for ABA accrediting authority is that such superintendence is necessary to protect consumers. But protect consumers *from what?* From a more diverse legal community? From black people? From poor people? That is the message the ABA is sending.

The ABA would never defend itself in these terms, nor purposefully discriminate with the goal of ensuring that the profession remain predominately white. Yet it can’t deny the realities that flow from its very purpose for

existing. The ABA was formed, in part, to segregate the legal profession from ethnic minorities. It can't be used now to fix the problems it caused and exacerbated. It simply lacks the institutional incentives and infrastructure to realize the objectives of diversity or inclusion.

Revising Standard 316

To make matters worse, the ABA is considering revising its Standard 316 to require law schools to maintain a 75 percent bar passage rate among its graduates in at least three of the last five years. Law schools failing to meet this standard face potential consequences for non-compliance, including loss of accreditation. The ABA House of Delegates rejected this measure in February, but the ABA has issued a questionnaire to law schools pending the possible reconsideration of this revised standard in 2018.

The ABA Council for Racial and Ethnic Diversity opposes the revised standard, which was proposed to address concerns that greedy law schools, faced with declining enrollments, were admitting unqualified students to generate tuition revenue. Although this criticism has merit, the revised standard is the wrong remedy. It will disproportionately impact schools in states like California, where bar passage rates historically have been low. Moreover, it could limit educational options for minorities who aspire to practice law by punishing schools with high minority enrollment.

You might be asking, "Why is the author advocating reform that would lower standards? Don't we want better attorneys? And don't we have enough attorneys already?" If the bar exam measured the ability to practice law, it might be a reliable indicator of a person's legal skills. But it has little to do with actual practice; therefore, passing or failing it doesn't measure one's legal skills. It also delays what has already been delayed during three years of law school: the practical experience necessary to make a good lawyer.

If there were no law schools, no bar exams, and no barriers to entry, we could still figure out how to weed out the good lawyers from the bad. In fact, we might even see exciting new advances in the field of online reputation markets that could rank and assess lawyers, giving a feedback mechanism to consumers.

And sure, there are a lot of attorneys. But having a lot of attorneys is not necessarily a bad thing. If we were to roll back all the anticompetitive practices perpetuated by the ABA, state bar associations, and their lobbyists, which work together to solidify lawyers' monopoly on the practice of law, the costs of legal services could be drastically reduced. An overabundance of lawyers would simply mean that hiring lawyers would be cheap. It's unlikely, at any rate, that we'd ever see an overabundance of lawyers in such a competitive market because intelligent people would choose to enter a different profession where salaries are higher.

If there were no law schools, no bar exams, and no barriers to entry, we could still figure out how to weed out the good lawyers from the bad.

The ABA discusses the bar exam in several standards: Standard 315 (the official interpretation), Standard 316, Standard 504, and Standard 505. The unintended consequence of this emphasis is to unreasonably encumber students and schools with red-tape administrative measures that have no proven effect on the quality of legal services.

Conclusion

The economic function of the ABA is, as I've said, to serve as a barrier to entry. Milton Friedman once declared that "[t]he overthrow of the medieval guild system was an indispensable early step in the rise of freedom in the Western World," adding that it was also "a sign of the triumph of liberal ideals." Recently, though, there's been what he called a "regression," and the ABA is a case in point.

Combating the ABA isn't easy. This organization is equipped with powerful lobbyists and enjoys longstanding relationships with influential politicians. Still the states, through their supreme courts and bar associations, remain in control over the admission of candidates into the legal profession in their jurisdiction.

State bar associations are typically corporations to which state legislatures have granted monopoly powers over the legal profession, subject to the oversight of state supreme courts. They are not affiliates or adjuncts of the ABA. If several state supreme courts and state bar associations allowed *all* graduates of non-ABA accredited law schools to sit for the state bar exam in their state, they could curtail the ABA's authority and diminish the ABA's credibility. To this end, they could also enter into reciprocity agreements with other states to allow graduates of non-ABA accredited schools in those states to sit for the bar exam.

State supreme court justices—or justices sitting on the highest court in their state—are elected in a majority of states. And of course judicial appointments are always political to some degree. Thus, these justices are likely attentive to the demands of an informed public. Citizens should press their state supreme courts about the ABA, especially during campaign season when seats are up for grabs. Moreover, citizens should urge their legislators to interrogate state bar associations about the ABA. After all, state legislators can undo legislation empowering state bar associations.

Citizens should press their state supreme courts about the ABA, especially during campaign season when seats are up for grabs.

Of course, the Obama administration contemplated another alternative that would likely appeal to both President Trump and Secretary of Education Betsy DeVos: the DOE could strip the ABA of its accreditation authority altogether, in effect getting the federal government out of legal education. (Obama was motivated by animus against for-profit colleges, as reflected in his Education Department's gainful employment rule, whereas Trump's interest would be in scaling back federal meddling.) This solution would leave matters of accreditation

and bar eligibility to the respective states. Stripping the ABA of accrediting powers, however, raises other concerns, given that, at present, a law school's eligibility to receive federal funds is tied to accreditation.

In this period of political rancor, reining in the ABA should appeal to both the Left and the Right, the former on grounds of racial diversity and fundamental fairness and the latter on grounds of decentralization and economic freedom. Despite the vitriolic and malicious rhetoric emanating from our politicians and media pundits, I believe most Americans want to get along and facilitate constructive dialogue about pressing issues. Why not refocus our attention on matters about which there is critical consensus? Why not work together, as a start, to curtail or revoke the ABA's ability to accredit law schools?

This move could reduce the costs of legal education and, hence, of legal services. It could go a long way towards restoring confidence in the legal profession and freeing up law schools to work more closely with state supreme courts and state bar associations to meet the needs of local markets, adapt to new industry technologies, and satisfy the changing demands of consumers.

Editor's note: Dr. Mendenhall recently discussed these issues on an episode of EconVersations, a show sponsored by the Manuel H. Johnson Center for Political Economy at Troy University. Here is the video:

EconVersations: The American Bar Association and Law School (...)





AUTHOR
Allen Mendenhall

How to Fight the ABA's Anticompetitive and Discriminatory Practices
AUG 23, 2017 › Academics, Costs, Governance, Innovation, Politicization

Making Legal Education Great Again
JUN 30, 2017 › Academics, Politicization

A Critical Education Department Position Has Been Filled—and Filled Well
JUN 9, 2017 › Academics, Costs, Governance, Innovation, Politicization

[More Articles >](#)

3 Comments

The James G. Martin Center for Academic Renewal

 Allen Mendenhall ▾

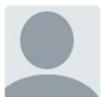
 Recommend

 Share

Sort by Newest ▾



Join the discussion...



48574 • 3 hours ago

On a related note one of the things that has bothered me about the legal profession is they have these barriers to enter the market which we the public pay for while we subsidize their education to get into the market. In many ways we pay twice. Between public education and financial aid law

How to Fight the ABA's Anticompetitive and Discriminatory Practices — The James G. Martin Center for Academic Renewal
to get into the market. In many ways we pay twice. Between public education and financial aid law is one of the most subsidies businesses you can enter.

Yes, all professions (including mine as a CPA) have this issue. But law and medicine are the two with the most education and largest barriers. The only thing I can do as a CPA a non-CPA accountant can't do it audits. Back in the '80s the legal profession tried to stop us from completing tax returns as a type of practicing law without the license.

^ | v • Reply • Share ›



George Avery • 5 hours ago

Fundamentally, law school - particularly the third year - is unrelated to the ability to practice law. California, Vermont, Virginia, Washington, and Wyoming allow admission to the bar to candidates who have "read the law" - that is, served an apprenticeship under a practicing attorney, as was the practice in most of the United States before the creation of the ABA and its subsequent efforts to limit market entry. New York only requires the first year of law school, and Maine only two years - which in both cases cover the core of courses on essential topics for practice (the third year of law school in pretty much every school includes only elective courses on material not related to the bar exam). The simple truth is that a good researcher with strong analytic skills can pretty much teach themselves the law, and needs only some training on trial procedure to be a successful barrister. I know that I have out-argued some licensed attorneys in small claims cases, largely because I knew the law better than they did, despite condescension towards me as someone who has a doctorate in policy, rather than a glorified MA in law.

1 ^ | v • Reply • Share ›



Westsylvania → George Avery • 3 hours ago

Thanks, I was curious if it was still possible to simply "read at the bar". I've always found it notable that most of ablest lawyers in history never got a degree or studied law at a university.

^ | v • Reply • Share ›

[Subscribe](#) [Add Disqus to your site](#) [Add Disqus](#) [Add](#) [Privacy](#)

Your support drives our success.

Your support enables us to improve higher education—in North Carolina and around the nation.

[Donate](#)

MORE IN ACADEMICS

[How to Fight the ABA's Anticompetitive and Discriminatory Practices](#) AUG 23, 2017

Recently I urged top law schools to stand up to the excesses and abuses occasioned by the ministrations of the Amer...

[When College Sports Lean Pro, Students and the Public Pay](#) AUG 21, 2017

Last week marked the latest chapter in the biggest college sports scandal in history. Administrators and athletics offi...

[Millennials and the Anti-Capitalistic Mindset](#) AUG 18, 2017

The great intellectual debate of the 20th Century was between capitalism and socialism, wrote Robert Heilbroner in ...

MORE IN COSTS

[How to Fight the ABA's Anticompetitive and Discriminatory Practices](#) AUG 23, 2017

Recently I urged top law schools to stand up to the excesses and abuses occasioned by the ministrations of the Amer...

[When College Sports Lean Pro, Students and the Public Pay](#) AUG 21, 2017

Last week marked the latest chapter in the biggest college sports scandal in history. Administrators and athletics offi...

[Should American Degree Programs Borrow from Their European Counterparts?](#) AUG 14, 2017

According to the National Student Clearinghouse Research Center, in the previous two decades over 31 million stude...

MORE IN GOVERNANCE

[How to Fight the ABA's Anticompetitive and Discriminatory Practices](#) AUG 23, 2017

Recently I urged top law schools to stand up to the excesses and abuses occasioned by the ministrations of the Amer...

[When College Sports Lean Pro, Students and the Public Pay](#) AUG 21, 2017

Last week marked the latest chapter in the biggest college sports scandal in history. Administrators and athletics offi...

[Should American Degree Programs Borrow from Their European Counterparts?](#) AUG 14, 2017

According to the National Student Clearinghouse Research Center, in the previous two decades over 31 million stude...

MORE IN INNOVATION

[How to Fight the ABA's Anticompetitive and Discriminatory Practices](#) AUG 23, 2017

Recently I urged top law schools to stand up to the excesses and abuses occasioned by the ministrations of the Amer...

[Should American Degree Programs Borrow from Their European Counterparts?](#) AUG 14, 2017

According to the National Student Clearinghouse Research Center, in the previous two decades over 31 million stude...

[Purdue Shakes Up Academe \(Not All Presidents Are as Innovative as Mitch Daniels\)](#) JUL 12, 2017

Five years ago, higher education was abuzz over distance learning, a "disruptive technology." The big question was w...

MORE IN POLITICIZATION

[How to Fight the ABA's Anticompetitive and Discriminatory Practices](#) AUG 23, 2017

Recently I urged top law schools to stand up to the excesses and abuses occasioned by the ministrations of the Amer...

[Millennials and the Anti-Capitalistic Mindset](#) AUG 18, 2017

The great intellectual debate of the 20th Century was between capitalism and socialism, wrote Robert Heilbroner in ...

No, Professor, Words Are Not Violence AUG 16, 2017

The excuse we have often heard for raucous campus protests over the last few years is that they are justified as a wa...

POPULAR ARTICLES

No, Professor, Words Are Not Violence AUG 16, 2017

The excuse we have often heard for raucous campus prote...

Why Many College Students Never Learn How to Write Sentences APR 1, 2016

Today's college writing is a big, knotted mess, decades...

Duke Assails Free Speech So It Can “Protect and Value Diverse Perspectives” JUN 14, 2017

American college campuses are becoming more and more li...

RECENT ARTICLES

How to Fight the ABA's Anticompetitive and Discriminatory Practices AUG 23, 2017

Recently I urged top law schools to stand up to the excesses and abuses occasioned by the ministrations of the Amer...

When College Sports Lean Pro, Students and the Public Pay AUG 21, 2017

Last week marked the latest chapter in the biggest college sports scandal in history. Administrators and athletics offi...

Millennials and the Anti-Capitalistic Mindset AUG 18, 2017

The great intellectual debate of the 20th Century was between capitalism and socialism, wrote Robert Heilbroner in ...

Martin Center Updates

Sign up to receive email updates from the Martin Center.

[Sign Up](#)

