The American Bar Association Stifles Legal Education

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By Allen Mendenhall 6/22/2017

The Accrediting Council on Education in Journalism and Mass Communications is a nonprofit accrediting agency for journalism programs. Bradley Hamm, the dean at Northwestern's Medill School of Journalism, has called the council's accreditation-review process "flawed," "superficial," "extremely time-consuming," and "sort of a low bar."

So he's gotten out. Northwestern University has effectively terminated its relationship with the council, calmly embracing its new status as unaccredited.

The online journal *Inside Higher Ed*, which points out that the Graduate School of Journalism at the University of California, Berkeley, has done the same, quotes Dean Hamm as saying that, "as we near the 2020s, we expect far better than a 1990s-era accreditation organization that resists change—especially as education and careers in our field evolve rapidly."

This is a tremendous blow—when two of the most prominent and celebrated journalism programs in the country refuse to acknowledge the authority and legitimacy of an accreditor, it's tough for the accreditor to argue that the resistant institutions are merely upset about their ability to maintain accreditation. If other journalism schools are frustrated with the council's obsolete standards, and its tendency to micromanage curricula, more of them will likely

follow the example of Northwestern and Berkeley.

The social and financial costs of burdensome accreditation standards and procedures are even more pronounced in the field of law. Small businesses and Americans of modest income struggle to afford the high costs of hiring an attorney or litigating a case. Access to justice or quality representation is a constant concern within the legal profession.

Meanwhile, the American Bar Association, which remains the only accrediting body for law schools in the United States, regulates legal education in a way that drives up costs for law students, and for the consumers onto whom those costs are eventually projected.

The ABA restricts innovation by fixing the number of credit hours necessary for law students to graduate, effectively eliminating the possibility of a shorter program than the standard three years. It discourages law professors from honing their practical skills by narrowing the designation of “full-time” faculty to exclude those who maintain an ongoing remunerative relationship with a law firm or business. Its requirements regarding equipment and technology mean, in practice, that many schools are buying expensive computers and furnishing computer labs that students may never use.

ABA scrutiny of attrition rates has also contributed to a change in law-school culture and practices. There was a time when law schools could accept a high percentage of applicants who, as students, had to prove their competence in the classroom and stand or fall on their academic merit. Those who couldn’t cut it flunked out. They didn’t incur three years of debt only to take and retake a bar exam they weren’t equipped to pass.

The ABA position penalizing schools for high attrition—the result of a new interpretation of Standard 501(b) that prohibits law schools from admitting applicants who aren’t “capable” of completing a Juris Doctor or passing a bar exam—now arguably causes law schools to seek to retain students who can’t cut it. To that end, it encourages grade inflation and heavier use of student loans.

Law schools recently came under criticism for hiring their own graduates as a way to boost their post-graduation employment statistics. In response, the ABA instituted procedures to prevent the spread of misleading data. What seemed like a good-faith effort to enhance transparency and accountability has led, instead, to flawed incentives. Law schools have taken to promoting “JD-required” and “bar-passage-required” jobs to their graduates more strongly than corporate or financial positions that pay higher salaries but don’t require either a law license or bar membership.

If you graduated from law school today and became the CEO of a large, multinational company tomorrow, you would skew your school’s data in an unfavorable direction.

This changed emphasis neglects the realities of a marketplace in which the availability of traditional law jobs remains stagnant. To best serve their students, law schools should feel free to guide them toward alternative careers based in new technologies and businesses that would benefit from the knowledge and leadership that legal education supplies.

The ABA’s ministrations also help drive up the price of legal education, forcing law schools to direct time and resources toward ABA compliance that could be put toward student scholarships or improving the curriculum. And a higher price tag means that members of the legal profession, and young lawyers in particular, in order to pay debts or compensate for opportunity costs incurred during law school, pass these costs on to consumers in the form of higher legal fees.

The bottom line is that, when a substantial portion of the population cannot afford to hire an attorney, or at least feels that way, the legal system has failed in its chief purpose: to ensure that wrongs are righted and justice is served.

Unintended harm, however, is nothing new for the ABA.

Founded in 1878 by “leading” or “representative” lawyers who were selected by an elite group of men from states along the East Coast, the ABA sought to nationalize professional and ethical standards with these goals: “to advance the science of jurisprudence, promote the administration of justice and uniformity of legislation throughout the Union, uphold the honor of the profession of the law, and encourage cordial intercourse among the members.”[1]

Noble ambitions indeed. But the organization soon became a fraternal guild that sought to enforce rigid barriers to entry into the legal profession with the assistance of independent bar associations in the 50 states. “For many years,” explained legal scholar Philip J. Wickser in the 1920s, “the Association fought hard to retain its selective quality, and not to forget that a relatively small homogenous group could get the most done.”[2]

The ABA officially excluded African Americans for 66 years, according to Susan D. Carle in her 2013 book *Defining the Struggle*. Its ouster of three African Americans in 1912 on the basis of their skin color drew protests from the newly founded National Association for the Advancement of Colored People. That same year, the ABA issued a resolution stating that “it has never been contemplated that members of the colored race should become members of this Association.”[3]

Although the ABA has since sought to make up for its racist past by increasing the ethnic diversity of its membership, creating a commission on sexual orientation and gender identity, and strengthening its rules prohibiting racial harassment or discrimination, part of its purpose historically has been to regulate entry into the profession and decrease the number of low-income, immigrant, and minority lawyers[4] (though in recent decades such decreases have been a consequence, not the purpose, of ABA regulation).

No matter how hard the ABA attempts to distance itself from its origins, it cannot escape the fact that its function is to exclude certain groups from membership to enable a monopoly on legal services by its members. Such exclusion has tended to fall along racial lines. One law professor has thus complained that “all of the ABA’s diversity efforts ring hollow” because the ABA “caused blacks to be excluded from the profession in the first place.”[5]

Given its racially charged beginnings and racially dividing regulations and standards, it’s surprising that the ABA is still considering revising Standard 316, which addresses the bar-passage rates of law-school graduates. Compliance with the revised standard would require bar passage by 75 percent of the graduates of a currently approved (as opposed to provisionally approved) law school in at least three of the last five years.[6]

A few months ago, Lawrence P. Nolan, the president of the State Bar of Michigan, penned a letter to ABA delegates to point out, among other things, that minority organizations—and even the ABA Council for Racial and Ethnic Diversity in the Educational Pipeline—were against the proposed revision to Standard 316. “The collective judgment of those committed to [reducing] the . . . racial disparity in the legal profession,” he said, “is reflected in their unanimous opposition to this amendment.”

Nolan also stated that the ABA’s own data “confirms the large gap for African-American bar passage rates, which are lower than overall rates, particularly on the multiple-choice test.” Statistics cited by Nolan show that African Americans pass the bar exam at a lower rate than whites and that the percentage of white repeat takers of the bar exam is 3.2 percent whereas the figure for black repeat takers is 14.1 percent. If those statistics are accurate and predictive, then the effects of the revised standard would fall disproportionately on those schools with higher numbers of African American students.

Supporters of the proposed revision portray law schools as exploiters of racial minorities that have been admitting underqualified applicants to make up for diminishing admissions applications. There’s truth to this characterization. Law-school admissions standards have dropped precipitously as enrollment has declined.

But why trust the organization that caused or at least exacerbated many of these problems to fix them? We need imagination and rational risk to move forward constructively and creatively. Proposals as wide-ranging as abolishing the bar exam or developing non-JD curricula in law schools ought to be seriously considered. Another idea would be

to strip the ABA of its accrediting powers altogether, something the U.S. Department of Education might consider.

During this moment of social unrest, when rancorous partisanship seems to permeate all fields of discourse, faculty and administration all along the political spectrum can agree on one thing: The ABA is systematically harming ethnic minorities and becoming as obsolete as its counterpart in journalism education.

It may well be time for top-ranked law schools to follow in the footsteps of the J-schools at Northwestern and Berkeley. Only if several leading law schools joined to seek an end to the ABA's accrediting function would this reform stand a chance. Law schools with lower rankings may lack the credibility to resist, given their stake in the accreditation process. Their administrators already, in my view, avoid speaking out against the ABA due to their reasonable fear of retaliation. (My own trepidation almost prevented this piece from reaching print.)

Granted, it might give the law schools pause that in most states, admission to the bar (by authority of the state bar or the state supreme court) is conditioned on holding a degree from an ABA-accredited law school. Still, the journalism-school revolt demonstrates that a mass rebuff of the ABA's accrediting legitimacy is neither extreme nor absurd. Prominent law schools are already experimenting in other areas, such as considering GRE scores (rather than just LSAT scores) for admissions purposes. Such experimentation is all to the good.

The legal profession is, in the words of Benjamin Barton, "facing a major retrenchment" and remains mired in outmoded tasks that artificial intelligence may replace. It's stuck in a bygone period when lawyers felt threatened by entrepreneurial upstarts who breached longstanding protocols such as prohibitions on advertising or contingency fees. It's time for an energetic rethinking of the goals and purpose of legal education and the legal profession.

Ending ABA accreditation authority would be an exciting first step. It would enable administrators to reallocate resources to lower the costs of legal education and, consequently, of legal services. And it would allow them to focus on their true mission: not lining the pockets of accreditation agencies and bureaucratic guilds but educating prospective lawyers and bringing justice and order to rich and poor alike.

The views expressed herein are solely the author's, and do not reflect those of Faulkner University's Thomas Goode Jones School of Law or its Blackstone and Burke Center.

[1] Simeon E. Baldwin, "The Founding of the American Bar Association," *The American Bar Association Journal* 3 (1917), 659-62, 695.

[2] Philip J. Wickser, "Bar Associations," *Cornell Law Quarterly* 15 (1929-30), 398.

[3] Susan D. Carle, *Defining the Struggle: National Organizing for Racial Justice, 1880-1915* (Oxford University Press, 2013), pp. 281-82, and 541-43.

[4] Jerold S. Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America* (Oxford University Press, 1976), p. 65: "During the second decade of the twentieth century the American Bar Association began to assert itself aggressively as a professional protective organization. Its purpose was twofold: to preserve its own exclusiveness (and the status that accompanied its preservation) and to exert professional leverage upon the political process." For admission of minorities, see Auerbach, pp. 65-66, 71, 107, 131, 159-60, 200, 216, and 295.

[5] George B. Shepherd, "No African-American Lawyers Allowed: The Inefficient Racism of the ABA's Accreditation of Law Schools," *Journal of Legal Education* 53 (2003), 104.

[6] The ABA Council and the Accreditation Committee of the Section of Legal Education and Admissions to the Bar operate independently of the ABA pursuant to regulations of the U.S. Department of Education, which recognizes these bodies as authorized accreditors. For ease of reference and understanding, and because of the connection

between these accrediting bodies and the ABA, the taxonomy I have adopted simply lumps these bodies together under the heading of “ABA.”