

## Reforming Legal Education: a Two-Track Approach

Over the past five years, many law students have struggled under the hardships of rising tuition and weak post-graduate job markets. Despite a poor economy, median law school tuition over the past five years has increased 5.2 percent annually, a much faster increase than inflation in the United States. Meanwhile, law schools now graduate more lawyers than the legal profession demands, resulting in the highest unemployment rate among law graduates in two decades. With the median starting salary for 2012 graduates 15 percent lower than in 2008, even graduates who find employment face financial uncertainty.

These statistics raise serious questions regarding the viability of the current legal education model. The ABA—empowered by the Department of Education to set accreditation standards—has tasked two separate entities with proposing systemic reforms. One is the *Standards Review Committee*, a permanent committee of the ABA Section of Legal Education and Admission to the Bar. The Section’s Council holds formal power over accreditation standards, but often relies on recommendations from the Standards Review Committee. The second vehicle for reform—the *Task Force on the Future of Legal Education*—is ad hoc, comprised of lawyers representing many different aspects of the legal profession. While the Standards

Review Committee focuses on the revision of formal accreditation standards, the Task Force seeks to engage the broader legal community in developing strategies to make law school education more cost-effective.

Both entities have the opportunity to change the traditional model of legal education and ensure that law schools satisfy students’ financial and professional needs. To realize this, the Standards Review Committee likely will need to alter accreditation standards in ways that enable law schools to experiment with new approaches to reducing costs and improving practical skills instruction.

### Track One: The Standards Review Committee

The Standards Review Committee is chaired by Jeffery Lewis, Dean Emeritus and Professor at Saint Louis University School of Law and consists of 14 members, including a judge, private and public attorneys, and law school professors and deans. In September 2008, the Committee commenced a long-term, comprehensive review of ABA accreditation standards. The review seeks to ensure “a sound program of legal education that will prepare law school graduates to become effective members of the legal profession.” This review began only two years after the Committee

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## The ABA and *United States v. Windsor*

Since 2004, the American Bar Association has formally opposed federal actions that ban or limit same-sex marriages. The ABA has consistently advocated same-sex marriage through government lobbying, public awareness campaigns, education of the legal profession, and amicus curiae briefs. In 2009 and 2010, the ABA House of Delegates adopted resolutions encouraging the repeal of DOMA and counseling all federal, state, tribal, and local governments to legalize same-sex marriages.

The ABA filed an *amicus curiae* brief on behalf of Edith Windsor in the recently decided Supreme Court case *United States v. Windsor*. The brief explained the effects of Section 3 of DOMA (Defense of Marriage Act), at issue in Windsor, on the legal community. The brief asserts that restrictions in DOMA hinder lawyers who seek to aid their gay and lesbian clients in attaining access to basic rights. The brief argues, “Though only 65 words long, Section 3 [of DOMA] is sweeping in its

breadth and devastating in its effect. Section 3 provides that, for purposes of every federal statute, regulation, and administrative ruling, the word ‘marriage’ means ‘only a legal union between one man and one woman,’ and the word ‘spouse’ means ‘only a person of the opposite sex who is a husband or a wife.’” Legal counsel advised the Court that the implications of DOMA make it increasingly difficult for attorneys to help clients adequately plan in legal areas pertaining their families’ futures, such as inheritance, trust funds, medical issues, and child custody. The brief suggests that gay and lesbian households must often devote considerable time and expense to navigate the legal issues and complications that a heterosexual couple would never encounter.

The ABA brief cited *Zablocki v. Redhail* as an authority in its reasoning that states should be allowed to determine their own marriage policies and that those policies should not be undermined by actions of the

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Proposition 8 case in California. Stewart served as the first openly gay president of the Bar Association of San Francisco, as well as the first co-chair of its Committee on Sexual Orientation.

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concluded its last review of accreditation standards, and followed on the heels of calls from within the ABA for the Committee to make further reforms.

Although the Committee initially expected its current review to last two years, the review is now approaching the end of its fifth year. The Committee hopes to conclude by the end of 2013. One possible reason for this delay is the magnitude of financial and educational problems facing the legal academy. A second reason is the Committee's membership structure. Committee bylaws prohibit members from serving more than six years. As a result, the Committee experiences frequent membership turnover, leading to instability and impeding progress.

The Committee's primary focus is to review all eight chapters of the ABA's accreditation standards. Although the Committee has approved recommendations for most accreditation standards, the Council has decided to postpone consideration of the recommendations, until the Committee submits all proposed reforms. Several of these reforms have loosened costly regulations on law schools. For example, the Committee has recommended the ABA require only that students have "reliable access" to essential legal materials, rather than mandating schools own physical copies of such materials. The Committee also supported removal of the requirement that law schools maintain a student-to-faculty ratio better than 20:1. Other recommendations, such as raising the required number of experiential coursework credits, will give students more practical legal training. The Committee also considered the LSAT's role in law school admissions. After much back-and-forth the Committee could not agree on whether the ABA should mandate LSAT use or allow schools to experiment with other admission procedures. As a result, the Committee submitted two competing recommendations: maintain a somewhat lessened LSAT

requirement or delete the requirement altogether.

The Committee is still considering two particularly contentious issues pertaining to faculty tenure and student performance. At its most recent meeting, the Committee approved four competing proposals that amend the ABA's current standard, which implicitly requires that accredited law schools offer faculty tenure. The first proposal clarifies the status quo by making the provision for "tenure or a comparable form of security of position" an express requirement. The second proposal does not require tenure, but mandates a "security of position" that provides, at minimum, five-year presumptively renewable contracts following a probationary period not to exceed seven years. The third proposal leaves "security of position" undefined, but requires schools to offer all full-time faculty the same security, governance, and other rights regardless of academic field or teaching methodology. The fourth proposal does not require any security of position. Although the committee expressed preference for the second proposal, the Council has not yet indicated which option it will approve.

The Committee is also considering, but has not yet approved, a plan to simplify and strengthen bar exam performance requirements for law schools. Currently, 75 percent of a law school's graduates in three of the past five years must pass the exam in order for the school to retain accreditation. Alternatively, a school can retain accreditation if the first-time exam passage rate among its graduates is no less than 15 points below the national average for first-time exam takers. The new standard would eliminate both of these requirements and mandate 80 percent of each school's graduates pass the exam within two calendar years following graduation. The new proposal may also change the method law schools use to calculate the passage rate of its graduates.

### **Track Two:**

#### **Task Force on the Future of Legal Education**

While the Standards Review Committee has moved slowly but with some concrete results, the Task Force has moved relatively swiftly but has not yet produced recommendations, nor have its public meetings suggested clear movement in any direction. Formed by the ABA in August 2012 and chaired by former Chief Justice of the Indiana Supreme Court Randall Shepard, the 19-member Task Force has a two-year mandate to broadly examine the challenges facing legal education. Recognizing the pressing nature of these challenges, the Task Force advanced its timeframe and now expects to release preliminary findings

by the end of this summer. It plans to issue official recommendations in November for consideration by the ABA House of Delegates.

The Task Force began its review with three goals: (1) study the impact of the weak economy on tuition and employment prospects, (2) develop strategies to alleviate the hardships that recent graduates face, and (3) understand how structural changes at law firms have altered the legal landscape. To accomplish these goals, the Task Force has divided into two subcommittees. The Subcommittee on Costs and Economics seeks to reduce the cost of legal education through curricular, instructional, and administrative reform. The Subcommittee on Delivery of Legal Education and Its Regulation seeks to adapt legal education to the projected needs of society over the next 25 years. Among this subcommittee's concerns are ABA regulations that tend to stifle innovation, such as the requirement that students pass at least 83 law school credits before graduation. Both subcommittees have invited public comment on their endeavors, and have received oral and written input from practitioners, law school administrators, and students, among others. Two common themes in these comments are (1) tuition must become affordable, and (2) law schools must improve attention to students' professional needs.

Despite a number of public meetings and media reports, the precise nature of the Task Force's forthcoming recommendations remains ambiguous, even though it has the power to propose far broader changes than the Standards Review Committee. Regardless of their specific content, the Task Force's recommendations could potentially identify creative strategies to lower the cost of legal education and raise the employment prospects of recent law graduates.

### **Change on the Horizon**

Both the Task Force and the Standards Review Committee are expected to release their respective recommendations toward the end of this year. Together, the two groups have the opportunity to initiate significant changes to traditional methods of legal education. However, some questions remain about the time frame for the recommendations. The years of delay and turnover that have plagued the Standards Review Committee raise questions about the suitability of ABA structures and methods for effecting reform. Further, it remains to be seen whether the Task Force can produce a coherent set of recommendations on its expedited schedule. Moreover, the groups' proposals risk contradicting each other. If

the Standards Review Committee keeps accreditation standards relatively tight and costly, it will discourage experimentation and the Task Force's proposed reforms, however sweeping, will carry little bite.

*ABA Watch* will continue to monitor developments.

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## **The ABA and *United States v. Windsor***

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federal government. The brief contended that even when a state has taken every care to ensure the complete equality of all married couples, regardless of sex or sexual orientation, the definitions of marriage in Section 3 of DOMA prevent true equality from being achieved. The brief highlights five areas in which Section 3 causes unreasonable burdens to be placed on gay and lesbian couples – healthcare, retirement planning, immigration, military benefits, and taxes. The brief asserts that Section 3 singles out a class of people for discrimination without a compelling, substantial, or even rational government interest.

After the Court announced a 5-4 decision in favor of Edith Windsor, ABA President Laurel Bellows released a press statement. She hailed the decision as “a historic milestone in America's quest for equal protection for all.” Bellows reaffirmed the ABA's commitment to marriage equality for gay and lesbian couples, declaring same-sex marriage to be a constitutional right. She told reporters, “We have repeatedly advocated for eliminating discrimination against gay and lesbian people. The rights of all Americans guaranteed under the Constitution are supported with the Court's decision today.”