

July 19, 2010

**Report of Special Committee on Foreign Law Schools
Seeking Approval under ABA Standards**

This Special Committee was appointed on June 10, 2010 and asked to report to the Council of the Section of Legal Education and Admissions to the Bar at its August 2010 meeting on the policy questions surrounding the question whether law schools located outside the United States or its territories, which have modeled their educational programs on the American model, should be allowed to seek accreditation under the governing Section *Standards and Rules of Procedure for Approval of Law Schools*. Notably, this inquiry follows the thorough July 15, 2009 *Report of the Special Committee on International Issues*, chaired by Justice Elizabeth Lacy. That report examined the impact of international issues on legal education and admissions to the bar, as well as the question of the various ways in which the Section should respond to those pressures, including the accreditation of non-U.S. law schools.¹

After a brief introduction, this report falls into three parts. The first discusses the policy implications and justifications for expanding the accreditation role of the ABA Section to encompass law schools located outside the United States or its territories. The second considers what special rules or concerns might need to be addressed should the Council determine to proceed to consider applications coming from such law schools. Because of the limited time frame in which this report was composed, no attempt is made to provide a detailed assessment of exactly how to address the possible concerns raised or to set out any special procedural Rules or Standards that should be adopted in response to such concerns. Instead, this latter section is designed to inform the Council of the kinds of matters that need further decisions or adjustments

¹As a result of the 2009 report the Council agreed to the appointment of a standing International Issues Committee, which currently is being chaired by Professor Dennis Lynch. That committee is examining issues related to the use of an LL.M. degree as a qualifying credential for foreign trained lawyers to be able to sit for a state bar examination in the United States and whether special bar-admissions consideration also is merited for graduates in common law countries that follow a graduate law school model similar to that used in the United States. Thus, this report omits examination of those issues.

should it be determined to move forward on the question of accrediting non-U.S. territorially based law schools. Finally, the report concludes with a series of recommendations.

Introduction

There appears to be nothing in the current *ABA Standards and Rules of Procedure* that specifically addresses whether a law school seeking provisional or full approval must be located in the United States. Nonetheless, the Preface to the *Standards* notes that "The Council grants provisional and full ABA approval to law schools located in the United States, its territories, and possessions." (p. vi) And the Bylaws of the Section state: "The purposes of this Section as stated in its Mission Statement are ... to provide a fair, effective, and efficient accrediting system for American law schools." This quoted language certainly accurately describes the historic role of the Section's accreditation function. The question is whether it should remain so limited in the future.

The 2009 Report details how the increasing globalization of law practice has placed greater pressures on the state supreme courts and bar admissions administrators, as well as clients and foreign lawyers, to develop better information for making determinations as to the admission of foreign lawyers to the practice of law in this country. It notes that overwhelmingly the accreditation function of the Section informs the state supreme courts and bar administrators about the quality of the educational experience of an applicant so that expanding that function to include foreign educational experiences could be an important way to provide the type of information needed. Thus, it concludes:

Probably the most compelling justification for why the scope of the Section's current accreditation efforts should be expanded is that in doing so the Section would be able to provide state supreme courts with a basis for deciding whether a person holding one of the degrees under these programs should be permitted to sit for their bar examinations and perhaps other conditions. (p. 25)

It also notes that the increased pressures for foreign practice in the U.S. and for Americans to practice abroad will continue regardless of U.S. cooperation so that the Section should help to ensure the intellectual and educational fitness of bar applicants to the extent their educational backgrounds justify ABA accreditation. Finally, it concludes on this issue that

any expansion of the ABA accreditation function to accommodate these globalization pressures should be limited to foreign law schools modeling their programs under and meeting fully the prevailing ABA standards and that no specialized, separate accreditation system should be established for foreign law schools generally. Rather, in exercising its existing accreditation function, "the Section should abandon any notion of territorial restrictions in accreditation." (p. 28)

This committee's charge, therefore, is to examine more carefully that conclusion, including what its implications may be.

I. Policy Considerations

A. Reasons supporting expansion of ABA accreditation to schools located outside the United States and its territories

(1) As described in the 2009 Report, such an expansion would provide additional guidance for state supreme courts when lawyers trained outside the United States seek to be allowed to sit for a U.S. bar examination. Since that is a key function of the accreditation process generally, the expansion would be consistent with the historic role of the Section in aiding the state supreme courts in the bar admissions area.

(2) If the Section does nothing to expand accreditation to schools located outside the U.S., pressures to find other routes to U.S. licensure will continue to increase and two negative things will occur. First, states will be forced to make decisions about what education is good enough to allow foreign-trained individuals to sit for the bar exam and some states undoubtedly will authorize lawyers to enter the U.S. legal profession with weaker and less reliable training than is provided in ABA approved law schools. Second, because these decisions will be made from state to state, there will not be just one standard for evaluating educational credentials, but many of them, and that will result in a lack of clarity and consistency. These effects are harmful to the profession and the public. They also will put more pressure on bar examiners to raise bar-passage requirements since the bar exam will be the primary means to ensure minimal quality and this will have adverse consequences for the graduates of many U.S. law schools as well. Thus, if the ABA Section is irrelevant in decision-making concerning the realities of the globalization of the legal profession, it will undermine its historic role as a leader on these matters. Yet inaction will have no impact on whether more

schools located abroad will open, as they will simply find other routes for their graduates to enter the profession.

(3) Statistics produced by the National Conference of Bar Examiners show that every year between 4,000 and 5,000 foreign-trained law graduates take a bar exam in the United States, mostly in New York and California. Although some of these foreign applicants complete a J.D. degree as an avenue of admission, most do not. Some of the non-J.D. graduates have additional education in the U.S. (typically a 20-hour LL.M. program), but some do not even have that educational exposure. Thus, most of these foreign applicants for bar admission do not have the benefit of a J.D. program meeting ABA Standards, and it can be argued that a J.D. degree from a foreign law school that teaches a U.S. law curriculum and meets ABA Standards is preferable to the current situation.

(4) If we believe that the American legal education model is the "gold standard" for legal education world-wide and that well-trained lawyers are critical to the global economy, then a willingness to expand accreditation to schools embracing the American model is an appropriate way to improve the training of lawyers globally and contribute to the modern economy and the international legal profession.

(5) We are in a period in which different legal systems are converging as part of the expanding global economy. Expanding accreditation to schools outside U.S. borders that focus on U.S. law will allow these schools to be in a position potentially to develop cutting-edge curricula to address these trends and the Section thus will be in a position to be an active player in the dialogue about how to develop high quality legal training for the global economy.

(6) Expanding accreditation would clarify that ABA approved U.S. law schools can open branch campuses to further the various international programs that they now conduct and therefore would provide another opportunity for U.S. law schools to compete internationally in the legal market place. Failing to make such a clarification raises questions about the status of such branches.

B. Reasons against expansion of ABA accreditation to schools located outside the United States and its territories

(1) This development could result in enlarging practice opportunities for

foreign lawyers in the United States because graduates of foreign ABA approved schools then would be eligible to sit for a bar exam without any reciprocity or parallel opportunities provided by other countries for U.S. lawyers.

(2) If the foreign school is government-sponsored, political difficulties could arise if the Council failed to approve an application for accreditation and, depending on the issues presented, this could create problems or pressures both within the larger ABA and potentially with the Department of State.

(3) Foreign students who never spend any time studying in the United States will not have the benefit of the acculturation process that naturally occurs when study is accomplished here and that provides context for understanding the development of U.S. law and professional ethics.

II. Concerns and the Need for Special Rules

As indicated earlier, if the accreditation function is to be expanded it is recommended that it only be done for the limited purpose of approving law schools that meet all the ABA accreditation Standards. However, because the current Standards were premised on an understanding that the law schools being accredited were within the United States several matters that most would see as inherent in a law school program operating here may need to be made explicit, rather than implicit, to avoid any confusion when the Standards are applied outside the U.S. The following discussion highlights what we have identified as basic assumptions about programs currently approved under the standards, and the need to clarify that these assumptions are correct. It also raises other practical concerns that need to be considered.

(1) The Standards do not expressly note that U.S. law must be the dominant focus of the curriculum, although that clearly is the case currently in ABA approved schools. For a school outside the country, we need to clarify this assumption that U.S. law must be the primary core of the educational program to satisfy the obligation to prepare students who are able to practice in the U.S.. Standard 302(a)(1), which requires substantial instruction in "the substantive law generally regarded as necessary to effective and responsible participation in the legal profession" should be read to mean "U.S. substantive law" and in the "U.S. legal profession". Similarly, Standard 302(a)(5), which requires substantial instruction in "the history, goals, structure, values, rules and responsibilities of the legal profession and its members" should be read to

mean the "U.S. legal profession and its members".

(2) The Standards dealing with faculty speak in terms of the need to have a well-qualified faculty. While many U.S. based law schools today have faculty members who are not primarily trained in U.S. law (as part of the internationalization of their curricula), or are not even trained in law itself, but in some other discipline, the core curriculum generally relies on faculty who have J.D. degrees. We need to make clear that the faculty at schools located abroad must be predominantly U.S. trained law faculty holding J.D. degrees from ABA-approved law schools to ensure that they are in the best position to offer quality instruction in U.S. law.

(3) In order to ensure that the training abroad is comparable to that in the U.S. and that graduates of such programs are able to practice in the U.S., English language facility, both spoken and written, is critical. Thus, it is important to have the curriculum taught predominantly in English. We recognize that the ABA already accredits law schools in Puerto Rico that teach solely in Spanish. While we do not know the history surrounding that allowance, we would note that Puerto Rico is a U.S. territory and the basis of the law in the federal courts there is U.S. common and statutory law. Further, the capacity of the Section to accredit schools regardless of language is minimal, if not nonexistent, and we would treat the Puerto Rico schools as an historic anomaly--one that should not be repeated as we look to the future of training lawyers in U.S. law for a globalized practice.

(4) In countries that have a very different social and governmental system, there is a concern about how we can ensure that the students studying at the foreign law school have been introduced to the social and political context in which U.S. law evolves since it is unlikely their undergraduate training would have exposed them to our system. Although many foreign students now coming to the U.S., both for J.D. programs and for LL.M. programs, have the same lack of background, their study in the U.S. should help to eliminate that gap. But there may be a need to require some basic education in the American governmental system for foreign students that we simply assume most U.S. students obtain prior to entering law school.

(5) If the accreditation function is expanded to schools outside U.S. borders, a suggestion has been raised that there should be a clear policy providing that the Section can refuse to review an application, as well as on what grounds. We see the issues that might invoke the possible exercise of such discretion as falling into two types. First, and easiest, would be when a

school is located in a country that is on a U.S. "Banned List" (today, North Korea, Cuba, and Iran) so that travel to its location is not possible. Necessarily, those schools should be rejected out of hand (not that they are likely to apply). However, there are various standards that cover "softer issues" that reflect the U.S. cultural and legal values that may be inconsistent with at least the traditional values in some other countries. These include, for example, the standards on academic freedom, on faculty governance by the full-time faculty, and on nondiscrimination and diversity. It should be determined whether the Section should have the right to reject an applicant school when it has factually-based concerns that those values will not be honored. Additionally, the factors or procedures that should govern the exercise of that discretion need to be clarified.

(6) A concern was raised as to whether the expansion of the accreditation function outside U.S. borders might have any implications for the Council's recognition by the U.S. Department of Education as the national accrediting body for U.S. law schools. Preliminary indications from our outside Counsel indicate the answer is no.

(7) A concern was raised that if the issue of increased opportunities for entry of foreign trained lawyers into the U.S. legal profession is one on which different sections and individuals in the larger ABA are deeply divided, then proceeding with this expansion could create additional contentious issues for the Section within the ABA. In fact, however, leadership of the ABA in the last several years has been very globally-minded.

(8) There is some question whether the expansion of the accreditation function outside U.S. borders will create a potentially undue burden on the Section's staff and volunteers to meet the additional workload. To the extent that greater efforts are required for these types of inspections and reviews, we believe that all those costs should be passed on to the applicant schools and inspection and accreditation fees adjusted accordingly. Along similar lines, if it is agreed to go forward with this expansion of accreditation, it is naturally difficult to decide all the issues that may emerge until one has some experience. Thus, it may be appropriate, at least in the early years, for some special pre-screening of applicant schools before a site-inspection team is assembled and sent in order to avoid misunderstandings and the expense of time and money if the applicant school is far from being in compliance.

III. Recommendations

Based on the preceding discussion, the Committee makes four recommendations.

(1) The Council should authorize the Accreditation Project to go forward with considering the accreditation of law schools outside the United States borders that meet all of the prevailing Section Accreditation Standards and Rules of Procedure for the policy reasons discussed in Part I.

(2) The Council should request the Standards Review Committee in its ongoing comprehensive review to look at all the Standards to ensure that none of them unintentionally sets up barriers to this geographic expansion and to remove any such barriers that do not implicate the substantive standards ensuring a quality legal education.

(3) The Council should consider drafting a policy statement to clarify the matters highlighted in Part II that deal with the underlying assumptions in the current standards, such as that the curriculum is primarily focused on U.S. law, the instruction is primarily in English, and the faculty are primarily J.D. graduates of ABA approved law schools.

(4) If the Council agrees with the preceding recommendations, recognizing that it is very difficult to consider in a vacuum all the issues that may arise when the Section has not before entered this arena, the Council should consider whether it might be advisable to allow a site visit on a trial basis of a foreign applicant school that wants to see whether it can meet all the standards.

Respectfully submitted,

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