Council, Please Shape Up

August 6th, 2017 / By **Deborah J. Merritt**

The Council of the ABA Section of Legal Education and Admissions to the Bar has weathered significant criticism over the last few years. Some of that criticism has been well founded; other attacks have been unfair. But now the Council is acting as its own worst enemy–pursuing a course that has already provoked significant criticism in the legal academy and probably will attract negative attention in the press.

As Jerry Organ explains in a detailed column, the Council voted in June to make several changes in the form used to report law school employment outcomes. The Council acted without any public notice, without following its usual processes, and without gathering input from anyone outside the Council. The lack of process is especially disturbing given: (a) some of the changes had previously provoked vigorous debate; (b) the Council had previously rejected some of the proposals in light of that debate; and (c) the Council–along with legal education more generally–has been accused of lacking transparency.

I am sure, as Council Chair Gregory Murphy has written, that the Council acted in good faith–believing that the changes would receive "universal, or near universal, acclamation." But that's the problem with disregarding process and input: a small group of decision makers can persuade themselves that they know best. This case is a good illustration of how even highly educated, well intentioned groups can fall prey to that fallacy.

Murphy, thankfully, has proposed unwinding some of the Council's procedural errors: Later this week, the Council will vote on whether to refer the June proposal to its Standards Review Committee for comment (which would have been the usual process for a proposal of this nature).

Regrettably, however, Murphy suggests that the Council should maintain its position–without seeking any further input–on one of the disputed policy decisions. That decision involves the reporting of law-school-funded jobs that are full-time, predicted to last at least a year, and pay more than $40,000 annually. Currently, the ABA classifies those jobs as "law school funded positions." Under the proposal adopted in June, and that Murphy proposes shielding from further input, those jobs would count as government or public service jobs without any recognition that the graduate's school paid the salary.

This is a top 1% problem that shouldn't even be absorbing the Council's time. Only 2.0% of 2016 graduates took a job funded by their law school, and only about half of those jobs were full-time, long-term positions. The ones that paid more than $40,000 almost

certainly were clustered at a few wealthy law schools. The dispute over how to categorize these jobs appears to affect only the relative position of T14 schools in a few news reports.

On the merits, there are good reasons to continue classifying these $40,000+ jobs as law-school-funded. Yes, these jobs often provide rewarding experiences for graduates; they may be "comparable to Skadden/EJW fellowships" in that respect. But the graduates who take these jobs are funded by their classmates, not by Skadden Arps. Some potential students may favor that practice, some may oppose it, and most may not care one way or another–but there is no good reason to deprive them of the information.

Law schools suffer no administrative burden in reporting all of their school-funded positions in one category. Indeed, it may take minimally more time to separate the jobs into two salary groups. Most important, law schools have suffered years of withering attacks on their lack of transparency–with some of those critiques specifically focused on school-funded jobs. Why should we reduce the transparency we've achieved and open ourselves to further attacks? One should reduce transparency only for compelling reasons–and after a very transparent process of deliberation.

Legal education faces many challenges. A short list would include:

- Our diminished applicant pool
- High tuition levels
- Declining bar passage rates
- Attempts to update our pedagogies and assessment practices
- Student and employer demands for more clinical education
- Deep status/pay divisions on our faculties
- The continuously shifting job market for graduates
- Ongoing technological change, both on campus and in practice
- Escalating competition for rankings rather than educational value
- Worrisome rates of mental health disorders and substance abuse among students and graduates
- Our inability to graduate enough lawyers with the will, training, and economic ability to serve the unrepresented clients who need our help

All of these issues are much more important than whether one wealthy law school ranks slightly higher than another on an employment report. It's embarrassing for all of us in legal education when the Council devotes so much attention to an issue like this–even more so when the Council does so without following its own procedures.

Please shape up, Council. Refer *all* of the questions related to the employment report to the Standards Review Committee, err on the side of transparency (in both substance and process), and get back to the serious issues challenging law schools today.

For further discussion of the Council's regrettable actions, see the excellent analysis by my co-moderator Kyle McEntee.