I am submitting these comments to the Commission in response to its invitation for public input into the Commission's study of the current status and future development of legal education in the United States.

This paper includes (1) a description of my professional background, (2) an overview of my conclusions, (3) two examples that illustrate those conclusions, (4) my responses to several objections that I anticipate from readers and (5) several suggestions I have for the future.

1. My Professional Background

Before I offer my views on this subject, I will describe my professional background, because I believe this will enable readers to better evaluate my comments and suggestions.

I graduated from Harvard Law School in 1963 and, after serving for two years as an attorney in the United States Army, I joined the law firm of Michael Best & Friedrich, a firm based in Milwaukee, Wisconsin which currently has about two hundred attorneys. I served as an associate and then as a partner in Michael Best until my retirement and am currently serving as counsel to the firm. During my years with the firm, I served at various times as a member of the Executive Committee, chair of the Associate Development Committee, chair of the Professional Recruitment Committee and chair of the Tax
Department. I have also been a longtime member of the American, Wisconsin and Milwaukee Bar Associations and served several terms as chair of the Tax Section of the Wisconsin Bar Association. In addition to practicing law, I have taught numerous continuing education courses in Wisconsin and elsewhere and, since 1988, I have served as an Adjunct Professor of Law at the University of Wisconsin Law School in Madison, teaching one or two basic and advanced tax courses each year. During that period, I received an award from the Law School as the outstanding member of the adjunct faculty and received what I think is fair to say are uniformly excellent evaluations from students. I also served for six years (2006-2012) as an Adjunct Professor at Cornell Law School in Ithaca, where my student evaluations were similarly excellent.

2. Overview of My Conclusions

Based on these experiences, I am extremely sorry to say that, in my opinion, the quality of legal education in this country has declined considerably over the years I have been practicing and teaching and that this decline is reflected in the reduced level of legal skills demonstrated by many (if not most) law school students and recent law graduates. As a result of my discussions regarding this issue with other practitioners, I can report that my opinion on this point is shared by many other legal professionals. In fact, I believe it is also shared by many law school faculty members (adjunct and otherwise). Finally, I should point out that my observations are by no means limited to the University of Wisconsin Law School. I reached a similar conclusion with regard to my students at Cornell Law and, from my experiences with law firm associates (who attended many different schools), I would say that the decline I have observed is widespread, if not universal, among American law schools.

I will explain below what I mean by the terms “legal thinking” and “legal analysis” but, before I do, I should point out that I am not objecting to the addition to the legal curriculum of clinical programs that stress “practical” over analytic skills nor of “Law and…” courses that focus on law-related sociological, philosophical, historical and
other issues. Those subjects have a place in law schools and their addition to the curriculum has generally been a positive development. I submit, however, that law schools have used them largely to supplant rather than to supplement their traditional emphasis on analytic skills.

Summarizing briefly the cause of this decline, I submit that the problem is caused by the abandonment by most (all?) law schools of what I was told many years ago was the most significant role of a legal education, which was to teach students to “think like a lawyer.” I am well aware that that phrase is now thought of by many as a cliché and that the very concept of “thinking like a lawyer” evokes scorn among many legal educators. I recall, for example, a conversation I had on this subject with a (tenured) law school faculty member who had both a legal degree and a PhD in sociology and who told me that, in his opinion, there was no difference between the analytic skills needed and used by a lawyer and those needed and used by a sociologist. If that were correct, however, there really would be no need for law schools since, presumably, a well-trained sociologist would then be able to deal with a client’s legal problem as well as any attorney. I strongly believe that is not the case and I trust that the members of the Commission will agree with me on that point.

By “legal analysis” and “thinking like a lawyer,” then, I am referring broadly to (i) the ability to carefully read and understand the sources of legal rules and principles, such as statutes, administrative pronouncements and case law, even when they are often vague, incomplete or contradictory and (ii) the skill involved in applying those rules and principles in a logical and reasoned manner to the infinite variety of specific fact patterns that may come before an attorney.

I am also familiar with the criticism (and derision) that has been directed at the so-called Socratic method of law teaching, the use of which has declined sharply in law schools, presumably because of the criticism that has been directed at it. I believe that this development has a connection to my broader point because, in my opinion, the skillful use of the Socratic method (as practiced by such teaching
giants as A. James Casner and Clark Byse, both of whom I was fortunate enough to have in my first year at Harvard Law) is an important tool in training lawyers in analytic skills. For those who disagree with my conclusion on this point, I can only ask whether they really believe that students in the past who were taught in this manner were inferior attorneys as compared to current law graduates.

3. Examples.

I would now like to present two specific examples from my teaching experience, because these should give readers a better understanding of the type of problem I am addressing.

My first example involves a decision of the United States Tax Court included in the casebook I use in my Tax I class, namely *Salvatore v. Commissioner*, 29 TCM 89 (1970). In this rather simple case, the taxpayer inherited a gasoline station from her husband and, several years later, she entered into a contract to sell the station to Texaco for $295,000. One month later, but before the closing with Texaco, she executed a warranty deed that conveyed a one-half interest in the station to her five children and then, one week after that, she and her children conveyed their respective interests to Texaco. She and the children each recognized one-half the total gain on their separate tax returns but, when Ms. Salvatore’s tax return was audited, the IRS took the position that 100% of the gain was taxable to her. After a trial, the Tax Court agreed with the IRS, holding that the taxpayer was the true seller of the entire station (and that she thereby owed a tax on the entire gain) because her children served only as a “conduit” for her sale.

I usually assign the *Salvatore* case to my Tax I students in the segment of the course dealing with “who is the taxpayer.” As I do throughout the course, I also assign, as part of that week’s readings, a “Class Discussion Example” that includes a hypothetical fact pattern and a series of questions regarding the hypothetical that I will ask of students in class. In one variant of the Discussion Example I use
when discussing this subject, I describe “Mr. Able,” the sole stockholder of a large corporation, who is planning to sell all his stock to another company. Mr. Able’s original plan was that he would first sell all his stock and then make a large charitable contribution in cash from the sales proceeds but, before signing any documents with the prospective buyer, he changed the structure of the transaction and established a family-controlled charitable foundation. He then donated a large block of his stock to the foundation (with the intent of claiming a large charitable contribution deduction on his tax return) and shortly thereafter, both he and the foundation sold their respective shares of the company to the intended buyer. As the students learned previously, the foundation (as a tax-exempt charitable organization) would not owe any taxes on its stock sale so, by taking these steps, Mr. Able was obviously intending to reduce the taxes he would have paid if he followed his original plan of selling all his stock to the eventual buyer and then making a cash donation to a charity. In the Discussion Example, I include several questions about this transaction, such as whether the revised plan would indeed save him taxes and whether there were any steps he might take to strengthen his ability to achieve that goal if the transaction were to be challenged by the IRS.

I repeat that my Discussion Examples are included in the course syllabus, which is passed out weeks in advance and I should also mention that the class is divided into four groups, with each group “on call” for one week of materials and questions. It therefore follows that the students I call on in class to discuss these questions know in advance that I will likely be calling on them and they are expected to have read and thought in depth about the assigned materials and questions.

In fact, it is almost always the case that my students (all of whom are either second or third year law students) miss the most elementary points of this exercise when I call on them.

First, a remarkably large number of students do not even recognize the relevance of the assigned Salvatore opinion to the
hypothetical fact pattern in the Discussion Example. They therefore fail to see how a case involving the gift of a gasoline station by a mother to her children can have any significance in addressing a transaction in which a corporate shareholder donates some of his stock to a charitable organization. In other words, many students are incapable of deriving a legal principle from a case and then applying that principle to a very different fact pattern.

Second, even if a student does see the relevance of *Salvatore* to the Discussion Example (or, more frequently, even after that relevance is pointed out in class), most students are unable to identify any factual differences between the hypothetical and the *Salvatore* case that might lead to a different, pro-taxpayer, result in the hypothetical. There are of course several such relevant factual distinctions, one of which is that, in *Salvatore*, the taxpayer had already entered into a binding contract to sell the entire property to Texaco before making her gifts. In fact, the Tax Court concludes its opinion in *Salvatore* by stating that the taxpayer cannot change her tax liabilities “by a rearrangement of the legal title after she had already contracted to sell the property to Texaco.” In the hypothetical, there was no such contract in existence before the donation and, although that difference might not be dispositive (and although there are other relevant factual differences between the two situations), the contract issue surely must be recognized and stressed by an attorney representing Mr. Able if he were audited by the IRS. I would also expect most second and third year law students to recognize this rather fundamental factual distinction but my experience is that most of my students fail to see it until it is pointed out to them in class.

Third, after discussing the significance of the pre-existing contract in *Salvatore*, I tell my students to “put on their IRS hat” and, even after considering the absence of such a contract in my hypothetical, I ask what arguments they might make on behalf of the IRS to support its position that the foundation’s gain would be taxable to Mr. Able. There are a number of such arguments that could (and would) be made by the IRS and, although I won’t get into these here, I
have to report that this question too draws a blank from most of my students.

Finally, the last question in my Discussion Example tells the students to assume they are an attorney advising Mr. Able at the time he is planning the donation and sale. It then asks whether there are any suggestions or changes in the structure of the transaction that might be desirable in order to strengthen Mr. Able's position if the transaction were to be challenged by the IRS in an audit. Here too, there are several such changes that might be proposed but this question also usually draws no response from students.

I hope the Commission agrees with me that second and third year law students should be able to do a far better job in responding to these types of questions. I submit that their frequent inability to do so reflects the absence or inadequacy of their prior training in legal analysis.

I next turn to one other example from my experience, involving a more advanced class (Tax II, the taxation of business entities) and an exercise in reading statutes and regulations. In this course, we discuss Internal Revenue Code §1032, which students are asked to read in advance of class and which addresses the tax consequences to a corporation when it issues corporate stock in return for money or property. The general rule, which the students have learned previously, is that any taxpayer will have a taxable transaction if it disposes of property (including corporate stock) in return for some consideration unless there is an Internal Revenue Code provision stating to the contrary. The question here, therefore, is whether and when IRC §1032 will prevent a taxable gain to the acquiring corporation in this type of transaction. The relevant portion of the statute is quite brief and is as follows:

IRC Section 1032. Exchange of Stock for Property.

(a) Nonrecognition of gain or loss. No gain or loss shall be recognized to a corporation on the receipt of money or other property in exchange for stock (including treasury stock) of such corporation....
Here too, the students are given in advance of class a Class Discussion Example containing a hypothetical in which a corporation (Corporation #1) wishes to obtain some property in return for its stock, but desires that the property be acquired by one of its wholly-owned corporate subsidiaries rather than by the parent corporation itself. The owner of the desired property does not want to receive stock of the subsidiary, however, and insists on receiving stock of Corporation #1. Therefore, in one hypothetical presented to the students, Corporation #1 first contributes shares of its own stock to one of its wholly owned subsidiaries (Corporation #2) and Corporation #2 then transfers its Corporation #1 stock to the owner of the property who, in return, transfers the desired property directly to Corporation #2. As I would hope students would see, such a transaction does not fall within the explicit language of Section 1032 above because Corporation #2 is not using its own stock to acquire the property, while, on its face, the statute applies only if the shares used to acquire the property constitute stock of “such” corporation, that being the corporation receiving the property. Students, however, are almost uniformly unable to read the statute carefully enough to recognize the importance of the “such corporation” language. Moreover, I also assign (in advance) a regulation in which the Government somewhat liberalizes this rule and, if certain requirements are met, it allows an “acquiring corporation” (Corporation #2 in the above discussion) to use stock of an “issuing” corporation (Corporation #1) to acquire property and still be treated as meeting the requirements of the statute. One such requirement is that the acquiring corporation must use the stock for these purposes “immediately” after receiving the stock from the issuing corporation. The regulation too is rather brief but, when I ask my students about a previously-distributed Class Discussion Example in which Corporation #2, as payment for property, uses shares of Corporation #1 that Corporation #2 acquired some years previously, the students almost always fail to see that this would violate the regulatory requirement of immediacy. In fact, many students are unable to identify which corporation (Corporation #1 or Corporation #2) is the “acquiring” entity and which the “issuing entity” within the
meaning of those terms as used in the regulation. I attribute these failures to a lack of prior training in the careful reading and application of statutes and regulations.

4. My Responses to Anticipated Objections.

From past conversations with various persons, I can anticipate some of the reactions that some Commission members might have to the conclusions and examples described above. I will now respond to some of these anticipated reactions.

First, the above examples involve situations in which students are being asked to advise a hypothetical client in legally reducing the client’s federal income tax obligations. I suspect that some readers will object to this subject being given any significant degree of attention in law school or even being taught to law students because it benefits only the financially privileged, while (these readers would assert) the role of a law school is to help the less fortunate in our society. I hope, though, that that most members of the Commission will agree with me that, while persons holding these political views have a place on the faculty of a law school, they should not be able to use those views to structure the entirety of the school’s curriculum.

Second, some observers might contend that my examples are immaterial because they have no broader significance beyond the field of taxation. Indeed, when I used a similar example in discussing the role of a legal education with one of the law school deans with whom I have worked, he responded that, although he understood my concerns, the subject of taxation is unique and more demanding of these types of skills than required in other legal areas and law courses. Again, I hope that the Commission will agree with me that this contention is incorrect and that a student or lawyer who, after making an effort, still lacks the skills to analyze a decision of the United States Tax Court or a provision of the Internal Revenue Code will also lack the skills to understand a case, statute or regulation involving, say, landlord-tenant relationships. In fact, I can report that, every year, several of my
students tell me that the analytic skills they have learned in my class have proved to be extremely valuable to them in other courses.

Third, on a somewhat related note, it may be that some readers will conclude from my examples that I am expecting too much from my students and that legal skills of the type I am expecting cannot be mastered in law school and can only be learned from years of practice in a particular subject matter. Here, my response is based on my experience over the years because I believe that second and third year law students in the past were able to handle problems of this type with far greater skill than the students of today.

Fourth, I suspect that some members of the Commission will be surprised at the student inadequacies described above. They will declare that the skill of legal analysis is adequately covered in the first year of most law schools and that my second and third year students should therefore be doing a better job in responding to these types of questions. Therefore, these observers would conclude that the deficiencies I have described must result just from inadequate pre-class preparation on the part of my classes and perhaps a lessening work ethic on the part of many law students (which, while unfortunate, cannot be remedied by changes in the curriculum). I have several responses to that. For one thing, although I assume that many law schools do retain some faculty members who still teach their first year courses in the “old” (analytic/Socratic) style, but I gather from my students that most of their courses are not taught in that manner. I also understand that most new law school faculty members are hired with other criteria mainly in mind and I have been told that, at many if not most law schools, the most significant criteria for new faculty hiring is an expertise (and perhaps a PhD) in some area in addition to law, enabling the individual to teach one of the “Law and....” subjects referred to above. Moreover, although I assume most law schools have a first year program of some type in legal research, writing and analysis, I believe that some of these programs are taught by part-time lecturers or adjunct staff and I also understand that, often, students are given no formal credits for the program and/or their grade in the
program are not included in their overall GPA. Given all or any of these factors, it follows that students do not give these programs the time and attention that students direct toward their substantive courses. Moreover, in some of these programs, the principal emphasis is spent on research and writing and the time spent on the teaching of pure analytic skills is limited; although research and writing are surely important in their own right and are related to legal analysis, such a program hardly compares to the past practice of teaching all the substantive first year courses in an analytic manner.

4. My Recommendations

I would like finally to submit several recommendations to the Commission if it agrees with my conclusion that the problem I have addressed does indeed exist. On this point, I think I am realistic and, considering the important and justified non-analytic additions to the curriculum over the past few decades, I am not going to propose a return to what some refer to as “the good old days” of legal education. I do, however, have two suggestions.

First, I would like to suggest that an ABA-accredited law school must offer a first year course in just “legal analysis.” I so not know whether any such courses exist but I am certain that there are existing and newly-hired (tenure-track) faculty members who would eagerly undertake to prepare and offer such a course. Going back again to my first year at Harvard Law, I recall the basic property course offered by the justifiably famed A. James Casner, who spent the first few months addressing one ancient English property decision after another (e.g. transfers “to Smith and the heirs of his body”). This was obviously not done with the goal of teaching us Old English land law but it was intended to develop our skill in reading and distinguishing among court opinions, common law principles and statutory rules. I also remember the well-known (and enjoyable) board game, WFF ‘n Proof, developed by Yale Law Professor Layman Allen solely for the purpose of teaching principles of legal logic. My point is that a course of this type could be developed and would be an invaluable addition to any first year law curriculum.
Second, I would also suggest that law schools be required to add to their second and third year offerings at least one mandatory substantive course taught in the classical analytic/Socratic manner. Any law subject can be taught in this form and I suggest that advanced law students would find such a course to be both enjoyable and highly worthwhile.

I thank the Commission for considering my views on this important subject.