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ACCREDITATION IN LEGAL EDUCATION

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IF ACCREDITATION of law schools does not help to bring about sound legal education, it does not justify its continued existence.

Acceptance of this theme means that accreditation in legal education must simultaneously provide reliable recognition of sound programs and be a force for improvement of weak programs. It must not hold back or discourage innovation, but it also must not cause sacrifice of valid practices because they are old or widespread. It must not discourage or intimidate good schools, but it must have the courage not to encourage or give its imprimatur to bad schools. For good schools, it must provide a framework for self-criticism and guidance on paths to betterment. For schools that have not achieved their accreditation, it must provide opportunities for expert and impartial criticism and counsel for entry into the realm of effective legal education.

To explore these goals, the subject will be divided into subheadings of the theme: (1) Accreditation of Law Schools; (2) Improvement of Legal Education; and (3) Its Continuing Function.

I. ACCREDITATION OF LAW SCHOOLS

Accreditation in legal education is part of a nation-wide system of accreditation for educational institutions.[1] The system is unique to the United States. In other countries of the world, the evaluation and ap-

* Executive Director Association of American Law Schools. Also author of, *inter alia, Accreditation of Law Schools in the United States*, 18 J. Legal Ed. 420 (1966).

[1] William K. Selden, Accreditation: A Struggle Over Standards in Higher Education (New York: Harper Brothers, 1960).

proval of educational programs, methods and institutions are in the hands of government agencies. In the United States, on the other hand, government agencies look to private, voluntary organizations to perform the essential social function of evaluating institutions and informing the government and the public whether individual educational institutions possess the necessary qualifications to warrant public patronage and government recognition, assistance and approval. While there are occasional exceptions to this pattern, the exceptions are more likely to prove embarrassing to all concerned and produce unnecessary aberrations.

Voluntary accrediting in higher education has grown into two branches: institutional and specialized. The various regions of the country are represented by "regional accrediting commissions," which perform the functions of evaluating and accrediting entire institutions, both colleges and universities. At the same time many agencies have been formed to evaluate and accredit the separate specialized and professional programs within the universities. The problems incident to the parallel activities of the regional, or institutional, accrediting agencies and those in the specialized and professional area are a story in themselves.[2] The need for coordination, collaboration and self-governance constitutes a story that should interest all who are concerned with the quality of American higher education. A description of accreditation in legal education would be incomplete without a mention of it because it deals with the vital question of who should accredit the accrediting agencies. On the answer to that question depends the educational evaluation of the general and special degrees granted by our colleges and universities. In the field of law, of course, as in all fields embracing licensure of practitioners, the educational evaluation of the degree programs is only half the story; the evaluation by authorities who control admission to the bar is the other half. The details of the historical development of accreditation in law has been treated elsewhere; they will be only touched on here. Similarly, consideration of the

[2] *See, e.g., Study of Accreditation of Selected Health Educational Programs*, Study Commission Sponsored by Council on Medical Education, American Medical Association; Association of Schools of Allied Health Professions; and National Commission on Accrediting (Washington, 1971-72).

learned society and institutional representation functions of the Association of American Law Schools, as distinguished from its accrediting function, will be left to other sources.[3]

In certain areas of society there is a need for licensure. This is uniformly a governmental function, and generally appears where practitioners of a particular skilled profession hold themselves out as offering professional services to the public. The need for this kind of government regulation is obvious and unquestioned in the area of medical services, the dispensing of medicines and drugs, the piloting of aircraft and the driving of school buses. In the legal profession, however, the concept of licensure has not always been readily accepted. One of the tenets of many early advocates of democracy and a bill of rights in the United States was that every citizen had a right to argue before the courts, that is, to be a lawyer. Although many states gradually adopted strict requirements for admission to the bar, including examinations and personal interviews with court-appointed boards, a hundred and fifty years of nationhood elapsed before the organized bar adopted the principle that formal, prescribed education, meeting certain predetermined standards, should be required for all lawyers. In 1921 the American Bar Association espoused that principle and started publication of a list of law schools meeting educational standards that could be accepted by bar admission authorities.[4] This created the kind of link between the education of lawyers and their licensure that had been adopted in the medical profession about fifteen years earlier.

The linking of accreditation and licensure in the legal and medical professions, however, was not the beginning of accreditation in those professions. Groups of both medical schools and law schools had long before banded together to adopt and publish standards of quality for themselves and for other schools aspiring to acceptance into the fellow-

[3] *See* Robert Stevens, *Two Cheers for 1870: The American Law School* and Jerold S. Auerbach, *Enmity and Amity: Law Teachers and Practitioners, 1900-1922*, in "*Law in American History*," Vol. V, *Perspectives in American History*, (Harvard, 1971) at 405-601. Both articles deal extensively with the development of standards for legal education, and mention "accredited law schools," but do not use the word "accreditation." The other functions of the A.A.L.S. are described in Fordham, *Eight Years of Challenge and Development in the Life of the Association of American Law Schools*, 24 J. Legal Ed. 94 (1971).

[4] *Supra* n.3.

ship. The Association of American Law Schools was established in 1900 when representatives of the law schools then recognized generally as offering legal education of high quality met together and established an association whose object was simply stated: "The improvement of legal education in America, especially in the Law Schools."[5] The Articles of Association adopted at that meeting stated that no law school could be elected to membership unless it complied with the requirements of the Articles of Association. This is the essence of accreditation.

Not without significance is the fact that the meeting at which the Association of American Law Schools was organized had been convened in August, 1900, at the invitation of a committee of the Section of Legal Education of the American Bar Association, and that they met in Saratoga, New York, at the time of the annual meeting of the American Bar Association. For many years the annual meetings of the Association of American Law Schools continued to coincide with the meetings of the American Bar Association. While the problem of numbers has made that arrangement no longer practicable, representatives of the American Bar Association continue to meet with the Executive Committee of the Association of American Law Schools, and officers of the AALS attend the meetings of the Council of the Section of Legal Education and Admissions to the Bar of the ABA. This relationship is the natural consequence of the concern of practitioners of a profession with the terms of entry into it.

This practitioners' concern gives accreditation in education for the professions a complicating dimension that does not apply in other kinds of accreditation. This is the dual involvement of the practitioners of the profession and the educators of those who are studying for it. A lawyer looks upon himself as a member of a special segment of society, the "officers of the court," with unique responsibilities and ethical canons. They jealously guard, with full justification, their right to oversee the standards for admission to their profession. At the same time, law schools are educational institutions, training their graduates to take part in a learned profession which draws on history, philosophy and

[5] Minutes of meeting held on August 28, 1900, in Saratoga, N.Y. Reprinted in Proceedings of the Meeting of the Section of Legal Education of the American Bar Association and Sixth Annual Meeting of the Association of American Law Schools, St. Paul, Minn., Aug. 28-31, 1906, at 97-100. The origins of the A.A.L.S. are described in Seavey, *The Association of American Law Schools in Retrospect*, 3 J. Legal Ed. 153 (1950).

intellectual skill as much as any other discipline within a university. Not surprisingly, educators in and out of the law look to the law schools and the law teachers to propose and enforce standards that will assure society of graduates worthy of the label "jurist."

The commonality of interest among the practicing lawyers and the academic world should assure easy collaboration between them in the accreditation of law schools. Indeed, not only did the first accrediting agency in law, the Association of American Law Schools, get its start as a result of the invitation of the practitioners, through the American Bar Association, but when the American Bar Association decided to enter the accrediting field directly in 1921, its entry was cordially welcomed in the annual address of the president of the Association of American Law Schools, and by other leading law teachers in the discussion that ensued, during the annual meeting of the Association in 1921.[6]

II. The Improvement of Legal Education

Although the statement of purpose of the AALS now reads, "The improvement of the legal profession through legal education,"[7] that purpose is still fully consistent with the purpose adopted when the ABA encouraged the law schools to form their association. The purpose motivating the American Bar Association in its accrediting function has been restated in the opening paragraph of a revision of standards for legal education drafted by a special committee of the Section of Legal Education and Admissions to the Bar of the ABA in 1971:

> The American Bar Association is vitally and actively interested in ways and means of bringing about the improvement of the legal profession. These standards for the approval of law schools by the American Bar Association are promulgated in pursuance of that objective.[8]

[6] Handbook of the Association of American Law Schools and Proceedings of the Nineteenth Annual Meeting, 1921, at 72-79 and 143-155. Among the speeches for and against the plan delivered at the meeting in 1921 of the Section of Legal Education of the American Bar Association was "the most eloquent and forceful speech" favoring the resolution by Joseph F. Dickey, Esq., of Texas, father of Dr. Frank Dickey, who became Executive Director of the National Commission on Accreditation in 1966. Editorial Notes of Albert Kocourek, Editor-in-Chief, on American Bar Association Meeting, Section of Legal Education, 16 Ill. L. Rev. 213, 223 (1922). The spirit of cooperation between the Associations was repeated by the Chairman of the A.B.A. Section of Legal Education and Admissions to the Bar, Harold Gill Reuschlein in *Message from the Chairman*, 22 J. Legal Ed. 119 (1969).

[7] Section 1-2, Article 1, By-laws of the Association of American Law Schools. The same statement of purpose appears in the Articles of Incorporation filed with the Recorder of Deeds, District of Columbia, in 1971.

[8] Message of Dec. 8, 1971, from Edward W. Kuhn, Chairman of the Section of

Thus, accreditation in the field of law can be recognized as an acceptance of responsibility, by two agencies deeply interested in the legal profession, to assure the public that the holder of a law degree from an accredited law school has received the education and training necessary for a member of the legal profession.

The words "education and training" must be noted carefully. Other requirements precede "membership in the bar." "Membership in the bar" implies licensure; training certifies the educational experience of the applicant. The licensing, however, remains a governmental function, to be exercised after whatever testing of legal learning and moral character the particular court system may specify. It is expected and to be hoped, of course, that the governmental authorities, in the exercise of their licensing prerogatives, will not constitute themselves judges of the adequacy and quality of the educational programs in the schools, colleges, universities and law schools from which the applicants for admission to the bar have received their diplomas. Indeed, the bar admission authorities almost universally accept the diploma granted by a law school that has been duly accredited.[9] Today "duly accredited" means being placed on the list of approved law schools by the American Bar Association. The diploma from one of the listed schools is a ticket of admission to the state bar examination.

The certification of the applicants for admission to the bar is, of course, only one of the purposes of accreditation in legal education. The accrediting agencies, as was stated at the start of this article, "must provide a framework for self-criticism and guidance on paths to betterment." Thus, the report on a re-evaluation visit to a law school of accepted excellence should not be an empty gesture certifying that the minimum standards are still in effect. The visitors, representing the entire legal profession, have the further function of using their knowledge of practice and of developments in other law schools, and in the legal profession generally, to counsel the visited school on ways in which it can better achieve its aims and take fuller advantage of its capacity to turn out graduates whose legal learning and judgment will

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Legal Education and Admissions to the Bar, American Bar Association, transmitting to the members of the Section "a revision of the ABA Standards for Legal Education."

[9] This was the basis of statements by representatives of the A.B.A. and A.A.L.S. in the spring of 1970. *See* AALS Newsletter of July 15, 1970, reprinted at 223-230, Proceedings of the A.A.L.S. Annual Meeting, 1970, Part Two.

better serve society. The visiting teams, if they are to serve this deeper function, must be composed of people with wide and varied experience. Recognizing this, the joint visitation teams participating in the program of re-evaluations by the ABA and the AALS, typically now have as members a law teacher, a law school administrator, a librarian, and a lawyer in active law practice, or a judge currently on the bench.[10]

A natural development from the increasing complexity of society in general is the need for standards to guide those who accredit educational institutions. The federal government, facing the proliferation of administrative agencies regulating all parts of our society, has created an agency to set standards of regulation for the regulatory agencies themselves. The Administrative Conference of the United States was established for this purpose.[11] Similarly, in the field of educational accreditation, the National Commission on Accrediting was created in 1949 by the educational community and given the function of setting the standards for accrediting agencies and listing agencies whose practices conform to those standards.[12] The entry of the federal government into large programs of aid to education has led to the opening of an accreditation bureau in the Office of Education.[13] Because of its responsibility to limit governmental aid to worthy institutions, that office has felt impelled to create a list of accrediting agencies that it recognizes as qualified to certify eligible educational enterprises. This has inevitably led to the setting of federal standards for the accrediting process. Fortunately, they have not differed markedly from those of the non-governmental National Commission.

In view of the development of the second list of accredited accrediting agencies, it is especially noteworthy that one of the standards has been a limitation of accrediting agencies in each specialized field or discipline to one agency. This has the worthy purpose of trying to relieve university administrators from having to deal with a greater multitude of accrediting agencies than is necessitated by the number of specialized fields within the universities. The standards developed by the National Commission have not required the elimination of all but one of the

[10] *See* Proceedings, A.A.L.S. Annual Meeting, 1969, Part One, § I, at 11; 1971, Part One, § I, at 9.

[11] Exec. Order No. 10934, 3 C.F.R. 464, 5 U.S.C. § 133z (Vol. I, 1964).

[12] *See* Selden, *supra* n.1 at 76-77.

[13] Federal Register, Vol. 34, No. 11, January 16, 1969, at 643.

specialized accrediting agencies for each field, but they do ask them to combine into single units for carrying out the actual visits to the campuses. Thus, the American Medical Association and the Association of American Medical Colleges has formed a single committee for the accreditation of medical schools. Their collaboration reflects not only their consensus on what constitutes sound medical education, but also a mature recognition of their common aims and a mutual confidence in each other's capabilities and concern for the public interest.

In the field of law the ABA and the AALS have not adopted a single set of standards and formed a single agency for the accreditation function. Nonetheless, both are accepted by the National Commission on Accrediting as "accredited" accrediting agencies in the field of law. This exception recognizes the practicalities of historical political facts and the necessity of having both the practitioners and educational groups represented in the accrediting of a profession. The joint visitation program of the two agencies prevents multiple visits by the two agencies, which would constitute undue harassment of the university officials. Further, since the initial evaluations have often been separated by many years, and the re-evaluations are now conducted jointly, there has been no urgency for uniting into a single agency. The actual structure of accreditation in legal education has grown pragmatically, but with remarkable effectiveness, considering the potential strains in the disunited nature of the arrangement.

The pattern of accreditation started by the AALS almost immediately after it was created in 1900 has not changed a great deal. Standards were adopted, first by the organizers, and then by vote of the existing members from time to time. When non-members applied for membership, the Association sent visitors to the schools to report on their compliance with the existing standards. The visitors' reports went to the Executive Committee of the Association. The conclusions of the Executive Committee were submitted to the entire membership. From the beginning, applications were sometimes successful and sometimes unsuccessful. As the complexity of the evaluation process increased, more elaborate procedures had to be adopted. Today the AALS has a Committee on Accreditation, which was created by the Executive Committee. Like all AALS committees, its members are appointed by the president-elect. The terms of office are staggered, so that each president-

elect appoints only one-third. The visiting teams are selected by the chairman of the committee. When the team is to make a joint re-evaluation visit, consultations are held with the ABA and the team acts on behalf of both the AALS and the ABA Section of Legal Education and Admissions to the Bar.

Whether the visit is by a joint ABA-AALS team or for AALS alone, the report of the visitors is checked for factual accuracy with the school. Then it goes to an AALS committee on accreditation, which in turn passes it on, with its recommendation, to the AALS Executive Committee. Representatives of the school may be heard by both committees if they wish to add comments to the report of the visitors. If the Executive Committee concurs in a recommendation for membership, the motion is made on behalf of the Executive Committee at an annual meeting. Representatives of the applicant school are generally present on the floor when that motion is made. If the accreditation committee and the Executive Committee, or the latter alone, decide not to recommend admission, no motion is presented to the membership at the annual meeting. If the applicant school still wishes to have its application considered by the full membership, this could be accomplished by the introduction of a motion on the floor on behalf of the applicant. The availability of this form of "appeal" from the conclusions of the Executive Committee, and the committee dealing with accreditation, is an essential part of "due process" in the accrediting function.

A "self-evaluation" is often prepared by an institution in anticipation of an evaluation visit on behalf of an accrediting agency. The purpose is said to be the statement of the institution's opinion of its success in achieving its own established aims in education. This report can also express the opinion of the institution, or those administering one of its specialized or professional programs, on its conformity with the standards of the accrediting agency. No outside visitor is in a better position to make such an evaluation, and the exercise can have salutory effects before the visiting team ever arrives. The visitors, when a good self-evaluation is presented, can limit their investigation to confirmation of the factual correctness of the self-evaluation and commenting on areas of excellence and deficiency.

In the American Bar Association the process of initial accreditation is very similar. When application for approval is made, the Council

arranges for a visit; the report on the visit goes to a committee on accreditation; that committee reports to the Council; and the Council's report goes, in due course, to the House of Delegates, which has the final voice in determining whether the school goes on the approved list.

Disputes in the realm of academic freedom and tenure and charges of improper discrimination become appropriate subjects of attention by accrediting agencies when they impinge on the quality of education offered at the institution involved. The AALS has recently dealt with such cases at two law schools, both of which led to elaborate hearings, the preparation of transcripts and reports, and ultimately findings of impropriety at the universities in question.[14] The procedures followed in those cases may stand as trail blazers for accrediting agencies faced with the need to advance principles of due process while adjudicating in a troubled and uncertain field.

III. Its Continuing Function

The significance of accreditation in education increases as the number of institutions and students multiplies, and as government involvement grows. As its significance increases, its resemblance to "state action" also becomes stronger. This imposes on the accrediting agencies a responsibility to accord measures of due process of law that is comparable with other state agencies. This responsibility is especially heavy in legal education because of the interdependence between government agencies, the bar examiners and the voluntary accrediting system. In the determination of initial accreditation, or in continued accreditation, the agencies involved in legal education have to take cognizance of the protections required by due process of law.[15]

The methods of adopting the standards applied by each of the two agencies, however, present a special problem. In federal regulatory agencies, regulations must be published and the affected public given a chance to be heard on them, before they come into effect. In legal edu-

[14] Proceedings, A.A.L.S. Annual Meeting, 1970, Part Two, at 80-86 and 183-221; Proceedings, 1971, Part Two.

[15] *See* Kaplin, *The Law's View of Professional Power: Courts and the Health Professional Associations*, in the study cited in footnote 2, *supra*, at J-1; Kaplin and Hunter, *The Legal Status of the Educational Accrediting Agency: Problems in Judicial Supervision and Governmental Regulation*, 52 Cornell L.Q. 1066 (1966); M. H. Cardozo, *Recent Developments in Legal Aspects of Accreditation*, 213 J.A.M.A. 594, July 27, 1970.

cation, the affected public are the college students and other laymen who may want to become lawyers, or those who wish to establish new law schools. The question whether and how they may be given an opportunity to comment on proposed standards for legal education is a challenging one. A similar question, of course, applies to the standards of accreditation for all educational institutions. Like accreditation as a whole, the standards must be strict and rigid enough to assure quality but broad and flexible enough to encourage the experimentation that leads to improvement. Similarly the steps that lead to adoption of standards must be consistent with good rule-making practice and free from the control of self-interested or uninformed persons.

In the *Marjorie Webster Junior College* case,[16] the propriety of the standard of "non-profit" for accreditation in one of the regional agencies was attacked as improper and as illegally adopted and applied. In its decision the court assumed that the standard had been adopted in accordance with appropriate procedures, and held that courts should not impose their views of proper standards on the educational organizations. The progress of that case, however, carries several warnings for the accreditors. Although the internal mechanism for adopting standards by any agency may vary, it will be vulnerable to charges of inadequacy if standards are not adopted by the exercise of the wise and considered judgment of experienced, non-partisan and imaginative officials who accord a full measure of opportunity to be heard to those who will be expected to conform to the standards. The *Marjorie Webster* case also emphasized the public impact of accreditation and how much the activity of accrediting agencies has the character of "state action." This may require the agencies increasingly to give attention to their responsibility to a public other than the institutions being accredited. That wider public is concerned not only with the adoption of standards that affect their participation in the field under scrutiny; they may also claim a right to be advised of the results of the scrutiny. They may insist on knowing more than the bare adjudication that accreditation was granted, and may want to be able to know the detailed characteristics found by the evaluating agency, in both a quantitative and a qualitative sense. They may insist that the public duty of accrediting agencies extends to giving helpful advice to students seeking admission to institutions best suited to

[16] Marjorie Webster Junior College v. Middle States Association, 432 F. 2d 650 (D.C. Cir. 1970), *cert. den.* 400 U.S. 965 (1970).

their needs and desires. The agencies will then have to decide if their duty extends that far into the public domain.

The evaluation of a law school in operation naturally reflects the experiences and predilections of those who draft and adopt the standards for accreditation and, to a certain extent, of the evaluation team and those who have to act on their reports. Their reactions to innovations and unconventional practices in law schools will naturally have an effect on the course of legal education generally. Schools with firm national reputations can ignore criticism if they feel it unwarranted, but they are likely to be highly sensitive to adverse reports that sully their records. Adverse comment on such schools' novel curricular or teaching techniques, moreover, can chill the enthusiasm for similar innovation in schools less confident of the strength of their standing. For the latter, even a hint of disaccreditation can cause apprehension and turmoil on a campus; actual disaccreditation can be a death blow. Consequently, an accrediting agency must move with circumspection and discretion when it looks into and comments on deviations from official standards or established practices. Intentional explorations of new paths to excellence or reluctant responses to financial stringency cannot be treated with the same criticisms as complacency with outworn methods or chronic underfinancing. Those who have the accreditation responsibility must remember to "let our minds be bold" without tolerating inadequacies.