

Will it happen? If it will, who will do it and when?

How a matrix of markets and culture affect the responses of law schools, law teachers, law students, and others with a significant role in the professional education of lawyers to the opportunities and challenges opened by digital technology.

Potential gains in professional education made possible by digital technology

Digital technology holds out exciting opportunities to U.S. law schools. Looking at other disciplines and sectors of higher education, one can imagine law schools deploying it so as to:

- involve academics, lawyers, and judges situated anywhere in the world in their educational program
- offer students both less costly and more flexible educational arrangements
- provide access to students currently excluded by cost and distance
- share courses and students
- distribute faculty scholarship more widely, at less cost
- extend their reach to regions and educational audiences previously closed

Brief elaboration on each (why the gains are important)

The possible implications of flexible, high capacity electronic storage, communication and exchange media for a service sector like that comprised of U.S. law schools are numerous and to this group, I assume, largely self-evident. They include but are hardly limited to how instruction of current students is carried out. These are, after all, technologies that pay scant attention to distance, technologies that can penetrate geographical, political, and institutional boundaries that previously seemed utterly defining. In theory they might enable law faculties to expand their reach, to play a role in the education of additional categories of students, both students of the same age and educational background as those they currently enroll -- being no longer limited to those who can travel to the university to sit in its lecture halls and use its library -- and other groups as well. More generally, they might lead U.S. law schools to a radical change in how they conceive of their student bodies, faculties, and research possibilities. They might, for example, come to view academics, lawyers, and judges situated anywhere on the globe as prospective presenters, commentators, and mentors for students. For their part, students might come to view individual courses or programs offered by widely scattered institutions as accessible components of their legal education, without any thought of having to move from place to place. Significantly, all of this could occur across national boundaries.

In one sense the pressures for dramatic change in the means of delivering legal education seem large, for the potential gains are enormous and the prospects of competition real. The overhead generated by the physical environment of higher education -- the library facilities, classrooms, and student spaces of all kinds along with the staff involved in their operation -- constitute a major part of the explicit cost of university-based legal education. Those responsible for legal education speak in dire tones about the increases in tuition over the past decade (up 86% on average at private law schools, 141% for

residents at public institutions). Adding significant on-line components to the curricular mix could dramatically alter the cost picture for both institution and student clientele. The time and place requirements that limit the formal education process to students who are resident during a term and to groups of students able to assemble in scheduled meetings (not conflicting with other course sessions) impose additional implicit costs on those students who are able to enroll. They also effectively exclude others from the educational process. Less costly and more flexibly scheduled legal education has the potential for being far more inclusive. Since barriers of cost (including not only out of pocket expenditures but opportunity and relocation costs) continue to block access to legal education disproportionately for racial and other minorities this prospect has special importance.

Classroom centered programs produce a heavy scheduling burden, forcing unhappy trade-offs on students, faculty members, and curriculum planners. Creating the course and exam schedules for a U.S. law school of even modest size is a task of near industrial complexity. And the segmented educational program most legal educators take for granted, one chunked in courses of standard length and pedagogy, is in no small part a consequence of rather than the reason why we march students through our degree programs in measured time, to a near military beat.

Digital distribution of course materials and networked communication linking faculty with students (and students with each other) has the potential for liberating legal education from many of these costs and rigidities. Students can be offered instruction where they are. Their faculty or instructional team can itself be spatially distributed and include lawyers and judges in addition to “resident” full-time academics. This should permit students (and legal employers) to mix professional employment and education in ways not presently possible.

With the capacity to educate at a distance law schools could and therefore law schools might expand their reach in other directions, offering programs aimed at a huge variety of new audiences. With it much easier to teach non-resident students, who have not committed to a multi-year program, law faculties might play a greater role in continuing professional education on the one hand and the education of students not headed toward professional roles in law on the other.

Downside risks to which U.S. law schools individually and collectively are exposed by virtue of this very technology

On the other hand, the same technology that opens these possibilities exposes U.S. law schools individually and collectively to severe challenges or threats. Possible futures include:

- the emergence of a few dominant programs, at least for some segments of the already stratified legal education marketplace
- law schools retaining credentialing authority while more and more of the preceding education is delivered by commercial entities
- failure for law schools that cannot deliver value for the added costs entailed in residential instruction
- erosion of the symbiosis between faculty teaching and scholarship

Placing U.S. law schools (collectively) in context

Collectively they exercise control over new entrants

ABA accreditation rules (Section on Legal Education and Admission to the Bar)

In over forty states admission to practice law requires a degree from an American Bar Association accredited law school. That accreditation process and the standards it employs constitutes a major constraint on who furnishes JD education and how.

Many graduate and professional degree programs in the United States are carried out under accreditation standards that allow substantial variation in the how, where, and when of student learning. It is fair to say that those that govern professional legal education in the United States are unusual in their rigidity. And what is both remarkable and directly relevant to our present exploration is the area of that rigidity.

ABA Standards 301 through 303 lay down remarkably loose requirements concerning the objectives, curriculum, and methods of evaluating student performance. For example, 302 requires that a law school offer all its students "instruction in those subjects generally regarded as the core of law school curriculum" and "at least one rigorous writing experience." By contrast, Standard 304 stipulates that law schools "require, as a condition for graduation, successful completion of a course of study in residence of not fewer than 1,120 class hours ..., extending over not fewer than three academic years for a full-time student or four academic years for a part-time student."

To the regulators of legal education the class hour is the base unit of measurement. The core algorithm goes as follows:

50 minutes in a classroom times 1,120 spread over 3 academic years made up of 140 days, extending into no fewer than eight months constitutes a completed course of study (assuming satisfactory performance measured by examination or suitable alternative).

Interpretations of this standard and the following Standard 305 pin down several of key points.

- Although the "class hour" standard is set in terms of 50 minutes of class "instruction", other lengths are permitted so long as they are converted to 50 minute equivalents.
- Courses taken outside the law school and "studies or activities away from the law school or in a format that does not involve attendance at regularly scheduled class sessions" may within limits be translated into "class hour" equivalents and applied against the 1,120 total BUT an irreducible minimum of "900 hours ... shall be in attendance in regularly scheduled class sessions at the law school."
- Credit may not be granted for "study by correspondence."

The ABA rules do not reach into the classroom beyond requiring that it be used and that students be required to attend class sessions. Law schools must demonstrate that they have adopted and enforce "policies insuring ... attendance."

Faculty members of all kinds can lead these meetings and can make use of these prescribed scheduled sessions as they see fit. Indeed, I see nothing in the standards that

requires that a faculty member be present for a 50 minute period to count. Classroom time can be silent time in which students work on assigned projects. Video or audio tapes can be run. Students can lead discussion or make presentations. Certainly, nothing in the standards prevents the use of technology to connect the faculty member with the students who have been assembled in a classroom pursuant to the standard's strictures. It is reasonable to view this whole structure built of class hours as a form of monitoring and assuring student commitment or effort. Law schools may not offer their professional degree program on terms that allow students to pursue the work at their own tempo and fit it together with employment, family responsibilities, and other commitments.

"Classes shall be scheduled to ensure that full-time students are engaged in full-time study" and that means, among other things, scheduled throughout the day. [Interpretation 304-6] Schools must have policies on class scheduling and attendance that insure that "full-time students devote substantially all working hours to the study of law."

[Interpretation 304-7]

Consent decree

This accreditation apparatus was the subject of private anti-trust litigation and Justice Department investigation in the nineties, which yielded a consent decree that critics found too mild. It prohibits the association from including faculty salary requirements in the process, from withholding accreditation from for-profit institutions, from preventing the transfer of credits from non-accredited schools. Finally, it requires the accrediting body to include no more than 50 percent insiders, law school faculty and deans.

LSAC

The Law School Admissions Council or LSAC is the 183 U.S. law schools are both approved by the ABA and members of the Law School Admission Council.

Introducing the Concord strand

Falling outside this ABA enforced cartel are a number of interesting institutions, but most interesting by far in terms of our current topic is the Concord University School of Law. Concord is the first law school, based in the U.S., with a URL < <http://www.concord.kaplan.edu/> > but no campus. It offers a four year JD program delivered via the Internet that qualifies its graduates to sit for the California Bar Exam and, as of January 2002, two LLM programs, one in health law, the second in taxation. In the 3 years since its launch Concord's on-line student population has risen from 30 to over 800. As Concord's Web site notes, a "critical factor in the evaluation of any institution is the organization behind it." The institution directly behind Concord is the commercial test-preparation service provider, Kaplan, which has decades of experience preparing prospective law students for the Law School Admission Test (LSAT). Kaplan is, in turn, a subsidiary of The Washington Post Company. In short, because of the organizations standing behind this radical model of entrepreneurial electronic legal education it cannot easily be dismissed as a madcap scheme sure to founder. This is true even though current bar admission and accreditation standards have dramatically limited its initial market. Concord represents a challenging model, one it did not invent but was able to adapt from neighboring educational sectors, notably business administration.

Directly through their library structures and indirectly through their students' coursebook and study guide purchases law schools expend considerable sums for commercially produced and distributed legal information products and services

ABA figures place average per law student annual library expenditures at about \$1,600. Figuring eight coursebooks at \$65 a piece plus a few statutory or code supplements, plus assorted study aids and the additional per student expenditure easily comes to \$700 a year.

However, as a market this is a small one

Individual law schools compete with one another in one of several distinct markets

Three interconnected markets

The market for students

The market for law graduates

The market for faculty members

Not all law schools are equal

The LSAC overlap report

Three quite different law schools

Elite national (global)

Private either in law or in fact (as in the highly selective state-campus situated law schools like Michigan and Berkeley)

Admission data:

Acceptance rate: 11-25%

LSAT scores (25th-75th percentile): 160-170

Tuition for 2000-2001: approximately \$29,000 (undiscounted)*

*From 1993-94 to 1999-2000 far and away the fastest growing expenditure category for U.S. law schools was financial aid (87.4% which contrasts, say with 29.8% for library operations or 36% for salaries and fringe benefits). Much of that growth has occurred at law schools with sufficient admissions draw that they can increase the nominal sticker price, using the surplus to discount for some but not all of their students. At this representative elite school 17% of the nominal tuition is returned in the form of discounts called scholarships, with fifty percent of the student body receiving some discount, ten percent or so receiving a discount of at least half the tuition, with the median discount being around one-third

There are two other important costs of pursuing a full-time JD program – living costs and opportunity costs (in the form of foregone earnings). The former are far less a function of the category of law school than its location, the student's family situation, and whether attendance requires a move. In relation to elite school nominal tuition numbers estimated living costs run around 50%. Opportunity costs are a function of both individual factors

and the possibilities and remuneration levels for employment during the 3-year, 2-summer so-called full-time JD course of study.

Median salary in the private sector for 1999 graduates employed full-time: \$95,000

Percentage of graduates employed by law firms (or in initial judicial clerkships): 90%

Percentage employed in state: 40% (for elite schools located in large lawyer states like CA, IL, NY)

Strong regional

Drawing the best students in a state (other than those leaving the state for an elite institution)

Very often a state institution with a substantial discrepancy between the tuition for state residents and others

Examples – Illinois, Ohio, Minnesota

Admission data:

Acceptance rate: 33-39%

LSAT scores (25th-75th percentile): 155-162

Tuition for 2000-2001: approximately \$19,000 (out-of-state), \$8,500 (resident)

Only 10% or so of the nominal tuition is returned as scholarships. On the other hand a higher percentage of those discounts (20%) represent at least half of tuition and a few in fact exceed tuition.

Median salary in the private sector for 1999 graduates employed full-time: \$60,000

Percentage of graduates employed by law firms (or in initial judicial clerkships): 65%

Percentage employed in state: 70%

Local

Limited admissions draw or placement beyond the immediate metropolitan region

Examples – Dayton, Suffolk, St. Mary's, Samford, Roger Williams

Admission data:

Acceptance rate: 55-60%

LSAT scores (25th-75th percentile): 145-155

Tuition for 2000-2001: approximately \$21,000 (**full-time**)

Only 7% or so of the nominal tuition is returned as scholarships. The amount and allocation of those discounts varies enormously in this law school sector, with the percentage of students receiving discounts of at least half their tuition ranging from 3% to over 20%.

Median salary in the private sector for 1999 graduates employed full-time: \$47,000

Percentage of graduates employed by law firms (or in initial judicial clerkships): 50%

Percentage employed in state: 80%

Dimensions of difference

Non-overlapping applicant pools

Different career paths for graduates

Career paths open to, professional demands on faculty members

Structural and cultural features shared by most law schools

Writing in the *Journal of Legal Education* in 1985, Professor Geoffrey Hazard, then of the Yale Law School wrote, in an article entitled “Curriculum Structure and Faculty Structure”:

My essential thesis ... is that the structure of the law school curriculum is a product of the structure of the law school faculty. This thesis, if correct, could explain why the law school curriculum has not changed very much over the years, despite repeated calls for reform. It also predicts that there will not be much change in the future, or at least that change will continue to be very slow.

Elaborating, he went on:

[L]aw faculties are in a position effectively to block any but an aggressive and sustained movement of reform, and probably could dilute or suppress even a movement of great strength.

Then, in a politic hedge of this critique (which includes the provocative sound bite – “in curriculum reform the faculty ... [are] not so much the solution as the problem”) Hazard observed:

Law schools have other tasks and other institutional responsibilities beyond giving instruction to the passing cohorts of law students. These responsibilities may be better served by the present structure of law faculties, and probably are important to society over time. Thus, as in all things in life, we probably confront trade-offs.

Many schools lack the institutional competence to respond effectively. Among the organizational and cultural elements that handicap law schools in the current environment are:

- limited capacity to respond quickly and strategically to external change
- narrow notions of mission and market
- an approach to academic program planning and governance generally that defers heavily to individual faculty preferences
- an approach to program finance that emphasizes annual expenditure over investment with longer-term returns
- little experience in building and teaching courses collaboratively or even with assistants

Turning (finally) to the questions of whether, who, and when

Framing the “what” question first

Transformation of educational program delivery, rather than curricular augmentation as in the LII’s courses delivered to and through other law schools.

Law school trio

Elite national school

Major issues of brand dilution. Strong demand for educational program. Little room for upward mobility. Faculty members tend to be far less supportive of curricular initiatives than in mid-tier institutions. The general atmosphere is contentment. To the extent there is unease over say the rapid climb of a competitor within the elite group, the standard

response is to compete for faculty. On the other hand elite schools have resources and draw both people and programs not directly tied to JD education.

Strong regional

- Public – While public funding has declined drastically turning many so-called public law schools into essentially private institutions located on a public campus, fiscal controls often hamper novel initiatives. Turf issues vis-à-vis other publicly funded law schools in the state (where they exist) can prove very inhibiting. The most likely directions for deployment of technology supported teaching by such institutions would be in support of outreach to undergraduate education and under-represented groups, particularly as more traditional affirmative action programs are blocked, and CLE were the school has already established a significant presence in that market. See, e.g., Univ. of Minn. and Univ. of Fla.’s participation in WestLegalEdcenter [=>](#)
- Upwardly mobile private – The business plan has been drawn up, the proposed loosening of ABA accreditation standards governing both on-line instruction and weekend programs provides modest encouragement, but is there a faculty that will vote to implement such a plan unless it believes itself under serious threat?

Vulnerable local

Following the vector already laid down by part-time programs Hamline [=>](#)
Nova Southeastern

- On-line courses
- Masters in Health Law [=>](#)

These are the schools at greatest risk. That exposure may break the lock of faculty resistance. On the other hand many of these institutions lack the resources to invest in innovative technology-based programs. One possible model is that these school’s become accredited delivery points for content

Commercial publishers (and CALI)

From coursebooks to course modules (TWEN, LEXIS Bridge project, CALI)

Study aids

Gilbert’s Casebriefs (and BuckABrief.com) (\$28/course or \$1 a brief)

With Casebriefs you simply click on the name of the case you’re looking for, and you instantly have an expert brief of it at your fingertips! The facts. The issue. The holding. The rationale. Expert commentary for each and every case.

When you use Casebriefs, you can focus solely on the cases covered in your casebook, or you can use the Case Library, which includes all the major cases from every major casebook. Whether you want to compare your own briefs to expert briefs, fill in gaps in your class notes or research cases for your legal writing class—Casebriefs is the source you’ll turn to, over and over again!

BuckABrief:

10,000 briefs you can buy and instantly view online, and print and take to class. \$1 each. Every major case from every major casebook—just a [click](#) away.

New entrants (outside some of the more important constraints)

Concord

Concord offers a provocative answer to the question “how can a student finance a legal education?” Its total tuition and fees for a four-year JD program are currently around \$24,000. (And this is a JD program that can be undertaken alongside employment, with zero relocation or commutation expense.)

The staffing for Concord’s technology-based legal education program looks quite different from that of the typical ABA-accredited institution. Sustainable, cost-effective on-line education involves the conversion of a significant fraction of classroom teacher activity into reusable multimedia content. Creating and subsequently revising (as distinguished from recreating) that educational commodity requires a team rather than an individual teacher and skills few law professors possess. To completing the full course package requires diverse forms of student monitoring, guidance, exchange, and evaluation. It is through disaggregating a law school course in civil procedure, criminal law, evidence or tax into a pre-packaged, reusable commodity combined with an interactive service component that on-line instruction can both keep costs (and tuition) down and offer attractive faculty-student ratios with unusual levels of student evaluation and feedback. The differentiated teaching roles and institutional structure this would seem to entail are not likely to be swiftly embraced by the faculties of existing law schools. But it is the Concord (and Phoenix and eCornell) model. Where do research and scholarship fit in a faculty that has been restructured around cost-effective on-line instruction? They don’t.

Concord is but part of a larger corporate business plan. Last August Ziff Davis SMART BUSINESS magazine named Kaplan, Inc. (www.kaplan.com), one of the top 50 U.S. companies in terms of success at using the Internet to expand and enhance their business. Ranked 19 in the list, Kaplan, Inc. is noted for its growth from a \$94 million company five years ago to a projected \$500 million in 2001, due in part by the company's expansions in online education and training. Several of Kaplan's online businesses are highlighted in the SMART BUSINESS profile, including Kaptest.com, the leading online test-prep provider; Kaplan Professional, with online offerings in securities and insurance training, compliance management for financial services firms, and a virtual campus for real estate educators (REcampus.com); eScore.com for parents of children in grades K-10; and The Kaplan Colleges, noted for offering online bachelor's degree programs and for its Concord Law School, the nation's only entirely online law school....

Business Wire August 8, 2001

Phoenix

Apollo Group, which provides higher education to working adults, breaks out numbers for its online group separately, and lists revenues as growing from \$28.6 million in 1997 to \$185.5 million in 2001. Capella (Apollo’s chief competitor which announced early

this month that it has raised a fresh \$16.7 million in venture capital) claims 95% compounded annual growth since 1996.

University of Phoenix Online reported income up 82 percent, to \$32 million, in the fiscal year that ended Aug. 31. The university has seen its use of online education increase 80 percent in the past year, with 34,700 online students today.

From the Florida Times-Union, Jacksonville (March 2, 2002)

The University of Phoenix, the largest private accredited institution of higher learning in the United States, is coming to Orange Park.

The university, which operates more than 110 campuses and evening learning centers nationwide, including two in Jacksonville, will occupy 25,000 square feet of space in a new two-story office building under construction on Wells Road.

....

'We'll be able to serve about 600 students, eventually, in Orange Park,' said Kim Rogers, operations manager for the university's Jacksonville operations. 'We're only going to open a couple of classrooms to start, but we'll gradually expand.' The University of Phoenix, which also has campuses in Orlando, Tampa and Fort Lauderdale, offers programs of study primarily for working adults striving for bachelor's degrees, master's degrees and doctorates in business management and other areas. Each course lasts five weeks.

....

Only evening classes will be offered Monday through Thursday, from 6 to 10 p.m., the same as at the main Jacksonville campus on the second floor of the Southpoint Building on Butler Boulevard, and at the school's learning center on Baymeadows Circle West. The Baymeadows campus also has recently begun offering Saturday classes from 8 a.m. to noon.

John G. Sperling: "At our school students come first and there is constant evaluation of faculty performance."=>

Possible Convergence

Los Angeles, CA/St. Paul, MN, August 21, 2001 -- Concord University School of Law, the nation's only entirely online law school, and a division of Kaplan, Inc., announces a new Trial Advocacy Program in conjunction with William Mitchell College of Law. John O. Sonsteng, Professor of Law at William Mitchell College of Law, and an expert in teaching trial skills, is overseeing content development for the unique collaboration, with Concord Dean Jack R. Goetz providing the distance learning expertise that is the foundation of Concord Law School. An online trial advocacy course, which will be available to both William Mitchell College of Law and Concord Law students, teaches the fundamentals of the courtroom and oral advocacy and provides the opportunity for students to develop their skills through practice. Students may then elect to attend an eight-day intensive advocacy program at William Mitchell College of Law in St. Paul, Minnesota.