

Employing Technology to Erode Legal Education's Twin Barriers of Distance and Cost*

Peter W. Martin[†]

This symposium has assembled a remarkable group of thoughtful and experienced legal educators. Nonetheless, there is a risk posed by who we are. As committed participants in ABA-accredited JD programs (varied though they may be) it is hard for us to escape accepting key elements of our shared enterprise as givens – elements that may seem puzzling, even problematic, to outsiders – such as educators preparing students for other professions or a would-be attorneys for whom the degree our institutions offer is a prerequisite.

I. Those Unable to Move to or Commute to a Law School

An email message that arrived at the end of March, offers such a perspective. It came unbidden, from a military veteran living and working in upstate New York. My correspondent explained that while in the military he began work toward a JD through an accredited law school's evening program. His military commitment ended well before completion of that degree and the ensuing search for employment led him to my state and

* © Peter W. Martin, 2009. This work is licensed under the Creative Commons Attribution-Noncommercial-ShareAlike 3.0 License. To view a copy of this license, visit <http://creativecommons.org/licenses/by-nc-sa/3.0/> or send a letter to Creative Commons, 543 Howard Street, 5th Floor, San Francisco, California, 94105, USA.

[†] Jane M.G. Foster Professor of Law, Cornell Law School

region. The writer described himself as married with two small children, his family's sole breadwinner. The dilemma he outlined boiled down to this:

Completing the requirements for a JD now seemed beyond reach. He could not afford to relocate his family. His full-time employment precluded attendance at daytime classes. No law school in upstate New York has a part-time evening program. No ABA-accredited law school located elsewhere offers a JD in a format that he can reasonably access from where he and his family now live.¹

I shall return to the particulars of this case, but before doing so feel a need to explain why I believe they warrant our attention. First, to those for whom New York is synonymous with the Big Apple and immediately adjacent communities, I should note that the rest of the state ("upstate"), constituting the overwhelming majority of its geography, is inhabited by over seven million people.² Were New York City to secede, upstate New York would be by population the thirteenth largest state.³ Across the 388 miles that stretch between its borders with Pennsylvania on the west and Massachusetts on the east are scattered four law schools, all ABA-approved. (Like most states, New York does not

¹ I've taken some liberty in characterizing the message. In fact, the writer reported he was attempting to continue his studies through the part-time evening program of the Western New England College School of Law located some 80 miles from his home. The commute, three evenings a week, seemed unsustainable.

² Wikipedia – the free encyclopedia, Upstate New York, http://en.wikipedia.org/wiki/Upstate_New_York (last visited May 13, 2009).

³ *Id.*

itself accredit law schools that the ABA has not approved.)⁴ In relation to the upstate population four is a respectable number. Washington State, which is in fact the thirteenth most populous state, has but three. Moreover, those in upstate New York are more widely dispersed. The city of Rochester, center of a metropolitan area with over one million inhabitants, has no law school, but Buffalo, Ithaca, Syracuse, and Albany have one apiece. As my correspondent pointedly observed, however, only one of the four (that in Albany) offers a part-time program, and its classes are not scheduled at times available to someone working conventional business hours.⁵

Half the nation's population lives outside the 40 largest metropolitan areas where law school programs are most densely concentrated.⁶ (Three-quarters of the law schools in New York State and all of those offering part-time evening programs are located in the New York City metropolitan area. The legal education options in Illinois are similarly concentrated in Chicago.)⁷ Numbers of states (*e.g.*, the Dakotas, Idaho, Montana, New

⁴ See N.Y. CT. RULES FOR ADMISSION OF ATTORNEYS AND COUNSELORS AT LAW 520.3(b)(2). New York does allow graduates of non-ABA-accredited law schools to sit for its bar exam if they have been admitted to the bar in another state and have practiced there for 5 years. See N.Y. CT. RULES FOR ADMISSION OF ATTORNEYS AND COUNSELORS AT LAW 520.5.

⁵ See Albany Law School, Admissions | First-Year Sample Schedules, http://www.albanylaw.edu/sub.php?navigation_id=1128 (last visited May 13, 2009).

⁶ See U.S. CENSUS BUREAU, 2009 STATISTICAL ABSTRACT, Tables 12, 19, *available at* <http://www.census.gov/compendia/statab/cats/population.html> (last visited May 13, 2009).

⁷ See LAW SCHOOL ADMISSION COUNCIL, OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS, Geographic Search, <http://officialguide.lsac.org/Search/GeographicSearch.aspx> (last visited May 13, 2009).

Mexico) have only one law school.⁸ Typically, it is located in a major urban setting and offers no part-time degree option. One state, Alaska, is altogether without a law school. As the University of Alaska's pre-law adviser's office explains to undergraduates there who want to practice law: "[Alaskans] must plan on leaving the state for their course of study."⁹ In short there is good reason to believe that my upstate New York correspondent has plenty of company throughout the United States.

II. Formats Employed in Other Fields

A comparative look at programs leading to other advanced professional degrees may help highlight the distinctive access barriers faced by would be law students rooted in communities without part-time law programs. To draw that comparison, let us consider the educational options open to several other individuals. Two have an interest in law, but don't require a JD; they are a young lawyer practicing in Buffalo and a health care worker in Rochester or Syracuse. The former wants to acquire an LLM in tax; the latter, to gain greater understanding of the law bearing on her field. Two others have ambitions that call for graduate study in other fields. These are a high school teacher who aspires to educational administration and a deeply committed Lutheran who has resolved to become a pastor. Assume that all four of these individuals are, like my correspondent, held in upstate New York by employment and other ties.

⁸ *Id.*

⁹ Prelaw Advising at UAA, <http://justice.uaa.alaska.edu/academic/prelaw.html> (last visited May 13, 2009).

In past writing on this subject¹⁰ I have used a taxonomy that distinguishes educational programs according to the terms on which they present themselves to potential students. First, there are “move to” programs. My own school’s JD program is for all but handful of nearby residents available only on “move to” terms. Those who would enroll must resettle in Ithaca, New York, for three years of full-time study. (Cornell has no part-time program.) Alternatives to “move to” programs include “commute to” ones, those available on “periodically travel to” terms, and finally programs that can be pursued “wherever, whenever.” Some “commute to” programs are configured so as to allow participation by fully employed individuals; some are not. Those of the “periodically travel to” and “wherever, whenever” varieties are specifically designed with such students in mind. “Wherever, whenever” JD programs are unambiguously excluded from ABA approval. The Association’s accreditation standards have also discouraged law schools’ establishment of “periodically travel to” options. (While weekend programs like those of Hamline¹¹ and Thomas Cooley¹² expand potential commuting access to their courses, they still require weekly class attendance. True “periodically travel to” programs schedule onsite instruction far less frequently.)

¹⁰ See Peter W. Martin, *Employing Distance Learning Approaches to Improve and Expand Access to Part-Time JD Programs* (2005), <http://www.aals.org/am2005/fripapers/830martin.pdf> (last visited May 13, 2009).

¹¹ See Part-time Weekend Program | Hamline University Law School, <http://law.hamline.edu/node/1292> (last visited May 13, 2009).

¹² See The Weekend Schedule, Thomas M. Cooley Law School, <http://www.cooley.edu/academics/weekendschedule.htm> (last visited May 13, 2009).

Alternatives available to the hypothetical upstate teacher illustrate all three non-“move to” categories. Seeking a master’s degree in educational administration or conceivably a doctorate this individual might enroll in any of the several part-time masters and doctorate programs with evening classes available at universities in the region. If within range of the University of Buffalo or the University of Rochester, for example, the “commute to” format is an option.¹³ A highly respected “periodically travel to” doctorate is available from Columbia Teachers College. It requires spending the month of July in New York City and traveling to the Teachers College campus for monthly weekend sessions during fall and spring terms over several years.¹⁴ Lastly, numerous universities now offer online programs leading to advanced degrees in educational leadership. The University of Massachusetts is one with such a “wherever, whenever” program.¹⁵

The aspiring Lutheran pastor has fewer options. Should she be within commuting distance of Rochester there are two Masters of Divinity programs with evening and

¹³ See Warner School of Education, University of Rochester, <http://www.rochester.edu/Warner/index.php> (last visited May 13, 2009); Graduate School of Education, University at Buffalo, <http://www.gse.buffalo.edu/> (last visited May 13, 2009).

¹⁴ See Urban Education Leaders Program, Columbia Teachers College, <http://uelp.tc.columbia.edu/> (last visited May 13, 2009).

¹⁵ See UMassOnline, <http://www.umassonline.net/> (last visited May 13, 2009). See generally Online Doctoral Degrees – Education & Teaching, <http://www.onlinedoctoraldegrees.net/doctoral-degree-directory/education-teaching.html> (last visited May 13, 2009).

weekend classes.¹⁶ Both purport to be ecumenical, but neither seems an ideal fit for a Lutheran. Furthermore, should she be located anywhere else in the upstate region even these “commute to” choices would be beyond reach. Fortunately, Luther Seminary in St. Paul, Minnesota, offers a Masters of Divinity in the “periodically travel to” mode.¹⁷ The school’s distributed learning program consists of a combination of online courses, intensive on campus periods of a week or two in January and June, plus ongoing work with a church in the student’s area, culminating in a period of internship.¹⁸ It enrolls students living far beyond commuting distance from St. Paul, Minnesota.¹⁹ Business schools, including many of the most selective, have long offered executive MBA programs in a similar format, integrating distance learning with short but intense on-campus periods of instruction. Their existence is a major reason that MBA education is far more accessible than legal education to the population ten years or more out of college.²⁰

¹⁶ See Colgate Rochester Crozer Divinity School – MDiv, <http://www.crcds.edu/masterdivinity.asp> (last visited May 13, 2009); Master of Divinity Northeastern Seminary, <http://www.nes.edu/Programs/MasterofDivinity.aspx> (last visited May 13, 2009).

¹⁷ See Luther Seminary – Online Learning, <http://www.luthersem.edu/online/> (last visited May 13, 2009).

¹⁸ See Luther Seminary – Master of Divinity – Distributed Learning, http://www.luthersem.edu/admissions/degrees/first/mdiv_dl.asp (last visited May 13, 2009).

¹⁹ See Luther Seminary, DL Dispatch, *Numbers*, Feb. 2009, at 2, available at http://www.luthersem.edu/admissions/degrees/first/mdiv_dl/February09_Newsletter.pdf.

²⁰ See Breaking Out of Legal Education’s Box, <http://www.law.cornell.edu/background/distance/otb/> (last visited May 13, 2009).

It is not that formats other than “move to” and “commute to” are unknown in our sector of higher education. The upstate lawyer who wants to gain specialized command of tax law is able to enroll in NYU’s eLLM program,²¹ in which all but two of the credits can be earned online, or Alabama’s fully online LLM in tax.²² The health care professional seeking greater knowledge and understanding of the legal issues surrounding that field can enroll in online masters programs offered by Nova Southeastern,²³ or as of 2008, Chicago Loyola, in partnership with Concord Law School.²⁴

III. Operating Outside the ABA Perimeter - Concord

Mention of Concord brings us back at last to my correspondent, for whom the preceding options have no relevance except as they illuminate formats that might make it possible for him to complete his JD. “Move to” programs are out of the question. No “commute

²¹ See NYU Law, Executive LL.M. in Tax, <http://www.nyulawtaxllm.org/> (last visited May 13, 2009).

²² See The University of Alabama, Tax LLM, <http://www.law.ua.edu/llmtax/> (last visited May 13, 2009).

²³ See Nova Southeastern University, Master of Science in Health Law, <http://nsulaw.nova.edu/online/mhl/index.cfm> (last visited May 13, 2009).

²⁴ See M.J. Degree Online | Loyola University Chicago School of Law | Concord Law School, <http://onlinemj.luc.edu/> (last visited May 13, 2009).

to” evening or weekend programs are within reasonable range.²⁵ Frustrating for him and startling, if not shocking, to educators in other fields, is the blunt fact that no ABA-approved school offers a JD in either the “periodically travel to” or “wherever, whenever” format.

There is at least one well conceived and ably executed JD program offered online,²⁶ but precisely by virtue of this choice of format Concord Law School’s degree fails to meet ABA accreditation standards. In a host of ways, those rules confine JD education to the “move to” and “commute to” modes and thus block entry into the legal profession for countless individuals.²⁷ In addition, the constraints they impose inflate the out-of pocket and opportunity costs, not to speak of the human wear and tear, for those who are able to

²⁵ The part-time evening program closest to upstate New York is that offered by Western New England College School of Law in Springfield, Massachusetts. It represents a one-way commute of 86 miles from Albany, 230 miles from Syracuse. On the other side of the region there is the University of Akron. It lies 216 miles from Buffalo. Getting to the twin cities of Minnesota every weekend for Hamline’s part-time program or to Michigan (Detroit, Lansing, or Grand Rapids) for Thomas Cooley’s is equally infeasible.

²⁶ Concord Law School, Kaplan University, <http://www.concordlawschool.edu/> (last visited May 13, 2009).

²⁷ Standard 304 requires “completion of a course of study in residence of no fewer than 58,000 minutes of instruction time, except as otherwise provided.” It goes on to insist that “[a]t least 45,000 of these minutes ... be by attendance in regularly scheduled class sessions at the law school. Standard 306 allows a few of those 45,000 minutes of instruction to be carried out by distance education methods, but very few – no more than 12 credit units spread more or less evening across the upperclass years. See ABA Standards for the Approval of Law Schools , 304, 306(d), *available at* <http://www.abanet.org/legaled/standards/20082009StandardsWebContent/Chapter%203.pdf>.

find an acceptable law school program within commuting range or are forced into the “move to” option. Concord has been able to operate because the nation’s most populous state, California, does not restrict the practice of law to graduates of ABA-approved institutions.²⁸ It is one of five distance learning law schools registered with the California State Bar.²⁹

Concord’s online program is specifically designed for individuals like my upstate New York correspondent. Its methodology renders geographic location a non-issue. Concord students include members of the armed service stationed around the globe, others living outside the U.S., and residents of all fifty states.³⁰ The school’s only option is a part-time program with

²⁸ The California State Board of Bar Examiners accredits a set of California law schools not approved by the ABA and also sets down terms on which graduates of unaccredited California law schools can take the bar exam. *See* The State Bar of California, California Law Schools, http://www.calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10115&id=5128 (last visited May 13, 2009). There are currently eighteen California law schools that have not been approved by the ABA that are accredited by the California Committee of Bar Examiners. Schools that conduct their instruction by correspondence or via the Internet do not qualify for state accreditation. Nonetheless, if they meet criteria established by the State Bar of California, their graduates can qualify for bar admission. Students attending schools in this “registered” category must take and pass a state-administered exam focusing on mastery of standard first-year courses before continuing further with their studies. This exam, formally designated the “First-Year Law Students Examination,” is more widely known as California’s “Baby Bar Exam.”

²⁹ *See* The State Bar of California, California Law Schools, http://www.calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10115&id=5128#distance (last visited May 13, 2009).

³⁰ Concord Law School Fact Sheet (March 2009) (on file with author).

enough scheduling flexibility to accommodate simultaneous employment, including employment that requires extensive travel.³¹ Because of Concord's "wherever, whenever" format, the school's studentbody demographics are radically different from the U.S. law school norm. The average age is in the forties rather than twenties. Forty percent of Concord students possess other graduate degrees upon matriculation.³² The school's curriculum is comparable to those at many of the 200 institutions approved by the A.B.A.³³ It includes skills courses and supervised internships. Through a partnership with William Mitchell College of Law, Concord students have, as a "travel to" option, an intensive 8-day trial advocacy program.³⁴

Several of the schools represented at this symposium make use of the Law School Survey of Student Engagement (LSSSE) to appraise the effectiveness of their programs.³⁵ Concord does as well. Compared to the full sample set, Concord's performance on such key questions as "How would rate your overall experience?" and "Would you do it again?" show greater student satisfaction by a statistically significant margin. Concord students also rate their experience highly on such measures as: interaction with professors, how

³¹ Actually, Concord offers two degrees, an executive JD which does not entitle the holder to sit for the California bar and a full JD which does, assuming satisfactory performance on the California "Baby Bar Exam." *See supra* note 28.

³² *Id.*

³³ *See* Kaplan University Catalog, Academic Year 205-29 (2008), available at http://info.concordlawschool.edu/SiteCollectionDocuments/ku_catalog.pdf.

³⁴ *See id.* at 228.

³⁵ *See* Law School Survey of Student Engagement, <http://lssse.iub.edu/> (last visited May 13, 2009).

demanding they found the work, development of critical thinking skills, and level of debt (minimal) on graduation.³⁶

That last point introduces another striking fact about a Concord JD – its cost. The school’s current tuition for a year of part-time study is \$9,600.³⁷ Assuming some increase over the four-year period leading to its JD, that amounts to a total figure around \$40,000. Not only does that represents a fraction of the out-of-pocket cost of a part-time JD at ABA “commute to” programs, where they exist, it fails to account for the savings implicit in a format that does not require students to travel from where they live and work on a fixed schedule, several times a week.

Legal educators who have not paid attention to what Concord has accomplished outside the ABA perimeter, in only a decade’s time, need to take a close look. As of February 2009, 235 of its graduates had been admitted to practice in California.³⁸

IV. Advice

The email message from my upstate New York correspondent ended with a straightforward request: “[P]lease let me know if you have any advice.” In reply I wrote of the high regard I have for Concord’s program and how impressed I have been with the Concord students I have taught online over a span of six years. I concluded, however, that I could not in good conscience at present recommend the school to

³⁶ E-mail from Barry Currier, Dean, Concord Law School, to author (Mar. 26, 2009) (on file with author).

³⁷ Concord Law School, Tuition and Fees, <http://info.concordlawschool.edu/Pages/Tuition.aspx> (last visited May 13, 2009).

³⁸ Concord Law School Fact Sheet (March 2009) (on file with author).

individuals planning to seek bar admission in states other than California.³⁹ That discouraging conclusion bears directly on the advice I have for those responsible for ABA-accredited legal education.

To the ABA's Section on Legal Education and Admissions to the bar my advice is: Let go of the claim of law school exceptionalism. In the comprehensive review of accreditation standards now underway,⁴⁰ replace those rules that insist on particular formats and inputs (minutes of classroom instruction, residence, use of physical spaces called libraries and classrooms) with assessments of educational efficacy. Failure to do so will allow Concord and other schools operating off a California base to expand their head start with less costly and more flexible formats, and may ultimately threaten both the ABA's recognition as an accrediting agency by the Department of Education and the widespread reliance on the ABA seal of approval by state bar admission rules.

³⁹ The success of Concord's Executive JD program (supra note 31) reveals a demand for legal education among students whose plans do not include bar admission. In addition, after admission in California, and in some cases a period of practice, individual Concord graduates have been able to persuade bar authorities in a number of other jurisdictions to allow them to sit for their exams. By this arduous and uncertain route they have been admitted to practice in D.C., Georgia, Maryland, Washington, Wisconsin, and Vermont. Massachusetts may soon be added to the list. There a Concord graduate gained access to the bar exam through an appeal to the state's highest court. *See Mitchell v. Bd. of Bar Examiners*, 452 Mass. 582, 897 N.E.2d 7 (2008).

⁴⁰ In September 2008, the Council of the ABA's Section of the Legal Education and Admissions to the Bar began a comprehensive review of the accreditation standards. See Standards Review Committee, <http://www.abanet.org/legaled/committees/comstandards.html> (last visited May 13, 2009).

Second, to any law school operating within the envelope defined by current ABA accreditation standards whose market is regional and who has part-time students or sees value in enrolling them, my advice is to use every bit of room created by the current distance learning standard and interpretation. Employ the flexibility it allows to expand access to your degree by reducing the number and frequency of times students must travel to your facility. With creative rearrangement a great deal is possible. If current standards pose a problem, seek a variance pursuant to Standard 802. If you lack critical capacity on your own, think about a partnership and don't ignore Concord as a potential partner.

Third, I am convinced that significant advantage will be reaped by the first ABA-approved school to offer a "periodically travel to" JD. Several years ago, one U.S. law school drew up detailed plans for such program. While that school's faculty suffered a failure of nerve, the blueprint they left for others is both attractive and easy to summarize. It took the number of contact hours required by the ABA and bunched them in three periods of intensive work each semester, one at the beginning, one in the middle, and one at the end. In between those compressed on-site days, distance learning tools were to be employed: for teacher presentation, discussion, mentoring, and the submission and critique of student written work. The business plan imagined drawing on a nationwide pool of part-time students who could fit a "periodically travel to" program into their lives. This blueprint has yet to be picked up by another institution. It will be. For those law schools with existing part-time programs, located in metropolitan areas with good transportation connections and reasonably priced short-term accommodations this untapped opportunity seems compelling.

Finally, to schools whose on-premises programs fail to command the attention and engagement of their students and whose principal attraction lies in geographic proximity to a pool of commuting students my advice is “you’ll have to learn to make better use of the time you insist students spend in your buildings” else you’ll lose them to the “periodically travel to” and “wherever, whenever” JD programs that I see as needed, appropriate, and therefore inevitable.

My advice to all is: Do not ignore successful models of professional education employed both in other fields and in non-ABA-accredited legal education.