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Via Email

October 28, 2013

Hon. Randall T. Shepard (retired), Chair
ABA Task Force on the Future of Legal Education

Dear Chair Shepard,

As Chair of the ABA Standing Committee on Professionalism (“Professionalism Committee”), I submit these comments of the Professionalism Committee on the Draft Report of the Task Force on the Future of Legal Education (“Report”).

We confine our comments to content of particular concern or interest to this committee in light of its mission and priorities. It is our hope that the relative brevity of these remarks will add to the weight accorded each of them by the Task Force. The absence of comment herein on any specific element of the Report should not be construed as tacit endorsement of or opposition to that element.

That said, the Professionalism Committee applauds and wishes to convey its gratitude to the Task Force for a lucid, compelling and much-needed call for legal education reform aimed at (i) better positioning our profession for a radically different future and (ii) training students to be effective lawyers without burying them in debt.

We are struck, however, by the Report’s omission of any reference to the centrality of professionalism education, focused on principled formation of professional identity, to effective law school instruction. That omission is a discordant note given the wide and growing recognition that professional formation is critical not only to preservation of core values of the profession such as civility, a service ethic, and integrity, but to the development of personal resilience as a professional – an essential attribute for lawyers facing turbulent times for the profession.

Professionalism education is a pillar of legal education reform upon which all else must rest. Neither clinical nor theoretical, it is rather a foundational topic that must be addressed early and often in law school, and, respectfully, should be spotlighted in the Report as a highest value and priority of any reform model.

The seminal and highly influential report of the Carnegie Foundation for the Advancement of Teaching, *Educating Lawyers: Preparation for the Practice of Law* (Sullivan et al. 2007) identifies development of professional identity as one of the “three apprenticeships” indispensable to effective legal education.

The Professionalism Committee urges the Task Force to augment its Report with a finding stressing the criticality of professionalism education and a recommendation that professionalism education be given heightened emphasis in law schools, including practical instruction on how professionalism values apply in practice settings.

In that vein, the discussion in the first full paragraph of page 25 of the Report, as but one example, offers an opportunity to emphasize that in order to fulfill their mission *all* law schools must incorporate professionalism education into their curricula. That paragraph states that it should be up to individual schools to decide which set of practice competencies they will teach. An appropriate and important new final sentence of that paragraph would state: “Whatever competencies a particular law school chooses to emphasize, however, all schools should incorporate professionalism education into both doctrinal and competency instruction.” As an acknowledged pillar of effective legal education, we believe professionalism education also should have a prominent place among the “Principles Guiding Task Force Work”, at 7-8.

The Professionalism Committee also believes the needed primary emphasis in the Report on professionalism education must extend beyond our borders to address the vital role of American law schools in advancing professionalism values, and all professional standards, globally. Conveying to foreign legal education audiences (“inbound” and “outbound” law students and representatives of legal institutions) the core-value significance of professionalism is of paramount importance to building appreciation for the Rule of Law globally. That essential interchange also advances the cause of overcoming barriers between the distinct legal cultures and social norms of the world’s nations. We therefore urge the Task Force to modify the Report to acknowledge the continuing essential need for American law schools to advance professionalism internationally.

We generally agree with and support the Task Force’s findings and recommendations on the pricing and funding of legal education, the urgent need to reduce the financial burden on law students, the need for flexibility in legal education models and corresponding reasonable relaxation of accreditation standards, the need to develop and reward a much stronger culture of innovation, and the need for much greater emphasis in our law schools on developing skills and competencies.

We note the Report’s findings and recommendations are largely devoid of citation to supporting authorities on point or accounts of vetting by interested parties and experts. It would be helpful for commenters and decision-makers assessing the Report to have more specifics to consider in weighing the merit of the recommendations. Yet we must recognize that the Task Force was given just over one year to report, which “necessarily constrained its ability to gather information, test hypotheses, and vet recommendations with interested parties.” We are persuaded that given that constraint, the Report represents best efforts of an expert panel, and taken as a whole is a credible and persuasive blueprint for needed systemic change. The groups and persons receiving the report will be free to test its validity and vet its recommendations. But we urge the Task Force to make the final Report as fact-specific as possible.

We would urge the Task Force to take a step back, however, from its unqualified call for all jurisdictions to authorize licensing of legal technicians (non-lawyers) in order to help fill the law-related services gap in many parts of the country. To be sure, the need to augment existing legal services is acute, and the nation's lawyers alone cannot currently fill that gap, which has been exacerbated by the dramatic decline in legal assistance program funding. We note, in this context, the ABA's core commitment to "[a]ssuring access to justice for all persons." (ABA Mission, Goal IV, Objective 3.) At the end of the day, as members of the legal profession we are "public citizen[s] having a special responsibility for the quality of justice." Preamble: A Lawyer's Responsibilities, *Model Rules of Professional Conduct* (ABA 2013). We find the Report's emphasis on access to justice commendable and necessary. But we believe it is premature for the Task Force to give unqualified endorsement of a largely untested concept on a nationwide basis.

The Report states, in pertinent part:

The Task Force also recommends, correspondingly: (a) that the Section of Legal Education, in collaboration with state regulators, develop standards for accrediting these educational programs or else expressly defer to other bodies to do so; and (b) *that state authorities regulating the practice of law develop licensing systems for limited law-related service, which assure quality but do not limit access or unduly raise the price of services. As part of ensuring access, state regulators should promote reciprocity in licensing. Other participants in the legal education system should support this increased heterogeneity of programs and forms of legal service as appropriate to their role in the legal education system.* (Emphasis added)

While the Professionalism Committee would not rule out endorsing, going forward, authorization of licensed non-lawyer service providers in those states where the legal profession is not filling, and is structurally incapable of filling, the need, provided necessary client protections and professional standards are in place, we feel it is unwise to offer unfettered endorsement of the concept. We would be concerned if a patchwork of regulatory schemes evolved across the country - a predictable outcome of unqualified endorsement - which, among other things, could make recommended reciprocity problematic.

The Professionalism Committee is highly sensitive to the fact that many thousands of lawyers are currently underemployed, with young and new lawyers bearing a heavy burden in that regard, even as the legal needs of large segments of the population are severely underserved, more so in certain geographic regions and segments of society. The profession, the bar and courts should do all in their power to match the skills of underemployed lawyers with the needs of the legally underserved. Yet even if the law job market were robust, a large unmet need for law-related services would persist in many areas. Such is the magnitude and nature of the justice gap in this country. New alternative forms of law-related service delivery could assist in that regard. But an unqualified endorsement of authorization of legal technicians in all jurisdictions does not seem warranted.

On another point, the Professionalism Committee perceives an inconsistency in two sections of the report addressing practical legal education. Section IV.J, *The Profession and Legal Education*, states in part:

The legal profession increasingly began to assign, or try to assign, more responsibility to law schools for the practical and business aspects of the education of lawyers, mainly for economic reasons The result has been increased pressures on law school curricula. Such pressures have surely contributed to increasing costs and increasing tuition. . . . [Emphasis added] (Report at 15.)

Thus the Task Force here appears to regard the original advent of “practical education” as a negative cost factor imposed on law schools by law firms and others. First, we have concerns that the relative cost of practical education is overstated. As a recent report on the cost of clinical education observed, referring to a separate Government Accountability Office report, “The *GAO Report*, among other sources, indicates that in-house clinical legal education contributes to higher law school tuition, but by no means is it the leading cause. [citation omitted]. In fact, a major expense not analyzed is the cost of new law school buildings. . . . While new buildings represent large, one-time expenditures, the most significant long-term drivers of rising legal education costs are lower teaching loads and higher salaries for law faculty.”¹

In contrast to the cost reference in Section IV.J, Section VII.E of the Report stresses the importance of educational programming to develop skills and competencies, stating, in pertinent part:

The educational programs of a law school should be designed so that graduates will have: (a) some competencies in delivering (b) some legal services. A graduate’s having *some* set of competencies in the delivery of law-related services, and not just some body of knowledge, is an essential outcome for any program of law-related education. [Italics in original; underscoring added]. (Report at 25.)

We strongly agree with the last assertion. Experiential learning and development of practice competencies are more essential than ever to effective legal education. Assuming that development of “competencies” is meant in context to have approximately the same meaning as “practical education” in the preceding excerpt, we are concerned the Task Force is conveying a mixed message by emphasizing the negative cost impact of “practical education” on law schools. We suggest the messages be harmonized with a final emphasis on the positive impact of and pressing need for skills training in law schools.

It also bears noting that law schools could and should greatly enhance the experiential legal education component by assigning more value to candidates with substantial

¹ Peter Joy, *The Cost of Clinical Legal Education*, 32 B.C.J.L. & Soc. Just. 309, 316 (2012), available at <http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1011&context=jlsj>.

practice experience in faculty recruitment and hiring decisions. We urge the Task Force to address the need to rethink standard faculty composition policies in light of the compelling need for more effective experiential and professionalism instruction.

Finally, we note that the Task Force product is styled “Report and Recommendations”, a term of art used for policy proposals submitted to the ABA House of Delegates. As the Task Force no doubt is aware, an actual policy proposal to the House of Delegates would require substantial reworking of the Report to conform to the formatting and content requirements of that body. We would request an opportunity to review any such final Report and Recommendations before filing. The Report identifies 15 different entities or types of entities, to whom any recommendations must be addressed. It would be helpful if the final report clarified, to the extent possible, that entity or those entities to which specific recommendations are directed, primarily or in the first instance.

Thank you again to the Task Force and each of its members for its visionary and outstanding contribution to the all-important dialogue on the future of legal education.

Sincerely,

A handwritten signature in black ink, appearing to read "F. Ury", with a stylized flourish at the end.

Frederick S. Ury
Chair, Standing Committee on Professionalism

cc: Arthur H. Garwin, Director, Center for Professional Responsibility
Paul A. Haskins, Lead Counsel, Standing Committee on Professionalism