

Distance Education in Law School: The Train Has Left the Station

The train called distance education left the station in the mid 1980s and started picking up steam in the mid 1990s.¹ At this writing the train is barreling down the tracks. Consider some of the stunning statistics reflecting growth of distance education in postsecondary, non-law institutions in the United States:

- The online enrollment growth rate of over 18.2% between 2003 and 2004 is over ten times that projected by the National Center of Education Statistics for the entire postsecondary student population.²
- Of all institutions offering undergraduate face-to-face courses, 63.5% also offer the same level course online.³
- Forty-four percent of schools offering face-to-face Master's programs also offer Master's programs online.⁴
- Nineteen percent of Baccalaureate institutions that offer face-face Baccalaureate programs also offer at least one online version of a program.⁵
- The overall percent of schools identifying online education as a critical long-term strategy grew from 49% in 2003 to 56% in 2005.⁶

Though these statistics push distance education into the mainstream of higher education,⁷ the American Bar Association (ABA) Standard 306 on Distance Education stands firm since 2002, allowing just 12 hours of online instruction towards a J.D., and then only after a student has completed 28 credit hours of instruction.⁸ Granted, the change from zero to 12 units allowed toward a J.D. was a watershed decision that required a great deal of study and discussion.⁹ Lack of change in the past four years, however, is at least one electronic age lifetime and many train stations away from where the rest of higher education is heading. In this paper I explore the reasons why law schools are slow to

¹ Farhad Saba, *Critical Issues in Distance Education: A report from the United States*, Distance Education, Vol. 26, No. 2, August 2005, at 256.

² The Sloan Consortium, *Growing by Degrees: Online Education in the United States, 2005* at 15.

³ *Id.* at 5. The report at page 5 says "(i)t could be argued that online education can not be a formidable force in U.S. higher education if the only areas where it is having a major impact are at the fringes---for non-credit courses or non-degree programs. The evidence from this year's study refutes this view: online education has made strong inroads in the core offerings for most types of institutions." The term "penetration rate" is used to describe the proportion of institutions that offer a particular type of face-to-face course or program that also provides the same type of offering online. "This means that 62.5% of all those institutions that offer undergraduate face-to-face courses also offer the same level course online; in other words, online has a 62.5% penetration rate for undergraduate-level courses."

⁴ *Id.* at 6.

⁵ *Id.* at 7.

⁶ *Id.* at 2.

⁷ *Id.* at 1.

⁸ American Bar Association Section on Legal Education & Admission to the Bar, Standard 306—Distance Education (2002).

⁹ See American Bar Association, Section of Legal Education and Admissions to the Bar, *Commentary on the Changes to the Standards for the Approval of Law Schools and Rules of Procedure and the Work of the Standards Review Committee, 2001-2002*, August 2002.

accept distance education and the changes signaling the switch that will propel law schools down the distance education track.

Three converging economic developments in the late 1990s resulted in the distance education explosion¹⁰. Tax revenues were reduced with the end of the Cold War and concomitant reduction of the defense industry; downsizing of businesses and industry enabled by the maturation of information technology; and the slow recovery from the recession of the early 1990s.¹¹ Concurrently, at state-supported systems of higher education enrollment was increasing as the children of the baby boomers reached college age.¹² Thus, the advent of distance education was primarily driven by public institution administrators seeking revenue sources and ways to meet growing demand not addressed by existing brick and mortar infrastructures. Coincidentally, the maturation of information technology that enabled business and industry to downsize also provided cost effective methods for developing online curricula and class delivery.

The economic and student demands that prompted public institutions to board the distance education train did not impact law schools similarly. Three significant reasons explain the difference. First, law schools do not generally suffer a dearth of applicants. The March 31, 2006, issue of U.S. News and World Report shows that the 2005 acceptance rate in law schools ranged from 6.2% at Yale to 68.5% at Thomas M. Cooley Law School.¹³ In other words, the law school with the highest acceptance rate still turned down 31.5 applicants for every 100 that applied. Consider also that at 68.5%, Thomas M. Cooley still had a lower acceptance rate than the 70% average acceptance rate at undergraduate colleges nationally.¹⁴

During periods of decreased enrollments such as the mid 80's¹⁵ the solution was to raise tuition¹⁶ and accept students with a lower GPA-LSAT index.¹⁷ Several schools in the bottom twenty of law schools involuntarily decreased enrollment because fewer persons applied than they were prepared to admit.¹⁸ But for most law schools, the declining interest in legal education over this period "would have been of relatively little

¹⁰ Saba, supra note 1, at 256.

¹¹ *Id.*

¹² *Id.* at 256-257.

¹³ U.S. News and World Report, March 31, 2005, pages 44-45.

¹⁴ Justin Ewers and Anna Haigh, *Getting Into College*, U.S. News and World Report, Vol. 137, Issue 6, 8/30/2004 at 69.

¹⁵ David H. Vernon and Bruce I. Zimmer, *The Size and Quality of the Law School Applicant Pool: 1982-1982 and Beyond*, 1987 Duke L.J. 204, April, 1987. See also American Bar Association, *Legal Education and Bar Admission Statistics, 1963-2005* at http://www.abanet.org/legaled/statistics/le_bastats.html.

¹⁶ A. Kenneth Pye, *Legal Education in an Era of Change: The Challenge*, 1987 Duke L.J. 191, April, 1987, page 191 (tuition hikes during 1970's and early 1980's). See also Robert E. Oliphant, *Will Internet Driven Concord University Law School Revolutionize Traditional Law School Teaching?* 27 Wm. Mitchell L. Rev. 841 (2000) at 869-870, quoting Christopher T. Cunniffe ("from 1974 to 1994, the consumer price index rose 201%. During the same period average tuition at private law schools rose 586%...while average tuition at public law schools rose 601%...").

¹⁷ Vernon and Zimmer, supra note 15 at 204 and 228.

¹⁸ *Id.* at 232-233.

importance had the academic credentials of the applicants not decreased at a faster rate.”¹⁹ In any event, fundamental curricular changes were not instituted in order to attract an adequate law school applicant pool.

Second, law faculty have not embraced distance education. In a culture where a major technology debate has been applied to questions as weighty as whether WordPerfect and Word should both be supported, legal educators may find themselves ill-equipped to deal with even the basics of distance education.²⁰ Some who would otherwise consider teaching an online class may be reluctant to invest the extra time and work required for an online forum.²¹ More likely, however, faculty are hesitant to offer distance education due to concerns that law schools offer a “sound” program of legal education. These concerns were reflected in the commentary made when the ABA standard on distance education was changed in 2002 to allow 12 units toward a J.D.²² The commentary says:

“The goal of the Standards ought to be to assure that a law school operates in such a manner that all students benefit from a sound environment for legal study. That environment includes not only class sessions but also interaction with instructors and fellow students outside of class and the opportunity to participate in the variety of co-curricular and enrichment programs that law schools offer. The Standards’ concept of “residency,” ultimately, aims to assure that students are “steeped” in this law school environment. This steeping plays an important role in developing the sense of professionalism and understanding of legal culture that law schools provide to students.”²³

The first year law school experience was deemed so valuable as to preclude earning any distance education units that year, which the original proposal would have allowed.²⁴ The Standard also served to effectively preclude a real distance education experience since a “law school shall not grant a student more than four credit hours in any term” of the 12 units allowed toward a J.D.²⁵

The third reason law schools were not subjected to the same demands that prompted public institutions to offer distance education is that legal education is not a competitive market.²⁶ Since graduation from an American Bar Association (ABA) accredited law school is required for admission to the bar in most American jurisdictions, compliance

¹⁹ *Id.* at 237.

²⁰ Nicolas P. Terry, *Bricks Plus Bytes: How ‘Click-and-Brick’ Will Define Legal Education Space*, 46 *Vill. L. Rev.* 95 (2001), at 96.

²¹ Oliphant, *supra* note 16, at 876.

²² American Bar Association, Section of Legal Education and Admissions to the Bar, *supra* note 9, at 3.

²³ *Id.* at 4-5.

²⁴ *Id.* at 3.

²⁵ ABA Standards 306(d), Distance Education (2002).

²⁶ Peter V. Letsou, *The Future of Legal Education: Some Reflections on Law School Specialty Tracks*, 50 *Case W. Res. L. Rev.* 457, Winter 1999, at 463.

with ABA-accreditation standards is essential for most law schools.²⁷ The ABA accreditation standards thus erects significant barriers to new entrants into the legal education business.²⁸ Further, these barriers result in limiting forms of competition between existing institutions²⁹ such as curricular changes, including distance education. As stated by one law professor, “(i)f the market for legal education was a competitive one, law schools would be forced to adopt curricular changes demanded by consumers (i.e. law students), even if their faculties found those curricular changes distasteful.”³⁰

This is not to say that curricular changes have not been made. “In 1979, the ABA Section of Legal Education and Admission to the Bar issued a report known as the *Cramton Report* that included recommendations for increasing the variety of law school teaching methods beyond the Socratic method and for the inclusion of skills-based course in the law school curriculum.”³¹ In 1992 the ABA Section of Legal Education and Admissions to the Bar issued the Report of the Task Force on Law Schools and the Profession: Narrowing the Gap, known as the *McCrate Report*, which identified ten fundamental lawyering skills that U.S. law schools should endeavor to teach.³²

Some changes were made to law school curricula as a result of these and several other few-and-far-between studies, yet the curriculum continues to look nearly the same as it did fifty years ago. As the 2005 American Association of Law Schools President, Dean N. William Hines, wrote:

“Most schools now offer a variety of clinical opportunities, specialization tracks, numerous “law and” and other perspective courses, much more training in professional skills, particularly legal writing, and a plethora of in-depth seminars that were not even dreamed of during my student days. But if you look at the required 1st year courses and the highest enrollment upper-level electives in the nation’s law schools, most students today are experiencing a core curriculum that, at least superficially, looks very similar to the one I first encountered nearly fifty years ago.”³³

Between the competition created from an abundant applicant pool, concerns for a sound legal education, and the lack of competition in the legal education industry, the law school environment is marked by a conservative status quo without motivation for change

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ Tammy A. Hinderman, *What Is Your Library Worth? Changes in Evaluation Methods for Academic Law Libraries*, *Legal Reference Services Quarterly*, Vol. 24(1/2) 2005, at 13-14. Also see at <http://www.haworthpress.com/web/LRSQ>.

³² *Id.* at 14. See also, N. William Hines, *Reporting “Down Under” About U.S. Curriculum Developments*, *Association of American Law Schools Newsletter* website at http://www.aals.org/services_newsletter_presApril05.php.

³³ N. William Hines, *Reporting “Down Under” About U.S. Curriculum Developments* at 2. *Association of American Law Schools online newsletter* at http://www.aals.org/services_newsletter_presApril05.php

and innovation. This is not an environment that will experience change driven by administration or faculty.³⁴ This is an environment where students as consumers will drive change. Even in the law school environment where students do not typically impact the curriculum significantly there are changes taking place that are already creating demand for more distance education classes.

Three changes are worth noting that signal the switch to distance education in law schools. First, students expect more.³⁵ They expect to be engaged in active learning, receive feedback, use technology, and have 24/7 electronic access to materials and services. Second, there is a growing demographic of non-traditional students for whom it is not economical or practical to leave homes and jobs to attend a brick and mortar school. In addition, some of those non-traditional students are attending law school for reasons other than practicing law. Third, the rising debt for law school is motivating students to find less expensive law school options.

Students expect to be engaged in active learning as evidenced in recent years by a noticeable shift towards more student-centered activities.³⁶ Based on the dual premises that learning by nature is an active process and that different people learn in different ways, active learning produces more lasting value because it requires students to undertake higher-order thinking, forcing them to engage in analysis, synthesis and evaluation.³⁷ As students, the generation born between 1977 and 1998, variously called the “Millennials,” “Echo Boomers,” and “Internet Generation,” “appreciate teamwork, experiential activities, structure, and the use of technology.”³⁸ These characteristics are responsive to active learning methods which helps explain the shift toward more student-centered activities. As more Millennials progress through undergraduate education, the resulting bottom-up trend will be a growing population of students who expect active learning pedagogy by the time they reach law school.

Closely connected to the active learning principle is the requirement that professors provide prompt feedback to students.³⁹ On the surface, the Socratic teaching method appears to fit an active learning model⁴⁰ since it provides both student engagement and professor feedback. However, a closer look leads to a different conclusion.⁴¹ The Socratic method assumes that all students, not just the one on the “hot seat,” are following the

³⁴ See also, Oliphant, *supra* note 16, at 841.

³⁵ From interview with Irene Good, Educational Technology Specialist, Legal Information Librarian, and Lecturer in Law, Boston College Law Library, on March 7, 2006. Presented *Crossing Borders: Teaching A Distance Education Research Course*, “2004 American Association of Law Libraries annual meeting.

³⁶ Claire Davis and Elizabeth Wilcock, “Developing, implementing and evaluating case studies in materials science,” *European Journal of Engineering Education*, Vol. 30, No. 1, March 2005, at 59.

³⁷ Paul L. Caron and Rafael Gely, *Taking Back the Law School Classroom: Using Technology to Foster Active Student Learning*, *Journal of Legal Education* 2004, page 4 at http://www.mhhe.com/cps/docs/CPSWP_TechnologyActiveLearning.pdf.

³⁸ Angela Provitera McGlynn, *Teaching Millennials, Our Newest Cultural Cohort*, Vol. 71, Issue 4, *Education Digest*, December, 2005, page 14.

³⁹ Caron and Gely, *supra* note 36 at 24.

⁴⁰ Caron and Gely, *supra* note 38, at 8.

⁴¹ *Id.* at

dialogue. In other words, all students except one are expected to learn vicariously.⁴² In addition, law professors seldom test skills until the final exam.⁴³ Thus, students are neither engaged in active learning nor do they receive feedback on which to evaluate their progress.

As elements of active learning, engagement and its corollary feedback are so important they have been the subject of two annual studies. The Law School Survey of Student Engagement (LSSSE), 2005 Annual Survey Results, found that “(s)tudents who frequently received prompt oral or written feedback from faculty were more positive about their overall law school experience.”⁴⁴ Unfortunately, the LSSSE survey found that one in six students never received prompt written or oral feedback from faculty.⁴⁵ In addition, about one-quarter of third year students went to class unprepared⁴⁶ and about two-fifths of law students spent no time on cocurricular activities.⁴⁷ These statistics do not bode well for describing students steeped in the law school environment. As indicators of the problems noted with the Socratic method, the statistics also do not bode well for legal educators faced with active-learning Millennials entering law school.

Enter Concord Law School, the first institution to offer a J.D. entirely through Internet technology. Because the American Bar Association Standards do not allow a program that relies substantially or completely on distance learning, Concord is not eligible to apply for ABA approval.⁴⁸ However, under the rules of the State Bar of California Committee of Bar Examiners, Concord’s J.D. graduates may sit for the Californian Bar Exam.⁴⁹ Concord was one of 73 law schools and 34,000 law students who participated in the LSSSE.⁵⁰ The report on the survey results for Concord says:

“Concord students report being more challenged, more likely to prepare for class, and more engaged in their studies in each year of their law studies than the overall group of respondents. Moreover, Concord students stay more engaged, prepare for class, and continue to be challenged by the program throughout the four-year Concord J.D. program, counter to the results of the overall survey.”⁵¹

Others have confirmed Concord’s experience of increased engagement and feedback found in the online environment. For instance, in a 2001 Memorandum from Professor Peter W. Martin, one of the founders of the Legal Information Institute at Cornell, to John

⁴² *Id.* at 9-10.

⁴³ *Id.* at 10-11.

⁴⁴ Alison Grey Anderson (Forward, representing LSSSE Advisory Board), *The Law School Years: Probing Questions, Actionable Data*, Law School Survey of Student Engagement, 2005 Annual Survey Results, at 18, http://nsse.iub.edu/Issue/2005_Annual_Report/index.cfm.

⁴⁵ *Id.* at 8.

⁴⁶ *Id.* at 9.

⁴⁷ *Id.* at 7.

⁴⁸ Press Release, *Concord Law School Students Report High Levels of Engagement and Satisfaction with Online J.D. Program* at 2. Sent by Donna Skibbe, Vice President for Development on 3-27-06.

⁴⁹ *Id.*

⁵⁰ *see* LSSSE at 2 and 21.

⁵¹ Press Release, *supra* note 30, at 1.

A. Sebert, ABA Consultant on Legal Education, Professor Martin summarizes the results of a final course questionnaire in which students were asked to compare two online course with other specialized, comparable credit law school courses:

“Answers were consistent across the two courses with a strong majority of students reporting that they worked harder, achieved comparable or greater mastery, and experienced more feedback and exchange than in a classroom course of similar content.”⁵²

As technology advances, so advances the opportunities to increase engagement and feedback in the online environment. At Concord, professors broadcast audio in live classrooms, can call on students, and receive text responses.⁵³ Professors can then either share the response with the class, anonymously or not, or respond to the student privately.⁵⁴ According to Donna Skibbe, Vice President of Development at Concord, there is often a response rate of 80-90% to professor questions. In addition, Concord monitors all questions received by students, and professors try to respond within 24-48 hours.⁵⁵

Increasingly, students expect to use technology in educational venues. If the statistics on the growing number of students taking postsecondary classes is not convincing, consider the generation or two behind them taking distance education in elementary and secondary school. According to the a survey done in 2002-03 by the National Center for Education Statistics (NCES), 38 percent of public high schools, four percent of middle schools, and fewer than one percent of elementary schools offered distance education courses.⁵⁶ In addition, school districts with students already enrolled in distance education courses were also very likely to have plans for expanding courses in the future.⁵⁷

Even state government is getting into the distance education act. In Michigan, Governor Jennifer Granholm recently signed legislation requiring, among other things, that all high school students complete at least one “online learning course” or participate in an “online learning experience.” Governor Granholm said in prepared release:

“Our online learning requirement makes Michigan a leader among all the states in using the power of the Internet to create learning opportunities in the classroom, the home and the workplace. In a world that demands life long learning, we are giving our students

⁵² Peter W. Martin, *A Report on the LII's Two Multi-Law School Courses Conducted on the Internet in 2000-2001*, American Bar Association at 5. Available at <http://www.abanet.org/legaled/distanceeducation/lii.html>

⁵³ From Interview with Donna Skibbe, Vice President of Concord Law School, on March 27, 2006.

⁵⁴ From Interview with Dean Barry Currier, Dean of Concord Law School and former deputy consultant with the ABA Section on Legal Education & Admission to the Bar on March 31, 2006.

⁵⁵ Skibbe, *supra* note 53..

⁵⁶ U.S. Department of Education Press Release 3-2-05, *Landmark Study Yields First-Ever Data on Distance Education in Elementary and Secondary School*. Available at <http://www.ed.gov/news/pressreleases/2005/03/03033005a.html>

⁵⁷ *Id.*

and our state a competitive advantage when it comes to landing the good-paying jobs of the 21st Century economy...”⁵⁸

Research done by the NCES shows that the Millennials are a “determined generation for whom the Internet appears to have stimulated interest in learning in general and, in particular, a revival of interest in researching and innovating using technology.”⁵⁹ Other results of the research say:

- 96 percent say that doing well in school is important to their lives.
- 88 percent say going to college is critical.
- 90 percent of children between ages 5 and 17 use computers.
- 94 percent of online teens use the Internet for school-related research.
- The largest group of new users of the Internet from 2000-2002 were 2-5 year olds.⁶⁰

With technology in place, students expect 24/7 access to materials and services. Such access embodies an autonomy that frees the student from time and place and makes distance education attractive for a growing number of students. Certainly this autonomy is a big attraction for students attending Concord Law School. For instance, Farzad Naiem, a member of Concord’s first graduating class, used his laptop to earn his J.D. while traveling on business to China, Italy, Mexico, Canada and elsewhere.⁶¹ Naiem is now general counsel at the Los Angeles engineering firm where he was a senior partner and had worked for about 20 years.⁶² Or take Jim Denton, an airline pilot who earned his law degree from Concord while he “soaked up streaming video lectures and inter-student chat sessions over the Internet” while on layovers in Shanghai and Tokyo.⁶³

Naiem and Denton are representative of the Concord ranks swelling a student body that has grown from 33 to 1800 since Fall, 1998.⁶⁴ The typical Concord student is mid-career, with an average age of 43 and undergraduate GPA of 3.0.⁶⁵ They live in all states and a number of foreign countries.⁶⁶ More than 40% of entering students already hold graduate or professional degrees.⁶⁷ These are the non-traditional students for whom it is not

⁵⁸ Ken Fisher, *Michigan to Require “Online Course” for High School Graduation*, ArsTechnica, 4/23/06, 4:39:32pm at <http://arstechnica.com/news/ars/post/20060423-6657.html>.

⁵⁹ U.S. Department of Education, *Toward a New Golden Age in American Education—How the Internet, the Law and Today’s Students Are Revolutionizing Expectations*, National Education Technology Plan 2004. Available at http://www.ed.gov/about/offices/list/ost/technology/plan/2004/plan_pg7.html

⁶⁰ *Id.*

⁶¹ Martha Neil, *Members of Online Law School’s First Graduating Class Are Off to a Good Start*, ABA Journal, July, 2004.

⁶² *Id.*

⁶³ Mark Baylis, *Online degrees gain in popularity*, Santa Maria Times, Lee Central Coast Newspapers, March 6, 2006.

⁶⁴ Press Release, *supra* note 48 at 2. *See also*, Concord Law School Press Release, *Concord University School of Law, Nation’s Only Online Law School, Grows from 33 Students in ‘98 to 600 Today*, New York, 2-7-01.

⁶⁵ *Concord Law at a Glance*, information sent from Donna Skibbe 3-27-06.

⁶⁶ *Id.*

⁶⁷ *Id.*

practical or financially wise to quit jobs, uproot family or even take time to commute to attend law school.

Enrollment increases at Concord regardless of the fact that it is not ABA accredited. In part this may be because California allows students from non-accredited law schools to take the bar exam. In part, some non-traditional students attend law school for purposes other than practicing law. Graduates include one who started a family mediation service, a CPA who wanted to expand his business to include estate planning,⁶⁸ a retired person volunteering at the public defender's office, and a retired physician who "achieved his primary goal of learning about the law and conversing more fully with the two of his five children who are attorneys."⁶⁹ While consumer demand for online law school is currently coming from an older, non-traditional population, it is only a matter of time before Millennials and students now earning online postsecondary degrees expect distance education in law schools.

Last but not least, the rising debt for law school is motivating students to find less expensive law school options. According to the LSSSE, "(t)he nine out of 10 JD students who incur debt to attend law school indicated they will owe more than \$77,000 when they graduate."⁷⁰ Compare Concord's annual tuition effective June, 2006, at \$8,550.⁷¹ Less law school debt is a consumer demand waiting to happen. As Dean Currier said, "those who don't get starting salaries better than \$100,000 should have an interest in what it costs to go to law school." Further, the "profession has danced around the problem of debt and whether people are getting out of law school what they want to get."⁷²

Dean Currier believes that ABA accreditation for online law schools "eventually will happen" and⁷³ would like to see it done in a "professional, intelligent, collegial way."⁷⁴ But because the ABA process is deliberate, and because the ABA may not have the ultimate authority to change distance education standards without U.S. Department of Education approval, Dean Currier says change may not evolve as quickly as Concord would like.⁷⁵ However, the Dean believes it is possible for a state bar admission process to base a waiver of its requirement that an applicant have a degree from an ABA approved school on a set of criteria that would acknowledge (1) that the ABA has not chosen to regulate in the area of online law school programs and; (2) that under certain circumstances a graduate of an online law school might be found to be qualified by education and experience to sit for the bar in that state and to be admitted if the person passes the state's bar exam. In any case, Dean Currier says distance education is here to

⁶⁸ Interview with Donna Skibbe, *supra* note 53.

⁶⁹ Interview with Dean Currier, *supra* note 54.

⁷⁰ Anderson, *supra* note 44, at 7.

⁷¹ *Concord Law at a Glance*, *supra* note 64.

⁷² Interview with Dean Currier, *supra* note 54.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

stay; “the ABA and the bar admissions committees around the country cannot ignore it and hope it will go away.”⁷⁶

⁷⁶ *Id.*