

TEMPORARY DISTANCE EDUCATION GUIDELINES PROVIDE OPPORTUNITIES FOR FLEXIBILITY AND INNOVATION

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Professor Rhode's paper is both elegant and provocative, and I concur with most of her critique of current legal education.¹ I disagree, however, with her conclusion that the American Bar Association (ABA) Law School Accreditation Standards (Standards) inhibit needed structural changes in legal education.

By Rhode's assessment, the current Standards represent "a one-size-fits-all accreditation framework" that is overly rigid and does not allow for sufficient flexibility or experimentation.² This criticism of the Standards is quite common and has become a mantra in virtually all critiques of American legal education. However, from my own experience, I do not believe that the "one-size-fits-all framework" has ever existed. In the approximately twenty-five years I have served on ABA site evaluation teams, each law school I have inspected has unique features and customs. The differences between these law schools have been at least as striking as their similarities. Moreover, even if this criticism was accurate in the past, it clearly is not the case today.

In 1996 after years of study and hearings, a complete new set of standards was adopted by the ABA Section of Legal Education and Admissions to the Bar.³ The 1996 Standards are much broader and less detailed in many respects than the previous set of Standards. Furthermore, each chapter of the Standards must be periodically reviewed and updated.⁴ This review process will take approximately six years. Additionally, several changes have been incorporated in the chapters revised since 1996. For example, recently approved changes in Chapter Six of the Standards dealing with law school libraries include several provisions requiring that law libraries have adequate technological capacities and electronic informational services.⁵ Therefore, the required review process of the Standards, coupled with their approved modification, allow appropriate evolution to accommodate developmental changes in legal education.

The current Standards also allow far more flexibility and room for experimentation than Professor Rhode and other critics of the accreditation rules realize. The existing rules and guidelines regarding various distance learning techniques are a good example. Standard 304(g), states the general rule on this issue: "A law school shall not grant credit for study by correspondence. A law

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1. Deborah L. Rhode, *Legal Education: Professional Interests and Public Values*, 34 IND. L. REV. 23 (2000).

2. *Id.* at 28.

3. *See* SEC. OF LEGAL EDUC. AND ADMISSIONS TO THE B., A.B.A., STANDARDS FOR APPROVAL OF LAW SCHOOLS 23 (1999) [hereinafter STANDARDS FOR APPROVAL OF LAW SCHOOLS].

4. *See id.* at 24.

5. *See* SEC. OF LEGAL EDUC. AND ADMISSIONS TO THE B., A.B.A., PROPOSED CHANGES TO THE STANDARDS ADOPTED (2000). The proposed changes in chapters 5, 6, and 7 were approved by the ABA House of Delegates on July 10, 2000. *See id.*

school may grant credit for distance learning study in accordance with such temporary or permanent guidelines as are authorized by the Council [of the American Bar Association of Legal Education and Admissions to the Bar].⁶

In 1997, in accordance with Standard 304(g), the Council approved the Temporary Distance Education Guidelines (Temporary Guidelines) developed by the Accreditation Committee.⁷ Permanent guidelines are expected at some unspecified point in the future.⁸

At first blush, the Temporary Guidelines appear to be very restrictive. A closer reading, however, indicates that the Temporary Guidelines allow law schools a great deal of flexibility in their use of various distance learning methodologies, and advanced approval for such courses is only required in a very limited number of circumstances where classroom-free learning is the principal course format.

Five categories of courses are discussed in the Temporary Guidelines. Three do not require any prior approval by the Consultant or the Accreditation Committee. The three categories are listed below.

1. *Live Dissemination of J.D. Courses from One Law School to Another Law School.*—Live dissemination of courses require only the use of appropriate technology and opportunities for immediate interactivity.⁹ These requirements cover courses offered live at one law school (or originated at a non-law school site) and delivered live on-site to a classroom in another law school by means of satellite transmission or on the Internet through teleconferencing equipment.¹⁰ Several courses of this type have been offered by law schools in recent years and the technology for delivering these courses is becoming more widely available and less expensive.¹¹

2. *Distance Learning Enhancements of Regular Classroom-based Courses and Distance Learning Classroom Components of Externships and Clinics.*—Similarly, the Temporary Guidelines specifically authorize the use of distance learning techniques for delivering classroom components to off-site externships

6. STANDARDS FOR APPROVAL OF LAW SCHOOLS, *supra* note 3, Standard 304(g), at 42.

7. See Memorandum D9697-59 from James P. White, Consultant on Legal Education to the American Bar Association, to Deans of A.B.A. Approved Law Schools (May 6, 1997) (on file with author) [hereinafter Distance Education Memorandum].

8. See *id.* The Distance Education Memorandum contemplates that information reports on distance learning courses requiring approval will be sent to the Consultant's office. These reports will be submitted to the Section of Legal Education and Admissions to the Bar Technology Committee. That committee will, at the appropriate time, develop a set of permanent distance education guidelines, which will then be reviewed by the Section's Standards Review and Accreditation Committees, and ultimately approved by the Council. See *id.* at 1-2.

9. See *id.* at 3, 5. It is not necessary that a faculty person be present in the classroom receiving the transmission. See *id.* at 3.

10. See *id.*

11. See Stephen M. Johnson, *www.lawschool.edu: Legal Education in the Digital Age*, 2000 WIS. L. REV. 85, 98.

and clinical courses.¹² In accordance with the Temporary Guidelines, the distance learning components must also be delivered with appropriate technology coupled with opportunities for interactivity.¹³

The rationale behind the externship and clinical distance learning exception to prior approval also applies to a wide variety of technological methodologies used to supplement or enhance otherwise traditional law school classroom courses, including out-of-class Computer Assisted Legal Instruction (“CALI”) exercises, CD-ROM formatted course materials, course websites that include a syllabus, electronic “handouts,” electronic course books, hyperlinks to other websites containing material relevant to the course, online quizzes, e-mail, and Internet discussion groups, all of which are widely used by law schools across the country.¹⁴

William Mitchell College of Law, for example, uses a software program developed by Lexis called “Web-Course-in-a-Box” that allows both synchronous and asynchronous communications between individual students as well as between the students and their classroom professors. During the 1999-2000 academic year, this software was used in approximately fourteen courses and in all thirty sections of the first-year writing program each semester, even though these types of distance learning course enhancements are not specifically mentioned in the Temporary Guidelines. However, no one, to the best of my knowledge, thinks that prior consent from the Consultant or the Accreditation Committee is necessary, assuming they meet the appropriate technology and interactivity requirements.¹⁵ Moreover, knowledge that these classroom enhancement techniques are being used is widespread, and neither the Consultant nor the Accreditation Committee has indicated any concern about their use.¹⁶

3. *Post J.D. Programs Such as LL.M. and S.J.D. Programs.*¹⁷—No prior

12. See Distance Education Memorandum, *supra* note 7, at 4.

13. See *id.*

14. See Johnson, *supra* note 11, at 92-96.

15. See Distance Education Memorandum, *supra* note 7, at 5. Interactivity and appropriate technology are requirements for all the different types of distance learning discussed.

16. See *id.* at 3. Paragraph 1 of the Temporary Distance Education Guidelines contains very broad language indicating that requests for approval of distance learning programs for first-year courses “will not usually be approved.” *Id.* at 4. The stated reason is “the special developmental and interactive nature of first year courses.” *Id.* My interpretation of this language is that it only applies to live transmission courses that fall within category 1. See *supra* notes 9-11 and accompanying text. Therefore, it should be permissible to use classroom enhancement forms of technology for first-year classes without any prior approval under paragraph 2 of the Temporary Guidelines. See *id.* William Mitchell College of Law has been using Web-Course-in-a-Box and other classroom enhancement technology methodologies in first-year courses for several years. Other law schools have also reached the same conclusion. See Jayne Elizabeth Zanglein & Katherine Austin Stalcup, *Te(a)chnology: Web-Based Instruction in Legal Skills Courses*, 49 J. LEGAL EDUC. 480, 494 (1999) (describing the computer technology incorporated into a first-year legal writing course at Texas Tech University School of Law).

17. See Distance Education Memorandum, *supra* note 7, at 5.

approval from either the Consultant or the Accreditation Committee is required simply because a graduate law degree has distance learning components.¹⁸ Graduate degree programs must, however, receive acquiescence from the Council, but the requirements for acquiescence are the same, whether or not the post J.D. program contains distance learning components.¹⁹ In 1998, the Council acquiesced to an Internet-based LL.M. in International Taxation offered by Regent University School of Law located in Norfolk, Virginia.²⁰ The law school's use of the Internet appeared to satisfy the technology requirement, and the electronic chat room and e-mail components of the program satisfied the interactivity requirement in the Temporary Guidelines.

In contrast to the three types of courses addressed above, the fourth and fifth categories discussed in the Temporary Guidelines and the Distance Education Memorandum require advance approval from the Consultant or Accreditation Committee. These two categories are listed below:

4. *Experimental Courses*.—Distance learning experimental courses that do not fit into any of the three categories discussed above can be approved by the Consultant's office on an individual basis. However, a student is only permitted to take a maximum of one three-credit hour experimental course for the purpose of satisfying the class hour and residency requirements in the Standards.²¹ The Temporary Guidelines specify that approval of experimental courses, designated as "limited exceptions," is discretionary and based "upon a showing of specific educational benefits" provided by the courses.²²

As of March 2000, the Consultant had approved six of seven experimental course applications.²³ One of them, an application for two Internet based courses offered by Syracuse University College of Law in the spring of 1998, probably did not require pre-approval because no students from Syracuse College of Law

18. *See id.* The Temporary Guidelines indicate that prior approval for post-J.D. distance learning courses might be required. *See id.* However, the Temporary Guidelines state that courses described in paragraph 4 do not require prior approval from the Accreditation Committee or the Consultant's office. *See id.* at 1.

19. *See* STANDARDS FOR APPROVAL OF LAW SCHOOLS, *supra* note 3, Standard 307, at 47. The principal requirements for acquiescence are: (1) that the post-J.D. degree program will not divert teaching resources from the J.D. program and (2) that the post-J.D. program will have sufficient administrative and teaching resources to meet the program's objectives. *See id.*

20. *See* Johnson, *supra* note 11, at 123.

21. *See* Distance Education Memorandum, *supra* note 7, at 4.

22. *Id.*

23. The application that was not approved was for an online survey course on commercial law scheduled by the University of Tennessee College of Law in the summer of 2000. It was rejected on the grounds that the course lacked any evidence of interactivity between the faculty member teaching the course and the students. *See* Letter from J. Richard Hurt, Deputy Consultant on Legal Education, to Thomas C. Galligan, Jr., Dean, University of Tennessee College of Law (Mar. 23, 2000) (on file with the author). A revised application was filed and this course was subsequently approved. Telephone interview with J. Richard Hurt, Deputy Consultant on Legal Education (June 29, 2000).

enrolled in the courses.²⁴ Two others involved interactive television courses offered live at one location and remotely at one or more additional locations that were not at a law school. The first was a 1998 summer course in Federal Taxation of Gratuitous Transfers taught live from a distance learning studio located on the University of Mississippi campus in Oxford, Mississippi, and transmitted to University of Mississippi Law Center students at three remote University of Mississippi campuses.²⁵ The other was a course in Alternative Dispute Resolution offered by West Virginia University College of Law during the summer of 1999 at the West Virginia University campus in Morgantown and transmitted remotely to West Virginia University College of Law students located at a branch campus of the University in Charleston, West Virginia, through dedicated T-1 telephone lines that simultaneously sent video and sound.²⁶ In addition to the usual classroom interaction at both sites, all students enrolled in this course were required to engage in various role-plays and videotaped performance exercises (negotiations and mediations). The instructor for the course was available to the students at both locations by telephone and e-mail.²⁷

Another application approved under the experimental course guidelines was for an Internet-only section of a seminar on controlled substances taught at South Texas College of Law in the fall of 1999.²⁸ An additional section of the course was taught in a traditional classroom setting. The most interesting aspect of this experiment was the law school's ability to compare the students' performance in the different course sections because all the students were graded primarily on the basis of a research paper. Professor Buford Terrell, who taught both sections, filed a report in the Consultant's office after the course was completed. It states: "The final papers were graded with the same criteria in both sections, and there were no grade differences that were attributable to the section or the methodology."²⁹ Professor Terrell also discussed the benefits of the Web-based format:

First, the class "discussion" method drew out more frequent, more

24. See Letter from Arthur R. Gaudio, Deputy Consultant on Legal Education, to Daan Braveman, Dean, Syracuse University College of Law (Dec. 1, 1997) (on file with the author).

25. See Letter from Arthur R. Gaudio, Deputy Consultant on Legal Education, to Larry S. Bush, Associate Dean, University of Mississippi Law Center (Feb. 6, 1998) (on file with the author).

26. See Letter from J. Richard Hurt, Deputy Consultant on Legal Education, to John Fisher, Dean, West Virginia University College of Law (May 3, 1999) (on file with the author). Neither this course nor the distance learning tax course at the University of Mississippi were exempt from prior approval under paragraph 1 of the Temporary Guidelines because the sites receiving the remote transmission were not located in a law school.

27. See *id.*

28. See Letter from J. Richard Hurt, Deputy Consultant on Legal Education, to Jeffrey L. Rensberger, Associate Dean, South Texas College of Law (June 21, 1999) (on file with the author).

29. Letter from Jeffrey L. Rensberger, Associate Dean, South Texas College of Law, to J. Richard Hurt, Deputy Consultant on Legal Education (Feb. 24, 2000) (on file with the author).

analytic, and better-conceived comments and arguments from the students than they normally demonstrate in a classroom. Second, students showed considerable initiative in originating and carrying forward discussion topics. The students demonstrated creativity in solving the problems of web-based presentations and multi-media communications. Third, the students were able to follow, to some extent, a self-paced and self-scheduled course of work, giving them freedom. Fourth, as a whole the class became very proficient in using Web resources as part of their learning and research.³⁰

The final two experimental course applications approved by the Consultant were stand-alone online courses. The first, an online course on Computer Assisted Legal Research taught during the summer of 2000 at St. Thomas University School of Law, seems to be naturally suited for a distance learning format.³¹ This course was instructed through the incorporation of a number of different technological methodologies and software programs, including: Web-Course-in-a-Box; videotaped lectures delivered on a CD-ROM; Catch the Web; FrontPage; Net Meeting; threaded discussions; and weekly chat room discussions.³²

The second course, a Cybercrimes Seminar, also presented a natural forum for a distance learning format.³³ In my opinion, so far it is the most interesting and innovative of all the distance learning experimental courses that have been

30. *Id.* These favorable comments about the level of learning that occurred in the online section of the course are echoed in the report on the West Virginia Alternative Dispute Resolution experimental course offered by the West Virginia University College of Law. The report submitted to the Consultant's office on the West Virginia course states:

Professor Patrick is of the view that students at the distance site enjoyed as good a learning experience as students in the local classroom Professor Patrick notes little difference in student participation in the learning experience. In addition, Professor Patrick believes that the students at the distance site learned as much as those at the local site. In terms of the student engagement and the quality of students' submissions, Professor Patrick notes no differences between students in the distance classroom and those on campus.

Letter from John W. Fisher, Dean, West Virginia University College of Law, to J. Richard Hurt, Deputy Consultant on Legal Education (Oct. 14, 1999) (on file with the author).

31. See Letter from to J. Richard Hurt, Deputy Consultant on Legal Education, to Jay Silver, Associate Dean, St. Thomas University School of Law (Mar. 23, 2000) (on file with the author).

32. See Letter from Jay Silver, Associate Dean, St. Thomas University School of Law, to James White, Consultant on Legal Education (Dec. 7, 1999) (on file with the author).

33. This seminar was initially approved for the fall 1998 semester. See Letter from Arthur R. Gaudio, Deputy Consultant for Legal Education, to Francis J. Conte, Dean, University of Dayton School of Law (May 22, 1998) (on file with the author). It was also subsequently approved for the fall 1999 semester. See E-mail from J. Richard Hurt, Deputy Consultant on Legal Education, to Susan W. Brenner, Associate Dean, University of Dayton School of Law (May 2, 1999) (on file with the author).

approved under the Temporary Guidelines.³⁴

Three features of the Cybercrimes Seminar are of particular interest. The first was its use of experts from across the country as assistants in the course. These experts regularly participated in the online class discussions, and also critiqued the statutory provisions drafted by the students.³⁵ The second was the seminar's use of a software program developed at the University of British Columbia which allowed the instructor to track how often each student logged into the class, how many areas in the website were visited by each student, how many assigned items each student read, and how many messages each student posted during the course.³⁶

The third interesting feature was the legal skills training incorporated into the course. In this course, students were required to draft specific provisions for a Model Cybercrimes Code. In fact, seventy percent of the final grade was based on the quality of the students' Model Code sections and commentary.³⁷ Teaching legal skills in a distance learning format is very controversial.³⁸ The favorable report by Professor Susan Brenner on the Cybercrimes Seminar indicates that at least some legal skills, in this case online legal research, collaboration, and legislative drafting skills, can be taught on a distance learning basis.³⁹ In fact, according to Professor Brenner, it may be easier in an online format for students to review, discuss, and critique the drafting of their fellow students than in a live classroom setting.⁴⁰

5. *Any Other Course.*—This category consists of any course that cannot qualify under one of the other four categories. Given the breadth of the kinds of technologies and formats that can be authorized under the other four categories, it is hard to envision a course that would fall into this last category. If there is such a course, it would require a waiver or variance from the Council.⁴¹ Waivers, which are rarely approved, are authorized when “the proposal is nevertheless consistent with the general purposes of the Standards.”⁴²

CONCLUSION

The available evidence indicates that many law schools are experimenting with various types of distance learning methodologies.⁴³ Under the Temporary

34. See Susan Brenner, Report: The Online Seminar Taught at the University of Dayton School of Law in the Fall of 1998 Pursuant to the May 7, 1997 Temporary Distance Learning Guidelines (Spring 1999), at 2-4, 12-14 (on file with author) [hereinafter *The Online Seminar*].

35. See *id.* at 2-4, 12-14.

36. See *id.* at 7-8.

37. See *id.* at 4.

38. See Johnson, *supra* note 11, at 108-10.

39. See *The Online Seminar*, *supra* note 34, at 17.

40. See *id.*

41. See Distance Education Memorandum, *supra* note 7, at 1.

42. STANDARDS FOR APPROVAL OF LAW SCHOOLS, *supra* note 3, Standard 802, at 66.

43. See generally Johnson, *supra* note 11, at 98.

Guidelines they are generally able to do so without any prior approval from the Council of the ABA Section of Legal Education and Admissions to the Bar. While it is not permissible under the current Standards to have a completely online J.D. program like the one being offered by Concord School of Law in California,⁴⁴ the Temporary Guidelines allow for an appropriate, but not excessive, amount of flexibility for distance learning experimentation and innovation to take place.

Given the small number of applications filed for experimental course credits in the three years the Temporary Guidelines have been in effect, there does not presently appear to be a great demand for distance learning courses that lack a significant live classroom component. Moreover, even though distance learning is being widely used in other disciplines, the pedagogical assessments of these other programs have been mixed.⁴⁵ Similarly, the successful use of a particular distance learning format in one field is not a guarantee that it will be equally successful in another field.

In conclusion, James P. White, who is retiring after a distinguished career as the Consultant on Legal Education and Consultant to the American Bar Association Section of Legal Education and Admissions to the Bar, should be praised for facilitating the flexibility incorporated into the Temporary Distance Education Guidelines. In due course, assuming various distance learning methodologies are proven to be pedagogically sound⁴⁶ and the demand increases for instruction that requires advanced approval as experimental courses, the permanent Guidelines, and ultimately the Standards for Approval of Law Schools, should be changed to accommodate these developments.

44. Many of the Standards for Approval of Law Schools would have to be amended in order to allow a school like Concord to be accredited by the ABA. *See, e.g.*, STANDARDS FOR APPROVAL OF LAW SCHOOLS, *supra* note 3, Standard 302(d), at 41 (“A law school shall offer live-client or other real-life practice experiences.”); Standard 304(a), at 42 (“An academic year shall consist of not fewer than 130 days on which classes are regularly scheduled *in the law school. . .*”) (emphasis added).

45. *See, e.g.*, Jamie P. Merisotis & Ronald A. Phipps, *What’s the Difference?—Outcomes of Distance vs. Traditional Classroom-Based Learning*, CHANGE, May-June 1999, at 12, 13-17; Ed Neal, *Using Technology in Teaching: We Need to Exercise Healthy Skepticism*, CHRON. HIGHER EDUC., July 19, 1998, at 84. *See also* Johnson, *supra* note 11, at 104-14 (discussing the disadvantages and limitations of distance learning in law schools).

46. *See generally* Zanglein & Stalcup, *supra* note 16, at 492-94 (discussing the pedagogical attributes of web-based instruction).