

Dear Mr. Greaney: I have headed a nationally recognized accrediting body since 1973, and served for two terms on the National Advisory Committee on Accreditation and Institutional Eligibility (now the National Advisory Committee on Institutional Quality and Integrity). In addition, I have been teaching at the university level since 1962. I believe I have a perspective which you may find helpful in reviewing your personal Final Judgment in the above named case. I very much appreciate this opportunity to comment.

I. The Focus of My Comments

It would be presumptuous of me to enter into the debate between the Department of Justice and the ABA. Where I do address ABA issues, it is only to be able to react to Department of Justice contentions, which, by extrapolation, can be applied to other accrediting agencies.

II. Are Anti-Trust Considerations Relevant To Higher Education?

Higher education is characterized by a sense of mission against which all considerations of commerce and competition must be weighed. Higher education in America traces its antecedents to a culture of service which pervades Academe and influences day to day policy. Two examples will suffice to illustrate my point.

(I) Most colleges and universities survive on the basis of student tuition and research. Consider a student who is doing poorly in his studies and enrolls in the class of a professor who opens up the excitement of learning. At the end of the term, in consultation with this professor, the student concludes that his career would be better served by transferring to another institution.

The professor does everything possible to facilitate this move, including contacting colleagues, writing letters of recommendation and helping the student search for applicable scholarships and fellowships. The professor knows full well that her classes will be the poorer for the student having transferred, and the student's tuition dollars will now help pay someone else's salary. Yet, everyone associated with the school recognizes the welfare of the student and his ultimate contribution to knowledge as the true goals of the institution.

(II) A senior research professor at a university works with his graduate students in an area of current research, helps them attain their Ph.D.'s and then moves heaven and earth to try to place them in tenure track positions at other universities. Knowing full well that these students will now be competing with him for research dollars and for quality graduate students.

In a word, postsecondary institutions have a bottom line which is quite different from that of commercial enterprises.

III. Accreditation is an Integral Part of the Culture of Higher Education

Accreditation agencies emanate from the community of schools they sever, and are guided by the same sense of mission. Accrediting bodies have an uninterrupted record of opening their doors to ever increasing number of schools. Highly paid professionals give gladly of their time to

serve on site visiting teams, on committees and commissions, for little or no recompense.

Accreditation professionals spend untold hours working with applicant institutions to help them meet standards. Visitors are encouraged to make helpful suggestions to institutions which they visit. The fact that so few institutions are turned down in petitions for renewal of recognition, even in this period of service competition for students, is inconsistent with accusations that accreditors have been stifling competition.

IV. Accreditation Involves the Application of Standards

Whenever standards are applied, there will be those who fail to meet those standards. Where judgement is involved, there will always be questions.

Scholarly journals publish only refereed papers. If I, a physicist, submit a research paper to a journal, it will be reviewed by someone working in the same field and therefore competing with me for recognition and research grants. If my paper is not accepted for publication, the outside observer might conclude that there was a desire to stifle competition. Yet, no one in the world of science, no matter how aggrieved, would come to this conclusion.

Accreditation, like all of higher education, is not an exact science. Judgement plays a large role in the decision making process, and disagreement is inevitable. But the honest application of standards is a far cry from an intent to stifle competition.

V. States Determine Eligibility for Bar Exams

ABA standards are universally recognized as establishing the quality of a law school; and any seeming restrictions on competition are a function of those who use the ABA list of accredited schools—not of the ABA itself! Thus, the fact that 40 states open the bar exams only to ABA graduates is not the fault of the ABA. Rather the states should be asked to open the bar exam process. Can an accrediting body be blamed for the misuse of its accreditation list?

VI. "Capture of the Accreditation Process"

It is important to recognize that law schools educate students in the law, whereas the bar examination and the states create lawyers. The distinction is important since it is educators, not practitioners, who are best qualified to judge the functioning of a school. Whether a school creates effective attorneys is a question entirely distinct from its ability to educate students in the law. It is counterproductive for the Department of Justice to force accrediting bodies to include people who are not educators to judge an educational institution.

VII. Professional Staff Compensation

A high salary structure, together with an emphasis on full-time faculty, can ensure that faculty remain fully focused on their teaching and research responsibilities without the pressures of an outside job. For some students, faculty availability outside class is as important as the lecture itself. High salaries will also ensure that schools will attract high quality faculty. In any case, it is not clear to me why such a clause is anti-competitive. Schools not accredited by the

ABA, and therefore not required to pay exceedingly high salaries, could charge a much lower tuition, thereby competing effectively for students.

VIII. Facilities

Proper facilities are integral to the educational process. It is inappropriate for government to determine how lectures are to be delivered, what books are to be read, and what facilities are appropriate for any given educational system.

IX. Public View

Bringing the public eye into deliberations involving standards can cripple the accreditation process and discourage site visitors from expressing true opinions and making difficult judgements.

X. Other Schools Can Compete

It would be extremely troubling were the Justice Department to force accrediting agencies to expand their scope to areas outside their competence. Well run non-ABA schools are able to attract students, and in many states their students can sit for the bar examination. Such schools can even organize their own (Department of Education Recognized) accrediting body. How is the ABA's unwillingness to accredit proprietary institutions a barrier to competition?

XI. An Alternative Approach

Recognized agencies must satisfy federal regulations which require, among others, that standards be reviewed regularly for reliability, validity and relevance. If there is any indication that standards are not relevant to quality education, the Department of Education can be very effective in ensuring change, particularly if a third party comment is properly structured.

XII. Conclusion

Higher education and accreditation have characteristics and a culture which may make certain anti-trust considerations irrelevant. Perhaps a reconsideration of the findings in this case, in light of the special nature of accreditation, is in order. Certainly a review of the proposed corrective actions should be made.

Thank you again for this opportunity to comment.

Respectfully,

Dr. Bernard Fryshman

Whiteford, Taylor & Preston,

1025 Connecticut Avenue, NW., Washington, D.C. 20036-5405, 202 659-6800, Fax 202 331-0573

October 2, 1995.

Via Hand Delivery

John F. Greaney,

Chief, Computers and Finance Section,
Antitrust Division, Department of Justice,
Room 9903, 555 4th Street NW.,
Washington, DC 20001

Re: U.S.A. v. American Bar Association, U.S.
District of Columbia, Civil Action No.
95-1211 (CR), WTP No. 00732/00408

Dear Mr. Greaney: Pursuant to Section V of the Competitive Impact Statement filed in the above captioned action on July 14, 1995, we