Resolved: ABA Accreditation Standards should be revised to prohibit merit scholarships – aid not based on a student’s financial need in excess of 10% of a law school’s total expenditures for financial aid.

Explanation and discussion: In earlier years, students thought they could justify the high cost of attending law school based on a reasonable probability they could get a high paying job upon graduation. Changes in the demand for and delivery of legal services make it less likely that law schools will be able to justify today’s high cost legal education.

One factor that has kept law school costs high and tuition advancing in recent years has been the exploding phenomenon of merit scholarships. Traditionally, scholarship aid was justified as a method of diversifying the legal profession by opening it to persons unable to pay full tuition for their education. Scholarship aid also helped increase diversity in terms of race and gender. Traditionally as well, scholarship aid was in large part funded out of endowment income that had been donated for exactly these purposes.

What has changed today is that many law schools are greatly increasing the size of their classes and the tuition they charge their least-likely-to-succeed students. They are then taking that revenue and giving it to non-needy students whose one or two point higher GPA or LSAT will raise the law school’s “quality” as reported to U.S. News & World Report for its annual rankings. It is hard to track the extent of this practice in detail, but from what I understand, some schools admit classes in which roughly 70% of the students are led to believe they are attending a better law school because their tuition funds up to 30% of their class who pay little or no tuition to attend.

Most schools, of course, have long had a limited number of merit scholarships typically funded by endowment income to attract unusually superior applicants. That is why this proposal excepts up to 10% of scholarship income from the prohibition. But in his AALS presidential address in January 2010, Dean Reese Hansen called merit scholarships as we now know them one of the largest moral issues facing legal education because of their inherent deception and effect of decreasing genuine law school diversity. I agree.

Further, the merit scholarship phenomenon is a significant economic issue for legal education and the legal profession. Tuition that could have been cut for all students is kept artificially high for most. Some proportion of students who would not have come to law school at all if they had to pay full tuition are steered into what appears in at least the short run to be a free good. But pressure on law deans to do everything possible to game the U.S. News rankings makes the practice hard to end without regulatory intervention.
Potential constituent support: I cannot cite systematic research on support for my proposal. In my experience, however, students in general are likely to favor the proposed change. During the admission process, the whole phenomenon is largely concealed unless one receives a merit scholarship. But when students arrive on campus and compare tuition bills with the person sitting next to them, the level of resentment is understandably high.

Deans who believe their school has improved its ranking using merit scholarships might initially not favor the rule change, and others would not support any regulatory initiative. But many deans also understand that merit scholarships represent an arms race that is ultimately unsustainable. On balance, I predict deans would tend to support the change.

Regulators might prefer to avoid any controversial proposal, but I believe they too would tend to see that legal education as a whole will benefit from lower student tuition rates and better information to all applicants about the cost of attending law school. In fairness, I should note that the ABA would likely need to clear any such regulation with the U.S. Department of Justice because of continuing antitrust scrutiny imposed on the ABA accreditation process.

Publishers such as U.S. News would likely not favor the change if it meant more work for them, but my experience is that they prefer rankings that can be seen as reliable. Thus they, too, could be expected to favor a policy that would be seen to filter out an element of their rankings that too many schools are in a position to exploit.

Time for implementation: Realistically, the process of changing ABA standards would not occur before April 2011. It takes longer than one academic year to make such a change. I would argue, however, that the clear prospect of a regulatory change would likely lead to an anticipatory change in behavior by ABA-accredited schools as planning for admissions for academic year 2011-12 takes place.

And if a recommendation from this conference could help persuade U.S. News & World Report to reduce the weight it gives to small differences in GPA and LSAT medians in calculating its rankings, the merit scholarship phenomenon might even disappear without the need for direct ABA regulation at all.

Respectfully submitted,

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