DISTANCE LEARNING IN LEGAL EDUCATION

A Summary of Delivery Models, Regulatory Issues, and Recommended Practices

Presented by
The Working Group for Distance Learning in Legal Education

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Executive Summary

The Working Group for Distance Learning in Legal Education is pleased to have the opportunity to present this Blue Paper on Delivery Models, Regulatory Issues and Recommended Practices on Distance Learning in Legal Education. This Blue Paper is intended to provide law schools and interested parties a summation of distance learning opportunities, tools, and considerations.

Unlike other sectors in higher education, law schools have little experience with distance learning or online education. Recent technological advances, as well as economic exigencies, have lead several law schools to contemplate launching one or more online programs. To date, a handful of schools have distance learning LLM programs and a few offer non-JD masters programs. As the American Bar Association considers loosening distance learning restrictions, and traditional law schools consider diversifying beyond their JD program, distance learning becomes one intriguing option.

This Blue Paper attempts to guide those schools beginning to explore distance learning opportunities. We recognize three fundamental questions, and attempt to provide a discussion—if not answers—to each.

First, there is the simple question of how it's done. Law schools considering adding online programs have a variety of questions about the strengths of various approaches and technologies. Goal 1 provides a summary of current topics and practices. This includes everything from examining the strengths and challenges of synchronous and asynchronous education, to considering platforms, pedagogy and the sorts of degrees and programs that are currently offered, or might be offered through distance learning portals.

Second, law schools have very technical questions about how to deliver information to students, and to create learning environments. Goal 2 summaries the technologies available, and gives a series of recommended practices for law schools using everything from webcasts to wikis. This section also contains extensive material on training for faculty, students, support staff and student services staff engaged in distance learning platforms, as well as information on institutional integration and administration, intellectual property rights, and a note on business and financial models for schools considering distance learning ventures.

Finally, there are institutional and accreditation concerns. Goal 3 outlines these concerns, and notes areas in which the Working Group may conduct further research and policy development. Appendices include research topics, as well as Model Law School Distance Learning Policy developed by the Working Group.

Throughout the paper, two themes emerge: concerns over educational quality, and the potential of distance learning programs to spread the educational mission of law schools. While we examine each theme in multiple aspects, we recognize that we have only begun, not answered, the conversation on these topics. The promise of distance learning, and its concurrent challenges, are numerous and multifaceted. As time goes forward, we expect to update this Blue Paper with new information, and to engage the larger law school community in an exploration of the challenges and opportunities of a new way of teaching law.

This draft manuscript, written by the Working Group for Distance Learning in Legal Education, Rebecca Purdom, editor, reflects the views of the Working Group for Distance Learning in Legal Education. For presentation purposes it has been compiled by Harvard Law School's Program on the Legal Profession.

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Introduction

This Blue Paper grows out of discussions of participants in the Working Group for Distance Learning in Legal Education. The inaugural meeting of this group was held at the Harvard Law School, Cambridge, Massachusetts, on November 11 – 12, 2011. This workshop, co-hosted by the Harvard Law School Program on the Legal Profession and the Vermont Law School, drew together representatives of many of the most active distance education programs in the legal academy and provided the opportunity for this group to exchange information on the breadth of current practice in the field and to explore questions around best practices that the group might help promote. Subsequent meetings occurred on January 7, 2012 at the AALS Annual Meeting in Washington, DC, on April 12 – 14, 2012 at the University of Dayton School of Law in Dayton, Ohio, and on September 13 – 15, 2012 at the Thomas Jefferson School of Law in San Diego, California. A list of the participants in the Working Group is attached to this report.

The title "Blue Paper" is one that the Program on the Legal Profession has adopted to describe a series of pieces that it distributes, but that are not as fully developed as a traditional "White Paper" might be. Blue Papers are also aimed at distribution beyond the traditional reach of legal and scholarly media channels. This appeared to be a reasonable description of this exercise, and we have adopted the term.

This Blue Paper represents more of a starting point than a set of conclusions on the issues facing legal distance learning. Its goals are three-fold:

1. To define and summarize current topics and practices in legal distance learning;
2. To identify areas that need best practices developed, and, to the extent possible, describe current recommended practices; and
3. To identify areas that need further attention, research or development by the legal distance learning community.

Background

There is little doubt that distance education is becoming one of the standard forms of instruction for American students at all levels of teaching. The impact of distance approaches has already been significant at the secondary level. Colleges are increasingly making distance offerings available, and graduate programs, such as law, are in the early stages of following suit. One must be clear that distance learning is not just the province of for-profit and entry level colleges; some of the nation's most prestigious universities are jumping onboard. When the Working Group first met in 2011, Stanford was experimenting with free, massive online courses, and MIT had just opened up virtually all of its instruction on a non-credit basis in a free, online format it calls "open courseware".[1] Over the past year as the Working Group has met, this stream of developments has become a torrent. Stanford's experiment has led to its own iTunes U channel[2] and helped to catalyze the formation of the for-profit outlet Coursera.[3] Harvard, MIT and Berkeley have countered with their own online education portal—EdX—offering free courses from their catalogs.[4]

Several forces are driving these developments. Some are technical. The has created opportunities for new forms of instruction and delivery, allowing distance learning to move far beyond the "talking heads on the TV screen" history of such efforts as the University on the Air.[5] Some are pedagogical. Our understanding of best practices for engaging and educating has grown with the addition of such elements as cognitive psychology and data-driven assessment techniques. As a result, we can design high-quality alternatives to classic "stand-up" teaching in the classroom or lecture hall. Some are social. Students of the "Digital Natives"[6] generation use computers and mobile devices to conduct most of their lives —why should education be any different? Some are economic. Although good distance instruction is not necessarily cheaper than the classroom equivalent, it does create some economies of scale and the possibility of an expanded market for worthy academic programs to populations heretofore unable to access educational opportunities. Finally, some driving forces are regulatory. As the federal government and various accrediting bodies, including regional higher education accreditors, become more accepting of distance delivery as a technique for quality teaching, the possibilities for putting all of this to work in practical ways is growing as well.

1 See http://ocw.mit.edu/index.htm

2 See http://itunes.stanford.edu/

3 ("Take the world's best courses online, for free" – see https://www.coursera.org/).

4 See https://www.edx.org/. In recent months, Wellesley, and Georgetown, and the University of Texas system have joined EdX as well.

5 See http://www.wpr.org/webcasting/audioarchives_display.cfm?Code=uoa.

6 Palfrey, John; Gasser, Urs (2008), *Born Digital: Understanding the First Generation of Digital Natives, Basic Books*.

Legal education has been slower to adopt distance approaches than many other fields, in part because the American Bar Association (ABA), as the principal national accreditor of J.D. programs, has put very restrictive rules on distance in place. As a result, much of the innovation in legal distance instruction to date has occurred in law school Master's programs, CLE of various kinds, and internal training by legal delivery organizations ranging from large law firms to the JAG Corps and the Federal Judicial Center. Best practice development for this field of teaching has been slow to evolve. The initiative that has sparked this Blue Paper represents a move to provide insight or direction from experts in a rapidly emerging field. While the initial pioneers within the legal academy are obvious participants in a best practice discussion, we expect that others will join soon. The distance learning tide is coming in for law as well, and when an aquatic experience is inevitable it is best to start the swimming lessons earlier rather than later.

One of the recurring themes in the conversations that lead to this Blue Paper has been quality. There is an assumption by some who approach distance learning, both proponents and critics, that it is a low-quality, inexpensive approach that can be used to turn a quick profit. While such an idea may be attractive in an age of budgetary pressure in legal education, we view this point of view as misguided. While there are financial reasons to pursue distance education, it is important that those considering it move beyond the view that distance is a way to cheaply re-use existing in-class resources. Distance education is a *sui generis* approach to education that, at its best, creates a high quality, academically successful experience Indeed, when well designed and delivered, distance provides student outcomes on par or even superior to those of traditional in-class teaching.[7]

Another recurring theme, which we believe has validity, is the opportunity to use distance approaches to spread the educational mission of law schools. Of course, different law schools will have very different approaches to spreading their teaching and influence through distance methods, but many law schools find the possibility of moving their reach beyond their campuses appealing. The flexibility and potential cost savings of that distance instruction allow a new channel of education for many whose resources of time and money limit their ability to pursue traditional forms of instruction, even in a part time program. We foresee increased access to justice coming from the spread of distance in the legal academy as underserved populations have a quality option not previously available. Distance learning will also permit schools to expand the reach of their expertise and philosophy of law. Vermont Law School, for instance, has a widely recognized program on Environmental Law. Under the traditional conceptions of what legal education looks likes, the ability of Vermont Law School to reach students is restricted by those who travel to its home campus in the village of South Royalton, Vermont. With distance learning programs, however, Vermont Law School's reach and impact, particularly in its areas of expertise and focus, is multiplied. This is a story that just about every law school in America can repeat around its areas of specialty and expertise.

There are roadblocks that are inhibiting the growth of distance education in law. A principal impediment comes from the ABA accreditation rules applicable to J.D. programs. The ABA's Standard 306 currently allows 12 credits to be taken through online courses, though only four credits in any one semester and none in the first year curriculum. Revisions to this policy are under discussion, and proposed Standard 311 would allow as many as 15 credits may be taken at one time, but only after the first year, effectively

7 See Means, et al, Evaluation of Evidence-Based Practices in Online Learning: A Meta-Analysis and Review of Online Learning Studies, United States Department of Education, September 2010, (finding that, on average, distance learning has as good or slightly better learning and retention results than classes delivered in a residential setting).

sanctioning an off-campus semester.[8] In law schools or programs that are not subject to ABA accreditation, however, entire programs are offered online. The majority of these programs operate primarily in California, where the state authorizes students from non-ABA schools to take the state bar exam, provided they meet other requirements.[9] Programs taking advantage of this include Concord Law School of Kaplan University, and California School of Law. Current ABA rules permit distance techniques to be blended into courses where the majority of teaching continues to be through local classroom instruction, and online elements constitute no more than 1/3 of the course, providing an avenue for some experimentation and learning to go forward.

It will come as no surprise that our Working Group, drawn mostly from schools that either have developed programs or are actively developing the field, for the most part are actively encouraging the ABA to reconsider its current standard and support the proposed new standard under review. We also believe, however, there are legitimate concerns about quality in distance legal education. In light of the potential benefits of distance learning—let alone its inevitability as some a part of the instructional mix—we further believe that developing standards that promote best practices is the appropriate response by the accrediting bodies. We also do not support arbitrary limitations on the availability of distance learning in the JD curriculum. We hope that the research and curricular knowledge that grow out of the efforts of this Working Group will contribute to just such a process.

Finally, we would also note that distance elements can more easily be incorporated in the non-JD programs offered by many schools, where ABA accreditation is not part of the mix. This is a field where there is already significant adoption, including by several of the participants in this Working Group. Indeed, the availability of distance instruction for such degrees is likely to stimulate additional growth in LLM and other Master's programs that offer further learning for JD holders as well as other "intermediate" legal degrees (e.g. for people engaged in particular areas of policy or administration such as health care or the environment).

8 The New York State Board of Bar Examiners currently only allows 12 credits of synchronous online education of the 83 credits required to sit for the bar examination. See http://www.nybarexam.org/Eligible/Eligibility.htm.

9 See http://admissions.calbar.ca.gov/Education/LegalEducation/LawSchools.aspx#unaccredited.

Goal 1: Summary of Current Topics and Practices

This discussion will focus on the models for delivering distance education and on the subject matters being taught in current programs. The delivery model discussion often leads to partisanship between those using the "synchronous" model, which more closely resembles traditional, in-class instruction, and those using the "asynchronous" approach, which untethers the pedagogy from the necessities of being "all-together" with an instructor at the same time. In reality, both approaches have strengths and challenges, and, in practice, are often blended into a "hybrid" approach. The key feature of good distance instruction is designing pedagogy that can effectively use the medium to help students achieve superior educational outcomes, and no particular methodology has a monopoly in this approach.

Delivery Models: Synchronous Model

Synchronous learning occurs at one time, while participants occupy different spaces. Experimented with by schools since the 1970s invention of interactive television, new technological advances make the development of live, real-time interaction between faculty and students useful and exciting. Free platforms like Skype and Google Hangouts as well as a variety of proprietary video conferencing systems allow faculty and students the ability to interact in ways similar to a live, classroom space. The invention of high definition systems delivered via high speed internet has all but eliminated the time delay and fuzzy quality of earlier systems.

Strengths of Synchronous. Synchronous systems can connect faculty, students, and other participants from across the globe in real-time settings. A real time, interactive lecture best parallels the traditional law school classroom; making it easy for many professors to make the transition to online teaching in this model. Current technologies are often so good that subtle interactions (e.g the confused expression on a student's face) can be engaged immediately. For example, the Socratic method can be retained under the synchronous model, and other types of instruction (e.g., moot courts, client counseling exercises, etc) can work much better under this format.

Considerations of Synchronous online learning systems. While technological advances have made synchronous education possible, it has not necessarily made it easy. There are subtle differences between a live class and an online experience that must be attended (e.g. which way is the camera pointing? Are all the students "present"?). There are also significant technological considerations that must be managed and accounted for.

- *Cost of facilities and staff.* Good systems, which provide high quality streaming images in both directions, can be expensive. Several schools that employ synchronous applications have built extensive new facilities, including full studios, to provide appropriate quality for faculty and students. In-time and local technical assistance is often required to run and maintain such systems so employee costs can be substantial. Students who access such systems need matching computer capabilities. They must also maintain and update their computers to ensure functionality and compatibility.
    - *Broadcast/transmission facilities.* The space from which a synchronous class is webcast—typically a studio or classroom—should be created, equipped, and manned with special consideration. Sufficient lighting, backdrops, and audio and visual capture and receiving technologies are important; often a classroom with a simple webcam will be insufficient to capture a faculty lecture, let alone provide the two-way interactive capacity typically required for a good synchronous class.
    - *Student reception and participation.* An institution providing synchronous classes must provide not only the broadcast or production of synchronous materials, but also the technological assurance that students can access the class. This typically requires that students have access to high speed internet, appropriate software and plugins, webcams and microphones. It also necessitates modern computing platform with fairly robust processing speeds. Assuring that students have all the appropriate equipment to participate, and that they are set up and that they are using it correctly, requires a significant investment of technology staff time.

      Also, and to the surprise of some who have entered the synchronous teaching space, attention must be paid to the physical space students use while taking synchronous classes. Should the class require students to listen, speak, and interact over a live internet connection, students must have a distraction-free space, They also must ensure that their own interaction with the online class will not cause others disruption. In other words, students can't just sit as at a carrel in the library, chatting away with their class. Institutions such as Brigham Young University School of Law (BYU) have invested in building individual student carrels specially equipped with soundproofing so that students can have a comfortable place from which to "attend" class. BYU has found that the quality of student interaction and overall learning improves when students use dedicated spaces. BYU started creating individual cubicles with a $40,000 grant and, on the success of that experience, is rapidly expanding such facilities.
    - *Staffing.* Proponents of synchronous classrooms generally agree that on-the-ground support should be available prior to and through the class to address any bugs and/or challenges that may arise. Significant and precious time can be lost if the professor drops connectivity or a student has access problems. Faculty are typically ill-equipped to address technological concerns and rarely able to both address technical glitches and simultaneously conduct a class. Students who lose access in the middle of a class need the ability to efficiently access technical assistance so they can quickly rejoin an ongoing class. On-the-ground, continuous technical staffing for every synchronous class is, obviously, an expense not born by the live, residential class equivalent.
- *Technological complications.* Maintaining appropriate technology, including bridging systems (systems that allow one synchronous system to talk to another synchronous system) can be time consuming and expensive, particularly given the rapid rate of change in the IT industry. There are two primary channels to consider, both of which deliver a host of technological considerations:

- *One-way, lecture capture technology.* Gone is the day of a talking-head-in-a-box. When online classes are delivered in this mode (students cannot actively "talk back to faculty"), they are typically delivered via a lecture capture solution: students can see the lecturer, the visuals provided on the classroom computer or annotation monitor (e.g. a slideshow or whiteboard notations) and an "ask the professor" or "raise your hand" feature that allows for students to type comments or questions into a chat-like feature. Lecture capture, which is becoming more common at academic conferences and is familiar to some who use online webinar conferencing systems, allows the lecturer to provide an uninterrupted presentation. A parallel chat stream can allow simultaneous questions and even conversations among audiences. Some faculty become adept at watching the chat stream as it develops, answering questions and noting comments on the side; others address comments and questions at the end. Proponents note that such systems require a dedicated, live IT person at all times to keep working well.
- *Two-way, interactive technologies.* Slick, high definition, and expensive two-way interactive conferencing systems provide close video and audio feeds of students and faculty. While technologies vary from one-face-at-a-time to wall-to-wall, larger than life multiple-video screen presentations, these technologies can show even nuanced expressions. Available technologies that allow two-way interactions for little or no cost include Google Hangouts, Illuminate, Wimba, and Adobe Connect. However, like any complicated broadcast, they can also be difficult to control. Bright colors, audio feedback, and overcomplicated visual presentation can create sensory overload for instructors and students. They are also prone to technological glitches. As noted, live technical assistance is key if such systems are to work correctly and consistently.
- *Backchannels.* In addition to the live event, proponents of synchronous programs suggest providing back-channel opportunities. There are three purposes such backchannels serve:
    - *Technical backup.* A back channel or redundant systems ensures that students have multiple ways to participate should one technology fail. For example, synchronous classes that use videoconferencing services often have a "back door" conference phone line students can call should they lose their internet connections. This allows students to phone in, and at least keep up with the class discussion, should they encounter other technological glitches. Some programs also provide archiving facilities, so students can go back and review classes in those cases in which they experienced technological malfunctions. Schools with synchronous systems note that archiving can be an expensive endeavor, but that it is key to keeping students engaged and minimizing instructor and class frustration when technical complications arise.
    - *Teaching support.* Technology personnel, or even teaching assistants, can monitor back channel chat rooms and answer questions that may be important, but not so important that a student wishes to interrupt the flow of the class. Questions can vary widely, ranging from "What page are we on?" to "I can't hear the audio—is it just me?". These sorts of questions can often most efficiently be managed outside the faculty member's course plans. Teaching assistants can be even more aggressive in the use of technology, posting summary points as the lecture goes along, such as by posing questions, polling students (e.g. "Did everyone

understand that, or do you need the faculty member to repeat that?") collecting and answering questions, and even posing bits of information not covered in the lecture (e.g., statute section numbers the faculty forgot to mention).

- *Corralling the digital native.* As anyone who has taught a live class has learned, students often have multiple windows open on their laptop at any one time. While they may be taking notes in one window, they may be shopping Amazon and checking Facebook at the same time. Many synchronous programs have attention monitoring schemes that allow faculty (or at least technical assistants) to tell who is paying attention, and who is not. That said, with the proliferation of devices, students may be checking their email on their iPhone just off screen. While some decry the lack of focused attention (perhaps rightly), pragmatically, students today are accustomed to splitting their attention across multiple platforms at any one time. Providing backchannels—chat rooms, places for students to pose questions, tidbits from teaching assistants—ensures that their split attention is still focused on the class.

◈ *Access.* To access synchronous online educational opportunities, students must be able to be in a computer-assisted, distraction-free, internet-capable environment at a particular hour on an appointed day. For many students, particularly those who have obligations outside of school or live in areas far from the time zone of the home of instruction, it is difficult to "attend" live sessions. In many parts of the world (and still in many parts of the United States) connectivity is limited, interfering with high quality transmission. It is notable that the largest developing field for online LL.M. programs is in tax law, an area where workplace norms often provide workers ample opportunity to suspend work at an appointed hour for specific training.

  - *Connectivity issues.* Simple, one-way streaming video can be produced in a few ways. The low-tech version (which provides none of the best practices for engagement or interactivity) can sometimes run on simple platforms and dial-up internet services. Any higher definition video, real time streaming video, or two-way synchronous video communication demands higher bandwidth to be functional.

  - *Platforms.* This Blue Paper is not intended as a guide to specific software products or platforms, and they are mentioned here simply to illustrate the potential services available. One should also note that no assumption is being made that those products/platforms mentioned represent the full scope of options. Nevertheless, even with those caveats in mind, it is worth identifying the type of technologies used in order to help paint a picture of distance education in practice:

    - *Individual conferencing systems.* The most familiar of these systems, typically intended for one-on-one contact or small, informal group interactions, include Skype, Google Hangouts, Wimba, Adobe Connect, and Blackboard Illuminate.[10]

    - *Group video conferencing systems.* Systems that allow voice interaction (over internet or phone lines) accompanied by visuals (e.g., PowerPoint presentation or screen capture) include systems like WebEx and GoToMeetings.[11]

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10 See, e,g,, http://www.skype.com/intl/en-us/home, http://www.google.com/+/learnmore/hangouts/, http://www.wimba.com/solutions/higher-education/wimba_classroom_for_higher_education/, http://www.adobe.com/products/adobeconnect.html, http://www.blackboard.com/platforms/collaborate/overview.aspx

11 See e.g., http://www.webex.com/, http://www.gotomeeting.com/fec/

- *Lecture Capture and rich media systems.* Rich media systems provide the ability to simultaneously capture audio, video, and an AV source into one combined stream. Rich media is ideal for capturing a professor's lecture and corresponding computer presentation, such as a presentation slideshow or drawing on an annotation monitor. Some examples include Sonic Foundry's Rich Media, Echo 360, and Panopto.
- *Education specific software.* Many learning management systems provide synchronous and asynchronous tools. Over the past two years systems primarily focused on synchronous systems have been absorbed by larger LMS providers. Proprietary systems like Blackboard, Desire 2 Learn (D2L) and EdTech, and open-source systems like Moodle, provide tools for synchronous interaction. These tools can vary depending on the package purchased by the institution.
- *Specific synchronous classroom systems.* There are several models for achieving the synchronous classroom. Two possibilities are the Virtual Classroom and the Telepresence Room:

  The Virtual Classroom is a space the size of an office and is custom designed with two 54" high-definition plasma screens, a custom table that can accommodate the professor in a seated or standing position, a Smart Technology Sympodium used as an electronic white board and ambiance to make for a familiar teaching environment. The Virtual Classroom connects each student to an online classroom using their computer or laptop equipped with a camera, microphone, broadband and Polycom's Desktop Video Conferencing Client. This solution allows the law school to connect up to 32 students at 32 different endpoints—16 on each screen. The professor sees all 32 students with the name of the student under their video image. Students see and hear whoever is speaking, any content pushed to their computer by the instructor (e.g., notes, slides) or simply the faces of other students, up to 16 classmates at a time.

  The Telepresence Room[12] is a space the size of a medium classroom with two rows of amphitheater seating along "smart" tables. The tables are equipped with individual monitors for each student's use. There is also a custom made table that can accommodate the professor in a seated or standing position, a Smart Technology Sympodium which is used as an electronic white board and a conference table for additional seating. Along the front wall of the room are four screens that connect up to 64 students at 64 different endpoints—16 on each screen. The Telepresence Room uses Polycom's RPX 418 Telepresence System which provides acoustics and HD Video Conferencing providing the user with interactive learning analogous to a live "in person" experience.

  North Carolina Central University School of Law has experimented with both systems, and determined the maximum class sizes for the Virtual and Telepresence Classrooms as noted above, but reports that experiences have shown that the

12 The Telepresence Room at NCCU School of Law was funded by a grant of approximately $2 million from the U.S. Commerce Department's National Telecommunications and Information Administration (NTIA) Broadband Technology Opportunity Program (BTOP). This grant, the first of its kind, made it possible to expand broadband infrastructure and deliver vital legal services throughout the state using Telepresence and High Definition (HD) Video Conferencing.

best interactions occur with 9 images per screen. This results in a total of 19 in the Virtual Classroom and 36 in the Telepresence room.

All of the classes taught in the Virtual Classroom or Telepresence room are recorded using Panopto, a classroom capturing solution. Since all of the students appear on screen with their name under their picture, attendance, tardiness and classroom participation are treated the same as in a traditional class.

- *Pedagogy.* Some prefer the synchronous model of online education for law schools because it mimics the traditional law school classroom. The transition to the online space is made easier for faculty, students, and administrators/accreditors. Because the methods are largely similar to a classroom-based experience, it is relatively easy to count seat time and other traditional measures of educational effectiveness. However, by mimicking classroom based education, some members of the Working Group worry that advances in learning theory and interactive, constructive based education may be diminished or unavailable. Successful synchronous program developers warn that presuming that a synchronous online class is "just like the classroom" without further assessment is a mistaken orientation to the technology. Special attention should be paid to outcomes, student attentiveness, and the technological capacity of all involved to successfully access the educational experience.

Delivery Models: Asynchronous Model

Asynchronous online education is characterized as work that can be done with a great deal of time flexibility; material is not presented "live," but can be accessed at any time of day or night. There are a wide variety of tools that can be employed in asynchronous systems that range from free chat boards to access through free materials portals (e.g., YouTube) to more sophisticated multi-participant venues developed for intricate discussion and knowledge assimilation (e.g., Discussion Boards and Wikis).

Strengths of Asynchronous. Asynchronous education provides one notable strength: it allows students flexibility to access educational resources at times available to them. In this respect, asynchronous online educational models are often more accessible to working professionals, people with life responsibilities beyond their educational pursuits, and individuals in far-flung areas. Unlike high quality synchronous programs that require relatively advanced standards of technology and connectivity, schools can design asynchronous programs for low-connectivity areas and inexpensive computing resources. This further extends the reach of the educational opportunity. Furthermore, asynchronous models often have better learning outcomes for non-native English speakers as it provides greater opportunity to replay materials, assimilate and process the materials, and edit responses.

It is important to note that asynchronous programs are not passive programs. Nor are they self-paced programs. Most schools with developed asynchronous programs report high interactivity and often very short deadlines for activities and assignments. While students may be able to do the work at the time convenient for them given their employment and life schedule and time zone, often work must be completed in relatively quickly. A 24-hour deadline for a paper, post, or response is not uncommon.

Considerations of Asynchronous. Synchronous online education plays on old methods—classroom presentations by faculty members—and therefore holds known challenges: some faculty provides a good classroom experience and some do not. Similarly, asynchronous online education can vary widely. The design of an asynchronous program is critical to a successful program; poorly designed and executed asynchronous classes can be just as dreadful as a poorly taught lecture class. As a result, careful attention to design and detail is critical from the outset and must be maintained diligently over the execution of

an offering. Finally, because even careful asynchronous education can, if poorly administered, become a passive opportunity, course designers and faculty should pay particular attention to designing interactive opportunities in to each asynchronous class.

- *Cost of platform and instruction.* Because of the variety of tools available to asynchronous course developers, the cost of actual technology can vary. Some law schools have used existing portals (e.g., West's TWEN, and LexisNexis' streamed Blackboard online classroom) to develop and deliver online courses for virtually no additional technological expense to the institution. However, while asynchronous online education may not require the expense of studio space and streaming video services, best practices suggest that online classes be carefully developed, crafted and managed. Whereas in a synchronous environment the technology carries the faculty's courses and the faculty absorbs the cost of course development as part of their regular teaching obligations, in the asynchronous environment the developmental elements of the course are created independent of the teaching activity. Thus, most asynchronous classes are actually developed and priced in two distinct stages: the course development cost (the pedagogy, materials, assignments and grading mechanism created and collected into a "course") and the teaching cost (wherein a faculty member delivers and supervises that "class"). Developing and maintaining courses with relevant materials and appropriate assignments and discussions can be accomplished by individual faculty members, or by course developers or other employees who work with appropriate content supervision.
    - *Staffing teams.* Most residential courses are "designed" by a single professor.[13] That professor sifts material, determines the order of presentation, develops a syllabus, and delivers the course as a class. In online classes, a team approach is necessary. As noted in the section on synchronous programs, at minimum practitioners suggest a live class always be accompanied by technical support. Asynchronous offerings, which are typically highly designed as courses before they are delivered as classes, typically require three types of expertise:
        - *The content expert*. Almost always the faculty member, the content expert is the person who identifies the important information students must learn, and the skills they must acquire to successfully accomplish the educational goals of the course.
        - *The instructional design expert.* A new professional in educational circles, instructional designers (also known as educational technologists) are specialists in the design and delivery of educational experiences. Focusing both on appropriate pedagogical design of learning goals and outcome-based assessments, and on the design of individual elements of online teaching, instructional designers make sure that the asynchronous environment provides all the tools and interactive experiences students need to accomplish the goals set by the content expert. In addition, instructional designers are often trained to design materials for ADA compliance and accessibility, and may also be able to assist schools with FERPA compliance for grade and record protection and management.

13 Note the distinction here between a "course," a general course, and a "class," the individual session that is delivered to students. For example at most law schools include a Contracts course in their catalog, which is described by a short and generic course description. In practice, Contract is offered in multiple sections, or "classes," by a variety of faculty members.

- *Technology support.* As with synchronous settings, both instructors and students are using a multiplicity of tools that can all suffer disruptions. In the asynchronous class, where students may be accessing their class in the middle of the work day or the middle of the night, providing technological support as needed is important. Several commercial services provide 24/7 online and phone support for online asynchronous classes, and some schools with dedicated distance learning facilities and expertise, such as Boston University's Office of Distance Education. Schools working with asynchronous programs report that using such a service, that can address technological bugs whenever students or faculty encounter them, is an indispensable part of conducing a successful program.

- *Technology.* As noted above, there is a wide variety of individual tools that can be employed to embody and deliver the course. Some schools use free online resources or the systems ancillary to other products (e.g., WestLaw's TWEN system); most use some form of Learning Management System (LMS) as a contained classroom for their students. Within online classrooms you find a variety of specific tools described later in this document. Whether using a proprietary LMS, a managed open-source solution, or other technologies, the bricks-and-mortar costs can be minimal: a standard laptop or PC, coupled with standard browsers and other downloads and plugins, is typically sufficient for both faculty and student. Backup technology (particularly to maintain links) is necessary, but can be provided by a variety of service companies, and need not be onsite. Students similarly need a computer, but online asynchronous programs can be developed for low connectivity users so access to high speed internet connections or universal (24/7) access may not be necessary. A few key systems vital to best practices are not available in free or add-on programs. Of particular note, developed learning management systems provide robust gradebook options, which allow faculty to provide feedback on individual assignments, the use of rubrics, and other specific feedback tools that enhance student achievement and success.

- *Access.* Asynchronous online education provides the distinct benefit of allowing students to access educational resources at any time of day or night. Because of this flexibility, students who have other obligations, live in remote areas, or who travel, can access education as appropriate. The asynchronous environment also allows students with particular learning modalities or accommodations better access than some forms of live class: written transcripts and other support capacities can be made available for students with disabilities; second language students can use additional time to review material for unknown or technical vocabulary. Schools with developed programs report a few considerations that schools exploring asynchronous programs should consider:

  - *Server overload.* While asynchronous programs anticipate students will access material at different times, sometimes many students will attempt to access material at a single time and put a significant load on the server where that information is stored. When this happens, students may not be able to access the information or materials at all while the system manages the inquiries. Schools may wish to explore ways in which information can be accessed efficiently, perhaps by using third party storage systems (e.g., private YouTube channels) instead of limited institutional server space.

  - *System requirements across multiple devices.* With so many different mobile devices on the market today (laptop computers, tablets, cell phones, etc.) students may be attempting to access online material in a form their device does not support. For example, Apple mobile products (iPad, iPhone, etc.) do not support Flash, a fairly common animation software. Similarly, many students working in an asynchronous environment will want to access information on their mobile phones. While some proprietary

learning management systems have created specific mobile-compatible features, others have not. This may involve separating audio and video feeds, reducing or limiting graphics (or putting mobile-recognizing filters that cut out graphics when an LMS is accessed by a mobile site) and other technological considerations.

- *Pedagogy.* While synchronous education often mimics traditional classroom-based education, good asynchronous education must actively pursue completely different pedagogical modes, particularly those that foster and demand interactivity. Goals-based, assessable and interactive assignments are vital to prevent asynchronous classes from becoming passive correspondence courses. Interactivity, often in short windows, also supplants the sense of isolation which the lack of a live interactive portal can sometimes create. Interestingly, for some students, interactive asynchronous classrooms can be more successful than synchronous ones. For example, whereas verbally quick students often do better in synchronous settings, in an asynchronous environment, students who are more contemplative often produce higher quality work. And, because time is effectively unlimited (i.e., there is not a single 45 or 90 minute live class, but everyone working on their own in their own time zones), all class members may—and are expected to—participate in discussions and interactive events. As some researchers say, "there's no back of the class"—no one student can skip class, fail to interact, or sit in a discussion and let classmates carry the day. As a result, pedagogical methods must anticipate full participation and structure assignments for both faculty and students that allow for thoughtful and through participation and assessment.

  In an asynchronous class, faculty are faced not only with all their students, but with the variety of students skills and personalities. Where in a live class typically the most outgoing and verbal students are well known by the professor, in an asynchronous classroom all voices are heard. This has both positive and challenging aspects. In the positive, faculty hear from students who are typically reticent to speak in a live class setting. Often this favors thoughtful, thorough, and shy students who use the seeming anonymity of written responses, and the time for careful contemplation, to generate excellent contributions. On the other hand, weaker students—who often can sit largely anonymously through live classes, and, in the traditional law school class produce poor and anonymous final exams, are suddenly exposed. Faculty teaching asynchronous classes for the first time often express surprise at the range of students and are dismayed at the weaker students' submissions. It is worth noting that there is often little difference in the overall quality of the students enrolled, but that the asynchronous environment can expose weaknesses and strengths in more specific detail that most live, time-limited classes. To the positive, however, thorough and thoughtful instructors will relish the opportunity to identify weaker students and work with them to shore up understanding and skills.

Hybrid systems. While this Blue Paper identifies the two opposing types of online education—synchronous and asynchronous—in truth, many programs adopt an approach that uses elements of each. Many largely synchronous programs also include discussion forums or other asynchronous assignments; many largely asynchronous programs will hold live chats to help students work through information or share projects. We separate the methods in this Blue Paper to more thoroughly explain and explore them for law schools just entering the fray, but we understand that increasingly hybrid programs are the norm.

Subject Matter and Degrees

The ABA currently limits the number of credits a student may take in an online course: students may take no online credits during their first year, and only one 4-credit during any term, for a total of 12 credits, during the remainder of their academic career. As a result, there are currently no online accredited JD degrees.

A few non-accredited online JD programs do exist. Most notably, Concord Law School offers a non-ABA accredited online JD degree. Unlike many states, California allows students from unaccredited law schools to sit for the bar exam, and many Concord graduates currently hold licenses and practice in California.[14]

A few schools have begun experimenting with single online JD-credit courses. To offer even such a limited program, the law school must first specially approve the course under the school's typical curriculum approval process. (See Standard 306). In 2012, the Working Group developed a model policy for law schools contemplating developing DL courses. A copy of that model policy is included as Appendix D to this Blue Paper. Schools offering JD-credit online courses and programs for JD credentials are included in Appendix B of this document.

Non-ABA degree programs abound. These programs fall into three categories:

> *LLMs.* While the American Bar Association does require law schools to demonstrate that LLM programs will not detract from their core JD offerings, LLM programs are not directly accredited by the ABA. Instead, regional accreditors are responsible for reviewing and accrediting post-JD degrees. Several online LLM programs exist, some in fully online versions and some as low-residential programs with online enhancements. So far, the majority of these are tax specialization degrees, which evolved early. Members of the Working Group speculate that tax law, which is highly content-based, job-training specific, and appropriate in an industry which values and requires advanced and ongoing training, was a logical starting ground for such programs. A myriad of online LLMs in other areas have emerged in the last few years.[15]
>
> *Masters/non-JD graduate degrees.* Several law schools have recently launched law and policy masters degrees in specialized fields for non-JD students. Masters in Elder Law, Educational Law and Employment Law at Nova Southeastern University's Shepard Broad Law Center, in Mental Health Law at New York Law School, and in Environmental Law and Policy at Vermont Law School provide non-lawyers with opportunities to master enough legal and policy content to be thoughtful advisors or informed administrators in important fields. Like the LLM, these programs are not accredited by the ABA, but by regional

14 Students at unaccredited law schools pass take the "First Year Bar Examination" after their first year of study to later qualify to take the California bar. See http://admissions.calbar.ca.gov/Education/LegalEducation/LawSchools.aspx#unaccredited. The past president of the California Bar, Howard B. Miller, acknowledged the importance nonaccredited schools in California legal education, and endorsed removing the ABA's "vestigial obstacles" to allow online legal education. See http://www.calbarjournal.com/August2010/Opinion/FromthePresident.aspx.

15 See, for example, programs in International Tax and Financial Services at Thomas Jefferson School of Law, Entertainment Law at Southwestern School of Law, Real Estate Law at New York Law School, Environmental Law at Vermont Law School, Global Food Law at Michigan State School of Law, International Taxation, and International Business Law at Boston University School of Law (which includes a high residency requirement).

accreditors.[16] In a variation on a theme, a few schools offer nonaccredited, executive JD programs. These programs, like the one offered by Concord Law School, are intended for advanced professionals who do not intend to practice, but who seek legal training to enhance their professional capacity.

Certificate/non-degree programs/Continuing Education/Corporate Education. Several schools are in the process of developing limited course and limited credit programs in specific areas. These programs receive no accreditation, but can provide limited expertise in an area of importance. These programs expand the scope of traditional education, and reach beyond "students" wide range of participants. Judges, prosecutors, professional organizations, and non-lawyer professionals (e.g., CPAs) seek legal training and advancement in specific areas. Foreign governments also seek this training for their programs, focusing on intersection of US and international law, examples from US legal regimes, or skill training.

Blended programs. Some schools have begun experimenting with programs that blend traditional JD programs or classes with nontraditional graduate programs or degrees. These may include a 2-year JD program, coupled with additional degree requirements offered through distance learning coursework.

16 These "middle degrees," have been analogized to growing market for non-MD degrees medical services degrees (e.g., Physicians Assistants). Several states, including Washington state, have considered licensure requirements for paralegal and nonlawyer legal speciation lists. To date, no formal licensure exam has been authorized in a state, although some states do register paralegals. Washington State offers a license for paralegals to conduct more complex "lawyerly" tasks in civil matters. Washington Court News, Supreme Court Adopts Rule Authorizing Non-Lawyers to Assist in Certain Civil Legal Matters (June 15, 2012), http://www.courts.wa.gov/newsinfo/?fa=newsinfo.pressdetail&newsid=2136.

Goal 2: Challenges, Solutions and Best Practices

The field of distance education in law is still young so it is hard to make authoritative pronouncements around best practices. Nonetheless, the experience of our working group points toward a number of common challenges, suggests good solutions, and indicates some responses and approaches that are indeed best avoided. The Working Group has already developed a model policy for law schools adopting forms of distance learning practices in their curriculum. That policy, included in this document as Appendix D, incorporates many of the best practice possibilities. This section will explore five distinct domains of challenge: i) educational theory and technological resources; ii) technology training and management; iii) technology training and management; iv) intellectual property and v) business and financial models.

Education Theory, Technology Resources and Teaching Techniques

Online education provides a new lens through which to explore learning theory and pedagogy. Most online learning modalities presume a "constructivist" approach instead of traditional learning modalities.[17] Many web 2.0 tools lead to learning that creates an active process of constructing knowledge rather than acquiring it and where instruction supports construction rather than simply communicating knowledge.[18] Some authors go so far as to suggest that modern online tools go behind simply allowing students to construct knowledge, but actually provide "education" by allowing students access to increasingly abundant and evolving knowledge.[19] Siemens calls this new learning "connectivism": learning is a process of connecting specialized nodes or information sources, nurturing and maintaining connections to evaluate and acquire new knowledge, and developing skills to "chose what to learn and the meaning of incoming information as seen through the lens of shifting reality." [20]

These new trends are particularly challenging for law schools, which largely still operate on the knowledge-acquisition paradigm. The very tools that provide the ability for constructivist or connectivist online classrooms seem unwieldy or cumbersome in the hands of traditional education. Any examination of online tools should understand the context in which they may be best applied, and that this context may differ from the knowledge acquisition models law schools traditionally prefer.

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17 R. Mason & F. Rennie, E-Learning and Social Networking Handbook: Resources for Higher Education (2008)

18 See also TM. Duffy & DJ Cunningham, *Constructivism: Implications for the design and delivery of Instruction*, in Handbook of Research for Educational Communications and Technology 1236 (D.H. Jonassen, 1996) (arguing that students should be empowered to learn rather than passively educated).

19 Mason and Rennie, id.

20 George Siemens, Connectivism: A Learning Theory for the Digital Age, elearnspace.org (December 12, 2004).

The following description of various online tools and discussions of best practices is intended as an introductory examination for those just exploring distance learning opportunities, as well as the Working Group's sense of recommended practices in law school context.

Webcasts. The primary method for synchronous online education, a live faculty member or speaker provides a lecture or guided discussion through a web-based broadcast. The webcast is then presented in a way that can be watched on at least one other device at a distance. Webcasts can be developed for three specific audiences:

> *Site-to-site.* Some webcasts, particularly dedicated web conferencing systems, link two or more specific sites through an internet connection.
>
> *Closed broadcast.* Webcasts broadly available, but which can be accessed only by someone who has a password or other method of entry.
>
> *Open broadcast.* Public webcasts posted on sites that can be visited by anyone, whether enrolled in the course or not.

Further distinction can be made as to the interactivity of webcasts:

> *Visual 2-way vs. visual 1-way.* In some systems, faculty can see students and students can see faculty. In other systems, students can see faculty, but faculty cannot see students. One-way visual technologically easier to maintain and stream.
>
> *Audio 2-way vs. visual 1-way.* In its simplest form, students can hear a professor and not "talk back" via an audio channel. In other systems, students can have audio access to a faculty member, and engage in conversation. Note that visual and audio channels need not be linked: in some cases the visual feed will be a one-way feed from the faculty member, but the audio a two-way channel, so students can ask questions. Mixing these tools, as appropriate for the institution's particular needs and technical capabilities, can provide both the delivery of information and the possibility of interactive exchange.

Recommended practice: Webcasts

Synchronous webcasts should, at a minimum, be sufficiently well designed and developed that the face and voice of speakers are clear and that any visuals used in a simultaneous webcast are clear and easy to see and access. In this context, the quality currently provided by Skype is probably insufficient for anything other than the occasional use in exigent circumstances. Platforms that provide strong bandwidth/connectivity (e.g., Cicso products, Fuse, etc.) can be expensive and today are not necessarily compatible with other systems. Webcasts with interactive features (i.e., the ability of students to interact, either via video or other means) should ensure that the timeliness of transmission to-and-fro is sufficient for interactive elements to occur in relative true-time. (i.e., minimal delay). Most synchronous practitioners note that interactivity allows faculty to see participants as well as for participants to see the faculty member -- and therefore enough control over the incoming student feeds to allow audio sharing across the entire class. Faculty also report the ability to "see eyeballs" (see faces of participants, either all participants during a synchronous session or at least the face of a person asking a question) enhances the instructor's ability to deliver a dynamic synchronous

class. While not yet defined as a best practice, we recommend schools with synchronous classes seek some means to achieve the "eyeball view" of the class.

Synchronous classrooms can and often do go beyond simply the 1- or 2-way video stream. Rich media, where a live capture of the professor plus a simultaneous display of slides or other material, can enhance the live experience. In addition, synchronous classes often have a third "conversation stream" flowing during the course: a Twitter feed or other live backchannel conversation can occur while the faculty conducts the live class. As one professor has noted, "Students these days have split attention spans. If they're going to be looking at several screens at the same time, I want all of those screens to be about my class." In the synchronous space, providing more than one live information stream can actually enhance attention among students accustomed to multitasking.

Regardless of the platform, the law school must take responsibility for ensuring that all participants have sufficient software, bridging systems, and connectivity options to participate in synchronous environments. Average student consumers should not be responsible for ensuring their own connectivity, given the complexity of bridging systems, software plugins, and so forth. At a minimum, schools should provide students with technological specifications, software or appropriate plugins, and a testing phase before the class begins to ensure the student can access the synchronous platform. As noted elsewhere, in-person support during class should also be provided.

While web-based consumer products like Skype and Google Hangouts may be insufficient platforms for a synchronous class, they can serve as good student-to-student interactive platforms, as one-on-one and office hour tools, or for other short term or limited audience interactions. One concern of using these systems, however, is the challenge of tracking interactivity over these platforms. The ABA requires minimum interactivity time for certain courses, which can be easily tracked by an institution's primary delivery source. Once a class begins mixing multiple tools, tracking interactivity time becomes more challenging.

Video feeds/video links. Unlike live webcasts, video feeds/links allow students to access a pre-recorded video at any time. Because the video is "canned," it is not possible to use an interactive link within prerecorded video, but interactive elements (see Discussion Threads, below) can be used in conjunction with static video presentations for analysis and discussion.

Recommended practices: Video feeds/video link

Students use video feeds differently than they use live webcasts in two important ways. First, they regard static video presentations as more authoritative and more akin to a text book than a live lecture or in-person discussion. Second, students will have the opportunity to review videos multiple times, thereby providing them the opportunity to re-watch the presentation several times. Given that students have a more concentrated viewing experience, and the opportunity to replay specific segments, the information presented in a static video must be presented clearly, carefully, and with a greater degree of accuracy than might be demanded by a live webcast. Many course developers believe that this means videos should be carefully prescribed, with scripts developed for presentation before shooting. Presenters must speak precisely and carefully. Many schools and experts who

work with static video also suggest that video feeds should be "chunked" or broken into 5- to 7-minute segments, each of which is easily identified and repeatable. This segmentation of videos and material allows students to easily access and review specific content on demand. To accommodate students with a variety of needs, best practices suggest that any video posted for student use be accompanied by a written transcript.

As with live webcasts, good video feeds and video links are produced with sufficient quality and clarity that speakers are both easily seen and easily heard. High quality video typically requires professional equipment, professional engineers and editors. Good quality video can require high bandwidth to deliver to individual users. Some practitioners recommend using a source outside the school's hosting capacity, like a private channel on YouTube, to host video links for such material. As a result, best practices suggest that a school should develop both a method for dealing with the storage and protection of such files as well as a means of ensuring that participants have sufficient bandwidth to download and view videos.

Schools using video links and materials should take careful note of two technical issues. First, most video will need some level of post-production work and review to meet adequate quality standards. Ensuring both time and staff are available to edit and produce video is key to ensuring quality material. Second, to meet accessibility standards, post production processes should include the production of a written transcript of all asynchronous video and audio material. Transcripts should posted alongside all video links for students who may have special needs as well as for students to review the material as necessary.

Podcasts. Podcasts are audio-only prerecorded sessions of one or more speakers. Podcasts have been used by radio journalists for years and are easily recorded on most handheld devices and mobile telephones.

Recommended practice: Podcasts

Audio files should be clear and easy to hear. Many schools imbed podcasts within their courses, playable as streaming audio from within the learning management system. Where this is the case, providing a separate file in a downloadable format will allow students to download the podcast to separate devices (e.g., iPods, etc.) and play it in other environments. As with static videos, students will often replay portions of the audio file several times to master particular content and ideas, so material presented should be carefully worded and of sufficient delivery and quality that they can be heard with clarity on appropriate devices.

As with pre-recorded videos, podcasts are best developed in small "chunks" of 5-7 minutes to help students access information in digestible and reviewable pieces. Many students review podcasts while commuting, and short, searchable pieces are easier to identify, find and review than longer programs.

As with pre-recorded videos, all podcasts posted as part of an online learning experience should be accompanied by a transcript to accommodate student needs and learning styles.

Live Dialog (aka "Chats"). A live chat can either be conducted in video, audio, or text-only formats. Chats are characterized as a platform in which two or more students interact with the professor or with each other, thereby expanding beyond the one-to-one interaction of an individual tutoring session. An open chat runs something like a conference call, where all participants have equal access to speak.

An open dialog/open chat can work well for small groups: either one member (the professor) leads the audio stream and allowing others to speak at specific intervals, or all members of the group discuss specific ideas in any format the group agrees is sensible. The challenge with open chats is the propensity for many voices to talk over one another, mudding the audio channel.

- *A moderated chat* allows one person to have primary audio control, and additional participants to participate by indicating their interest in speaking ("raise a hand" protocols that signal a moderator to turn on a particular participants channel) or allow textual comments to be submitted in side channels (e.g., a text box on a web page that accompanies the call where students post questions that are then responded to by the moderator or professor).
    - *Video.* Video chats, not unlike live video webcasts, allow students and professors to see one another, and, if the medium allows, students to see each other. Video chats can be run with open audio channels in which everyone who is visible can also speak and be heard by all participants or like a moderated chat with turn-taking access to audio. Some commercial ventures, such as Google Hangouts, allow participants to toggle between participants as speakers.
    - *Audio.* Audio chats can be run either as audio-only exercises akin to a conference call or as audio feed over a manipulated video feed. For example, some audio chats run through a computer modulated space where the faculty can present static or manipulated PowerPoint or white board exercises. As students ask questions, the professor can type out examples, manipulate data, or demonstrate materials.
- *Text.* Interestingly, many students prefer text-only chat forums. Indeed, they remain popular not only because the technologies are well developed and the band width requirements are relatively low, but because students appreciate the anonymity that text-based chat can allow. Shy students, in particular, can thrive in the relative anonymity of text-only forums.
- *Voice-to-text.* Technologies that render a spoken word to text, or text to spoken words, is rapidly evolving. Most famously, the iPhone's Siri can take spoken directions and read back written emails. While a few programs are currently available and used to enhance accessibility we feel this technology still must mature a bit before it can be recommended as a teaching tool. At the rate of current technological advancement, voice-to-text and text-to-voice technology will likely be available and an important teaching tool within the next two years.

Recommended practice: Dialogs and chats

Dialogs in any forum should provide two elements: First, the medium should allow more than one student to interact with one professor. Good chats allow students to not only interact with a faculty member, but to also see or hear what other students are asking and how conversations within the course of the chat develop. Thus, a chat may allow a whole class to participate in the experience or may be limited to subgroups. Second, chats that take place within the context of a class should be

recorded or archived, so faculty and students may go back and view the material presented in that format. This allows not only the live and spontaneous exchange of information, but the opportunity to review that information later for better comprehension and retention.

Unlike webcasts, static video feeds, and podcasts, chats do not demand a high level quality production. So long as participants can adequately see, hear, and access the appropriate participants, professional quality can be diminished in favor of informal interactivity. Several free or inexpensive services currently used for teleconferencing (e.g., Google Hangouts, GotoMeetings, etc.) as well as elements imbedded within most learning management systems can provide adequate tools, provided all participants have sufficient bandwidth to participate. Appropriate connectivity, especially in interactive discussions, is important: chats are discussions, and if slow bandwidth prevents participants from interacting in a way that facilitates easy exchange, the underlying pedagogical benefit of a chat is lost. It should be noted that many, but not all, commercial systems do not allow for recording of sessions (or, when they do, some processing is required to make those recorded sessions available for review).

Online discussion forums. Made popular at the end of many news articles and YouTube videos, the concept of the online discussion forums is familiar to many internet users. Nevertheless, the employment of the discussion forum in online learning is significantly different than its popular, let-me-get-my-say counterpart. Less a comment feature, online chats provide opportunities for students to explore material and provide graded responses. Online discussions appear in two primary forms:

- *Broad discussions.* Broad discussions give students an opportunity to explore material, ask questions, posit opinions, and consider concepts provided in class. Often a supplement to synchronous webcasts or asynchronous video posts, broad discussions give students an opportunity to delve more deeply into concepts presented, to present questions to classmates, and to provide group feedback on learning concepts and ideas. Broad discussions are typically graded on participation, with few specific goals.
- *Directed discussions.* In directed discussions, students are given a particular assignment, and asked to develop a concept over the course of interactive conversations with faculty and students. The discussions that follow are intended to either expand or critique the initial entry, and can be used to further develop or argue an initial posting student's point. Directed discussions are typically assessed based on specific criteria for both the initial poster and for the discussants. As noted elsewhere, the use of rubrics that specifically identify both the requirements and criteria for an initial post, and for subsequent posts, provide both clear guidelines for student submissions and clear and manageable grading criteria for faculty reviewing discussion posts.
- *Chats.* Chats, typically conducted synchronously or in close time, are largely informal written discussions among two or more people. Many faculty use chats for questions, clarifications, or as a method of interaction available for "office hours." Chats typically do not have a specific learning goal, but are used as a supplemental conversational tool.

Recommended practice: Discussion Forums

To use discussion boards effectively, the discussion board should be related clearly to course objectives, and targeted to those objectives. Setting formative or graded assessments that require students to post specific information, read each other's posts and comment in particular manners, or provide other feedback, will encourage useful and productive discussion board use. The use of legal citation, including appropriate footnoting and blue book form, should be part of any substantive discussion. Discussion posts should be held to the plagiarism and honor code requirement of any other paper or written assignment that a law student might submit in a law school class.

ABA standards on interactivity, and in particular proposed Standard 311 on Distance Learning, allow online discussion times to be counted toward interactive class time. Therefore arranging the capacity to track the amount of time students spend on discussion is an important element of any discussion board set up. Most Learning Management Systems provide time and tracking capabilities.

Blogs (aka "Social Space"). Blogs are online web page, typically developed in the form of an online journal. Individuals can share news, events, knowledge or ideas, and disseminate those ideas widely to others. Readers can provide feedback through a comment feature, to which the original author can respond. In educational settings, blogs may be used in several ways. Two of the most productive include:

- *Information dissemination* (e.g., faculty lectures) followed by student comments/questions and feedback.
- *Journals, student reflections with faculty response.* Many schools use the blog feature as a journal-keeping exercise during externships, where faculty may respond in a closed or open setting. Students may also keep blogs on particular subjects (each student follows on case or event, for example) subject to comments by others.
- *"Vlogging".* Like regular written blogs, students can submit video blogs (often simply video commentaries, but sometimes more substantively produced video excerpts). Faculty and students may then submit written comments on the student's video.

Recommended practice: Blogs

To use blogs effectively, the blog should be related clearly to course objectives, and targeted to those objectives. Setting formative or graded assessments that require students to post specific information, read each other's posts and comment in particular manners, or provide other feedback, will encourage useful and productive blog use.

Wikis. Wikis are open, group written documents in which two or more people can create, edit and develop materials. Wikis typically provide not only a group "writing space," but also a data history so each keystroke change can be attributed to each participant. Wikis can be used as group project space for class groups, or as a moderated compendium space for information gathering and dissemination.

Recommended practice: Wikis

In cases where the wiki is used as a group project space, students should have clear instructions on how final products will be evaluated, and made aware to the extent participant data is collected, and how that data will be evaluated (if at all). In cases where wikis are used as moderated information spaces, submission guidelines, and the principles by which submissions will be evaluated and included or excised from the space, clearly delineated before submissions are accepted. Many instructors find wikis work best when students are given at least two separate spaces in which to work: the wiki, and a separate chat board, discussion space, or other spot. As with the wiki itself, the extent to which these moderated spaces will be evaluated should be clear to students at the outset.

As most wikis have traceable histories (an instructor or administrator can see who submitted information or made edits, and when those submissions or edits occurred), students should be informed the degree to which their group work can be tracked, and how, if at all, information from their working experience will be used in their grades.

Faculty who construct wiki exercises should be aware of IP implications. If a group of students constructs new work, the nature and ownership of that work should be identified at the outset.

Online quizzes. There are a variety of online quiz tools that allow faculty to present anything from a short multiple-choice quiz to a highly complex assessment, depending on the nature of the Learning Management System.

Quizzes can be used as one-shot assessments, time-limited tests, or open ended opportunities. Students may be allowed multiple attempts, and quizzes can block access to other portions of a course until a certain success rate is achieved. Feedback on individual answers can be given immediately can be withheld until the end of quiz, or can be released at a later set date in the class. Faculty currently use online quizzes for everything from formative assessment tools to self-assessment opportunities.

Recommended practice: Quizzes

The use of quiz, and the deployment of a quiz, should be part of the overall design of a course. While quizzes can enhance the learning environment, they are not tools to be deployed as the only assessment opportunity for students. Quizzes, whatever their nature, should be used as supplements to, and not substitutes for, interactive discussions and opportunities.

Assessment of student performance. The online learning paradigm, which emphasizes clear learning goals, interactive feedback and outcomes-based assessment, provides a new paradigm for legal instruction. Traditionally many law schools provided doctrinal classes with little or no assignment work or feedback during the semester and that concludes with a single written exam and a grade at the end of the semester.

In contrast, online learning almost always involves a series of assignments, each of which offers high levels of interactivity between faculty and students as well as among students themselves. This interactivity provides multiple opportunities for faculty to offer feedback, grades, and coaching to improve student performance. It also, however, creates new challenges, particularly for those accustomed to a limited number of graded events, limited feedback opportunities and/or responsibilities, and a more subjective or intuitive grading scheme.

Recommended practices: Student Assessment

In the online learning space, learning objectives are specifically and concretely identified. Those learning objectives are mirrored and measured in assignments and feedback on one's progress toward those goals is routinely given. Where possible, multiple opportunities to develop skills and deepen knowledge, coupled with increased feedback and faculty interaction, provide students with new learning tools and methods Faculty availability (or, as appropriate, teaching assistants or other personnel) remains key to providing appropriate and timely assessment.

Rubrics. Each assignment or assessment opportunity should provide a specific rubric that states: (a) the learning objective of the assignments, (b) the knowledge or skill the assignment is designed for students to demonstrate or develop, and (c) the specific criteria by which each student will be evaluated. These rubrics should be provided to students before they begin work on an assignment and then be used as the primary grading criteria.

It is worth noting that learning objectives, goal-based assessment and rubric-bound grading are philosophically distinct from the anonymous curve-based grading traditionally deployed in law schools. The notion that students should be "shown the goal posts" and be rewarded if they hit targets regardless of the accomplishments of their peers stands in stark contrast to the curve-based sorting function law schools typically deploy and where students are ranked against one another and in which achievement is a subjective and relative measure. This is not to say that curves cannot be used in online courses, but that they must be carefully designed to harmonize both with the assessable learning outcomes increasingly required by accreditors and clearly explained so students can manage expectations, identify appropriate goals and accurately measure achievement.

Feedback. Students should be provided timely feedback on all assignments. Grades and feedback ought to be provided in sufficient time such that students may incorporate lessons learned before attempting the next assignment or activity. Using rubrics, faculty should indicate both student performance and opportunities for improvement. Wherever possible, narrative evaluation, in addition to numeric scoring, will provide students with the added information and incentive needed to improve performance. Because students perform work at a distance, they have little opportunity to meet with faculty face-to-face, gain a sense of their work performance, or ascertain the faculty's general impression of the assignment's importance to real-world skill building. To moderate for that displacement, faculty should provide extra attention to assessment and feedback.

Peer grading. To provide significant feedback on student work in light of the volume many online assignments can generate, many professors use peer grading and feedback tools to both build assessment, and increase overall group learning and skills. Without providing detailed recommendations here, peer grading is both acceptable and recognized as highly beneficial, provided it is designed and weighted so that the overall authority – the faculty member – both has final say and a weighted evaluative role. Many learning management systems provide tools for intricate weighting and grading devices wherein peer and faculty assessment can be combined. Faculty can also leverage other tools (e.g., comment features within discussions) to allow peers to provide corrective feedback before final submissions. Peer ranking (e.g., students vote for the "best" assignment) can not only provide grading criteria, but can provide faculty with valuable feedback on overall student understandings of best concepts and desirable skill development.

Attendance as assessment. In some classes, particularly synchronous classes, assessment tools may be used as proxies for attendance and attention (e.g., short quizzes along the way to ensure students are attentive and understanding the material). The use of modified "clicker" or poll technology, quizzes, and other tools can provide immediate and interactive attention-testing moments that demonstrate the group understanding of concepts or material. In these instances, the purposes of such assessments should be made clear to students, and feedback mechanisms adjusted to meet this goal.

Gradebook/dashboard. Most learning management systems provide a gradebook feature that is available to students at all times. This "dashboard" progress report provides students immediate information on their progress. Depending on design, students can see not only their current grade and feedback (typically provided in spaces directly within the grade book) but a sense of their progress on individual learning goals. Because students are learning remotely, constant access to their progress and grades is an important element not for ongoing student achievement, but simply for ongoing student engagement.

Assessment of course effectiveness. Student tracking, through grade book functions as well as more broadly in assignments, online classrooms, and other forums, allows for a variety of other benefits, including retention and program assessment. Unlike traditional students, who have both a place to go (the classroom) and a series of reinforcing lifestyle choices (moving to a new city, peers and social networks also engaged in the same school) online students are often isolated, without the physical routine that reinforces class work and with limited in-person access to supportive student networks. Closely tracking student achievement, including attendance, performance, and nuanced differences in performance in response to feedback, can give significant insight into a student's progress, and, in turn, give faculty and administrators tools to retain students.

Similarly, careful tracking of overall student interactivity and progress will provide faculty and administrators valuable information on the success of the course. Thoughtful feedback can be amalgamated and studied for trends. For example, if students are routinely told over the course of a class to "improve legal research and citation," and this comment persists from the second week to the last week of class, faculty and administrators can identify a skill need. Similarly, administrators can study over several course offerings which students (and what percentage of overall students) master particular course goals. Adjustment to curriculum, pedagogy, or even orientation and selection criteria, may be considered as a result of data. Tracking data, and demonstrating the use of such information, is of increased importance to a variety of accreditors.

Recommended practice: Course Assessment

Rigorous student surveys should be coupled with data collected from the class (attendance, participation, assignments, qualitative and quantitative feedback analysis) to assess whether learning objectives have been reasonable attempted and appropriately met. Each iteration of a class should be studied for its effectiveness and subsequent offerings adjusted appropriately.

Technology Training and Management

The ABA's Standard 306 requires that all faculty and students who participate in online classes receive sufficient training and technical support. We deem a school's minimum obligation to fulfill this requirement must include the following:

Faculty training. While many faculty members reach the front door of their first classroom without any specific pedagogical or technical teaching training, it is unwise—if not nearly impossible—for faculty to enter the world of online learning without training in a variety of areas. Appropriate training will both enable faculty to be self-sufficient in appropriate areas, and set expectations for best practices in teaching in the distance learning space. Note that some online learning models scale their offerings by placing one supervising instructor (often a highly qualified faculty member) in charge of a number of instructors who in turn deliver different sections of the same course. All involved should be provided training appropriate to their role, including training for supervising faculty, facilitators, teaching assistants, and anyone else in an instructional or support role.

> *Pedagogical training.* Faculty training should include pedagogical training appropriate to the medium of instruction as well as and sufficient technical training to be able to perform teaching duties within the medium of instruction. Pedagogical training should include both the rationale for goals-based education, the mechanisms for appropriate assessment, and the methods employed by tools used in the system. Developing faculty should have a deep understanding of outcomes based education, and sufficient assignment design training to both craft appropriate learning goals based on their context expertise, and to craft assignments that will adequately assess student's ability to master those goals. Teaching faculty should have sufficient training in pedagogy and content to be able to accurately direct student activities and appropriately assess student outcomes.
>
> *Technical training.* Revised rule 1.8 of the Model Rules of Professional Responsibility requires that attorneys must keep abreast of technological changes relevant to the profession.[21] While distance education does not necessarily overlap with technical proficiency in digital drafting, ediscovery, document mining, electronic filing, or other recent technical advances, general familiarity with online access, discussion, etiquette and remote interaction skills directly within the scope of the proposed Model Rule.
>
> Depending on the institution's model, faculty may need different levels of technical training. Faculty should have sufficient training to interact appropriately with students online, and to access each part of their course. Faculty should also have sufficient training so that they can perform all grading and grade book functions without assistance.

21 Model Rules of Professional Conduct, Rule 1.8 Maintaining Competence
[8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject. http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence/comment_on_rule_1_1.html

Recommended practice: Faculty Training

Before participating in any distance learning experience, faculty should receive both pedagogical and technical training. At minimum, faculty should be trained in outcomes-based course design, appropriate feedback and responsiveness for the medium, and develop sufficient technical capacity to operate effectively in the distance learning environment.

Student training. Online classes, whether synchronous or asynchronous, can be very different than a traditional classroom. Student training should include both an orientation toward the technical aspects of class, and clear expectations around interactivity and quality of work. Because students often use technology for a variety of purposes, often many of them highly informal, clear and specific quality guidelines should be articulated as part of initial training.

Pedagogical training. We strongly recommend students have sufficient orientation to the program and the institution's goals and expectations that they can reasonably understand expectations and attempt to meet them. Students should learn the levels of appropriate formality or informality for the program, appreciate the importance of their individual contributions, and be versed in appropriate netiquette (online behavior).

Technical training. Prior to beginning a class, students should have sufficient technical orientation that they possess all the relevant programs, downloads and plug-ins necessary for the class. Students should have an orientation dedicated exclusively to exploring the online space and practice with all key learning components (e.g., video streaming, connectivity, posting, submitting assignments, accessing grade book, etc.). Students should have an opportunity to work with a technical advisor to ensure all aspects of online learning materials are working adequately before the start of class.

Recommended practice: Student training

Students should participate in a targeted orientation program that, at minimum, aquatints them with online learning techniques, technology, and expectations. Students should test all necessary technology, including connectivity and software, prior to the start of any distance learning class.

Support staff training. A variety of different kinds of staff support may be provided in distance learning programs. In some programs, faculty will be asked to fill each role; in other programs, each function will be assigned to a different staff member. While this Blue Paper does not advocate a specific staffing plan, we acknowledge each of these separate tasks. Whoever is performing these tasks—developing faculty, staff members, or others—should have adequate training for the roles they pursue. A fully developed program, using each of these professionals, is notably expensive. Up front investment, however, can provide strong student outcomes and satisfaction, and address issues likely raised by accreditors down the line.

Content expert. The content expert, almost always the faculty member, is the person who identifies the pedagogical goals of the course and provides the appropriate content guidance to develop a satisfactory academic experience. At minimum, this person should be primarily responsible for developing course goals, the appropriate literature, material, re-

sources, and exercises that will provide students with adequate exposure and practice to accomplish course goals, and the appropriate assessments to measure student achievement. Content experts are expected to know the field of instruction, and will almost always be sufficiently credentialed to teach the course upon completion.

Course designer. A course designer (sometimes called "instructional designer") is a partner with the content expert/developing faculty member who ensures that the pedagogical goals of a distance learning course are adequately developed and delivered. To this end, course designers must have sufficient training to understand educational pedagogy, technical course development, statistical analysis, and program development.[22] This technical expert will guide content experts in the development of resources and exercises within the media of instruction (e.g., learning management system). Course designers will have sufficient technical expertise to develop and appropriately incorporate course materials, develop and program exercises, and provide quality control assurance for courses based on institutional policies and procedures. Course designers are responsible for design before live instruction, or, in the case of asynchronously delivered courses, prior to student participation.

Technical support. Technical support should be available to faculty and students throughout the actual running time of a synchronously delivered class and more continuously during an asynchronously delivered class. This support is necessary to deal with both primary delivery and system challenges. In synchronous systems, technical support should be available throughout live sessions to both set up and ensure onetime delivery, monitor delivery throughout the synchronous delivery, and provide troubleshooting should problems arise. To that end, technical support personnel should be adequately trained in all portions of the synchronous system as to be able to both deliver and troubleshoot systems. Technical support should have appropriate authority to be able to modulate systems to ensure interactive delivery with students enrolled in the course. In asynchronous systems, technical support should be well versed in all deployed technologies, and able to provide support to faculty and students on systems challenges and glitches. Technical support should have sufficient authority to fix all technical problems, and available at times when students will need such support (including evenings, weekends, and any time students may reasonably be expected to work on asynchronous programs).

Minimum technical support. All programs should have accessible technical support for both faculty and students during the period of instruction. For synchronous instruction, technical support should be available for a reasonable period prior to the start of class, throughout the live session, and for sufficient period at the end of class to allow for appropriate recording and program shut down. In asynchronous environments, technical assistance should be available to both faculty and students 24/7, through both computer and non-computer based means (e.g., call center).[23]

Student services. Most online students access a distance learning opportunity because they cannot afford the luxury of participating in a residential campus experience: jobs, families, illness, or other factors make

22 Several universities now offer undergraduate and graduate degrees in instructional design, including Florida State University, Boise State University, University of Texas at Austin, Brigham Young University, and University of Georgia. *See also* M. Orey & P. Fortner, *Worldwide List of Graduate Programs in Learning, Design, Technology, Information, or Libraries, in Educational Media and Technology Yearbook* (2012).

23 It is worth noting that year-round, 24/7 support can be an expensive undertaking for startup programs. This function can be outsourced, and need not be live. Chat-based support, or specially delineated "warm" support (a promised response within a three-hour window) can typically suffice, provided the level of service and expectations are carefully set with students at the start of classes.

distance learning the only option for pursuing further education. Because these students have significant life events competing with their attempt to attend school, they must be provided customized student support services.

Advising. Online students should have adequate access to appropriate advisors who can provide course selection and other appropriate academic advising. Distance Learning students have unique needs, including competing priorities and work conflicts, that may impact their capacity to participate in courses. Online resources, and adequate access to advising functions—sometimes outside traditional office hours—are critical to providing online students sufficient academic counseling. Most current online programs identify a strong advising program as the most effective retention tool.

Career Services. At this time, few schools have a fully developed career services program specifically designed for their distance learning students. The schools that have developed such programs report success, but note that delivery is difficult. At this time we do not have a recommendation on what kinds of career planning or other student assistance services should be provided by such program, but do note that it is incumbent on programs to carefully articulate to students what services will and will not be available to distance learning students.

Recommended practices: Student Services

All offices with which students interact (Financial Aid, Business, Registrar, etc.) should provide means of contact and/or alternative hours to accommodate distance learning students. Students with illnesses, emergencies, in need of leave, or other experiences that inhibit capacity to participate should have an office with whom to interact on such matters. All information, resources and forms required of students should be provided in electronic form, and allow for electronic signatures.

Library resources, technical services, and any other services students may require during the course of a class experience must be available in a form and at a time that it can be reasonably employed to meet the needs of the student while in the class (e.g., hours that match course access times, resources available on schedule with student needs, etc.). Similarly, schools must have in place an appropriate method for students to request appropriate accommodations, securely provide necessary medical documentation, and discuss accommodations needs with appropriate and expert personnel.

Institutional Integration and Administration

Many institutions are currently considering the degree to which online offerings should be interchangeable with, or integrated within, traditional residential offerings. In many non-law school programs, schools offer the same classes online and in residential formats, and students may pick the session that best fits their needs. To date, because of the ABA's limitation on online credits, this mixed program has not been proposed at any law school. That said, as integration of both JD and non-JD programs increases, there are several curriculum management decisions to consider.

Instructional integration. Some schools employ their core residential faculty to develop and teach their online courses. These schools feel using core faculty both protects the integrity of the brand, and the quality of the course content. By using largely long term faculty who have vested interest in the institution, and a known teaching reputation, the school may feel the integrity of the program is maintained.

Other schools use almost exclusively adjuncts to develop and teach online courses. Because adjuncts are typically cheaper than residential (particularly tenured) faculty, this decreases overall program costs. However, the fluidity of adjunct teaching pools makes quality control more difficult to manage, and requires additional management and oversight.

Administrative integration. Some schools integrate online offerings into their regular instructional budget, registration systems, business office functions, and other school offerings. Initial set up challenges should not be underestimated: online offerings typically occur at different cycles than residential classes, requiring all business functions within an institution to adopt new terms, billing cycles, financial aid cycles, and student contact protocols. Often policies within existing student handbooks will take on unintended outcomes when applied to online course offerings. Moreover, because students are not typically on campus, their ability to reach appropriate business offices and resolve problems is limited. Careful review of all business systems, and specific plans for student contact and information, should be developed prior to the first online offering.

Some schools have set up parallel business processing units for online programs, akin to a continuing education office with its own registration and billing systems. Schools that choose to set up parallel and independent systems for online programs should pay careful attention to following all Title IV financial aid and billing requirements as well as identifying student registration and privacy concerns. Despite the initial attraction of setting up a self-contained billing system for online programs, when programs increase in size, and the complexity of student billing and financial aid increases as well, programs often find the expense of running parallel systems greater than the benefits.

Student support integration. Distance Learning students have very different needs and support access opportunities than traditional residential students. First, because they are typically not on campus, they do not have the opportunity to resolve issues by visiting various offices and commanding individual attention. Instead, issues are typically resolved over the phone or by email. Second, because distance learning students are typically employed full time while pursing online courses, they are often not able to call appropriate offices to resolve issues during normal business hours. These two facts alone can mean students have less access to support and fewer avenues to resolve academic issues than traditional campus-based students.

In addition, distance learning students often have very different student support needs than campus based students. For example, online students who experience computer difficulties typically need their technology issues addressed immediately—they can't access class, work on assignments, or be "present" when their technology is down. Online students are also often fully employed and many have families and other time consuming responsibilities and priorities beyond their coursework. Family emergencies, workplace demands, and other life events can prevent students from participating successfully in online classes. Because most online students are individually isolated—as noted previously they tend to work from their computer and do not have immediate access on a daily basis to classmates for emotional support—crises can occur without anyone being aware of a student's circumstance. Even when students request accommodations or assistance, the nature of the assistance classmates and faculty can provide is very different when students are participating in a class from different parts of the world.

Recommended practice: Student Support

Schools make specific plans for student support. These plans should include a single point of contact or limited and responsive contact person in each appropriate office, methods to resolve questions and challenges outside of regular business hours, Best practices will also include some method for monitoring of individual student progress, and the ability for accommodation requests to be processed and addressed specific to online classes and programs.

Intellectual Property

A well-planned distance education program needs to establish clear intellectual property policies that fairly address the needs of the educational institution, its faculty, and its students. At this point there are no fully settled "best practices," although the needs of providers, particularly in the asynchronous mode, probably require some departure from traditional models. The use of third-party material also needs to be approached carefully within the framework of copyright and fair use rules. The one clear requirement for any program is that its IP structure fully enables its intended operation.

Rights in the Course Design and Materials. In the traditional world of non-profit legal education, the teaching faculty member has generally asserted ownership in the syllabus, in-class delivery, and any instructional and reference materials she has created. Although there is an arguable legal basis for the school making a "work for hire" style claim on these creations, the widely honored custom of the "industry" has been to recognize faculty ownership. The faculty member may, of course, enter into an arrangement with a publisher to license or assign rights in her work, as in a casebook, hornbook, or study-guide, generally on some kind of exclusive and long-term basis. Commercial publishers then charge students for these books outside the normal tuition structure, often paying royalties or even an advance back to the author. Scholarly work in the law faces a variety of publication arrangements, including copyright assignment, license and retention by the author. Article scholarship is generally (although not always) published without compensation. That being said, scholarly books may entail an advance to the author and/or earn royalties.

In distance learning, the model is also variable. Synchronous teaching most often follows the traditional model for in-class teaching in rights allocation as well as in pedagogy. The provider does need to, at the very least, acquire rights from the teacher to webcast or otherwise distribute the course design and classroom performance, along with sufficient rights to any ancillary materials for reproduction and distribution as well. Such rights would typically be compensated through the teaching fee and not as a separate payment. While such classes are often recorded for archival and "quality control" purposes (a fact that should be authorized as well), they are rarely re-used verbatim; if any re-use is contemplated, either of the teaching performance or of the course design, then rights for that should be negotiated.

Asynchronous models will probably be more complex, and may look more like the textbook publishing model. As described above, the provider institution will generally commission a series of different players to come together in a collaborative way to provide both subject matter and pedagogical design skills in the creation of the course and an eventual teaching performance as well. As in the textbook case, the commissioning institution will generally intend to re-use these elements in subsequent iterations of the course, iterations that may involve new teaching faculty or the redesign of the course by new creative and knowledge players. Furthermore, the commissioning school may want to further license some or all of the course to other providers, or to develop additional versions such as e-books (e.g. in collaboration with a third party publisher). All of these practices will necessarily involve some kind of long term or

permanent grant of rights, whether through work-for-hire, assignment or license structures. This grant may be compensated by a one-time "buy out" payment, or may be subject to some kind of use-related residual or royalty. One-off or short term licensing, while potentially beneficial to the creator, puts the institution at considerable risk and is likely to appear only in unusual contexts.

Another variable in the asynchronous approach is whether the grant is exclusive to the commissioning institution. Here there is room for greater variation. A faculty member interested in moving between institutions may wish to retain some rights in her designed course, or, at least, the ability to design a similar course at a new institution on similar subject matter. The initial grant to the former employer could also contain some kind of shared ownership, allowing the former institution to keep using the design while the designing faculty takes it to a new context.

Work by the educational design consultant is more commonly done on work-for-hire/buyout style contracting, reflecting practices applicable for editorial and design professionals in the book publishing context. The teaching faculty will also create content, both through tweaks and improvements to the course material and through contributions such as comments, assignments, and other interactions within the class itself. Here, too, licensing should be addressed permitting capture, dissemination and use; a long term buy out will provide the greatest flexibility for the provider.

Rights in Class-Generated Interactions and Student Work Product. Distance education programs should also attend to rights in the class-generated interactions and student work product. At the very least, agreements with students should fully authorize the capture, reproduction and sharing of the student generated material within the context of the course. Recordation for future and outside use is also a possibility. Such uses could include sharing as examples in future classes, depiction in publicity materials, or even publication as papers, wikis, or edited materials at the school or by outside providers or vendors. Online experiential programs, such as clinics or internships, should explicitly address not only IP allocation but also issues of confidentiality, competition and legal ethics. Planning and the inclusion of appropriate language of grant and retention in agreements with all the participants will prevent IP related "train wrecks" as the program goes forward. Finally, outside of the student/institution contract, the practices of the program should respect the rules of FERPA, the US Department of Education, and various state authorities on issues of educational privacy and data security.

Rights in Third Party Materials. While proper IP clearance or reliance on fair use is necessary for traditional modes of teaching, the permanence and searchability of the digital records left by distance learning can make a lapse particularly exposed and discoverable. Each case where a third party creative element or personality is used should be covered either by appropriate permission or by a valid fair use, first amendment, or other justification. Many law schools already approach this challenge in the context of preparing course-packs for traditional courses. Unfortunately, clearing material for online use can sometimes cost more or even run into absolute road-blocks of reluctance by the copyright owner.

Permission is not always needed, however. In the U.S., federal government work is statutorily free of copyright, although rules for the output of individual states is less well settled. If third-party work appears in an authorized form online, links can often be substituted for reprints without compensation. Care should be taken, however, not to send students to unauthorized, infringing links as this may constitute an infringement itself. Many works, including useful images, are available on a public domain, open source, or creative commons basis, and using them appropriately can avoid headaches. Furthermore, fair use provides a perfectly legitimate avenue for incorporating portions of works and even for whole works in a relatively spontaneous classroom setting. Unfortunately, fair use is generally decided on based on the

balance of a number of variable factors, which makes bright-line applications hard to define. Courts have yet to provide much guidance of the application of fair use principles in the virtual classroom.[24]

Moreover, copyright is not the only concern for clearance. Depictions of third party individuals can raise concerns of privacy, publicity and defamation. Trademarks should not be referenced in ways that might create infringing confusion or that are unlawfully dilutive.

Optimally, decisions on third party materials should be made early in the design process of a course, so that last-minute scrambles and panics are avoided. In the asynchronous context, the instructional designer is a natural locus for systematic thinking on this issue, and can help to curb the sometimes naïve enthusiasm of the faculty involved. Of course, some questions will crop up in the running of the course —with material posted by teaching faculty or by students. Training for both of these populations should aim to increase their sensitivity to these constraints. Luckily, federal law immunizing internet providers may give some protection to the course provider for infringing posts made by students, although this protection may require quick responses and "take down" actions by the course provider. Agreements with students and faculty should give the provider full authority over the course website, including the power to remove infringing or offensive material.

Business and Financial Models

There is a wide variety of business and financial models for the creation and delivery of distance education, ranging from free distribution (generally without any attached assessment, certification or degree) to full-price degree programs. Within legal education, distance programs have so far been on a paid basis, although pricing models here vary depending in part on whether the provider is a for-profit or not-for-profit entity. It is the widespread conclusion of the Working Group that quality in distance education, as in most things, requires care and attention in the design, execution and delivery of the educational experience.

The recommended practices suggested in this Blue Paper provide guidance as to how this care may be exercised and, cumulatively, a business model for the courses and support activities necessary for a good distance program. On the financial side, it is our experience that establishing a good, careful program does not come without significant cost. To fully realize their potential, distance programs, whether synchronous, asynchronous, or blended, need to be approached as sui-generis forms of instruction, and not as a cheap re-use opportunity of existing lectures, recorded badly and popped on the web with a few accompanying quizzes. That said, the medium does offer opportunities for economies of re-use, scale, and personnel deployment that can create savings both for the students and the course providers. We believe quality distance education for law can be delivered on an economically attractive basis, but not "dirt cheap." Before an institution chooses to go forward with a program, it should create a budget based on the approach it wishes to adopt; the activity categories described in this Blue Paper can provide a starting point for expenditure categories. It is reasonable to anticipate that start-up capital requirements will run at least well into the six figures, if not more.

> *Outside providers.* One area where there is considerable variation is how much use should be made of outside providers. The technological, support, recruitment and servicing needs

24 Princeton Univ. Press v. Michigan Document Services, 99 F.3d 1391, 1392 (6th Cir. 1996); Audrey Wolfson Latourette, *Copyright Implications for Online Distance Education*, 32 J.C. & U.L. 613, 619 (2006).

of a good program have themselves attached economies of scale, and there are a number of companies that offer a full complement of services across these needs. Furthermore, these companies have already made capital investments that will lower the capital investment entry barriers for individual schools. Making the right decisions around what functionalities to keep "in house" and what to outsource, along with the compensation models for such outsourcing, is a key precursor to a successful program. The present iteration of this Blue Paper will not undertake a more detailed analysis of such arrangements.

Goal 3: Areas for Further Research and Policy Development

Outcome Data

The Working Group recommends that this Blue Paper be only a first step in developing best practices of an emerging and changing industry. In the years ahead, we will work with existing and emerging programs to collect both experience and data to further develop best practices for distance learning in legal education. Our first set of data-driven questions was developed at the Working Group's inaugural meeting at Harvard Law School through the suggestions offered by key participants and are attached in Appendix B.

Administrative Policies and Practices

The Working Group acknowledges two clear authorities who must be engaged in policy questions around future distance learning programs: external accreditors and individual institutions.

Accreditors. The U.S. has two types of accrediting agencies: Those recognized directly by the U.S. Department of Education, and those recognized by the Council for Higher Education Accreditation (which is aligned with the US DOE). Accreditation by a recognized accreditor is required for an institution to be eligible to accept federal student aid funds.

- *Legal Accreditors.* Recognized by CHEA, the American Bar Association provides direct accreditation to law schools in the United States. As noted in section x, supra, most states only allow graduates of ABA accredited schools to sit for the bar exam and become licensed to practice law. As noted elsewhere in this Blue Paper, the ABA currently provides significant limitations on Distance Learning courses within the JD curriculum. In addition to the ABA, the American Association of Law Schools, a membership organization representing most U.S. law schools, has standards for membership that currently do not directly address distance learning within the JD curriculum.
- *Regional Accreditors.* Recognized directly by the U.S. Department of Education and CHEA, six regional accreditation organizations govern most current distance learning programs offered by law schools. Regional accreditors have taken the lead in goals and assessment based education, and while different regional organizations have different thresholds, the pedagogical requirements identified in this Blue Paper respond to the trends and requirements of these accreditors. Those accreditors are:

- MSA - Middle States Commission on Higher Education
- NASC - Northwest Association of Schools and of Colleges and Universities
- NCA - Higher Learning Commission of North Central Region
- NEASC - New England Association of Schools and Colleges
- SACS - Southern Association of Colleges and Schools
- WASC - Western Association of Schools and Colleges

◈ *Other accreditors.* Distance Learning programs and institutions can be specially reviewed and accredited by the Distance Education and Training Council (DETC). Recognized by CHEA, DETC is a fully voluntary organization and accreditation has no influence on the availability of federal financial aid funds. Many schools - notably most law schools - have not yet pursued DETC accreditation. In addition to DETC, several international organizations accredit distance learning programs in their country of origin or region. These include:

- Open and Distance Learning Association of Australia (ODLAA)
- Norwegian Association for Distance Education (NADE)
- European Distance Education Network (EDEN)
- The Commonwealth of Learning (COL)
- Canadian Association for Distance Education (CADE)

Institutions. While accreditors set some policies governing distance learning programs, during this growth phase individual institutions should take responsibility for most program development. The Working Group is not yet prepared to make specific prescriptions for individual institutional policy at this juncture, but provides a watch list of issues.

◈ *Curriculum Development and Approval*. As noted earlier, the ABA requires that schools adopt a policy governing the approval of courses developed for distance learning modalities. The Working Group has developed a model policy for schools to consider and adopt, provided in Appendix D of this Blue Paper.

◈ *Institutional Home.* While law schools are relatively new to distance learning, many institutions of higher education have experimented with different models for the past decade or longer. Two models have emerged: the inclusive and the exclusive model. In the inclusive model, core faculty teach both traditional residential courses and online courses. Institutional enterprise systems (e.g., business office, financial aid, registrar's office) serve both residential and online students. While some portions of the distance learning program are outsourced or exclusive (e.g., certain kinds of technical support), for the most part the institution integrates online and on campus programs. In some models, students are allowed to flow between both systems as their lives and schedules allow.

In the exclusive model, distance learning programs, including their business functions, are isolated and detached from the main institution. Treated as an institute (and often as a profit center), courses are developed and taught by adjunct faculty and parallel business, registrar, and financial aid functions are constructed to deliver online courses. Often an exclusive model is preferable when core faculty wish to retain their residential teaching role and regard online programs as an acceptable profit center but not part of the core academic program or mission of the institution.

At this time the Working Group urges schools to carefully consider which model to employ, and cautions against the temptation to set up an exclusive model for purely revenue generating means. Members of the Working Group expressed concern about the quality of courses developed and taught exclusively by adjuncts: Core faculty should retain oversight, content control, and quality control of such programs. Second, the Working Group worries that if all law schools set up distance learning programs outside of core legal education programs, the industry as a whole may develop a two-tiered track of legal education. Thus, the preference at this writing is for integration where feasible and appropriate, respecting that some institutions may need to differentiate programs as they begin based on the resource availability of their home institution. Recognizing the full cost of the program—including increased support demands for ancillary departments like the library, registrar, etc.,—should occur whatever the model.

While integration is an important goal, we recognize the distinct needs of the DL program. Start-up needs (both structural and emotional) may lead to be bifurcate in early phases. Regardless of the start-up infrastructure, new programs should resist integration where the sole goal is for the parent institution to capture revenue. Programs should typically reinvest the first 1-2 years of profitable return in course refreshment and revision, personnel training, and infrastructure improvements if the program is to eventually yield sustainable profits for parent institution. Beyond initial investment, protecting this reinvestment capital in early stages should be part of the initial business plan for any distance learning project.

Conclusions

Distance learning is already an established element in most fields of education. While legal education has lagged behind other disciplines, adoption is likely to accelerate in the next few years, particularly if proposed changes in the ABA's JD accreditation standards occur allowing the possibility of doing a distance semester within a JD degree. As more and more law schools consider how to create a good program of distance education, whether in the JD context or focusing on other degrees, the creation of a set of recommended practices that will contribute to a quality result becomes a matter of some urgency.

This Blue Paper has sought to provide both the background and specific analysis and suggestions to fill this need. As the product of a collaborative conversation among many of the schools currently most active in the field, we believe that it provides a balanced discussion and a set of recommended practices that can be helpful both to schools with existing experience and to those just starting on a distance education program. The Blue Paper explores factors that will help guide the early stage decision of whether to give emphasis to synchronous or asynchronous approaches. It then explores a set of topics, ranging from pedagogical design and teaching methods, through technology needs and training, and on to issues of administration, student services, intellectual property, and financial models. Finally, considerations of data and policy are discussed. While no treatment of this length can pretend to be exhaustive, we do believe that we have addressed much of the terrain that a good distance education program needs to master if it is to succeed both educationally and financially.

As with any attempt to provide analysis and advice about a moving target, we recognize that this Blue Paper will begin to be out of date the moment it is released; we anticipate, therefore, additional iterations, and hope that the working group will continue to be a forum where the best policies and practices for distance education in law can continue to be thrashed out and disseminated. We welcome additions to our group; contact information is available on the cover pages.

In closing, the authors wish to thank the Harvard Law School Program on the Legal Profession for its intellectual leadership, convening ability and willingness to sponsor the efforts of the working group and to acknowledge the generosity of Vermont Law School, the University of Dayton School of Law, and Thomas Jefferson School of Law for hosting the ongoing meetings of the group while this Blue Paper was developed.

Appendix A:

Working Group Attendance

Host: Harvard Law School

Date: November 11 – 12, 2011

Attendees:

Daniel Ambrosini, Harvard Law School Program for the Legal Profession
April Mara Barton, Villanova University School of Law
Barbara Bernier, Florida A&M College of Law
William Byrnes, Thomas Jefferson School of Law
Greg Clinton, , North Carolina Central University School of Law
Barrier Currier, Legal Educational Technologies
Larry Farmer, Brigham Young School of Law
Fred Galves, McGeorge School of Law
Dennis Greene, Dayton School of Law
Craig Gold, Legal Education Technologies
Oliver Goodenough, Vermont Law School
Andrew Gurthet, , Hastings University School of Law
Barry Hill, Environmental Law Institute
Hakim Lakhdar, Harvard Law School Program for the Legal Profession
Catalina Laserna, Berkman Center for Law and Society at Harvard Law School
Albert Lauber, Georgetown University Law Center
Paul McGreal, Dayton School of Law
Michele Pistone, Villanova School of Law
Rebecca Purdom, Vermont Law School
Pavai Reddy, LexisNexis
Wendy Scott, North Carolina Central School of Law
Susie Pontiff Stringer, Florida Costal School of Law

Host: University of Dayton School of Law

Date: April 12 – 13, 2012

Attendees:

April Mara Barton, Villanova School of Law
William Byrnes, Thomas Jefferson School of Law
Adam Candeub, Michigan State University School of Law
Lisa Carper, Lesix Nexis
Greg Clinton, Director of Instructional Technology, NCCU School of Law
Heather Cucolo, New York Law School
Larry Farmer, Brigham Young School of Law
Craig Gold, Legal Educational Technologies
Oliver Goodenough, Vermont Law School
Dennis Green, University of Dayton School of Law

Andrew Gurthet, University of Hastings School of Law
Dan Katz, Michigan State University School of Law
Dean Paul McGreal, Dayton School of Law
Deedee Nachman, North Carolina Central School of Law
Rebecca Purdom, Vermont Law School
Pavani Reddy, Lexis Nexis
Susie Pontiff Stringer, Florida Costal School of Law

Host: Thomas Jefferson School of Law

Date: September 13 – 15, 2012

Attendees:

April Mara Barton, Villanova School of Law
William Byrnes, Thomas Jefferson School of Law
James Cooper, Kaplan
Bridgette de Gyarfas, Southwestern Law School
Larry Farmer, Brigham Young University School of Law
Jason Fiske, Thomas Jefferson School of Law
Craig Gold, Legal Educational Technologies
Oliver Goodenough, Vermont Law School
Denis Green, University of Dayton School of Law
Barry Hill, Environmental Law Institute
Jake Hornsby, UC Hastings
Susan Jaworowski, University of Hawaii
Renee Newman Knake, Michigan State University School of Law
Dean Maria Lopez, Loyola University School of Law
Karl M. Manheim, Loyola Law School
Dean Paul McGreal, University of Dayton School of Law
William Monroe, Louisiana State University
Deedee Nachman, North Carolina Central University School of Law
Ian C. Pilarczyk, Boston University School of Law
Michele Pistone, Villanova School o fLaw
Ellen Podgor, Stetson University School of Law
Susie Pontiff-Stringer, Florida Costal School of Law
Rebecca Purdom, Vermont Law School
Pavani Reddy, LexisNexis
Gordon Russell, Duncan School of Law
Chris Sove, Thomas Jefferson School of Law
Dean Kimberly Stanley, Golden Gate School of Law
Rebecca Trammel, Stetson University School of Law

Appendix B:

American Bar Association
2011-2012 Standards and Rules of Procedure for Approval of Law Schools

Standard 306. DISTANCE EDUCATION

(a) A law school may offer credit toward the J.D. degree for study offered through distance education consistent with the provisions of this Standard and Interpretations of this Standard. Such credit shall be awarded only if the academic content, the method of course delivery, and the method of evaluating student performance are approved as part of the school's regular curriculum approval process.

(b) Distance education is an educational process characterized by the separation, in time or place, between instructor and student. It includes courses offered principally by means of:

(1) technological transmission, including Internet, open broadcast, closed circuit, cable, microwave, or satellite transmission;

(2) audio or computer conferencing;

(3) video cassettes or discs; or

(4) correspondence.

(c) A law school may award credit for distance education and may count that credit toward the 45,000 minutes of instruction required by Standard 304(b) if:

(1) there is ample interaction with the instructor and other students both inside and outside the formal structure of the course throughout its duration; and

(2) there is ample monitoring of student effort and accomplishment as the course progresses.

(d) A law school shall not grant a student more than four credit hours in any term, nor more than a total of 12 credit hours, toward the J.D. degree for courses qualifying under this Standard.

(e) No student shall enroll in courses qualifying for credit under this Standard until that student has completed instruction equivalent to 28 credit hours toward the J.D. degree.

(f) No credit otherwise may be given toward the J.D. degree for any distance education course.

(g) A law school shall establish a process that is effective for verifying the identity of students taking distance education courses and protects student privacy. If any additional student charges are associated with verification of student identity, students must be notified at the time of registration or enrollment.

Interpretation 306-1
To allow the Council and the Standards Review Committee to review and adjust this Standard, law schools shall report each year on the distance education courses that they offer.

Interpretation 306-2
Distance education presents special opportunities and unique challenges for the maintenance of educational quality. Distance education accordingly requires particular attention from the law school and by site visit teams and the Accreditation Committee.

Interpretation 306-3
Courses in which two-thirds or more of the course instruction consists of regular classroom instruction shall not be treated as "distance education" for purposes of Standards 306(d) and (e) even though they also include substantial on-line interaction or other common components of "distance education" courses so long as such instruction complies with the provisions of subsections (1) and (2) of Standard 306(c).

Interpretation 306-4
Law schools shall take steps to provide students in distance education courses opportunities to interact with instructors that equal or exceed the opportunities for such interaction with instructors in a traditional classroom setting.

Interpretation 306-5
Law schools shall have the technological capacity, staff, information resources, and facilities required to provide the support needed for instructors and students involved in distance education at the school.

Interpretation 306-6
Law schools shall establish mechanisms to assure that faculty who teach distance education courses and students who enroll in them have the skills and access to the technology necessary to enable them to participate effectively.

Interpretation 306-7
Faculty approval of credit for a distance education course shall include a specific explanation of how the course credit was determined. Credit shall be awarded in a manner consistent with the requirement of Interpretation 304-4 that requires 700 minutes of instruction for each credit awarded.

Interpretation 306-8
A law school that offers more than an incidental amount of credit for distance education shall adopt a written plan for distance education at the law school and shall periodically review the educational effectiveness of its distance education courses and programs.

Interpretation 306-9
"Credits" in this Standard means semester hour credits as provided in Interpretation 304-4. Law schools that use quarter hours of credit shall convert these credits in a manner that is consistent with the provisions of Interpretation 304-4.

Interpretation 306-10
Methods to verify student identity as required in 306(g) include, but are not limited to: (i) a secure login and pass code; (ii) proctored examinations; and (iii) new or other technologies and practices that are effective in verifying student identity.

Appendix C:
Distance Learning (DL) in Legal education: Possible Research Avenues

This list of research needs and topics was generated at the inaugural meeting of the Working Group, and has been used to guide Working Group discussions and projects.

1. What are the outcome variables that should be measured to determine the effectiveness of DL (i.e. retention; problem-solving ability; knowledge of rules)?
    a. Are there moderating variables that influence these outcome variables (i.e. engagement; attention; sociality)?
    b. What is the best method to identify the outcome variables from the outset (i.e. current academic literature; consensus; Delphi; guidelines)?
2. How effective is synchronous DL compared to asynchronous DL? To what extent does temporality and geographical location influence learning? What role does context-dependent learning have? Does randomly assigning students to different learning styles (i.e. classroom; talking head asynchronous; talking head synchronous; other formats) influence outcome variables?
3. How do individuals from mixed group class settings learn differently across (i) age groups; (ii) professional/law student status; (iii) JD/MBA?
4. What do professional experts using DL identify as best practices? Identify and administer survey to DL experts to develop criteria, gain consensus, points of convergence and divergence. What are the challenges experienced among professionals?
5. What are the barriers key stakeholders (i.e. gatekeepers) identify in the use of DL? Administer a short non-invasive survey that can be administered to Deans of Law Schools (Associate Deans) asking about perceptions of DL. Correlate stakeholders' perceptions with Schools that have already implemented DL practices. What are the barriers associated with DL (financial; training; professional development; staff; incentive structure; technical support; release time; stipend)?
6. What is the ideal size of a DL classroom setting? Does this differ between synchronous versus asynchronous?
7. To what extent are ABA accredited Schools using DL currently implementing ABA policies? Develop economic rationale for proposing certain changes (ROI)?
8. How important is social contact for DL? Do students prefer specific pedagogical formats based on cognitive or social factors? What metric should be used to measure incremental learning?
9. What areas within management of DL technology need to be examined more closely?
10. Is DL more "effective" for particular law students (i.e. JD; LLM)?
11. Are evaluation methods in DL different from classroom learning? Will some students choose DL over classroom on the bases of perceived grades?
12. What types of courses do professors currently use DL for primarily (taxation; civil procedure; evidence)? Is there a tendency to develop certain DL courses based on content of the material? If so, what are the factors?
13. What insights does Design Research (process of undertaking research into the design of DL) offer into the process of "thinking like a lawyer" or "thinking like a DL lawyer"?

Appendix D:

Working Group's Model Law School Distance Learning Policy

For more information, contact Rebecca Purdom at rpurdom@vermontlaw.edu

An electronic copy of this policy can be found at:
http://www.law.harvard.edu/programs/plp/pages/distance_learning_working_group.php

MODEL LAW SCHOOL DISTANCE LEARNING POLICY

1. Purpose

This policy is designed to guide the law school in the development, delivery, and evaluation of JD distance learning education in accordance with the requirements of American Bar Association's Standard 306.

Notes

Note 1-1 This draft policy is designed to meet the current ABA Standard 306. See Interpretation 306-8. The drafting committee understands that Standard 306 is currently under review, and has reviewed the proposed terms of Standard 310. If Standard 310 is adopted, the drafting committee will make revisions to this model policy.

Note 1-2 A law school may determine under this section whether some or all of these policies will be adopted for other law school programs, including for residential programs using some online elements. See section 8.Emergency, below.

2. Definitions

2.1 Distance Education. The American Bar Association defines Distance Education as "an educational process characterized by the separation, in time or place, between instructor and student." In accordance with Interpretation 306---3 of the ABA Standard, courses in which more than one third of the course instruction is outside the regular classroom are considered Distance Learning courses.

2.2 Distance Learning Course ("Course"). A Course is a discrete product of developed material, including but not limited to, syllabi, introductory material, articulated learning goals, assigned materials (readings, podcasts, weblinks, text assignments, prepared powerpoints, etc.), assignments and assessment mechanisms. A Course is a completed unit that may be taught multiple times.

2.3 Distance Learning Class ("Class"). A Class is the version of a course that is delivered by a teaching professor and taught to students. There may be multiple classes for a single course. Classes may be delivered either asynchronously or synchronously. See sections 2.7 and 2.8, below.

2.4 Course Developer. A Course Developer is the person who designs and prepares a course, paying particular attention to developing appropriate materials, activities and assessments tied to learning goals. A Course Developer may be a faculty member with specific content knowledge, and/or learning specialists and technical experts tasked with developing and designing a course.

2.5 Teaching Faculty. A Teaching Faculty member is a person who executes and delivers a class. Teaching Faculty interact with students, provide feedback, assessment, and other appropriate material.

2.6 Distance Learning Program Administrator ("Program Administrator"). The Program Administrator is the person who is responsible for training of faculty, development and quality review of courses, and ongoing evaluation and review of classes. In different institutions, this person may be the Academic Dean, Distance Learning Program Coordinator, or some other person designated to oversee the Distance Learning Program.

2.7 Asynchronous. An asynchronous class is one in which the instruction is delivered at one time and the work can be completed at different times. In asynchronous classes, students and teachers use e---mail, discussion boards, listservs, wikis, video or audio posts, and other technologies which allow them to communicate without having to be in the same place at the same time.

2.8 Synchronous. A synchronous class is one in which teachers and students are in different physical locations, but conduct two---way communication with virtually no time delay, allowing participants to respond in real time.

2.9 Hybrid or Blended. A hybrid or blended class is one that includes both live, in-person sessions and additional asynchronous and/or synchronous distance learning sessions.

Notes

Note 2-1 The distinction between a Course and a Class is more apparent, and for some more relevant, in the asynchronous environment. The distinction in asynchronous programs is important as multiple prepared Classes may be modeled off a base Course. See 3.4, Intellectual Property Rights to Courses.

Note 2-2 Some law schools may wish to designate a Course Developer as only the faculty member with content knowledge who designs and participates in the creation of a course. Many Courses, particularly asynchronous Courses, may be developed by a faculty content specialist working in conjunction with one or more technical personnel who provide programming, graphic, and educational design purposes.

Note 2-3 The drafting committee recognizes that creating a quality Course is a significant scholarly undertaking. Some law schools may wish to give faculty Course Developers credit toward writing and publishing requirements in their faculty bylaws.

Note 2-4 The drafting committee recognizes the increased use of hybrid or blended class methods as part of residential curriculums. Many faculty members supplement their live, residential class with distance learning elements. The use of distance learning technology solely to supplement a residential class in a blended or hybrid format is beyond the scope of this policy.

3. Courses

3.1 Each Course developed to be delivered through distance learning by the law school will be designed to utilize the technological resources available at the institution, supportable by the institution, and reasonably available to student populations.

3.2 Each Course will maintain outcome standards consistent with Standard 303. All Courses will include student based outcome goals, and assessments and evaluations of student outcomes.

3.3 Each Course will include sufficient interactive tools and course design elements that allow faculty and students interactive opportunities that equal or exceed the interaction found in a traditional classroom setting. See Standard 306(c)(1), and Interpretation 306-4.

3.4 Intellectual Property Rights to Courses.

3.4 Option 1: All Courses will be the joint property of the Course Developer and the law school, and may be further developed and used by each one.

3.4 Option 2: All Courses developed by law school employees and its contractors are owned solely by the law school.

3.5 Course Approval

3.5 Option 1: Every course in the law school's residential curriculum may be redesigned as a Course and taught as a Class, so long as the Course is approved for the Distance Learning program by the Program Administrator and/or Academic Dean.

3.5 Option 2: All Distance Learning Courses must be approved in accordance with the school's normal approval process, even if the Course is already offered in the residential program.

Notes

Note 3-1 Law schools must ensure that Distance Learning is delivered via technologies available and supportable by the law school. The law school has an obligation not only to provide and support those technologies, but to ensure that faculty (see 5.1, below) and students (see 6.1, below) have sufficient skill and access to participate effectively. See Interpretation 306-5 and 306-6.

Note 3-2 The second sentence of 3.2, which requires that all distance learning classes identify learning outcomes and assess student performance based on those learning goals, is not a requirement of the ABA. However, all regional accreditors do require goals-based learning and assessment, and the drafting committee feels that outcomes-based learning is sufficiently key to distance learning program design to suggest this best practice be incorporated in this policy. Moreover, both Interpretation 306-8 and proposed Standard 310 Interpretation 310-5 require a law school offering distance learning education for credit to review the effectiveness of those offerings. The drafting committee feels that outcomes-based learning and assessment is the most effective means of performing this assessment.

Note 3-3 Standard 306(c) requires distance learning courses provide "ample interaction" among faculty and students, but does not define "ample." Interpretation 306-4 provides that the law school "shall take steps" to provide interactivity that "equals or exceeds" interaction in a traditional classroom. The drafting committee includes the "equal or exceeds" language because it is more precise and provides more guidance than the "ample interaction" standard in 306(c).

Note 3-4 Section 3.4 suggests two methods in which law schools may address intellectual property rights around distance learning courses. Some programs, particularly those that work on an asynchronous model, may require substantial institutional investment (e.g., not only the time and energy of a developing faculty member, but the time and salary of a course designer, educational specialist, and administrative oversight for both faculty training and quality review). In such cases, it may be appropriate for a law school to treat a course as a discrete unit, produced as work-for-hire, and owned by the institution. On the other hand, some Classes produced primarily synchronously, may involve significant individual work by the Teaching Faculty, and little institutional investment beyond the transmission medium. In such cases, the institution may wish to allow individual faculty members to share in the intellectual property rights of that development. The drafting committee does not endorse one model over another, but does encourage law schools to think carefully about investment, incentive structure, and the administrative work required to share revenues when making this policy choice.

Note 3-5 Standard 306 (a) requires that academic content, the method of course delivery, and the method of evaluating student performance are "approved as part of the school's regular curriculum approval process."

Interpretation 306-7 indicates that faculty approval for Distance Learning Courses is required, and that such approval must meet minimum instruction time and other requirements. The drafting committee provides two avenues law schools may take to address this concern. The appropriate choice will depend on the law school's bylaws around course approval, and the nature of curriculum overview.

4. Classes

4.1 All Classes will meet the minimum design requirements of Courses described in section 3. Courses, above.

4.2 Each Class will protect student privacy according to federal and institutional Family Education Rights and Privacy Act (FERPA) and Health Insurance Portability and Accountability Act (HIPAA) guidelines. All distance learning Classes will be provided from secure sites, and all required course elements that require student identification will be limited to those sites.

4.3 Each Class will require students to have, at minimum, a unique login and password, issued to the student through the law school's standard student verification protocols.

4.4 All required examinations that are not otherwise modified for use of outside materials (e.g., open book exams), will be proctored by appropriate personnel or through available technological means.

4.5 All Classes, and any subsequent modifications to Courses, delivered as Classes through any distance learning means, belong solely to the law school.

4.6 The law school shall obtain a perpetual nonexclusive license for any and all use of all student work developed or presented in a Class.

Notes

Note 4-1 Student verification, including but not limited to, verifying student identity in synchronous and asynchronous Distance Learning Classes, remains a largely moving target, and law schools should remain aware and current on developing concerns and technologies. See Interpretation 306-10.

Note 4-2 In many instances, Classes require different forms of outcomes-based assessments (e.g., papers, projects, multi-media presentations, etc.) and do not necessarily use traditional single anonymous large exams. Interpretation 306-10 requires "proctored examinations," without distinguishing between the unique modes of assessment that occur on line, and how these "examinations" may differ from traditional classroom examinations. Law schools and Course Developers should pay close attention in the course development process to provide summative experiences that do not run afoul of Interpretation 306-10, or to require sufficient proctoring opportunities (in-person proctored exam sites, proctoring technology, etc.).

Note 4-3 Law schools may wish to use student work performed and captured in a Distance Learning Class for marketing purposes, as example material in future classes, or for other purposes. While the drafting committee does not feel it is appropriate for the law school to necessarily own intellectual property interests in student work performed in a Distance Learning setting, law schools may wish to obtain a perpetual nonexclusive license on student work for such purposes. Such a license could be gained as part of the Orientation process.

5. Faculty

5.1 Faculty members who develop a Course, or who teach one or more Classes, will participate in mandatory technology and distance learning teaching training.

5.2 Teaching Faculty will be online, will monitor and, as appropriate, participate in class delivery, for at least the number of hours necessary for the credit hour allocation made to the class.

5.3 Teaching Faculty will answer student questions and concerns within 24 hours during the period in which the Class is offered. If a Teaching Faculty is unable to attend to a course for more than a 24-hour period, the Teaching Faculty will alert students in advance. If the Teaching Faculty will be unavailable to students for more than three days, the faculty member will alert the students and the Program Administrator in advance. If a Teaching Faculty is unavailable due to an emergency, he or she will alert the Program Administrator at his or her first possible opportunity.

5.4 Teaching Faculty will provide regular and concrete feedback on student effort and performance. See Standard 306(c)(2).

Notes

5-1 How much time is required of a Teaching Faculty member, and how often Teaching Faculty must respond to a student request, will largely be a function of the design of the law school's Distance Learning program. For example, some asynchronous programs run intense courses for as little as five weeks, with multiple topics and assignments required of students each week. In such an instance, faculty who take a three- or four-day hiatus from interactive or responding with students will both violate Section 306's goal for high interactivity and will leave students in a difficult position should questions arise. In contrast, courses that run over longer periods of time, or which have designated synchronous meeting times in which students may ask questions, will not need stringent faculty interactivity requirements. The policy as drafted in section 5.3 is not an indication of a best practice (though it might be, for certain intense programs), but is instead the drafting committee's attempt to illustrate the best elements of such a policy, including minimum time between interaction, and notification to students and Program Administrators at certain thresholds of unavailability.

6. Students

6.1 All students who participate in Classes must participate in a mandatory orientation program, which will, at minimum, train students in technology used and Distance Learning protocols and etiquette. See Interpretation 306-6.

6.2 In accordance with the ABA's Standard students may take up to 4 credits per semester via distance learning, for a total of 12 total distance learning credits during their academic career. No distance learning Classes may be taken during the first year, or to fulfill first---year curriculum requirements. See Standard 306(d) and 306(e).

6.3 All students work that occurs in a distance learning class may be monitored and reviewed by the teaching faculty, program administrator, and other law school personnel.

6.4 All Distance Learning students will abide by the law school's honor code in all Classes, and in all other relevant aspects of the Distance Learning program.

Notes

Note 6-1 Because of the nature of distance learning technology, all student actions within distance learning classes may be monitored by a variety of people. Students (and faculty) unfamiliar with current technology may be surprised to learn the extent to which monitoring can occur, and that technicians, program administrators, and others may have ample access to their course work and course activities. All faculty and student orientation should include explicit information about how much monitoring is possible and methods for students to communicate privately with faculty or program administrators.

7. Oversight and Administration

7.1 The Program Administrator will oversee all aspects of the Distance Learning program, including the creation of Courses, the delivery of Classes, and ancillary student experiences. The Program Administrator shall ensure systematic, valid, and reliable evaluation of all Distance Learning Courses and Classes to consistently improve quality of content and delivery.

7.2. The Program Administrator will ensure regular monitoring of faculty activity, including faculty interactivity with students, feedback, and assessment.

7.3 The law school will develop a plan for administering the Distance Learning program that provides students access to financial aid, business offices, learning support, library, student services, and other services comparable to those provided to residential students.

7.4 The Distance Learning program will provide reasonable accommodation opportunities to comply with Americans with Disabilities Act requirements.

7.5 The administration of the Distance Learning program is the responsibility of the Dean of the law school. All policies of the law school apply to the Distance Learning program, unless otherwise provided in this policy.

8. Emergency

8.1 In an emergency circumstance that impacts the ability of the law school to deliver its residential curriculum in its normal course, distance learning may be used in ways that are not governed by this policy. In such an event, the Program Administrator will set appropriate guidelines.

Notes

Note 8-1 Some schools may choose to use Distance Learning Classes or other Distance Learning means to deal with institutional emergencies (e.g., epidemics or natural disasters that interrupt residential classes for a period of time). This draft policy is not designed for such events. The use of Distance Learning technology and resources for emergency purposes should be incorporated in an institution's emergency plan.