

THE SIMILARITIES AND DIFFERENCES BETWEEN INDEPENDENT AND UNIVERSITY AFFILIATED LAW SCHOOLS

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I have had the privilege of serving as the dean of William Mitchell College of Law (1995-present), an independent law school, and also Southern Illinois University School of Law (1990-1995), a university affiliated law school. I have often been asked to describe the differences between the two types of law schools. To the best of my knowledge there are no recent publications comparing them. Hence this article.

There are only 19 ABA accredited independent law schools.¹ The approximately 165 remaining ABA accredited law schools are university affiliated. The number of ABA accredited law schools has stayed fairly constant for the past twenty years or so, although some that started as independent law schools have become university affiliated law schools as a result of a merger or purchase of assets,² and others, that may have started out as unaccredited independent law schools, have retained their independent status after receiving accreditation.³

The criteria for qualifying as an independent law school are somewhat unclear. Traditionally, law schools that had no university affiliation have been classified as independent law schools. By itself, however, this criteria is insufficient because most of the accredited independent law schools have dual degree and other joint academic programs with one or more universities and some have long-term contractual relationships with a university which authorize a broad range of joint programming. Perhaps a more useful distinction would be whether a law school has an organic, as opposed to a mere contractual, relationship with a university. Using this as a distinguishing criteria, a law school would not be an independent law school if it is classified as a department or college of a university and the university governing board is legally the governing board of the law school. An independent law school, on the other hand, has independent legal status and its own governing

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1. AMERICAN BAR ASSOCIATION SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR 2001-2002 COMMITTEE DIRECTORY 18-19. The law schools that are members of the Independent Law Schools Committee are: Albany Law School, Appalachian School of Law, Brooklyn Law School, California Western School of Law, Florida Coastal School of Law, Franklin Pierce Law Center, University of California Hastings College of Law, John Marshall Law School, Michigan State University Detroit College of Law, New England School of Law, New York Law School, South Texas College of Law, Southwestern University School of Law, Stetson University College of Law, Thomas M. Cooley Law School, Thomas Jefferson School of Law, Vermont Law School, Western State University College of Law, and William Mitchell College of Law.

2. Pennsylvania State University acquired Dickinson School of Law, an independent law school, in the late 1990s. As a result, the law school is now known as The Pennsylvania State University, Dickinson School of Law.

3. An example is Thomas Jefferson School of Law, which received full accreditation by the ABA in August 2001.

board of trustees. All but perhaps one⁴ of the members of the ABA Section of Legal Education and Admission to the Bar Independent Law Schools Committee qualify under this criteria.⁵ The significance of the independent legal status and independent governing board will be explored later in this article.

Under the ABA Section of Legal Education and Admissions to the Bar Standards for Approval of Law Schools, frequently referred to as the “accreditation standards,” there really is no difference between independent and university affiliated law schools. Only two of the Standards specifically refer to independent law schools. Standard 203 states:

A law school that is no part of a university shall be governed by a governing board composed of individuals dedicated to the maintenance of a sound program of legal education.⁶

The “maintenance of a sound program of legal education” is exactly the same language that is used in the standards for university affiliated law schools.⁷ The other standard that relates specifically to independent law schools is Standard 208, which states:

If a law school is not part of a university ... the law school should seek to provide its students and faculty with the benefits that usually result from a university connection, such as by enlarging its library collection to include materials generally found only in a university library and by developing working relationships with other education institutions in the community.⁸

Moreover, deans of both independent law schools and university affiliated law schools have to manage the same kinds of problems and issues, including admissions and financial aid, student counseling and student complaints, employment opportunities for graduates, curriculum, technology, library, faculty

4. Stetson University College of Law is organically a part of Stetson University, but is located some 150 miles from the main campus and is semi-autonomous. It has been a member of the Independent Law Schools Committee since its inception.

5. All accredited independent law schools are automatically appointed as members of this committee.

6. AMERICAN BAR ASSOCIATION SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR STANDARDS FOR APPROVAL OF LAW SCHOOLS 2001-2002, Standard 203. The heading to this standard is “Governing Board of an Independent Law School.”

The approval by the U.S. Department of Education of the ABA Section of Legal Education and Admission to the Bar Council as the official accrediting agency for American Law Schools has special significance for independent law schools. University affiliated law schools are accredited by the various college and university regional accrediting agencies under the umbrella of their university’s accreditation. Most independent law schools, however, have not been accredited by the regional accreditation agencies and therefore must rely on their ABA accreditation. Several years ago the appropriateness of the ABA’s role in accreditation was challenged and there was a significant danger that the Department of Education might not continue to recognize the ABA as the official law school accrediting agency. This controversy has now subsided and the ABA’s accreditation status was renewed without objection for a five year term beginning in 2001.

7. *Id.* Standard 201.

8. *Id.* Standard 208. The heading to this standard is “Non-University Affiliated Law Schools.”

hiring, tenure and governance, financial resources, fundraising, alumni relations, human resource problems, and so on infinitum.

Given these similarities, why is it that, based on my experience at least, deans of independent law schools seem, in general, to be happier and more content and to have longer tenure than deans of university affiliated law schools? The answer, in my opinion, emanates from the decision-making and financial autonomy that inherently exists in an independent law school because it has an independent legal existence and its own governing board.

Decision-making is streamlined, at least in theory, because there are no layers of university bureaucracy to review and approve every major decision, including those that have to be approved by the university's board of trustees. An independent law school, on the other hand, has a much simpler organizational and decision-making structure than most university affiliated law schools. The dean of an independent law school has essentially the same authority as a president of a college or university or a chief executive officer of a corporation (that is why many of the independent law school deans have two titles: president and dean) and therefore has final decision-making authority on all matters except those delegated by its governing board to the faculty or reserved by the board for its final decision.⁹ Most deans of university affiliated law schools have much less decision-making authority. In the corporate world they would probably be classified as vice-presidents, or perhaps chief operating officers of divisions or subsidiaries, who report to the corporate CEO or someone else who in turn reports to the CEO.

The financial autonomy that exists in an independent law school is also extremely important. An independent law school's budget is approved by its governing board, and all the income generated by the law school, including annual gifts and income

9. The ABA Standards for Approval of Law Schools provide only very general guidelines for the division of authority between the governing board, the faculty, and the dean. Standard 204(b) states:

The dean and faculty shall formulate and administer the educational program of the law school, including curriculum; methods of instruction; admissions; and academic standards for retention, advancement, and graduation of students; and shall recommend the selection, retention, promotion, and tenure (or granting of security of position) of the faculty.

The division of authority between the dean and the faculty is contained in Standard 206, which states:

The allocation of authority between the dean and the law faculty is a matter for determination by each institution as long as both the dean and the faculty have a significant role in determining educational policy.

The other applicable standards are Standard 205, which provides that the faculty should have substantial involvement in the selection of a dean, who is hired by, and responsible to, the governing board, and Standard 204(a) which states:

A governing board may establish general policies that are applicable to a law school if they are consistent with the Standards.

The generality of the Standards is necessary, but at the same time fosters tension between the faculty, the administration, and the governing board of a law school. This tension is essentially the same, however, whether a law school is independent or university affiliated.

from endowment, goes to the law school. There are no overhead charges, "taxes," or fees that have to be paid to a university central administration, ostensibly for services rendered to the law school. An independent law school also does not have to absorb disproportionate mid-year budget cuts necessitated by unanticipated budget shortfalls in other parts of the university. Claims of excessive overhead charges, in particular, have been the source of much tension between law schools and the central administrations of their universities.¹⁰

The combination of streamlined decision-making and financial autonomy provide the framework for independent law schools to have great flexibility and to be more innovative and more responsive to the educational needs of the legal profession than is possible in most university affiliated law schools. This, at least, was the conclusion of independent law school deans in a 1999 survey of all the members of the ABA Section of Legal Education and Admissions to the Bar Independent Law School Committee.¹¹ The following responses to the question "What is the importance of being an independent law school?" are typical:

- ▶ An independent law school is able to manage its program without interference by a university administration. This gives the school more flexibility to be innovative and experimental.
- ▶ The financial freedom to pursue opportunities as they present themselves without the budgetary and bureaucratic constraints of a university system.
- ▶ We have much more control over our destiny than law schools that are part of a university¹²

The autonomy of an independent law school also has potential negative aspects, however. An independent law school must be self-sufficient and therefore must be able to provide sufficient financial resources to fund adequately every aspect of its operations, including maintenance and security staff, facilities upkeep and utilities. These functions and expenses are normally provided by the central administration

10. Standard 209(b) directly addresses this issue. It states:

The resources generated by a law school that is part of a university should be made available to the law school to maintain and enhance its program of legal education.

Interpretation 209-2 elaborates on this standard:

"Resources generated" includes law school tuition and fees, endowment restricted to the law school, gifts to the law school, and income from grants, contracts, and property of the law school. The university should provide the law school with a satisfactory explanation for any use of resources generated by the law school to support non-law school activities and central university services. In turn, the law school should benefit on a reasonable basis in the allocation of university resources.

11. The author was at the time chair of the committee. A copy of the survey is in my files at William Mitchell College of Law.

12. *Id.* Several of the respondents, including the author, have been deans of both independent and university affiliated law schools.

of a university affiliated law school.¹³ An independent law school must also have more managerial and professional staff than is customary in university affiliated law schools. In addition to staff to handle admissions, financial aid, registrar, career services and similar functions,¹⁴ the library and administrative support for the faculty, most independent law schools have full-time human resource directors and HR staff, chief financial officers as well as an accounting department, full-time professionals working on marketing and publications and several professionals assigned to fundraising functions and alumni relations. Many of these staff functions are provided in whole or in part by the central administration of a university affiliated law school on a cost-sharing basis with other colleges and departments in the university

Deans of university affiliated law schools frequently complain about the central administration's overhead costs charged back to their law schools. This criticism might be somewhat more muted if they had to hire and pay directly for all the staff and services they need without the ability to cost-share. At William Mitchell we have over 100 staff. Approximately twenty-five, many of whom are part-time, are employed in maintenance, security and purchasing. The salary budget for the maintenance, custodial and security staff exceeds \$450,000 per year. When I was the dean at Southern Illinois University School of Law, security and maintenance were provided by the university administration and purchasing functions were a minor portion of the tasks of one or two members of the law school staff. The cost of utilities at William Mitchell is about \$230,000 per year and the capital budget for equipment, facilities upkeep and improvement is about \$1 million. At Southern Illinois University, these costs were absorbed by the central administration. At William Mitchell, there are approximately sixteen full-time employees working in development, alumni relations, marketing and publications. At Southern Illinois University School of Law most of these functions were handled in whole or in part by the central administration and, to the best of my recollection, there may have been two or three staff who worked part-time in these areas with the total amounting to about one full-time equivalent professional employee. Moreover, because of the need to handle all accounting and related functions, including payroll, William Mitchell has a Director of Finance and three full-time accountants. At Southern Illinois University School of Law, the Associate Dean was able to manage all of the law school's finances on a part-time basis since payroll and most purchasing functions were handled on a centralized basis. Finally, because of the large staff and the need to handle employee benefits, William Mitchell has three full-time employees in its human resource department. At Southern Illinois University

13. The law school, of course, indirectly pays for these expenses through the overhead charges made by the university.

14. Under Standard 511 of the ABA Standards for Approval of Law Schools, "basic student services including maintenance of accurate advising and counseling and financial aid counseling" can be provided by the university in a university affiliated law school. For the most part, these services are provided by staff employed by the law school. In some university affiliated law schools, however, some registrar functions and a significant amount of financial aid counseling may be performed by university personnel.

School of Law, on the other hand, most HR functions and all matters relating to employee benefits were handled by the central administration.¹⁵

An independent law school not only has to have a larger staff and more senior level administrators than a university affiliated law school, it will also in all probability need to use more outside consulting services to assist with problems like the technology needs of the law school and advice on legal issues. These outside services are very likely to be much more expensive than if they were provided by the central administration of a university on a cost-sharing basis.

Furthermore, because an independent law school must rely solely on its own resources, it cannot go to a university central administration to ask for extra funds to make a critical faculty hire or to cover the expenses of an unbudgeted high priority technology initiative. Even in tight budget periods (and in my 30 years in legal education I have never experienced anything but tight budgets), universities are often able to piece together funds from all the colleges to cover very high priority expenses that may directly benefit only one of the colleges or departments but meet an overall university priority. A special fund administered by the central administration to help finance the hiring of minority faculty throughout the university is one example. While it is always possible to go to the board of trustees of an independent law school with special funding requests, my experience is that it is often easier to make a successful compelling case to a university administration than it is to a fiscally conservative board of trustees. This is particularly true with respect to approval of additional full-time, tenure-line faculty positions.

Another advantage enjoyed by university affiliated law schools is that it is easier to have dual degree and other joint programs with other colleges and departments. Most central administrations encourage these types of interdisciplinary programs within the university family. Independent law schools, on the other hand, have to seek out these opportunities with other colleges that do not have a law school and with which they may have no existing faculty or institutional ties. Nevertheless, I have seen many situations where faculty and administrative politics in a university have blocked well-conceived, innovative interdisciplinary programs between a law school and another college or department. Independent law schools can, hopefully avoid these problems and, in my opinion, should aggressively pursue various types of program affiliations with other colleges under arrangements that do not jeopardize their organic autonomy.

Although the decision-making process in an independent law school is theoretically more streamlined than in most university affiliated law schools, this advantage may be illusory because of the dynamics of decision-making authority in a particular law school. Not surprisingly, many faculty in independent law schools feel that the faculty should have a greater governance role than in a university affiliated law school that has a university-wide senate or similar institutional structure. Where this faculty perspective becomes problematic is when

15. William Mitchell College of Law has approximately three times as many students as Southern Illinois University School of Law (1030 vs. 350) but the difference in size only accounts for a relatively small portion of the difference in staff size between the two law schools. Most of the difference is due to the number of functions performed by the central administration at Southern Illinois University that William Mitchell must pay for directly.

a controlling faction of the faculty in an independent law school adopts the position that the faculty is essentially a legislative body and should be involved collectively in virtually every decision. That attitude not only is likely to cause tension with the law school's governing board, which quite properly thinks it is the duly constituted policy making authority for the law school, but it will also almost certainly create time delays and bottlenecks in getting final decisions made. My experience has been that every member of the faculty feels that he or she should speak at least once on every matter that comes before the faculty. I have also experienced many situations where an objection to a proposal by one or two members of the faculty will hold up approval of the proposal until the objectors change their minds, which usually means a compromise that in many cases can create a whole new set of problems.

This faculty-is-a-legislature perspective also makes it much more difficult for the dean of an independent law school to function as a chief executive officer. It creates a "weak dean" model as opposed to a "strong dean" model where the faculty's role is primarily to focus on educational program issues. These same tensions between the respective roles of the faculty, the dean and the governing board probably also exist in virtually all university affiliated law schools. The result is the same in both types of law schools. The dean must spend a great deal of time trying to figure out who has decision-making authority for various issues and how to process issues through the institution in a way that minimizes bottlenecks and delays based on procedural or process objections.

Another potential problem area that can undermine streamlined decision-making in an independent law school occurs when the law school's governing board ceases to function as a governing board that is concerned with broad policy matters such as the overall budget, new program approvals, tuition levels and scholarships, the granting (or denial) of tenure and the like and instead begins to assume decision-making authority in day-to-day issues that should be decided by the president and dean or academic program issues that should be decided by the faculty and dean. This "officious inter-meddling" can also sometimes extend to insisting on deciding how many paper clips the law school will be authorized to purchase for the faculty in a given year.¹⁶ This same potential exists in the governing board of a university affiliated law school. The law school is much less likely to be directly affected by this officious inter-meddling (unless, of course, it is the specific target of the governing board's action) than would be the case with an independent law school because the university organizational structure helps to insulate a particular college or department from this type of behavior.

CONCLUSION

Both independent and university affiliated law schools have advantages and disadvantages. My own conclusion is that the ideal situation is one where the law school has both financial autonomy and an effective, streamlined decision-making

16. A few years ago, I was told that the governing board at one independent law school required board approval of not only full-time faculty but also every adjunct faculty member. I do not know whether this "policy" still exists.

process. If these two conditions exist, then it really does not matter whether the law school is independent or university affiliated. Because of organization and structural differences, it is at least theoretically more likely that both conditions will exist in an independent law school. Financial autonomy is illusory, however, if the law school does not have adequate financial resources to respond in a timely fashion to market and other changes or to improve the quality of its academic programs.¹⁷ Furthermore, the potential autonomous decision-making advantage of an independent law school is illusory if the division of authority between the faculty, dean and governing board is seriously conflicted or dysfunctional.

¹⁷ Independent law schools have not, in general, achieved high levels of annual fund gifts and endowments. These non-tuition funds are critically important as a source of financial flexibility.