LAW SCHOOL TRANSPARENCY

MEMORANDUM

To: **Council of the ABA Section of Legal Education and Admissions to the Bar**
From: **Kyle P. McEntee, Executive Director of Law School Transparency**[1]
Re: **Proposed Change to Employment Status Determination Date from February 15 to March 15**

July 2013

Law School Transparency urges the Council to reject the proposed change to the employment status determination date from February 15 to March 15.

The burden is on the Data Policy and Collection Committee's ("DPCC") to demonstrate that a multi-decade data measurement ought to be changed. It has not met this burden. Worse, the DPCC's purpose is outside the scope of the Council's role as the accreditor of law schools.

The Committee's Evidence

Some graduates don't obtain legal jobs by February because some state bars have slow licensing processes. The DPCC proposes changing the February determination date so that schools in those states can capture more positive job outcomes—the outcomes obtained after February 15 but before March 16. As committee chair Len Strickman puts it, this data policy change would have "the benefit of a more level playing field." The DPCC considered the change at the request of multiple law schools in California and New York.

I begin by discussing the review that the DPCC relied on to make its initial recommendation to the Council. This is essential to showing how the DPCC failed the Council. I then move on to discuss a subsequent review by the DPCC, which did not cause the DPCC to withdraw support of its proposal, despite the review resulting in a *significantly* weaker conclusion.

<u>The DPCC's Preliminary Review:</u>

Recognizing the importance of showing an actual quantifiable advantage through data-based analyses to justify this sort of change, one member of the DPCC (Jerry Organ) conducted a preliminary review of school employment data that the DPCC used to justify its decision to

[1] Law School Transparency ("LST") is a nonprofit legal education policy organization founded in July of 2009. Our board of directors, staff, and advisory board consist of attorneys, law professors and others interested in legal education. Our mission is to hold law schools accountable, make access to the legal profession more affordable and fair, and provide quality and consistent information to prospective students and the public.

propose the employment status determination date. He considered two data measures for two separate years.

First, he sorted schools by the percentage of graduates working professional jobs (lawyers or otherwise) as of February 15 (the "good news"). Second, he sorted schools by the percentage of graduates who were unemployed or had an unknown employment status (the "bad news"). For both measures, the committee determined that New York and California schools were disproportionally represented on the bad end of the curves.

In other words, California and New York school accounted for a higher than expected percentage of schools at the bottom of the curve. Among the bottom 37 schools (excluding the Puerto Rican schools), 18 schools were from these two states. Two immediate questions jump out here:

(1) *Why exclude Puerto Rican schools*? No reason was offered. Perhaps the reason is that the "bad news" was so bad and the "good news" was non-existent; thus the data were invalid. Or perhaps the DPCC mistakenly thought that the oversupply of law school graduates and lawyers in Puerto Rico, rapid emigration from the territory, and horrific economy were something no U.S. state could relate to. Or perhaps no thought went into it.

(2) *Why 37?* No reason was offered, but the 2011 "good news" list puts New York and California schools in bottom positions 36 and 37. It appears that the cutoff was simply eye-balled, though perhaps 37 was chosen randomly. After all, the number 37 is commonly referred to as "the most psychologically random number."

In fact, changing the cutoff and list used wildly alters the results and can even support the opposite conclusion. For example, schools in both New York and California are overrepresented at the top of the "good news" list in 2012 when I use an arbitrary cutoff of 17. The results look even better for California if I use an arbitrary cutoff of 10—twice as many schools as one might expect, in fact. These two cutoffs are no more or less justified than the number 37. All provide different results.

Arbitrary cutoff point aside, the very premise that an even distribution would reveal a disadvantage is unsupported. The DPCC memo did not indicate why one would expect an even distribution of schools up and down either the "good news" or "bad news" list. Instead, Professor Strickman notes that many of the poorly-performing schools are "are broadly considered to be highly competitive schools nationally." Is he suggesting that the employment outcomes don't match *U.S. News* rankings? The committee's collective impression of how relatively well the schools should perform? Faculty reputation? It's a mystery and without further support, not at all compelling. Instead, it suggests confirmation bias.

The preliminary review was used to support the claim that schools in states with extended licensing processes were disadvantaged by the February status date. Professor Organ's review was the supporting evidence. However, that evidence was very weak. It relied upon an arbitrary

cutoff point for measuring an advantage, excluded the Puerto Rican schools without reason, and offered no support for the assumption that schools should be evenly distributed on the "good news" and "bad news" lists. Despite a myriad of flaws with the simplistic analysis, the review managed to persuade the DPCC that its proposal to change a policy that spans three decades was valid. Thankfully, the Council acted with good sense in June and declined to act on such shaky evidence.

The DPCC's Subsequent Review

Recognizing that the preliminary review was laden with weaknesses, the DPCC had Professor Organ submit additional findings to the Council. However, the subsequent review still fails to adjust for a number of faulty premises. The cutoff for revealing disadvantages was still unsupported, though it did shift the cutoff number to the top and bottom 25% of the "bad lists" and "good lists," respectively. The Puerto Rican schools were still excluded without explanation.

The presumption that an even distribution would be expected still plays a large role, though Professor Organ does introduce a rudimentary attempt to control for *U.S. News* ranking. Additionally, Professor Organ expanded his review to see if other states, besides California and New York, may be advantaged or disadvantaged by the current rule. However, as Professor Deborah J. Merritt points out in her memo to the Council, the two other states that Professor Organ says "appear to have disproportionate representation" on the lists (Oregon and Massachusetts), receive their bar results much earlier than California and New York. Thus two states do not appear to be disadvantaged by bar results and two states appear to be.

Ultimately, Professor Organ narrows his conclusion explicitly and immensely:

- The findings do not show causation;
- The findings "*at best* appear[] to show some correlation" (emphasis mine); and
- The findings are weak enough to cause him to explicitly conclude that a more sophisticated data analysis is needed to show that state licensing causes or even correlates to a systematic disadvantage or advantage.

Despite the softened conclusions, the DPCC did not withdraw its proposal. Instead, it doubled down with a slight modification to its original memo.

Explaining the best case scenario: "some correlation"

Give the DPCC the benefit of the doubt for one moment. Suppose that there does appear to be "some correlation" between employment outcomes and licensing. What else might more aptly explain a difference in employment outcomes among schools other than an extended licensing process?

Somehow, neither the original nor the revised DPCC memo addresses plausible explanations in any serious fashion. In the DPCC memo, Professor Strickman acknowledges that other factors may explain the placement differences allegedly captured by Professor Organ's

review—although the acknowledgement is a shallow afterthought in the memo. Here are some factors that may explain the so-called disadvantage:

(1) Graduate surplus (not just in 2012, but for years);
(2) Attractiveness of certain states to graduates from out-of-state schools;
(3) Overall health of local legal markets;
(4) Graduate desirability;
(5) Ability of schools to fund post-graduation jobs;
(6) Bar passage rates;
(7) Unaccredited and California-Accredited law school competition (for the CA schools at least).

The only consideration the DPCC provides to other explanations is the following:

> Of course, this isolated data point may reflect employment market factors not related to bar admission, but simple logic and the experience of Committee members suggests that there is some impact on the date of the reporting of bar examination results and consequent bar admission on the timing of employment commitments to law school graduates.

"Simple logic and experience" stand in the place of additional data and thoughtful analysis. "Some impact" is enough to move a policy with significant consequences to prospective students and future research. The employment determination date is far from untouchable, but the burden is on change proponents to do more than passively rationalize the way important data are collected.

Instead, change proponents should ask, *What's more useful for people trying to make an informed decision about law school?* That's the appropriate lens for determining the quality of a proposal on the employment determination date. Professor Strickman seems to recognize the need to at least acknowledge this, so he added a new sentence to the very end his revised memo. He declares:

> That more level playing field will give law school applicants and other interested persons a more accurate picture of the comparative performance of different law schools in the successful placement of their graduates.

For an example of a well-reasoned policy analysis, read Professor Merritt's argument for adopting both six month and eighteen month reporting dates instead. She puts prospective law students first in her analysis; the same group that the DPCC treats as an afterthought.

But let's assume that the correlation is statistically significant, something Professor Organ cannot claim from his review and something the DPCC cannot claim despite Profssor Strickman's bold appeal to authority. We do not even have any reason to suspect that the proposed rule revision would level the playing field—the very thing the DPCC has set out to do. The DPCC has provided no evidence that, after accounting for people losing jobs and gaining

jobs from February 16 to March 15, the data would do anything more than shift a school's data around underneath the aggregated figures.

In other words, insofar that there is an uneven playing field (not shown) caused by a statistically significant correlation (unknown and not shown) to licensing that the Council should remedy (outside the scope of the accreditor's role), the DPCC provides no reason to suspect it will even that playing field with its proposal. The DPCC has not met its burden of proof.

The Accreditor's Role

Worse than recommending an unsupported policy change, the DPCC ignores the group for whom law schools produce job statistics: prospective students. Prospective students, students, and the public are the Section of Legal Education's constituents according to the Department of Education. Calling the uneven playing field a "disadvantage," "penalty," and "hardship" for law schools shows from where the DPCC obtained its perspective. This perspective is inappropriate and continues a dangerous precedent that the Council needs to put behind it.

(1) Is there a normative problem with an uneven playing field?

It's not apparent that there's an issue to resolve. Once again grant the DPCC its premise that state credentialing timelines materially affect performance on employment metrics. Is it the ABA's job to ensure that schools compete with each other on a level playing field?

In one sense, yes, of course. When a school lies or cheats or deceives it gains an undeserved advantage and ABA Standard 509 prohibits this behavior. The Section of Legal Education was ahead of the curve when it adopted Standard 509 in the 1990′s. The organization interpreted its accreditation role to include communicating non-educational value to these constituents through employment information.

But Standard 509 does not prohibit that behavior because of how it affects competition among schools. Prohibitions are a consequence of the Section of Legal Education's role in protecting consumers and the public.

Here, the DPCC failed to adequately consider the prospective students who want to make informed decisions, and the public which subsidizes legal education. Prospective students received only a passing mention in Professor Strickman's memo. In describing why the committee rejected several schools' request to move the measurement back to one year, Professor Strickman's explains:

> The Data Policy and Collection Committee decided to reject this request because that length of delay would undermine the currency of data available to prospective law students.

As it happens, the DPCC's proposal also has a currency problem. The committee also failed to convey whether or how, if at all, it considered the change's impact on the value of the consumer information.

(2) Does the new policy impede a prospective student's ability to make informed decisions?

One of the Council's recent accomplishments was accelerating the publication of employment data. Previously, the Section of Legal Education published new employment data 16 months after schools measured employment outcomes. In 2013, the section took just six weeks. If the Council adopts the DPCC's proposal, the Council will lose significant goodwill. The public and its representatives will wonder whether the Section of Legal Education made its previous strides due only to public pressure, rather than a reassertion of its accrediting responsibilities.

If the Council adopts the ten-month proposal, it pushes data publication to the end of April—after many deposit deadlines and on the eve of others. While applicants should not overrate the importance of year-to-year differences, they should have the opportunity to evaluate the changes.

Moreover, the new policy makes the information less useful. At one time schools reported graduate employment outcomes as of six months after graduation. In 1996, NALP began measuring outcomes at nine months instead. The Section of Legal Education, which at that time only asked schools to report their NALP employment rate, followed.

The six-month measurement makes far more sense than the nine-month date. Six months after graduating, interest accumulated during school capitalizes and the first loan payment is due. Ideally that six-month period would be used to pay down the accumulated interest so that less interest is paid later. The credentialing process makes this a rarity. Adding another month to the measurement makes the post-graduation outcome measure even less valuable.

Reducing comparability also dilutes the value of recent employment information. Students should not consider one year of data in isolation, but should analyze changes and the reasons for those changes. It's for this reason that the Council decided to require schools to publish three years of employment data as of last August.

Additional Thoughts

It is more than apparent that the Council needs to add additional viewpoints to the data policy committee. Right now, the DPCC is dominated by law school faculty and administrators. All twelve members are current faculty, deans, or other administrators at law schools. The name change from the "Questionnaire Committee" to the "Data Policy and Collection Committee" envisions a policy role for the group. The concern for prospective students, students, and the public does not appear to be of central or even secondary concern.

Just as the Council, standards committee, and accreditation committee need a diversity of viewpoints, so too does the data policy committee. Perhaps if this diversity existed on the committee to begin with a proposal for a new measurement date without any persuasive support would not have been recommended too soon or at all.

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I want to thank the Council for the opportunity to submit this Memorandum. Law School Transparency is committed to assisting the Council in its continued efforts to improve law school regulation and oversight.

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Law School Transparency
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