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Lifting the Veil: An Expose on the American Bar Association's Arbitrary and Capricious Accreditation Process

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THE WAYNE LAW REVIEW

VOLUME 49 SPRING 2003 NUMBER 1

LIFTING THE VEIL: AN EXPOSÉ ON THE AMERICAN BAR ASSOCIATION'S ARBITRARY AND CAPRICIOUS ACCREDITATION PROCESS

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Table of Contents

I. INTRODUCTION 3
II. THE DEVELOPMENT AND STRUCTURE OF ABA ACCREDITATION . . . 7
A. The Structure of the ABA 8
B. The Department of Justice Antitrust Consent Decree 14
C. The Department of Education's Review of the ABA and the DOJ Modified Consent Decree 15
III. THE ABA'S DELEGATION OF AUTHORITY TO AN ADVISORY BODY TO RENDER LAW SCHOOL ACCREDITATION DECISIONS WHICH BIND THE CORPORATION IS AN ULTRA VIRES ACT 19
A. The ABA's Delegation of Binding, Non-Reviewable Authority over Law School Accreditation Matters to an Advisory Body Is an Ultra Vires Act Prohibited by Illinois Law 20
B. The ABA's Delegation of Binding, Non-Reviewable Authority over Law School Accreditation Matters to an Advisory Body Is an Ultra Vires Act Prohibited by Article 6.1 of the ABA Constitution 30
IV. THE ABA'S FLAWED ACCREDITATION PROCESS EXPOSED BY ITS HANDLING OF BARRY UNIVERSITY SCHOOL OF LAW 36
A. The Council Reverses the Accreditation Committee's Recommendation and Denies Accreditation 37
1. The Accreditation Committee's Report Recommending in Favor of Provisional Accreditation 38

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2. The Council's Decision Overruling the Accreditation Committee 39
a. The Council Violated ABA Rules by Using a De Novo Standard of Review 39
b. The Council Unlawfully Raised Anti-Competitive Concerns 44
B. The Council Reverses the Accreditation Committee's Recommendation and Accredits Barry 45
1. The Accreditation Committee's Report Recommending Against Provisional Accreditation 47
2. The Council's Decision Overruling the Accreditation Committee 49
V. THE ABA'S ACCREDITATION PROCESS AND FEDERAL ANTITRUST LAWS 49
A. The ABA's Action with Respect to Barry Was Private Action . 52
B. The Agreement or Conspiracy 57
C. The ABA Has Imposed An Unreasonable Restraint On Trade . 60
1. Barry Compared to the Only Law School Provisionally Approved in 2001 61
2. Barry Compared to the Only Law School Provisionally Approved in 2000 62
3. Barry Compared to the Only Law School Provisionally Approved in 1999 64
4. Barry Compared to Only Law School Provisionally Approved in 1998 66
D. The ABA's Accreditation Process Injures the Legal Profession 69
1. The Market 69
2. Interstate Commerce 71
3. The Antitrust Violation Causes Injury to the Legal Market. 71
VI. CONCLUSION 74
VII. APPENDICES 77
APPENDIX A 77
APPENDIX B 79
APPENDIX C 85
ENDNOTES TO APPENDIX C 91

I. INTRODUCTION

The American Bar Association (ABA) has become "the gatekeeper to the legal profession."[1] Approximately forty-five states require graduation from an ABA-accredited law school as a prerequisite to bar admission.[2] Despite a growing uneasiness about the ABA accreditation process, most state supreme courts and legislatures have deferred to the ABA for accreditation decision-making, which some contend "amounts to an abdication of political responsibility."[3] Those critical of the current

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1. Andy Portinga, *ABA Accreditation of Law Schools: An Antitrust Analysis*, 29 U. MICH. J.L. REFORM 635, 670 (1996); *see also* Henry Ramsey, Jr., *The History, Organization, and Accomplishments of the American Bar Association Accreditation Process*, 30 WAKE FOREST L. REV. 267, 272 (1995) (proclaiming the ABA and law schools are the "gatekeepers to the profession"). Ramsey's statements were made at a Deans' Workshop during the ABA's mid-winter meeting in February 1995. At the time, the ABA was under investigation by the United States Department of Justice (DOJ) for alleged anti-competitive activity. The DOJ filed its complaint against the ABA alleging antitrust violations on June 27, 1995, and simultaneously filed an agreed stipulation with the ABA for the entry of a Final Judgment along with a Competitive Impact Statement. *See* Complaint and Stipulation and Competitive Impact Statement, United States v. ABA, 934 F. Supp. 435 (D.D.C. 1996) (noting the "year long" investigation). On the same day the DOJ issued a press release announcing the proposed settlement. *See* Proposed Settlement, United States v. ABA, 934 F. Supp. 435 (D.D.C. 1996) (on file with authors). Then, on August 2, 1995, the DOJ filed its Proposed Final Judgment and Competitive Impact Statement, United States v. ABA, 60 Fed. Reg. 39,421 (Dep't Justice Aug. 2, 1995) [hereinafter Proposed Final Judgment]. *See also* United States' Response to Public Comments About Proposed Modifications of Final Judgment, United States v. ABA, 934 F. Supp. 435 (D.D.C. 1996). Ramsey's speech was designed to cheer-up the troops and to quell voices of dissent.

2. Benjamin Hoorn Barton, *Why Do We Regulate Lawyers?: An Economic Analysis of the Justification for Entry and Conduct Regulation*, 33 ARIZ. ST. L. J. 429, 435 nn.16-17 (2001). *See generally* NAT'L CONF. OF BAR EXAM'RS & ABA SEC. OF LEGAL EDUC. & ADMISSIONS TO THE BAR, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS (Erica Moeser & Margaret Fuller Corneille eds., 2002), *available at* http://www.abanet.org (accessed from homepage by selecting Search and entering phrase "Bar Admission Requirements") (last visited Mar. 30, 2003).

3. Christopher T. Cunniffe, *The Case for the Alternative Third-Year Program*, 61 ALB. L. REV. 85, 145 (1997). The Montana Supreme Court stated that it did "not have the expertise or the resources to conduct independent reviews of non-ABA approved law schools to determine which such schools offer the quality legal education we seek to obtain from Montana Bar applicants." *In re* Culver (Mont. Sup. Ct. Order Feb. 2, 2002). However, a few states have chosen to maintain local control over law school education and provide for state approval in addition to ABA accreditation. *See, e.g.*, ALASKA R. BAR RULE 2, § 1(b) (West 2003) (providing for ABA or the Association of American Law Schools, which has now ceded accreditation to the ABA); CAL. BUS. & PROF. § 6060 (West 2003); CAL. ADMIS. RULE 19, § 3 (West 2003); MASS. R. S. CT. RULE 3:01, § 3.3 (West 2003); MICH. R. BD. LAW EXAM'RS RULE 2(B) (West 2003); TENN. SUP. CT. RULE 7, art. 2, § 2.03 (West 2003); VT.

accreditation process became more vocal following a lawsuit filed on November 23, 1993, against the ABA by a Massachusetts law school.[4] Shortly thereafter, the deans of fourteen law schools, including the University of Chicago, Harvard and Stanford, sent an open letter to the deans of every ABA-accredited law school, urging that the accreditation process be reformed.[5] The letter, in part, stated the following:

> We find the current process overly intrusive, inflexible, concerned with details not relevant to school quality (perhaps even at odds with maintaining quality), and terribly costly in administrative time as well as actual dollarcosts to schools. . . .
>
> . . . .
>
> It is this sense of responsibility that gives rise to our concern that the accreditation process for law schools is heading in the wrong direction. Our varied visions of legal education focus on the results of the educational process, on the *outputs* of legal education—about the sort of graduates we produce, about the sort of lives they will lead, about the consequences of our writing and teaching. In contrast, the ABA's accreditation process increasingly concentrates on *inputs* . . . .[6]

The Department of Justice (DOJ) began investigating the ABA in

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STAT., GOV. CODE § 82.024 (West 2003); VT. R. ADMIS. § 6 (West 2002); VA. CODE ANN. § 54.1-.3926 (Michie 2002).

4. *See* Mass. Sch. of Law at Andover v. ABA, 846 F. Supp. 374 (E.D. Pa. 1994), *aff'd*, 107 F.3d 1026 (3d Cir. 1997), *cert. denied*, 522 U.S. 907 (1997). One outspoken critic suggests that "the accreditation system's restrictions on market entry limit the availability and the diversity of both legal education and legal services and, thereby, impose substantial social costs." John S. Elson, *The Governmental Maintenance of the Privileges of Legal Academia: A Case Study in Classic Rent-Seeking and a Challenge to Our Democratic Ideology*, 15 ST. JOHN'S J. LEGAL COMMENT. 269, 271 (2001).

5. Portinga, *supra* note 1, at 637.

6. *Id.* (quoting *An Open Letter to the Deans of the ABA Accredited Law Schools*). The number of law school deans dissatisfied with the ABA accreditation process is evident by the growing number of deans who have become members of the American Law School Deans Association (ALSDA), which has been very critical of the ABA accreditation process. More than 100 deans are members of the ALSDA. *See also infra* Appendix B; Luis M. Acosta, *Reforming the Legal Profession: Implications for Law Librarianship,* 94 LAW LIBR. J. 121, 123 (2002) (reviewing DEBORAH L. RHODE, IN THE INTEREST OF JUSTICE: REFORMING THE LEGAL PROFESSION (2000)) ("The accreditation standards of the American Bar Association (ABA) attempt to ensure quality of educational outputs by detailed regulation of educational inputs, such as facilities, resources, and faculty-student contact, but there is little evidence that these factors are correlated with the quality of educational outputs.").

1994,[7] and on June 27, 1995, the DOJ filed a federal antitrust action,[8] claiming that the ABA accreditation process violated the Sherman Act.[9] On June 25, 1996, the ABA agreed to the entry of a consent decree, which required the ABA to modify its accreditation process.[10]

Despite the consent decree, the ABA accreditation process remains flawed at its very core. The typical assumption by those not familiar with the ABA accreditation process is that ABA accreditation equates to quality education outputs. Unfortunately, the ABA accreditation process "increasingly concentrates on inputs"[11] and thus tends to hurt, rather than help, the quality of legal education.[12]

To understand the flaws of the ABA accreditation process, this article will overview the experience of Barry University School of Law (Barry) with ABA accreditation. Section II will discuss the development and structure of the ABA. Section III will argue that the ABA's delegation of authority to an internal advisory body to render accreditation decisions, which bind the ABA, is an ultra vires act forbidden both by the laws of its state of incorporation and by the ABA Constitution. Section IV will then discuss the ABA accreditation process as applied to Barry. In Section V, this article will address federal antitrust concerns of ABA accreditation.

To set the backdrop against which the ABA accreditation will be discussed, a brief introduction of Barry is necessary at this stage. Throughout this article, more detail about the accreditation process involving Barry will be discussed where appropriate.

Barry is a law school located in Orlando, Florida.[13] The School of Law is one of ten colleges of Barry University, a successful private school located in Miami, Florida.[14] In 1999, Barry filed an application with the

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7. Shortly after Massachusetts School of Law filed an anti-ABA lawsuit on November 23, 1993, the law school forwarded documents obtained by discovery to the DOJ in 1994. These documents are on file with the authors. *See also supra* note 1.

8. *See* Complaint and Stipulation and Competitive Impact Statement, United States v. ABA, 934 F. Supp. 435 (D.D.C. 1996).

9. 15 U.S.C. §§ 1-7 (2000).

10. United States v. ABA, 934 F. Supp. 435 (D.D.C. 1996).

11. Denise Rothbardt, *ABA Accreditation: Educational Standards and Its Focus on Output Requirements*, 2 J. GENDER RACE & JUST. 461, 492 (1999).

12. *See* Portinga, *supra* note 1, at 669-70; *see also* John S. Elson, *Why and How the Practicing Bar Must Rescue American Legal Education from the Misguided Priorities of American Legal Academia*, 64 TENN. L. REV. 1135 (1997).

13. Staver v. ABA, 169 F. Supp. 2d 1372, 1374 (M.D. Fla. 2001).

14. *See* Barry University: Academics, *available at* http://www.barry.edu (accessed from homepage by selecting Academics) (last visited Mar. 30, 2003).

ABA for provisional accreditation.[15] The ABA sent a site evaluation team to Barry's campus and the team prepared a report which was submitted to the ABA Accreditation Committee.[16] Upon consideration of a second report, the Accreditation Committee notified Barry on February 6, 2001, of its recommendation that the school receive provisional approval,[17] which would allow graduates to practice law upon successful passage of the bar.[18] However, on February 17, 2001, the ABA Council of the Section of Legal Education and Admissions to the Bar (Council) reversed the Accreditation Committee, citing, as one of four reasons, competition among law schools, including a new state law school that planned to begin operations in Orlando at some time in the future.[19]

Barry initially requested that the ABA House of Delegates (House) "review" the Council's decision in hopes that the Council would reconsider the denial.[20] However, a few weeks before the matter was to come up before the House in early August 2001, the Council agreed to send out a new site evaluation team in September 2001 and to again review the matter in February 2002.[21]

From November 1, 2001 through November 3, 2001, the Accreditation Committee reviewed the updated *Supplemental Site Evaluation Team Report on Barry University of Orlando School of Law* and issued its recommendation on November 28, 2001.[22] The Accreditation Committee denied provisional approval *solely* on the basis of competition with the new state law school, which was still some years away from opening its doors

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15. *Staver*, 169 F. Supp. 2d at 1374.

16. *Id.*

17. *Id.*

18. *See In re* Barry Univ. Sch. of Law, 821 So. 2d 1050 (Fla. 2002).

19. *Staver*, 169 F. Supp. 2d at 1375; *see also* Council Action Letter from John A. Sebert, Consultant on Legal Education to the ABA, to Sister Jeanne O'Laughlin, President, Barry University and Stanley M. Talcott, Dean, Barry University School of Law (Feb. 26, 2001) (filed in *Staver*, 169 F. Supp. 1372, Exhibit 6 (M.D. Fla. 2001), *available at* http://www.lc.org (accessed from homepage by selecting ABA Accreditation Research, Complaint Exhibits, then Council Action Letter) (last visited Apr. 15) [hereinafter Letter from Sebert]. The Florida Legislature authorized the opening of two state-supported schools, both of which admitted their inaugural class in the Fall of 2002. These include Florida International University College of Law located in Miami, Florida and Florida A&M University College of Law located in Orlando, Florida.

20. *Staver*, 169 F. Supp. 2d at 1375.

21. *Id.*

22. *See* Supplemental Site Evaluation Team Report on Barry University of Orlando School of Law at 1 (Nov. 28, 2001) (on file with the authors) [hereinafter Barry Supplemental Site Report].

to the first student.[23] The academic program and outputs of Barry were not criticized by the Accreditation Committee.[24]

After immense pressure, including a federal antitrust lawsuit filed on behalf of students and graduates of Barry, along with attorneys who employed or sought to employ them,[25] intense local and national media criticism of the ABA's handling of Barry, and pressure from Florida's governor, attorney general and legislature,[26] the ABA finally granted Barry provisional accreditation.[27] On February 2, 2002, the Council met at the ABA mid-year meeting in Philadelphia, at which time the Council reversed the Accreditation Committee and voted to grant Barry provisional accreditation.[28] On February 4, 2002, the House accepted the Council's decision.[29]

II. THE DEVELOPMENT AND STRUCTURE OF ABA ACCREDITATION

The ABA was founded in 1878,[30] and is "the largest voluntary professional association in the world."[31] The ABA is incorporated in the state of Illinois as a nonprofit corporation and is recognized by the Internal Revenue Service as a nonprofit, tax-exempt 501(c)(6) "business league" or trade association.[32] Under Illinois law, an Illinois nonprofit corporation may establish an advisory body that "may not act on behalf of the corporation or bind it to any action but may make recommendations to the board of

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23. *Id.*

24. For a more detailed discussion of the Barry Supplemental Site Report and the Accreditation Committee Report No. 2, *available at* http://www.lc.org (accessed from homepage by selecting the topic of ABA Accreditation Research, ABA Evaluation Reports on Barry University School of Law, then Accreditation Committee Report, 11-2001) (last visited Feb. 17, 2003). *See infra* Section IV.B.1.

25. *Staver*, 169 F. Supp. 2d at 1372.

26. *See* discussion *infra* Section IV.

27. *See id.*

28. *See id.*

29. *See* discussion *infra* Section IV.B.2.

30. ABA Profile: History, *available at* http://www.abanet.org (accessed from homepage by selecting Search and entering phrase "Profile of the American Bar Association") (last visited Mar. 30, 2003).

31. *See* About the ABA, *available at* http://www.abanet.org (accessed from homepage by selecting FAQs then About the ABA) (last visited May 13, 2003).

32. *See* I.R.C. § 501(c)(6) (2000); ABA Articles of Incorporation, *available at* http://www.cyberdriveillinois.com (accessed from Corporation/LLC Search Page by entering search term "American Bar Association") (last visited Mar. 30, 2003) (also on file with the Illinois Secretary of State).

directors or to the officers."[33] In order to satisfy the United States Department of Education's (DOE) "separate and independent"[34] requirement, the ABA vested the Council (an advisory body) with authority to bind the entire corporation with respect to law school accreditation.[35]

A. The Structure of the ABA

The control and administration of the ABA is vested in the 538 members of the House of Delegates (House).[36] The Board of Governors (Board) consists of thirty-seven members and has authority to act for the ABA when the House is not in session.[37] Pursuant to the Illinois General Not For Profit Corporation Act of 1986, a corporation may establish committees.[38] "Each committee shall have two or more directors, a majority of its membership shall be directors, and all committee members shall serve at the pleasure of the board."[39] The Council is not a committee; it is an advisory body.[40] An advisory body may not act on behalf of nor bind the corporation.[41]

Since August 1999, the Council has violated Illinois law in two ways. First, the Council now makes decisions binding the ABA with respect to law school accreditation.[42] Second, the Council's Accreditation of Law

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33. 805 ILL. COMP. STAT. ANN. 105/108.40(d) (West 1993).

34. Due to the inherent conflict of a trade association accrediting its own profession, the DOE requires that the accrediting body be "separate and independent" from the association itself. This requirement is designed to avoid self-serving interests of the association.

35. *See* 34 C.F.R. § 602.3(d) (1994-99), *recodified effective* July 1, 2000, at 34 C.F.R. § 602.14(a)-(b); 64 Fed. Reg. 56612, 56618-19 (Oct. 20, 1999). This restructuring of the ABA began in August 1999 and culminated in February 2001. The current structure is discussed in more detail *infra* Section II.C.

36. ABA Profile: Structure, *available at* http://www.abanet.org (accessed from homepage by selecting Search and entering phrase "Profile of the American Bar Association") (last visited Mar. 30, 2003); *see also* ABA CONST. art. 6, *available at* http://www.abanet.org (accessed from homepage by selecting ABA Governance then Constitution and Bylaws) (last visited Mar. 30, 2003). As of August 2002, there were 538 members of the House; however, this number changes from time to time.

37. ABA Leadership: Board of Governors, *available at* http://www.abanet.org (accessed from homepage by selecting ABA Governance, then Board of Governors) (last visited Mar. 30, 2003); ABA CONST., *supra* note 36, art. 7.

38. 805 ILL. COMP. STAT. ANN. 105/108.40(a) (West 1993).

39. *Id.*

40. See *infra* Section III for a more detailed discussion on this topic.

41. 805 ILL. COMP. STAT. ANN. 105/108.40(d) (West 1993).

42. See *infra* Section III.A. for a discussion of this topic.

Schools Project budget is not subject to review or consultation by the House or the Board.[43] The Council now operates autonomously.[44]

From the inception of the ABA until 1992, the ABA was an unincorporated association.[45] On December 7, 1992, the ABA incorporated in Illinois as a nonprofit corporation.[46] Under the Illinois statute, the affairs of a nonprofit corporation must be managed under the direction of the governing board.[47] An Illinois nonprofit corporation may establish a committee which may render certain binding decisions not otherwise prohibited by statute.[48] The Council is not a committee under the Illinois statute because less than 51% of the Council's membership is composed of members of the House or of the Board, and the members of the Council are not appointed by the House or by the Board.[49]

Under Illinois law, an Illinois nonprofit corporation may "appoint persons to a commission, *advisory body* or other such body which may or may not have directors as members, *which body may not act on behalf of the corporation or bind it to any action but may make recommendations to the board of directors or to the officers*."[50] An advisory body may not act on behalf of the corporation nor bind the corporation to any action; it can only make recommendations to the governing board or to the officers.[51]

Until August 1999, the Council had always functioned as an advisory body.[52] Outside of accrediting law schools, the Council continues to operate

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43. *See id.*

44. *See id.*

45. *See* ABA Articles of Incorporation, *supra* note 32.

46. *Id.*; *see also* 805 ILL. COMP. STAT. ANN. 105/101.01-.17 (West 1993).

47. 805 ILL. COMP. STAT. ANN. 105/108.05(a) (West 1993).

48. 805 ILL. COMP. STAT. ANN. 105/108.40(a), (c) (West 1993).

49. Members of the Council are elected by ABA members of the Section of Legal Education and Admissions to the Bar. Members of the ABA may join one or more sections of the ABA. These sections, established by the House pursuant to the ABA Constitution, focus on various areas of the legal profession. *See* ABA CONST., *supra* note 36, art. 30, § 30.1. Section members elect members to the Council of each section. Council members are not appointed by the House or the Board, which constitute the ABA governing board. *See* ABA POLICIES AND PROCEDURES HANDBOOK (1999).

50. 805 ILL. COMP. STAT. ANN. 105/108.40(d) (West 1993) (emphasis added).

51. *Id.*

52. Each section of the ABA is governed by a chair and a council. ABA CONST., *supra* note 36, art. 30, § 30.5. The House establishes the sections and may discontinue any section. *Id* at art. 30, §§ 30.1-30.2. Although members of the sections must be members of the ABA, non-members may serve on the Council of the Section of Legal Education and Admissions to the Bar. *Id*. at art. 30, § 30.4; ABA Section of Legal Education and Admissions to the Bar: Section Bylaws, art. IV, § 3, *available at* http://www.abanet.org (accessed from homepage by selecting Law Student Resources, Legal Education, Standards & Rules of Procedure, then

as an advisory body.[53] However, with respect to law school accreditation, the Council now makes decisions that are binding on the ABA, which neither the House nor the Board may veto.[54] The Accreditation of Law Schools Project budget is no longer subject to review or consultation by the Board or any other entity outside of the Council.[55] Given these facts, the Council now operates as an autonomous entity with respect to law school accreditation and budgetary matters pertaining thereto.

The control and administration of the ABA is vested in the House.[56] The House elects the officers of the ABA and the members of the Board.[57] Established in 1936, the House meets twice per year, at the ABA annual and mid-year meetings.[58] "At the Midyear Meeting, the Nominating Committee nominates officers and members of the Board of Governors . . . [at] the Annual Meeting, the full House votes on these nominees."[59] The Board has authority to act and speak for the ABA when the House is not in session.[60] The Board "usually meets five times a year. It oversees the general operation of [the ABA]."[61]

The ABA first accredited law schools in 1923.[62] One of the main

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Section By-laws) (last visited Mar. 30, 2003) [hereinafter Legal Educ. Bylaws]. As will be discussed below, this compromise to allow a few non-members to serve on the Council was in response to the DOE. *See infra* Section II.C. Sections are not autonomous and can exercise only such power as granted to them by the House: "[t]he House . . . shall control, formulate policy for, and administer the Association." ABA CONST., *supra* note 36, art. 6, § 6.1. The House "shall supervise and direct the Board of Governors, officers, sections, committees, and employees and agents of the Association."

53. Except for law school accreditation decisions and the budget for the Accreditation of Law Schools Project, the Council continues to act like any other council of any other section, namely, in an advisory capacity to the House. *See* Legal Educ. Bylaws, *supra* note 52 art. X; *see also* ABA CONST., *supra* note 36, art. 45, § 45.9, art. 6, § 6.1.

54. *See* Legal Educ. Bylaws, *supra* note 52, art. VI, § 1(b) and art. X; *see also* Standards for Approval of Law Schools and Interpretations Rules 6, 10, *available at* http://www.abanet.org (accessed from homepage by selecting Law Student Resources, Legal Education, About the Section, Committees, then Standards for Approval of Law Schools and Interpretations) [hereinafter Rule or Rules] (last visited May 13, 2003).

55. Legal Educ. Bylaws, *supra* note 52, art. IV, § 1(b).

56. ABA CONST., *supra* note 36, art. 6, § 6.1.

57. *Id*. at arts. 7-8, §§ 7.2, 8.2.

58. ABA Profile, *available at* http://www.abanet.org (accessed from homepage by selecting FAQs, About the ABA, Media Relations, ABA Information, then Profile) (last visited Mar. 30, 2003).

59. *Id.*

60. ABA CONST., *supra* note 36, art. 7, § 7.1.

61. ABA Profile, *supra* note 58.

62. ABA Approved Law Schools by Year Approved, *available at* http://www.abanet .org (accessed from homepage by selecting Law Student Resources, Legal Education, ABA

functions of the ABA is to "provide law school accreditation."[63] The ABA's Section of Legal Education and Admissions to the Bar (Section) was created in 1893 as the ABA's *first* section.[64] The ABA has sections, divisions and commissions, standing and special committees, forums and task forces that are part of the ABA, none of which are separately incorporated.[65] Each section has a council and bylaws, but amendments to the section bylaws become effective only upon approval of the House.[66]

In 1973, the House adopted the Standards for Approval of Law Schools (Standards), which set forth the requirements that law schools must meet in order to be approved.[67] The Standards, along with their accompanying interpretations, relate to many aspects of the operation of law schools, including admissions, educational requirements, faculty, placement programs, funding and facilities.[68]

The Council of the Section established the Accreditation Committee to recommend provisional or full approval of new law schools and to oversee and reinspect currently approved law schools.[69] An ABA Site Team prepares a detailed report for the Accreditation Committee, but makes no conclusions or recommendations.[70] After reviewing the Site Team's report, the Accreditation Committee makes conclusions based on the facts in the

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Approved Law Schools, then Law Schools By Year Approved) (last visited Mar. 30, 2003). Before the ABA began accrediting law schools, most attorneys qualified through independent study and apprenticeships. *See* Barton, *supra* note 2; James P. White, *Rededication to Our Core Values: Legal Education in the Public Interest*, 31 SW. U. L. REV. 159, 161 (2002).

63. About the ABA, *available at* http://www.abanet.org (accessed from homepage by selecting FAQs then About the ABA) (last visited Mar. 30, 2003). For a list of the original law school accreditation requirements, see White, *supra* note 62, at 163.

64. Section of Legal Education and Admissions to the Bar, *available at* http://www.abanet.org (accessed from homepage by selecting Law Student Resources, Legal Education, then About the Section) (last visited Mar. 30, 2003).

65. *See* ABA CONST., *supra* note 36, art. 10, § 10.1(b) ("Section and division bylaws become effective when approved by the House of Delegates.").

66. ABA CONST., *supra* note 36.

67. *See* Standards for Approval of Law Schools, *available at* http://www.abanet.org (accessed from homepage by selecting Accreditation then Standards for Approval of Law Schools) (last visited May 30, 2003) [hereinafter Standards].

68. *See* Rules, *supra* note 54.

69. Legal Educ. Bylaws, *supra* note 52, art. VIII, § 1(b); *see also* Standards, *supra* note 67, Ch. 1, Standards 101-102 and Interpretation 101-1.

70. *See generally* Internal Operating Practices: Site Team Evaluators, *available at* http://www.abanet.org (accessed from homepage by selecting Law Student Resources, Legal Education, Standards & Rules of Procedure, then Internal Operating Practices) last visited May 17, 2003); *see also* Rule 2, *supra* note 54.

report and makes a *recommendation* to the Council for or against approving the school.[71] The recommendation is then reviewed by the Council, which votes to accept or reverse the Accreditation Committee.[72] Prior to August 1999, the Council merely made recommendations to the House, which could affirm or reverse the Council.[73] After August 1999, the House may only remand back to the Council, but the Council's decision is now final and binding on the ABA.[74] Neither the House nor the Board may reverse the Council.[75]

From 1921 to 1999, the House had final authority over accreditation decisions,[76] but in August 1999, the ABA amended the Section Bylaws to vest *final authority* over accreditation in the Council of the Section. The Section Bylaws now provide:

> The Council shall develop separate budgets for the Accreditation of Law Schools Project and for its other activities. Both budgets shall be prepared pursuant to the generally established accounting principles used by the Sections and entities within the Association. *The Accreditation of Law Schools Project budget itself, however, will not be subject to review or consultation by the Board of Governors or any other entity outside the Section.* The budget for the other activities of the Section will be subject to the

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71. *See* Rule 3, *supra* note 54.

72. *See* Rule 6, *supra* note 54.

73. At the annual meeting of the ABA in August 1999, the House of Delegates approved amendments to the Rules of Procedure for the House of Delegates (art. 45 § 45.9), the Bylaws of the Section of Legal Education and Admissions to the Bar (art. IV and art. X) and more to the Rules of Procedure for Approval of Law Schools (Rules 5 and 6). Until that time, the Council made accreditation recommendations to the House. The House either voted to accept or reject these recommendations, and this decision was final.

74. *See* ABA CONST., *supra* note 36, art. 45, § 45.9; Legal Educ. Bylaws, *supra* note 52, art. X; Rules 6, 10, *supra* note 54.

75. *See* ABA CONST., *supra* note 36, art. 45, § 45.9.

76. *See* United States' Response to Public Comments About Proposed Modifications of Final Judgment, United States v. ABA, 934 F. Supp. 435 (D.D.C. 1996) (modifying the original consent decree to account for the new accreditation process, which was done to address concerns raised by the DOE in reference to the "separate and independent" requirement); *see also* U.S. Department of Education Staff Report to the National Advisory Committee on Institutional Quality and Integrity 3, 6-7 (1997) [hereinafter U.S. Department of Education Staff Report] (on file with authors) (stating in 1997, prior to the 1999 accreditation changes, that the ABA Council "does not meet either the 'separate and independent' requirement or the conditions for a waiver of that requirement" because "the council is not the final decision-making body; this responsibility rests with the House of Delegates.").

> Association's regular budget process. With respect to those other activities, the Council shall not authorize commitments for expenditures in a fiscal year that would exceed the income and reserves of the Section for that fiscal year without approval of the Board of Governors.[77]

Article X of the Section Bylaws states that while any action of the Section must be approved by the House or by the Board of the ABA before the action can be effective, *actions relating to the accreditation of law schools no longer need approval by the House or the Board*.[78]

> Any action by this Section *must be approved* by the House of Delegates or by the Board of Governors of the American Bar Association before the action can be effective as the action of the American Bar Association. *Actions taken pursuant to Article I, Sections 2(a-b) of these Bylaws shall become effective after review by the House of Delegates, as set forth in the Rules of Procedure for the Approval of Law Schools*.[79]

Actions taken pursuant to Article I, section (2)(a)-(d) of the Section Bylaws pertain to the accreditation of law schools.[80] While the House or Board must still approve most of the Section's activities, neither the House nor the Board may approve decisions or budgetary matters regarding accreditation.[81]

The House may now only "agree" or "refer" back to the Council a Council decision to grant or deny provisional or full accreditation; the House may no longer overrule a Council decision regarding accreditation.[82] Rules 9 and 10 of the *Rules of Procedure for Approval of Law Schools by the American Bar Association* (Rule or Rules) explains the new procedure for review by the House of the Council's decision to deny provisional or full accreditation to law schools.[83] Rule 10 states:

> A decision by the Council to deny an application for provisional or

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77. Legal Educ. Bylaws, *supra* note 52, art. IV, § 1(b) (emphasis added).

78. *Id*. at art. X.

79. *Id.* (emphasis added).

80. Legal Educ. Bylaws, *supra* note 52, art. I, § (2)(a)-(d).

81. *See id.*; *see also* ABA CONST., *supra* note 36, art. 45, § 45.9; Legal Educ. Bylaws, *supra* note 52, art. X; Rules 6, 10, *supra* note 54.

82. *See* ABA CONST., *supra* note 36, art. 49, § 49.5.

83. Rules 6, 10, *supra* note 54.

> full approval, is subject to a maximum of two referrals back to the Council by the House. If the House refers a Council decision back to the Council twice, then the *decision of the Council following the second referral will be final and will not be subject to further review by the House.*[84]

The Council's decision after a second remand is final and binding on the ABA.[85]

Despite the amendments to the Section Bylaws and Rules, the ABA never amended Article 6, section 6.1 of the ABA Constitution, which provides in relevant part:

> *The House of Delegates shall* control, formulate policy for, and administer the Association. It has all the powers necessary or incidental to performing those functions. It shall *supervise and direct the* Board of Governors, officers, *sections*, committees, and employees and agents of the Association.[86]

B. The Department of Justice Antitrust Consent Decree

In 1994, the Antitrust Division of the DOJ began an investigation of ABA accreditation of law schools.[87] On June 27, 1995, the DOJ filed a federal antitrust action against the ABA under § 1 of the Sherman Act.[88] A consent decree was approved on June 25, 1996 (Consent Decree.)[89] The DOJ, in its Complaint, alleged that:

> the ABA restrained competition among professional personnel at ABA-approved law schools by fixing their compensation levels and working conditions, and by limiting competition from non-ABA-approved schools. The Complaint also allege[d] that the ABA allowed its law school accreditation process to be captured by those with a direct interest in its outcome. Consequently, rather

84. Rule 10(a)(3), *supra* note 54.
85. *Id.*
86. ABA CONST., *supra* note 36, art. 6, § 6.1 (emphasis added).
87. *See supra* note 6 and accompanying text.
88. United States v. ABA, 934 F. Supp. 435 (D.D.C. 1996).
89. *Id.* This Consent Decree remains in effect for ten years. *Id.* at 439. The Supreme Court has repeatedly held that a consent decree does not preclude a private suit. *See* Sam Fox Publ'g Co. v. United States, 366 U.S. 683, 689-90 (1961); *see also* Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 13 (1979).

> than setting minimum standards for law school quality . . . the legitimate purpose[] of accreditation, the ABA at times acted as a guild that protected the interests of professional law school personnel.[90]

The DOJ determined that the application of certain ABA law school accreditation standards "unreasonably restricted competition in the market for the services of professional law school personnel."[91] The Consent Decree was necessary because most of the process "was carried out by the Accreditation Committee and the Consultant's office and was kept from public view and the supervision of the ABA's Board of Governor's and House of Delegates."[92] The DOJ felt that "reform of the entire accreditation process was needed."[93] The Consent Decree "provisions were designed to address allegations that the ABA had allowed the accreditation process to be misused by law school personnel with a direct interest in its outcome."[94] The Consent Decree required, inter alia, that the Council revise its membership so that, in part, no more than fifty percent of the members consist of law school deans or faculty.[95]

C. The Department of Education's Review of the ABA and the DOJ Modified Consent Decree

In 1992, Congress amended the Higher Education Act to require that a DOE-recognized accrediting agency be "separate and independent" from an affiliated trade association.[96] In 1994, the DOE promulgated implementing regulations.[97] After conducting an investigation of the ABA, the DOE determined that the ABA was not in compliance with federal law and was not entitled to a waiver.[98] A waiver may not be granted if the trade

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90. Proposed Final Judgment, 60 Fed. Reg. 39,421.

91. *Id*. at 39,425.

92. *Id.* at 39,426.

93. *Id.* at 39,427.

94. United States Memorandum in Support of the Joint Motion for Modification of the Final Judgment at 4, United States v. ABA, No. 95-1211 (D.D.C. Feb. 16, 2001), *available at* http://www.usdoj.gov/(accessed from homepage by selecting Antitrust Case Filings, U.S. v. American Bar Association, then United States' Memorandum in Support of the Joint Motion for Modification of the Final Judgment) (last visited Mar. 30, 2003) [hereinafter Memorandum in Support of the Joint Motion for Modification].

95. *See* United States v. ABA, 934 F. Supp. 435, 437 (D.D.C. 1996).

96. *See* 20 U.S.C. § 1099b(a)(3), (b) (2000).

97. *See* 34 C.F.R. § 602.14(a), (b) (2001) (effective July 1, 2000).

98. United States' Response to Public Comments About Proposed Final Judgment,

association plays any role in the "making or ratifying" of accreditation decisions, or engages in sharing of the accrediting agency's non-public information, both of which the ABA did.[99] The ABA was not entitled to a waiver based on the House's role in approving accreditation policies, making final accrediting decisions, and hearing appeals, and on the sharing of non-public accrediting information between the Council and the ABA's governing board.[100] An affiliated trade association may not make final accreditation policies or decisions.[101] The body that makes such decisions may not be elected or selected by the Board or Chief Executive Officer of the related trade association.[102] Furthermore, one-seventh of the accrediting agency's decision-making body must be comprised of members of the general public, not members of the trade association.[103]

The DOE recommended that either the Council be the final decision-making authority, or the composition of the House be changed.[104] The DOE informed the ABA that an affiliated trade association may not make final accreditation policies or decisions.[105] The body that makes the accreditation decisions may not be elected or selected by the board or Chief Executive Officer of the related trade association.[106] One-seventh of the accrediting agency's decision-making body must be comprised of members of the general public, not members of the trade association.[107] The House has no public, non-law degreed members.[108] The DOE recommended to the ABA that either the Council must be the final decision-making authority, or that the composition of the House be changed.[109] The ABA made the Council the final decision-making authority.[110]

The DOJ consented to the DOE's recommended modification to the Consent Decree.[111] The district court's only consideration regarding the

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supra note 1.

99. *See* 34 C.F.R. § 602.14(d) (2001); *see also* United States' Response to Public Comments About Proposed Final Judgment, *supra* note 1.

100. *See id.*

101. *See* 20 U.S.C. § 1099b(b)(1) (2000); 34 C.F.R. § 602.14(b)(1) (2001).

102. *Id.*

103. *See* 20 U.S.C. § 1099b(b)(2) (2000); 34 C.F.R. § 602.14(b)(2) (2001).

104. *See* Memorandum in Support of the Joint Motion for Modification, *supra* note 94, at 5-6.

105. *Id.* at 5.

106. *Id.* (citation omitted).

107. *See id.* (citation omitted).

108. *See id.*

109. *Id.* at 5-6.

110. *Id.* at 6.

111. United States v. ABA, No. 95-1211, 2001 WL 514376, at *1 (D.D.C. Feb. 16,

Consent Decree was limited to determining whether the proposed modification was within the "zone of settlements."[112] In the United States' Memorandum in Support of the Joint Motion for Modification of the Final Judgment, the DOJ and the ABA, in response to the DOE,

> agreed to modify the Final Judgment to specifically provide for the House of Delegates to have a House of Lords *advisory role* in accrediting individual law schools. *At the time the Final Judgment was entered, the House of Delegates had been the final decision-maker on accrediting individual law schools for more than half a century, and, therefore, the Justice Department did not need to seek relief on this issue.* Because the DOE has now determined that the House may not make these decisions, the parties have agreed to add this provision to mandate the House of Lords oversight role that DOE has approved. Moreover, adding this provision to the Final Judgment will prevent further dilution of the role of the House of Delegates without the Court's permission.[113]

The DOJ and ABA agreed to modify section VI(A) of the Final Judgment,[114] which now states, in pertinent part:

> that following notification by the Council of the Council's action to adopt or amend any Standard, Interpretation, or Rule, the House of Delegates shall vote either to agree with the Council's action, or refer it back to the Council for consideration based on reasons specified by the House, *provided that the House shall be limited to referring an action back to the Council a maximum of two times, and that the decision of the Council will be final following its consideration of the last permitted referral.*[115]

2001).

112. *Id. See* United States v. W. Elec. Co., 993 F.2d 1572, 1576 (D.C. Cir. 1993) (citation omitted); *see also* United States v. Microsoft Corp., 56 F.3d 1448, 1460 (D.C. Cir. 1995) (explaining that the court's function in reviewing agreed-upon decree modification is "not to determine whether the resulting array of rights and resulting liabilities 'is the one that will best serve society,' but only to confirm that the resulting settlement is 'within the reaches of the public interest.'").

113. Memorandum in Support of the Joint Motion for Modification, *supra* note 94, at 8-9 (emphasis added).

114. *Id.*; *see also ABA*, 2001 WL 514376 at *1.

115. Memorandum in Support of the Joint Motion for Modification, *supra* note 94, at 9 (emphasis added).

Section VI(M) was added to the Final Judgment,[116] now requiring that the ABA

> permit appeals to the House of Delegates from a Council decision granting or denying provisional or full approval to a law school, or withdrawing, suspending or terminating approval of a law school. The House shall vote either to agree with the Council's action or to refer it back to the Council for a reconsideration based on the reasons specified by the House. An action granting or denying provisional or full approval may be referred back to the Council a maximum of two times. An action withdrawing, suspending or terminating approval may be referred back to the Council one time. The decision of the Council will be final following its consideration of the last permitted referral.[117]

Section VI(A) of the Consent Decree now states that "the House shall be limited to referring an action back to the Council a maximum of two times, and that the decision of the Council will be final following its consideration of the last permitted referral."[118] Section VI(M) of the Consent Decree now reads: "*The decision of the Council will be final following its consideration of the last permitted referral*."[119] While the approval of the Consent Decree was pending, the House amended Article IV of the Council's Bylaws to divest oversight by the House or the governing board of the Accreditation of Law Schools Project budget so that it is no longer "subject to review or consultation by the Board of Governors or any other entity outside the Section."[120] Article X of the Bylaws now states that actions taken by the Council regarding accreditation are effective after review, rather than approval, by the House.[121] Rules 6 and 10 of the Rules of Procedure of the Approval of Law Schools now states that both the House and the Board are divested of final decision-making authority over the Council's accreditation decisions.[122]

Tom Leahy, a past president of the Illinois State Bar Association and member of the House, filed a public objection to the proposed modification,

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116. *See ABA*, 2001 WL 514376 at *1.
117. *Id.*
118. *Id.*
119. *Id.* (emphasis added).
120. *See* Legal Educ. Bylaws, *supra* note 52, art. IV(b).
121. *See id*. at art. X.
122. Rule 6(b), *supra* note 54.

stating that if the House no longer had authority over the Council, the Council could make independent decisions and not be swayed at all by the corporation.[123] Notwithstanding, the modified Consent Decree was approved on February 16, 2001.[124] The very next day, February 17, 2001, the Counsel reversed the Accreditation Committee's favorable recommendation to approve Barry.[125]

III. THE ABA'S DELEGATION OF AUTHORITY TO AN ADVISORY BODY TO RENDER LAW SCHOOL ACCREDITATION DECISIONS WHICH BIND THE CORPORATION IS AN ULTRA VIRES ACT

When the House confirmed the Board's decision to vest binding authority in the Council with regard to accreditation and budgetary matters, the ABA acted ultra vires. This ultra vires act is null and void. The ABA has essentially two choices. The ABA must either (1) forgo DOE accreditation, or (2) create a completely separate corporation, having a separate corporate identity from the ABA. Under its present structure, if the ABA abides by state law, it violates federal law.[126] If the ABA abides by

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123. *See* United States' Response to Public Comments About Proposed Modification of Final Judgment, *supra* note 1, at 26. The DOJ also acknowledged arguments presented by Professor Gary Palm, a former member of the Council, and Professor John Elson, a former member of the Accreditation Committee who participated in numerous site visits. However, the DOJ was unconcerned about whether the structural change being pursued by the ABA was otherwise prohibited.

> In addition to these arguments, Professors Elson and Palm argued that the ABA violated its constitution in adopting the provision giving the House of Delegates review and remand authority rather than final decision-making authority. They argue that the ABA's constitution requires the House to supervise the Section on Legal Education. Whether the ABA followed its own rules in adopting the change is immaterial to the issue before the Court. The only issue before the Court is whether the modification proposed is in the public interest, not whether the ABA procedures to implement the modification violate its own procedures.

Id. at 26 n.24. It appears the DOJ put on blinders and focused only on whether the Consent Decree could be modified like any other consent decree, not whether the path toward modification was otherwise barred by the organizational structure of the ABA via the ABA Constitution and Illinois law.

124. *See* United States v. ABA, 2001 WL514376 at *1 (D.D.C. Feb. 16, 2001).

125. *See* Letter from Sebert, *supra* note 19, at 3.

126. The Illinois Not For Profit Act, under which the ABA is incorporated provides that only the governing board and committees (whose membership consists of a majority of the governing board) may act to bind the corporation. All other entities act only in an advisory capacity to the corporation. *See* 805 ILL. COMP. STAT. ANN. 105/108.40 (West 1993). However, federal law regarding professional accrediting associations requires that the accrediting body be "separate and independent" of the association. *See* 34 C.F.R.

federal law, it violates state law and the ABA Constitution.[127] At a minimum, the ABA must abide by state law. The ABA must either relinquish DOE accreditation or it must restructure and spin off a separate corporation. There are no other options.[128]

A fundamental and central object of the ABA is the accreditation of law schools. The first section created by the ABA in 1893 was the Section of Legal Education and Admissions to the Bar.[129] Presently, the ABA is the only law school accrediting agency recognized by the DOE.[130] Since the Council of the Section began accrediting law schools in 1921, the governing body of the ABA, vested in the House, has always had absolute veto power over accreditation decisions and budget.[131] Only recently did the ABA change this procedure. This change was done to satisfy the DOE. In doing so, the ABA violated Illinois law.

A. The ABA's Delegation of Binding, Non-Reviewable Authority over Law School Accreditation Matters to an Advisory Body Is an Ultra Vires Act Prohibited by Illinois Law

The Illinois Not For Profit Act requires that the affairs of the corporation "be managed by or under the direction of the board of directors."[132] The governing board may also appoint a committee authorized

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§ 602.14(a), (b) (2003). Since a majority of the Council is not composed of members of the House, the Council must function under Illinois law in merely an advisory capacity. On the other hand, in order to maintain its accrediting role, federal law requires the Council to act "separate and independent" from the corporation. These two roles cannot be reconciled. *See infra* note 212.

127. *See* Elson, *supra* note 4, at 283.

128. If the ABA forgoes DOE accreditation, the state supreme courts could still look to the ABA for accreditation decisions. Independent law schools not affiliated with a regionally accredited university would be unable to offer federally funded student loans. These law schools would have to seek accreditation from some other DOE approved regional accrediting organization.

129. *See* About the Section, Accreditation, Bar Admissions, *available at* http://www.abanet.org (accessed from homepage by selecting Law Student Resources, Legal Education, About the Section, Accreditation, then Bar Admissions) (last visited May 19, 2003).

130. *See* National Institutional and Specialized Accreditation Bodies, *available at* http://www.ed.gov/offices/OPE (accessed from homepage by selecting Accreditation, Lists of Nationally Recognized Accrediting Agencies, then Law (last visited Mar. 7, 2003); *see also* 34 C.F.R. § 602 (2003).

131. *See* United States' Response to Public Comments About Proposed Modifications of Final Judgment, *supra* note 1.

132. 805 ILL. COMP. STAT. ANN. 105/108.05(a) (West 1993).

to bind the corporation to certain acts not otherwise prohibited by statute.[133] A majority of the committee's members must be members of and appointed by the governing board. Besides the governing board and a committee, all other entities of a corporation are only advisory, which means that the governing board must retain power to approve or overrule all decisions made by such entities.[134]

A majority of the Council of the Section's membership does not consist of members of the House or of the Board, is not appointed by these governing boards and thus, the Council is not a committee.[135] Only the governing board or a committee properly constituted and appointed by the governing board may bind the entire corporation.[136]

The ultra vires action occurred when the ABA divested the governing board of supervision, direction and control over an advisory body, the Council. ABA General Counsel, Darryl DePriest, admitted in an affidavit that in August 1999 the ABA restructured the accreditation process "to give the Council final decision-making authority concerning accreditation of individual law schools."[137]

On December 7, 1992, the ABA incorporated in the State of Illinois.[138] Prior to this time the ABA had never been incorporated anywhere in the

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133. 805 ILL. COMP. STAT. ANN. 105/108.40(a) (West 1993).

134. 805 ILL. COMP. STAT. ANN. 105/108.40(d) (West 1993).

135. *See* Plaintiff's Amended Complaint ¶¶ 83, 85, 86, 88, 367, Staver v. ABA, 169 F. Supp. 2d 1372 (M.D. Fla. 2001) [hereinafter Complaint]; Defendant's Answer to Amended Complaint ¶¶ 83, 85, 86, 88, Staver v. ABA, 169 F. Supp. 2d 1372 (M.D. Fla. 2001), *available at* http://www.lc.org (accessed from homepage by selecting ABA Accreditation Research then Amended Complaint) (last visited Mar. 30, 2003).

136. *See* 805 ILL. COMP. STAT. ANN. 105/108.05(a), .40(a)-(d) (West 1993). The ABA Constitution addresses the sections under Article 30, whereas *committees* are addressed under Article 31. *See* ABA CONST., *supra* note 36, arts. 30-31. ABA representative Marina Jacks has acknowledged that which is evident in the ABA Constitution: that the sections are not committees. *See* Declaration of Marina Jacks ¶ 18, Staver v. ABA, 169 F. Supp. 2d 1372 (M.D. Fla. 2001), *available at* http://www.lc.org (accessed from homepage by selecting ABA Research then Amended Complaint) (last visited Mar. 14, 2003). Moreover, mere nomenclature does not make a department of a corporation a committee. Even the entities within the ABA which the ABA terms "committees" are not committees according the definition of a committee under Illinois law. At a minimum, a committee under Illinois law must be composed of at least fifty-one percent of the governing board. A duly constituted committee under Illinois law must be appointed by and composed of a majority of the governing board. *See* ILL. COMP STAT. ANN 105/108.40(a); ABA CONST., *supra* note 36, arts. 30-32.

137. Declaration of Darryl DePriest ¶ 5, Staver v. ABA, 169 F. Supp. 2d 1372 (M.D. Fla. 2001), *available at* http://www.lc.org (accessed from homepage by selecting ABA Accreditation Research then Declaration of Darryl DePriest) (last visited Mar. 30, 2003).

138. *See* ABA Articles of Incorporation, *supra* note 32.

United States.[139] When the ABA became a corporate entity in the State of Illinois where it is headquartered, it became regulated by Illinois corporate law.[140]

From its incorporation until August 1999, the ABA House continued to exercise veto power over the Council's accreditation decisions as it had done from its inception. However, in August 1999, for the first time in its history, the ABA purported to change its structure by allowing the Council to bind the corporation in all matters pertaining to law school accreditation.[141] This change was undertaken solely to placate the DOE in meeting the "separate and independent" requirement.[142] The House, as the governing board, literally *reversed* roles with the Council. Instead of the Council being advisory to the House, the House became advisory to the Council.[143] This role reversal is precluded by Illinois law and is ultra vires.[144]

In 1992, prior to the DOJ's antitrust action against the ABA, Congress passed a requirement in the Higher Education Act that required a DOE-recognized accrediting agency to be "separate and independent" from an affiliated trade association.[145] In 1994, the DOE promulgated regulations to implement the federal law.[146]

In 1997, the year following the DOJ Consent Decree, the DOE determined that the ABA was not in compliance with the Higher Education Act.[147] Under DOE regulations, a trade association may not play any role in the "making or ratifying" of accreditation decisions, or engage in sharing of the accrediting agency's non-public information, both of which the ABA did.[148] The body that makes the accreditation decisions may not be elected

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139. *See* ABA CONST., *supra* note 36, art. 14.

140. *See* 805 ILL. COMP. STAT. ANN. 105/101.70.

141. *See* ABA CONST., *supra* note 36, art. 45, § 45.9; Legal Educ. Bylaws, *supra* note 52, art. IV; Rules 6, 10, *supra* note 54.

142. *See* United States' Response to Public Comments About Proposed Modifications of Final Judgment, *supra* note 1.

143. This structure exists only in relation to law school accreditation decisions and the budget of the Accreditation of Law Schools Project. Outside of these two areas, the Council of the Section remains an advisory body in the same way that every other section operates in an advisory capacity to the House and the Board.

144. *See* 805 ILL. COMP. STAT. ANN. 105/108.40(a).

145. *See* 20 U.S.C. § 1099b(a)(3), (b) (2000).

146. *See* 34 C.F.R. § 602.3(d), .14(a), (b) (1999); 64 Fed. Reg. 56612, 56618-19 (Oct. 20, 1999).

147. *See* United States' Response to Public Comments About Proposed Modifications of Final Judgment, *supra* note 1.

148. 34 C.F.R. § 602.14(d) (1999).

or selected by the Board or Chief Executive Officer of the related trade association.[149] Furthermore, one-seventh of the accrediting agency's decision-making body must be members of the general public, not members of the trade association.[150]

The DOE recommended that either the Council of the Section be the final decision-making authority, or the composition of the House be changed.[151] The ABA decided to make the Council the final decision-making authority.[152] The DOJ consented to the DOE's recommended modification to the Consent Decree.[153] In response to the DOE, the DOJ and the ABA

> agreed to modify the Final Judgment to specifically provide for the House of Delegates to have a House of Lords *advisory role* in accrediting individual law schools. *At the time the Final Judgment was entered, the House of Delegates had been the final decision-maker on accrediting individual law schools for more than half a century, and, therefore, the Justice Department did not need to seek relief on this issue.* Because the DOE has now determined that the House may not make these decisions, the parties have agreed to add this provision to mandate the House of Lords oversight role that the DOE has approved. Moreover, adding this provision to the Final Judgment will prevent further dilution of the role of the House of Delegates without the court's permission.[154]

The DOJ and ABA agreed to modify section VI(A) of the Consent Decree to provide that "the House shall be limited to referring an action back to the Council a maximum of two times, and that the decision of the Council will be final following its consideration of the last permitted referral."[155] A further modification to section VI(N) of the Consent Decree now states: "*The decision of the Council will be final following its*

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149. 20 U.S.C. § 1099b(b)(1) (2000).

150. 20 U.S.C. § 1099b(b)(2) (2000).

151. *See id.*

152. *See id.*; *see also* Memorandum in Support of the Joint Motion for Modification, *supra* note 94.

153. When a court considers modifying a consent decree, the court does not conduct a survey of existing law to determine whether the modification implicates some legal dictum. *See* United States v. W. Elec. Co., 993 F.2d 1572, 1576 (D.C. Cir. 1993) (citation omitted).

154. Memorandum in Support of the Joint Motion for Modification, *supra* note 94.

155. *Id.*

consideration of the last permitted referral." [156]

The modified Consent Decree was approved on February 16, 2001.[157] While the approval of the Consent Decree was pending, the House amended Article IV of the Section's Bylaws to divest oversight by the House and the Board over the Accreditation of Law Schools Project budget.[158] The Council's decisions concerning the accreditation budget are no longer "subject to review or consultation by the Board of Governors or any other entity outside the Section."[159] Article X of the Bylaws was amended to give the Council final authority in accreditation decisions.[160] Rules 6 and 10 and Article 45.9 of the ABA Rules of Procedure of the House of Delegates state that both the House and the Board are divested of final decision-making authority over the Council's accreditation decisions.[161]

Under Illinois law there are only two entities within a corporation than can bind the entire corporation—the governing board and committees.[162] A committee is more than mere nomenclature; it must be constituted pursuant to Illinois law. The relevant statute states the following:

> If the articles of incorporation or bylaws so provide, a majority of the directors may create one or more committees and appoint directors or such other persons as the board designates, to serve on the committee or committees. *Each committee shall have two or more directors, a majority of its membership shall be directors, and all committee members shall serve at the pleasure of the board*.[163]

If so constituted, a committee "may exercise the authority of the board of directors," except a committee may not bind the corporation to seven specified categories.[164] Pursuant to Illinois law, the governing board

> may create and appoint persons to a commission, *advisory body* or other such body which may or may not have directors as members,

156. *Id*. (emphasis added).
157. *See* United States v. ABA, 2001 WL 514376 (D.D.C. Feb. 16, 2001).
158. *See* Legal Educ. Bylaws, *supra* note 52, art. IV(1)(b).
159. Legal Educ. Bylaws, *supra* note 52, art. IV(b).
160. *Id.* at art. I(2)(b).
161. *See* ABA CONST., *supra* note 36, art. 45, § 45.9.
162. *See* 805 ILL. COMP. STAT. ANN. 105/108.05(a), .40(a) (1993).
163. 805 ILL. COMP. STAT. ANN. 105/108.40(a) (1993) (emphasis added).
164. *See* 805 ILL. COMP. STAT. ANN. 105/108.40(c)(1)-(7) (1993).

> *which body may not act on behalf of the corporation or bind it to any action but may make recommendations to the board of directors or to the officers.*[165]

According to Illinois law, a corporation's "bylaws may contain any provision for the regulation and management of the affairs of a corporation *not inconsistent with law or the articles of incorporation*."[166] If the ABA's Bylaws violate the statute, the articles or the ABA Constitution, then the Bylaws are ultra vires. The ABA's amendments to Articles IV and X of the Section Bylaws, to Article 45.9 of the ABA Rules of Procedure of the House of Delegates, and Rules 6 and 10 of the Rules of Procedure for Approval of Law Schools violate both the Illinois Not For Profit statute and Article 6.1 of the ABA Constitution.[167]

Accreditation is a major function of the ABA. The first section created by the ABA in 1893 was the Section of Legal Education and Admissions to the Bar. In 1921, the ABA began accrediting law schools.[168] From its inception, the governing body of the ABA, vested in the House, has exercised veto power over the Council's decision on accreditation. Only recently did the ABA divest the House of authority over the Council. This action violates the Illinois Not For Profit Act. The ABA could comply with state law, the ABA Constitution and the Higher Education Act if it chose to do so.[169]

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165. 805 ILL. COMP. STAT. ANN. 105/108.40(d) (1993) (emphasis added).

166. 805 ILL. COMP. STAT. ANN. 105/102.25 (1993) (emphasis added).

167. The Illinois Not For Profit Act, 805 ILL. COMP. STAT. ANN. 105/108.05(a) (1993), like Article 6.1 of the ABA Constitution, requires the governing board (in this case the House) to manage and control the ABA. Notwithstanding Illinois law and Article 6.1, these amendments divest the governing board of final authority over a central purpose of the ABA, namely accreditation.

168. *See, e.g.*, Massachusetts Sch. of Law at Andover v. ABA, 107 F.3d 1026 (3d Cir. 1997).

169. The ABA could separately incorporate the Council. To maintain compliance with the DOE, the governing board of a separately incorporated Council could not be elected or appointed by the governing board of the ABA. Obviously, the ABA would lose a significant amount of control over a separately incorporated council. Such a move would weaken, but not eliminate, the ABA's control over accreditation. On the other hand, if the ABA wanted to retain control over accreditation and continue its current structure, it could choose to forgo approval by the DOE. If the ABA were not approved by the DOE because of non-compliance with the Higher Education Act, the state supreme courts may still rely on the ABA for accreditation. The only benefit DOE approval brings to an accrediting body is that schools accredited by such an entity may offer federally guaranteed student loans. Law schools may still offer federal student loans if they are separately accredited by regional accrediting agencies. Only a few have not sought separate accreditation.

The United States Supreme Court stated long ago that "corporations created by statute must depend, both for their powers, and the mode of exercising them, upon the true construction of the statute itself."[170] A corporation is a creature of the legislature to which it "owes its existence" and from which it must "derive all its powers," and thus it may act "only in the manner which that act authorizes."[171]

Under Illinois law, members of a corporation entitled to vote may institute a proceeding in court "to enjoin the doing of any act or acts" of a corporation which are claimed to be ultra vires.[172] An Illinois corporation has only those powers authorized by statute and within its constitution, so long as it is consistent with the authorizing statute. One Illinois court observed the following:

> A corporation has no natural rights or capacities, such as an individual or an ordinary partnership, and if a power is claimed for it, the words giving the power or from which it is necessarily implied must be found in the charter or it does not exist. The law on this subject is stated by the Supreme Court of the United States in *Central Transportation Co. v. Pullman Palace Car Co.*,[173] as

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170. President, Dir. & Co. of the Bank of the United States v. Dandridge, 25 U.S. 64, 68 (1827).

171. Head & Armory v. Providence Ins. Co., 6 U.S. 127, 166 (1804).

172. 805 ILL. COMP. STAT. ANN. 105/103.15(a) (1993); *see also* Sawko v. Dominion Plaza One Condo. Ass'n No. 1-A, 578 N.E.2d 621, 624 (Ill. App. Ct. 1991) (holding that a member of a nonprofit condominium association has standing to challenge an association's action as ultra vires). Members of the ABA have standing to challenge ultra vires acts of the membership corporation, which includes not only operating outside of the state law that gives the corporation life, but also includes violation of internal governing documents such as the Constitution, Bylaws and Rules. *See, e.g.*, Perkaus v. Chi. Catholic High Sch. Athletic League, 488 N.E.2d 623, 627 (Ill. App. Ct. 1986); *see also* Wolinsky v. Kadison, 449 N.E.2d 151, 155-56 (Ill. App. Ct. 1983). Under Illinois law, "the constitution and bylaws of an unincorporated association [including a corporation] constitute a contract between the association and the members." *Perkaus*, 488 N.E.2d at 627; *see also* Austin v. Am. Ass'n of Neurological Surgeons, 253 F.3d 967, 968 (7th Cir. 2001) ("Ordinarily a dispute between a voluntary association and one of its members is governed by the law of contracts, the parties' contractual obligations being defined by the charter. . . ."); *Wolinsky*, 449 N.E.2d at 155-56 (holding that a condominium association owes a fiduciary duty to members of the association and violation of condominium declaration or bylaws constitutes a breach of said duty); St. Francis Courts Condo. Assoc. v. Investors Real Estate, 432 N.E.2d 1274, 1277 (Ill. App. Ct. 1982) (holding an attempted amendment to condominium declaration void for failure to follow condominium act and condominium declaration); Bramson v. Beau Monde, Inc., 415 So.2d 761, 763 (Fla. Dist. Ct. App. 1982) (holding that failure of board of directors to comply with condominium declaration was ultra vires and action was void).

173. 139 U.S. 24 (1891).

> follows: "The charter of a corporation, read in the light of any general laws which are applicable, is the measure of its powers, and the enumeration of those powers implies the exclusion of all others not fairly incidental."[174]

In *Wallace v. Madden*,[175] the Illinois Supreme Court reviewed a decision on a Catholic Order of Foresters, a fraternal beneficiary society, and stated the following:

> When the order adopted its constitution and by-laws, and became organized under the statute, it became subject to all the provisions of the statute. *It became clothed with such power, and such only, as was conferred by the statute; and any provision of its constitution or by-laws inconsistent with the statute or not authorized by the statute, would be a nullity.*[176]

In Illinois, the rule of construction applicable to statutory provisions is "that every power that is not clearly granted is withheld, and that any ambiguity in the terms of the grants must operate against the corporations and in favor of the public." If the power claimed is withheld, "it is regarded as a prohibition against the exercise of such a power."[177] "Corporations can only exercise such powers as may be conferred by the legislative bodies creating them. . . ."[178] The Illinois Supreme Court further said:

> Where a corporation is formed under the general law, *the law itself*, and not the declaration of incorporation, or the constitution and bylaws adopted for the corporate government, *becomes the charter*, and enumerates the powers which are to be exercised. The charter of a corporation formed under such general law does not consist of the articles of incorporation alone, but of said articles taken in connection with the law under which the organization takes place.[179]

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174. Alexander v. Bankers Union of Chi., 187 Ill. App. 469, 475 (Ill. App. Ct. 1914) (quoting Nat'l Home Bldg. Ass'n v. Home Sav. Bank, 54 N.E. 619, 619-20 (Ill. 1899)).

175. 48 N.E. 181 (Ill. 1897).

176. *Id*. at 182 (emphasis added).

177. Fritze v. Equitable Bldg. & Loan Soc'y of Peoria, 57 N.E. 873, 877 (Ill. 1900) (quoting Am. Loan & Trust Co. v. Minn. & N.W.R. Co., 42 N.E. 153, 157 (Ill. 1895)).

178. *Id*. at 877.

179. *Id*. (emphasis added) (internal citation omitted).

The laws of other jurisdictions comport with the well-settled law in Illinois. In *Chapin v. Benwood Foundation, Inc.*,[180] the court stated that directors of a "corporation may not delegate to others those duties which lay at the heart of the management of the corporation."[181] In a case involving investments by a corporation, a federal court found that "[t]otal abdication of the supervisory role . . . is improper even under traditional corporate principles."[182] The governing board may not delegate power to enter into a contract which totally encumbers the most significant aspect of the corporation.[183] Regarding the nonprofit Boston Athletic Association, the Massachusetts Supreme Court stated the following:

> Principles of corporate governance with respect to the power of the board of governors to delegate authority to individual officers are applicable to profit and nonprofit corporations alike. In fact, *the powers of an officer of a charitable corporation to bind the corporation without specific ratification by the board of governors or directors are more strictly construed than would be similar powers of an officer of a business corporation. . . .*
>
> . . . .
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> . . . The rule on delegation of authority to officers of charitable or nonprofit organizations is the result of heightened public interest in the affairs of those organizations.[184]

An essential function of the Boston Athletic Association was a local marathon, and that function could not be delegated outside of the direct supervision of the board.[185] Most assuredly, the ABA may not delegate the function of law school accreditation.[186] "Too broad a delegation of powers,

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180. 402 A.2d 1205 (Del. Ch. 1979).

181. *Id*. at 1210. Whether accreditation is a central function of the ABA need not be resolved to conclude that the ABA has acted ultra vires under the Illinois Not for Profit Act and Article 6.1 of the ABA Constitution. The central function of a corporation need only be resolved if the corporate statute or the constitution are silent on particular functions. Here, the Illinois statute and Article 6.1 are crystal clear. *Only a corporate governing board or a duly constituted committee may bind the corporation, and the House, as the governing board, must "direct" and "supervise" the Section.*

182. Stern v. Lucy Webb Hayes Nat'l Training Sch. for Deaconesses & Missionaries, 381 F. Supp. 1003, 1014 (D.D.C. 1974).

183. *See* Boston Athletic Ass'n v. Int'l Marathons, Inc., 467 N.E.2d 58, 63 (Mass. App. Ct. 1984).

184. *Id*. at 63-64 (emphasis added) (internal citation omitted).

185. *See id.* at 62.

186. *See* Stoneman v. Fox Film Corp., 4 N.E.2d 63, 66 (Mass. 1936) (holding that

either expressed or implied, may be interpreted as an unlawful abdication by the board of directors of its management functions."[187] The ABA has abdicated the responsibility of supervising and controlling the Counsel. The ABA's abdication of oversight is both "formal" and "effective."

> Formal abdication occurs when directors are fully and unalterably deprived of the ability to make a decision that they are required to make. Effective abdication may occur when directors retain authority to make the decision but, in reality, the outcome is predetermined.[188]

The current "appeal" procedure from the Council to the House is no appeal at all; it is illusory. The House has no authority to overrule the Council. The House may only "refer" back to the Council, but the Council has the final word.[189] Indeed, the "outcome is predetermined." The Council has been cut free from the ABA governing body, yet it remains part of the ABA. The Council is not separately incorporated. It is not a committee. Nonetheless, the Council exercises enormous autonomy and authority to bind the ABA on issues central to the corporation, namely accreditation. This structure violates Illinois law and is ultra vires.

Traditional corporate law has long established that directors may not "delegate the responsibility to govern the corporation unless permitted to do so by statute."[190] Moreover, "directors of the corporation do not have the power to delegate to others those duties which are at the focal point of the management of the corporation."[191] When a corporation acts outside of an authorizing statute, it is considered to have acted ultra vires, which is beyond the power of the corporation.[192] "[A] board of directors has no power to delegate the performance of its basic powers and functions, particularly its statutory prerogatives, in the absence of express statutory

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directors of a corporation are regarded as fiduciaries and may not delegate ultimate decision-making of essential functions).

187. Fournier v. Fournier, 479 A.2d 708, 712 (R.I. 1984); *see also Stern*, 381 F. Supp. at 1013-14 (noting that abdication of directors' supervisory role is improper).

188. Karen L. Valihura & Leonard P. Stark, *Fiduciary Duties Derailed? Appropriation of Directors' Duties in the Battle for Control of Conrail*, 24 J. CORP. L. 29, 34 (1998).

189. *See* ABA CONST., *supra* note 36, art. 45, § 45.9; Legal Educ. Bylaws, *supra* note 52, art. X; Rules 6, 10, *supra* note 54.

190. 18B AM. JUR. 2D *Corporations* § 1507 (1985).

191. 2 FLETCHER CYCLOPEDIA OF PRIVATE CORPORATIONS § 495 (1998) [hereinafter FLETCHER].

192. *See* 18B AM. JUR. 2D *Corporations* § 2009 (1985).

authority."[193] The powers of a nonprofit corporation's board to delegate (or in this case, to abdicate) authority to a subordinate entity is more circumscribed than for profit corporations.[194] "The board of directors cannot delegate to subordinate officers or agents the exercise of discretionary powers which by the articles of incorporation, general laws, bylaws, or vote [of the members or shareholders] is vested exclusively in the board."[195]

An ultra vires act is one undertaken without authority. The action of the ABA to vest binding authority in what the Illinois statute considers an advisory body is ultra vires, and such act is void *ab initio*.

> An ultra vires act or contract is one that is beyond the powers expressly or impliedly conferred upon a corporation. The act must be beyond the powers of a corporation as defined by its charter and the law. So long as an act is beyond a corporation's power as so defined, it is ultra vires. . . . If the act sought to be done is foreign to the nature and design of the corporation, it is ultra vires; furthermore, although the act is calculated to attain a permissible corporate purpose, it may be ultra vires because of the undue means of accomplishing it. . . . [C]orporate acts are also said to be ultra vires where the corporation is not authorized to perform such acts because of a disregard of certain formalities which the law demands, because of an improper use of enumerated powers, or because of a lack of power in such regard in its officers or agents.[196]

The statutory prohibition against vesting an advisory board with authority to bind the corporation is clear. The ABA vested the Council with such authority. This act is ultra vires.

B. The ABA's Delegation of Binding, Non-Reviewable Authority over Law School Accreditation Matters to an Advisory Body Is an Ultra Vires Act Prohibited by Article 6.1 of the ABA Constitution

Vesting the Council with authority to bind the ABA is not only

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193. Wells Fargo Bank v. Superior Court of the City & County of San Francisco, 811 P.2d 1025, 1033 (Cal. 1991) (citation omitted).

194. *See* FLETCHER, *supra* note 191, at § 496.

195. *Id*. at § 497.

196. 18B AM. JUR. 2D *Corporations* § 2009 (1985).

prohibited by Illinois law, it is prohibited by the ABA's constitution. Article 6.1 of the ABA Constitution states that "The House of Delegates shall . . . supervise and direct the . . . sections . . . ."[197] Professor John Elson, former member of the ABA Accreditation Committee, has written that the divestiture of "the ABA House of Delegates of any decision making authority over accreditation matters, [is] contrary to the ABA's own constitution."[198]

Interpreting the word "supervise" as utilized in another Illinois statute, an Illinois court of appeals pointed to the definition in *Webster's Third New International Dictionary*, which defined "supervise" as follows:

> [T]o *coordinate*, *direct*, and *inspect continuously* and at first hand the accomplishment of: *oversee with the powers of direction and decision* the implementation of one's own or another's intentions.[199]

The same court also pointed to the *Oxford English Dictionary*, which defines "supervision" as "[g]eneral management, direction, or control; oversight, superintendence."[200] The court noted that the same dictionary defined the word "direct" in the following manner: "[k]eep in right order; to regulate, control, govern the actions of . . . *[t]o cause (a thing or person) to move . . . toward a place*."[201] The court also noted that "supervision often involves some active participation."[202] Indeed, "supervision extends beyond passive oversight of an activity and includes direction . . . and—*to some degree*—active participation in an activity while supervising it."[203]

Article 6.1 of the ABA Constitution requires the House to "direct" and "supervise" the Section. That is, the House must "inspect continuously," "oversee with the powers of direction and decision," "control," "govern the actions of," and "actively participate" in the Council's decisions regarding accreditation of law schools. The House must do more than merely engage in "passive oversight" of the Council's decisions on law school

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197. ABA CONST., *supra* note 36, art. 6, § 6.1 (emphasis added).

198. Elson, *supra* note 4, at 283.

199. Longfellow v. Corey, 675 N.E.2d 1386, 1389 (Ill. Ct. App. 1997), *appeal denied*, 684 N.E.2d 1336 (Ill. 1997) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2296 (1996) (emphasis added by the court)).

200. *Id*. at 1389 (quoting OXFORD ENGLISH DICTIONARY 245 (2d ed. 1989)).

201. *Id*. (quoting OXFORD ENGLISH DICTIONARY, *supra* note 200, at 701 (emphasis added by the court)).

202. *Id*.

203. *Id.* (emphasis added).

accreditation.

Article 6.1 has never been amended and itself prohibits the Council from acting independently. The House must actively "supervise" and "direct" the Council as it did prior to August 1999. Under its present structure an aggrieved law school can only hope for a remand *to the same body that denied the school in the first place*. That is not an appeal, nor is it supervision or direction. The House remand is without power, is not capable of reversal, and obligates the Council to do nothing. This process violates Illinois law and the ABA's constitution under Article 6.1.

The argument that the ABA's current structure violates its own constitution is not unprecedented. On June 8, 1998, ABA General Counsel Darryl DePriest testified before the DOE's National Advisory Committee on Institutional Quality and Integrity regarding the ABA's compliance (or lack thereof) with the Higher Education Act. Mr. DePriest acknowledged that to divest the House of control, the ABA must amend its constitution. He stated the following:

> [T]he Board of Governors can act between meetings of the House, the Board of Governors, though, cannot amend the constitution and bylaws of the Association. If that were to be the solution to this problem [of the Council being "separate and independent" from the trade association], to amend the constitution and bylaws, it would have to be done by the House. . . . Let us just say, for example, the role that the House of Delegates plays in the accreditation process is captured within our constitution and bylaws. So that, *if, for example, in order to comply with separate and independent, we wanted to excise the role of the House from the process, that would require an amendment to our constitution and bylaws*.[204]

Also testifying at the same DOE meeting in 1998 was Scott Bice, who at the time was dean of the University of Southern California Law School and president of the American Law Deans Association (ALDA).[205] He

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204. Statement of Darryl DePriest, National Advisory Committee on Institutional Quality and Integrity, 59-60 (emphasis added) (1998) [hereinafter DOE Transcript].

205. The ALDA is composed of more than 100 members, all of whom are deans of ABA approved law schools. During the DOE hearing in 1998, the governing board of the ALDA consisted of Robert Scott of the University of Virginia, Judith Areen of Georgetown University, Douglas Baird of the University of Chicago, Paul Breast of Stanford University, Ron Case of Boston University, Colin Diver of the University of Pennsylvania, Pamela Brooks-Gann of Duke University, James Hoffman of Lewis and Clark University, Jeffrey Lehman of the University of Michigan and Harvey Perlman of the University of Nebraska.

stated the following:

> [T]here are significant problems for the ABA to overcome in meeting the separate and independent criterion. Under the current process, the ABA Board of Governors and its House of Delegates have virtually plenary power over the Council. State delegations can and have proposed accreditation standards directly to the House of Delegates without consent of the Council.
> The House of Delegates has the power to adopt those standards over the objection of the Council. *The Council is, in effect, a mere department of a voluntary trade association, and there will have to be significant changes in the ABA Constitution to give independence to the Council* if it is to continue as a federally approved accrediting agency.[206]

The ABA acknowledged before the DOE that if the ABA were required to isolate the Council's accreditation decisions from the House, it would have to amend its constitution.[207] Putting aside for the moment the statutory prohibition to the current ABA structure, Article 6.1 would have to be amended so that the House is no longer required to "direct" and "supervise" the Council of the Section. The ABA has never amended Article 6.1. An amendment to the constitution requires an affirmative vote of two-thirds of the members of the House.[208] An amendment to the Bylaws requires only a simple majority.[209]

One would expect a league of attorneys would abide by the law and respect the rights of its members. Unfortunately, the ABA has a checkered history of flouting the law. In the area of accreditation, the ABA has violated antitrust law, and has become subject to a ten-year Consent Decree to refrain from antitrust activities. The ABA violated the federal Higher

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Id.

206. *Id*. at 100 (Statement of Scott Bice) (emphasis added).

207. DOE Transcript, *supra* note 204.

208. *See* ABA CONST., *supra* note 36, art. 13. Article 13 actually states that an amendment requires an affirmative vote of two-thirds or 150, whichever is greater. Since the House consists of 538 members, an affirmative vote of two-thirds is necessary.

209. ABA CONST., *supra* note 36, art. 12. Perhaps the ABA chose to amend the ABA Bylaws and not the ABA Constitution because the latter may have been politically impossible. At any rate, the bylaws of a corporation cannot grant a right which is prohibited by the corporate charter or constitution. The relationship of a corporate charter or constitution to a corporation's bylaws is analogous to the United States Constitution to federal statutes. That which is prohibited in the former may not be granted in the latter.

Education Act (HEA). When the DOE inquired of the ABA regarding its compliance with the Higher Education Act, the ABA stated that the accreditation process and structure complied the law.[210] Obviously, the ABA was not in compliance with the Higher Education Act, and thus the reason for the modified Consent Decree. The ABA is currently violating Illinois law under which it is incorporated. The ABA is also presently violating its own constitution. Despite the fact that the ABA told the DOE it would have to amend its constitution in order to make the Council "separate and independent," it has failed to do so.

Even if the ABA did amend Article 6.1 of the ABA Constitution to allow the Council to act autonomously of the House, such action would still violate Illinois law. An Illinois non-profit corporation must act in accordance with the state corporate statute *and* in accordance with its own constitution. A corporate constitution may not grant authority to a nonprofit corporation which is prohibited by the corporate statute. For example, if the state statute prohibits a nonprofit corporation from issuing shares, the corporate constitution may not authorize the issuance of shares. Similarly, if the state law prohibits officers and directors of a nonprofit corporation from receiving dividends, the corporate constitution may not authorize the payments of dividends. Thus, even if Article 6.1 of the ABA Constitution were amended to authorize the Council to bind the corporation to accreditation decisions over which the House has no veto, such act would be ultra vires because Illinois law prohibits an advisory body from binding the corporation.[211]

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210. See United States' Response to Public Comments About Proposed Modifications of Final Judgment, *supra* note 1, at 9 n.5. The Response declares that:

> After the 1992 amendments to the HEA were passed, DOE needed to conduct a thorough review of 80-100 accrediting agencies to determine whether each met the new requirements for recognition by DOE that were contained in the 1992 amendments. . . . The ABA sent a letter stating that in its opinion, it complied with the waiver requirement. Based on that assurance, DOE scheduled the ABA for review in 1997. During this review, DOE determined that the ABA was not entitled to a wavier based on the House of Delegates' role in approving accreditation policies, making final accrediting decisions, and hearing appeals, and on sharing non-public accrediting information between the Council and the ABA's Governing Board, which was permitted by the Final Judgment.

Id.; *see also* U.S. Department of Education Staff Report, *supra* note 76, at 3, 6-7.

211. If the House constituted the Council as a committee under the Illinois Not For Profit Act, this action would conflict with the Higher Education Act. Under Illinois law, a committee must be appointed by the governing board, but under the Higher Education Act, an accrediting body of an affiliated trade association may not be appointed by the association's governing board. *Compare* 805 ILL. COMP. STAT. ANN. 105/108.40(a) (1993) *with* 20 U.S.C. § 1099b(b)(1) (2000) *and* 34 C.F.R. § 602.14(b)(1) (1999).

The problem with the current structure is that the Council of the Section is completely isolated from the ABA governing board, from the ABA members and from the public. ABA members have been disenfranchised from the accreditation process. Under the current structure, ABA members may no longer object to arbitrary and potentially illegal decisions of the Council, not even when they are directly injured by the Council's actions. Incredibly, not even the House, which is the governing body of the ABA, can overrule the Council's decision regarding accreditation.[212] The governing board sits on the sidelines as the Council renders final decisions regarding accreditation. The Council's actions are immune.

When the DOJ filed the antitrust action in 1995, the ABA faced potential civil and/or criminal liability for engaging in anti-competitive activity. Antitrust activities and arbitrary accreditation decisions jeopardize not only the ABA, but also work to the detriment of the membership and the legal services market. The members must retain their voice to ensure that the ABA and law school accreditation does not go up in smoke.

The Council of the Section must be responsive to the full membership

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212. This point should not be overlooked. The Council not only makes decisions regarding new applications for provisional accreditation, it also reviews accredited schools for continued accreditation. Moreover, the Council, not the House, creates the Standards which govern accreditation. One would think that the governing body of the corporation would by necessity exercise veto power over a department of the corporation, especially when that same department has faced investigations by both the DOJ and the DOE. If the Consent Decree is breached at any time during the effective period, such breach by its very terms subjects the ABA to contempt of court. *See* United States v. ABA, 934 F. Supp. 435, 439 (D.D.C. 1996). After the Arthur Anderson accounting fiasco, corporate America assumed that the corporation would exercise more, rather than less, oversight of the business activities. Similarly, one would assume that the ABA governing board would seek to exercise more supervision over the accreditation process, rather than less, following the DOJ Consent Decree. In fact, the DOJ Consent Decree was originally designed to open up the process because the Council had concealed much of its activities from the House. Proposed Final Judgment, 60 Fed. Reg. at 39,426 ("Most of the process, as it applied to individual law schools, was carried out by the Accreditation Committee and the Consultant's office and was kept from public view and the supervision of the ABA's Board of Governors and House of Delegates."). The purpose of the DOJ Consent Decree was essentially gutted by the modified Consent Decree, which gave way to the DOE's request to isolate the Council from the House. *See* United States v. ABA, 2001 WL 514376 (D.D.C. Feb. 16, 2001). The reason for this request is understandable. By their very nature, trade associations that engage in accreditation or standard-setting have a tendency to act in a self-interested, and thus, anti-competitive manner. However, the current structure isolates the Council to such an extent that self-interest and anti-competitive activity is an inherent byproduct. Whatever structure the ABA takes in the future, the current structure in not in the best interest of ABA members, law schools or the legal profession.

of the ABA, not to just a small guild of legal educators intent on promoting their own self interests. It makes no sense to allow an advisory body to enjoy the benefits of legal liability protection behind a corporate veil, and yet allow the advisory body to violate the same law under which it claims protection. The law of the state of incorporation grants certain benefits to corporations and imposes responsibilities. The ABA is incorporated under the laws of Illinois and it must respect these laws. The ABA has chosen to become a law unto itself. It flouts state law and thumbs its nose at its members by acting contrary to the Illinois Not For Profit Act and its own constitution.

The Council of the Section has historically proven that it has not acted in the best interest of law schools or its members. Dean Bice, while president of the American Law School Deans Association, expressed his concern with the Council:

> [M]any of the standards [for law school accreditation] are inappropriate. Some entrench status and compensation for particular classes of faculty and administrators. Some impose educational programs that are not essential to providing an adequate legal education, and others micromanage law school administration in indefensible detail.
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> As the chairperson of the Council himself has stated, the standards currently reflect "political compromise" responding to a range of special interests, including librarians, clinical teachers, and practicing lawyers. We believe the standards should be sanitized of these political compromises and set only criteria that are directly related to ensuring that an institution provides adequate legal education to its students.[213]

The current structure of the ABA is ultra vires in violation of state law and the ABA Constitution. In the interest of the legal profession, the ABA accreditation process must be reformed.

IV. THE ABA'S FLAWED ACCREDITATION PROCESS EXPOSED BY ITS HANDLING OF BARRY UNIVERSITY SCHOOL OF LAW

After an eighteen month investigation which began in 1994, the DOJ concluded that it would be able to prove at trial that the ABA engaged in

213. DOE Transcript, *supra* note 204, at 102-03.

anti-competitive activity, that it had become a cartel taken over by deans and law professors who imposed their interests over the educational interests of the law schools, and that the entire accreditation system needed complete revision.[214] The DOJ was concerned about the unreasonable and arbitrary rules and implementation thereof by the ABA. The American Law Deans Association has also castigated the ABA accreditation Standards.[215]

Former University of Chicago Professor Gary Palm, a six-year veteran of the Council, wrote to the DOE in 2000, requesting that it revoke the ABA's authority to accredit law schools, contending that "the [C]ouncil and consultant's actions have not been even-handed and consistent, showing favoritism and retaliatory motives."[216] He stated that the Council "makes inconsistent decisions in similar cases. . . . Bar results that are acceptable for one school are not for another. Schools with 'friends' of powerful members of the Section receive less scrutiny. Schools and individuals who have challenged the ABA or the Council and its process are treated adversely."[217] Despite the Consent Decree, the "process is still controlled by the old group and by academics and dean-friendly groups."[218]

In 2000, when John Marshall Law School in Georgia was denied accreditation, its dean, Robert D'Agostino, stated that there was no objective evidence for the denial because the school's bar passage rates were higher than any other provisionally accredited school. He resigned, stating that he did not have the political connections to be ABA accredited.[219] In order to determine whether the ABA has ultimately changed its process since the Consent Decree, D'Agostino says, "[c]ases to watch are Barry University School of Law in Orlando, Florida where administrators were shocked in February by the ABA's decision to reject the school's bid for accreditation. . . ."[220] "If it turns out the ABA has judged Barry more harshly than other recently approved schools, . . . critics will say the old days are back again."[221] Unfortunately, the old days have

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214. *See* Proposed Final Judgment, 60 Fed. Reg. at 39,426.

215. *See* Portinga, *supra* note 1, at 637.

216. Tom Stabile, *ABA Still in Charge*, NAT'L JURIST 15 (Apr. 2001).

217. *Id*.

218. *Id*. The ABA's Section on Legal Education has resisted changes to legal education that would give students more skills training while providing legal services to the poor, because of a desire "to control the academic content of the law school curriculum." Arline Jolles Lotman, *Pro Bono and the Challenge of Mandatory Skills Training*, 24 PA. LAW. 36, 37 (2002).

219. Stabile, *supra* note 216.

220. *Id*.

221. *Id*.

never left.[222] As this article will show, the ABA's handling of Barry underscores the fundamental flaws in the ABA accreditation process. In February of 2001, the Council groped for reasons to deny Barry in the face of a glowing Accreditation Committee Report. The Council focused on anti-competitive considerations, asking whether Barry could survive in the central Florida area in view of a newly authorized state school that planned to begin operations at some indeterminate future date. After the Council convinced Barry officials to drop its "appeal" to the House in exchange for a supplemental site visit, the Accreditation Committee issued a report on November 28, 2001, recommending denial solely on the basis of potential competition against a law school that had not even accepted its first student application.[223] Competition with other law schools is not a subject for an accrediting body to consider. These considerations are for the market to decide.

A. The Council Reverses the Accreditation Committee's Recommendation and Denies Accreditation

Those who closely followed the ABA accreditation process involving Barry were shocked in February of 2001, when the Council reversed a very favorable Accreditation Committee Report that recommended provisional accreditation.[224] To compound matters, following a supplemental site visit, the Accreditation Committee later recommended denial in spite of never once taking issue with the academic program offered by Barry. The sole reason give for this reversal of opinion was the future presence of a state supported law school.[225]

1. The Accreditation Committee's Report Recommending in Favor of Provisional Accreditation

The Accreditation Committee met on January 26 through 27, 2001, to

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222. Robert E. Oliphant, *Will Internet Driven Concord University Law School Revolutionize Traditional Law School Teaching?*, 27 WM. MITCHELL L. REV. 841, 843 (2000) (stating that "most agree that the status quo was retained" even after the DOJ's antitrust lawsuit).

223. Accreditation Committee Report No. 2, *supra* note 24.

224. *See* numerous letters written by attorneys and judges to Barry and the ABA which were filed in as exhibits in *Staver v. ABA*, 169 F. Supp. 2d 1372 (M.D. Fla. 2001), *available at* http://www.lc.org (accessed from homepage by selecting ABA Accreditation Research, Complaint Exhibits then Attorney Letters) (last visited May 17, 2003).

225. *See* Accreditation Committee Report No. 2, *supra* note 24.

consider Barry's application for provisional accreditation.[226] The Committee reviewed the Site Team's report, which stated:

> *Barry University and its Law School have proceeded with getting all the pieces into place for the operation of an institution that will produce qualified lawyers.* There have been marked and observable changes since the prior site visit in 1999, and the University has shown good faith in its delivery of support and encouragement. The law school is maturing.[227]

On January 27, 2001, the Accreditation Committee recommended provisional approval of Barry.[228] Pursuant to the Standards for Approval of Law Schools of the American Bar Association, Standard 102(a) states that "[a] law school is granted provisional approval if it establishes that it is in substantial compliance with each of the Standards and presents a reliable plan for bringing the law school into full compliance with the Standards within three years after receiving provisional approval." According to 102(a), provisional approval requires only "substantial compliance" rather

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226. The Barry Site Report (2000) is three times longer than any other report on a new school considered by the Council over the past several years. Report on Barry University of Orlando School of Law (Nov. 1, 2000), *available at* http://www.lc.org (accessed from homepage by selecting ABA Accreditation Research, Complaint Exhibits, then Barry Site Report) (last visited May 17, 2003) [hereinafter Barry Site Report of 2000]. Notwithstanding, the Council reviewed the recommendation de novo, rather than giving it deference under then Rule 5(a). *See* Report by Diane C. Yu at 2, *available at* http://www.lc.org (accessed from homepage by selecting ABA Accreditation Research, Complaint Exhibits, then Report by Diane C. Yu) (last visited May 17, 2003); *see also* Rule 5(a), *supra* note 54. At the time the Council first reviewed Barry in February 2001, Rule 5(a) provided that favorable Accreditation Committee recommendations were merely to be placed on the agenda for the Council to review, while unfavorable recommendations under Rule 5(b) were to be reviewed by the Council de novo. Barry's favorable recommendation should therefore have been reviewed under Rule 5(a) rather than de novo under Rule 5(b). Following the subsequent lawsuit against the ABA filed in July 2001, the ABA amended Rule 5 in August 2002. The current rules eliminate any reference to de novo review by the Council. Rule 6 now states that the Council shall adopt the Accreditation Committee's finding of fact unless the Council determines that the findings of fact are unsupported by substantial evidence in the record. *See* Rule 6(b), *supra* note 54. Moreover, the Council will not accept new evidence unless (1) the new evidence was not submitted to the Accreditation Committee; (2) the new evidence could not reasonably have been presented; and (3) a reference back to the Accreditation Committee to consider the new evidence would present a serious hardship to the school. *See* Rule 6(e), *supra* note 54.

227. Barry Site Report of 2000, *supra* note 226, at 38-39 (emphasis added).

228. See Accreditation Committee Report No. 1 (Jan. 2001), *available at* http://www.lc.org (accessed from homepage by selecting ABA Accreditation Research, Complaint Exhibits, then Accreditation Committee Report) (last visited May 7, 2003).

than "full compliance." A law school has five years after provisional approval to obtain full approval.[229]

Law students graduating from provisionally approved ABA schools in Florida are eligible to practice law after passing the bar exam, but students graduating from a Florida law school which does not receive provisional approval are likely to be barred from practicing law in all fifty states and territories.[230]

2. The Council's Decision Overruling the Accreditation Committee

The Accreditation Committee's favorable recommendation issued on January 27, 2001, was heard by the Council a few weeks later on February 17, 2001. Amazingly, the Council reversed the Accreditation Committee's favorable recommendation that Barry be accredited.[231] In doing so, the Council violated its own Rules and also raised antitrust concerns.

a. The Council Violated ABA Rules by Using a De Novo Standard of Review

At the time the Council first reviewed Barry in February 2001, the Council was required by then Rule 5(a) of the ABA Rules of Procedure for the approval of Law Schools[232] to give substantial deference to a decision by the Accreditation Committee recommending provisional approval.[233] Rule 5 stated:

> (a) Accreditation Committee Recommendation to Approve. In the event that the Accreditation Committee shall determine to recommend to the Council that provisional or full approval be granted, the Consultant shall place the Committee recommendation on the agenda of the meeting.
>
> (b) Accreditation Committee Recommendation to Disapprove. In the event that Accreditation Committee shall determine not to recommend to the Council that provisional or full approval be

229. *See* Rule 102(b), *supra* note 54.

230. *See In re* Barry Univ. Sch. of Law, 821 So.2d 1050 (Fla. 2002). Also, the pursuit of an additional law degree, such as an LL.M., is also limited in this situation as most law schools require graduation from an ABA approved school in order to be admitted to the LL.M. program.

231. *See* Letter from Sebert, *supra* note 19, at 2.

232. Rules, *supra* note 54.

233. *See* Rule 5(a), *supra* note 54.

> granted and if the Consultant receives a timely notice of appeal to the Council from that decision, the Consultant shall place the school's appeal on the agenda of a Council meeting. The appeal to the Council shall constitute a *de novo* proceeding.[234]

Rules 5(a)-(b) call for a de novo proceeding *only when* the Committee recommends denial of accreditation. The review for an approval is arguably supposed to be deferential, whereas the review for a denial is de novo. Yet, Council Chairperson Diane C. Yu stated in a report: "[t]he Council of the Section of Legal Education Admissions to the Bar considered the Law School's application in a de novo proceeding."[235] Despite Rule 5, the Council engaged in a de novo review and reversed the Accreditation Committee.[236]

First, the Council found that:

> The School had not established that its educational program prepares its graduates for admission to the bar [as required under Standard 301(a)] . . . because (1) examinations vary substantially in degree of difficulty. . .(2) some student upper-class writing papers were of average or less-than-average quality . . .[237] and (3)

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234. Rule 5(a)-(b), *supra* note 54. Following the lawsuit, the ABA amended Rule 5 during its annual meeting held in August 2002. *See supra* note 226. Former Rule 5 is available at http://www.lc.org (accessed from homepage by selecting ABA Accreditation Research then Amended Complaint) at ¶¶ 63-64 (last visited May 7, 2003). Rules 6 and 7 now require the Council to accept the Accreditation Committee's findings of fact, unless the Council determines that the findings are unsupported by substantial evidence in the record.

235. Report by Diane C. Yu, *supra* note 226, at 2.

236. *See* Letter from Sebert, *supra* note 19, at 2.

237. At the time Standard 302(a)(2) required "at least one rigorous writing experience." Standards, *supra* note 67, at 302(a)(2). Barry not only complied with that Standard but imposed its own higher standard which required an additional substantial writing requirement. It is this additional substantial writing requirement to which the Council referred. *See* Letter from Sebert, *supra* note 19, at 3. Since these papers were not required for ABA accreditation, most were not kept by the School. At any rate, the Barry Site Report of 1999 praised Barry's writing program, stating that:

> Barry's program of legal writing and analysis courses is unusually strong. In addition to six units of required legal writing and research in the first year, including a first year moot court experience, several upper division writing and research elective courses are offered. Advanced Legal Writing is a prerequisite for all skills courses and clinical placements.

Barry Site Report, ABA Site Evaluation Team 9 (Oct. 1999) (last visited Apr. 15, 2003), *available at* http://www.lc.org (accessed from homepage by selecting ABA Accreditation Research, Complaint Exhibits, then 1999 Site Team Report) [hereinafter Barry Site Report

the School's academic support program had only been implemented in the Fall 2000.[238]

Second, the Council pointed to Standard 303(a) and (c) and suggested that grades were too high, but it ignored the implementation of a new mandatory curve that requires no more than thirty-three percent of the grades be awarded at B or above.[239] Subsequently, *nothing* in the Barry Site Report of 2000[240] indicated a lack of application of the academic retention policies.[241]

Third, the Council said Barry had not established that it denied admission to those not capable of completing its educational program.[242] The Council could point to only three students who were admitted with Law School Admission Test (LSAT) scores at or below 140.[243] According to the 2002 edition of the *ABA-LSAC Official Guide to ABA Approved Law Schools* (ABA Law School Guide), the LSAT 25th percentile profile of the fall 2000 entering class shows Barry equal to or higher than that of twelve *fully* approved schools.[244] Sixty-four of the reporting schools admitted a

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of 1999].

238. This is inaccurate because the academic support program was implemented in the fall of 1998. Even the Barry Site Report of 1999 noted that "[t]wo faculty members assist in the academic support program. Almost all of the students identified as at risk who participated in the program are in school and appear to be much stronger academically." *See* Barry Site Report of 1999, *supra* note 237, at 9-10.

239. *See* Letter from Sebert, *supra* note 19, at 3.

240. Barry Site Report of 2000, *supra* note 226.

241. *See id.* at 10. The Council expressed concern over "high grades" and noted that in the spring of 2000, the following grade distribution existed: "12% (A's), 36.5% (B's), 46.2% (C's), 4.5% (D's), and .6% (F's)." *Id.* However, a May 2000 letter from the ABA Accreditation Committee regarding the William S. Boyd School of Law at the University of Nevada - Las Vegas, which the Council provisionally accredited in 2000, noted that "of the 1185 grades [given in] (1998-1999), only 35 were C- or lower [2.9%] . . . [and] only 10 were D [.8%] and only one was F [.08%]." UNLV Report, ABA Accreditation Committee, Finding 14, at 3 (2001), *available at* http://www.lc.org (accessed from homepage by selecting ABA Accreditation Research, Complaint Exhibits, then UNLV Report) (last visited Feb. 17, 2003) [hereinafter UNLV Report].

242. Letter from Sebert, *supra* note 19, at 3.

243. The Council Action Letter pointed to Finding 16 of the Accreditation Committee Report of January 2001 regarding the admissions of *four* students in 2000 having the following scores and undergraduate grade point averages: "[1] LSAT of 138 and a UGPA of 2.39 . . . [2] LSAT of 140 and a UGPA of 2.09 . . . [3] LSAT of 145 and a UGPA of 1.53 . . . [4] LSAT of 139 and a UGPA of 2.47." Accreditation Committee Report No. 1, *supra* note 227, Finding 16, at 4.

244. When searching the 2002 ABA-LSAC OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS, *available at* http://www.abanet.org (accessed from homepage by selecting Law

total of 396 applicants with LSAT scores below 140, and twenty-one schools admitted students with LSAT scores further below 140 than the three aforementioned Barry students. In 2000, the University of Florida admitted two students with LSAT scores between 135 and 139,[245] Nova University, a private Florida law school, admitted thirty-seven students in that range,[246] and Stetson, another private and highly-respected Florida law

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Student/Legal Education and following the links to the Guide) (last visited Apr. 10, 2003) [hereinafter ABA LAW SCHOOL GUIDE], and entering the LSAT/UGPA combination of 138 and 2.39 into the web-based search system, one may retrieve the names of twenty-two ABA approved law schools that have full accreditation status, including University of Denver, Loyola University, Rutgers University, and Stetson University. AMERICAN BAR ASSOCIATION, INC. AND LAW SCHOOL ADMISSION COUNCIL, INC., OFFICIAL GUIDE TO ABA APPROVED LAW SCHOOLS (2002). A similar search of the resource finds that thirteen fully approved ABA law schools admitted at least one student in 2000 with LSAT/UGPA of 140/2.09; one fully approved law school admitted a student with an LSAT/UGPA of 145/1.53; and thirty-three schools admitted students with an LSAT/UGPA combination of 139/2.47, including Pepperdine, Widener, Stetson, and Nova Southeastern. Of course, there are many more schools that could not be added to this list because those schools do not release their results.

245. *See* ABA LAW SCHOOL GUIDE, *supra* note 244, at 253. Three of the four Barry students in question were minority students. The average LSAT score for Caucasians is 152, for African-Americans is 142, for Hispanics is 148, and for Puerto Ricans is 140. Law School Admission Council, *LSAT Performance with Regional, Gender, and Ethnic Breakdowns: 1993-1994 Through 1999-2000 Testing Years* (2000). One of the students had an LSAT score of 138 and a GPA of 2.39. This student was a minority and showed exceptional leadership and potential for success in graduate school. One student had an LSAT score of 140 and a GPA of 2.09. Another had an LSAT score of 145 and a GPA of 1.53. This student actually earned a GPA of 2.0 from his degree-granting school, and had paralegal work experience. The final student had an LSAT of 139, with an overall GPA of 2.47, but a 3.54 GPA in his major when discounting graduate level courses which the student incorporated into his undergraduate experience. The graduate level courses brought down his overall GPA. For an illustration, visit the ABA's website, *available at* http://www.abanet.org/legaled/home.html (accessed from homepage by selecting ABA-LSAC Official Guide to ABA-Approved Law Schools and entering the LSAT and GPA combinations of each of the aforementioned students) (last visited May 17, 2003). In June 2002 the results revealed that the Barry student with a LSAT/GPA combination of 138/2.39 qualified for admission into twenty-two *fully approved* schools, the second student qualified for admission into thirteen schools, the third student qualified for admission into one school, and the fourth student (using the lower GPA of 2.47) qualified for admission into thirty-three schools. For a compelling perspective on the ABA's use of the LSAT, see George B. Shepherd, *ABA Damages Black Law Schools*, NAT'L L.J., May 14, 2001, at A23; *see also* Richard Delgado, *Official Elitism or Institutional Self Interest? 10 Reasons Why UC-Davis Should Abandon the LSAT (and Why Other Good Law Schools Should Follow Suit)*, 34 U.C. DAVIS L. REV. 593 (2001); William C. Kidder, *Does the LSAT Mirror or Magnify Racial and Ethnic Differences in Educational Attainment?: A Study of Equality Achieving "Elite" College Students*, 89 CAL. L. REV. 1055 (2001).

246. *See* ABA LAW SCHOOL GUIDE, *supra* note 244, at 497.

school, admitted four students in that range.[247] The University of Miami refused to publish its scores.

Finally, in the Council's decision to deny Barry accreditation, the Council found that Barry "h[ad] not presented a reliable plan for bringing it into full compliance with the Standards within three years."[248] The Council pointed to Findings 4, 5, and 29 of the Accreditation Committee's Findings of Fact.[249] Finding 4 refers to the two recently approved state law schools, one of which chose to locate in Orlando, namely Florida A & M Law School.[250] Finding 4 merely made the observation that "[a]fter the October 2000 site visit took place, the Florida Legislature determined that one of the two additional publically funded law schools it had decided to establish would be located in Orlando, as part of Florida A & M University."[251] Finding 5 refers to grappling with the uncertainties "inherent in the [accreditation] situation in which the Law School finds itself."[252] Reading Finding 29 as a negative statement makes no sense. It refers to Barry expressing "a commitment to expend the funds necessary to develop a quality program of legal education, and is committed to financing significant deficits in the near term."[253]

b. The Council Unlawfully Raised Anti-Competitive Concerns

The Council unlawfully denied Barry provisional accreditation because of anti-competitive concerns regarding FAMU.[254] The Council's

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247. *Id*. at 653.

248. Letter from Sebert, *supra* note 19, at 3.

249. *See id.*

250. For a closer look at Finding 4, see Barry Site Report of 2000, *supra* note 226 (describing the new Florida A & M Law School [hereinafter FAMU]). The central Florida market should decide whether the region is large enough for two law schools, not the ABA. While there might be some overlap, Barry and FAMU would likely draw from different resources. Both Barry and FAMU have feeder undergraduate schools. Barry is a Catholic school with relationships to other Catholic institutions throughout the United States. FAMU is an historically black school, also with relationships to other institutions throughout the country. Pitting the two schools against each other as the ABA attempted to do is simply wrong. *See* Myriam Marquez, *In Barry-FAMU Flap, ABA Plays Divide and Conquer*, ORLANDO SENTINEL, Dec. 16, 2001 at G-3.

251. *See* Barry Site Report of 2000, *supra* note 226, at Finding 4.

252. *Id*. at Finding 5.

253. *Id*. at Finding 29.

254. After the site visit from October 29 through November 1, 2000, the Florida Legislature voted to authorize expanding two public law schools. Barry Site Report of 2000, *supra* note 226, at 4. FAMU selected Orlando. In 2000, the Florida Legislature appropriated $2.5 million for each law school. *See* Raju Chebium, *Florida To Build Two Public Schools*

consideration of another law school coming to Orlando was a main focus of attention by Council member Dean Jeffrey Lewis. Chairperson Diane C. Yu opened the Council's meeting on February 17, 2001, by giving the floor to Dean Lewis, who asked the following question:

> Have you made any assessment of the need for legal education in Florida in light of the two public law schools that have been authorized by the legislature in the [S]tate of Florida? One will be in north Dade County and the other one I believe will be in Orange County.[255]

Council member Pauline Schneider asked, "[w]hat percentage of your currently enrolled students are residents of Florida?"[256] Dean Lewis then asked whether Barry's enrollment "studies take into consideration the public schools as well as Florida coastal [sic] in Jacksonville?"[257]

B. The Council Reverses the Accreditation Committee's Recommendation and Accredits Barry

On January 26, 2001, the Accreditation Committee recommended that

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Simultaneously, May 29, 2000, *available at* http://www.cnn .com (accessed from homepage by selecting Search and entering phrase "Florida Public Schools") (last visited May 17, 2003). However, the Florida Legislature in 2001 appropriated only half of the funds necessary. FAMU started classes in a renovated county building in the Fall of 2002, with plans to build a $27.7 million building in 2003. *See* Melanie Yeager, *Law School Opens Its Doors*, Sep. 3, 2002, *available at* http://www.tallahassee.com/mld/tallahassee/3989847.htm (last visited May 2, 2003).

255. Transcript of Council of the Section of Legal Education and Admissions to the Bar of the ABA 41 (Feb. 17, 2002), *available at* http://www.lc.org (accessed from homepage by selecting ABA Accreditation Research, Complaint Exhibits, then February 17, 2001, Transcript of Council Meeting Executive Session) (last visited May 17, 2003) [hereinafter Council Transcript].

256. *Id.* at 46.

257. *Id.* at 67. The Council is supposed to "act impartially and avoid even the appearance of impropriety." *Id.*; *see also ABA Statement of Ethical Practices in the Process of Law School Accreditation*, ¶ 1; 34 C.F.R. § 602.21(b)(5) (1999) (stating that a recognized accrediting agency must have "[c]lear and effective controls against conflicts of interest or the appearance of conflicts of interest."). A DOE approved accrediting agency "must consistently apply and enforce its standards." 34 C.F.R. § 602.18 (1999). An accrediting agency "meets this requirement if [it] (a) [h]as effective controls against the inconsistent application of the agency's standards; (b) [b]ases decisions regarding accreditation and preaccreditation on the agency's published standards; and (c) [h]as a reasonable basis for determining that the information the agency relies on for making accrediting decisions is accurate." *Id.*

Barry receive provisional accreditation. A few weeks later, on February 17, 2001, the Council stunned most observers by reversing the Accreditation Committee and denied provisional approval. Two significant events occurred after the Council's decision. First, Barry requested that the Council reconsider its decision. The Council refused. Barry then filed an appeal with the House, hoping the House would remand their application back to the Council. The Council then agreed to continue the review process by sending out another Site Team for a supplemental visit if Barry would withdraw its appeal. Barry agreed, and a new Site Team visited Barry in September of 2001.[258]

The second event to occur following the Council's decision involved a federal law suit that was filed against the ABA by several law students and attorneys.[259] One of the interesting aspects of this case was the significant volume of material that the plaintiffs filed in federal court. The ABA has always attempted to shield its accreditation deliberations behind a cloud of secrecy.[260] The documentation revealed not only information about the ABA's dealings with Barry, but the records also showed inconsistent applications of the ABA Standards over the past several years. The Florida[261] and national[262] media printed numerous articles criticizing

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258. The Site Team prepared a forty-one page report that mostly incorporated the earlier Barry Site Report of 2000, but also added supplemental information. Barry Supplemental Site Report, *supra* note 22.

259. *See* Staver v. ABA, 169 F. Supp. 2d 1372 (M.D. Fla. 2001).

260. The ABA contends that the accreditation process is confidential and that any written information may be released only on the consent of the law school in question. *See* Rules, *supra* note 54. Law schools are often reluctant to release accreditation information out of fear that the school might anger the ABA. The ABA has insinuated that it does not want law schools to release accreditation information. *See* Memo from John A. Sebert, Consultant on Legal Education to the ABA, to Deans of ABA Approved Law Schools (May 23, 2001), *available at* http://www.lc.org (accessed from homepage by selecting ABA Accreditation Research, American Bar Association Evaluation Reports on Public Law Schools, then Memo from ABA to Law School Deans re: Accreditation Reports) (last visited May 6, 2003) (url no longer available). Notwithstanding, public law schools are required to hand over accreditation records under state public record laws. *See, e.g.*, *infra* Appendix B.

261. *See, e.g.*, Scott Powers, *Barry Law School is Dealt Major Setback*, ORLANDO SENTINEL, June 5, 2001, at A-1 (reviewing the ABA's dealings with Barry including a time line); Scott Powers, *ABA Panel Was Overruled When Barry Lost Bid for Accreditation*, ORLANDO SENTINEL, July 8, 2001, at B-1 (noting that ABA documents are normally confidential, but the *Orlando Sentinel* had obtained the documents from court filings); Scott Powers, *Lots of Objections to Law Accreditation*, ORLANDO SENTINEL, July 9, 2001, at B-1 (quoting Dean Robert J. D'Agostino, then-Dean of John Marshall School of Law as saying, "I would certainly characterize the ABA's application of their standards as arbitrary and capricious"); Scott Powers, *Barry Granted Another Chance*, ORLANDO SENTINEL, July 17, 2001, at D-1 (quoting Mathew D. Staver as saying, "If it's quality that's at issue, Barry should have gotten accredited a long time ago. The problem is, we're dealing with the ABA

the ABA accreditation process. The *Orlando Sentinel* editorial board wrote several editorials highly critical of the ABA, stating at one point that we should "bury the ABA."[263]

An amazing role reversal then occurred. The Accreditation Committee recommended against provisional accreditation in November of 2001.[264] This caused both Florida Governor, Jeb Bush, and Florida Attorney General, Bob Butterworth, to write strongly-worded letters to the ABA encouraging accreditation of Barry.[265] Florida legislators then filed a bill threatening to repeal the rule that requires Florida students to graduate from an ABA accredited law school.[266] On February 2, 2002, the Council

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political machinery."); Scott Powers, *Barry Student, Graduates, Challenge Bar*, ORLANDO SENTINEL, July 25, 2001, at D-1 (providing overview of federal law suit filed against the ABA regarding Barry's accreditation; article also distributed by the Associated Press on July 26, 2001); Holly Steep, *Florida Law Students Taking ABA to Court*, MIAMI HERALD, Aug. 6, 2001, at A-1; Scott Powers, *Barry Isn't Alone in ABA Clash: Two Other State Law Schools Have Ongoing Fights with the American Bar Association*, ORLANDO SENTINEL, Aug. 7, 2001, at A-1 (discussing the ABA's unfair treatment of Florida State and the University of Florida law schools); Robert Steinback, *A Bum Rap from the Bar*, MIAMI HERALD, Aug. 8, 2001, at B-1 (discussing the Barry situation and blasting how the ABA accreditation process limits minority enrollment); Editorial Board, *ABA Is Micromanaging*, ORLANDO SENTINEL, Aug. 8, 2001, at A-10 ("The ABA's current rules lack specificity and appear to vary considerably depending on who is interpreting them."); Editorial Board, *Accrediting Barry*, ORLANDO SENTINEL, Dec. 8, 2001, at A-24 (referring to the so-called "musical deans", which tends to occur at the time of accreditation review, the Editorial Board stated: "As long as the ABA's system remains arbitrary, inconsistent, and cloaked in secrecy, schools will hire people who can play the game. The ABA fails to inspire confidence by making such hires a necessity."); Editorial Board, *Be Fair with Barry*, ORLANDO SENTINEL, Jan. 25, 2002, at A-16 (noting the "ever-changing of the ABA's concerns" and warning that a "lot of people will be watching to see how the ABA treats Barry this time around").

262. *See, e.g.,* Katherine S. Mangan, *Minority Students Sue ABA over its System for Accrediting Law Schools*, CHRON. OF HIGHER EDUC., July 26, 2001, *available at* http://chronicle.com (accessed from homepage by entering the term "articles" in the Search box) (last visited Feb. 13, 2003). Tom Stabile, *Barry Gets Recount*, NAT'L JURIST 12 (Sept. 2001) (reviewing the lawsuit against the ABA over Barry's accreditation). Although the ABA accredited twenty-two law schools in the 1970s, it approved only seven between 1981 and 1993. *Id*. After a lawsuit and federal investigations began in 1993, the ABA "opened the floodgates" and approved ten between 1994 and 2001. *Id.*

263. *See* Marquez, *supra* note 250 ("It's a twisted tale of capricious ABA rules coupled with the power and prestige of large corporate law firms that like business just the way it is: going their way.").

264. *See* Accreditation Committee Report No. 2, *supra* note 24.

265. *See* Scott Powers, *Bush Backs Barry's Law Bid*, ORLANDO SENTINEL, Jan. 18, 2002, at C-1 (reporting the both Florida Governor Jeb Bush and the Florida's Attorney General Bob Butterworth wrote strong letters to the ABA urging accreditation of Barry).

266. *See* Scott Powers, *Barry May Get Boost from Lawmakers*, ORLANDO SENTINEL, Jan. 30, 2002, at B-3 (noting that Florida lawmakers introduced a bill aimed at eliminating

reversed the Accreditation Committee and granted provisional accreditation.[267] The House then voted to affirm the Council's decision on February 4, 2002.[268]

1. The Accreditation Committee's Report Recommending Against Provisional Accreditation

Following the supplemental site visit in September 2001, the Accreditation Committee met in Puerto Rico from November 1 to November 3, 2001, to once again consider Barry.[269] The Findings noted that Barry's "revised self study is comprehensive in scope and states goals and objectives clearly."[270] The grade distribution showed 9.6% As, 21.6% Bs, 59.0% Cs, 7.4% Ds and 2.3% were Fs.[271] The student writing requirements "showed substantial effort and some insight: a few were of publishable quality."[272]

The Accreditation Committee Report No. 2 mentioned Barry's student-faculty ratio of 8:1, and that staffing of courses "is accomplished primarily with full-time faculty, who devote substantially all working time to teaching, legal scholarship and participation in Law School governance and

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a law which requires Florida students to graduate from ABA accredited schools). "Also welcoming the bill was FAMU's law dean, Percy Luney, who said it could ease concerns of prospective students who are nervous about committing to any unaccredited law school because of what has happened to Barry." *Id.*

267. *See* Scott Powers, *Law School Gets Bar's OK*, ORLANDO SENTINEL, Feb. 3, 2002, at B-1.

268. See Amicus Curiae Brief in Support of Barry University School of Law Rehearing at 1, (Fla. Apr. 24, 2001), *available at* http://www.law/fsu.edu/library (accessed from homepage by selecting Law Library, Fla. Sup. Ct. Briefs and Opinions, SC02-0501 - SC02-750, Docket # SC02-740, then Amicus Curiae Brief in Support of Barry University School of Law) (last visited May 30, 2003) [hereinafter Amicus Curiae Brief]. Documents filed in Barry's case are available at http://www.flcourts.org (accessed from homepage by selecting Press Page, Supreme Court Press Information High Profile Cases, Barry University Petition, then Documents) (last visited June 6, 2003).

269. *See* Petition of Barry University School of Law at 15 (Fla. Apr. 30, 2002), *available at* http://www.flcourts.org (accessed from homepage by selecting Press Page, Supreme Court Press Information High Profile Cases, Barry University Petition, Documents, then Filed_4-3-2002_Petition.pdf) (last visited June 6, 2003).

270. Accreditation Committee Report No. 2, *supra* note 24, at Finding 4. Accreditation Committee Report No. 2, Findings 5-9 noted that Barry offered a traditional curriculum, legal research and writing courses, electives and seminars, clinical programs, and exams, which relied on short and long essays, and "require thoughtful integration of subject matter."

271. *Id.* at Finding 10.

272. *Id.* at Finding 11.

service."[273] The Report then favorably discussed the students, the academic assistance and retention programs, and noted that no student was admitted with an LSAT score below 142.[274] The Report then overviewed the Law School administration, information services and finances, noting that Barry University "is committed to subsidizing substantially the operations of the Law School."[275] The Report next overviewed the facilities, noting the number of buildings and the room for future expansion on twelve acres of property.[276] Commenting on Barry's future projections for enrollment, the Report noted the following: "In response to a question as to whether the School will not have to reduce its admission standards to meet its enrollment projections, both the Dean and the President indicated they believed they would not have to do so."[277]

The Accreditation Committee's November Report never took issue with the faculty, the curriculum, the facilities, the library, the students, the academic admission, or the retention standard. In short, the Report never criticized the outputs of Barry. However, the Accreditation Committee nevertheless recommended against provisional accreditation.[278] The Report pointed to the future competition for students, which Barry would face when a new state school would begin operation in Orlando at some future date, stating that Barry would not be able to meet its enrollment targets for the fall of 2003 to 2005, "without substantially reducing the academic qualifications of those entering classes."[279] In other words, while not taking issue with Barry's educational program at the time of the current review, the Accreditation Committee prognosticated that at some point in the future, Barry may lower its academic standards in order to compete against a yet-to-be-built public law school.

2. The Council's Decision Overruling the Accreditation Committee

Following the Accreditation Committee's recommendation to deny Barry provisional accreditation, Barry officials backed up their commitment to the law school by revealing that in a few short weeks the university had raised $15.3 million dollars for the school.[280] Then, as noted

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273. *Id.* at Findings 12-14.
274. *See id.* at Findings 15-23.
275. *Id.* at Finding 34; *see also id.* at Findings 24-33.
276. *See id.* at Finding 35.
277. *Id.* at Finding 36.
278. *See id.* at Finding 12.
279. *Id.* at Conclusion.
280. *See* Scott Powers, *Gifts Lift Barry's Spirit, Confidence*, ORLANDO SENTINEL, Jan.

above, Florida's Governor and Attorney General both wrote letters to the ABA strongly urging that the ABA approve the law school.[281] A week prior to the Council meeting, Florida legislators filed bills which were designed to repeal the rule that required students to graduate from an ABA accredited law school.[282]

On February 2, 2002, the Council met and again reversed the Accreditation Committee.[283] This time the Council voted to grant provisional approval to Barry.[284] The Council's decision was affirmed by the House on February 4, 2002.[285]

V. THE ABA'S ACCREDITATION PROCESS AND FEDERAL ANTITRUST LAWS

Section 1 of the Sherman Act states that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal."[286] Section 2 applies to monopolies.[287] The Clayton Act provides that

> any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.[288]

Any "person, firm, corporation, or association shall be entitled to sue for

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12, 2002, at C-1.

281. *See supra* note 265 and accompanying text.

282. Powers, *Barry May Get Boost from Lawmakers*, *supra* note 266.

283. *See* Amicus Curiae Brief, *supra* note 268.

284. *See* Petition of Barry University, *supra* note 269.

285. Nevertheless, those students who graduated before accreditation faced additional obstacles after Barry's accreditation. Those who graduated more than twelve months before ABA accreditation and who desired to practice law in Florida needed an order of the Florida Supreme Court. *See* Jan Pudlow, *Budding Legal Careers Put on Hold Barry University Graduates Abort Their Fate*, 29 FLA. BAR NEWS 10 (2002); *see also In re* Barry Univ. Sch. of Law, 821 So.2d 1050 (Fla. 2002); RULES OF THE FLORIDA SUPREME COURT RELATING TO ADMISSIONS TO THE BAR R. 2-11.1, 4.13.

286. 15 U.S.C. § 1 (2000).

287. *See* 15 U.S.C. § 2 (2000).

288. 15 U.S.C. § 15 (2000).

and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the anti-trust laws . . . ."[289]

In *Blue Shield of Virginia v. McCready*,[290] a Blue Cross subscriber was denied reimbursement for treatment by a psychologist. Acknowledging that the conspiracy was designed to restrict competition among psychologists, the Court held that the subscriber had standing.[291] "The harm to McCready and her class was clearly foreseeable; indeed, it was a necessary step in effecting the ends of the alleged illegal conspiracy."[292] "The availability of the § 4 remedy . . . is not a question of the specific intent of the conspirators."[293] Furthermore, "the remedy cannot reasonably be restricted to those competitors whom the conspirators hoped to eliminate from the market."[294] The standing analysis under § 4 is designed to consider the class of persons affected by the anti-competitive activity. The more remote the injury, the less likely standing will be granted. On the other hand, the standing inquiry under § 16 (injunctive relief) is not always identical to the standing analysis under § 4 (damages).[295] Section 16 raises no threat of multiple lawsuits or duplicative recoveries, and therefore "some of the

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289. 15 U.S.C. § 26 (2000). In *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 107-13 (1982), the Court refers to 15 U.S.C. § 15 (damages) as Section 4 and to 15 U.S.C. § 26 (injunctive relief) as Section 16. For general information on antitrust laws, see Kimberly L. King, *An Antitrust Primer for Trade Association Counsel*, 75 FLA. BAR J. 26 (2001); Jeffery C. Sun & Philip T.K. Daniel, *The Sherman Act Antitrust Provisions and Collegiate Action: Should There Be a Continued Exception for the Business of the University?*, 25 J.C. & U.L. 451 (1999); Thomas D. Morgan, *The Impact of Antitrust Law on the Legal Profession*, 67 FORDHAM L. REV. 415 (1998); Harry S. Gerla, *Federal Antitrust Law and Trade and Professional Association Standards and Certification*, 19 U. DAYTON L. REV. 471 (1994); Diane P. Wood, *"Unfair" Trade Injury: A Competition-Based Approach*, 41 STAN. L. REV. 1153 (1989); Frank H. Easterbrook, *Allocating Antitrust Decisionmaking Tasks*, 76 GEO. L.J. 305 (1987); Frank H. Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696 (1986); William H. Page, *The Scope of Liability for Antitrust Violations*, 37 STAN. L. REV. 1445 (1985); *see also* PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION (2003).

290. 457 U.S. 465 (1982).

291. *See id.* at 485.

292. *Id*. at 479. The Supreme Court has rarely addressed the issue of how to determine the area of injury. *See* Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519 (1983); Hawaii v. Standard Oil Co., 405 U.S. 251 (1972); Perkins v. Standard Oil, 395 U.S. 642 (1969). In *McCready*, the Court did not rely on any of the various tests used by the Courts of Appeal, nor did it express any opinion as to the relative utility of these tests. *McCready*, 457 U.S. at 465.

293. *McCready*, 457 U.S. at 479.

294. *Id*.

295. *See* Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 111 n.6 (1982).

factors other than antitrust injury that are appropriate to a determination of standing under § 4 are not relevant under § 16."[296] "[T]he fact is that one injunction is as effective as 100, and, concomitantly, that 100 injunctions are no more effective than one."[297] Since § 16 is "designed to stop anticompetitive behavior in its incipiency," a lower threshold for standing is required than for § 4.[298] "The 'threatened' injury requirement of 16 may indeed require a smaller showing of the *amount* or even the fact of injury than is needed to prove damages under § 4."[299] In order to seek injunctive relief under § 16, "a private plaintiff must allege threatened loss or damage 'of the type the antitrust laws were designed to prevent and that flows from that which makes defendant's acts unlawful.'"[300] Thus, standing to pursue a damages action under § 4 considers whether the plaintiff is in the target area of the defendant's anti-competitive activity. This is a narrower question than standing to pursue injunctive relief under § 16, which simply considers whether there is antitrust injury. An antitrust violation includes a broader class of people. Students and recent graduates of a law school would have standing under both § 4 and § 16.

Students, graduates, and most likely attorneys seeking to employ the students and graduates, are similar to the subscribers in *McCready*. Even if the graduates could become licensed despite the ABA's refusal to accredit the school, these graduates will likely suffer an injury separate and apart from the law license. This separate injury may take the form of a "stigma" which will follow the students and graduates throughout their professional careers.[301] For some, the injury may have nothing to do with the inability to obtain a law license. For example, many people attend law school to obtain a law degree but have no interest in the practice of law. These include individuals desiring jobs in the corporate world, those seeking work as a civil servant in government agencies such as the FBI, those who seek a political career, or plan to teach in law schools. Moreover, most law schools require graduation from an ABA accredited school as a

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296. *Id*.

297. *Id*. (quoting *Standard Oil Co*., 405 U.S. at 261).

298. *See* Christian Schmidt Brewing Co. v. G. Heileman Brewing Co., 753 F.2d 1354, 1358 (6th Cir. 1985).

299. HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE ¶ 13.3e, at 602 (1999).

300. *Cargill*, 479 U.S. at 113 (quoting Brunswick Corp. v. Pueblo-Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977)); *see also* William Page, *The Scope of Liability for Antitrust Violations*, 37 STAN. L. REV. 1445 (1985).

301. Graduating from an unaccredited law school "carries a stigma of being second class." Oliphant, *supra* note 222, at 874-75.

requirement for entering an LL.M. program. Thus, the injury and the stigma are separate and independent from the ability to become a licensed attorney.[302]

To bring an antitrust action, a plaintiff must show (1) an agreement or a conspiracy that (2) unreasonably restrains trade (3) which affects interstate commerce.[303]

A. The ABA's Action with Respect to Barry Was Private Action

Referring to the Sherman Act, the Supreme Court stated that "[l]anguage more comprehensive is difficult to conceive."[304] Legislative history "shows a carefully studied attempt to bring within the Act every person engaged in business whose activities might restrain or monopolize commercial intercourse among the states."[305] Congress has made few exceptions to the Act.[306] In *Goldfarb v. Virginia State Bar*,[307] the Court applied the Act to a state and local bar association, stating:

> The nature of an occupation, standing alone, does not provide sanctuary from the Sherman Act, nor is the public-service aspect of professional practice controlling in determining whether §1 includes professions. Congress intended to strike as broadly as it could in §1 of the Sherman Act, and to read into it so wide an exemption as that urged on us would be at odds with that purpose.
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> The language of §1 of the Sherman Act, of course, contains no

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302. The Third Circuit in *Massachusetts School of Law at Andover, Inc. v. American Bar Association*, 107 F.3d 1026, 1038 (3d Cir. 1997), left open the door to pursue an antitrust injury against the ABA based on stigma. However, the court found that the school did not present enough evidence on this issue. Interestingly, although the Third Circuit did not accept the law school's complaint against the ABA, the subsequent DOJ Consent Decree incorporated many of the concerns raised by the Massachusetts School of Law. It should also be pointed out that the law school objected entirely to ABA accreditation. The school made no allegation that it complied with the ABA Standards. Rather, the law school argued that the Standards themselves violated antitrust laws. *Id.* at 1031.

303. *See* Standard Oil Co. v. United States, 221 U.S. 1, 63-64 (1911).

304. United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 553 (1944); *see* 15 U.S.C. § 1 (2000).

305. *South-Eastern Underwriters Ass'n*, 322 U.S. at 553.

306. *See, e.g.*, 15 U.S.C. § 17 (2000) (exempting labor unions and agricultural cooperatives); 15 U.S.C. §§ 1011-1012 (2000) (exempting insurance where the industry is already subject to state regulation); 15 U.S.C. § 2158 (2000) (exempting certain activities which further national defense objectives).

307. 421 U.S. 773 (1975).

> exception. . . . And our cases have repeatedly established that there is a heavy presumption against implicit exemptions.[308]

In *National Society of Professional Engineers v. United States*,[309] the Court applied the Sherman Act to an engineers' organization that prohibited its members from bargaining with a customer until the customer selected a specific engineer for the job. In *Arizona v. Maricopa County Medical Society*,[310] the Court applied the Act to a medical society which established a schedule of maximum fees. In *Parker v. Brown*,[311] the Court held that anti-competitive conduct undertaken pursuant to a mandate from state law is immune from antitrust liability. *Parker* involved a raisin producer who sought to enjoin enforcement of California's Agricultural Prorate Act.[312] However, in *Goldfarb*, the Court rejected arguments by a state and local bar that the Act did not apply to a voluntary bar association. The ABA argued that the fee schedule authorized by the Supreme Court of Virginia was immune from antitrust liability. The Court ruled that the fee schedule was private anti-competitive activity and thus the Act applied. "It is not enough that, as the County Bar puts it, anti-competitive conduct is 'prompted' by state action; rather, anti-competitive activities must be compelled by the direction of the State acting as a sovereign."[313] "Although states have relied upon ABA accreditation decisions, the ABA cannot argue that states have authorized it to issue specific accreditation standards that restrain trade."[314]

A state law or regulatory scheme, including one where a state bar recognizes the ABA as a law school accrediting body, cannot be the basis for antitrust immunity unless "first, the State has articulated a clear and affirmative policy to allow the anti-competitive conduct, and second, the State provides active supervision of anti-competitive conduct undertaken

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308. *Id*. at 787 (citations omitted).

309. 435 U.S. 679 (1978).

310. 457 U.S. 332 (1982).

311. *Parker v. Brown*, 317 U.S. 341 (1943); *see also* William H. Page, *Interest Groups, Antitrust, and State Regulation: Parker v. Brown in the Economic Theory of Legislation*, 1987 DUKE L.J. 618 (1987).

312. *Parker*, 317 U.S. at 344.

313. *Goldfarb*, 421 U.S. at 791.

314. Portinga, *supra* note 1, at 653; *see also* George B. Shepherd & William G. Shepherd, *Scholarly Restraints? ABA Accreditation and Legal Education*, 19 CARDOZO L. REV. 2091 (1998); Rothbardt, *supra* note 11; Henry First, *Competition in the Legal Industry (II): An Antitrust Analysis*, 54 N.Y.U. L. REV. 1049 (1979) (discussing the history of the ABA and applying antitrust analysis).

by private actors."[315] The Court explained:

> The active supervision requirement stems from the recognition that where a private party is engaging in the anti-competitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interest of the State. . . . The requirement is designed to ensure that the state action doctrine will shelter only the particular anticompetitive acts of private parties that, in the judgement of the State, actually further state regulatory policies. To accomplish this purpose, the active supervision requirement mandates that the State exercise ultimate control over the challenged anti-competitive conduct. . . . The mere presence of some state involvement or monitoring does not suffice. . . . The active supervision prong of the *Midcal* test requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy. Absent such a program of supervision, there is no realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests.[316]

The "mere potential for state supervision is not an adequate substitution for a decision by the State."[317] Indeed, "state-action immunity is disfavored, much as are repeals by implication."[318] In *Ticor*, the Court found that the states authorized regulatory practices but did not *compel* the establishment of specific rates and therefore rejected a state action immunity defense. Although most state supreme courts have recognized the ABA as an accrediting body, the courts do not actively supervise or compel application of the Standards, nor do they have any knowledge of the Council's application of such Standards to a specific law school.[319]

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315. Fed. Trade Comm'n v. Ticor Title Ins. Co., 504 U.S. 621, 631 (1992) (citing Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980)); *see also* Patrick v. Burget, 486 U.S. 94 (1988); S. Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48, 57 (1985).

316. *Ticor*, 504 U.S. at 634 (quoting *Patrick*, 486 U.S. at 100-01) (internal quotations and citations omitted).

317. *Id.* at 638.

318. *Id.* at 636 (citing Lafayette v. La. Power & Light Co., 435 U.S. 389, 398-99 (1978)).

319. In *Lawline v. ABA*, 956 F.2d 1378, 1383 (7th Cir. 1992), the court held that the ABA could not be held liable for an antitrust injury resulting from the Illinois Supreme

Standard-setting groups such as the ABA "can be rife with opportunities for anti-competitive activity."[320] "[A]lthough many states have delegated authority to the ABA to determine which law schools should receive accreditation, none has clearly and affirmatively authorized the ABA to adopt and enforce each of its many anti-competitive procedures and standards."[321] The ABA cannot claim immunity under the so-called petitioning exception. The *Noerr-Pennington* doctrine permits private competitive actors to influence government action without violating the Sherman Act.[322] *Noerr-Pennington* only protects action that involves petitioning[323] and does not apply when the association *applies* its own

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Court's adoption of ethical standards developed and promulgated by the ABA. However, *Lawline* is distinguishable from ABA accreditation because, unlike ethical standards which the state supreme courts may adopt and enforce, the state supreme courts have never adopted or reviewed or enforced the ABA Standards. For the same reason, *Zavaletta v. ABA*, 721 F. Supp. 96 (E.D. Va. 1989), is inapposite. *Zavaletta* was one of the first suits filed against the ABA regarding accreditation. (Before *Zavaletta*, a law school that was associated with Oral Roberts University sued the ABA because it was denied accreditation for religious reasons. *See* Oral Roberts Univ. v. ABA, No. 81-C-3171 (N.D. Ill. 1981); *See also* Nicholas P. Cafardi, *Catholic Law Schools and Ex Corde Ecclesiae, or What Makes a Law School Catholic?*, 33 U. TOL. L. REV. 7, 11 n.22 (2001)). Zavaletta filed suit because the ABA initially refused to accredit CBN University School of Law (renamed Regent University School of Law), which was founded by Pat Robertson. The concern that the ABA expressed during the Council meeting centered around academic freedom in light of Mr. Robertson's strong religious views. *See* Excerpts from Transcript of Proceedings Before the Council of the Section of Legal Education and Admissions to the Bar (Feb. 23, 1989 Denver) (on file with authors); *see also* Letter from James P. White, Consultant on Legal Education to the ABA, to Bob G. Slasser, President of CBN University and Herbert W. Titus, Dean of CBN University School of Law and Government (Feb. 10, 1989) (on file with authors) (referring to Council concerns regarding the impact of the school's religious beliefs on academic freedom). The students filed suit, alleging that the ABA was a state actor for purposes of constitutional due process, and also alleged violation of the Sherman Act. The district court first dismissed the state action claims, and then as if an oversight, issued a second short opinion regarding the antitrust claims. However, instead of challenging the process, the suit was a frontal attack against the ABA. Interestingly, shortly after the case was appealed, the ABA agreed to provisionally accredit CBN on the condition that the appeal be dismissed. The case of *Brandt v. ABA*, 1997 WL 279762 (N.D. Tex. May 15, 1997), provides no clarification. In *Brandt*, the plaintiff was served with a motion to dismiss or for summary judgment by the ABA and the law school dean. The plaintiff filed no response, and thus the case was dismissed without discussing the merits.

320. Am. Soc'y of Mech. Eng. Inc. v. Hydrolevel Corp., 456 U.S. 556, 571 (1982).

321. Shepherd & Shepherd, *supra* note 314, at 2238-39.

322. *See* E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); United Mine Workers of Am. v. Pennington, 381 U.S. 657 (1965).

323. *See Noerr*, 365 U.S. at 140-41.

standards. In *Allied Tube & Conduit Corp. v. Indian Head, Inc.*,[324] the Court found that the *Noerr-Pennington* doctrine did not apply to a standard-setting *process*, by a private organization, that thwarts competition.[325] "Accordingly, private standard-setting associations have traditionally been objects of antitrust scrutiny."[326]

> Unlike the publicity campaign in *Noerr*, the activity at issue here did not take place in the open political arena, where partisanship is the hallmark of decision-making, but within the confines of a private standard-setting process. The validity of conduct within that process has long been defined and circumscribed by the antitrust laws without regard to whether the private standards are likely to be adopted into law.[327]

The ABA's Standards have not been compelled or adopted by the state, nor has their action with respect to Barry University been adopted, supervised or compelled by the state. The *process* is generally shrouded in secret, and the *action* is undertaken primarily behind closed doors. As the Third Circuit noted the following:

> [T]he ABA is not immune in the actual enforcement of its standards. The state action relates to the use of the results of the accreditation process, not the process itself. The process is entirely private conduct which has not been approved or supervised explicitly by any state. Thus, the ABA's enforcement of an anti-competitive standard which injures [potential plaintiffs] would not be immune from possible antitrust liability. Extending *Noerr* immunity to this type of private activity would run counter to *Allied Tube*.[328]

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324. 486 U.S. 492 (1988).

325. *See id.* at 500.

326. *Id.*

327. *Id.* at 506.

328. Mass. Sch. of Law at Andover, Inc. v. ABA, 107 F.3d 1026, 1038-39 (3d Cir. 1997). In *Hoover v. Ronwin*, 466 U.S. 558 (1984), the state action doctrine applied where the state supreme court delegated the administration of the bar admissions to a committee because the court retained sole authority to determine which candidates should be admitted to the practice of law. Similarly, in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), the Court found that where the state supreme court adopted and enforced the specific ABA's advertising rule, the immunity doctrine applied.

B. The Agreement or Conspiracy

Price-fixing involves some type of agreement. The government can establish the existence of an agreement either by implication, if the parties exchanged material information or though direct evidence that an agreement actually existed.[329] *Goldfarb* noted that "anti-competitive activity by lawyers may exert a restraint on commerce."[330] As one scholar pointed out: "The adoption and enforcement of the ABA standards by each accredited law school is sufficient evidence to prove an agreement."[331] The ABA is a standard-setting association and "[t]ypically, private standard-setting associations, like the Association in this case, include members having horizontal and vertical business relations," thus, "[t]rade and standard-setting associations routinely [are] treated as continuing conspiracies of their members."[332]

In *National Society*, the Court never inquired as to whether the entity had conspired with anyone, instead, it saw the issue as whether an agreement among competitors unjustifiably restrained competition.[333] While the Society's rules were not disturbed, the Court enjoined *enforcement* of the Society's anti-competitive activity.[334]

In *American Society of Mechanical Engineers v. Hydrolevel*,[335] a group of competitors created an organization to examine and promulgate industry product standards.[336] This function was not challenged. "The formulation of standards, their interpretation, and product examination were ordinarily performed by experts, or committees of experts, drawn from the industry and serving the organization on a voluntary basis."[337] The Court imposed liability

> in order to encourage the organization to supervise those who acted

329. *See* United States v. Container Corp. of Am., 393 U.S. 333, 337 (1969) (holding that the dissemination of trade information may constitute price-fixing).

330. Goldfarb v. Va. State Bar, 421 U.S. 773, 788 (1975); *see also* Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679 (1978) (holding that professional or trade associations are subject to the Sherman Act).

331. Rothbardt, *supra* note 11, at 465.

332. *Allied Tube*, 486 U.S. at 500 (citing 7 P. AREEDA, ANTITRUST LAW, ¶ 1477 (1986)).

333. *See Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 692.

334. *See id.* at 687-89.

335. 456 U.S. 556 (1982).

336. *Id.* at 559.

337. AREEDA, *supra* note 332, ¶ 1477.

> with apparent authority in its behalf. The underlying antitrust violation was apparently based not on a possible conspiracy between the organization and the direct employers of the misbehaving volunteers, but on its members' conspiracy to promulgate and administer industry standards.[338]

In *Associated Press v. United States*,[339] a number of newspapers created the Associated Press (AP) as a vehicle for exchanging news.[340] The AP rules allowed a member to obstruct the admission of a local competitor.[341] Although the government regarded the AP itself as lawful, "the organization's admission rules were treated as a conspiratorial 'boycott' decision by the members."[342] Similarly, in *Goldfarb*, and in *Silver v. New York Stock Exchange*,[343] "the challenged behavior was treated as a conspiracy among the members."[344] "There seems to be no conceptual difficulty in treating organizations created to serve their member-competitors or to regulate their market behavior as continuing conspiracies of the members."[345]

Not only are the ABA Standards an agreement between the ABA, law schools, and others, the ABA itself is a continuing conspiracy among its members. Moreover, in adopting and enforcing the Standards, the ABA has engaged in concerted activity among the Association and with the Law School Admission Council (which administers the LSAT), the Association of American Law Schools and others.[346] In applying the Standards to law

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338. *Id.*

339. 326 U.S. 1 (1945).

340. *See id.* at 3-4.

341. *See id.* at 4.

342. AREEDA, *supra* note 332, ¶ 1477.

343. 373 U.S. 341 (1963).

344. AREEDA, *supra* note 332, ¶ 1477.

345. *Id.*

346. Although the official statement by the ABA is that the Standards do not require a certain score on the LSAT, and that the LSAT is not the only permissible test, it is common knowledge that schools seeking provisional accreditation are advised not to admit students with LSAT scores under 142. *See* Standard 503 ("A law school that is not using the Law School Admission Test sponsored by the Law School Admission Council shall establish that it is using an acceptable test."). As noted in this article, a score of 142 automatically eliminates most African-Americans and Puerto Ricans. *See supra* note 245. Additionally, there is not one ABA accredited law school in America which uses an entrance test other than the LSAT. ABA LAW SCHOOL GUIDE, *supra* note 244, "The LSAT is required for admission to all United States and Canadian Law Schools and is taken by more than 100,000 people each year." Law School Admission Council, *available at* http://www.lsac.org

schools, and obviously in regard to Barry University, the ABA has conspired not to deal with the schools it chooses not to accredit.[347] The ABA did not objectively evaluate the product Barry produces, namely, individuals who are prepared to enter the market of lawyers.[348] The ABA's arbitrary actions often force customers not to buy a product offered by the law school. If the reason for refusing accreditation to any one school had anything to do with the quality of the education, then one could perhaps justify the ABA's decision not to deal with the school. However, when the ABA acts like a political machine, arbitrarily granting accreditation to some schools while shutting out others, and when law schools have little or no idea how to comply with the standardless Standards,[349] then the ABA crosses the line into anti-competitive activity.

(accessed from homepage by selecting Research Grants then Law School Admission Council) (last visited May 7, 2003). The reason is evident to anyone who has been involved in the ABA accreditation process. The authors cannot find any instances where the ABA has ever recognized a test other than the LSAT.

347. *See, e.g.*, Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961); Klor's, Inc. v. Broadway-Hale Stores, 359 U.S. 207 (1959). Among many lost opportunities, law schools which are not ABA approved are precluded from attending the Law School Admissions Council's recruiting forums. The LSAC produces the LSAT. *See* About LSAC, *available at* http://www.lsac.org (Accessed from homepage by selecting About LSAC) (last visited May 7, 2003).

348. The ABA currently approves the following schools despite their bar passage rates: Thomas Jefferson (33%), Western State (34%), Whittier (39%), The District of Columbia (24%), Howard (32%), Florida Coastal (45%), Southern University Law Center (44%), Pontifical Catholic (47%) and Regent (39%), along with many others in the 50% category. *See* ABA LAW SCHOOL GUIDE, *supra* note 244, at 827-32. Many familiar with the ABA accreditation process suggest that it is more difficult to win provisional accreditation than it is to maintain accreditation once granted. This double standard is often apparent when the ABA criticizes a school seeking provisional approval for accepting students with low LSAT scores while allowing fully approved schools to admit students with the same, or sometime lower, LSATs. *See* discussion of LSAT scores, *supra* notes 244-45 and accompanying text. Once a school joins the club, it is hard to get thrown out especially after full accreditation. Fully accredited law schools remain fully accredited for many years although almost every report the ABA claims they are not in compliance with the standards. *See infra* Appendix B (discussing noncompliance of the University of North Carolina from 1993 until 2000). Perhaps this is due to the political fallout that would occur if the ABA revoked a school's accreditation. Whatever the reason, the current system is neither fair nor objective.

349. The ABA Standards are far from precise and leave a great deal of interpretation to the Council. Most law schools seeking ABA approval have only one question—what specific and objective criteria must the school meet to be accredited? This process seems to work in other situations outside of ABA accreditation. There's no reason the criteria for obtaining and maintaining accreditation should not be easily understood and uniformly applied.

C. The ABA Has Imposed An Unreasonable Restraint On Trade

While not all restraints are unlawful, unreasonable restraints violate the Sherman Act. "Concerted efforts to *enforce* (rather than just agree upon) private product standards face more rigorous antitrust scrutiny."[350] The ABA's application of the Standards may raise anti-competitive concerns, and result in an unreasonable restraint on trade. Product standardization might impair competition in several ways. "[It] might deprive some consumers of a desired product, eliminate quality competition, exclude rival producers, or facilitate oligopolistic pricing by easing rivals' ability to monitor each other's prices."[351] "There is no doubt that the members of such associations often have economic incentives to restrain competition and that the product standards set by such associations have the serious potential for anti-competitive harm."[352] That is why "private standard-setting associations have traditionally been objects of antitrust scrutiny."[353]

Barry University received an overwhelmingly favorable report from both the ABA Site Team and the Accreditation Committee, which recommended provisional accreditation in January 2001.[354] However, during the February 2001 meeting, the Council ignored its own rules by instigating a de novo review, and impermissibly delved into anti-competitive considerations.[355] The question of whether Barry could compete in the market with the addition of other schools concerned the Council.[356] The issue in the Barry case became even more clear when the Council dispatched another Site Team for a supplement site visit in September 2001. Although the second Site Team once again gave an extremely favorable report, the Accreditation Committee this time recommended against granting Barry University provisional accreditation.[357] At no time did the Accreditation Committee take issue with the academic program offered by Barry.[358] Instead, the Accreditation Committee focused (as did the Council in February 2001) solely on the

350. Allied Tube Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 501 n.6 (1988).

351. *Id.* at 500 n.5 (quoting AREEDA, *supra* note 332, ¶ 1503, at 373).

352. *Id.* at 500.

353. *Id*.

354. *See* Accreditation Committee Report No. 1, *supra* note 227, at 7.

355. *See supra* note 226.

356. *See* Council Transcript, *supra* note 255.

357. *See* Barry Supplemental Site Report, *supra* note 22. Accreditation Committee Report No. 2, *supra* note 24, at 12.

358. *See* Accreditation Committee Report No. 2, *supra* note 24.

threat of competition with a future state law school.[359] These concerns are purely anti-competitive and have no business in the context of accreditation. The ABA should only consider the output of the school, not competing market factors. In delving into these impermissible areas, the ABA unreasonably restrains trade, and thus precludes a broad class of students and graduates from entering the legal profession. The unreasonableness of the restraint becomes more evident, and the anti-competitive nature more apparent, when comparing Barry to four of the law schools which received provisional accreditation since 1998.[360]

1. Barry Compared to the Only Law School Provisionally Approved in 2001[361]

Appalachian School of Law (Appalachian) appeared before the Council for provisional accreditation consideration on February 17, 2001, the same day as Barry.[362] Appalachian appointed its new dean only a few months prior to the meeting.[363] The meeting transcript illustrates the sharp contrast between Appalachian and Barry. It is a private law school located in a "very isolated, very rural community," two hours from the nearest airport, one and a half hours from the nearest mall, and one hour from the nearest bookstore.[364] At the time of the meeting, virtually no opportunities to intern or clerk arose during the school year.[365] Teaching loads were heavy.[366] Appalachian, the Council noted, located in "literally [an] all-white region. Professor Dale Ruben, an African-American, . . . is only the second African-American person ever to vote in Buchanon County, and the first person only voted once, and Dale has already improved that record."[367] The

359. As already argued, competition among law schools should not be a topic of concern to the ABA. Even if one could argue otherwise, shouldn't the question be instead posed to the not yet existing school whenever it applies for accreditation?

360. The discussion regarding the comparisons of Barry to the other provisionally approved schools is not meant to cast any aspersions on these schools, nor are the comparisons meant to suggest that these schools fail to provide a quality education. Rather, the comparisons are meant only to shed light on the capricious actions of the ABA with respect to Barry.

361. *See infra* Appendix C (comparing provisionally approved law schools).

362. *See* Council Transcript, *supra* note 255, at 3.

363. *See id.* at 4-5.

364. *Id.* at 10-11.

365. *See id.* at 10-11, 27-28.

366. *See id.* at 11.

367. *Id.* at 32.

school has racial, gender and faculty tensions.[368] Some students have filed grievances citing use of racial epithets.[369] In contrast, to Appalachian, Barry has no racial or gender tensions. In fact, the student body is thirty-seven percent minority, and the faculty is approximately thirty percent minority, of which forty-three percent are female.[370] Appalachian's LSAT scores for 2000 were lower than Barry's and the Council anticipated the 2001 scores would be no better.[371]

Whereas Appalachian announced its inaugural board for the *Appalachian Journal of Law* in 2000, Barry established its board in 1997 and published its first law review volume, focused on juvenile justice, in 2000.[372] Barry offers significant clinical and internship opportunities, and received a grant from the State of Florida of between $800,000 and $900,000 to begin a Social Justice Clinic.[373]

2. Barry Compared to the Only Law School Provisionally Approved in 2000

An ABA Site Team visited William S. Boyd School of Law at the University of Las Vegas (UNLV) on November 14-17, 1999.[374] The law school began on August 17, 1998 and applied for provisional accreditation in August of 1999.[375] The Accreditation Committee considered this school in April of 2000 and granted it provisional accreditation the following June.[376] At the time of the Site Team's visit, "[m]any elements of the program were not developed."[377] "The upper class curriculum was still in the process of development . . . [and the] curriculum for skills development had not been finalized."[378] The grades were highly inflated.[379] "The school

368. *See id.* at 12-15.
369. *See id.* at 33-34.
370. *See* Barry Site Report of 2000, *supra* note 226.
371. *See* Council Transcript, *supra* note 255, at 26.
372. *See id.* at 12.
373. *See id.* at 9.
374. *See* UNLV Report, *supra* note 241.
375. *See id.*
376. *See id.*; *see also* ABA-Approved Law Schools, *available at* http://www.abanet.org (accessed from homepage by selecting Law Student Resources, Legal Education, then ABA-Approved Law Schools) (last visited May 7, 2003).
377. *Id.* at 2.
378. *Id.* at 3.
379. *See id.* ("Of the 1,185 grades in the spring, fall and summer sessions, only thirty-five were C- or lower [2.9%]; only ten were D [.8%] and only one was F [.08].").

ha[d] elected not to publish an admission profile using data from the Fall 2000 admission cycle because that data may not [have] accurately reflect[ed] the applicant pool foreseen in subsequent years."[380] Furthermore, the "lawyering process course [was] deficient in academic oversight . . . . "[381] The Site Team worried that "faculty involvement in governance may distract the members from the more academic pursuits," thereby impeding scholarship.[382] The law journal and the moot court program were not developed.[383] Additionally, the Site Report expressed sincere concerns about UNLV's library.[384] The Accreditation Committee ultimately recommended approval, but suggested that the school improve on overall standards in order to be fully accreditation compliant.[385]

In contrast to the thirteen page report on UNLV's substandard status, the thirty-nine page report on Barry glows with approval. Barry owns the new facilities it occupies.[386] As opposed to the 7,112 titles carried at UNLV, Barry had "38,404 titles comprised of 180,533 volumes, . . . 1,644 active serial subscriptions for 1,638 titles [and] . . . 21 CD-ROM titles."[387] Barry's library had received high praise from every Site Team visiting the school.[388] Moreover, the main university library at the Miami Shores campus "provides [Barry] with a full complement of traditional and innovative library services," including an "on-line catalog of more than 600,000 items and almost 150 electronic data bases, 133 electronic journals, Web bibliographies and an online periodical directory of 2,600 titles."[389] Also in contrast to UNLV, Barry's self study was deemed

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380. ABA LAW SCHOOL GUIDE, *supra* note 244, at 445.

381. UNLV Report, *supra* note 241, at 5.

382. *See id.* at 6.

383. *See id.* at 8.

384. *See id.* at 9-10 (noting that UNLV's library staff cautioned that "it soon could find itself stretched to meet the service demands of non-law school constituencies"). The library had only 7,112 titles consisting of 48,544 hard copy volumes and its budget "[would] be insufficient in the light of escalating costs for legal continuation and international materials . . . and [would] be hard pressed to build even a minimal [foreign and international law] collection without a budgetary adjustment." *Id.* The adequacy of the building housing the library also concerned the Site Team. *Id.*

385. *See id.* at 13; see also Standards, *supra* note 67, at 202(a), 302(c)-(d), 303, 403, 405(a), 606, 701.

386. *See* Barry Site Report of 2000, *supra* note 226, at 3.

387. *Id.* at 30.

388. *See* Barry Site Report of 1999, *supra* note 237; Barry Site Report of 2000, *supra* note 226.

389. Barry Site Report of 2000, *supra* note 226, at 30.

"comprehensive" in the Site Report.[390] Further, Barry offers significant skills-oriented coursework.[391] Its law review program was underway at the time of the Site Visit and the Site Team reviewed a draft copy of the first law review volume, which has now been published.[392] Moreover, the moot court and trial advocacy programs were highly competitive.[393]

The Site Report also made favorable findings regarding Barry's faculty, stating that "the range of legal education and other advanced degrees held by the faculty is impressive."[394] It noted the Barry faculty's significant publication activity and visiting professor fellowships at foreign law schools, and "observed high-quality classroom teaching, with few exceptions, and observed generally high levels of student preparation and participation."[395] Furthermore, Barry fulfilled a need in the local legal community. "Numerous statements were made of the community's need for Barry graduates to service unmet legal needs in the surrounding counties."[396] The Site Team praised the facilities, noting its room for expansion. Thus, Barry received a glowing recommendation for provisional accreditation.[397]

3. Barry Compared to the Only Law School Provisionally Approved in 1999

Florida Coastal School of Law (Florida Coastal) is a *for-profit* school.[398] The school leased facilities in Jacksonville, Florida at the time of

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390. *Id*. at 5.

391. *See id.* at 9 ("Trial Advocacy and Florida Civil Practice are offered frequently and have great demand from students. Thus, trial work skills receive more emphasis, although mediation courses are also available. The school's strong performance in extramural trial performance competition attests to the value of this particular educational experience.").

392. *See id*. at 11.

393. *See id*.

394. *Id*. at 12.

395. *Id*. at 14-15.

396. *Id*. at 23.

397. *See id.* at 38-39.

398. *See* ABA Accreditation Committee, Action of the Accreditation Committee Report 1 (Apr. 1999), *available at* http://www.lc.org (accessed from homepage by selecting ABA Accreditation Research, Complaint Exhibits, then Florida Coastal Report) (last visited May 12, 2003) [hereinafter Coastal Report]. Prior to issuance of a June 1996 Consent Decree with the United States Department of Justice, which required the ABA to accredit for profit schools, the ABA had refused to do so. Chapman School of Law was the first for-profit school accredited by the ABA. It received provisional accreditation in February 1998. *See* Parham Williams, Greetings from the Dean, *available at* http://www.chapman.edu/law

the Site Visit.[399] The student-faculty ratio in 1997 was 28-1 and in 1998, 19.2-1.[400] With respect to "faculty scholarship," the Site Team noted "the lack of prior teaching and writing experience by some faculty members" and were concerned about the "other demands currently made on them."[401] The library contents were comparable in size to those at Barry.[402] The previous action letter expressed concern about grade inflation, as no students had been academically dismissed.[403] Some students in need of academic help appeared not to benefit from the available voluntary, rather than mandatory, academic support programs.[404] The school had no law clinics, although some were being planned for the future.[405]

The Site Team further noted that "comparing the GPA and LSAT scores for the entering students at Florida Coastal with those of other Florida law schools, one would project that Florida Coastal's bar passage rates would be in the lowest in the state."[406] Additionally, the minority class "declined from 39% in 1997 to 24% in 1998, in large part as a result of the termination of the 'special student' program."[407] Ultimately, the Coastal Report C recommended that the school receive provisional accreditation, but noted that the school needed to address certain areas to be in full compliance with several ABA Standards (302(a), 303, 301(a) and 501(b) and 701-3).[408]

In contrast, Barry's faculty have excellent academic credentials and have extensively published.[409] No mention was made in Coastal's thirteen

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(accessed from homepage by selecting General Information then Greetings from the Dean) (last visited Feb. 16, 2003).

399. *See* Coastal Report, *supra* note 398, at 3. The school was "exploring and assessing permanent site options" as the school was renting offices in temporary facilities, much like UNLV. *Id.* at 9.

400. *See id.* at 4.

401. *Id.* at 5.

402. *See id.*

403. *See id.* at 6.

404. *See id.*

405. *See id.* Indeed, "[a]n issue of concern about the clinical program [was] the appointment of a full-time permanent director. [At the time of the report,] the duties [were] being shared by a paid consultant who teaches at the University of Florida and a professor who teaches at Florida Coastal." *Id.*

406. *Id.* at 8. LSAT scores in the 25th percentile were in the 138 range, but Barry was faulted for admitting one student with a 138 and one with a 139 LSAT. *See supra* note 244.

407. Coastal Report, *supra* note 398, at 9; *cf.* Shepherd, *ABA Damages Black Law Schools*, *supra* note 245.

408. *See* Coastal Report, *supra* note 398, at 9.

409. *See* Barry Site Report of 2000, *supra* note 226, at 14.

page report about moot court or trial advocacy or law review because there was nothing notable to say. Coastal had not successfully competed in any trial or moot court program. Barry, in contrast, has published its first law review, and has become highly successful in state and regional competitions in both the trial and moot court competitions.[410] Barry had an active clinical program, whereas Coastal was lacking in this area. Barry owns beautiful new facilities, whereas Coastal was renting office spaces and looking for a new site when the ABA was considering its application.

4. Barry Compared to Only Law School Provisionally Approved in 1998

The University of the District of Columbia David A. Clarke School of Law (DC) was provisionally approved by the ABA in 1998.[411] While the ABA Council denied accreditation to Barry in January 2001 (following a favorable recommendation from the Accreditation Committee), DC was provisionally accredited in February 1998, notwithstanding the Committee's unfavorable recommendation in January and April 1997.[412] As this section points out, the Accreditation Committee concluded in February 2001 that DC was still not in compliance with three of the same four standards the ABA Council had used the previous month to reverse the Committee's favorable recommendation and to deny accreditation to Barry.[413]

According to the Council's report, DC was formed by a merger of the District of Columbia School of Law, a freestanding law school, and the

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410. *See id.* at 9, 11; *see also infra* Appendix C.

411. *See* Approved Law Schools, *available at* http://www.abanet.org (accessed from homepage by selecting Law Student Resources, Legal Education, then ABA Approved Law Schools (last visited May 7, 2003).

412. *See* Letter from James P. White, Consultant on Legal Education to the ABA, to Dr. Julius F. Nimmons, Jr., Acting President of the University of the District of Columbia, and Dean William L. Robinson, Dean of DC (Feb. 5, 1998), *available at* http://www.lc.org (accessed from homepage by selecting ABA Accreditation Research, ABA Evaluation Reports on Public Law Schools, then Council Action Letter 02-05-1998) (last visited May 17, 2003).

413. In fact, even in 1997, the year before DC received provisional accreditation, the entering class of forty-one had a mean LSAT/GPA of 142/2.63. *See* ABA's Accreditation Committee Report Regarding the University of the District of Columbia School of Law, Appendix at 6 (2001), *available at* http://www.lc.org (accessed from homepage by selecting ABA Accreditation Research, ABA Evaluation Reports on Public Law Schools, then Accreditation Report 02-12-2001) (last visited May 17, 2003) [hereinafter DC Accreditation Committee Report].

University of District of Columbia School of Law.[414] Located in the facilities that housed DC's predecessor law school renovations were made after provisional accreditation was granted. As part of the ABA's annual review of provisionally accredited law schools, the Accreditation Committee reviewed a Site Team report from an April 9 through April 12, 2000, visit and issued a Report dated November 2000.[415] The Committee concluded that although "the Spring, 2000 site evaluation report and Dean Broderick's update on the School's situation shows progress," DC was still not in compliance with seven standards.[416] The Committee requested that school representatives appear at a meeting "to show cause why the School should not be required to take appropriate remedial action, placed on probation, or removed from the list of [approved] law schools . . . ."[417] A subsequent report, dated January, 2001, concluded that DC was still not in full compliance with three standards, but the Committee ceased any threat of probation or removal due to the school's progress.[418] The report also noted that DC had only gained internet access in 2000, and planned to

414. *See id.* at 1. Historically, the law school began as the Antioch School of Law in 1972, and was dedicated to providing a legal education to minority students and legal services to poor residents of Washington, D.C. In 1988, the school became independent as the District of Columbia School of Law and gained provisional ABA approval in 1991. After merging into the University of the District of Columbia in 1995, the ABA required an application for new provisional accreditation, which was finally granted in 1998. *See id.* at 3. It has been designated a historically black institution. *See id.* at 1.

415. *See id.* at Appendix 1.

416. *See id.* at Appendix 15-16. The Accreditation Committee concluded that DC did not comply with Standards 301, 303(c), and 501(b), "because the School is admitting applicants who do not appear capable of satisfactorily completing the educational program and being admitted to the bar, and being employed as practicing members of the bar." *Id.* The Committee noted that the "credentials of the students are among the weakest in the nation." *Id.* at Appendix 5. By 1999, the entering class of eighty-eight had a mean LSAT/GPA of 141/2.68, with the LSAT/GPA 25th percentiles at 138/2.36. The Fall 2000 class had LSAT/GPA percentiles at 142/2.5. *Id.* at Appendix 5-6. Bar exam passages rates were also a concern. "While the School attributes its bar passage results in part to its mission to provide access to students from underrepresented groups and its willingness to accept more at-risk students than most traditional law schools, it also acknowledges that its bar passage rate is disproportionately low even given the characteristics of the student body." *Id.* at Appendix 6. The Accreditation Committee also concluded that DC did not comply with Standards 601, 604 and 606, "because of the fiscal and space constraints and the severe understaffing and insufficient collection of the library;" and Standard 201(a) due to "the present and anticipated financial resources . . . do not appear adequate . . . ." *Id.* at Appendix 16.

417. *Id.* at Appendix 16-17.

418. *Id.* at 7-8. The three standards of noncompliance were still 301, 303(c), and 501(b), relating to the admission of applicants, attrition and bar passage rates.

network computers for building-wide internet access and access to an on-line library catalog system.[419] The library collection had increased from 171,791 volumes and volume equivalents in 1999 to 184,000 in 2000.[420] The school was also directed to attend to matters involving financial resources, and the requirement that the law school must qualify for full approval within five years of provisional approval.[421] A forty page report was prepared based on a Site Team visit to DC in April, 2001.[422] DC had a 26% bar passage rates for summer 1999 and winter 2000 exams.[423] The site team's report noted:

> [T]he most serious problem still confronting . . . [the School] . . . is the recruitment and retention of quality law students in a brutally competitive market. . . . While the University and the School of Law seem willing to admit another class of 40 first-year students if necessary to improve quality, there is widespread skepticism about the long-term viability of the School with such a small entering class. . . . The School needs to bend every effort to move toward its eventual goal of 100 students per entering class, yet remaining true to its public interest mission and its key role of providing access to legal education for the disadvantaged citizens of the District of Columbia. Accomplishing all these ends will not be easy, but certainly appears possible.[424]

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419. *Id.* at 6.

420. *Id.* at 7.

421. *Id.* at 8; *see also* Standards, *supra* note 67, at 102(b) (providing the basic requirements of law school accreditation):

> A law school that is provisionally approved may have its approval withdrawn if it is determined that it is not in substantial compliance with the Standards or if more than five years have elapsed since the law school was provisionally approved and it has not qualified for full approval. In extraordinary cases and for good cause shown, the Council may extend the time within which the law school shall obtain full approval.

Id.

422. *See* Accreditation Committee Report Regarding DC, *available* at http://www.lc.org (accessed from homepage by selecting ABA Accreditation Research, ABA Evaluation Reports on Public Law Schools, then Site Team Report 08-07-2001) (last visited May 17, 2003) [hereinafter DC Site Report]. The ABA sends a site team annually to each provisionally accredited school until full accreditation is obtained or until provisional accreditation is withdrawn. A law school has five years from provisional accreditation to obtain full accreditation.

423. *See* 2001 ABA-LSAC OFFICIAL GUIDE TO ABA APPROVED LAW SCHOOLS 828 (2001).

424. *See* DC Site Report, *supra* note 422, at 39.

The report further noted that the "level of staff support remains low, though improvements are on the way."[425] Plus, the facilities, "long a problem bedeviling the administration, students and faculty, are now adequate for its mission and program, though continued improvements are needed and planned."[426] In contrast, Barry occupies four buildings built in 1995 that are well-maintained to this day.[427]

When comparing the above data, it becomes quite obvious that the Council subjected Barry to unfair treatment and engaged in impermissible anti-competitive behavior when it denied Barry accreditation.[428] There is no rational, objective reason for the ABA's actions in respect to Barry.

D. The ABA's Accreditation Process Injures the Legal Profession

The actions of the ABA clearly injured Barry and its students. The question that must be addressed in any antitrust claim is whether the injured party has also suffered an antitrust injury.

1. The Market

"[T]he ABA is the gatekeeper to the legal profession."[429] "[I]f the government has granted the seller a patent or similar monopoly over a product, it is fair to presume that the inability to buy the product elsewhere gives the seller market power."[430] The ABA is recognized in most states as the only law school accrediting organization. The ABA indeed has market power.

> When the seller's share of the market is high, or when the seller offers a unique product that competitors are not able to offer, the Court has held that the likelihood that market power exists and is being used to restrain competition in a separate market is sufficient

425. *Id.* at 38, 40.

426. *Id.*

427. *See* Committee Report No. 1, *supra* note 227.

428. The fact that the Council finally approved Barry in February 2002, does not diminish this argument. The Council should not have denied Barry in February 2001, nor should the Accreditation Committee have taken a 180 degree turn following the Council's denial by recommending against provisional approval based on competition concerns. The fact that the Council finally relented to overwhelming pressure from many sources does not relieve the ABA of its actions.

429. Portinga, *supra* note 1, at 669.

430. Jefferson Parrish Hosp. Dist. v. Hyde, 466 U.S. 2, 16 (1984) (citing United States v. Loew's, Inc., 371 U.S. 38, 45-47 (1962)).

to make per se condemnation appropriate.[431]

Almost every state requires graduation from an ABA-accredited law school in order to sit for the bar exam.[432] Indeed, 109 Barry students who graduated prior to the school obtaining provisional approval from the ABA run the risk of not becoming licensed.[433] The market in Barry's case is, at a minimum, central Florida.[434] This is the market that the Council was so concerned about.[435] The Council questioned whether the students primarily came from Florida at large or from the surrounding seven counties.[436] The Council was concerned about the impact of a competitor school in central Florida.[437]

2. Interstate Commerce

The Sherman Act "was intended to reach activities that, 'while wholly

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431. *Id.* at 17 (citations omitted).

432. *See* ABA-Approved Schools, *available at* http://www.abanet.org (accessed from homepage by selecting Law Student Resources, Legal Education, ABA-Approved Schools, then FAQs) (last visited May 7, 2003); *see also supra* note 2. George Leef, *Free the Law School Market and the Public Will Benefit*, Apr. 5, 2003, *available at* http://www.cato.org (accessed from homepage by entering "free the law school market" in the search engine) (last visited May 17, 2003).

433. The Orange County Bar Association filed a petition with the Florida Supreme Court requesting a change in the licensing rule so that students at any Florida law school could become licensed if their law school became ABA accredited within twelve months of the ABA's decision to grant accreditation so long as the original site team visit on which the decision is based occurred within twelve months of graduation. *See* Petition of Orange County Bar Association and Thomas B. Drage, Jr., Esq., et al., Petition to Amend Rules 2-11.1 and 4-13.2 of the Rules of the Supreme Court Relating to Admissions to the Bar, No. SC02-2354 (Fla. Oct. 23, 2002), *available at* http://www.lc.org (accessed from homepage by selecting ABA Accreditation Research then Petition of Orange County Bar Association to Change Florida Supreme Court Rules) (last visited May 12, 2003).

434. *See In re* Barry Univ. Sch. of Law, 821 So.2d 1050 (Fla. 2002) (ruling that those students who graduated more than twelve months prior to the ABA granting provisional accreditation on February 4, 2002, may not take the Florida bar exam, and those who already sat for the exam, but whose scores were impounded until such time as the ABA conferred provisional approval, may not have their exam scores released).

435. Since Barry is located in central Florida, the market at a minimum concerns this area.

436. The Council focused on the introduction of FAMU, a state approved law school, which at the time of the Council's first deliberation in February 2001, was almost two years away from its inaugural class that began in August 2002. *See* Council Transcript, *supra* note 255, at 41, 46, 67.

437. *See id.* at 46, 67.

local in nature, nevertheless substantially affect interstate commerce.'"[438] "The jurisdictional requirement of the Sherman Act may therefore be satisfied by proving either that the business activities occurred in commerce or that those activities had an effect on commerce."[439] A challenge to subject matter jurisdiction is resolved by answering the question: "Can Congress prohibit the challenged conduct under the Commerce Clause? If so, then the conduct is within the jurisdictional reach of the Sherman Act."[440] Accreditation activities certainly impact commerce across the nation. First, the ABA is engaged in interstate commerce. The ABA is a nationwide organization. It is recognized as a national accrediting agency by the Department of Education. The ABA regularly sends site teams to various schools to conduct site visits.[441] On several occasions the ABA has sent Site Teams to Barry for a fee.[442] Second, the law school, the students and graduates are engaged in interstate commerce. Ten members of the class of 2000 listed a permanent residence outside of Florida.[443] One student, a resident of Georgia, traveled to Florida during the week and returned home on the weekends.[444] Some students clerked with law firms having a nationwide practice.[445] The jurisdictional requirement of the Sherman Act is met.

3. The Antitrust Violation Causes Injury to the Legal Market

Under § 4, a private plaintiff who demonstrates a violation of the Sherman Act must also show an antitrust injury.[446] "[Proving damages] under § 4 the Clayton Act is satisfied by proof of *some* damage flowing from the unlawful conspiracy; inquiry beyond this minimum point goes only to the amount and not the fact of damage."[447] "[I]t is enough that the

438. McLain v. Real Estate Bd. of New Orleans, 444 U.S. 232, 241 (1980).

439. Constr. Aggregate Transp., Inc. v. Florida Rock Indus., Inc., 710 F.2d 752, 766 (11th Cir. 1983).

440. *Id*. at 766 n.29 (citation omitted).

441. *See* Rule 9, *supra* note 54 (providing for the payment of fees by law schools applying for provisional approval).

442. *See* Rules 4(b)(9), 29, *supra* note 54 (providing for the payment of fees by law schools applying for provisional approval).

443. *See* Barry Site Report of 2000, *supra* note 226, at 17.

444. *See* Jan Pudlow, *Budding Legal Careers Put on Hold*, 29 FLA. BAR NEWS 2, 1 (Jan. 15, 2002).

445. *See* Terry O. Roen, *Law Students Have Faith that Barry Will Get Accredited*, THE FLA. CATHOLIC, July 26, 2001.

446. *See* Constr. Aggregate Transp., Inc. v. Florida Rock Indus., Inc., 710 F.2d 752, 782 (11th Cir. 1983).

447. Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 114 n.9 (1969)

illegality is shown to be a material cause of the injury; a plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury under § 4."[448]

Without provisional accreditation, the rigorous law school training is wasted. The dream to practice law or to otherwise effectively use a law degree is dashed. The only hope of those who graduate from a law school that does not timely win provisional accreditation is to start afresh and plough through at least two more grueling years of law school.[449] For the most part, the injury and the additional aspect of stigma precludes virtually all opportunity to practice law, and precludes most opportunities of pursuing specialty legal education and other non-licensed job opportunities.[450]

The injury to the legal profession occurs in many ways. Attorneys are often the brunt of jokes, but it is interesting how an attorney becomes a client's best friend when successful. Allowing more attorneys in the legal market will have the inevitable effect of driving down prices for legal services.[451] Many of the students at Barry desired to offer their services pro

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(citation omitted).

448. *Id*.

449. Standard 506(b) permits accredited law schools to accept students from state-accredited law schools and transfer up to one-third of the credits required for graduation. One other *possibility* is to find a school which accepts applicants into an LL.M. program without the requirement of having obtained a J.D. degree from an ABA approved school. Currently, the states of Louisiana, Michigan, and North Carolina allow those having a J.D. from a non-ABA approved school, but who have obtained an LL.M. from an ABA approved school, to sit for the state bar exam. *See* SUP. CT. OF LA. R. XVII; MICH. BD. OF L. EXAM'RS R. 2(B)(2); N. C. STATE BAR R. .0100.0105. Another *possibility* is to petition the Nevada Supreme Court for permission to sit for the bar exam if the school which granted the J.D. obtained ABA approval within three years of graduation. The petition must show that the school in question provides an equivalent education to an ABA approved school. *See* NEV. SUP. CT. R. 51.5.

450. For example, a professor or law librarian need not have a law license in order to teach law. However, most law schools will not hire faculty who graduated from non-ABA approved schools. Having faculty on staff from non-ABA approved schools would not bode well with the ABA during the accreditation review process. There is an argument that the ABA is immune from antitrust claims because the injury of not being able to sit for the state bar exam flows from the state supreme courts which rely on the ABA. Thus, the injury, if any, flows from the state, and not the ABA. While this argument might sound appealing at first blush, it breaks down in several ways. First, challenging the process as applied to a particular law school avoids state action because the state supreme court does not supervise the day-to-day accreditation process. Second, challenging the ABA in respect to the injury caused to those pursuing non-licensed carrier eliminates the issue of a law license, and thus eliminates the argument that the injury flows from the state supreme courts.

451. *See* Benjamin Hoorn, *Why Do We Regulate Lawyers?: An Economic Analysis of the Justification for Entry and Conduct Regulation*, 33 ARIZ. ST. L.J. 429, 462 (2001); *see*

bono, or at reduced rates.[452] The resulting injury far surpasses those who

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also Robert W. Bennett, *Reflections on the Law School Accreditation Process*, 30 WAKE FOREST L. REV. 379, 383 (1995) (ABA accreditation process increases cost of law school education); John S. Elson, *The Governmental Maintenance of the Privileges of Legal Academia: A Case Study in Classic Rent-Seeking and a Challenge to Our Democratic Ideology*, 15 ST. JOHN'S J. LEGAL COMM. 269 (2001) (arguing that the ABA accreditation process needs reform and that the current process drives up the cost of legal education while providing little practical training); Timothy W. Floyd, *Legal Education and the Vision Thing*, 31 GA. L. REV. 853, 856 (1997) (stating that law school education focuses too much on legal doctrine and not enough on the practice of law); A'Lelia Robinson Henry, *Inequality: Plessy v. Ferguson and the Dilemma of Black Access to the Public and Higher Education*, 37 J.L. & EDUC. 47 (1998) (arguing that the ABA accreditation process raises economic barriers to African-Americans); Peter V. Lestou, *Law, Education and Legal Education: The Future of Legal Education: Some Reflections on Law School Specialty Tracks*, 50 CASE W. RES. L. REV. 457 (1999) (estimating the cost of ABA accreditation to be one million dollars). This cost estimate is extremely conservative. The minimum annual cost of maintaining a library to meet ABA standards is one million dollars. This is due, in part, to the fact that the ABA has not yet come into the computer age, where little used volumes and rows of dusty book shelves are no longer necessary. The largest single component comprising law school tuition is the maintenance of the law library. *See* George Shepherd, *No African-American Lawyers Allowed: The Inefficient Racism of the ABA's Accreditation of Law Schools*, J. LEGAL ED. (forthcoming); *see also* Christopher T. Cunniffe, *The Case for the Alternative Third-Year Program*, 61 ALB. L. REV. 85, 101-02 (1997) (arguing that the cost of legal education is borne by the students and the market); Claudia MacLachlan, *Doing Well vs. Doing Good*, LEGAL TIMES, Sept. 4. 2000, at 50 (stating that the median law school debt is $80,000 per student); Symposium, Legal Ethics, *An Informal Discussion on Legal Ethics*, 2 J. INST. STUD. LEGAL ETHICS 427, 436 (1999) (stating that students are forced to take high paying jobs to pay off law school debt and are thus prohibited from serving the poor and middle class). ABA accreditation straight-jackets legal education by not allowing alternative programs such as those allowed in California. *See* Josh Ard, *Serving over the Net: Legal Education over the Internet*, 79 MICH. BAR J. 1050 (2000) (arguing that on-line legal education, which is allowed in California, reduces the cost of tuition and may provide legal education to groups typically denied such opportunity); Mark E. Dykstra, *Why Can't Johnny Sit for the Idaho Bar?: The Unfair Effect of ABA Accreditation Standards on State Bar Admission Requirements*, 3 SAN DIEGO JUST. J. 285, 289-90 (1995) (arguing that the ABA accreditation unfairly eliminates many qualified graduates of unaccredited schools from the practice of law); Jeffrey S. Kinsler, *Correspondence Law School Grads May Practice in Wisconsin*, 74 WIS. LAW 4 (Nov. 2001) (stating that on June 4, 1998, Wisconsin amended its rules of admission to allow any person who is eligible to take the bar in their state of graduation to take the exam in Wisconsin, thereby allowing graduates of California-approved internet law schools the right to practice in Wisconsin); Oliphant, *supra* note 222, at 843.

452. The Orange County Bar Association where Barry is located requires mandatory pro bono service of all its members. The ABA recently honored the Orange County Bar Association for its model pro bono program. Many of the students at Barry participate in the Orange County Bar's pro bono program as law clerks. *See Affiliate Membership Application* and Article II, Orange County Bar Association Bylaws, *available at* http://www.ocbar.org (noting that law students may join as affiliate members, but must provide pro bono service) (last visited at Apr. 15, 2003).

invested their lives to obtain a legal education. The poor, minorities and the disadvantaged also suffer.[453]

VI. CONCLUSION

The ABA accreditation process must be reformed. The future and integrity of the legal profession depends on administering fair and objective accreditation standards. The recent trend appears to show a growing dissatisfaction for the ABA accreditation process. However, state supreme courts must take the matter of accreditation seriously. No longer can one assume that the ABA is acting reasonably and in the best interest of the public or the legal profession.

In February 2002, the Montana Supreme Court narrowly denied a California law school graduate's petition for waiver of the state bar rule that require an applicant "must have a Juris Doctor or equivalent degree from a law school accredited by the American Bar Association at the time of graduation. . . ."[454] In a 4-3 decision, the court declined to waive the bar rule on ABA accreditation.[455] The majority maintained that the court did not have the "resources or expertise to independently examine the legal education offered by law schools around the country."[456] Justice Leaphard concurred, adding: "I do not favor changing the requirements for taking the bar examination in such a way that the support for the University of Montana School of Law[457] will be eroded."[458]

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453. *See* Shepherd, *supra* note 245 (arguing that ABA accreditation has proven to be a barrier to minorities entering the legal profession, especially among African-Americans); *see also* Robert E. Hirshon, *The Importance of Unbundling Legal Services*, 40 FAM. CT. REV. 13 (2002) (stating that low and moderate income persons have a substantial need for legal assistance); Michael D. Schattman, *Picking Federal Judges: A Mysterious Alchemy*, 96 MICH. L. REV. 1578, 1584-85 (1998) (claiming that the ABA was brought into the judicial screening process to "block the appointment of women and black" from the federal bench); Jonathan D. Glater, *Few Minorities Rising to Law Partner*, N. Y. TIMES, Aug. 7, 2001, at A1. Notably, Barry University was recognized as the number one university in the south for diversity of students; Robert Steinback, *A Bum Rap from the Bar*, MIAMI HERALD, Aug. 8, 2001, at 1B (arguing that ABA accreditation eliminates minorities). *See also America's Best Colleges*, U.S. NEWS & WORLD REPORT, Sept. 6, 2001, at 73. The ABA's political bias in the rating of nominees to the federal bench still continues. *See* James Lindgren, *Examining the American Bar Association's Ratings of Nominees to the U.S. Courts of Appeals for Political Bias, 1989-2000*, 17 J. L. & POL. 1 (2001).

454. *In re* Petition of Culver, slip op. at 1, 4 (Mont. 2002).

455. *Id.* at 4-5.

456. *Id.* at 3.

457. A January 29, 1996 letter from the ABA Accreditation Committee to the University of Montana School of Law concluded that the law school was "not in compliance with the Standards." *See* Letter from James P. White, Consultant on Legal Education to the

However, Justice Trieweiler issued a noteworthy dissent, in which he criticized the ABA:

> no empirical data has been offered to suggest that the ABA's standards correlate in any way to a quality legal education. What is evident is that the monopoly given to this private trade association to set standards for law schools increases the cost of legal education, burdens new members of the profession with debt that limits their options for professional and public service, hampers innovations in the area of legal education, discriminates against "working faculty" with practical professional experiences to share with their students, and discriminates against non-conventional students and minorities who do not meet the arbitrary admission standards imposed.[459]

Justice Trieweiler pointed to six ABA standards to illustrate his point that ABA accreditation is unrelated to the quality of legal education obtained.[460]

> [The ABA standards] are merely arbitrary standards established to perpetuate traditional notions of who should receive a legal education and traditional notions of full time law faculty who place too much emphasis on producing grain silos full of worthless legal literature every year and not enough emphasis on quality classroom education.[461]

Justice Cotter, one of the two justices who wrote separate dissents, noted that she expressed support for "most of Justice Trieweiler's comments."[462] Justice Cotter agreed "in particular with the contention that

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ABA, to Dr. George M. Dennison, President, University of Montana, Jan. 29, 1996, at 7 (on file with authors). The Accreditation Committee listed six standards of non-compliance: "Standards 105 and 201(b) and adopted interpretations thereof" regarding "[t]he adequacy of resources available to support the educational mission"; and "Standards 601(b), 604, 605, and 606" relating to the "adequacy of resources available to the law library." *Id.* In addition, the Accreditation Committee expressed concern with respect to eight other standards and requested a report showing compliance with the standards by September, 1996. *Id.* at 7-8.

458. *Culver*, slip op. at 7. Justice Leaphard attended the University of Montana School of Law. *Id.*

459. *Id.* at 9.

460. *Id.* at 12-13.

461. *Id.* at 13.

462. *Id.* at 17.

there are valid, workable and relatively simple alternatives" to decide if an applicant is qualified "without chaining ourselves to the ABA standards."[463]

Professor John Elson, a veteran of many ABA Site Team visits and a former member of the ABA Accreditation Committee, laments the current state of ABA accreditation.

> There is no cause: to celebrate a system that limits competition in the legal services market so effectively that vast numbers of Americans cannot afford legal services; to celebrate a system that is so costly that the non-wealthy are either priced out of legal education entirely or must take on tremendous debt; or to celebrate a system that fails to prepare most students to meet the initial challenges of law practice.[464]

Lifting the veil of the ABA accreditation process reveals a system that is arbitrary and lacking in predictability. Fairness and quality education should be the hallmark of any accreditation process.

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463. *Id.*
464. Elson, *supra* note 4, at 269-70 (citations omitted).

VII. APPENDICES

APPENDIX A

ABBREVIATIONS

ALSDA - American Law School Deans Association.

ABA - American Bar Association.

Accreditation Committee - ABA Accreditation Committee of the Section of Legal Education and Admissions to the Bar of the ABA.

Accreditation Committee Report No. 1 - Report by the Accreditation Committee following its meeting of January 26-27, 2001, regarding Barry's application for provisional accreditation.

Accreditation Committee Report No. 2 - Report by the Accreditation Committee following its meeting of November 1-3, 2001, regarding Barry's application for provisional accreditation.

Barry - Barry University School of Law.

Barry Site Report (1999) - Report prepared by the ABA Site Team regarding Barry University School of Law for site visit in 1999.

Barry Site Report (2000) - Report prepared by the ABA Site Team regarding Barry University School of Law for site visit in 2000.

Barry Supplemental Site Report (2001) - Report prepared by the ABA Site Team regarding Barry University School of Law for site visit in 2001.

Board - Thirty-seven member governing Board of Governors of the ABA which governs the ABA between meetings of the House of Delegates.

Coastal Report - Florida Coastal Site Report prepared by the ABA Site Team regarding Florida Coastal School of Law.

Committee - ABA Accreditation Committee of the Section of Legal Education and Admissions to the Bar of the ABA.

Consent Decree - Consent Decree entered into by the DOJ and the ABA on June 27, 1995, and approved by the court on June 25, 1996.

Council - Governing body of the Section of Legal Education and Admissions to the Bar of the ABA Council Action Letter - Letter issued by the Council regarding its decision on accreditation.

Council Transcript - Council of the Section of Legal Education and Admissions to the Bar of the ABA on February 17, 2001.

DC - District of Columbia David A. Clarke School of Law.

DC Accreditation Report - Report prepared by the ABA Accreditation Committee regarding the District of Columbia David A. Clarke School of Law.

DC Site Report - Report prepared by the ABA Site Team regarding the

District of Columbia David A. Clarke School of Law.

DOE - United States Department of Education.

DOE Transcript - Transcript of National Advisory Committee on Institutional Quality and Integrity dated June 8, 1998.

DOJ - United States Department of Justice.

FAMU - Florida A&M University.

Findings- Findings made in the Site Team Report.

HEA - Higher Education Act.

House - ABA House of Delegates, the governing board of the ABA, which meets twice per year, consisting of 530 members.

LSAC - Law School Admission Council.

LSAT - Law School Admission Test.

Modified Consent Decree - Consent Decree entered into by the DOJ and the ABA on June, 27, 1995, approved by the court on June 25, 1996, and modified by the court on February 16, 2001.

Report by Diane C. Yu - Report issued by Diane C. Yu, Chairperson of the Council, following the Council's denial of Barry's application for provisional accreditation.

Rules or Rule - Rules of Procedure for Approval of Law Schools by the American Bar Association SACS - Southern Association of Colleges and Schools.

Section - Section of Legal Education and Admissions to the Bar of the ABA.

Standards - ABA Standards for Approval of Law Schools of the American Bar Association.

UNLV Site Report - Report prepared by the ABA Site Team regarding William S. Boyd School of Law at the University of Nevada at Las Vegas.

APPENDIX B

EXPOSING THE ABA'S REPORTS ON PUBLIC LAW SCHOOLS: FOCUSING ON INPUTS RATHER THAN OUTPUTS

ABA reports and letters to law schools are sometimes difficult to obtain due to the ABA's rule that "matters relating to the accreditation of a law school shall be confidential. . . . [including] all non-public documents and information received or generated by the American Bar Association."[465] In August 2001, after being notified that various public law schools had received public records requests for documents relating to the accreditation process, the ABA sent a memo to the deans of ABA approved law schools reminding them of the confidentiality rule. The memo stated:

> [A]lthough under Rule 25 it is within the school and university's discretion to release such documents publically, we understand that the common practice of most law schools and universities has been not to release such accreditation documents unless required to do so under applicable public records disclosure legislation.
> The interpretation of applicable public records disclosure legislation is, of course, a matter for each individual law school and university. . . . We have been informed, however, that *under some public records statutes it has successfully been argued that ABA accreditation documents are not subject to compelled disclosure* under the statute because the documents were not generated by an entity that is subject to the statute.
> *If your law school or university does release any ABA accreditation documents, please notify our office.*[466]

Perhaps the ABA's veiled attempt to keep the law school documents from being released is to keep their arbitrary decision-making process private. The ABA protects itself from public scrutiny by draping the accreditation process in a cloak of secrecy. Most public law schools do comply with the public records laws in their state, and release the accreditation reports as required.

The ABA's own reports show that the ABA continually attempts to micromanage law schools by focusing more on inputs rather than outputs. Although no attempt has been made to be exhaustive, the following reports show that universities and their associated law schools must go to great

465. *See* Rule 25(a), *supra* note 54.
466. *See* Letter From Sebert, *supra* note 19.

lengths to appease the ABA.

The Accreditation Committee issued a November 1999 report regarding **Arizona State University College of Law** (ASU). The report concluded that ASU needs "to improve acoustics in the physical plant."[467]

In the Accreditation Committee's June 2001 report about **Florida State University College of Law**, the committee found noncompliance with the Standards because the school did "not afford to full-time clinical faculty non-compensatory perquisites [voting rights] reasonably similar to those provided other full-time faculty members."[468] The Committee also found that issues involving other Standards (relating to library resources, the increasing use of adjunct professors, class sizes of up to 125 students, coupled with a "tight budgetary climate" and a decline in the number of minority students merited) required "close attention and review."[469]

A January 2001 Accreditation Committee Report regarding the **University of Florida College of Law** concluded that the law library "continues to be insufficient in size, location, and design to accommodate its students and faculty. . . . This inadequacy has a negative and material effect of [sic] the education University of Florida law students receive."[470] The Committee requested that the administration appear at the April 2001 Committee meeting to "show cause why . . . the College of Law should not be required to take appropriate action, be placed on probation, or be removed from the list of law schools approved by the American Bar Association."[471] After the April 2001, meeting was held, the Committee concluded that although the school developed a plan to build a 57,400 square foot library addition, the school would continue to be out of compliance until the building was occupied.[472]

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467. *See* Arizona State University Accreditation Committee Report 4 (Nov. 1999) (on file with authors).

468. *See* Florida State University College of Law Accreditation Committee Report 8 (June 2001) (on file with authors).

469. *Id.* at 8. Florida State University Law School dean, Don Weidner, commented: "One of the aspects of the ABA process that has been controversial is the extent that they are focusing on inputs rather than on outcomes." Scott Powers, *Barry Isn't Alone in ABA Clash*, ORLANDO SENTINEL, Aug. 7, 2001, at A1.

470. *See* University of Florida College of Law Accreditation Committee Report 2 (Jan. 2001) (on file with authors).

471. *Id.* at 4.

472. *Id.* at 1-2. After an investigative reporter for the Orlando Sentinel obtained the University of Florida's accreditation documents by a public records request, the Editorial Board, wrote: "The ABA's current rules lack specificity and appear to vary considerably depending on who is interpreting them. . . . Why should a public university—such as UF—have to spend $20 million to expand its facility to the ABA's definition of appropriate square footage?" Editorial Board, *ABA is Micromanaging*, ORLANDO SENTINEL, Aug. 8,

Since at least 1999, the Accreditation Committee has advised the **University of Georgia School of Law** about the Committee's conclusion that the law library facilities are inadequate. In April 2001, the Committee issued a request that the school show cause that it should not be sanctioned in some manner by the ABA for noncompliance.[473] The Dean responded that the school was working to secure funding for planned renovations, but maintained that there was no "evidence whatsoever that these challenges are having a negative and material effect on the education received by our students."[474]

In April 2000, the **University of Houston Law Center** was advised by the ABA Accreditation Committee that it was not in compliance with three standards. Concerns included short-term contracts for clinical instructors, the understaffed library, and the "adequacy of the library collection."[475] By April 2001, due to additions of staff and an increase of $350,000 for the library budget, the Committee found only one area of noncompliance. The report noted: "[c]onsistent with the wishes of the faculty, monograph expenditures have increased sevenfold, to over $140,000 per year."[476] The only remaining concern was with the lack of voting privileges of clinical faculty, and questions about the LL.M. program.[477]

In a November 1998 report regarding the **University of Mississippi School of Law**, the Accreditation Committee expressed concern about the adequacy of the physical facilities (mainly about a sagging roof and library crowding) and regarding the admission and attrition of minorities. The report noted that the average LSAT scores for minority and non-minority students were 147 and 154 respectively. The Committee concluded that the law school was not in compliance with two standards due to the high turnover rate and lack of professional staff in the library.[478]

In a January 2001 report, the Committee found that the **University of Nebraska College of Law** was not in compliance with Standard 212 because the school had not yet installed a door containing magnetic strips

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2001, at A10; *see also* Powers, *Barry Isn't Alone in ABA Clash*, *supra* note 469 (discussing the FSU and UF reports).

473. *See* University of Georgia School of Law Accreditation Committee Report 3-4 (Apr. 2001) (on file with authors).

474. *Id.*

475. University of Houston Law Center Accreditation Committee Report 8-9 (Apr. 2000) (on file with authors).

476. *Id*. at 2.

477. *Id.*

478. University of Mississippi School of Law Accreditation Committee Report 10 (Nov. 1998) (on file with authors).

to provide "full disability access"[479] despite the fact that the school's ADA's Compliance Officer informed the ABA that the door was "in compliance with the Americans for Disabilities Act Architectural Guidelines."[480] The school also reported that the type of door which the ABA requested would cost around $22,000.[481] The report also cited the law school for non-compliance with Interpretation 212-1 of Standard 212, in that "vertical access within both buildings of the Law School is not accessible to mobilely challenged persons."[482] The Dean maintained that the students did have access to both buildings by taking the elevator in one of the buildings and following an internal path from that building to the adjacent building.[483]

In April 2000 the Committee even found fault with one of the nation's oldest law schools.[484] The **University of North Carolina School of Law** has been ABA approved since 1928. Since 1993, the Committee complained about the facilities and continued to find the school out of compliance until an over $10 million dollar construction project was completed in 2000.[485]

The Committee faulted the **University of North Dakota School of Law** in 2000 with violating five standards, involving "the inadequacy of financial resources," students being paid and receiving credit for legislative externships, failure to regularly offer courses that are listed in the school's catalog, and inadequacy of the library facilities.[486]

The **Northern Kentucky University Salmon P. Chase College of Law** was found in violation of Standard 201, because of the "present and anticipated financial resources" were not adequate, although the school had made progress in increasing funding.[487] The Committee made this conclusion citing to two Findings of Fact. One Finding simply mentioned that over $90,000 had been raised from the government and private foundations for clinical programs and that $100,000 was gained from restructuring. The other Finding stated that a grant of $180,000 was being

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479. University of Nebraska Accreditation Committee Report 1 (Jan. 2001) (on file with authors).

480. *Id.* at 13 app.

481. *Id.* at 1.

482. *Id.* at 12.

483. *Id.*

484. *See* University of North Carolina School of Law Accreditation Committee Report 1 (Apr. 2000) (on file with authors).

485. *Id.* at 15.

486. University of North Dakota School of Law Accreditation Committee Report 8-9 (Nov. 2000) (on file with authors).

487. Northern Kentucky University Salmon P. Chase College of Law Accreditation Committee Report 14 (Nov. 1996) (on file with authors).

used to modernize computer systems. Evidently, the Committee concluded that level of spending was insufficient.[488]

In an April 1998 report regarding the **Ohio State University College of Law**, the Committee cited noncompliance to two standards and questioned possible noncompliance with a third.[489] The issues related to low student attendance in some upper level courses and library equipment and storage space. The report also noted a need for improvement in moot court facilities and temperature control, the quality of teaching due to some superficial case discussions and excess lecturing, and the lack of clarity and enthusiasm.

A Committee report dated April 2001 summarized actions of the **University of Oklahoma College of Law** in response to the Committee's findings since November 1987. During that time, to conform to the standards, the school spent over $17 million on new construction, downsized student numbers from 690 to 499 over three years to achieve the desired student/faculty ratio and guarantee sufficient library seating, increased tuition by 15% to replace revenues lost from downsizing and to increase faculty salaries.[490]

Beginning in 1998, the Committee complained about the inadequacy of facilities at the **University of South Carolina School of Law**.[491] In the January 2001, report, the Committee noted that the law school would remain out of compliance with the standards until the required building renovations or new construction was completed.[492] The school plans to raise approximately $40 million dollars for a new law school facility to comply with ABA Standards.[493]

In an April 2001, report, the Committee noted that renovation and construction of a new 54,000 square foot building brought the **Wayne State University School of Law** into compliance with ABA Standards.[494]

In 1999, the Committee opined that the **University of Wisconsin Law School** is out of compliance with four standards "in that the Law Library is understaffed and does not have sufficient resources to provide either

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488. *Id.*

489. Ohio State University College of Law Accreditation Committee Report 7 app. (Apr. 1998) (on file with authors).

490. University of Oklahoma College of Law Accreditation Committee Report 25, 33-34 app. (Apr. 2001) (on file with authors).

491. University of South Carolina School of Law Accreditation Committee Report Appendix at 12 (Jan. 2001) (on file with authors).

492. *Id*. at 2.

493. *Id.* at 1.

494. Wayne State University School of Law Accreditation Committee Report Appendix at 1 (Apr. 2001) (on file with authors).

sufficient services or a collection that will meet the needs of the Law Schools' programs of teaching, research and service."[495] The Dean stated that the financial problems would continue because the State's budgeting was on a two-year cycle.[496]

Clearly, the mantra of the ABA Section on Legal Education and Admissions to the Bar and has continued to be "spend and build." Much of the focus appears to be on building bigger libraries.[497] In the computer age (which the ABA has apparently missed), there is increasingly less need for bigger libraries stuffed with rarely-used books and journals (which overstuffing lead to the need for continuous purging of unused materials).[498] The size of libraries and number of volumes which the ABA demands significantly increases law school tuition.

Regardless of the length of time a fully accredited law school takes to meet the ABA's requirements, the law schools never lose the coveted status. The ABA's threats to those law schools to hold them to their Standards appear to have no teeth. However, law schools take these threats very seriously. The key to a law school's survival is to maintain ABA accreditation. Without ABA approval, the doors to the legal profession are slammed shut. The ABA's arbitrary application of the Standards to new law schools, and its steadfast refusal to accredit while schools are attempting to comply with ABA demands, can have catastrophic consequences.[499]

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495. University of Wisconsin Law School Accreditation Committee Report 10 (Nov. 1999) (on file with authors).

496. *Id.*

497. In 1990, it cost $7.5 to $10 million to build a law library in the Midwest. *See* Oliphant, *supra* note 222, at 866.

498. *See id.* ("[T]echnology and the Internet have dramatically changed the legal research game while the ABA accreditation standards have yielded only slightly to this phenomenon.").

499. *See, e.g.*, *In re* Application of Bennett v. State Bar of Nev., 746 P.2d 143 (Nev. 1987). Nevada School of Law closed the month after the ABA denied it provisional approval in April 1987, leaving graduates to petition the Nevada Supreme Court for a functional equivalency evaluation. *See id.* While denial of accreditation can be devastating, the grant of accreditation is a boon to a school. *See, e.g.*, Richard J. Morgan, *Lights Shining Brightly at Law School*, 9 NEV. LAW. 14 (Oct. 2001). Following provisional accreditation of UNLV's William S. Boyd School of Law, the Dean reported a forty-five percent increase in applications. *See id.*

APPENDIX C

COMPARISON CHART OF BARRY TO OTHER LAW SCHOOLS RECEIVING PROVISIONAL ACCREDITATION SINCE 1998: ILLUSTRATING THE ARBITRARY APPLICATION OF ABA STANDARDS

ABA STANDARD	BARRY[1]	ASL[2]	UNLV[3]	COASTAL[4]	DC[5]
Accreditation Committee (AC) concluded that each school was in substantial compliance with every ABA standard and recommended accreditation for each school.[6] The Council ONLY denied provisional accreditation to Barry.	•Feb.2001: Provisional accreditation *denied*.[7] •AC - January 2001: Barry is in substantial compliance. Must fully comply in 4 areas to receive *full* accreditation: •301(a): Educational program; •303(a),(c): Academic Standards; •501: Admissions; •505: Readmissions.[8] •AC - November 2001: recommended denial. Not convinced Barry could maintain the same admission standards because of competition[9] •Cited no areas of noncompliance.	•Feb. 2001: Provisional accreditation *granted*. •AC Report unavailable. Data is from 2001 Council meeting transcript.	•July, 2000: Provisional accreditation *granted*. •AC - Apr 2000: UNLV must fully comply in 8 areas to receive full accreditation: •202(a):Self study; •302(c): Curriculum; •302(d): Clinical program; •303:Academic standards; •403: Faculty; •405(a):Professional environment; •606: Library; •701: Facilities[10]	•July, 1999:Provisional accreditation *granted*. •AC - Apr 1999: must fully comply in 5 areas to receive full accreditation: •301(a):Educational program; •302(d):Clinical program; •303:Academic standards; •501(b):Admissions; •701:Facilities.[11]	•Feb.1998: Provisional accreditation *granted*. •AC - Feb 01, still not in full compliance in 3 areas: •301: Educational program; •303(c):Academic standards; •501(b):Admissions.[12] •Needs sufficient financial resources and cites three findings of fact on which it bases its concern. •The next site evaluation should pay close attention to the attrition rate of students, bar passage rates, job placement, academic support program, and the "organization and administration" of the law school and how the law schools budget is controlled.[13]
ORGANIZATION AND ADMINISTRATION (Standards 201-213)	•Started in 1995. •Affiliated with Barry University, started in 1940, and run by women. •Accredited by the Southern Association of Colleges and Schools. Decisions on academic standards, curriculum, teaching and faculty are made by the Law School.[14] •"The atmosphere at the Law School is infused with a new sense of confidence, security, and optimism."[15] •Administration is "optimistic and pragmatic and possessed of strong		•Started in 1998. As part of the Nevada state college system, UNLV it opened its doors to its charter class in1998, and applied for provision approval in August 1999, only one year after opening.[21] •Funded 35% by Nevada and 65% by tuition/ fees.[22] •Self Study: "in the form of planning statements in the document that was prepared after only one year of operation. Many elements of program not developed."[23]	•Started in 1996. •A private, for-profit law school. •95% of revenue is from tuition and fees. October 1998: revenue - 7.9% under projections; expenses - up 2.4%. 1998-99 operating income over $1 million.[24]	•Formed in 1995 by a merger of the District of Columbia School of Law into the University of District of Columbia School of Law. •Jan and April 1997: AC recommended against provisional approval. •Feb 1998: gained provisional approval.

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	commitment and determination."[16] •Self-study is "comprehensive in scope and articulates goals and objectives clearly."[17] •"Senior management of the University has expressed a commitment to expend the funds necessary to develop a quality program of legal education, and is committed to financing significant deficits in the near term."[18] •University had operating surplus every year since 1981 and recently raised $27 million though a bond issue and had an endowment of over $22 million.[19] •Received state grant of over $300,000 per year for three years for clinical program.[20]				
PROGRAM OF LEGAL EDUCATION (Standards 301-307)	**CURRICULUM**: •Traditional curriculum requiring 90 credits.[25] •"[P]rogram of legal writing and analysis courses is unusually strong."[26] •Council complained that a few papers that students wrote (before 2000 site visit) for the upper-class writing requirement did not meet the school's own policies (the requirement was an additional paper that exceeds ABA requirements).[27] •Council complained that there was "little progress since the October1999 site visit in the development of challenging examination measures"[28] But	**CURRICULUM**: •Fairly standard curriculum of 92 credit hours required.[44]	**CURRICULUM**: •Eighty-six credits required for graduation. •"The upper class curriculum was still in the process of development at the time of the site visit."[48] •"At the time of the site visit . . . the curriculum for skills development had not been finalized" but the Dean reports that they how have a "plan for offering in-house clinics and externships."[49]	**CURRICULUM**: •Fairly standard curriculum of 87 credit hours required.[56]	**CURRICULUM**: •Fairly standard curriculum. Ninety credits required for graduation.[61] •Not in compliance with Standards 301 and 303(c) because the school is "admitting applicants who do not appear capable of satisfactorily completing the educational program and being admitted to the bar.[62] •AC noted: (1) "relatively high attrition rate" due in part to voluntary transfers and low admission standards; (2) Seventeen percent of 1999 admissions were on academic probation for a GPA of 1.85 or below; (3) The class of 2000 "did poorly on the

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	Barry's Dean had mentioned improvements in exam composition during the Council meeting. A committee of senior faculty and the Dean read all examinations prior to administration.[29] •Because of the ABA's prior complaint about using open book and multiple choice exams, only six of the exams given in 27 classes during 1999 contained some multiple-choice questions, five of 24 exams contained multiple-choice questions in 2000, and no open book examinations were given. Other fully-accredited ABA schools also use multiple choice exams.[30] •Council complained that academic support program was implemented in 2000,[31] but the 1999 site team reported on academic support program: "Two faculty members assist in the academic support program. Almost all the students identified as at risk who participated in the program are in school and appear to be much stronger academically."[32]				summer 2000 bar exams of the District of Columbia, Virginia, Maryland, and New York." Only three of the 16 graduates passed the first time. (4) The applicant pool for the fall 2000 class was 375; (5) The 25th/75th percentile LSATs in 2000 were 142/147, and the mean UGPA was 2.95; (6) School does not have a full-time recruiter and is making plans to develop recruiting materials; and (7) Just 84% of graduates are working in law related jobs.[63]
	QUALITY OUTPUT: •Many attorneys, judges and professors of other law schools wrote letters to the ABA, praising the student's performance as law clerks and commented on their excellence in	**QUALITY OUTPUT**: •Bar exam pass rate: 44.8%. State pass rate for all takers was 68.8%.[45]	**QUALITY OUTPUT**: •No students had graduated as of accreditation date.	**QUALITY OUTPUT**: •No graduates by the April 1999 Accreditation Committee meeting, thus no bar exam scores at the time of the Report.[57] •In 2000, 45% of Coastal's graduates who took the Florida	**QUALITY OUTPUT:** •Bar exam: 26% bar pass rates for summer 1999 and winter 2000 exams.[64] •Three of 16 of the year 2000 graduates passed the bar exam the first time.[65]

ABA STANDARD	BARRY[1]	ASL[2]	UNLV[3]	COASTAL[4]	DC[5]
	competitions.[33] •77 graduates took Florida Bar Exam before accreditation, but scores were sealed by Florida Supreme Court.[34]			Bar Exam passed.[58]	
	GRADING: •In the spring of 2000, Barry gave the following grades in required courses: 12% A, 36.5% B, 46.2% C, 4.5% D, and .6% F.[35] •Barry instituted a mandatory mean that requires no more than thirty-three percent of the grades be awarded at B or above.[36]	**GRADING**: •Not mentioned in Council Transcript.	**GRADING**: •Of the 1185 grades in Spring, Fall, and Summer sessions (1998-99), only 35 were C- or lower (2.9%); only 10 were D (+ or -) (.8%) and only one was F (.08%).[50]	**GRADING**: •Adopted grade distribution policy for the 1997-98 academic year.[59]	**GRADING**: •Not mentioned in DAC.
	CLINICAL PROGRAM: •Two in-house clinical programs, four externship programs, and several skills-oriented courses.[37] •State grant of over $300,000 per year for three years for clinical program.[38]	**CLINICAL PROGRAM**: •Mandatory summer clerkships offered due to lack of opportunities in Grundy during school year.[46]	**CLINICAL PROGRAM**: •The "required nine-credit (now changed to 10-credit) lawyering process course is deficient in academic oversight . . . ."[51] •No students are involved in faculty-supervised clinical courses.[52]	**CLINICAL PROGRAM**: •Established in the year before accreditation, but no full-time permanent clinical director.[60]	**CLINICAL PROGRAM**: •Not mentioned in DAC. Several clinics are offered in 2001.[66]
	LAW REVIEW: •Editorial board was seated in 1997. Published first volume in 2000. "The draft copy [of the journal] examined by the team is a positive step."[39]	**LAW REVIEW**: •Announced inaugural board for Appalachian Journal of Law in 2000.[47]	**LAW REVIEW**: •Editorial board and by-laws developed after 1999 site team visit.[53]	**LAW REVIEW**: •Not mentioned in FAC.	**LAW REVIEW**: •Biannual edition began publication in 1992, before school merger.[67]
	MOOT COURT AND TRIAL TEAM: •Moot Court teams have advanced against teams from each Florida law school with which they have gone head-to-head.[40] •Two Moot Court members recognized	**MOOT COURT AND TRIAL TEAM**: •Not mentioned in Council Transcript.	**MOOT COURT AND TRIAL TEAM**: •Moot Court developed after 1999 site team visit.[54] •Trial Team not mentioned; No students were involved in moot court or trial competitions.[55]	**MOOT COURT AND TRIAL TEAM**: •Not mentioned in Committee Report.	**MOOT COURT AND TRIAL TEAM**: •Moot court participation satisfies the second year writing requirement.[68]

ABA STANDARD	BARRY[1]	ASL[2]	UNLV[3]	COASTAL[4]	DC[5]
	as outstanding oralists - one as the top in the state.[41] •Trial Teams earned First to Ninth place in six competitions between 1999 and 2001.[42] •Barry's "strong performance in extramural trial performance competitions attest to the value" of the emphasis on trial skills.[43]				
FACULTY (Standards 401-405)	•Student/Faculty Ratio was 11:1[69] •Educational level of faculty is "impressive." Ten of the 22 full-time professors had LLMs, one JSD, three PhDs and several had Masters degrees. Two professors received Fulbright Fellowships for the current year.[70] •Several faculty members have "well-established reputations as scholars" and others are "highly productive scholars," having published ten journal articles between the 1999 and 2000 site visits.[71]	•Student/Faculty Ratio not mentioned in CT. •Teaching loads at Appalachian are heavy.[72] •Council questioned ability to retain faculty over time because of turnover rate.[73] •Faculty involved in intensive skills courses have not had very much time to publish and research.[74] •Faculty tension, especially in the area of scholarship and the selection of a new dean.[75]	•Student/Faculty Ratio was 17.5:1[76] •"Scholarship may be impeded by involvement in administrative matters" and "faculty involvement in governance may distract the members from more academic pursuits."[77]	•Student/Faculty Ratio 28:1 for fall 1997; 19.2:1 for fall 1998.[78] •Mentions "lack of prior teaching and writing experience by some faculty members" but states that the faculty's progress in scholarship is "noteworthy" in light of the "newness of the school" and "other demands currently made of them."[79] •Instruction ranges from "fair" to "excellent."[80]	•Student/Faculty Ratio unknown at time accreditation granted. A 9:1 ratio is reported in 2002.[81]
ADMISSIONS (Standard 501- 510)	•Concerns about "the credentials of the Fall 2000 and Fall 1999 entering classes and the admission of a number of transfer students having law school grade point averages of less than 2.0." (However none were actually transfer students).[82]	•1999: Concerns about admissions and recruitment.[84] •Twenty-five percent of the students admitted in the fall of 2000 had LSAT scores at or below 141; 25 percent of those accepted for fall 2001 entry had a 143 or lower.[85] •Based on the 2001 applications, the	•Council did not express a concern over admissions.	•The 25 percentile of the LSAT/GPA scores of the 1997 entering class was 138/2.4; and 25th percentile of the 1998 entering class was 143/2.3. In 1997, students were previously admitted who were academically dismissed from other law schools.[91]	•Not in compliance with Standards 301 and 303(c) because the school is "admitting applicants who do not appear capable of satisfactorily completing the educational program and being admitted to the bar.[94] •Credentials of fall 2000 class had

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	DIVERSITY: •37% of the students and 30% of the faculty members are minorities; 43% of faculty members are female.[83]	LSAT scores would be essentially the same as those in 2000.[86] **DIVERSITY**: •Has racial tension and gender discrimination complaint.[87] •Located in all-white region. African-American professor was the second African-American person ever to vote in the county.[88]	**DIVERSITY**: •8% of the students are minority.[89] •Two of the 14 faculty members are minority.[90]	**DIVERSITY:** •25% percent of students are minorities. •Percentage of minorities entering declined from 39% in 1997 to 24% in 1998.[92] •26% of the faculty is minority. Eight of the 23 faculty members are female, but all tenured faculty are male.[93]	improved: 25th/75th percentiles for LSAT were 142/149; mean UGPA was 2.95. DC "plans to raise the standards" for fall 2001.[95] **DIVERSITY**: •61% of students; about 50% of faculty members are minorities.[96]
FACILITIES (Standards 701 - 703)	•Four well-maintained buildings, completed in 1995 on 20 acres in Orlando, purchased by Barry for $7 million, with sufficient space expansion.[97] Four classrooms with seating for 200, two seminar rooms and an electronic classroom. Moot court room seats 140.[98]	•Grundy, Buchanan County, Virginia, a "very isolated rural community" approximately two hours from the nearest airport, one and one-half hours from a shopping mall and one hour from a bookstore.[99]	•Renovated elementary school, not sufficient for permanent facility.[100]	•Two leased 2-story office buildings, which are adequate for existing needs, but not suitable for full accreditation. Plans call for purchase of a suitable building site, contingent on ABA provisional approval.[101]	•Used facilities in Washington, DC, that housed predecessor law school. Renovations were made after provisional accreditation was granted by the ABA.[102]

ENDNOTES TO APPENDIX C

1. Barry University School of Law, Orlando, Florida.
2. Appalachian School of Law, Grundy, West Virginia.
3. University of Nevada, Las Vegas, William S. Boyd School of Law.
4. Florida Coastal School of Law, Jacksonville, Florida.
5. University of the District of Columbia, David A. Clarke School of Law.
6. Full compliance with all standards is required to obtain full accreditation. *See* Standards, *supra* note 67, at 102(a) ("A law school is granted provisional approval if it establishes that it is in substantial compliance with each of the Standards and presents a reliable plan for bringing the law school into full compliance with the Standards within three years after receiving provisional approval."); 102(b) ("A law school that is provisionally approved may have its approval withdrawn if it is determined that it is not in substantial compliance with the Standards or if more than five years have elapsed since the law school was provisionally approved and it has not qualified for full approval. In extraordinary cases and for good cause shown, the Council may extend the time within which the law school shall obtain full approval.").
7. The ABA finally provisionally accredited Barry February 4, 2002. *See* Approved Law Schools, available at http://www.abanet.org (accessed from homepage by selecting Law Student Resources, Legal Education, then ABA Approved Law Schools) (last visited May 17,2003).
8. *See* Barry Committee Report No. 1, *supra* note 227, at 7.
9. *See* Barry Committee Report No. 2, *supra* note 24, at 12.
10. *See* UNLV Report, *supra* note 241, at 13.
11. *See* Coastal Report, *supra* note 398, at 10.
12. *See* DC Accreditation Committee Report, *supra* note 413, at 7.
13. *See id.* at 8-9.
14. *See* Barry Accreditation Committee Report No. 2, *supra* note 24, at 12.
15. Barry Site Report of 2000, *supra* note 226, at 3.
16. *Id.* at 5.
17. Barry Accreditation Committee Report No. 1, *supra* note 227, at 2.
18. *Id.* at 6.
19. *Id.*
20. Barry Site Report of 2000, *supra* note 226, at 8.
21. UNLV Report, *supra* note 241, at 1.
22. *Id.* at 11.
23. *Id.* at 2.
24. Coastal Report, *supra* note 398, at 2.
25. *See* Barry Accreditation Committee Report No. 1, *supra* note 227, at 2.
26. Barry Site Report of 2000, *supra* note 226, at 9.
27. Letter from Sebert, *supra* note 19, at 3.
28. *Id.* at 2.
29. *See* Council Transcript, *supra* note 255, at 39.

30. *See* Complaint, *supra* note 135, ¶¶ 182, 185.

31. *See* Letter from Sebert, *supra* note 19, at 3.

32. Barry Site Report of 2000, *supra* note 226, at 9-10.

33. *See* Attorney Letters, *available at* http://www.lc.org (accessed from homepage by selecting ABA Accreditation Research, Complaint Exhibits, then Attorney Letters) (last visited Feb. 17, 2003).

34. *See* Complaint, *supra* note 135.

35. *See* Barry Accreditation Committee Report No. 1, *supra* note 227, at 3.

36. *See id.* at 10.

37. *See id.* at 2.

38. *See* Barry Site Report of 2000, *supra* note 226, at 8.

39. *Id.* at 11.

40. Complaint, *supra* note 135, ¶ 257.

41. *Id.* ¶¶ 182, 185.

42. *Id*.

43. Barry Site Report of 2000, *supra* note 226, at 9.

44. *See* Appalachian School of Law Website, *available at* http://www.asl.edu (accessed from homepage by selecting Prospective Students then Curriculum) (last visited Feb. 17, 2003).

45. Complaint, *supra* note 135, ¶ 285.

46. *Id.*

47. *Id.* ¶ 282.

48. UNLV Report, *supra* note 241, at 3.

49. *Id.*

50. *Id.*

51. *Id.* at 5.

52. ABA LAW SCHOOL GUIDE, *supra* note 244.

53. UNLV Report, *supra* note 241, at 19.

54. *Id.* at 8.

55. ABA LAW SCHOOL GUIDE, *supra* note 244.

56. Coastal Report, *supra* note 398, at 6.

57. *Id*. at 8.

58. Complaint, *supra* note 135, ¶ 312.

59. Coastal Report, *supra* note 398, at 6.

60. *Id*. at 6-7.

61. UDC Graduation Requirements, *available at* http://www.law.udc.edu (accessed from homepage by selecting Current Students then Graduation Information) (last visited May 17, 2003).

62. DC Accreditation Committee Report, *supra* note 413.

63. *Id*. at 7-8.

64. ABA LAW SCHOOL GUIDE, *supra* note 244, at 828.

65. DC Accreditation Committee Report, *supra* note 413, at 3.

66. ABA LAW SCHOOL GUIDE, *supra* note 244, at 232.

67. *Id*. at 233.

68. *Id.*
69. Barry Accreditation Committee Report No. 1, *supra* note 227, at 3.
70. Barry Site Report of 2000, *supra* note 226, at 12.
71. *Id.* at 15.
72. Council Transcript, *supra* note 255, at 11.
73. *Id*. at 9.
74. *Id.* at 14.
75. *Id.* at 32-34.
76. UNLV Report, *supra* note 241, at 13.
77. *Id.* at 5, 6.
78. Coastal Report, *supra* note 398, at 4.
79. *Id.* at 5.
80. *Id.* at 4.
81. ABA LAW SCHOOL GUIDE, *supra* note 244, at 230.
82. Letter from Sebert, *supra* note 19, at 3.
83. Barry Site Report of 2000, *supra* note 226, at 13.
84. Council Transcript, *supra* note 255, at 3.
85. *Id.* at 16.
86. *Id.* at 26.
87. *Id.* at 32-33.
88. *Id.* at 32.
89. UNLV Report, *supra* note 241, at 7.
90. *Id.* at 4.
91. Coastal Report, *supra* note 398, at 7.
92. *Id.* at 8-9.
93. *Id*. at 4.
94. DC Accreditation Committee Report, *supra* note 413, at 7-8.
95. *Id*. at 4.
96. ABA LAW SCHOOL GUIDE, *supra* note 244, at 230.
97. Barry Accreditation Committee Report No. 1, *supra* note 227, at 6.
98. *Id.* at 36.
99. Council Transcript, *supra* note 255, at 10-11.
100. *Id*.
101. Coastal Report, *supra* note 398, at 6.
102. DC Accreditation Committee Report, *supra* note 413, at 6.