

**SUPPLEMENTARY REPORT**

**OF**

**THE COMMISSION TO REVIEW THE  
SUBSTANCE AND PROCESS OF THE  
AMERICAN BAR ASSOCIATION'S  
ACCREDITATION OF AMERICAN LAW SCHOOLS**

**November 27, 1995**

**COMMISSION TO REVIEW THE SUBSTANCE AND PROCESS OF**

THE AMERICAN BAR ASSOCIATION'S  
ACCREDITATION OF AMERICAN LAW SCHOOLS

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*In accordance with the proposed Final Judgment submitted by the parties in United States v. American Bar Association, C.A. No. 95-1211 (D.D.C., filed June 27, 1995), this report is submitted to the Board of Governors of the American Bar Association. A copy of this report is being provided to the Council of the American Bar Association's Section of Legal Education and Admissions to the Bar, the entity which created the Commission to Review the Substance and Process of the American Bar Association's Accreditation of American Law Schools.*

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## Introduction

The Commission to Review the Substance and Process of the American Bar Association's Accreditation of American Law Schools (generally known as the "Wahl Commission," after its chairperson, the Honorable Rosalie E. Wahl) was created in June 1994 by the Council of the American Bar Association's Section of Legal Education and Admissions to the Bar. The Wahl Commission's mandate was to conduct a thorough, independent examination of all facets of law school accreditation and to present a report on the subject on or before the date of the 1995 Annual Meeting of the American Bar Association.

From June 1994 to June 1995, the Commission met on several occasions, held public hearings, solicited written comments, and conducted surveys. The Commission received input from a wide range of individuals, including law school deans and professors, university presidents and administrators, practicing lawyers, representatives of state and local bar associations, bar examiners, and law students. The processes by which the Commission gathered information are described in detail in the Introduction to the Commission's Report of August 3, 1995 (hereafter referred to as "Initial Report").

At the 1995 Annual Meeting of the American Bar Association, the Commission presented its Initial Report to the Council. Although the original charge from the Council had contemplated that the Wahl Commission would conclude its work with the presentation of this report, subsequent developments resulted in the Commission's receiving a new assignment and a mandate to continue its work for an additional period of time.

On June 27, 1995, shortly before the anticipated end of the Commission's tenure, the United States Department of Justice filed a civil antitrust suit against the American Bar Association, alleging that the ABA had violated the Sherman Antitrust Act, 15 U.S.C. § 1, by the manner in which it conducted some of the aspects of its accreditation of law schools. United States v. American Bar Association, C.A. No. 95-1211 (D.D.C., filed June 27, 1995). Although denying any wrongdoing, the ABA elected to settle the suit. In a public statement issued on June 27, 1995, ABA President George E. Bushnell, Jr. explained that the Association had "entered into a consent decree with the Department of Justice ... to avoid chaotically disrupting a legal education system that is the model for much of the world."

The proposed Final Judgment submitted by the parties to the United States District Court for the District of Columbia requires that the ABA

establish a Special Commission to Review the Substance and Process of the ABA's Accreditation of American Law Schools to determine whether the Standards, Interpretations, and Rules, and their enforcement governing the following subjects should be revised:

- (1) faculty teaching-hours;

- (2) leaves of absence, compensated or otherwise, for faculty and other staff;
- (3) the calculation of the faculty component of student-faculty ratios;
- (4) physical facilities;
- (5) the allocation of resources to a law school by the law school or its parent university; and
- (6) the treatment of bar preparation courses.

Proposed Final Judgment, at 7-8. The parties agreed that the Wahl Commission, which had already begun an examination of many of these issues during its existence, was the entity to conduct the review of the above-enumerated subjects. In the Competitive Impact Statement filed with the court, the Department of Justice explained:

The ABA has established a Special Commission to Review the Substance And Process of The ABA's Accreditation of American Law Schools.... The Special Commission will review the[] [designated] subjects and report to the [ABA] Board of Governors no later than February 29, 1996. Upon completing its review, the Board will file its report with the United States and the Court. The United States may challenge any proposal in the report within 90 days of the Commission's report. Any such challenge will be decided by the Court applying an antitrust analysis. This is novel relief in a government antitrust case, resulting from a recognition that some accreditation practices implicate both antitrust and educational policy concerns. Since the ABA had initiated the Special Commission in response to academic criticism of its accreditation process and its perception of possible antitrust problems, the United States has agreed that the ABA may first attempt to reconcile antitrust and educational concerns through its Special Commission.

Competitive Impact Statement, at 12-13.

This "Supplementary Report" of the Wahl Commission addresses the six issues identified in the Proposed Final Judgment. Because some of these issues also were discussed in the Commission's Initial Report, the following discussion will refer to and incorporate pertinent portions of that report. The discussion also notes, where appropriate, the Commission's responses to the Recodification of the ABA Accreditation Standards, which was published in draft form by the ABA Standards Review Committee on September 23, 1995.\*

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\*Subsequent to the meeting at which the Commission considered and reached its conclusions regarding the six issues identified in the Proposed Final Judgment, the ABA Standards Review Committee issued a draft of the Recodification of the Standards, dated October 20, 1995. Because the later draft was not before the Commission at the time of its

## I.

### Analysis of the Issues Certified to the Special Commission

#### A. Faculty Teaching-Hours

In its Initial Report, the Commission recommended that the ABA accreditation standard on faculty teaching hours, Standard 404(a) X which sets a maximum number of teaching hours per week (8 hours per week if "repetitions during the same academic period" are counted on a one-half basis; 10 hours per week if repetitions are counted at "full value") X be revised to replace the current focus on quantitative criteria with a qualitative measure. *See* Initial Report at 29-30. As the report explained, "qualitative measures are generally preferable" unless a quantitative criterion is needed to accomplish the relevant educational interests. *Id.* at 30. *See also id.* at 29. In the case of faculty teaching-hours, the Commission concluded that "there is no compelling reason to use a quantitative approach to accomplish the [underlying] educational interests." *Id.* at 30.

The Commission recommended that the present language of Standard 404 be deleted and replaced with the following language, which is drawn from Interpretation 2 of Standard 403:

Each law school should have established policies with respect to faculty members' responsibilities in teaching, scholarship, service to the law school community, and professional activities outside the law school. Such policies should address themselves to:

- i) Faculty teaching responsibilities, such as carrying a fair share of a law school's course offerings, preparation for classes, availability for student consultation, and creation of an atmosphere in which student and faculty may voice opinions and exchange ideas;
- ii) Research and publication, and integrity in the conduct of scholarship, such as appropriate use of student research assistants, acknowledgment of the contributions of others, and responsibility of faculty members to keep abreast of developments in their specialties;
- iii) Obligations to the law school or university community, such as participation in the governance of the law school, and

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deliberations, this Report will refer exclusively to the Recodification draft of September 23, 1995.

- iv) Conduct of professional activities outside the law school and university community and their relationship to teaching responsibilities.

*Id.* at 30.

The above-quoted language recognizes the wide range of a law professor's responsibilities. As Dean Henry Ramsey, Jr., a Commission member, observed in a memorandum to the other members of the Commission:

A full-time law professor is required to do much more than simply teach in the classroom. Like other university academics, a competent full-time law professor serves as a classroom teacher, research scholar, student counselor, and citizen of the law school and university, as well as being actively engaged in public service.... All [of these responsibilities] are in some significant way important to the quality of the law school's educational program and to the education offered its students.

Time available to teach students in a classroom has obvious significance, as does time spent by professors to discuss the subjects they teach with their students after class and during office hours. The number of courses taught by each full-time professor is also a determinant of the number of small classes that are available for law students. The more students an individual professor must teach and examine during a semester, the less opportunity there is for students to receive instruction from that professor in small and more intimate classes.

In addition to time spent with students regarding course materials and in-class discussion, law professors are obligated to spend a significant amount of time counseling students regarding career choices, a student's particular course of study, opportunities for judicial clerkships, and, indeed, other personal matters that can be very sensitive and private. Beyond time spent with students, professors must devote time to faculty governance, which involves law school and university committee work. Finally, most law professors devote a great deal of time to scholarship intended to improve the law and explore legal frontiers, as well as serve the public interest.

Memorandum of Henry Ramsey to Wahl Commission on the subject of "Faculty Teaching Hours" (September 21, 1995), at 1-2. *See also* Thomas L. Shaffer, *Four Issues in the Accreditation of Law Schools*, 59 WASH. U. L.Q. 887 (1981); Gerald J. Thain & Peter K. Rofes, *What's a Typical Day Like in the Life of a Law School Professor?*, WISCONSIN LAWYER (December 1990), at 69.

In response to the Commission's Initial Report, the ABA Standards Review Committee has implemented the Commission's recommendation by proposing the deletion of Standard 404 and the substitution of the above-quoted language from the Initial Report. *See* RECODIFICATION OF THE STANDARDS (September 23, 1995 Draft), at 26-27 (Standard 405 on "Instructional Assignments").

After examining and discussing the action of the Standards Review Committee, the Commission concluded that there is no need for further action on the issue of faculty teaching-hours. The Commission reaffirms its previous position on this issue and endorses the action of the Standards Review Committee.

B. Leaves of Absence

Prior to February, 1995, ABA Standard 405(b) mandated that faculty members be afforded a "reasonable opportunity for leaves of absence and for scholarly research." Although there appears to have been a public perception that the Standard also required that such leaves be compensated, there was no such requirement enunciated in Standard 405(b), its Interpretations, or any other Standard or Interpretation.

As the Commission's Initial Report observed, the ABA House of Delegates amended Standard 405(b) in February, 1995 to delete the provision on leaves of absence. *See* Initial Report, at 30-31. On the basis of the factual data the Commission gathered and its discussions of the issue of leaves of absence, the Commission concluded in its Initial Report that there are not "any reasons to revive former Standard 405(b) or to make any new reference to leaves of absence, compensated or otherwise." *Id.* at 31.

After revisiting the issue and considering it further, the Commission remains of the same view. The Commission therefore reaffirms its previous discussion of the subject of leaves of absence.

C. Student-Faculty Ratios

In its Initial Report, the Commission discussed the subject of student-faculty ratios at some length. *See* Initial Report, at 26-29. As that discussion explains, the Commission concluded that "the Standards' use of student/faculty ratios is an appropriate X and perhaps the only effective X means to achieve a number of important educational benefits, including smaller classes (essential both for the teaching of theory and professional skills), and adequate contact between teachers and students outside of class." *Id.* at 28. Emphasizing that the ratios set forth in the Interpretations to Standard 201 "are designed to operate as guidelines," the Commission endorsed the continuing use of flexible quantitative guidelines in this area. *Id.* at 28-29.

The proposed Final Judgment directs the Special Commission to examine "the calculation of the faculty component of student-faculty ratios." Proposed Final Judgment, at 8. In its Initial Report, the Wahl Commission had recommended that the criteria for calculating the faculty component of student-faculty ratios be "re-examined to ensure that they adequately take into account the contributions of adjunct instructors and faculty members who are still teaching although they have administrative posts or are on research leave or emeritus status." Initial Report, at 29.

Specifically, the Commission recommended that:

The criteria for assessing student/faculty ratios under the Interpretations of Standard 201 should be re-examined to ensure that they adequately take into account that:

- i) Faculty members who are still teaching although they have administrative posts or are on research leave or emeritus status continue to play an active role in the law school community and therefore should be counted in some proportionate way in assessing student/faculty ratios;
- ii) Adjunct instructors may enrich a law school's curriculum in a variety of ways, including expanding the number and types of course offerings and providing different perspectives. Therefore, it is reasonable to consider the effect of adjuncts on the quality of the academic program in assessing the significance of student/faculty ratios.
- iii) Faculty members with substantial responsibilities outside the law school should not be deemed "full time faculty" for purposes of student/faculty ratios if their outside activities unduly interfere with their obligations as faculty members.

*Id.* at 29.

In response to the Commission's recommendations, the Standards Review Committee has proposed a number of revisions in the existing Standards and Interpretations. Among other things, the Committee's proposed recodification clarifies the criteria by which student-faculty ratios are calculated, reaffirms the non-mandatory nature of the ratios, and identifies a variety of educational factors that should be considered in assessing whether the student-faculty ratio at a particular school satisfies the Standards. *See* RECODIFICATION OF THE STANDARDS (September 23, 1995 Draft), at 23-26.

The Commission generally approves of the revisions recommended by the Standards Review Committee. In particular, the Commission endorses those revisions that are designed to recognize and take into account the contributions of "full-time teachers who have administrative duties, are on partial research leave, or have emeritus status" and "part-time adjunct faculty" (*id.* at 24-25 (Interpretations 402-1(1), 402-2(3); Standard 403(c)).

After further consideration of the procedures by which the guidelines on student-faculty ratios may best be applied, the Commission has concluded that the relevant Standards and Interpretations should be revised so as to incorporate the following principles:

- (1) A ratio of 30:1 or more is presumptively not in compliance with Standards 401-405 but a school may rebut this presumption by showing that the ratio has not actually had negative educational effects.

- (2) When considering ratios above 20:1, the determination of the actual educational effects of the faculty size may take into account a range of factors, including:
- (a) The contributions of individuals who do not come within the definition of "full-time faculty," including:
    - i) Faculty members with administrative posts;
    - ii) Faculty members who are on leave but in residence;
    - iii) Faculty on emeritus status;
    - iv) Clinical teachers who do not possess "security of position" under Standard 405(e);
    - v) Adjunct instructors;
    - vi) Full-time legal writing instructors;
  - (b) Instructional assignments of full-time faculty and other teachers of courses (taking into account, to the extent appropriate, teaching hours, the nature of the courses taught, and the amount of out-of-class time required by forms of instruction such as seminars, clinics and simulation courses);
  - (c) Class size, including the number of small group classes and seminars;
  - (d) Quality of teaching;
  - (e) Student-faculty contact;
  - (f) Examinations and grading;
  - (g) Scholarly research and public service;
  - (h) Governance.

The above proposal clearly and unequivocally recognizes that individuals who are not "full-time faculty" often make invaluable contributions to the education students receive and to the functioning of an educational institution. At the same time, the proposal follows the existing Standards and the revisions proposed by the Standards Review Committee in assigning to full-time faculty members the primary responsibility for providing, and overseeing the quality of, legal

education. Full-time faculty members (as that term is defined in the existing Standards and in the revisions drafted by the Standards Review Committee) have a constancy of role and commitment that are essential to the maintenance of a quality educational institution.

In accordance with the foregoing approach of taking into account the relative contributions of both full-time and part-time faculty, the Commission strongly endorses the Standards Review Committee's proposed revision of the Standards and Interpretations relating to adjunct instructors. The existing standard, Standard 403, permits the use of adjunct instructors but does not expressly acknowledge the special contributions that adjunct instructors can make. The existing standard provides:

The proper use of qualified practicing lawyers and judges as part-time faculty members is an appropriate means of enriching the educational program.

Standard 403(b). The Standards Review Committee has proposed replacing the above language with a new Standard that reads:

A law school should use skilled and experienced practicing lawyers and judges as part-time faculty because they contribute to the enrichment of the educational program.

RECODIFICATION OF THE STANDARDS (September 23, 1995 Draft), at 25 (Standard 403(b)). The Standards Review Committee's draft appropriately recognizes the unique contributions that lawyers and judges can make and encourages law schools to take advantage of these valuable assets.

The Commission recommends that the Standards Review Committee and other relevant divisions of the ABA further implement the above principles by studying the appropriateness of devising additional ratios (or other suitable measures) that are framed in terms of the comparative number of students and "educational resources," defining "educational resources" broadly to include adjunct instructors, clinical teachers who do not qualify for Standard 405(e) status, and other individuals who teach law students but do not come within the definition of "full-time faculty." In studying this issue, the ABA should attempt to quantify and evaluate the impact that these non-full-time faculty have on the education students receive.

#### D. Physical Facilities

In its Initial Report, the Commission recommended that the various Standards relating to the subject of law school facilities (Standards 701-705) be replaced with a single Standard that would read as follows:

The law school shall have a physical plant that is adequate for its educational program, library, scholarly and research activities, administrative and secretarial services, and student services, and for such growth in enrollment or program as

should be anticipated in the immediate future.

Initial Report, at 31. The Commission further recommended that the substance of former Standards 702-705 be retained as Interpretations to this new Standard. *Id.*

The Standards Review Committee's proposed recodification adopts the Commission's approach by replacing former Standards 701-705 with a single standard on "General Requirements," which reads:

A law school shall have physical facilities that are adequate both for its current program of legal education and for growth anticipated in the immediate future.

RECODIFICATION OF THE STANDARDS (September 23, 1995 Draft), at 38 (Standard 701). The Interpretations to this Standard define the criteria by which the adequacy of physical facilities will be assessed, incorporating the principles previously set forth in Standards 702-705.

The changes that would be effected in the physical facility standards by the Standards Review Committee's revisions address the problems of which the Wahl Commission is aware. We note, however, that the Competitive Impact Statement filed by the Department of Justice appears to imply that the Standards on physical facilities have been enforced in an overly zealous manner. The Statement alleges that although "[n]early all ABA-approved law schools occupy new facilities or have made substantial renovations to existing facilities since the new Standards were adopted in 1973[,] ... over one-third of all ABA-approved schools were put on report for 'inadequate facilities' by the Accreditation Committee in 1994, including law schools of recognized distinction." Competitive Impact Statement, at 8.

We are unable to comment on whatever material or information the Department of Justice may have in its possession that gave rise to its implication of over-enforcement. The allegation that a substantial number of law schools are on report-back status despite an overall trend of improvements of physical facilities does not necessarily suggest that the Accreditation Committee has been excessive in its enforcement of the Standards on physical facilities. The Commission has been informed by members of the Accreditation Committee that law schools with violations or areas of concern may remain on "report back" status until the violations or concerns have been fully addressed. Thus, the schools presently on "report back" status include those which have made improvements but which have not yet completed the process of addressing identified deficiencies. Moreover, no law school has lost its accreditation due to such shortcomings. Overall, it appears that the Standards are having the desired effect of prompting law schools to correct physical plant deficiencies that interfere with students' education.

In the extensive fact-gathering process the Commission employed, which included public hearings and a broadly-based solicitation of letters and comments, the Commission was not presented with evidence of overzealous enforcement of the Standards on physical facilities. If there is such a pattern, one would expect that it would have emerged from the comments of the law school deans, university presidents, or other individuals who spoke at the public hearings or submitted

written comments.

In light of the apparent implication in the Competitive Impact Statement, the Commission attempted to gather more information about the Accreditation Committee's handling of physical plant problems. In response to inquiries directed to members of the Accreditation Committee, the Commission learned that citations of schools for physical plant deficiencies typically originate with the schools themselves identifying such deficiencies in their Self-Studies. Since the Self-Study process is designed to take into account the views of all parts of a law school community, including its affiliated University, the Self-Study would appear to be an appropriate source of information about an institution's strengths and weaknesses. The Commission learned from Accreditation Committee members that the Committee does not rely unduly on the schools' own perceptions. The site evaluation team inspections are specifically designed to serve as an independent fact-gathering process so that the Accreditation Committee can make a fully informed judgment. Indeed, the Accreditation Committee members reported that site evaluation teams routinely hear severe complaints about physical facilities from law students, faculty, and alumni. If the Site Evaluation Team's independent inspection does not support a complaint about the physical plant or reveals that an existing deficiency in the physical plant does not have a negative and material effect on the education students receive, the Accreditation Committee does not cite the deficiency in its Action Letter. Thus, the number of schools cited for physical plant deficiencies apparently does not reflect either over-enforcement by the Accreditation Committee or undue deference to the law schools; rather, it appears to result from a process that is appropriately designed to identify and independently evaluate potential or actual impediments to educational quality.

In order to examine the subject further, the Commission requested that the Office of the ABA Consultant provide it with a sampling of physical plant deficiencies identified in past years. By obtaining such a sampling, the Commission hoped to be able to make a provisional assessment of the types of physical plant problems that are being identified and the extent of their relationship to the quality of education students receive.

The Office of the ABA Consultant furnished the Commission with a sampling of excerpts from Self-Studies, site evaluation team reports, and action letters relating to varying schools and various years. In reviewing these excerpts, the Commission found concrete support for the Accreditation Committee members' statements that citations for physical plant deficiencies typically originate with the school itself via its Self-Study. For example, in the case of one school of recognized distinction, the Self-Study stated:

The deficits of our physical plant amount to what virtually all would agree is the single most serious and intractable problem facing [the Law School] ... today. And the "building problem" naturally affects our whole community: members of the faculty, administrators -- even visitors, as well as students. It also has an impact on the school's future insofar as its deficiencies may at some point, if not corrected, diminish our ability to continue to attract the best students, professors and staff.

In this case, as in the other cases represented in the materials furnished to the Commission, the Site

Evaluation Reports and Action Letters appear to reflect a process of independent examination and evaluation of physical plant inadequacies which may in the first instance have been identified by the Self-Studies.

Moreover and particularly significant, the physical plant deficiencies identified in these cases were ones that would appear to have a material and negative effect on the quality of the education students receive. These included, for example: mold and mildew in the library so extreme that it was causing serious damage to books and threatening to "destroy the entire hard-copy collection"; insufficient space for faculty and student working areas and in the library, along with inadequate soundproofing of classrooms and routine breakdowns in ventilation systems and elevators; insufficiency of space in the library because "the library was designed to accommodate a student body of 500, a staff of five or six, and a collection of about 80,000 print materials [and] ... [t]he modestly enlarged library now accommodates over 600 FTE students, a staff of twelve, a collection of 246,962 volume equivalency, and many additional service programs, such as a computer center, that were not contemplated thirty years ago."

There also were indications in some of the reports that the attention given to a school's physical plant as a result of ABA accreditation reviews has played a critical role in ensuring that deficiencies were eventually remedied. For example, one school stated in its Self-Study: "It took an ABA report in 1985 to get action on a two year request to have a protective railing installed at a ledge in the library stacks."

In conclusion, the information available to the Commission does not suggest a problem of unwarranted enforcement of Standards relating to physical facilities. However, since it appears that at least some participants in the accreditation process fear the possibility of over-enforcement, the Commission recommends that the Council of the Section of Legal Education and Admissions to the Bar revise its "Policies" to explicitly affirm what the Commission understands to be the Accreditation Committee's policy and practice: that physical facility problems are cited in Action Letters only if they have a negative and material effect on the education students receive.

E. *Allocation of Resources Between the Law School and Its Parent University\**

In its Initial Report, the Commission concluded that the Standards relating to the allocation of resources between the law school and its parent university generally establish "appropriate mandates." Initial Report, at 32-33. The Commission did, however, recommend a drafting change to improve the clarity and coherence of these Standards. Because there is substantial overlap

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\* At the time of the issuance of the Commission's Initial Report, Dean Ronald A. Cass prepared a separate statement on a variety of issues, including resource allocations between universities and law schools. At the request of Dean Cass, we are noting here that he is of the view that this Supplementary Report's treatment of the subject of allocation of resources largely satisfies the concerns he expressed on this subject in his earlier separate statement.

between Standards 201(b) and 209, the Commission recommended that "Standard 209 be deleted in its entirety and that Standard 201(b) be amended to encompass the portions of Standard 209's preamble not already covered by 201." *Id.* at 32.

In response to the Commission's Initial Report, the Standards Review Committee has proposed that Standards 201 and 209 be revised in the manner recommended by the Commission. The Standards Review Committee's proposed recodification integrates language from existing Standard 209 in its revised Standard 201. *See* PROPOSED RECODIFICATION OF THE STANDARDS (September 23, 1995 Draft), at 6. In accordance with the discussion in the Commission's Initial Report, the draft of the Standards Review Committee preserves the Interpretation which recognizes that the resources generated by a university-affiliated law school should be available for the maintenance and enhancement of the law school's educational program. *See id.* at 9 (Interpretation 208-2, reaffirming December 1978 Interpretation of Standards 105 & 210). *See also* Initial Report, at 33. The Standards Review Committee's language on this subject does, however, differ from the previous Interpretation in one important respect. In recognition that Universities may appropriately use resources generated by the law schools for non-law-school activities, the Standards Review Committee draft does not require that the resources be "*fully available*" to the law school. *Compare* PROPOSED RECODIFICATION OF THE STANDARDS (September 23, 1995 Draft), at 9 (Interpretation 208-2) *with* December, 1978 Interpretation of Standards 105 & 210).

The Commission endorses the work of the Standards Review Committee.

In the Competitive Impact Statement filed with the court, the Department of Justice states that Standards 201 and 209

have been applied at times by the Accreditation Committee to place law schools on report for alleged shortcomings. In 1994, about 50 law schools, including many of recognized high quality, were on report for allocating inadequate resources to their law school program.

Competitive Impact Statement, at 9. As in the Competitive Impact Statement's discussion of physical facilities, there is an apparent implication that the Accreditation Committee has been extreme or unreasonable in enforcing the Standards on allocation of resources. The Commission is unable to comment on whatever material or information may be in the possession of the Department of Justice that gave rise to this implication.

The Commission did not receive any complaints or hear any concerns on this issue in the public hearings it conducted or in the written submissions it received. This is particularly significant, given that the Commission received comments from University Presidents and other University administrators. It is reasonable to expect that a concern would have been voiced publicly at the hearings or in the written submissions if the dissatisfied individuals or institutions felt strongly about the matter.

The statistic cited in the Competitive Impact Statement, that "about 50 law schools, including many of recognized high quality, were on report [in 1994] for allocating inadequate resources to

their law school program," does not by itself tend to show over-enforcement. By directing inquiries to members of the Accreditation Committee, the Commission has learned the following:

- ∃ That violations and concerns about allocation issues, like those relating to physical facilities, typically begin with the law school itself identifying the issue as a problem in its Self-Study, followed by independent examination and evaluation by the Site Evaluation Team and the Accreditation Committee;
- ∃ That, with the downturn in the economy, there has been an ever-increasing number of schools identifying unavailability of resources as a central or significant problem area; and
- ∃ That, once a law school has been placed on report-back status for a violation or concern, the school generally remains on such status until the problem has been fully corrected.

Accordingly, the cited statistic can be understood as a function of the economic difficulties afflicting law schools, the schools' self-identification of the inadequacy of their resources, and the Accreditation Committee's consequent placement of the schools on report-back status until the problem is resolved. Moreover, Accreditation Committee members report that no school has ever lost its accreditation as a result of problems relating to the allocation of resources.

Thus, the information known to the Commission does not suggest that the Accreditation Committee has been enforcing the standards relating to allocation of resources in an overly zealous fashion.

#### F. Bar Preparation Courses

The Initial Report of the Commission did not address the subject of bar preparation courses because this was not an issue identified as an area of concern by the individuals who testified at the Commission's public hearings or who submitted written comments. As a result of the issue's designation in the proposed Final Judgment as one on which the "Special Commission" should comment, the Wahl Commission has examined the relevant Standards and proposed revisions, discussed the issue at length, and reached certain conclusions.\*

ABA Standard 302(b) states that a "law school may not offer to its students for academic credit or as a condition to graduation, instruction that is designed as a bar examination review course." An Interpretation of Standard 301 provides that "[c]ourses conducted specifically for

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\* At the request of Commission member E. Thomas Sullivan, this Report is explicitly noting that Dean Sullivan recused himself from the Commission's discussion of bar examination preparation courses because he participates in the teaching of a bar review course.

improving student performance on bar examinations may be offered at law schools approved by the American Bar Association, but credit may not be given for courses conducted for this purpose."

The Standards Review Committee's proposed Recodification of the Standards contains the following Standard on bar examination preparation courses:

A law school may offer a bar examination preparation course, but may not grant credit or require the course as a condition for graduation.

RECODIFICATION OF THE STANDARDS (September 23, 1995 Draft), at 14 (Standard 302(d)). Thus, the proposed Recodification elevates the former Interpretation of Standard 301 to the level of a Standard. In doing so, the Recodification significantly changes the tone of the Standards' treatment of bar examination preparation courses. Currently, the Standards suggest disapproval of bar examination preparation courses in that current Standard 302(b) is framed in terms of a prohibition of bar examination courses for credit or as a requirement of graduation. Although the Standard implicitly *permits* such courses to be offered on a voluntary, non-credit basis, it has an unmistakably negative tone. Indeed, presumably this was the reason why it was deemed necessary to add the Interpretation of Standard 301. In contrast, the Standards Review Committee's proposed Recodification explicitly recognizes the appropriateness of a law school's electing to offer a bar examination preparation course as long as that course is neither offered for credit nor required as a condition for graduation.

The Commission approves of and endorses the revision made by the Standards Review Committee. If a law school concludes, on the basis of its overall educational objectives and the educational needs of its students, that it wishes to make available to students a bar examination preparation course, the Standards should not discourage the school from doing so.

The question then naturally arises: Should the Standards prohibit law schools from offering such courses for credit or as a condition for graduation? After discussing this issue at considerable length, the Commission concluded that the current prohibitions are appropriate. The fundamental objections to requiring bar examination courses as a condition for graduation, or even offering such courses for credit, are duplication of course material and a teaching style that focuses on test-taking techniques and black-letter law without the evolution, historical context, or policy ramifications of the material.

For example, a bar examination preparation course addressing Multistate Bar Examination subjects presumably would cover torts, contracts, property, criminal law and procedure, evidence, and constitutional law. Since law students typically study most of these subjects in the mandatory first-year curriculum and almost invariably elect to take the remaining subjects at some point in their second or third year of school, a bar examination preparation course would merely reiterate lessons already taught in other courses. While a return to previously studied subjects can be educationally productive if the subjects are examined at a more sophisticated level (or, for example, from a new perspective, such as in an interdisciplinary course or a clinical course), the very nature of bar examination preparation courses tends to preclude the injection of educational value or depth of this

sort. To achieve the goal of preparing students for the bar examination, such review courses must necessarily reiterate the basic doctrines and rules the students previously studied in the other courses.

For these reasons, the Commission concluded that the Standards' prohibition of mandatory and for-credit bar examination courses furthers an important educational purpose: that of ensuring that students will not receive credit for studying material that was already covered in another course. In doing so, the Standards safeguard the integrity of the educational enterprise and enhance the value of the education students receive.

Other than approving and endorsing the revision proposed by the Standards Review Committee, the Commission has only one recommendation to make in this area. Given the thrust of the Standards Review Committee's revision of the Standard governing bar examination review courses, the Commission recommends that the Policies of the Council of the Section of Legal Education and Admissions to the Bar also be amended to clearly recognize the appropriateness of a law school's offering a bar examination preparation course. At present, Council Policy No. 21 reads as follows:

Courses Conducted for the Purpose of Improving  
Student Performance on Bar Examinations

Law school courses conducted for the purpose of improving student performance on bar examinations may not be offered for credit, although such courses may be offered as non-credit courses.

The Commission recommends that the foregoing language be deleted and replaced with the following:

Bar Examination Preparation Courses

A law school may offer a bar examination preparation course, particularly if the school determines that such a course would be of benefit to students who would otherwise be at risk of failing the bar examination, but may not grant credit for or require the course as a condition for graduation.

## II.

### Recommendations

Based on its analysis of the issues which were certified to it for consideration, the Wahl Commission hereby amends the Recommendations in its Initial Report by adding the following

Recommendations:

(1) Faculty Teaching-Hours

- (a) The Commission reaffirms its previous recommendation on Standards and Interpretations relating to faculty teaching-hours (Initial Report at 58 (Recommendation B(6))).
- (b) The Commission recommends that the ABA adopt the Standards Review Committee's proposed revisions of the existing Standards and Interpretations on faculty teaching-hours, as set forth in the Committee's September 23, 1995 Draft of the Recodification of the Standards.

(2) Leaves of Absence

The Commission reaffirms its previous conclusions that former Standard 405(b) should not be revived and that there is no need to make any new reference to leaves of absence, compensated or otherwise, in the Standards.

(3) Student-Faculty Ratios

- (a) The Commission reaffirms its previous recommendation on Standards and Interpretations relating to student-faculty ratios (Initial Report at 57-58 (Recommendation B(5))).
- (b) The Commission recommends that the relevant Standards and Interpretations on faculty-student ratios be revised so as to incorporate the following guidelines:
  - (i) A ratio of 30:1 or more is presumptively not in compliance with Standards 401-405 but a school may rebut this presumption by showing that the ratio has not actually had negative educational effects.
  - (ii) When considering ratios above 20:1, the determination of the actual educational effects of the faculty size may take into account a range of factors including:
    - (A) The contributions of individuals who do not come within the definition of "full-time faculty," including:
      - (I) Faculty members with administrative posts;
      - (II) Faculty members who are on leave but in residence;

- (III) Faculty on emeritus status;
  - (IV) Clinical teachers who do not possess "security of position" under Standard 405(e);
  - (V) Adjunct instructors;
  - (VI) Full-time legal writing instructors;
  - (B) Instructional assignments of full-time faculty and other teachers of courses (taking into account, to the extent appropriate, teaching hours, the nature of the courses taught, and the amount of out-of-class time required by forms of instruction such as seminars, clinics and simulation courses);
  - (C) Class size, including the number of small group classes and seminars;
  - (D) Quality of teaching;
  - (E) Student-faculty contact;
  - (F) Examinations and grading;
  - (G) Scholarly research and public service;
  - (H) Governance.
- (c) The Commission recommends that the ABA adopt the Standards Review Committee's proposed revisions of the existing Standards and Interpretations on adjunct instructors, as set forth in the Committee's September 23, 1995 Draft of the Recodification of the Standards.
- (d) The Commission recommends that the ABA charge its Standards Review Committee and other relevant divisions of the Association to study and devise new ratios (or other suitable measures) that are framed in terms of the comparative number of students and "educational resources," defining "educational resources" broadly to include adjunct instructors, clinical teachers who do not qualify for Standard 405(e) status, and other individuals who teach law students but do not come within the definition of "full-time faculty." In studying this issue, the ABA should attempt to quantify and evaluate the impact that these non-full-time faculty have on the education students receive.

(4) Physical Facilities

- (a) The Commission reaffirms its previous recommendation on Standards and Interpretations relating to physical facilities (Initial Report at 58 (Recommendation B(7))).
- (b) The Commission recommends that the ABA adopt the Standards Review Committee's proposed revisions of the existing Standards and Interpretations on physical facilities, as set forth in the Committee's September 23, 1995 Draft of the Recodification of the Standards.
- (c) The Commission recommends that the Council of the Section of Legal Education and Admissions to the Bar revise its "Policies" to explicitly affirm the Accreditation Committee's policy and practice of citing physical facility problems in Action Letters only if they have a negative and material effect on education.

(5) Allocation of Resources Between the Law School and Its Parent University

- (a) The Commission reaffirms its previous recommendation on Standards and Interpretations relating to the allocation of resources between the law school and its parent university. (Initial Report at 59 (Recommendation B(8))).
- (b) The Commission recommends that the ABA adopt the Standards Review Committee's proposed revisions of the existing Standards and Interpretations on the allocation of resources between the law school and its parent university, as set forth in the Committee's September 23, 1995 Draft of the Recodification of the Standards.

(6) Bar Examination Preparation Courses

- (a) The Commission recommends that the ABA adopt the Standards Review Committee's proposed revisions of the existing Standards and Interpretations on bar examination preparation courses, as set forth in the Committee's September 23, 1995 Draft of the Recodification of the Standards.
- (b) The Commission recommends that the ABA replace Policy No. 21 of its Policies of the Council of the Section of Legal Education and Admissions to the Bar with the following:

Bar Examination Preparation Courses

A law school may offer a bar examination preparation course, particularly if the school determines that such a course would be of

benefit to students who would otherwise be at risk of failing the bar examination, but may not grant credit for or require the course as a condition for graduation.