FROM THE

EDITORS

In its mission statement, the American Bar Association declares that it is the "national representative of the legal profession." And, not surprisingly, as the largest professional legal organization in the world, many policy makers, journalists, and ordinary citizens do in fact look to the ABA as a bellwether of the legal profession on matters involving law and the justice system. This is why debate about the work and the activities of the ABA—and the role that it plays in shaping our legal culture—is so very important.

ABA Watch has a very simple purpose—to provide facts and information on the Association, thereby helping readers to assess independently the value of the organization's activities and to decide for themselves what the proper role of the ABA should be in our legal culture. We believe this project is helping to foster a more robust debate about the legal profession and the ABA's role within it, and we invite you to be a part of this exchange by thinking about it and responding to the material contained in this and future issues.

In this issue, we discuss recent ABA activities and task forces that have scrutinized the scope of executive power. We also present a profile of the ABA Standing Committee on the Federal Judiciary's membership. The article will discuss the purpose of the Committee and will survey the professional and political backgrounds of its members. We also discuss the recent controversy concerning the Council of the Section on Legal Education and Admissions' diversity standards for law schools. And, as in the past, we digest and summarize actions before the House of Delegates.

Comments and criticisms about this publication are most welcome. You can email us at fedsoc@radix.net.

EDITOR
Lisa Budzynski

LAYOUT EDITOR
Kenneth R. Wiltberger

CONTRIBUTING EDITORS
Joel Pardue
Cameron Kilberg

PUBLISHED BY:
The Federalist Society
1015 18th Street, N.W., Washington, D.C. 20036
Phone: 202-822-8138 • Fax: 202-296-8061 • www.fed-soc.org

Controversy Continues Over New ABA "Diversity" Standards for Law Schools

Last February, "equal opportunity and diversity" standards adopted by the ABA's Council of the Section on Legal Education and Admissions to the Bar provoked a heated debate amongst the bar association's critics. Although amendments were offered to the most controversial standard, Standard 211, and its Interpretation, many observers questioned whether the Association was promoting an unconstitutional consideration of racial preference in its law school accreditation policy. *ABA Watch* updates the controversy on law school accreditation standards, discusses actions taken by the United States Department of Education to possibly revoke the Association's accrediting power, and previews the recommendation that will be considered in Hawaii at the ABA's 2006 Annual Meeting, which includes an important revision to the Standards discussed in February.

Background

Since 1952, the ABA Council of the Section of Legal Education and Admissions to the Bar has been approved by the Department of Education as the recognized national agency for accrediting law schools. Its "Standards for Approval of Law Schools" outline the requirements law schools must meet in order to be accredited. According to the Council, "Interpretations that follow the Standards provide additional guidance concerning the implementation of a particular Standard but have the same force and effect as a Standard. Almost all Standards and Interpretations are mandatory, stating that a law school 'shall' or 'must' do as described in the Standard or Interpretation. A few Standards and Interpretations are not mandatory but rather are stated

as goals that an approved law school "should" seek to achieve."

Preliminary discussion of proposed changes to the ABA's Standards were first initiated in November 2004 by the ABA Standards Review Committee and assisted by a set of recommendations for revisions prepared by the Section's Diversity Committee. The Council considered the Committee's recommendations and additional recommendations offered by Gary Palm ("the Palm proposals") on behalf of himself and other members of the Clinical Legal Education Association (CLEA) and the Society of American Law Teachers (SALT).

Standard 211

Among the proposed changes is proposed revised "Standard 211," the "Equal Opportunity and Diversity Effort." Previously, the Standard only governed admissions; the revisions extend its reach to cover faculty hiring. In February, the Council proposed the Standard state:

> A law school shall demonstrate by concrete action a commitment to providing full opportunities for the study of law and entry into the profession by members of underrepresented groups, particularly racial and ethnic minorities, and a commitment to having a student body that is diverse with respect to gender, race and ethnicity…[And law schools] shall demonstrate by concrete action a commitment to having a faculty and staff that are diverse with respect to gender, race and ethnicity.

Standard 211 had not been substantially reviewed since 1994. Discussions began in the Standards Review Committee, which developed a proposal in March 2005. The Council of the Section of Legal Education and Admissions to the Bar approved distribution of the proposal for comment in August of 2005. The proposal was then posted on the web site, preceding a hearing to discuss the proposal at the Association of American Law Schools Annual Meeting in January 2006. Written and e-mailed comments were submitted to the ABA. All of the feedback was taken into account, and a final recommendation was submitted at the Council's February 2006 meeting at which time some modifications were made. The new Standard 211 will be officially voted on by the ABA's House of

ABA Fined by the Department of Justice for Violating 1996 Consent Decree

The controversy regarding the ABA's requirements for law school accreditation extends beyond its recently revised diversity standards. On June 23, the ABA agreed to pay $185,000 in fees and costs relating to charges for violating six provisions of a 1996 antitrust consent decree.

In June of 1995 the United States Department of Justice filed an antitrust lawsuit against the ABA in the U.S. District Court for the District of Columbia. The suit claimed that the ABA had been involved in anti-competitive conduct when it allowed its law school accreditation process to be misused by law school personnel who had a direct economic interest in the outcome of accreditation reviews. The 1996 consent decree, which resulted from this suit, prohibited the ABA from fixing faculty salaries and compensation, from boycotting state-accredited law schools by restricting the ability of their students and graduates to enroll in ABA-approved law schools, and from boycotting for-profit law schools. The consent decree also required the ABA to abide by newly created structural reforms and compliance obligations.

These structural reforms and compliance obligations became the subject of this lawsuit. The consent decree was set to expire on June 25, 2006, but before that date, the Department of Justice charged the ABA with violating six structural compliance provisions of the 1996 consent decree. The six provisions the ABA violated included the following requirements:

> o Annually certify to the court and the United State that it has compiled with the terms of the final judgment;

o Provide proposed changes to accreditation standards to the United States for review before such changes are acted on by the ABA's Council of the Section of Legal Education and Admissions to the Bar;
o Provide briefings to certain ABA staff and volunteers concerning the meaning and requirements of the decree;
o Obtain annual certifications from certain ABA staff and volunteers that they agree to abide by the decree and are not aware of any violations;
o Ensure that no more than half of the membership of the ABA's Standards Review Committee be comprised of law school faculty; and
o Include in the on-site evaluation teams, to the extent reasonably feasible, a university administrator who is not a law school dean of faculty member.

ABA President Michael Greco released a statement declaring: "Contrary to the impression resulting from a press release issued last week by the Department of Justice, the stipulation executed by the parties and the order entered by the court make clear that there was no finding of civil contempt. The ABA remains committed to assuring the highest quality education for lawyers because this benefits both the public and our profession. The ABA Section of Legal Education and Admissions to the Bar will promote this commitment by continuing to administer the law school accreditation process in full compliance with antitrust law, and by the ABA's services to law schools and to the bar admissions process."

Delegates at the ABA's annual meeting held this August in Hawaii.

The ABA revisited Standard 211 because of its commitment to diversity in the legal profession. The disparity between the minority population and minorities in the legal profession continues to grow, and the Council contended it was impossible to achieve diversity at the current rate of minority matriculation. In light of the recent U.S. Supreme Court case, *Grutter v. Bollinger*, 539 U.S. 306 (2003), the ABA determined the timing was prudent to clarify its commitment to diversity through the accreditation standards.

In *Grutter*, the Supreme Court held that law schools could "within constitutionally proscribed limits" consider an applicant's minority status when deciding whom they would admit into the school. A school may not establish a quota for minorities; that would be "outright racial balancing, which is patently unconstitutional." However, schools may aspire to have a diverse class, if they believe that such diversity would further their educational goal.

Many critics of racial preferences and affirmative action policies sharply criticized the ABA's tactics in constructing Standard 211. The Standard's opponents argue that the ABA's racial diversity standard is not an option and is being forced upon them. *Grutter* stated that a law school *may* use race and ethnicity in the admissions process to promote its educational goal of diversity; however, the ABA states that "law school[s] *shall* take concrete actions to enroll a diverse student body" (Interpretation 211-2). These critics allege that the ABA has misrepresented the Court's decision in *Grutter*. In addition, the ABA's requirements are results oriented and thus, the opponents contend, law schools have no other choice but to use race based admissions.

The Standard's critics also contend that the ABA is forcing law schools to not only break their own admissions policies, but also state and federal laws. Interpretation 211-1 has stated that the "requirement of a constitutional provision or statute that purports to prohibit consideration of gender, race, ethnicity or national origin in admissions or employment decisions is not a justification for a school's non-compliance with Standard 211. A law school that is subject to such constitutional or statutory provisions would have to demonstrate the commitment required by Standard 211 by means other than those prohibited by the applicable constitutional or statutory provisions." Consequently, these critics allege that the ABA has placed itself above the law and has told the law schools to join them.

The opponents cite the ABA's removal of the word 'qualified' from its description of members of an unrepresented group as another cause of concern. The question is whether the ABA has told law schools to admit even those who are unqualified and, thus, lower their standards to meet Standard 211's diversity requirement. There has been much debate over the impact of lower bar admissions standards and the minority bar passage rate. See Richard H. Sander, *A Systematic Analysis of Affirmative Action in American Law Schools*, 57 Stan. L. Rev. 367 (2004).

Despite the vocal criticisms, the Council continues to support Standard 211. The Council maintains that the revisions of Standard 211 do not require law schools to consider race or ethnicity in their admissions decisions; rather, they *may* use it. They are not requiring schools to fill quotas of unrepresented groups, but schools simply must show a commitment to having a diverse student body, faculty, and staff. Such a commitment would not violate state or federal laws, which prohibit the consideration of gender, race, ethnicity, or national origin in admissions or employment. Schools do not need to use race-based admissions or hiring policies to reach this commitment level; rather, they may choose from a diversity of options. Schools may partake in admissions recruiting at colleges with a high minority rate, or they may use "pipeline" efforts to encourage minority groups, at a young age, to enter the legal profession. Schools may also consider factors other than the LSATs and undergraduate GPA, such as student leadership, workplace achievement, and graduate work. Schools could use summer programs to assist minority groups to be more well prepared for admissions and the legal curriculum. The ABA has referred to these efforts as a mere sampling of what law schools may do to meet Standard 211.

However, the Council did make one concession to some of its critics. At its June meeting, the Council reviewed Standard 211 and its Interpretations to determine whether changes were needed to clarify the intent of the Standard. The Council concluded that it needed to add a clarifying sentence to the end of Interpretation 211-1. This statement clarified: "A law school that is subject to such constitutional or statutory provisions would have to demonstrate the commitment required by Standard 211 by means other than those prohibited by the applicable constitutional or statutory provisions."

Government Response

Responding to some of the criticism proffered against Standard 211, the Department of Education pushed back its renewal of recognition of the ABA as an official accrediting body from June of this year to December. The Department of Education's accreditation division informed the ABA of its decision in an April letter. The letter advised the ABA that it had failed to provide notice of these changes and that there had been considerable protest from outside groups, which warranted a second look at the proposed Standard 211.

In June, the U.S. Commission on Civil Rights held hearings on law schools and diversity standards. Steven Smith, Dean of the California Western School of Law and the chairman of the Council, testified on behalf of the ABA. He discussed the ABA's perspective on the benefits of diversity and the Council's process in revising the Standards. He also corrected some "misperceptions" concerning the Standards. Dean Smith argued that the proposed revisions do not impose any significant new requirements or quotas on law schools, nor do they require law schools to consider race or ethnicity in their admissions process. He also emphasized that the revised Standards and Interpretations do not require any law schools to violate any state or federal laws.

Dean Smith affirmed the ABA's commitment to law school diversity and its benefits. He stated, "Fostering diversity in legal education has been a core goal of the ABA and of the Section of Legal Education and Admissions to the Bar for many years…We believe all students benefit from exposure to diverse viewpoints and experiences, and racial and ethnic differences often provide the basis for differences in perspective."

Recommendation 106B

Proposed recommendation 106B states that the House of Delegates "concurs in the action of the Council of the Section of Legal Education and Admissions to the Bar in adopting revisions to Standards 210-212, concerning equal opportunity and diversity, of the Standards for Approval of Law Schools and the Interpretations thereto dated August 2006." *ABA Watch* will monitor developments concerning this recommendation and the vote before the House of Delegates in August.