Written testimony of Kevin Cole, Dean, University of San Diego School of Law
Submitted to the ABA Questionnaire Committee
for consideration at hearing on December 13, 2010
in Fort Lauderdale, Florida

Two significant problems confront prospective law students in assessing likely employment options after graduation, both of which involve the difficulty in assessing their likely starting salaries. The first centers on the skewed sample from which salary data is reported. The second centers on the various approaches taken by law schools in reporting salary data specific to their schools. In deciding whether to attend law school, and in deciding among law schools to attend, prospective students should have easy access to better salary information. Better data on salary information would reduce the need to require and regulate the disclosure of other placement data and would permit greater attention to ensuring that salary data—the most useful data to prospective students—is reported in a fair and understandable manner.

To address this need, the ABA should consider requiring each law school to disclose starting salary information in the same way that entering class grade-point average and LSAT scores are reported: with the figure for the graduate whose annual salary is at the median, 75th percentile, and 25th percentile of the graduating class. The mandatory regime might require law schools to report this range taking into account all living graduates, with no exclusion of any living graduate because of the school's lack of information about the graduate or the graduate's salary, the graduate's enrollment in a post-J.D. program, or the graduate's decision not to seek employment (graduates in any of these categories would simply be deemed to have a salary of $0 or given the salary associated with any part-time work they have undertaken). Alternatively, the ABA might permit schools to exclude some living graduates in calculating their salary-reporting obligations, but if it does so, it should require that the school prominently disclose the percentage of living graduates used to calculate the range. Regardless of the approach taken, serious consideration should be given to creating a program for auditing this information.

Second, the ABA should require that any publicity by a school about salaries in any category of employment must include the number of graduates who provided salary information on which the figure was calculated and the total number of graduates in the category. So, for example, if a school reported that its big-firm graduates had a starting salary averaging $160,000 per year, it should be required to disclose both the number of its graduates working for big firms and the number in that category who provided salary information on which the average was calculated.

The ABA should also consider taking additional steps to help prospective students to understand the limits of salary data in choosing a law school. Salary data is not the only factor to take into account in deciding whether and where to attend law school.

The proposed steps have the potential to facilitate useful competition among schools along a dimension of great interest to potential students. In the absence of good information about salary, imprecise rankings of law schools have gained an unhealthy prominence. These rankings might have far less influence if law schools made available to prospective students the kind of salary information that they would find more useful than imprecise rankings of law schools that inflate the difference among some law schools and obscure the difference among others. Relatedly, better information about the realistic salaries available to law graduates might serve better to align law school tuition with the value of a law school education for graduates.

The nine points below explain why the proposed changes deserve consideration, elaborate on the proposal, and highlight some of the challenges in seeking to implement such a system. If the Committee determines that better disclosure of salary information is warranted, further comment should be sought on some of these particulars.

1. Potential law school applicants should have easier access to better information about starting law salaries than they do now.

While the bimodal distribution of starting law school salaries has been common knowledge for some time, many potential students may not discover the information. Moreover, the aggregate information made available by the National Association of Law Placement is incomplete. It is based only on graduates who report starting salaries, a number far short of 100 percent of all graduates. Nor does the aggregate information help applicants estimate where they might fall along the bimodal distribution. As tuition has rapidly increased and the market for young lawyers has worsened, better information becomes even more important.

2. The ABA can and should play an important role in providing this information to potential applicants.

Providing prospective students with helpful information requires the trust of recent graduates, who must be confident that personally identifiable information will not be disclosed. The ABA will be capable of securing the trust of graduates in this regard. Legal employers who do not publish their starting salaries also will object if data about their job offers are reported in ways that identify the employer, and the ABA can be trusted to preserve these employers' legitimate interests as well.

Also significant is the ABA's ability to audit data reported by law schools.

While individual schools, on their own initiative, might disclose information in the form suggested above even without an ABA requirement to that effect, such schools would risk that their fuller information would be mistakenly compared by some prospective students with other data drawn from differently constituted samples. An ABA requirement of uniform reporting would facilitate informed comparisons by prospective students.

3. Requiring better disclosure of salary data may eliminate much controversy about the reporting of placement data.

Much of the concern about the reporting of placement numbers has focused on the employment numbers used in the *US News* ranking. As these numbers count as "employed" even those working in jobs for which legal training is not a qualification, these numbers can easily be viewed as trivial, and this view, coupled with well-founded suspicion that others are gaming the system, creates an atmosphere in which sharp practices can easily be rationalized. Salary figures on which students are more likely to rely, one hopes, will be treated more respectfully by the law school personnel who report them.

In addition, the salaries associated with particular jobs will work better than any manipulable definition could in distinguishing between "real" jobs and those contrived to boost reported job numbers. For example, schools cannot afford to employ very many of their own graduates in jobs with salaries that would be attractive to prospective students. Modest fellowship programs may remain justifiable aids to students' transition from law school to the world of practice; fuller disclosure of salary data would lend to more sensible evaluation of such programs for their salutary purposes.

4. Crude data may be better than manipulable data.

In choosing whether schools should be permitted to exclude graduates in certain categories in complying with a salary-disclosure requirement, attention should be paid to which approach would provide more easily digestible information to prospective students. In that regard, efforts at precision may make data less useful. This effect is a point in favor of a system that does not allow the exclusion of any living graduate from the pool on which a required salary-range disclosure would be calculated.

Consider students not seeking employment. Certainly, the employability of a school's graduates is not impugned by the inclusion among its graduates of an independently wealthy person who sought a law degree out of intellectual curiosity with no intention ever to work. It is hence tempting to permit such students to be backed out of the sample from which salary data is drawn. Likewise, if reclusive graduates drop off the face of the earth, leaving their employment status unknown, only weak inferences can be drawn about their likely salaries.

While salary figures might hence be more useful if we had perfect information and excluded those who really should be excluded, these categories are so flexible that we can never hope for perfect information about them. Indeed, both categories—those not seeking employment and those for whom information is not known—have been among those manipulated by schools seeking advantage in the annual *US News* law school rankings. The distinction is hazy between (1) those not seeking employment and (2) those not looking for work very hard, because they have become distressed by their prospects. Likewise, a school's "knowledge" of a graduate's status can be influenced by

the school's "suspicion" that the graduate isn't doing well combined with a lack of serious inquiry.

Rather than embracing crudeness, the ABA could address the manipulability concern by relying on disclosure. Indeed, the ABA currently requires disclosure of the number of graduates who are not seeking employment and the number whose status is unknown. One could simply require that when a school discloses its salary data, it also prominently discloses what percentage of the class has been excluded because they fall within particular categories. This approach would certainly be better for prospective students than is the *status quo*. However, complicating the math of comparing schools will make salary data less useful to prospective students. The crudeness of the proposed disclosure regime—with no required salary disclosure below the 25th percentile of the graduating class—reduces the significance of these arguably excludable students. Additionally, all schools will have some percentage of these students, who would be expected to impact all schools in roughly similar numbers.

Enrollment in graduate programs might be thought to justify different treatment. However, as many schools will have the ability to enroll their graduates, tuition free, in their own graduate programs, excluding these students from counting in the mandatory salary-range disclosure might impair its usefulness. As salary disclosure becomes more uniform, schools will pay more attention to how to improve their salary numbers, and some new misleading techniques must be anticipated in fashioning a disclosure regime.

Again, the risk of schools' boosting numbers by excluding students is greatly reduced if, at the very least, the ABA requires precise disclosure of the number of students being excluded. While comparing various schools requires some mathematical sophistication if schools can exclude some living graduates from the salary pool, prospective students would likely pay attention both to the salary ranges of various schools and to the percentage of graduates reporting data used to calculate those ranges, drawing adverse inferences if a school excludes higher percentages of its graduates.

5. Problems in annualizing salary

Some salaries are easy to annualize, but others are not. If reporting of salary information is to become mandatory, some attention will need to be paid to this problem. Part-time workers might have a regular job at 15 hours per week; they might have a one-month job that takes 40 hours per week; they might take on a particular task in return for a set fee rather than an hourly rate. Schools will have an incentive to extrapolate from part-time work in ways that may overstate a graduate's actual annual income. Similar problems arise in connection with graduates who enter solo practice. How does one fairly estimate annual income at the point when disclosure is required?

One solution would be to report income retrospectively rather than to report a forward-looking "salary." This approach seems especially attractive if the percentage of graduates entering solo practice is on the rise and data about these graduates is important to prospective students. However, the solution poses its own difficulties. At nine months

after graduation, few graduates will have held full-time employment for a twelve-month period, much less for an entire tax year. To delay the collection of salary surveys will only make more complicated the process of getting graduates to respond.

Another solution would be to exclude from the mandatory salary-range disclosure those graduates who do not have positions regarded as "permanent" employment relationships from which annual salaries can be calculated. Disclosing the number of graduates so excluded will deter schools from "hiding" low salaries by claiming the employment is not permanent, as prospective students will likely draw an adverse conclusion if a school reports too many students in this category.

6. Auditing data

The ABA should consider announcing and undertaking a program to audit the salary information schools disclose. At least in the beginning, this program should not be limited to audits during sabbatical inspections. Moreover, the ABA should identify in advance what kinds of evidence will be required to document claims that schools make about graduate salaries.

7. Why not other data instead or in addition to that covered by the proposal?

Collecting data from graduates is costly, and unless covered by increasing tuition, resources expended gathering data are not available to enhance students' educations, job searches, and the like. Accordingly, the ABA must carefully consider how much data to require schools to gather and report. Ideally, the ABA would pick a point at which the data will be most beneficial to schools and to prospective students but securable at reasonable cost. Obviously, law schools need some reliable salary information to ascertain whether they have a sustainable tuition structure.

The longstanding approach of the National Association of Law Placement to focus on graduates' employment status nine months after graduation has much to commend it. First, because the data has been gathered as of that date for some time, continuing the practice facilitates evaluation of historical trends; and it is better if schools do not need to collect one set of data to achieve this continuity and another set to comply with ABA requirements. Second, nine months after graduation is soon enough to provide only somewhat delayed information to prospective students but late enough to dampen the differential impact of employment patterns associated with the varying degrees of difficulty of different states' bar exams; in states with more difficult exams, employment commitments are more frequently delayed until bar results have been reported.

In some ways, the best information for prospective students would focus on how graduates fare several years after graduation. Moving in this direction, however, greatly increases the cost of gathering information. Recent graduates are more likely to be in touch with Career Services offices and to comply with requests for information than are those who have spent several years in practice.

8. Contextualizing salary information.

While prospective students need better salary information to decide whether and where to attend law school, they also would benefit from assistance in evaluating such information. That assistance is likely to become even more important, because any information gathered and disclosed by the ABA may well be incorporated into rankings by others that will not employ the data in a sensible manner. Although individual schools might attempt to contextualize salary information, their statements would be discounted by prospective students in a way that an ABA statement would not, and reviewing a single ABA statement would be more convenient for prospective students than reviewing numerous statements by individual schools.

Among the points that the ABA should consider making about salary data:

*Because many law schools attract students interested in remaining in their region, schools in cities with lower starting salaries will tend to have lower salary ranges notwithstanding the quality of the school or its students. Students attending those schools but interested in practicing in cities with higher starting salaries may earn higher salaries than might be expected simply by reviewing their school's salary range.

*Even within the same region, a school's lower salary range does not destine each of the school's students to a lower salary than he or she would earn if graduating from a school with a higher salary range. Students at a top of any school's graduating class can often secure the same job regardless of where they attend law school. Salary ranges help prospective students assess what options the average graduate has at various law schools. The prospective student must assess how he or she is likely to compare to an average graduate of the school.

*Some practice areas with significant mid- to long-term earning potential typically have lower starting salaries than big-firm associate positions—e.g., plaintiff's personal-injury practices.

*Money isn't everything. Many attorneys with options to earn at substantially higher levels choose practices that they find more personally fulfilling. Prospective students should not view the reporting of salary data to imply that more lucrative practices are better for all lawyers.

9. The Questionnaire Committee should make recommendations that are sensitive both to the urgent need for better information and to the importance of securing agreement from others with the jurisdiction to ensure that the new reporting regime will be successful.

A successful regime will require a commitment to meaningful audits of salary information, publication of data, and prominent advisory statements to prospective students. If the Questionnaire Committee lacks the jurisdiction to implement a proposal with all these features, its recommendations should be conditional on securing the needed commitments from others within the ABA. Agreement might also be needed from the National Association of Law Placement so that schools do not find themselves obligated to collect salary data in multiple ways. For example, the current instructions to the NALP

Employment Report and Salary Survey might be thought by some schools to preclude releasing school-specific salary information. The instructions read:

> Your law school and NALP respect your expectations concerning confidentiality of these data. The responses provided on the enclosed survey will not be submitted directly to NALP. Data submitted to NALP will be recoded by your school and will not include any information identifying you as an individual. Moreover, you can be certain that NALP treats all information in a highly confidential manner. No information that could be associated with a specific individual or school is released — only aggregates and averages are published.

It would also be helpful for the Questionnaire Committee to signal a planned salary-disclosure requirement sufficiently in advance of implementation that individual law schools that have not emphasized the collection of salary data from graduates will have time to revamp their own processes. Otherwise, prospective students might receive data that misrepresents the employment prospects of graduates of schools that historically have not emphasized the collection of salary data.

December 3, 2010