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Dear Scott,

We are writing on behalf of the NALP Board of Directors to provide comments on the latest draft Protocol for Reviewing Law Graduate Employment Data and Statement of Procedures for Collecting, Maintaining, and Reporting Law Graduate Employment Data.

First let us say how appreciative the NALP Board is for the opportunity to contribute to the development of this important set of policies and procedures related to the collection of consumer information about the legal employment outcomes of graduates from ABA-approved law schools. NALP is committed to fairness, accuracy, and transparency in the collection and dissemination of information about law school graduate employment outcomes. For more than thirty years, NALP has been the primary source of industry data about law school employment outcomes, and the reputation of our association rests in large measure on the integrity and reliability of the data that we collect, analyze, and publish.

Now that NALP and the ABA are both collecting and publishing similar data on an annual basis, our two organizations have common and shared interests in ensuring the integrity and reliability of that data.

The NALP Board of Directors supports the development and implementation of an oversight and peer audit policy and procedures that would serve to protect and verify the accuracy and reliability of the employment data that law schools annually submit to both of our organizations. However, after careful review and extensive consideration, the Board has
significant reservations about the current draft document and believes that the draft protocol as written is significantly flawed. If implemented as currently drafted, the Board believes the burdens on American legal education will considerably outweigh the benefits.

1. *This set of policies and procedures is unnecessarily burdensome on law schools and will inevitably further change the role of the career services professional from that of counselor to that of full-time investigator.*

NALP’s members are committed to the careful, thoughtful collection and reporting of employment data, and understand the often-challenging balance of student support and thorough investigation. However, we believe that the policies and procedures outlined in the draft protocol will have a damaging impact on the relationship between law students and their career services counselors. The primary responsibility of career services professionals is to provide career guidance, counseling, and resources that will help law students learn and master life-long skills for professional identity formation, career goal formation, job search and job change skills, and terms-of-employment negotiation skills. When career services professionals are called upon to repeatedly pursue students and graduates to obtain information about their employment status that they do not wish to share, the relationship with the students or graduates becomes adversarial, and is at odds with the primary responsibility of the career services professionals to provide counseling and support. It forces the career professional into a forensic role and values and rewards investigative skills over counseling skills. This will inevitably erode the confidence and faith students have in the career services staff as their allies.

In addition, compliance with this protocol as outlined will further shift limited career services resources away from career guidance and counseling to data management and collection. Career services professionals already spend hundreds of hours each year gathering post-graduate employment data. The procedures outlined in this protocol will significantly increase the number of hours necessary to complete this project each year. The requirement that a single electronic file for each graduate be compiled from paper records will alone create a huge administrative burden for most schools. These additional hours will need to be met either by shifting resources away from student counseling at a time when student counseling contact hours are more important than ever, or it will need to be met by hiring additional staff at a time when tuition revenue for nearly all law schools is diminishing. This shift in resources will have a net negative impact on the student population and will impede the career development initiatives undertaken by the law school. Law schools with smaller career services staffs and constrained financial resources will be particularly challenged.

2. *The draft protocol is flawed because it elevates the integrity of information received directly from a law school graduate over the integrity of information received from other sources with equal or even superior reliability.*
The protocol preferences information obtained directly from law school graduates over information obtained from other sources when in fact often the best and most accurate information comes from employers. It is not uncommon, for instance, at law schools with OCI programs for participating employers to communicate directly with law school career services professionals about the outcomes of summer programs and the offer and acceptance status of individual students. The same thing is true with a variety of other employers that do not participate in the OCI program. Similarly, students often provide incomplete information about their post-graduate employment status. The protocol requires schools to repeatedly attempt to gather the missing information directly from the graduates when often the missing information is readily available from the public record. The requirement that schools continue to pursue the students directly for this information wastes limited resources and will strain relationships between law graduates and their alma maters. The emphasis should be on obtaining reliable, verifiable information, regardless of source, rather than preferring information obtained directly from law school graduates.

Related to this, the hearsay rule, as currently written, disregards the reality that law graduate employment data is gathered over time from multiple sources, and often comes from a variety of people within the law school community. It is not uncommon for law professors to have first-hand knowledge of the employment situation of a variety of law school graduates. As written, this protocol does not allow the career services professional to rely on an oral report of employment status information from a faculty member. Instead it seems to require that each law faculty member with such knowledge create an original writing memorializing that information, which could then be added to the graduate’s employment file. These steps are not practical. The effect will be to force career services professionals to expend additional time and resources finding the same information from another source, whereas schools have historically been able to rely on this second-hand information as accurate and sufficient for reporting purposes.

3. The draft protocol does not provide for the exercise of professional judgment by career services professionals in the course of collecting, recording, and submitting law school graduates’ employment outcomes data.

NALP’s Best Practices Guide for Managing Law School Employment Outcomes states that “When collecting, maintaining, and using employment data, career services professionals should use their best professional judgment and should uphold the highest ethical standards.” This statement reflects the fact that career services professionals are often called upon to exercise professional judgment when collecting and reporting employment outcomes data. It is not uncommon for graduates to submit survey responses that are internally inconsistent or are obviously in error. Similarly, graduates may report employment situations that are not easily or clearly categorized, for instance whether a particular non-law practice job is indeed a job that can be classified within the JD Advantage category. In these situations, career services professionals are called upon to exercise their considered professional judgment and they must exercise
the highest level of ethical care when they do so. The draft protocol does not mention or allow for the exercise of such judgment, a judgment that goes to the heart of the professional training and identity of the career services professional. Not every element of every graduate’s employment status can be clearly discerned from unambiguous hard evidence. The protocol should provide for the allowable exercise of professional judgment when the sum of the available evidence is itself unclear. To omit any such provision is to place every career services professional at risk for the ordinary exercise of his or her professional responsibilities, a risk that includes sanction or even loss of accreditation for the law school and job loss for the individual career services professional.

4. The draft protocol, and ABA employment outcomes data collection policies in general, do not provide for the eventuality that some data elements for particular law school graduates will always remain unknown.

NALP policies and procedures allow law schools to report employment and salary data for law school graduates that contain responses of ‘unknown’ for data elements that are indeed unknown. This reflects the reality that not every aspect of every job held by a graduate is discoverable or knowable. It is not unusual, for instance, for the available facts to provide no indicators at all about whether a job is long-term or temporary, or about whether it is full-time or part-time. Similarly the actual start date of an employment situation may be unknown and effectively unknowable. By contrast, the policies and procedures developed by the ABA’s Data Policy and Collection Committee do not allow for any data elements to be unknown. An affirmative response is required for every data element. This means that if a fact is indeed unknown but a data value must be submitted for that fact in order to be able to submit any information for a particular graduate, then the career services officer must exercise professional judgment and make a reasoned guess about the correct data value, without external evidence upon which the fact can be supported. This inability to select a value of ‘unknown’ when the fact is indeed unknown at the point of ABA submission, coupled with the regime outlined in the draft protocol that requires every data element to be supported by sufficient primary evidence, puts career services professionals at risk every time they are called upon to exercise their professional judgment about an unknown aspect of a graduate’s employment record. Either the policy disallowing the submission of a response of ‘unknown’ or the standards set out in the draft protocol must be changed, as the two provisions cannot be reconciled with one another.

5. The draft protocol is flawed because it does not provide a materiality standard, and fails to provide law schools notice of what would constitute insufficiency.

The draft protocol is silent as to what constitutes a material flaw or violation in a graduate’s employment record. As described, the policies and procedures seem to imply that all data elements have equal weight, and the burden of documenting each element with original source material seems to be equal. Would it be an equally fatal flaw, for instance, for a school to report that a student was working as a private
practitioner when in fact he or she was unemployed, as it would be to report that a student is working in the Chicago office of a law firm when he or she is in fact working in that firm’s Milwaukee office? Does a file fail to pass muster if the reported employment start date is July 30 when in fact the student did not start work until August 30, both of which are well before the bright line date of February 15 (or, beginning with the Class of 2014, March 15)? Is this fault the same as if a job that is clearly a job that does not involve the practice of law is reported as a job for which bar passage is required? Will auditors be tasked with verifying each data element in the file? What if there is documented source material for every element except the location of the law firm office? Is that a material failure that would trigger further scrutiny? As written, the draft audit protocol does not provide law schools or auditors with any standard for determining whether the documentation in an individual graduate’s employment file would be sufficient.

6. The draft protocol, if adopted, should be implemented for the graduates of the Class of 2015 and not the Class of 2014, some of whom have already graduated and entered the workforce; it would be unreasonable to retroactively apply these standards to data collection efforts that have already taken place, and to impose sanctions on law schools for actions taken prior to having notice of this set of standards and procedures.

At this late date it is not reasonable to implement this set of policies and procedures for members of the Class of 2014. If adopted, it should be made operational for the first time for the Class of 2015. By the ABA’s own definition, law students who graduated in December 2013 are counted in the Class of 2014. These students have long since left campus, many of them have jobs, and their employment files are complete and considered closed. Similarly, there are students who will graduate in May of 2014 who have already obtained federal judicial clerkships or jobs with law firms or the JAG Corps or other entities and whose career services employment files are already completed and considered closed. It would be an unreasonable burden to require law schools to go back and open these files to gather new documentation to meet the requirements set out in this protocol. Taking a broader view, this protocol will require some schools to actually add staff or change current staff assignments and responsibilities. Law schools have long since put in place policies and procedures for gathering employment outcomes data for the Class of 2014. As the earliest this protocol could be adopted is at the Council’s meeting in March, it is not reasonable to require law schools to make all of the required changes to staffing and office procedures in time to have new systems in place for May graduates. The implementation of the protocol, if adopted, should be deferred until the Class of 2015.

7. The draft protocol, if adopted, should have a sunset provision that would, after a reasonable passage of time, require the evaluation of the effectiveness of the policies and procedures contained in it and a reauthorization of the protocol by the Council in order to continue its enforcement beyond an initial period of years.
This set of policies and procedures imposes a tremendous burden both on the ABA Section and on the law schools themselves in an attempt to address a problem the extent of which is entirely unknown. In the absence of evidence that there is material misreporting of employment data, the Council should not require the Section or the schools to commit scarce resources in perpetuity. If the Council decides to proceed with this set of policies and procedures, it should, at a minimum, require that they expire automatically unless after some reasonable period (perhaps 2 or 3 reporting cycles) they surface evidence of material violations. The Council would, of course, continue to have an oversight role, but employment data need not be singled out for special scrutiny and would be subject to the same review as other law school-provided data.

In closing, the members of the NALP Board of Directors would again like to thank the ABA Council for providing this opportunity to provide comments on the draft protocol. We want to reiterate that NALP strongly supports a system that ensures the quality, reliability, and transparency of the employment outcomes consumer information that schools collect and publish in a variety of settings, and NALP is committed to working with the ABA to ensure that our mutual interests in this arena are met in ways that are not unreasonably burdensome on our member law schools. We believe that as written, the current draft protocol is overly burdensome for the end it seeks to achieve. If implemented as written, the current protocol will add real costs to the price of the JD degree. It will also erode the ability of law schools to provide top quality professional career counseling and guidance to law school students. For all of the reasons outlined above, the NALP Board of Directors cannot support the adoption of this protocol as written. We remain eager to work with the ABA Council on an alternate plan for the ongoing oversight and verification of the collection and publication of law school employment outcomes consumer information from all ABA-approved law schools.

Sincerely,

Stacey Kielbasa     James G. Leipold
President     Executive Director