

Zoom School of Law?

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INTRODUCTION

The novel coronavirus pandemic forced law schools to close in compliance with state and local health guidance and quickly pivot to virtual education in a way that runs afoul to American Bar Association (ABA) standards and exposes inconsistencies with the current rules.¹ While the ABA has responded and allowed schools to operate in ways that are not in compliance with standards, the pandemic provides an opportunity to consider what rules law schools may abide by and how they can be updated to better reflect our current reality. This Note will use the pandemic to reconsider law school requirements by (I) laying out the current state of requirements (II) proposing a policy change; and (III) analyzing the impacts of the policy change.

A. REQUIREMENTS THAT LAW SCHOOLS ABIDE BY

Law schools are a unique entity to look at and suggest policy for because the body that governs them is not tied to any state.² In order to maintain accreditation, law schools must follow the standards set out by the American Bar Association Section of Legal Aid and Admission to the Bar.³ The Coronavirus pandemic quickly brought the public health rules to the forefront of law school deans' minds and required law schools to stop in person teaching and move to online classes.⁴ Every state and locality has set out their own public health guidelines that institutions and people in the state and locality must abide by. Each law school has to chart its own path forward considering both the ABA standards they need to follow to maintain accreditation and the state and local public health guidelines that the school must follow in order to be open.

B. CURRENT ABA STANDARDS GOVERNING DISTANCE EDUCATION

The ABA is responsible for law school accreditation and in this role the ABA has set out Standards and Rules of Procedures for Approval of Law

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1. Gabriel Kuris, *The Impact of the Coronavirus on Legal Education*, U.S. NEWS & WORLD REPORT (Aug. 24, 2020, 9:24 AM), <https://www.usnews.com/education/blogs/law-admissions-lowdown/articles/the-impact-of-the-coronavirus-on-legal-education> [https://perma.cc/2F4M-PM7D].

2. *Law School Accreditation*, AM. BAR ASS'N., https://www.americanbar.org/groups/legal_education/accreditation/ [https://perma.cc/9BTU-X5EM] (last visited Nov. 14, 2020).

3. *Id.*

4. Kuris, *supra* note 1.

Schools.⁵ In order to sit for the bar examination, most states require examinees to hold law degrees from ABA accredited institutions making the ABA the first barrier to entry that people seeking to enter the legal profession face.⁶ These standards include varying requirements ranging from the organization of law school to faculty qualifications to the academic program.⁷

Most relevant to this Note is ABA Standard 311 of the Standards and Rules of Procedure for Approval of Law Schools.⁸ Standard 311 lays out the requirements for schools' Academic Program and Academic Calendar.⁹ This standard includes requirements for how many credit hours students must complete in order to graduate, how many credits a student may take per semester, and how long it can take for a student to complete their legal studies at the school.¹⁰ Under Standard 311 (e), "A law school may grant up to ten credit hours required for the J.D. degree for distance education courses during the first one-third of a student's program of legal education."¹¹ Under Standard 311(a), full-time law students attend school for three years and take at least eighty-three credit hours.¹² This means that if the credit hours are equally spread out over the three years of legal education, each law student takes approximately twenty-seven credit hours a year. ABA Standard 311(e) creates a *de facto* rule that first year law students are unable to take their full course load through distance education meaning that law students are unable to complete their legal studies by taking only distance education classes.¹³ Currently there are no ABA accredited fully virtual J.D. programs.¹⁴ This Note will argue that the ABA needs to change their rules in order to create consistency with other ABA rules as the current guidelines for law school accreditation are inconsistent.¹⁵

In Section II, this Note will explain the recent changes to ABA accreditation standards due to the Coronavirus pandemic and lay out the suggested rule change. In Section III, the proposed rule change will be examined beginning with an analysis of benefits provided by in-person education followed by a review of other ABA requirements dealing with distance education. When reviewing other ABA requirements, this Note will look to find ways that this rule change can bring the ABA accreditation standards into consistency with other ABA policies. This

5. *Law School Accreditation*, see note 2.

6. *Can You Take the Bar Exam Without Going to Law School?* INDEED (Dec 17, 2020) <https://www.indeed.com/career-advice/career-development/can-you-take-the-bar-exam-without-going-to-law-school> [<https://perma.cc/R6VR-FTKK>].

7. ABA STANDARDS AND RULE OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS (AM. BAR ASS'N 2020) [hereinafter ABA ACCREDITATION STANDARDS].

8. *Id.*

9. *Id.* § 311.

10. *Id.*

11. *Id.* § 311(e).

12. *Id.* § 311(a).

13. *Id.*

14. Jordan Friedman, *6 Ways to Study Law Online*, U.S. NEWS AND WORLD REPORT (Mar. 26, 2018, 10:02 AM) <https://www.usnews.com/higher-education/online-education/articles/2018-03-26/6-ways-to-study-law-online> [<https://perma.cc/XWQ6-NVR8>].

15. *Infra* Section II(B).

Note will conclude with a look at potential partners and roadblocks in advocating for this proposal.

I. POLICY PROPOSAL

A. RECENT CHANGES TO ABA STANDARDS

1. PREVIOUS ABA DISTANCE EDUCATION POLICY

Distance education is a new phenomenon spurred on by the Coronavirus pandemic.¹⁶ ABA Standard 311(e), which now governs distance education policies for law schools, was updated in August of 2020.¹⁷ Prior to the change, ABA Standard 306 governed distance education.¹⁸ In the 2019-2020 Standards and Rules of Procedure for Approval of Law Schools, students who were engaged in distance education may only receive ten credit hours during their first year of law school and could be granted one-third of their required credits through distance education.¹⁹ This restriction expressly prohibits law schools from providing students with the option to complete their J.D. through distance education. Some schools that hope to provide more flexibility to students and offer an online option have attempted to craft their curriculum to create programs where students can take full advantage of being allowed to take one-third of their classes through distance education.²⁰ More on this is discussed later in section (II)(C).

In addition to promulgating regulations that prohibit students from taking all of their classes through distance education, the 2019-2020 Standard and Rules of Procedure for Approval of Law Schools provides guidance as to what forms of distance education are permissible.²¹ The ABA provides a definition of distance education and allows a law school to award credit if:

- (1) there is opportunity for regular and substantive interaction between faculty member and student and among students;
- (2) there is regular monitoring of student effort by the faculty and the opportunity for communication about that effort; and
- (3) the learning outcomes for the course are consistent with Standard 302.²²

16. Kuris, *supra* note 1.

17. *Summary of Action of the House of Delegates*, AM. BAR ASS'N., https://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/summary-of-action/summary-of-action-2020-annual.pdf. [<https://perma.cc/T3W7-2WNU>] (last visited Feb. 23, 2021).

18. *ABA Standards and Rules of Procedure – Matters for Notice and Comment*, AM. BAR ASS'N., https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/3-6-20-notice-and-comment-memo-distance-ed.pdf [<https://perma.cc/JUN3-STB3>] (last visited Feb. 23, 2021).

19. ABA STANDARDS AND RULE OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS (AM. BAR ASS'N 2019) § 306(e) [hereinafter 2019 ABA ACCREDITATION STANDARDS].

20. Doug Lederman, *Syracuse Law Gains Approval for (Mostly) Online J.D.*, INSIDE HIGHER ED (Feb. 15, 2018), <https://www.insidehighered.com/quicktakes/2018/02/15/syracuse-law-gains-approval-mostly-online-jd> [<https://perma.cc/LYE5-SHW4>].

21. 2019 ABA ACCREDITATION STANDARDS, *supra* note 19, § 306(d).

22. *Id.*

Standard 302 governs the learning outcomes that schools must require that their students achieve from their education.²³

2. FLEXIBILITY AND CHANGE TO DISTANCE EDUCATION IN RESPONSE TO CORONAVIRUS

In the spring of 2020 as the Coronavirus pandemic was spiking, the ABA and law schools across the country needed to respond and public health officials started banning large gatherings, making it all but impossible for law schools to hold in person classes.²⁴ In order to keep educating students while maintaining accreditation, the ABA needed to update their guidance and provide for variances to allow law schools to offer distance education to all of their students.

In an effort to pre-empt some of the issues raised by the pandemic the ABA sent out a memo in February of 2020 providing guidance for law schools to respond to emergencies and disasters.²⁵ In this memo, the ABA recognized that there will be disruptions that will necessitate departure from the normal operation of a school's J.D. program that implicate the schools' compliance with the standards set out by the ABA.²⁶ There is a section of the Standards relating to variances which provides for variances "in extraordinary circumstances in which compliance . . . would create or constitute extreme hardship for the law school and/or its students."²⁷ But in recognizing that variances could prove helpful in emergencies and disasters, the ABA Section of Legal Education and Admissions to the Bar also noted that the variance process may take too long and that schools might have to take action before getting a variance.²⁸ This memo also stated that distance education may be a good solution for emergencies or disasters that make a law school's facilities unavailable or when it would be difficult or impossible for students to get to class.²⁹ For distance education to be effective, schools need to be deliberate with how they move classes online and make sure that students are still engaged and are in programs that meet ABA requirements.

When the pandemic continued into the spring of 2020, it became clear that students would not be able to attend in person classes, law schools had to submit their emergency remote learning plans to the Section of Legal Education and Admissions to the Bar.³⁰ The Section's role was to make sure that the schools

23. *Id.* § 302.

24. Amanda Robert, *Coronavirus and law schools: Numerous schools canceling in-person classes*, ABA JOURNAL (March 11, 2020, 10:15 AM) <https://www.abajournal.com/news/article/At-least-seven-law-schools-to-close-or-cancel-classes-because-of-coronavirus> [<https://perma.cc/USS2-EKLH>].

25. AM. BAR ASS'N, MANAGING DIRECTOR'S GUIDANCE MEMO: EMERGENCIES AND DISASTERS: FEBRUARY 2020 (2020) [hereinafter EMERGENCIES AND DISASTERS MEMO].

26. *Id.*

27. ABA ACCREDITATION STANDARDS, *supra* note 7, § 107(a)(1).

28. EMERGENCIES AND DISASTERS MEMO, *supra* note 25.

29. *Id.*

30. Robert, *supra* note 24.

were not allowing substandard education.³¹ After allowing for flexibility due to the pandemic, the ABA House of Delegates voted to adopt a proposal that would allow law schools more flexibility in how they run their programs.³² The timing of this change creates the assumption that the ABA saw how successful the relaxed distance education requirements had been and decided to continue granting schools more flexibility. In addition to relaxing the distance education requirements, the ABA House of Delegates also adopted a rule that would allow the Council to “adopt emergency policies and procedures in response to extraordinary circumstances when compliance with the standards would create extreme hardship for multiple law schools.”³³

3. SUMMARY OF THE CURRENT POLICIES AND HOW SCHOOLS CAN REQUEST CHANGES

Schools are able to offer sixty-four credits through distance education as long as those courses require attendance in regularly scheduled classroom sessions or direct faculty instruction.³⁴ The largest limitation towards allowing for fully virtual education comes in Standard 311(e) which only allows first year students to receive ten credits for distance education.³⁵ This is currently the rule, but schools have been granted flexibility due to the pandemic.³⁶

If schools would like a variance to deviate from the standards set out by the ABA, there is a procedure laid out in Standard 107.³⁷ This Note will not argue that more schools should go through the variance process and instead will argue that there should be a larger systemic change of the Standards. The variance process is involved and when the initial variance is granted, it will be for a limited amount of time. After the term of the variance has expired the school can apply for an extension which may be indefinite.³⁸ Creating an option for students to complete their J.D. program online would bring the ABA accreditation guidelines into consistency with their other rules. A consistent and predictable outcome is something that the ABA should strive for as it would give their rules greater authority.

31. Stephanie Francis Ward, *If law schools can't offer in-person classes this fall, what will they do instead?*, ABA JOURNAL (May 7, 2020, 11:59 AM) https://www.abajournal.com/web/article/if-law-schools-cant-offer-in-person-classes-this-fall-what-will-they-do-instead?utm_source=feedburner&utm_medium=feed&utm_campaign=ABA+Journal+Top+Stories. [https://perma.cc/ST7M-FSEN]

32. Stephanie Francis Ward, *Law schools should have flexibility in responding to 'extraordinary circumstances,' ABA House of Delegates says*, ABA JOURNAL (Aug. 3, 2020, 4:18 PM) <https://www.abajournal.com/news/article/various-legal-ed-proposals-approved-by-aba-house-of-delegates> [https://perma.cc/QS9T-9K4S].

33. LEGAL EDUCATION AND ADMISSIONS TO THE BAR STANDARDS REVIEW SUBCOMMITTEE, PROPOSED CHANGE TO RULE 2 (2020) https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/may2020/20-may-council-standards-memo-rule-2.pdf [https://perma.cc/L5FV-94AM].

34. ABA ACCREDITATION STANDARDS, *supra* note 7, § 311(a).

35. *Id.* § 311(e).

36. EMERGENCIES AND DISASTERS MEMO, *supra* note 25.

37. ABA ACCREDITATION STANDARDS, *supra* note 7, § 107.

38. *Id.* § 107(a)(2).

B. SUGGESTED ABA RULE CHANGE

The ABA's Section of Legal Education and Admission to the Bar should change the Standards and Rules of Procedure for Approval of Law Schools and remove the requirement of Standard 311(e) that limits the number of credit hours that a first-year law student can receive for distance education courses. This change would allow for law schools to offer students the option to receive their J.D. through fully virtual classes. This proposal would not change the number of credit hours that students must take, how many of those credit hours must be achieved through regularly scheduled classroom sessions or direct faculty instruction, and experiential education.³⁹ Students would still have to take eighty-three credit hours to graduation, sixty-four of which would need to be through regularly scheduled classroom sessions or direct faculty direction, but those credits hours could be taken through distance education. While flexibility in a pandemic is great, the ABA needs to consider long-term changes to how schools are accredited and what type of education is allowed.

The effect of this proposal is allowing schools to offer J.D. programs that students could complete exclusively through distance education. Schools would not be required to offer fully virtual programs, but the option would be there if schools decide they would like to offer fully virtual programs. In implementing this rule change which would allow for increased distance education, schools and the ABA would need to set standards that would maintain a high quality of education. Currently schools can only grant credit hours that are achieved through "regularly scheduled classroom sessions or direct faculty instruction."⁴⁰ In order to properly allow online legal education, the ABA would need to promulgate guidance that adapt those standards to distance education. This could include requirements that students attend live lectures, have mandatory officer hours to get faculty instruction, or forbid students from self-scheduling their classes in a way that would amount to self-study as discussed in the Continuing Legal Education section.⁴¹ This Note will not suggest what exact rules the ABA should promulgate in order to make sure that distance learning is in accordance with curriculum requirements. Instead, it will focus on why schools should be allowed to offer distance education to all students. The exact requirements for those online programs can be determined by the ABA Section of Legal Education and Admission to the Bar in conjunction with legal education experts.

This change would help the ABA modernize their standards and bring the Standards and Rules of Procedure for Approval of Law Schools in line with other standards and rules promulgated by different sections of the ABA. Creating consistency in the rules that govern legal education is something that should be strived for as all people entering the legal field should follow the same guidance.

39. *Id.* § 304; *id.* § 311(a).

40. *Id.* § 311-1.

41. *Infra* Section III(B)(1).

Opponents of virtual learning because of the public health benefits provided by in person schooling, would not have grounds to object to this proposal. The benefits provided based on in person schooling are most pronounced among young children, and do not extend to legal education.⁴²

C. CURRENT HYBRID ONLINE LAW PROGRAMS

As mentioned, there are currently no law schools that are permanently online.⁴³ In order to get around the requirement that classes be taught in person, some schools including Syracuse University have started offering hybrid degree programs.⁴⁴ It is important to note that this program first received accreditation from the ABA in 2018.⁴⁵ In granting the accreditation, the ABA provided a variance to Syracuse to allow them to grant students more than the allowable fifteen credit hours through online classes. When the ABA updated its standards in 2019 to allow for thirty credit hours to be delivered through online classes, they also allowed first year students to take online classes allowing for students to start their education online as long as only ten of those credits are online.⁴⁶

In administering the hybrid program, students are required to take some of their classes in person, on campus. Under the new standards promulgated in 2020, students in their second and third year would not have to take classes in person, but first year students would continue to have to take classes in person, as they can only receive ten credit hours during their first year through distance education.⁴⁷ While the first students at Syracuse University's hybrid program have not yet graduated, the program provides an interesting look at how schools are attempting online legal education and makes clear that there is demand for online legal programs.

Notably, the New York Bar Association, which governs entry into the legal profession in New York State, where Syracuse University is located, has stricter requirements regarding distance education for students who wish to sit for the New York State Bar Exam.⁴⁸ Students wishing to sit for the Bar Exam and to use their legal education as a qualifier must have graduated from a school approved by the New York State Bar Association.⁴⁹ Approved schools must require that at least sixty-four of the credits hours students have received to be in "attendance in

42. *Infra* Section III(A).

43. Friedman, *supra* note 14.

44. Lederman, *supra* note 20.

45. *Id.*

46. Mark Lieberman, *States Limit Spread of Online Legal Education*, INSIDE HIGHER ED (Jan. 23, 2019) <https://www.insidehighered.com/digital-learning/article/2019/01/23/new-york-maintains-restrictions-around-online-programs-amid> [<https://perma.cc/78F2-F6ZZ>].

47. ABA ACCREDITATION STANDARDS, *supra* note 7, § 311(a); ABA ACCREDITATION STANDARDS, *supra* note 7, § 311(e).

48. Lieberman, *supra* note 46.

49. RULES OF THE STATE BOARD OF LAW EXAMINERS (N.Y. STATE BAR ASS'N) § 520.3(a)(1) <https://www.nybarexam.org/Rules/Rules.htm#520.3> [<https://perma.cc/79E3-7RJY>].

regularly scheduled classroom courses at the law school”⁵⁰ and fifteen of those sixty-four credit hours may be from classes categorized as distance education.⁵¹ In order for schools like Syracuse to confer degrees that allow their graduates to sit for the bar exam in New York State, the state bar association must update their rules to be in accordance with the ABA standards that this paper will suggest.⁵² Reluctance of states to change their requirements for the bar examination will be discussed as a potential roadblock to effectiveness of this proposal in a Section III(C).

II. ANALYSIS OF THE PROPOSAL

This analysis will start by looking at potential benefits provided by in person education and analyze if those have an impact on the proposal.⁵³ The analysis will look at the at other rules and regulations promulgated by the ABA that deal with education.⁵⁴ Following that analysis this Note will continue with looking at potential partners in advocating for this change.⁵⁵

A. NOT AN INEFFECTIVE WAY TO LEARN

As mentioned, the Coronavirus pandemic quickly changed the face of American education as students ranging from primary school to post-graduates were forced to transition to online education.⁵⁶ There have been concerns about not only the effectiveness of online education but also its impact on public health.

This section will look at the public health reasons that have been put forth by experts that support re-opening schools and requiring in person education. After looking at those reasons, this paper will attempt to determine if those reasons are relevant to J.D. students. If the public health reasons supporting in person schooling do not apply to J.D. students, then the only other major obstacle standing in the way of allowing access to online schooling other than hypocritical ABA standards.

1. BENEFITS PROVIDED BY IN-PERSON EDUCATION

In looking to determine if this proposal should be adopted it is vital to see if a virtual J.D. program is an effective way to learn. This section will look at two benefits provided to students attending in person school. At the end of the section, the benefits of in-person J.D. programs will be weighed against the lack of flexibility required.

50. *Id.* § 520.3(b)(2)(c)(ii).

51. *Id.* § 520.3(c)(6)(i).

52. *Id.* § 520.3(a)(1).

53. *Infra* section III(B).

54. *Infra* section III(A).

55. *Infra* section IV.

56. Kuris, *supra* note 1.

a. Attendance and Engagement

With the move to virtual schooling due to the pandemic, there have been noted declines in classroom attendance and engagement of students who are attending schools. Even before the pandemic, chronic absenteeism was a problem in schools, especially schools that teach a lot of low-income students where poverty can prevent students from attending class.⁵⁷ Attendance in school leads to graduation and the educational opportunities that come with having a degree.⁵⁸ Class attendance disparities will deepen the academic achievement gap between low-income, middle-class, and wealthy students.⁵⁹ Studies suggest that only “sixty percent of low-income students are regularly logging into online instruction” compared to ninety percent of high-income students.⁶⁰

The attendance and engagement gap created by virtual schooling is even wider among black and Hispanic students. Not only are Black and Hispanic students attending class less frequently than white students, but they are also at higher risk of not receiving remote instruction of average or above-average quality.⁶¹ Additionally, it is estimated that two to nine percent of high school students will drop out as a result of coronavirus related school closures.⁶² The long-term impacts of virtual schooling will be felt more by black and Hispanic students.⁶³

There is little research about attendance gaps for online graduate programs, but one would expect that there is not as large of an attendance and engagement gap. That would be expected because students are choosing to attend a graduate program and are likely paying out of pocket for school or forgoing other employment opportunities to attend school. This creates a financial incentive for students in graduate programs to attend classes because they are quite literally wasting their money if they do not attend classes.

b. Digital Divide

Low-income students may not have access to a personal computer at home or high-speed internet. Some school districts attempted to give laptops to all

57. Mike Maciag, *Chronic Absenteeism a Major Problem in U.S. School*, *Governing* (Dec. 2018) <https://www.governing.com/topics/education/gov-chronic-absenteeism-schools.html> [<https://perma.cc/8277-JSS3>].

58. Lauren Bauer, *School attendance: A building block of student achievement*, *Brookings* (Apr. 25, 2018) <https://www.brookings.edu/blog/up-front/2018/04/25/school-attendance-a-building-block-of-student-achievement/> [<https://perma.cc/3GFQ-AQUE>].

59. Dana Goldstein, Adam Popescu, and Nikole Hannah-Jones, *As School Moves Online, Many Students Stay Logged Out*, *N.Y. TIMES* (Apr. 8, 2020) <https://www.nytimes.com/2020/04/06/us/coronavirus-schools-attendance-absent.html> [<https://perma.cc/7FCK-UXKT>].

60. Emma Dorn, Bryan Hancock, Jimmy Sarakatsannis, and Ellen Viruleg, *COVID-19 and student learning in the United States: The hurt could last a lifetime*, *MCKINSEY & COMPANY* (Jun. 1, 2020) <https://www.mckinsey.com/industries/public-and-social-sector/our-insights/covid-19-and-student-learning-in-the-united-states-the-hurt-could-last-a-lifetime> [<https://perma.cc/KE8F-9GPS>].

61. *Id.*

62. *Id.*

63. *Id.*

students but ran out, so some students were learning using paper packets.⁶⁴ About fifteen percent of households in the United States lack high-speed internet access and with parents working from home and students learning from home, high-speed internet is essential to facilitating both of those.⁶⁵

The digital divide may impact law students who might choose the fully virtual option that this paper is proposing. Low-income virtual law students might not have access to a computer or high-speed internet, two things that are essential to successfully attending virtual classes and completing assignments. If policy-makers do not take steps to provide high-speed internet to low-income communities, students in fully virtual J.D. programs could take out federal student loans to buy a computer and pay for internet access.⁶⁶ This is not a perfect solution but is one that could help mitigate the impacts of the digital divide on students who chose to attend a fully virtual J.D. program. The digital divide is still an issue for law students but is an issue that could be addressed through the use of student loan funds.

2. CONCLUSION ON EFFECTIVENESS OF EDUCATION

The engagement gap and digital divide create a situation where low-income students are not receiving the same quality of education as high-income students either because they are not attending classes or do not have the technology required to facilitate successful online learning. Students need to have the proper technology and attend classes in order for a virtual J.D. program to be effective. Students attending a virtual J.D. program would be paying tuition which creates an incentive for students to attend class potentially mitigating the engagement gap. Additionally, students could use student loans to purchase the technology required to attend class.⁶⁷ The benefits of in-person schooling do not create a meaningful barrier to this proposal.

B. CREATING CONSISTENCY WITH OTHER ABA RULES

In addition to promulgating regulations that law schools must follow in order to be accredited, the ABA works on a variety of other issues including conducting research on the legal field and those who practice in it. Two of the most important and influential sets of model rules that the ABA have adopted are the *Model Rules of Professional Conduct* and the *Model Rule for Continuing Legal Education* (MCLE Model Rule). The *Model Rules of Professional Conduct* are

64. Katie Reilly, *The Achievement Gap Is 'More Glaring Than Ever' for Students Dealing with School Closures*, Time (Mar. 26, 2020) <https://time.com/5810503/coronavirus-achievement-gap-schools/> [<https://perma.cc/P9QE-ZPJG>].

65. *Id.*

66. Stephen Dash, *Yes, You Can Use Student Loans To Pay For These Living Expenses*, Forbes (Dec 12, 2016) <https://www.forbes.com/sites/stephendash/2016/12/12/yes-you-can-use-student-loans-to-pay-for-these-living-expenses/?sh=5b1dc8b520ca> [<https://perma.cc/R6JU-BXFB>].

67. *Id.*

the professional ethics rules in most United States jurisdictions and will not be discussed in this paper as the proposed rule change impacts legal education rather than those already practicing law.⁶⁸ The rules govern how lawyers licensed to practice in a that state must continue their legal education once they have started practicing.⁶⁹

Law schools grant degrees other than the J.D. degree to students who already have their J.D. known as LL.M. degrees which can be the entry point to working in the legal profession for foreign trained lawyers. The ABA has few requirements regarding the curriculum for degrees other than the J.D.⁷⁰ In order to create consistency among the rules promulgated by the ABA, the de facto prohibition of a virtual J.D. program needs to be addressed.

1. CONTINUING LEGAL EDUCATION CREDITS

As mentioned, the ABA Standing Committee on Legal Education created a de facto bar to students getting their J.D. degree through a fully virtual program. This is in direct opposition with other standards promulgated by different sections of the ABA. Most notably the Standing Committee on Continuing Legal Education has adopted the MCLE governing how lawyers continue their legal education once they have completed their legal education.⁷¹ Each state implements their own rules regarding continuing education, but the MCLEs provide a good starting part for analyzing the proposed use of virtual learning and distance education from a national perspective.

The current MCLEs were adopted in 2017 updating the previous standards which were adopted in 1988.⁷² This modernization effort and the changes that were made help reflect the changes in the world and what subjects are important for lawyers to continue educating themselves in.⁷³ Generally, lawyers must take fifteen continuing learning credits (CLE) per year and in the updated standards implemented in 2017, lawyers must take specialized credits including Ethics and Professionalism; Diversity and Inclusion; and Mental Health and Substance Use Disorders.⁷⁴ In addition to mandating what types of classes are required for lawyers to reach their CLE requirement, the Standards also set requirements for

68. MODEL RULES OF PROF'L CONDUCT.

69. MODEL RULE FOR MINIMUM CONTINUING LEGAL EDUCATION IMPLEMENTATION RESOURCES (AM. BAR ASS'N 2017) <https://www.americanbar.org/events-cle/mcle/modelrule/> [<https://perma.cc/WQ5R-HQVL>] [hereinafter MCLE IMPLEMENTATION RESOURCES].

70. *Post-J.D. & Non-J.D.*, AM. BAR ASS'N, https://www.americanbar.org/groups/legal_education/resources/llm-degrees_post_j_d_non_j_d/ [<https://perma.cc/C5UE-U79R>] (last visited Feb. 23, 2021).

71. MCLE IMPLEMENTATION RESOURCES, *supra* note 69.

72. *Id.*

73. *Id.*

74. MODEL RULE FOR MINIMUM CONTINUING LEGAL EDUCATION IMPLEMENTATION RESOURCES § 3(A)(2)(a)-(c). (AM. BAR ASS'N 2017) https://www.americanbar.org/content/dam/aba/directories/policy/2017_hod_midyear_106.pdf [<https://perma.cc/39XN-HH5P>] [hereinafter MCLE STANDARDS].

which types of programs meet the MCLE standards.⁷⁵ These standards range from what is taught in the classes to how the classes may be delivered. The programs can be administered through two different means: “Moderated Programming or Non-Moderated Programming with Interactivity as a Key Component.”⁷⁶ The only form of programming that is expressly prohibited is “self-study.”⁷⁷ Self-study includes programs that do not include interactivity with a faculty member or a qualified commentator.⁷⁸

When looking at Moderated Programming, it becomes clear that the ABA allows online distance education when lawyers are getting their CLEs.⁷⁹ In defining what methods of delivery “Moderated Programming” includes, the ABA expressly lays out six methods but notes that this is not an inclusive list as to how the programs can be delivered.⁸⁰ These methods range from “In-Person” to “Webcast/Webinar Replay.”⁸¹ Notably, only one of the methods requires in-person attendance and the other five allow for lawyers to attend programs where they are able to “interact in real time with program faculty members or a qualified commentator who are available to offer comments and answer oral or written questions before, during, or after the program.”⁸² The ABA currently recognizes that a moderated program of virtual education can be effective as long as it is done properly following certain guidelines.

The requirement that CLE students interact in real time with program faculty is quite similar to Standard 311(a), in the Standards and Rules of Procedure for Approval of Law Schools.⁸³ Recall that Standard 311(a) requires that law students obtain sixty-four credits hours from classes that “require attendance in regularly scheduled classroom sessions or direct faculty instruction.”⁸⁴ In the comment to Standard 311(a) the ABA goes on to note that distance education is included in regularly scheduled classroom sessions or direct faculty instruction.⁸⁵ There are already ABA standards in place that would govern how distance education would proceed and to ensure that the quality of the education would not fall and those standards would not be changed by this proposal. The similar requirements for CLEs and Distance Education suggest that the education received by students of either would be of similar quality. While the purpose of a J.D. program is different than the purpose of CLEs, students of both are engaged and enmeshed in the legal community and should not be held to different standards

75. MCLE STANDARDS, *supra* note 74, § 4.

76. *Id.* § 4(C).

77. *Id.* § 4 cmt 10.

78. *Id.* § 1(N) (this proposal would not allow schools to offer programs where students would get their degrees through self-studying making this prohibition in line with this proposal).

79. MCLE STANDARDS, *supra* note 74, § 1(K).

80. *Id.*

81. *Id.* § 1(K)(1)-(6).

82. *Id.* § 1(K).

83. ABA ACCREDITATION STANDARDS, *supra* note 7, § 311(a).

84. *Id.*

85. *Id.* interpretation 311-1.

unless the ABA believed that the two types of students are markedly different. If the ABA believes that virtual learning is not adequate for J.D. students, then that belief is inconsistent with the allowance of distance CLE through moderated programming.

The ABA also allows for lawyers to get their CLE credits through non-moderated programming as long as the non-moderated program has interactivity as a key component.⁸⁶ These programs include classes that are delivered by a “recorded format that contains a significant level of interaction with the program, faculty, or other attendees.”⁸⁷ The levels of interactivity range from students “submit[ting] questions to faculty members or a qualified commentor” to students taking quizzes and/or tests along with the recorded program.⁸⁸ In allowing lawyers to take classes that do not have live direct interaction with faculty, the ABA is implicitly agreeing that lawyers can learn without having direct faculty interaction and in person classes. This is in direct contention with the requirements for law students and is an inconsistency that must be fixed.

2. MASTER OF LAWS DEGREE

Law schools also offer degree programs other than the traditional J.D. program. These programs are traditionally Master of Laws degrees (LL.M.) which are offered to students who already have a J.D. degree. Often these are students who have obtained the equivalent of a J.D. degree in a foreign country who are seeking a LL.M. in order to obtain a job in the legal profession in the United States.⁸⁹ ABA accreditation does not apply to the post-J.D. programs other than the fact that schools may be allowed to offer LL.M. degrees.⁹⁰ Currently there are over 150 LL.M. programs most of which are targeted to students with the foreign equivalent of a J.D.⁹¹ Students who receive their LL.M. and hope to practice law in the United States are required to pass the same state bar examination that J.D. students are required to pass.⁹² Most LL.M. students and J.D. students are receiving their first exposure to in-depth education about the American legal system, but LL.M. students are able to take classes fully online as the ABA does not provide accredited standards for LL.M. Programs.⁹³ Unless the ABA is willing to

86. MCLE STANDARDS, *supra* note 74, § 1(M).

87. *Id.*

88. *Id.*

89. Law School Admission Council, LLM Degree Program, <https://www.lsac.org/discover-law/types-law-programs/llm-degree-programs> [<https://perma.cc/N959-79CH>] (last visited Nov. 14, 2020).

90. ABA Section of Legal Education and Admissions to the Bar, Frequently Asked Questions, https://www.americanbar.org/groups/legal_education/resources/frequently_asked_questions/ [<https://perma.cc/K2JR-ETZT>] (last visited Nov. 14, 2020).

91. Keystone Law Studies, 179 Online LLM Programs in USA, <https://www.lawstudies.com/LLM/USA/Online/> [<https://perma.cc/KC3R-5WJQ>] (last visited Nov. 14, 2020).

92. U.S. News and World Report, Online Master of Laws Degree (LL.M.), <https://www.usnews.com/education/online-education/law-masters-degree> [<https://perma.cc/WER3-KJAQ>] (last visited Nov. 14, 2020).

93. *Post-J.D. & Non-J.D.*, *supra* note 70.

argue that there is a marked difference between LL.M. students and J.D. students that necessitates J.D. students taking some of their first year classes in person, the current policy remains inconsistent and punishes J.D. students who may wish to take their full course load through distance education.

3. CONCLUSION AND CURRENT DOUBLE STANDARD

The ABA's current requirements make it clear that education programs that are not in person can provide students with an effective education. In allowing students to obtain CLE credits for non-moderated classes the ABA is acknowledging that lawyers can be educated through recorded lectures as long as students are able to interact with the material in some way that can be as minimal as taking quizzes along with the material.⁹⁴ This does not even require interaction with a professor. For the ABA to not allow virtual education for J.D. students is a double standard that needs to be fixed. If the ABA is going to continue with this double standard, they will need to provide some evidence that would support their conclusion, but at this time there is no evidence provided by the ABA to back up the idea the two types of students are different enough to require them be educated differently. But that idea would be hard to prove given that the ABA allows for LL.M. students to attend school through virtual programs. It is true that many LL.M.'s have already received a legal education in a foreign country, but those LL.M. students are getting their first education in the American legal field just like J.D. students are. Consistency is something that the ABA should be striving towards if they would like to remain to be seen as the authority on legal education in the United States. If there is not consistency among their rules, it creates a situation where they could lose some of their credibility.

The ABA is likely to push back from this theory by arguing that the education needed for students who are first entering the legal profession is quite different than the type of education that is needed by lawyers who are necessarily already in the legal profession. People already in the legal profession have already learned the basics that J.D. students are currently attempting to learn. If the ABA believes that there is a distinction between J.D. students and lawyers in terms of how they can learn, the ABA can set stricter standards for students who are undertaking a fully virtual J.D. program. This could include requiring classes to be delivered to students live and for there to be a professor live teaching the class to better replicate the in-person experience. Schools have been delivering this type of education due to the coronavirus pandemic and can use what they have learned from that experience to help the ABA write standards that can allow students more flexibility in how they get their legal education through fully virtual programs while still delivering a high-quality education. The potential explanation that may be provided by the ABA that standards for J.D. programs should be

94. MCLE STANDARDS, *supra* note 74, § 1(K).

different than the standards for CLE programs does not hold up to scrutiny and standards and policies can be promulgated to ensure that transitioning to distance education does not mean a decrease quality of education provided to J.D. students.

C. STAKEHOLDERS: POTENTIAL PARTNERS AND ROADBLOCKS MOVING FORWARD

1. AMERICAN BAR ASSOCIATION

The ABA would need to provide detailed guidance to schools about how they can implement fully virtual J.D. programs that will still comply with the other accreditation standards. If the ABA does adopt this proposal, they should be transparent with their reasoning and provide schools with all the information that they used to make their decision. Providing schools with that information could alleviate fears from schools that these programs would be second tier and help schools provide reasons for adopting a fully virtual J.D. program. The ABA should offer trainings and conferences so schools can discuss the potential benefits of creating fully virtual J.D. programs. Providing resources to schools would make the ABA a partner in helping schools implement a proposal that the ABA is suggesting is a viable one.

2. STATE BAR ASSOCIATIONS

In order to practice law in a state, one must be admitted to that state's bar association.⁹⁵ Each state has the ability to set their own rules and requirements as to how one gains entry into the association. Generally, one must pass an entry examination in order to be licensed to practice in that state. State bar can be protective over their state's legal market and set their own requirements for sitting and passing the exam. In order to sit for the examination, one must generally have graduated from an accredited law school and meet certain requirements set out by that state.⁹⁶ These requirements can include things like number of credit hours taken and the breakdown of those credit hours. Even if this proposal does pass, state bar associations would still need to allow for students who attended fully virtual J.D. programs to sit for the bar examination. This could be a major issue if state bar associations are reluctant to change their policies out of fear that graduates of a virtual J.D. program are less qualified than students who attended school in person. In order to counteract this, the ABA would need to make sure that their accreditation standards remain robust and that the education that virtual students receive is on par with that received by in person students.

If this proposal does get implemented and schools begin offering fully virtual J.D. programs, law schools offering virtual J.D. degrees would likely become advocates of their program to the state bar associations. Schools would not want

95. MODEL RULES OF PROF'L CONDUCT R. 5.5 (2016).

96. MODEL RULES OF PROF'L CONDUCT R. 5.5 (2016).

to offer a degree that does not allow its graduates to sit for the bar examination in that state. Law schools would need to advocate to state bar associations that the quality of the education is the same as in person classes and that students who have completed a fully virtual J.D. should be able to sit for the bar examination.

3. LAW SCHOOLS

If the ABA adopts the proposal, it will still be up to individual law schools to determine whether or not they will offer a virtual J.D. program. This proposal simply allows law schools to make that decision but does not require law schools to offer a fully virtual J.D. program if they choose not to. This will likely be a large hurdle to widespread adoption of fully virtual J.D. programs. Students currently enrolled in online education have reported concerns about how their online degree will be viewed by future employers and there is no reason to believe that that concern would not apply to students in a J.D. program.⁹⁷ Schools that currently have virtual LL.M. programs should use best practices developed from those programs to implement virtual J.D. programs. Law schools that do implement virtual programs should share stories about their students in an attempt to convince schools that might be suspect of virtual J.D. programs of the success of the program. Most schools will already have the infrastructure in place to facilitate more students through distance education due to changes schools had to make in response to the pandemic. School and faculty have had practice teaching in a virtual setting. This hopefully will have alleviated the concern that online classes are not an effective way to teach.

Law schools can use the option of a new fully virtual J.D. program as a potential new revenue stream. While schools set out with educating students as their first priority, they still must have the finances to operate. A fully virtual J.D. program would not stress the physical infrastructure of a school and would allow more tuition paying students without having to create any new on campus facilities. More faculty and IT staff would likely need to be hired to teach the virtual classes and maintain the online infrastructure, but schools would be free to increase the number of students without having to make any physical infrastructure changes opening a potential new revenue stream which could help keep struggling law schools open.

Law schools would need to decide to implement virtual J.D. programs. This will likely make the first few schools that implement the program “guinea pigs” while other schools wait to decide whether or not they would like to implement the program. The first schools should seek suggestions and best practices from the other schools and the ABA to make sure that the quality of education remains high. This proposal is not self-implementing, but schools who do choose to

97. *Online Education Statistics*, EDUCATIONDATA.ORG, <https://educationdata.org/online-education-statistics> [https://perma.cc/JK5E-N58S] (last visited Dec. 11, 2020).

implement fully virtual J.D. programs will help other more skeptical schools see that it is a viable option.

CONCLUSION

The Coronavirus pandemic has exposed the inconsistencies in the ABA standards for law school accreditation. Currently J.D. students are not able to earn their degree through fully virtual classes. Students can earn some credits through distance education, but not enough to complete their degree. There has been a push to reopen primary and secondary schools closed due to the pandemic because of the benefits in person schooling provides to those students. Those benefits do not translate to the law school context because the services do not exist for law students. Engagement and attendance gaps and the digital divide are creating a situation where not all virtual primary and secondary schools are the same. High-income students are receiving a better education and low-income students are falling even further behind. These concerns do not translate well to law schools because students are choosing to attend law school and would be engaged and could use student loans to bridge the digital divide.

The current ABA policy is in direct conflict with other ABA standards that allow for virtual education for LL.M students and Continuing Legal Education credits. Due to the pandemic, law schools have been to grant more credits for distance education credits suggesting that the ABA believes that they are a viable way for students to learn. This double standard should be changed to create uniformity among ABA guidelines.

The ABA, state bar associations, and law schools will have to work together should this proposal be implemented to create successful fully virtual J.D. programs. Schools will need to share best practices and other success strategies to ensure that students who are taking classes solely online are still receiving a high-quality education. After adopting this program, the ABA will need to advocate for schools to implement fully virtual programs to make sure that this change is not moot. Adoption of this proposal will remove some inconsistencies in the ABA accreditation standards.