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November 18, 2013

Mr. John Kolotos  
U.S. Department of Education  
1990 K Street, NW  
Room 8031  
Washington, DC 20206-8502

RE: The Proposed "Gainful Employment" Rule

Dear Mr. Kolotos:

On behalf of The InfiLaw System ("InfiLaw"), we write regarding the proposed gainful employment rule ("GE Rule" or "Rule"), as discussed at the last negotiated rulemaking session from September 9-11, 2013, and as subsequently revised by the Department on November 8, 2013 in advance of the next session. As you may recall, on September 9, 2013, the rulemaking committee passed on the request of Mr. Chidi Ogene, the interim Dean of Florida Coastal School of Law – one of the three law schools accredited by the American Bar Association that InfiLaw owns – to be seated as a negotiator. We now respectfully submit this letter for consideration by all members of the rulemaking committee to offer the unique perspective that would have been brought about by Mr. Ogene's selection to the committee, and to otherwise reiterate our deep reservations about the GE Rule's application to proprietary law schools, and first professional degree programs in general.

The GE Rule assumes that immediate repayment of student debt is an accurate indicator of program quality. In over three years of work on this subject, however, the Department has not provided any evidence to support this assumption with respect to professional schools generally, or specifically with regard to proprietary professional schools. The available data – including the most recent results from a continuing longitudinal study of lawyers admitted to the bar in 2000 – suggest quite the opposite: while lawyers (as well as doctors and other professionals) rationally defer payment to later years in accordance with the substantial increase in their earnings over time,

graduates of professional degree programs are exceedingly likely to repay their student loans. Indeed, in applying this Rule to professional degree programs, the Department is imposing a one-size-fits-all solution where there is no documented problem.

The GE Rule, as currently being discussed, fails to account for this phenomenon. As currently formulated, many professional schools – regardless of tax-status and including several law and medical schools of unimpeachable quality – do not comply with the GE Rule, which in turn casts doubt on the efficacy of the Department’s methodology. If implemented as proposed, the GE Rule will have the unintended consequence of foreclosing opportunities for students to become professionals who, over time, will likely experience dramatic increases in their economic prospects. Moreover, it will also have a negative effect on innovation and serving undeserved communities. Accordingly, we request that the Department:

- Exempt First Professional Degree Schools from Complying with the GE Rule;
- Deem Compliant with the GE Rule Any Institutions Accredited by Bodies Sponsored by Associations of Professionals (such as the ABA Section of Legal Education and Admissions to the Bar or the Liaison Committee on Medical Education) Given the Rigorous Accreditation Standards Employed by those Accreditors;
- Provide that Institutions with Exceptional Cohort Default Rates, Such as Those Schools with a three year Cohort Default Rate of less than 10%, are deemed to have complied with the GE Rule; or
- Require that Institutions Comply with One of the Three (as Opposed to All Three) Metrics Currently Included in the GE Rule, as a Means of Complying with the GE Rule.

#### Our Schools

InfiLaw currently operates three for-profit law schools: Florida Coastal School of Law in Jacksonville Florida, Arizona Summit Law School in Phoenix, Arizona, and The Charlotte School of Law in Charlotte, North Carolina. All three law schools are fully accredited by the American Bar Association (the “ABA”). Each school provides in-person legal education responsive to the realities of today’s legal market. Our law schools employ curricula that focus on experiential education: the hands-on learning needed to equip graduates with the leadership, management and interpersonal skills that are necessary for career success. Our professors, most of whom have significant experience as practicing lawyers, are actively engaged in student success through classroom and practical instruction, as well as personal mentoring.

Our schools’ focus on practice-readiness has resulted in an impressive record of accomplishment, a small sample of which follows:

- InfiLaw’s schools have a bar passage rate of 74.4%, based on the three most recent years. In a testament to the academic success of the programs,

both Charlotte School of Law and Arizona Summit Law School outperformed their respective state averages in February 2013. In fact, Charlotte School of Law outperformed UNC and Wake Forest in February 2013 to place 3rd overall in the state;

- InfiLaw's schools have a career placement rate of 85.1% (based on the three most recent years) with over 77% of those placements being in positions in which a law degree is required or preferred, or other professional positions;
- Florida Coastal School of Law's Moot Court program ranked 4th in 2011-2012 and is currently ranked 2nd; and
- Pre-Law Magazine, a publication of National Jurist, recently named Arizona Summit Law School as a best value law school. In addition, a recent edition of National Jurist recognized the school as one of the most innovative law schools in the country.

Our three-year cohort default rates and other outcomes compare favorably with our peer schools. Indeed, the most recent three-year cohort default rate for the schools were as follows: Florida Coastal School of Law was 4.3% (2009 official rate), Charlotte School of Law was 2.5% (2010 draft rate), and Arizona Summit Law School was 3.8% (2009 official rate).

#### The Department has not Provided a Basis for Applying the GE Rule to Post-Graduate, Professional Schools

In all of the Department's discussion over the past three years about the need for a GE Rule, the Department has not cited any data to support extending the Rule to proprietary, professional schools or any evidence that debt levels at graduate and professional institutions – of any type – are problematically high. As the Government Accountability Office noted: "Researchers estimated that borrowing larger amounts is correlated with higher levels of education—such as graduate or professional programs—which give borrowers an increased earning potential so that they are better able to repay their loans."<sup>1</sup> Nor has the Department demonstrated that proprietary professional schools have a default rate materially in excess of their non-profit peers. To the contrary, InfiLaw schools' three-year default rates, as noted above, are consistent with the three-year default rates of other law schools that report such rates individually.<sup>2</sup>

While the Department has previously argued that "[f]or professional degrees, the known debt levels at public and nonprofit institutions *could be* problematic if earnings are not sufficient," the Department explicitly concedes that it does not have separate data

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<sup>1</sup> Government Accountability Office, Stronger Department of Education Oversight Needed to Help Ensure Only Eligible Students Receive Federal Student Aid, at 21 (August 2009) located at <http://www.gao.gov/new.items/d09600.pdf>.

<sup>2</sup> See <http://federalstudentaid.ed.gov/datacenter/cohort.html>. Most law schools are affiliated with large universities and, as such, do not report CDR's separately. For the 26 law schools that reported three-year CDRs individually in FY2010, the average three-year CDR was 3.5%. In FY2009, the three-year CDR for the same schools was 3.1%.

for these programs.<sup>3</sup> The Department has not produced any evidence as to how the “known debt levels” compare between proprietary professional schools and their non-profit peers. Nor has the Department produced any evidence as to what constitutes “sufficient earnings.” Unfortunately, given the GE Rule’s proposed focus on income of relatively recent graduates, nearly all law schools – not just proprietary ones – would have difficulty complying with the GE Rule, a result that is patently unfair for those few law schools currently contemplated to be subjected to the Rule.

### The GE Rule Ignores Lifetime Earnings Potential for Professional, Post-Graduate Programs

The GE Rule currently proposed by the Department takes an unduly narrow view of the ability of graduates of professional programs to repay their debt. Data demonstrate that graduates of professional programs experience a significant increase in lifetime earnings compared to college graduates. The income differential is not very large in the early years. However, it continues to increase over time and is very substantial, and persistent, in later years. Moreover, any concerns of the Department over law students’ ability to repay their loans is misplaced. The evidence demonstrates that these lawyers do in fact pay down their loans over time<sup>4</sup>.

In addition, the current debt-service test reflected in the Rule does not comport with the reality of financing professional degrees. The debt-service test, as discussed at the September rulemaking session and in materials published by the Department, measures whether graduates have the requisite income to pay off their loans in 10 years. But the choice of a 10-year repayment period is arbitrary, because most graduates of professional schools repay their loans over a much longer period, and rationally so based on the factors discussed above.

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<sup>3</sup> GE Rule, at 43622, fn 3.

<sup>4</sup> Robert L. Nelson & Ronit Dinovitzer, *After the JD II: Second Results from a National Study of Legal Careers*, American Bar Foundation and The NALP Foundation for Law Career Research and Education, at 80, (2009) (About seven years after graduating from law school, two-thirds of AJD respondents continue to carry educational debt, with the median debt (for those who still have debt) at \$50,000. While these are substantial numbers, 20% of AJD respondents have fully paid off their educational debt since we last surveyed them in 2002-2003, and the median debt load has fallen by \$20,000.”)

## The Unintended Consequences of the GE Rule

Applying the GE Rule as proposed to professional schools will have unintended consequences that are severe and far-reaching. Those schools will, in all likelihood, react to the Rule's inordinate focus on early repayment by pushing their graduates to apply for jobs with very high starting salaries. Yet that is precisely the sector experiencing the most disruption: the market for beginning lawyers with starting salaries of \$125,000 and above – a career option available only to a select few even in the best of economic times – has contracted severely in the wake of the economic downturn. Elite law firms are encouraging students to postpone their start dates, rescinding outstanding job offers, and drastically reducing the size of their incoming classes.<sup>5</sup> Applying the GE Rule to professional programs would only exacerbate this problem.

Students have reacted in many ways to the changes in the legal employment landscape. Many of our students look to public interest and state and local government positions upon graduation. Still others, as the ABA has observed, are opening up solo or small firm practices.<sup>6</sup> These lawyers are providing valuable legal services to underserved communities.<sup>7</sup> Although solo and small firm lawyers have starting salaries lower than those of their large firm colleagues, the data indicate that, over time, incomes of lawyers in solo or small practices increase as their practices mature. Similarly, while starting salaries for government and public interest lawyers remain low, these salaries increase substantially over time. But the GE Rule – by focusing on the income in the earliest years of what will likely be a thirty to forty year career – penalizes schools whose graduates heed President Obama's call to eschew the trappings of the global corporate world and serve their local communities. This cannot be the intent of the Department.

Another unfortunate consequence of the Rule is that it elevates form (the manner in which a school is organized) over substance (whether schools, regardless of status, produce quality outcomes). There are over 200 ABA-accredited law schools, only six of which are proprietary.<sup>8</sup> Using weighted average salaries from graduates in private and public sector jobs, as reported in *US News and World Report*, and median debt levels by law schools, as reported to the ABA, we estimate that, at most, only 27 law schools of any kind (e.g. proprietary or nonprofit; private or public) would pass the debt to

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<sup>5</sup> Nathan Koppel, *Bar Raised for Law-Grad Jobs*, WALL ST. J., May 5, 2010, available at <http://online.wsj.com/article/SB10001424052748704866204575224350917718446.html>.

<sup>6</sup> A.B.A Commission on the Impact of the Economic Crisis on the Profession and Legal Needs, available at [http://www.abanet.org/op/lamm/docs/accomplishments\\_for\\_website.pdf](http://www.abanet.org/op/lamm/docs/accomplishments_for_website.pdf) (“[A]nother likely consequence borne out in previous recessions is increasing numbers of solo practitioners as lawyers in all stages of their careers turn to solo practice.”).

<sup>7</sup> See, e.g., Allan J. Tanenbaum, *Recommendation and Report of the Commission On The Impact Of The Economic Crisis On The Profession And Legal Needs Delivered to the ABA House of Delegates*, 2010 A.B.A. Law Stud. Div., at 2, available at <http://www.abanet.org/op/lamm/presidentialcommissions.shtml#economic>.

<sup>8</sup> According to the Law School Admission Counsel, there are approximately 38 law schools that are not ABA-accredited. See, e.g., Law School Links, available at <http://www.lsac.org/JD/Choose/law-school-links.asp#NON-ABA>. Approximately nine of those schools currently receive Title IV funding.

discretionary income ratio at the 20% threshold. And only one law school in the entire country would pass the debt to annual income ratio.<sup>9</sup> Further, the foregoing does not even take into account how any of these institutions would fare under the other two metrics – CDR and Loan Repayment – recently introduced into the Rule. And yet, by its terms, the GE Rule does not apply to these non-profit law schools – just the six proprietary schools.<sup>10</sup>

The arbitrariness is compounded by the provisions in the Rule that require proprietary schools to provide a debt warning to their students if they are in danger of not meeting the thresholds. This would place these schools at a significant competitive disadvantage: Even if a non-profit law school across the street had lower bar passage rates, higher median debt, and a lower median salary, it would not be required to provide any disclosures to students. Several commentators have remarked upon the inequity of such a result when it was originally proposed in 2010,<sup>11</sup> and the Department was wise to remove it from the rule published in 2011.

In addition, the Rule under consideration holds institutions to account for all debt taken by students at that institution, regardless of whether the institution received such funds for tuition and fees. Under the Grad Plus loan program, graduate students may borrow up to \$30,000 beyond tuition costs at a graduate or professional degree institution to pay for living expenses. Holding graduate and professional degree programs accountable for the living expenses borrowed by their students is not only unfair, but runs counter to established principles about the ability of graduate students to repay their loans.

#### The Nature of A Professional Degree Institution Ensures that Our Schools Meet Student Needs

We strongly believe that many of the attributes of a professional degree education make it very unlikely that an institution could engage in the abuses purportedly giving rise to the need for the GE Rule. Our students wouldn't stand for an institution that did not help them accomplish their goal of passing the bar and becoming a lawyer. Moreover, if our institutions were simply saddling our students with debt they could never repay and leaving them without an education sufficient to achieve their purposes, the judges, lawyers and other distinguished persons who serve as faculty, guest speakers, authors in our law journals and on our board would no longer do so.

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<sup>9</sup> Notably, those few that do pass these metrics are highly selective institutions with large endowments and with low acceptance rates that generally place graduates in large law firms located in high end markets.

<sup>10</sup> In addition, the data relied on by the Department to craft the rule in 2010 showed that both Missouri law schools would fail the debt metrics: the two Missouri non-profit law school would have debt-to-income ratios of 16% and 17% (as opposed to the 8% threshold being discussed) and debt-to-discretionary income levels of 23% and 25% (as opposed to the proposed level of 20%).

<sup>11</sup> Daniel L. Bennett & Zac Bissonnette, *Red Herring Crusade*, *Forbes*, Aug. 11, 2010, available at <http://www.forbes.com/2010/08/01/student-debt-profit-expense-opinions-best-colleges-10-bennett-bissonnette.html>; Kantrowitz Summary, at 2 (“Just because a college lacks an overt profit motive does not mean that it should be permitted to routinely graduate students with excessive debt.”).

Equally important, is that the rigorous standards employed by the accrediting bodies for professional programs, such as the ABA, ensure we must offer an education that will help students achieve their goals. Indeed, the ABA already addresses many of the issues the Department has used to justify the GE Rule:

- *Marketing and Admissions Practices:* The ABA explicitly prohibits law schools from basing compensation paid to “any person for service to the law school . . . on the number of persons enrolled in the school, enrolled in any class, or on the number of persons applying for admission or registering in the law school.” The ABA Standards require all law schools to deny admission to those applicants that are unlikely to successfully complete the program. The ABA Standards also explicitly require that law schools base admissions on the results of an admissions test, such as the LSAT.
- *Consumer Information:* The ABA Standards require all law schools to publish “Basic Consumer information,” including admission data; tuition, fees, living costs, financial aid, and refunds; enrollment data and graduation rates; and job placement rates and bar passage data.
- *Debt Counseling and Avoiding Economic Exploitation:* The ABA Standards require all law schools to “take reasonable steps to minimize student loan defaults, including provision of debt counseling at the inception of a student’s loan obligations and prior to graduation.” Economic exploitation is addressed further by the requirement that law schools not enroll students whose inability to do satisfactory work is sufficiently manifest that the student’s continued enrollment would “inculcate false hopes” or “constitute economic exploitation.”
- *Academic Support:* The ABA Standards require law schools to provide academic support to their students to enable them graduate and become members of the legal profession. They further provide that “[t]his obligation may require a school to create and maintain a formal academic support program.”
- *Bar Examination Performance:* The ABA Standards require law schools to demonstrate that their students pass the bar at a rate of not less than 75% (or not less than 15 percentage points below the state average).

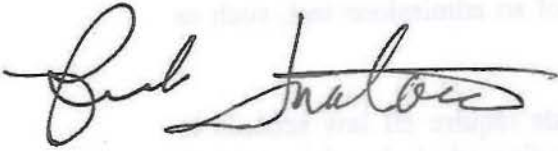
These standards (and their rigorous enforcement) are instrumental in assuring that professional programs do not abuse the trust reposed in them by their students. We believe the Department should adopt these standards as best practices for the entire higher education sector, proprietary and non-profit alike. It is our firm belief that doing so will go a long way towards curbing the abuses some students have been subjected to. We are happy to assist with such an effort.

Conclusion

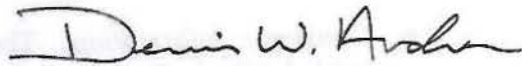
We support the Department in its attempt to eliminate abusive practices at proprietary schools but strongly believe the GE Rule as currently drafted does not effectively address these issues. We urge the Department to consider the recommendations made in this letter.

Thank you for your consideration of these comments.

Sincerely,



Rick Inatome  
Chief Executive Officer,  
The InfiLaw System



Dennis Archer  
Chairman, National Policy Board  
The InfiLaw System