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January 11, 2012

Professor Jeffrey E. Lewis, Chair
Standards Review Committee
Saint Louis University School of Law
3700 Lindell Boulevard
St. Louis, MO 63108

Dear Professor Lewis:

In its January 2012 meeting, the Standards Review Committee will be discussing draft Standard 303, which now contains the bar passage standard (moved from current Interpretation 301-6). Although the most recent draft of Standard 303 does not increase the bar passage requirement, as had been previously proposed, SALT is uncertain whether the Committee might still consider such a change in light of earlier proposed versions of this section. SALT remains opposed to a bright-line bar passage accreditation standard and strongly opposes any increase in the bar passage requirement. SALT's position is based upon serious concerns that toughening the bar passage requirement discourages schools from accepting non-traditional students and contributes to the under-enrollment of African-American and other minority students in law schools.

When Interpretation 301-6 was proposed in 2007, many individuals and groups opposed adoption on the ground that it would unjustifiably reduce the opportunities available for minority law school applicants. That danger persists today and would be exacerbated by any proposal to make the Standard tougher to satisfy. In fact, in 2007, in recognition of the danger that a bright-line bar passage standard would seriously affect diversity, the ABA considered but rejected proposals to set first time passage and ultimate passage rates any higher than what is currently required in Interpretation 301-6 and carried over to proposed Standard 303. In a FAQ to the House of Delegates, the ABA explained why it adopted 75% instead of 80% or 85% for ultimate passage and 15% instead of 10% for first time passage:

The 75% was ultimately decided upon after reviewing first-time pass rates for states; after reviewing the Law School Admissions Council national bar examination pass study (which involved 163 law schools with results from 50 jurisdictions); after reviewing the recently conducted New York bar examination study; and after consultation with law school deans, current and former members of the Accreditation Committee, section staff, and many, many others interested in this matter.

The FAQ describes the performance gap between African-Americans and Caucasians on the bar exam, as documented by the LSAC longitudinal study (ultimate bar pass of 94.8% for all participants contrasted to 77.6% for African-Americans) and the New York Board of Law Examiners study (ultimate pass rate of 93.4% for Caucasians contrasted to 75.1% for African-Americans). The determination in 2007 to adopt 75% instead of 80 or 85 % for ultimate passage and within 15 points rather than 10 points for first time bar passage reflected the ABA's concern about adopting an accreditation standard that would provide disincentives to law schools to admit minority students. There is no reason to be any less concerned today.

The statistics regarding the number of minority students in law schools remains a serious cause for concern. Since a high in the early 1990s, there has been a decline in the number of enrolled African-American and Mexican-American law school students despite an increase in the number of applicants, the number of seats available, and overall improvement in these applicants' test scores. Columbia Law School and SALT documented this decline in a website launched in January 2008, and revised in January 2010, called "A Disturbing Trend in Law School Admissions."¹ That website documents the downward trend in enrollment for African-American students and Mexican-American students:

The percentage representation of both groups has actually trended downward since 1993. These groups account for a significantly smaller percentage of the 2008 entering class than the 1993 entering class. Indeed, there was a 7.5% decrease in the proportion of African Americans in the 2008 class as compared with the 1993 class. There was a 11.7% decrease in the proportion of Mexican Americans in the 2008 class as compared with the proportion entering law school 15 years ago.

Therefore, over the past 15 years, African American and Mexican American representation in law school has decreased. African Americans and Mexican Americans have captured none of the nearly 3,000 additional seats that became available. Even in real numbers, there are fewer African-American and Mexican-American matriculants in the 2008 class (4,060 combined) than existed in the Fall 1993 class (4,142 combined).²

A concern that was raised in 2007 and is even more troublesome today is the impact of bar passage as a bright-line measure of accreditation on historically black law schools (HBLS). There has been a dramatic decline in enrollment of African-American students at historically black law schools, which may well reflect the schools' concern about risking accreditation due to noncompliance with 301-6. For example, the University of the District of Columbia no longer has a majority of African-American students.³ This

¹ Available at <http://blogs.law.columbia.edu/salt/> (last visited March 25, 2011).

² *Id.*

³ See Gary Rosin's May 2011 submission to Standards Review Committee entitled Endangerment of HBLS, available at http://www.americanbar.org/content/dam/aba/migrated/2011_build/legal_education/outcome_measurements/20110525_comment_outcome_measures_gary_rosin_revised.authcheckdam.pdf. Professor Rosin reports the following average distribution of African-American students for the period Fall 2007 through 2009 : UDC (30.2%); Florida A&M (41.2%); Texas Southern (49.0%); NC Central (50.6%); Southern (62.5%); and Howard (78.4%). Professor Rosin

was precisely the fear articulated by Linnes Finney, Jr., then President of the National Bar Association, when he testified against the adoption of bar passage as a bright-line standard in 2007. “If Proposed Interpretation 301-6 is adopted,” he said, “law schools whose mission is to increase the diversity of the profession by providing access to historically underrepresented groups will be required to choose between their mission and the reality that every African-American applicant they admit, will, on average, push them further out of compliance with the standards.”⁴

The importance of historically black law schools cannot be overstated. Gary S. Rosin, who has compiled statistics on historically black schools, reports that “for Fall 2005 through Fall 2009, even though students at the six HBLSs represented only 2.0% of entering classes, as a group, those students represented 16.3% of Black/African-American entering students, as a group. Within the jurisdictions in which they are located, HBLSs represented a much greater portion of Black/African-American law students—from 25.9% to 63.6% of students entering law schools in each jurisdiction.”⁵ Professor Rosin concludes that “bar passage concerns have already adversely affected Black/African-American enrollment in these schools. Raising the minimum Bar passage rate requirements would only accelerate that trend.”⁶

It is bad policy to have a bar passage standard that penalizes schools that admit and educate students who will diversify the bench and bar. Indeed, the only fair evaluation of law school success related to bar passage would compare the predicted success of the enrolled students on the bar exam to the actual success of the law school’s graduates. If bar passage is a valid measure of law school competence, a law school whose students are predicted to pass the bar at 98% but which routinely only achieves 90% should be scrutinized, notwithstanding the seeming success of its students in passing the bar, but that kind of scrutiny is not part of the proposed standard. Any bright-line bar pass rate standard punishes law schools that undertake the crucial work of improving the profession by identifying talented future lawyers on grounds other than their preexisting expertise as standardized test takers. SALT thus continues to recommend that there be no bright-line bar passage rate. However, if the SRC decides to retain a bright-line standard, SALT strongly opposes any increase in the bar passage requirements beyond those already in place.

reports that for the Fall 2010 entering classes, the 2012 Official Guide presents a much starker picture for Black/African-American share: three out of six below 50%, two in low 50% range, and only Howard with strong numbers: DC: 31.0%; Florida A&M: 45.5; Howard: 76.4%; NC Central: 51.7%; Southern: 53.4%; TSU: 35.5%.

⁴ Available at <http://www.floridabar.org/DIVCOM/JN/JNNews01.nsf/Articles/AC40CF791930F8B78525730100703A13> (last visited March 25, 2011). Mr. Finney cited studies by Professor William Wesley Patton and by the NBA Law Professor Division.

⁵ See Gary Rosin’s May 2011 submission to Standards Review Committee entitled Endangerment of HBLS at fn. 3 *supra*.

⁶ <http://uberlaw.net/LawNumbers>

For these reasons, SALT respectfully urges the SRC to consider eliminating a bright-line bar pass requirement, or in the alternative, to retain the present requirements for bar passage by a law school's graduates as the SRC has proposed to do in draft Standard 303. Any increase in the requirements for first time and ultimate bar passage threatens to further erode the progress that has been made in diversifying the bench and bar, a goal that the ABA has enthusiastically supported and worked to achieve.

Submitted on behalf of the Society of American Law Teachers by

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