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Council of the ABA Section on Legal Education and Admissions to the Bar
321 N. Clark Street, 21st Floor
Chicago, IL 60604
By Email

Re: Comments on Proposed Revisions to Standard 316

Dear Council:

We write on behalf of the Society of American Law Teachers (SALT) regarding the proposed amendments to Standard 316 of the *ABA Standards and Rules of Procedure for Approval of Law Schools*, the bar passage accreditation standard. The proposal simplifies Standard 316 to a single criterion: “at least 75 percent of a law school’s graduates in a calendar year who sat for a bar examination must have passed a bar examination administered within two years of their date of graduation.”¹

While the proposed standard’s simplicity has appeal, unanswered questions remain about how the standard will work, especially in view of the recent worrying declines in the rate of bar passage in many states and for many schools. We urge the Council to consider the questions we raise below before adopting the standard to ensure it works fairly and appropriately. As we also note, we continue to have fundamental concerns about the limitations of the current system of licensing lawyers through the bar exam and the unfortunate ways in which Standard 316 affects law school admissions and pedagogy.² Removing the flexibility in the current standard may well exacerbate those problems. We urge the Council to use the discussion of Standard 316 as an opportunity to raise and address those broader issues as well.

¹ Currently, schools are in compliance with Standard 316 if (1) 75% of those taking a bar exam in a given year pass the exam; or (2) 75% of those taking a bar exam in three of the last five years pass the exam; or (3) in three of the last five years, a school’s first time bar passage rate is no more than 15 points below the average first-time bar passage rates for graduates of ABA approved law schools taking the bar exam in those same jurisdictions.

² SALT’s concerns about the bar exam were first set forth in *Society of American Law Teachers’ Statement on the Bar Exam*, 52 J. OF LEGAL EDUC. 446 (2002). Although that article was written almost 15 years ago, neither the fundamental approach of the bar exam, nor SALT’s concerns, have changed. The adoption of the UBE in some states has only exacerbated the fundamental problems by more heavily weighting the multiple-choice portion of the test and by overemphasizing speed as a factor.

The most serious question that needs to be addressed is how the adoption of a single national standard requiring 75% of a law school's graduates to pass the bar within two years, and the elimination of the option of showing first-time bar passage at a rate no more than 15 points below the state average, will impact schools in states that consistently have an annual pass rate below 75%. For reasons we explain below, we believe the proposed standard should not be enacted until more data exists to ensure that this national standard will not inadvertently disadvantage schools in states with overall low bar pass rates.

Data for 2015 from the National Council of Bar Examiners (NCBE) indicates that “first time takers from ABA-approved law schools” in 21 states plus the District of Columbia had overall bar pass rates under 75%, so the concern is a real one. The generally available data about bar passage focuses on first-time test-takers or on results from a single administration of the exam, not on ultimate pass rates. Aggregate data on repeat takers shows that nationally in 2015, only 38% of those from ABA approved schools who re-took the exam passed it. While the data tells us that pass rates decline with repeat administrations of the exam, the data does not indicate eventual pass rates for repeat takers. While the NCBE has provided the Council with information about the persistence of test-takers (how many continue taking the exam after two years), the data does not provide information about the success rate for students who fail initially. Thus, neither the ABA Standards nor the NCBE data has focused on ultimate pass rate for cohorts of students, so no one knows whether ultimate pass rates for schools in states with consistently lower pass rates would meet the proposed single standard. We hope the Council will request that both the NCBE and individual schools compile data on test-takers' eventual pass rates in sample states to determine the impact of the proposed rule before adopting it to ensure that the rule does not inadvertently disadvantage those schools whose students take exams in states with low overall pass rates.

The uncertainty about the effect of the proposal is exacerbated by the recent significant and the inadequately-explained declines in bar passage rates in many states and for many schools and by the uncertain impact of the recent adoptions of the Uniform Bar Exam (UBE). The impact of the UBE on bar passage rates has not been studied, although we do know that bar pass rates fell in states administering the UBE for the first time, as have national rates on the MBE. Law schools in states that have recently adopted the UBE are adjusting to the test, including making changes in their curricula to correspond to the new subject areas.³ It may be better to continue with the flexibility included in the current standard rather than impose a more stringent requirement while the results of the UBE on bar passage remain uncertain.

In a time of continuing bar pass rate decline—including the most recently reported results from February 2016—we are concerned as well, about the impact the proposed standard may have on law schools' willingness to provide opportunities to students who perform less well on standardized tests such as the LSAT. Despite questions about the LSAT's predictive value for any given student when it comes to law school performance and bar passage, LSAT scores are one of the few data points schools have when deciding whom to admit to law school. If the new

³ For example, law schools in New York are altering their coverage of subjects like Trusts & Estates and Business Organizations because the UBE, adopted in New York in July 2016, tests uniform laws that are quite different from NY state-specific law.

standard is more difficult for schools to satisfy, or if schools worry that it will be more difficult to satisfy given declining bar passage rates, will schools rely even more heavily on LSAT scores in their admissions process? What impact will this have on the admission of students from diverse, economically disadvantaged, and non-traditional backgrounds? What impact will this proposed change have on the overall diversity of the bench and bar? These are important questions to address before making this change.

Although less significant in terms of impact, we also note that there may be a disjunction between the data on persistence (which focuses on how many times a graduate takes the bar exam) and the proposal (which focuses on how many opportunities a graduate has to take the bar within two years of graduation). If the intent is to allow for up to four administrations of the exam for any individual student, as suggested in the explanation accompanying the proposal, the standard as drafted may not capture that intent. Students may not take the bar in four consecutive administrations, or may not take the bar exam that is offered immediately after their graduation, so a standard that requires “at least 75 percent of a law school’s graduates in a calendar year who sat for a bar examination [to have] passed a bar examination administered within two years of their graduation date” may not work as envisioned. These issues may or may not affect a law school’s compliance with the proposed standard, but the way in which the proposal would operate should be clarified and the effects on accreditation should be understood.

In addition to the unanswered questions about the direct impact of the new standard, we urge the Council also to consider its potential indirect impacts on the course of legal education. The bar exam pass rate standard is the only bright-line accreditation standard with respect to student learning outcomes. Will this new standard, which focuses on a 75% bar exam pass rate, have consequences with respect to what law schools teach and how they assess? By eliminating the leeway for schools in states with historically low pass rates, the standard may lead these schools to focus on bar-type courses for their students and limit the growth of experiential learning, despite the emphasis on experiential and skills-oriented learning that recently adopted accreditation standards seek to encourage. The new learning outcome accreditation standards encourage schools to think broadly about preparing students for law practice. Will a strict 75% pass rate cause schools to focus on traditional outcomes tested by the bar exam, rather than to think expansively about learning outcomes related to skills development, access to justice, and cultural competence?

Whatever the Council decides with respect to the standard itself, we urge the retention of the list of factors that may be taken into account as “good cause” for extending the period the law school has to demonstrate compliance with the standard. While those factors, and others, would likely still be relevant to determinations by the Accreditation Committee of the consequences of failing to meet the bar passage standard, it is important to be transparent about the circumstances that might constitute good cause. The lengthy list of factors in the current standard contains thoughtful and helpful suggestions for considering the complex reasons why a law school may be failing to meet the standard but nonetheless be on a path to compliance. They should be retained to continue to provide guidance for both law schools and the Accreditation Committee as they respond to concerns about bar passage rates.

The questions raised here focus primarily on the immediate effect of adopting the proposed new standard. There are broader, more systemic issues raised by the nature of the traditional bar exam, however. The current proposal to amend the accreditation bar pass standard provides an opportunity for the Council, the academy, and the legal community to engage in a more extensive and much-needed discussion about law licensing reform and to discuss licensing methods that better measure lawyer competence rather than merely to tinker at the edges of an accreditation standard that entrenches the current inadequate licensing regime. It is increasingly recognized that the traditional bar exam is an inadequate licensing measure because it tests a narrow range of lawyering skills and tests those skills in ways unrelated to law practice. Some states have attempted to address the disconnect between the bar exam and law practice with alternative licensing requirements designed to ensure newly licensed lawyers possess a broader range of competencies than those tested by bar exams. Recognizing the need to better prepare law students for 21st-century practice, legal education, accreditation standards, and some states' licensing schemes have significantly changed. While the academy moves forward, the fundamental bar exam format and content remain static. Should the Standards focus exclusively on passage of the traditional bar exam or should they look also to the new licensing schemes that are developing in recognition of the fact that the existing bar exam fails to adequately measure minimum competence to practice law?

In sum, as Standard 301 provides, law schools have obligations to prepare students “for admission to the bar and for effective, ethical and responsible participation in the profession” and not to admit students whom they cannot successfully prepare to pass the licensing exam. The accreditation standards certainly should help ensure that law schools fulfill those obligations. However, the proposed amendment to the current bar examination standard may have substantial unintended consequences. SALT urges the Council to consider the questions raised here before adopting the proposal.

Thank you for this opportunity to participate in the discussion of this important aspect of law school accreditation. We would be happy to respond to any questions the Council has about the comments we offer here.

SUBMITTED ON BEHALF OF THE SOCIETY OF AMERICAN LAW TEACHERS BY



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Co-President



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