

American Bar Association
Section of Legal Education and Admissions to the Bar
Standards Review Committee

CHAPTER 3
Interpretation 301-6

DRAFT FOR April 2011 Meeting

Redline to Standards

Interpretation 301-6

A. A fully approved law school's bar passage rate shall be sufficient, for purposes of Standard 301(a), if the law school demonstrates that it meets any one of the following tests:

1) That for students who graduated from the law school within the five most recently completed calendar years:

(a) ~~75~~ 80 percent or more of these graduates who sat for the bar passed a bar examination, or

(b) in at least each of three of these calendar years, ~~75~~ 80 percent of the students graduating and sitting for the bar have passed a bar examination.

[Comment: The change from 75% to 80% reflects the Subcommittee's proposal and affirmative discussions at January's meeting. There is no narrowing of the five year window because of the belief that a five year window is necessary to help equalize "difficult bar jurisdictions" with easier jurisdictions.]

In demonstrating compliance under sections (1)(a) and (b), the law school must report bar passage results from as many jurisdictions as necessary to account for at least 70% of its graduates each year, starting with the jurisdiction in which the highest number of graduates took the bar exam and proceeding in descending order of frequency.

[Comment: for this draft, there is no change yet to the requirement that data must be collected on 70% of graduates. We are awaiting statistical analysis from experts who may guide us on whether, and how, to change this requirement.]

2) That in at least each of three or more of the five most recently completed calendar years, the law school's annual first-time bar passage rate in the jurisdictions reported by the school is no more than ~~15~~ 10 points below the average first-time bar passage rates for graduates of ABA-approved law schools taking the bar examination in these same jurisdictions.

[Comment: The change from no more than 15 points to no more than 10 points reflects

the Subcommittee's proposal and affirmative discussions at January's meeting to strengthen the Standard.]

In demonstrating compliance under section (2), the law school must report first-time bar passage data from as many jurisdictions as necessary to account for at least 70 percent of its graduates each year, starting with the jurisdiction in which the highest number of graduates took the bar exam and proceeding in descending order of frequency. When more than one jurisdiction is reported, the weighted average of the results in each of the reported jurisdictions shall be used to determine compliance.

[Comment: For this draft, there is no change yet to the requirement that data must be collected on 70% of graduates. We are awaiting statistical analysis from experts who may guide us on whether or how to change this requirement.]

B. When seeking full approval, a provisionally approved law school's bar passage rate shall be sufficient, for purposes of Standard 301(a), if the law school demonstrates that it meets one of the following three tests:

1). That for students who graduated from the law school *since provisional approval was received*, at least 75 percent of these graduates who sat for a bar examination have passed a bar examination prior to the time in which the school is considered by the Council for full approval. (301-6(A)(1)(a)).

OR

2). That in each of at least *two* calendar years since the law school received provisional approval, at least 75 percent of the graduates who took a bar examination in those same years have passed a bar examination prior to the time in which the law school is considered by the Council for full approval. (301-6(A)(1)(b)).

OR

3). In each of at least *two* calendar years since the law school received provisional approval, the school's annual *first-time* bar passage rate in the jurisdictions reported by the law school is no more than 15 points below the average first-time bar passage rates for graduates of ABA-approved law schools taking the bar examination in these same jurisdictions. (301-6(A)(2)).

[Comment: Section B is language taken from the Commentary of 301-6, and which has been treated as a Standard. Based on full Committee discussions in January, it appears that the Committee would like to continue to offer shortened timeframes for provisional law schools seeking full approval.]

B. C. A law school shall be out of compliance with the bar passage portion of 301(a) if it is unable to demonstrate that it meets the requirements of paragraph A (1) or (2) or B (1), (2), or (3).

[Comment: The addition of the underlined language reflects the inclusion of provisional school rules.]

€. D. A law school found out of compliance under paragraph C and that has not been able to come into compliance within the two year period specified in Rule 13(b) of the Rules of Procedure for Approval of Law Schools, may seek to demonstrate good cause for extending the period the law school has to demonstrate compliance by submitting evidence of:

[Query: Does a provisionally approved law school that fails to meet 301-6 also have two years to come into compliance in the same way that fully approved law schools have that opportunity under Rule 13(b)? Or are provisionally approved law schools that fail to meet a standard governed by different DOE regulations?

(i) The law school's trend in bar passage rates for both first-time and subsequent takers: a clear trend of improvement will be considered in the school's favor, a declining or flat trend against it.

(ii) The length of time the law school's bar passage rates have been below the first-time and ultimate rates established in paragraph A: a shorter time period will be considered in the school's favor, a longer period against it.

(iii) Actions by the law school to address bar passage, particularly the law school's academic rigor and the demonstrated value and effectiveness of its academic support and bar preparation programs: value-added, effective, sustained and pervasive actions to address bar passage problems will be considered in the law school's favor; ineffective or only marginally effective programs or limited action by the law school against it.

(iv) Efforts by the law school to facilitate bar passage for its graduates who did not pass the bar on prior attempts: effective and sustained efforts by the law school will be considered in the school's favor; ineffective or limited efforts by the law school against it.

(v) Efforts by the law school to provide broader access to legal education while maintaining academic rigor: sustained meaningful efforts will be viewed in the law school's favor; intermittent or limited efforts by the law school against it.

(vi) The demonstrated likelihood that the law school's students who transfer to other ABA-approved schools will pass the bar examination: transfers by students with a strong likelihood of passing the bar will be considered in the school's favor, providing the law school has undertaken counseling and other appropriate efforts to retain its well-performing students.

(vii) Temporary circumstances beyond the control of the law school, but which the law school is addressing: for example, a natural disaster that disrupts operations or a significant increase in the standard for passing the relevant bar examination(s).

(viii) Other factors, consistent with a law school's demonstrated and sustained mission, which the school considers relevant in explaining its deficient bar passage results and in explaining the school's efforts to improve them.

APPENDIX 3: COMMENTARY ON INTERPRETATION 301-6

(Commentary approved by the Council of the Section of Legal Education and Admissions to the Bar, February 2008.)

Interpretation 301-6 establishes **several** alternatives under which a law school can demonstrate compliance with Standard 301(a) as it relates to bar passage. Compliance may be demonstrated under **any** of these alternatives.

A. Demonstrating Compliance with 301-6(A)(1)(a) and (b)

The first listed alternative for demonstrating compliance focuses on **repeat-takers**, within a five-year look-back period, for purposes of establishing compliance. In demonstrating compliance under (A)(1)(a) and (b), the school must first account for at least 70 percent of its graduates each year, starting with the jurisdiction in which the highest number of graduates took the bar exam and proceeding in descending order of frequency. Under this alternative a school can demonstrate compliance with the bar exam passage portion of Standard 301(a) by demonstrating *either*:

that for the most recently completed five **calendar** years, 75% or more of the school's students who graduated during this period and sat for a bar exam, passed a bar exam [301-6(A)(1)(a)];

OR

by showing that for each of at least three of those same five calendar years, 75% or more of the school's students who graduated during those years and sat for a bar exam, passed a bar exam. [301-6(A)(1)(b)].

Again, under both alternatives, the school must first report bar passage results from as many jurisdictions as necessary to account for a cohort of at least 70 percent of its graduates and then, within that cohort, pass at a rate of 75 percent or better over the entire five calendar years or 75 percent for each of at least three of those years. In addition, under both of these alternatives, the look-back period is the five most recently completed calendar years. Thus, in a matter before the Accreditation Committee in 2008, the look-back period would be 2003-2007.

As noted above, for purposes of demonstrating compliance under 301-6(A)(1),

the performance of **repeat-takers** of the bar exam is taken into account. This alternative is responsive to third-party comments that noted that bar exam pass rates for many of their students increase significantly on the second (or, possibly, subsequent) testing. To avail itself of the alternative methods for demonstrating compliance in 301-6(A)(1), a law school would be required to “track” its graduates and provide reliable data indicating a graduate’s bar exam pass status. Schools must make their best efforts to locate and provide reliable data on the bar pass status of their graduates, starting with the jurisdiction in which the highest number of graduates took the bar exam and proceeding in descending order of frequency until *at least* 70 percent of the school’s graduates in the relevant time period are accounted for. A school may provide data on additional jurisdictions (i.e., beyond 70 percent) but must continue to do so from highest number of takers to lowest number of takers. (For example, suppose in reporting 70 percent of takers a school is not in compliance but by showing data on 80 percent of takers it would be in compliance. The school may do this as long as the additional jurisdictions included are a continuation of the descending order of frequency of takers.) Schools must report on all students that make up the “at least 70 percent” cohort (even those for whom their pass status is unknown). Once a jurisdiction is included in the computation for a given year, all of the school’s graduates taking the bar in that jurisdiction in that year must be reported, even if a student’s status is unknown and even if it results in the school reporting on more than 70 percent of its graduates taking a bar exam. A cohort of 70 percent takes into account the difficulties, expressed by several commentators, a school may experience in locating all of its graduates over a period of years, and in getting appropriate data from bar admissions authorities. Note that the Section is working actively with the National Conference of Bar Examiners (NCBE) and state Supreme Courts to develop a mechanism for improved reporting of bar passage data. Pending the implementation of such a mechanism, schools, as noted above, must make their best efforts to locate and provide reliable data on the bar pass status of their graduates when demonstrating compliance under 301-6.

The five-year look-back is a rolling time frame for both (A)(1)(a) and (A)(1)(b) – e.g., if a school came before the Accreditation Committee in 2008, the time frame would be 2003-2007; if the school was not in compliance with 301(a) at that time, and came before the Committee again in 2009, the look-back period for demonstrating compliance under 301-6(A) would be 2004-2008, and so on. Note that in reaching the 70% cohort under 301-6(A)(1), “non-persisters” (i.e., those who took a bar examination once and failed but did not take a bar examination again in *any* jurisdiction over the next two examination opportunities) are not counted; however, non-persisters must be identified and tracked separately by the school. Also, if a graduate elects never to sit for a bar examination, he or she is not counted in computing the school’s pass rate (under (A)(1) or

(2)).

B. Demonstrating Compliance with Standard 301-6(A)(2)

The next alternative [301-6(A)(2)] for demonstrating compliance with the bar exam passage portion of Standard 301(a) focuses on **annual** (i.e., combined February and July) **first-time** bar pass rates. In the case of demonstrating compliance using first-time pass rates, there is one way (discussed below) to demonstrate compliance.

In order to demonstrate compliance under A(2), a school would have to show that in each of at least three of the most recently completed five calendar years, in the jurisdiction(s) which account for at least 70 percent of the school's graduates who take the bar exam for the first time:

the school's pass rate is not more than 15 points below the first-time bar pass rate for graduates of ABA-approved law schools taking the bar exam in the same jurisdiction(s) in the relevant years.

In demonstrating compliance under sections (A)(2), the school must report first-time bar passage data from as many jurisdictions as necessary to account for *at least 70* percent of its graduates each year, starting with the jurisdiction in which the highest number of graduates took the bar exam and proceeding in descending order of frequency. Once a jurisdiction is included in the computation for a given year, *all* of the school's graduates taking the bar exam in that jurisdiction for the first time must be reported. As was noted above, a cohort of 70 percent was chosen in response to comments about the difficulties of getting data for 100 percent of a school's graduates, particularly when a graduating class may sit for the bar exam in numerous jurisdictions and the number sitting in many of those jurisdictions may be quite limited. This, too, is being addressed in discussions with NCBE and state Supreme Courts.

When 70 percent or more of a school's graduates take the bar exam in the same jurisdiction, the determination of whether this performance requirement is met is easy to compute. By way of illustration, consider the following chart reflecting hypothetical annual first-time bar exam pass rates from 2002 to 2006, for a school being reviewed in 2007 where 70 percent or more of its graduates sit for the exam in a single jurisdiction.

Year	School's Annual 1st Time	ABA 1st Time	Rate Difference
2002	73	79	(-6)*

2003	63	81	(-18)
2004	70	77	(-7)*
2005	67	84	(-17)
2006	71	78	(-7)*

In each of the three years marked by asterisks, the school's annual (combined February/July of the same year) first-time bar pass 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 the same jurisdiction. Hence, under 301-6(A)(2) the school would be in compliance with the bar pass portion of 301(a).

For some schools, however, graduates may sit for the bar exam for the first time in a variety of jurisdictions, and the percent taking the bar exam in any one jurisdiction may be less than 70 percent of the cohort. In this situation 301-6(A)(2) requires the school to report first-time bar passage data from as many jurisdictions as necessary to account for *at least* 70 percent of its graduates, starting with the jurisdiction in which the highest number of graduates took the bar exam and proceeding in descending order of frequency. The **weighted average** of the results in each jurisdiction will be applied to determine whether a school complies with the Standard. The following illustrations demonstrate how 301-6(A)(2) would work in this circumstance.

Illustration 1: Assume a school had 250 graduates in a given year who took the bar exam for the first time, 90 in State A, 45 in State B, 45 in State C, 30 in State D, and the other 40 scattered in multiple jurisdictions. The 90 from State A represent 36% of the graduates. The additional 45 each from States B and C would bring the number of graduates taking the bar in these three states to 72% of the graduates (180 of 250, or 72%). Thus, this school would have to report the bar exam pass data for its graduates taking the exam in States A, B, and C, but not for those taking the bar exam in State D or other jurisdictions.

In order to measure compliance with the performance requirement of 301-6(A)(2), the Interpretation requires a comparison of the weighted average first-time pass rate for the 180 graduates of this school who took the bar exam in States A, B, and C, with the comparable weighted average of the overall first-time pass rate for graduates of ABA-approved law schools in the same three states. The following table for 2006 illustrates how the weighted averages for the school and for the states would be calculated.

Illustration 1:

Year = 2006

	State A	State B	State C	Weighted Average
Weighted average				
# takers from school	90	45	45	
% takers from school	50	25	25	
# passers from school	81	27	18	
Pass rate for school	90%	60%	40%	
Weighted average for school	45%	15%	10%	70%
ABA pass rate for states	90%	80%	60%	
Weighted average for states	45%	20%	15%	80%

The weighted average for the school is calculated by taking the pass rate for the school in the three states and weighting it in proportion to the number of students taking the bar exam in the three states. Here, of the 180 graduates taking the bar exam in these three states, 50% took the exam in State A, 25% took the exam in State B, and 25% took the exam in State C. So, by multiplying the pass rate for the school in each state by its proportional weight, and adding those results together, one arrives at a weighted average pass rate of 70 percent for graduates of the school who took the bar exam in these three states.

The school can demonstrate compliance under 301-6(A)(2) by showing that it is no more than 15 points below the overall first-time taker pass rates for graduates of ABA-approved law schools in these states (i.e., in the example above, states A, B and C) using the same weighted average formula. Using the hypothetical data in the example above for 2006, in order to compare the 70% pass rate for the school's graduates with the performance of all first-time takers from ABA-approved law schools in these three states, one must take the overall first-time taker pass rates for graduates of ABA-approved schools in these states and calculate a weighted average, based on the same weighting applied to determine the school's weighted average pass rate. So, by multiplying the overall pass rate in each state by the proportional weight determined by looking at the number of the school's graduates who took the exam in each state (here, 50%, 25%, and 25%), and adding those results together, one arrives at a weighted average pass rate of 80 percent for all first-time takers from ABA-approved law schools in these three states.

Since, for this hypothetical year, the school's weighted average for its graduates taking the bar in these three states is not more than 15 points below the first-time ABA

weighted average for these same states, the performance requirement would be met for this year. Compliance with 301-6(A)(2) would be determined by doing a similar calculation for the most recently completed five calendar years, to ascertain whether the school could meet the “not more than 15 points below” standard in each of at least three of those five years.

Illustration 2: Assume a school had 100 graduates in a given year who took the bar exam for the first time in several jurisdictions, 50 in State A, 20 in State B, and the other 30 in several other states (none with more than 20, or that state would be number two on the list). The 50 from State A represent 50% of the graduates. The additional 20 from State B bring the number of graduates taking the bar exam in these two states to 70% of the graduates. Thus, this school would have to report the bar pass data for its graduates taking the bar exam in States A and B, but not those taking the bar exam in other jurisdictions.

Assume the following first-time bar pass data for the graduates of this school in State A and B, and for all takers in States A and B.

Illustration 2

Year = 2005

	State A	State B	Weighted Average
# takers from school	50	20	
# passers from school	40	8	
Pass rate for school	80%	40%	
Weighted average for school	57.1%	11.4%	68.6%
ABA pass rate for states	80.0%	70.0%	
Weighted average for states	57.1%	20.0%	77.1%

The passing rate for graduates of the school in State A is identical to the state-wide passing rate. By comparison, the passing rate for the school in State B is 30% below the statewide passing rate. However, only two in seven graduates of this school who took the bar exam in either of these two states elected to take it in State B. So, the weighted average pass rate for the graduates of this school who took the bar in these two states is 5/7^{ths} (.71430) weighting to the pass rate in State A, and 2/7^{ths} (.28572) weight to the pass rate in State B. And, similarly, when comparing the school’s graduates in these two states

to the overall performance of test takers in these two states, the pass rate for State A is given 5/7th weight, and the pass rate for State B is 2/7th weight. Thus, the weighted average for graduates of this school taking the bar exam in States A and B is 68.6%, and the weighted average for all takers in these two states is 77.1%.

Since, for this hypothetical year, the school's weighted average for its graduates taking the bar in these two states is "no more than 15 points below" the weighted average for these three states, the performance requirement would be met for this year. Again, compliance with 301-6(A)(2) would be determined by doing a similar calculation for the most recent five year period, to ascertain whether the school could meet the not more than 15 points below standard in each of at least three of those five years.

C. Provisional Schools Seeking Full Approval – Application of Interpretation 301-6

The application of Interpretation 301-6 to provisionally approved schools seeking full approval tracks that of fully-approved schools: the cohort size (70 percent) is the same, the first-time pass rate (not more than 15 points below . . .) is the same, and the ultimate pass rate (at least 75 percent . . .) is the same. The one area where there is some difference in application is with respect to the time periods covered when a provisional school applies for full approval. Thus, when a provisionally approved school applies for full approval, the application of 301-6 necessarily takes into account the fewer number of bar exam sittings these schools have in order to demonstrate full compliance with the bar passage portion of Standard 301(a).

Interpretation 301-6 sets out three different ways for a school to demonstrate compliance with the bar passage portion of Standard 301(a). In applying for full approval, a provisionally approved school may demonstrate compliance under *any* of the three tests. As applied to provisionally approved schools seeking full approval, the three tests would work as follows:

1). That for students who graduated from the law school *since provisional approval was received*, at least 75 percent of these graduates who sat for a bar examination have passed a bar examination prior to the time in which the school is considered by the Council for full approval. (301-6(A)(1)(a)).

OR

2). That in each of at least *two* calendar years since the school received provisional approval, at least 75 percent of the graduates who took a bar

examination in those same years have passed a bar examination prior to the time in which the school is considered by the Council for full approval. (301-6(A)(1)(b)).

In demonstrating compliance under either of the above requirements, the school must report bar passage results from as many jurisdictions as necessary to account for at least 70% of its graduates each year, starting with the jurisdiction in which the highest number of graduates took the bar exam and proceeding in descending order of frequency. Non-persisters (i.e., those who took a bar examination once and failed but did not take the bar examination again in *any* jurisdiction over the next two examination opportunities) must be identified as such but are not factored in when determining compliance under either of the two tests above.

OR

3). In each of at least *two* calendar years since the school received provisional approval, the school's annual *first-time* bar passage rate in the jurisdictions reported by the school is no more than 15 points below the average first-time bar passage rates for graduates of ABA-approved law schools taking the bar examination in these same jurisdictions. (301-6(A)(2)).

To demonstrate compliance under this test, the school must report first-time bar passage data from as many jurisdictions as necessary to account for at least 70 percent of its graduates each year, starting with the jurisdiction in which the highest number of graduates took the bar exam and proceeding in descending order of frequency. When more than one jurisdiction is reported, the weighted average of the results in each of the reported jurisdictions shall be used to determine compliance. (The application of weighted average is discussed elsewhere in the Commentary.)

Under all of the above tests, only those who graduated *after* the school received provisional approval are counted. Thus, if a school received provisional approval in February 2008, only those who graduated and took a bar exam after that date would be tracked and reported by the school. In determining "calendar" years, if the first opportunity for a school's graduates to take the bar from a provisionally approved school is in July, then that would count as the first calendar year. Subsequent calendar years would, of course, include the entire January – December period. Note that schools that receive full approval undergo a site visit three years after this approval and at that point they must meet the five-year look-back as set out in 301-6.

D. Noncompliance Under 301-6 (B) and (C)

A school that is unable to demonstrate compliance under any of the tests set out in 301-6 (A), after having had an opportunity to do so, will be found out of compliance with Standard 301(a). If a school is found to be out of compliance with Standard 301(a) (or any other Standard), Rule 13(b) of the *Rules of Procedure for the Approval of Law Schools*, provides that a school has two years to demonstrate compliance unless the Accreditation Committee or Council “extends the period for demonstrating compliance for good cause shown.” This two-year limitation is mandated by DOE regulations (34 CFR 602.20). If a school fails to demonstrate compliance with a Standard within two years (unless the time for achieving compliance is extended for good cause) the Accreditation Committee must recommend to the Council that the school be removed from the list of accredited law schools.

If a school is found out of compliance for two years, 301-6 (C) provides that a school may seek to demonstrate good cause for extending the period for coming into compliance. 301-6 (C) (i – viii) provide guidance to schools as to how they may be able to demonstrate good cause. Note that a good cause extension is not automatic nor is it indefinite in its duration.

301-6 (C) sets out the types of evidence the school may use to seek to demonstrate “good cause” for extension of time to come into compliance with the bar passage portion of Standard 301(a). Examples of this evidence include: the trend (up or down) in the school’s bar passage rates; the length of time the school’s bar passage rate has been marginal or poor; effectiveness and value of the school’s academic support and bar preparation programs; and efforts by the school to facilitate bar passage of its graduates who were unsuccessful in their attempts to pass the bar in previous attempts. This last example—the school’s efforts to facilitate bar passage of its graduates who were unsuccessful in previous attempts—warrants additional comment. Schools that rely on second or subsequent bar pass rates in order to demonstrate compliance with the bar pass portion of Standard 301(a) must not only track their graduates but they may also be asked to provide information regarding post-graduation support programs they offer to their graduates who are unsuccessful in their first attempt to pass the bar.

While not part of proposed Interpretation 301-6, Rule 27 of the *Rules of Procedure for Approval of Law Schools* permits the Accreditation Committee and Council to require a school to report-back on its bar passage status. Thus, if a school were otherwise in compliance but was near noncompliance or had shown a pattern of decline

in bar exam passage results, the Accreditation Committee or Council may require the school to report back so that the school's continued compliance can be tracked.

This Interpretation will be reviewed following issuance of the report from the Special Committee on Outcome Measures and assessment of that report by the Council. In addition, the Council will direct the Accreditation Committee to report by February 2009 on the impact of 301-6 on law schools.