

MEMORANDUM

TO: Standards Review Committee

FROM: Subcommittee on Bar Passage and Interpretation 301-6
Margaret Barry
Catherine Carpenter (chair)
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DATE: December 20, 2010

RE: Reexamination of Current Bar Passage Requirements: A Progress Report

I. Introduction: Where we were at November's Meeting

This memorandum serves as a follow-up to our November 2, 2010 memo regarding reexamination of current bar passage requirements. At that time, the Subcommittee on Bar Passage identified two possible approaches to the treatment of bar passage in the Standards. One approach would continue the bright-line, independent compliance requirement embodied in Interpretation 301-6, with possible modifications to some of the criteria. The other approach would treat bar passage as "one of several factors" to be considered when assessing Standard 301. Although the list of other factors had not yet been determined, the Subcommittee believes that this list would ultimately include outcome measures that are being formulated by the Bahls subcommittee.

The benefit of the "one of several factors" approach would place bar passage in an equal position rather than a superior position with other outcome measurements that exist or are being developed. Without additional language or guidance in related standards, it is difficult to know whether a law school's compliance with 301-6 is intended to demonstrate compliance with Standard 301 (educational program), Standard 303 (academic support), and Standard 501(admissions).

The full Committee expressed support for both approaches at our November meeting. The Committee did hit one substantial snag in discussing bar passage as "one of several factors." Recognizing that the outcome measures approach being developed by the Bahls subcommittee is intended for phase-in several years from now, Committee members expressed concern about our treatment of bar passage until such time as the phase-in would be complete. Would the current benchmarks of 301-6 remain in effect or would we have an interim change in policy until other outcome measures are enacted and fully phased-in?

II. Where we are now: Proposal of Bar Passage as an Independent Compliance Requirement

Two factors have swayed the Subcommittee on Bar Passage to recommend that bar passage continue as an independent compliance requirement (referred to as "301-6" in this memo). First, as outlined above, significant problems arise in trying to address the gap in time between phase-in of other outcome measures and the adoption of the "one of several factors"

approach. Solutions that attempt to address the gap are likely to create confusion and additional logistical concerns.

Second, the Subcommittee believes that steps can be taken to ensure that compliance with an independent bar passage standard does not have the unintended effect of presuming compliance with overarching and related standards. Specifically, the Subcommittee endorses the actions by other subcommittees to include the following statement in interrelated standards: “Satisfying the requirements of 301-6 is not, alone, sufficient to satisfy this Standard.” (See, e.g., DRAFT Standard 501, Interpretation 501-3 (outlining factors to be considered in determining compliance with admissions requirements.) The Subcommittee intends to include this language in Interpretation 301-6.

III. Reviewing the Factors in Interpretation 301-6

A. First time Bar Passage and Ultimate Bar Passage Rates

The Subcommittee unanimously endorses retention of ultimate bar passage as a separate, and equally valid, method to determine compliance with an independent bar passage standard. Until the passage of Interpretation 301-6 in 2007, only first time bar passage data was considered when determining compliance with Standard 301. At the time Interpretation 301-6 was drafted, debate highlighted the importance of employing ultimate bar passage rates as an outcome measure. Statistics compiled for the ABA House of Delegates demonstrated that many students, including a large percentage of diversity students, who were not successful on their first attempt, ultimately passed a bar examination.¹ Scholarship emphasizes that performance in law school and on the bar examination involve a complex relationship of factors.² Relying exclusively on first time bar passage as the sole method of determining compliance has the potential to negate these important realities.

B. Other Factors to be Reviewed

Assuming the full Committee endorses a bright-line, independent compliance requirement, the Subcommittee has identified several criteria in Interpretation 301-6 for its review, including:

1. First time bar passage rate of no more than 15 points below ABA Average;
2. Ultimate Bar Passage Rate of at least 75%;
3. Window Period of 5 years;
4. Requirement of Law Schools to collect bar examination data on 70% of their graduates;
5. Only two years of required data for provisional law schools seeking full approval;
6. Further clarification and explanation of the meaning of the term “non-persister.”

The Subcommittee is mindful of the legislative history behind the structure and current thresholds of Interpretation 301-6. It appreciates the considerations and forces that helped

¹ See www.abanet.org/yld/assembly/FAQonProposedInterpretation301-6.

² What follows is only a sample of robust scholarship in the area. See, e.g., Denise Riebe, *A Bar Review for Law Schools: Getting Students on Board to Pass their Bar Exams*, 45 BRANDEIS L. J. 269, 277-279 (2007) (detailing a host of reasons for poor performance on the bar examination); Melissa J. Marlow, *It Takes a Village to Solve the Problems in Legal Education: Every Faculty Member’s Role in Academic Support*, 30 U. ARK. LITTLE ROCK L. REV. 489, 490-91 (2008) (identifying the myriad of psychological, racial, ethnic, and cultural issues affecting student learning); Judith Welch Wegner, *Reframing Legal Education’s Wicked Problems*, 61 RUTGERS L. REV. 867, 885-86 (2009) (addressing the invisible dimensions of student learning).

shape the current benchmarks of Interpretation 301-6, including the significant disparities in state bar examination cut scores and passage rates, the recognition of racial and ethnic disparities in passage rates, and the desire to foster diversity in admissions.³

As the Subcommittee explores the various components of an independent compliance requirement, it also recognizes the important role of academic support and bar readiness programs in addressing this question. Indeed, law schools recognize this point as well, as they have increased significantly their resources and efforts to develop and sustain academic support and bar readiness programs.⁴

The Standards also now reflect this understanding. As of 2007, then Standard 302, Interpretation 302-7 did not allow bar preparation courses to be counted toward minimum units required for graduation or allow law schools to demand successful completion of a bar preparation course as a condition of graduation. This provision was deleted in 2008 in response to criticism raised by law schools. The Subcommittee believes that any discussion of a bar passage standard should also include the concomitant discussion of academic support and bar readiness programs in a law school's obligation to prepare its students for admission to the bar.

We present the following issues and questions for discussion by the full committee that may assist us in our further review:

1. First time bar passage rate of no more than 15 points below ABA Average

As noted in the November 2010 memorandum, prior to 2007, the Accreditation Committee operated on an internal standard called the "70/10" first time bar passage rule (70% bar passage or no more than 10 points below ABA Average). This rule was called into question in 2007 because of its lack of transparency, but it is unclear whether there was sufficient vetting of that rule to discount it as a viable option. Would it be advantageous to return to the "70/10" rule, or 10 points below, as an explicit part of the standard rather than continue to use a bar passage rate of 15 points below ABA average, which has proved to be rather generous?

2. Ultimate pass rate of 75%

While the Subcommittee unanimously endorses the retention of ultimate bar passage as a test for compliance, it is exploring whether the ultimate pass rate of 75% is a meaningful threshold, or whether it should be raised. As reported to the House of Delegates, studies conducted by the New York Bar and LSAC demonstrate that graduates, including graduates of color, ultimately pass at a higher rate than this percentage.⁵ Should the Committee explore increasing the ultimate pass rate to a minimum of 80%, or perhaps 80% and then 85% in a two step phase-in over several years?

No matter the threshold requirement for ultimate pass rates, the Subcommittee believes that law schools bear an obligation, not only to prepare their students for admission to the bar, but to support their graduates who have not passed a bar examination. Consequently,

³ See www.abanet.org/yld/assembly/FAQonProposedInterpretation301-6.

⁴ For a thoughtful review of one school's integration of academic regulations, academic support, and bar readiness programs to improve bar passage, see Donald H. Zeigler, et al., *Curriculum Design and Bar Passage: New York Law School's Experience*, 59 J. LEGAL EDUC. 393 (2010).

⁵ *Id.*

the Subcommittee advocates additional language in any Standard related to academic support that states such an obligation.

3. Window period of 5 years

The Subcommittee is exploring whether to retain the current window period of five years or to shorten it. This issue is closely linked with whether, and to what extent, other benchmarks are raised. It may be important to maintain a five year window period if the requirements on ultimate pass rates are increased, in that the longer window would provide more opportunities for graduates to take and pass a bar examination.

4. Data collection for 70% of graduates

As noted in the November memo, data collection remains a burdensome obligation for many schools that are faced with state bars that are not forthcoming with the information, or where they are required to track graduates in five, six, or seven states in order to account for 70% of their graduates. Therefore, the Subcommittee is reviewing ways to ameliorate this burden while ensuring that a proposed substitution in data collection will continue to provide a statistically sound basis from which to evaluate bar passage (i.e. a lower percentage that would provide a benchmark statistically equal to 70% of graduates, or review of three jurisdictions with the greatest frequency of test takers.)

5. Only two years of data required for provisionally approved schools seeking full approval

The current Interpretation provides different timeframes for fully approved and provisionally approved law schools. Fully approved law schools must track at least three years of data within a five year period of time. Provisionally approved law schools need track only two years of data to seek full approval. The Subcommittee is considering whether to require the same data for provisionally approved law schools as is required for fully approved law schools. While a shortened timeframe for data collection is obviously advantageous for a law school seeking full approval as quickly as the Standards allow, there is concern that two years of data may be insufficient to present an accurate and complete picture of bar passage for a newly-approved institution.

6. The meaning of non-persister in Interpretation 301-6

The Commentary on Interpretation 301-6, Section A (ABA Standards 2009-10) defines a non-persister as one “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.” With three years of implementation to inform us, it has become clear that this definition may not adequately cover the myriad of scenarios involving graduates who take and opt out of successive bar examinations over a five year period. The Subcommittee is considering how to count those who opt out within the window time period but return to take a bar examination after two examination opportunities have passed.