

MEMORANDUM

TO: Standards Review Committee

FROM: Catherine Carpenter,
Chair Subcommittee Bar Passage – 301-6

DATE: November 2, 2010

RE: Reexamination of Current Bar Passage Requirements

The Subcommittee on Bar Passage, consisting of Margaret Barry, Tom Edmonds and Catherine Carpenter (Chair) has been charged with examining the bar passage requirement, and specifically with reexamining Standard 301, Interpretation 301-6. Following conference calls on September 22, October 13, and October 22, the Subcommittee has made a preliminary assessment of the goals and issues that implicate the bar passage requirement.

This memo offers an historical context for the current view of the bar passage requirement, outlines issues that have arisen in connection with the enforcement of Interpretation 301-6, and suggests two alternative approaches for full Committee exploration.

I. Historical Context

Prior to the adoption of Interpretation 301-6 in 2007, the ABA Standards included Interpretation 301-1, which stated, “Among the factors to be considered in assessing the extent to which a law school complies with Standard 301 are the attrition rates of the school’s students, and the bar passage and career placement rates of its graduates.”

Over the years, a test developed within the Accreditation Committee and Council that assessed compliance of the bar passage factor within 301-1. It ultimately became called the “70/10 rule.” A law school complied with the bar passage factor in 301-1 if it could demonstrate a first time bar passage rate within the home state of 70%, or no more than 10 points below the ABA-average in the home state. Two problems surfaced in connection with the use of this test. First, the test was not transparent in that the language of the Standards did not provide sufficient notice to the schools that such a test was being used as the measure of enforcement. And because the test was not transparent, a second concern was raised: whether this test was applied consistently to all law schools.

II. The Current Bar Passage Standard: Standard 301, Interpretation 301-6

In 2007, following intense discussion and debate, the Council approved a new bar passage standard and test for implementation. A brief review of this test follows.

Interpretation 301-6 is a stand-alone requirement that determines compliance of bar passage. (See Standard 301, Interpretation 301-6, B. “A 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)).

Under the current model, there are two ways to prove compliance under 301-6: First Time Bar Passage Results and Ultimate Bar Passage Results. Each provides a legitimate method of compliance. The timeframe for reporting data for fully approved law schools is the five years prior to the site visit. Provisionally approved law schools have a modified version this timeframe (see 2009-10 ABA Standards and Rules of Procedure, Appendix 3, Part C.)

A. First time Bar Passage Results

Schools may prove compliance under 301-6 if, in three or more of the last five years, the annual first-time bar passage rate is no more than 15 points below the state ABA average. In tracking this, schools must account for at least 70% of its graduates each year, starting with the jurisdiction with the greatest frequency.

B. Ultimate Bar Passage Results

Schools may also prove compliance using ultimate bar passage results under one of two ways. First, within a total of five years previous years, at least 75% of the graduates who sat for a bar examination have passed one, or in each of at least three of the last five years, 75% of graduates who sat for a bar examination have passed one.

III. Issues That Have Arisen in Connection with Enforcement of Interpretation 301-6

We have had the benefit of three years of implementation of Interpretation 301-6, and it has become increasingly clear that the current Interpretation is fraught with difficulties. The difficulties seem to fall into three categories: 1) determining the relationship of Interpretation 301-6 to Standards 301 (educational program), Standard 303 (Academic Standards) and Standard 501 (admission of students), 2) threshold requirements for bar passage compliance; and 3) issues of data collection.

A. Relationship of 301-6 to Standards 301, 303, 501

From a reading of the Standards, it is unclear how compliance of 301-6 impacts compliance of the larger issues of Standard 301, Standard 303, and Standard 501. Without additional language or guidance in related standards, a law school's compliance of the bar passage requirement in 301-6 has come to stand for compliance of Standard 301, Standard 303, and Standard 501.

B. Threshold Requirements for Compliance

In attempting to provide a bright line rule on bar passage that also fits a range of circumstances (including geographical diversity of bar examination rigor, missions of law schools, and treatment of provisionally accredited law schools) Interpretation 301-6 broadened considerably the 70/10 rule. It is seen by many as providing an extremely low threshold for bar passage compliance, and consequently, a less than meaningful compliance requirement. Coupled with the fact that compliance of 301-6 has come to suggest compliance of Standard 301, 303, and 501, the low threshold for compliance of 301-6 has a spill-over effect on the other standards.

C. Data Collection Issues

When Interpretation 301-6 was passed and law schools were required to report at least 70% of their graduates who had sat for a bar examination, the hope was that States would begin to

offer uniform and comprehensive data on bar passage. We are moving in that direction, but we are not there yet. Schools continue to report great difficulty in amassing the data on 70% of their graduates, either because graduates sit for bar examinations in a number of jurisdictions, or because some states do not provide the necessary information. Consequently, at this time, there is a significant gap between what the Interpretation requires law schools to provide and the bar passage information that law schools are given.

IV. Two Alternative Approaches to Consider

After considerable discussion, the Subcommittee has identified two fundamentally different approaches for full Committee comment. The first approach would consider bar passage as one of several factors that determines compliance of the educational program. The second approach would continue bar passage as an independent, stand-alone requirement, but with modifications to the existing Interpretation.

A. Whether to make bar passage one of several factors that illuminates Standard 301

Under this approach, bar passage would be only one of several factors considered in the totality of the circumstances to determine compliance of Standard 301. The Benefit of this approach would place bar passage in an equal position, rather than superior position, with other outcome measurements that exist or are being developed. Adopting this approach raises the important issue of commitment to transparency. It must be clear from the drafted language the relationship of bar passage to the other listed output measures and it must also be clear how compliance would be determined.

B. Whether to continue to have bar passage as an independent compliance requirement.

Under this approach, bar passage would continue to be an independent requirement. The benefit of this model is that it continues a bright line rule on bar passage. The concern raised with this model is that there may be a tendency to overemphasize bar passage as a more important output measure than others. Assuming that bar passage remains an independent requirement, the Subcommittee feels strongly that ultimate bar passage results should continue to be included as a method for determining compliance.

Questions that arise in connection with maintaining an independent bar passage requirement include the following:

1. Should we continue with the current data collection approach that requires schools to gather data for at least 70% of their graduates? Or are there other less intrusive ways to seek enough data that would meet compliance?
2. Should the threshold requirements for compliance change – either in percentages required for compliance and/or in the window period for review?
3. How best can we articulate requirements for Standards 301, 303, 501 that are separate and independent from compliance of Interpretation 301-6?