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Statement on Bar Passage Interpretation 301-6 Submitted by Society of American Law Teachers For the April 2, 2011 meeting of the Standards Review Committee

The Society of American Law Teachers submits this statement in opposition to the proposal to amend Interpretation 301-6 to make the bar passage standard more difficult to satisfy. As more fully explained below, SALT also opposes the decision to continue to treat bar passage as an independent, bright line measure for accreditation—one that must be satisfied, no matter what else the school may demonstrate regarding learning outcomes for its students.

Our position is based upon our serious concerns that: (1) retaining bar passage as a bright line measure for accreditation is inconsistent with and undermines the SRC's proposal to adopt more comprehensive learning objectives by encouraging schools and students to focus their curricular efforts too much on bar-related activities and (2) treating bar passage as a bright line measure and toughening the standard discourages schools from accepting non-traditional students and contributes to the under-enrollment of African American and other minority students in law schools.

Retaining bar passage as a bright line measure of accreditation is inconsistent with the move to adopt more comprehensive learning objectives and serves to undercut that project

SALT urges the SRC to consider bar passage rates as one, but only one, measure of a school's compliance with outcomes measures standards rather than as a stand-alone accreditation measure because the bar examination itself measures only a small portion of the knowledge, skills, and values the proposed standards recognize are critical for effective, responsible, self-reflective, and ethical entry-level lawyers. While SALT believes that schools should devote time, energy and resources to improving their students' likelihood of passing the bar examination, by retaining the measure as a stand-alone requirement the standards would suggest that the bar exam stands alone in its importance, especially because, unlike other learning assessments, there is a stark number associated with the measure. Bar examination passage rates should not be considered alone but only as part of the ABA's assessment of a school's success in achieving its articulated learning outcomes.

The SRC's Subcommittee on Bar Passage highlighted this concern in its November 2, 2010 report. At page 2, the Subcommittee stated "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." One of those reported difficulties is that "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." This problem is likely to be further compounded upon adoption of learning outcomes. The entire thrust of the proposal to move from input measures to learning outcomes is to emphasize the obligation of law schools to prepare students for the practice of law by addressing not just doctrine but also skills and values. Retaining bar passage as an independent bright line measure serves to reify bar passage and place it above the achievement of other student outcomes. Indeed, the SRC Subcommittee noted that the benefit of making bar passage only one of several factors to determine compliance with Standard 301 is that "it would place bar passage in an equal position, rather than superior position, with other outcome measurements that exist or are being developed." Although the Subcommittee ultimately proposed to retain bar passage as a bright line measure, SALT believes that the Subcommittee's acknowledgement of the benefits of treating bar passage as one of a totality of circumstances better coincides with the underlying premise of the work the SRC has done these past two years on the Outcome Measures Standards. One cannot, with consistency, say on the one hand that schools must develop curricula that better prepare students to become lawyers by exposing students to a wider range of skills and helping them understand how doctrine, skills, theory and professionalism intersect, and on the other hand, that the one thing that really matters is whether students can answer multiple choice and short essay exam questions that assess a narrow range of the knowledge and skills new lawyers need. Additionally, making bar pass rates the linchpin of accreditation has the potential to stifle innovation, pose serious resource issues, and drive curricular choices aimed at increasing bar passage rates rather than developing students' ability to integrate doctrine, skills and values. This is especially true if the SRC adopts the proposed changes to 301-6 and requires an even higher overall bar pass rate.

Given limited resources, schools will be forced to choose between devoting extra time, energy and resources to enhanced opportunities for skill development and multiple forms of experiential learning (which is what every recent report about legal education advocates and what adoption of outcome measures will require) and adding more required "core" doctrinal courses covering subjects tested on the bar exam and more extensive bar-exam-preparation-type courses. The proposal to continue to treat bar passage as a stand-alone independent compliance requirement and to make it more difficult to satisfy that requirement may have the unintended consequence of diminishing the ability of law schools to revise their curricula in ways that more comprehensively prepare students for the practice of law and that respond effectively to the new learning outcomes standards.

Finally, retaining bar passage as a bright line measure undercuts the effort to develop more and varied assessment measures in law school. While the proposal to adopt outcome measures requires schools to utilize a variety of formative and summative assessment models across the curriculum,¹ the emphasis

¹ Proposed Standard 304 states: "A law school shall apply a variety of formative and summative assessment methods across the curriculum to provide meaningful feedback to students."

on the bar exam reinforces the pressure to use timed make-or-break high stakes multiple-choice and short-essay-question exams as a way to prepare students for the bar exam. In this way, too, the proposal undermines the important work of the Outcome Measures subcommittee, and runs counter to the teachings of the Carnegie Report and Best Practices Book.

Retaining bar passage as a bright line measure and toughening the standard discourages schools from accepting non-traditional students and contributes to the under-enrollment of African American and other minority students in law schools.

When 301-6 was proposed in 2007, many individuals and groups opposed adoption on the ground that it would unjustifiably reduce the opportunities available for minorities. That danger persists today and is exacerbated by the 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 at the very rates that are being proposed today. 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 newly revised in January 2010, called "A Disturbing Trend in Law School Admissions."² That website documents the downward trend in enrollment for African American students and Mexican American students:

² Available at <http://blogs.law.columbia.edu/salt/> (last visited March 25, 2011).

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).³

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. 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, Atlanta's John Marshall and the University of the District of Columbia no longer have a majority of African American students.⁴ This was precisely the fear articulated by Linnes Finney, Jr, then president of the NBA, 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."⁵

The importance of historically black law schools cannot be overstated. Gary S. Rosin, who has compiled statistics on historically black schools, reports that "the seven historically black schools represented only 2.7% of the Fall 2005 through Fall 2009 entering classes, as a group, but 16.3% of Black, African-American entering students."⁶ Within the jurisdictions in which they are located, the historically black law schools represented from 25.3% to 63.6% of students entering law schools in each jurisdiction. Professor Rosin concludes that "bar passage concerns have already adversely affected Black/African

³ *Id.*

⁴ See <http://uberlaw.net/LawNumbers> (last visited March 27, 2011).

⁵ 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.

⁶ Gary S. Rosin, *The Importance of Historically Black Law Schools*, available at <http://uberlaw.net/LawNumbers/?p=392> (last visited March 25, 2011). The seven ABA-accredited law schools that are historically black law schools include Howard University, the University of the District of Columbia, Florida A & M, Atlanta's John Marshall, Southern University, North Carolina Central University, and Texas Southern University.

American enrollment in these schools. Raising the minimum Bar passage rate requirements would only accelerate that trend.”⁷

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 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. As drafted, the proposed revision exacerbates the problem of punishing 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.

Conclusion

For these reasons, SALT respectfully urges the SRC to treat bar passage as one of several factors that are considered in determining a school’s compliance with outcomes measure standards. Retaining bar passage as a make-or-break outcome measure undermines the effort to encourage schools to prepare their students with the knowledge, skills, and values necessary for the effective, ethical and responsible practice of law. If, however, bar passage is retained as a bright line measure of accreditation, we urge that it not be made more difficult to satisfy. Increasing 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.

⁷ *Id.*