

AMERICAN BAR ASSOCIATION
SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR
REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

- 1 RESOLVED, That the American Bar Association House of Delegates concurs in the
- 2 action of the Council of the Section of Legal Education and Admissions to the Bar in
- 3 making amendments dated January 2019 to Standard 316 (Bar Passage) of the *ABA*
- 4 *Standards and Rules of Procedure for Approval of Law Schools*.

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48 (1) The law school's trend in bar passage rates for both first time and subsequent
49 takers: a clear trend of improvement will be considered in the school's favor, a
50 declining or flat trend against it.
51
- 52 (2) The length of time the law school's bar passage rates have been below the first-
53 time and ultimate rates established in paragraph A: a shorter time period will be
54 considered in the school's favor, a longer period against it.
55
- 56 (3) Actions by the law school to address bar passage, particularly the law school's
57 academic rigor and the demonstrated value and effectiveness of its academic
58 support and bar preparation programs; value added, effective, sustained and
59 pervasive actions to address bar passage problems will be considered in the law
60 school's favor; ineffective or only marginally effective programs or limited action by
61 the law school against it.
62
- 63 (4) Efforts by the law school to facilitate bar passage for its graduates who did not
64 pass the bar on prior attempts: effective and sustained efforts by the law school
65 will be considered in the school's favor; ineffective or limited efforts by the law
66 school against it.
67
- 68 (5) Efforts by the law school to provide broader access to legal education while
69 maintaining academic rigor; sustained meaningful efforts will be viewed in the law
70 school's favor intermittent or limited efforts by the law school against it.
71
- 72 (6) The demonstrated likelihood that the law school's students who transfer to other
73 ABA approved schools will pass the bar examination: transfers by students with a
74 strong likelihood of passing the bar will be considered in the school's favor,
75 providing the law school has undertaken counseling and other appropriate efforts
76 to retain its well-performing students.
77
- 78 (7) Temporary circumstances beyond the control of the law school, but which the law
79 school is addressing: for example, a natural disaster that disrupts operations or a
80 significant increase in the standard for passing the relevant bar examination(s).
81
- 82 (8) Other factors, consistent with a law school's demonstrated and sustained mission,
83 which the school considers relevant in explaining its deficient bar passage results
84 and in explaining the school's efforts to improve them.

REPORT

The Council of the Section of Legal Education and Admissions to the Bar (Council) submits to the House of Delegates (HOD) for its concurrence the attached changes to Standard 316 of the *ABA Standards and Rules of Procedure for Approval of Law Schools*¹.

Under Rule 45.9(b) of the Rules of Procedure of the House of Delegates, the Council of the Section of Legal Education and Admissions to the Bar files a resolution to the HOD seeking concurrence of the HOD in any actions of the Council to adopt, revise, or repeal the *ABA Standards and Rules of Procedures for Approval of Law Schools*. The HOD may either concur with the Council's decision or refer the decision back to the Council for further consideration. A decision by the Council is subject to a maximum of two referrals back to the Council by the HOD. The decision of the Council following the second referral shall be final.

The amendments were approved by the Council for Notice and Comment during its meetings held on March 11-12, 2016, and June 3-4, 2016. A public hearing was held on August 6, 2016. The Council approved the amendments at its meeting on October 20-22, 2016. The changes were submitted to the HOD at the 2017 Midyear meeting in Miami. The HOD did not concur in the changes and referred the matter back to the Council. After review, gathering of data, and discussion, the Council reaffirmed its approval at its meeting on September 13-15, 2018.

The revised Standard 316 on bar exam outcomes provides a clear and straightforward statement of the bar passage rate required of a law school for the purposes of accreditation. It is clear, simple, and appropriate. It provides an ultimate pass rate for each graduating class of a law school over the two-year period following that class' graduation. First-time pass rates are important information that will continue to be disclosed under Standard 509 (Required Disclosures). However, for purposes of assessing whether a law school is operating a sound program of legal education, the revision provides that the most appropriate measure of a law school's performance is the ultimate pass rate and that a two-year period is the optimal period over which to measure that performance for accreditation purposes.

The revised Standard does not place a limit on the number of times that an individual may sit for a bar exam. The Standard never has. That is a matter for each state to determine as part of its lawyer licensing process. The Standard speaks only to the ultimate bar passage rate required of a law school for accreditation purposes.

¹ "2018-2019 ABA Standards and Rules of Procedure for Approval of Law Schools," http://www.americanbar.org/groups/legal_education/resources/standards.html.

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Features of the revised Standard:

1. The requirement of an ultimate passage rate of 75 percent remains unchanged from the requirement of current Standard 316(a)(1).
2. The period of time within which a law school must show that it has achieved a 75 percent passage rate is reduced from five calendar years to two years from the date of graduation.
3. The ability of a law school to report its ultimate pass rate based on only 70 percent of its graduates is eliminated.
4. The opportunity for a law school to satisfy its obligations under Standard 316 on the basis of its bar pass rate for first-time takers is eliminated.
5. Rule 13(c) provides for an extension for good cause shown. Current Standard 316(c) is, therefore, unnecessary and redundant.

Analysis of the revisions:

The revisions adopted by the Council do not change the basic requirement in current Standard 316(a)(1) that a law school must achieve at least a 75 percent ultimate bar pass rate. This standard is an appropriate independent accreditation requirement; it is also an important component of a set of outcomes, which are connected and relevant to the fundamental question of whether a law school's program is sound.² The other relevant and related outcomes are admissions (Standard 501), attrition (Interpretation 501-3), and academic support and program of legal education (Standards 309 and 301). There is an obvious continuum inherent in these provisions from admissions, through law school, the licensing exam.

While the ultimate passage rate (75 percent) remains unchanged in the revised Standard, the revisions do make important changes to measuring law school graduate success on the bar exam for purposes of law school accreditation:

- a. The period for demonstrating compliance is shortened from five years to two. The National Conference of Bar Examiners (NCBE) data supports this change. It shows only a small fraction of takers who fail the exam persist and retake the exam more than twice. The data that the Section has collected also supports this change, with law schools in the aggregate reporting for the year 2015 that 97 percent of graduates had taken a bar exam within two years of graduating. In the development of these revisions, some suggested that the Standard should focus on "attempts" for each graduate, rather than a pass rate over a period of time. That

² Standard 301(a) – Objectives of Program of Legal Education provides: "A law school shall maintain a rigorous program of legal education that prepares its students, upon graduation, for admission to the bar"

is also a sensible approach, but there are practical problems³ with requiring a law school to track graduates by attempts. The data gathered by the Section and the NCBE demonstrate that a two-year period captures almost all graduates and assesses their success on the bar exam. It is a fair and appropriate piece of a revised bar passage standard.

- b. The revision strikes the previous requirement that a law school needed to report on only 70 percent of its graduating class. That requirement, in large part, reflected the difficulty that many law schools reported in gathering bar exam outcomes. The data that the Section collected from law schools for 2015 graduates shows that law schools, in the aggregate, had information for 97.5 percent of graduates.⁴ The data collected show that the revision is a reasonable expectation. Full reporting is appropriate and certainly presents a more accurate picture of how a law school's graduates are doing on the bar exam.
- c. A significant change in the revised Standard is the elimination of current Standard 316(a)(2), which allows a law school to comply on the basis of first-time outcomes by showing that the law school's first-time pass rate is within 15 percentage points of the pass rate in the jurisdiction(s) where its graduates took the bar exam⁵ for three of the preceding five years. For example, if a state bar pass rate for a particular year is 75 percent, then a law school would comply for that year if its first-time pass rate was 60 percent. This change was subject to notice and comment and generated considerable discussion. The reasons for this change were discussed in depth when the Council adopted the revised Standard. While the Council appreciated and understood the concerns of those who opposed this change, after considering the arguments on both sides and in the exercise of its informed judgment, the Council concluded that this change was not only appropriate, but also was necessary. First-time pass rates will continue to be collected and reported as consumer information. Compliance with the revised Standard, however, will be based exclusively on the ultimate pass rate for a law school's graduates who sat for the bar exam.

In part, and as was true with the 70 percent reporting requirement, the "first-time taker" option was provided at the time the Standard was first put in place because of difficulties law schools reported in collecting ultimate bar pass data. First-time rates were more easily collected because they were more regularly reported by

³ E.g., continuing to track graduates over longer periods of time, coordination of data across jurisdictions.

⁴ Considered on a school-by-school basis, just eight of the 203 ABA-approved law schools reported not locating more than 10 percent of that cohort. On the other hand, more than 160 law schools reported locating at least 97 percent of their 2015 graduates. In practice, the revised Standard will require a law school to make reasonable efforts to find and report on all its graduates; law schools making reasonable efforts will not be non-complaint because a small number of graduates could not be tracked.

⁵ A weighted average is computed for a law school based on the number of graduates sitting in a jurisdiction and that jurisdiction's outcomes.

bar examiner offices to law schools. In effect, first-time pass rates served as a proxy for the eventual, overall success of a law school's graduates on the bar exam, which was the primary focus of the Standard. Recent experience confirms, however, that ultimate passage data, at least for the two-year period that is part of the revised Standard, can be gathered with reasonable efforts by law schools.

A different, more substantive reason suggested by Standard 316(a)(2) is that a relative performance standard that measured a law school's outcomes against the outcomes of other law schools on the same exam was necessary to avoid penalizing law schools located in jurisdictions with "more difficult" bar exams or where the passing (or "cut" score) on the exam was higher than the passing score on the same exam in other jurisdictions. The rise of the NCBE's Uniform Bar Exam (UBE) has exacerbated this concern, but at present it is not possible to have a bar passage standard that is based on bar exam cut scores. Further, so long as jurisdictions have the authority to determine their passing scores, graduates must obtain a score that meets whatever passing score is required in the jurisdiction where they want to practice.

Finally, the option provided by current Standard 316(a)(2) is not acceptable in some specific situations. For example, in states with one law school where the majority of bar takers are that law school's graduates, it is almost impossible for the law school's outcomes to be more than 15 percentage points below the overall state first-time bar pass rate, regardless of how low the law school's first-time pass rate might be. An appropriate standard does not simply evaluate one institution against others, it sets an acceptable minimal level of performance that a law school must meet to be approved. The revised Standard accepts that level of performance as the 75 percent passage rate that has been in the Standards for many years.

Concerns the Council heard from the HOD and others during the concurrence process on the revised Standard in February 2017:

- a. There was a concern that more information about how the revised Standard would impact particular law schools, specifically those in California, where the passing score (cut score) is comparatively high, and those law schools that are designated minority-serving institutions, particularly historically black colleges and universities (HBCU).
- b. There was a concern that the revised Standard could have a disproportionate impact on minority students and a desire for information on that topic.
- c. There was a concern law schools in California retain a "relative" standard, in light of the high cut score in California and the California Supreme Court's unwillingness to lower it.
- d. There was a concern expressed by a few law schools about a perceived burden of gathering data under the revised Standard.

- e. There were concerns that the case for changing the Standard had not been made.

Responses to the concerns:

Since, as discussed above, the Council collected substantial data following the prior HOD's consideration of this matter, responses to some of the concerns related to the data are discussed in the analysis of the data below. Several general points, however, can be made:

1. While some additional work is required for law schools to collect additional data, the effort is reasonable given the significance of the information. If anything, perhaps more data – more complete and more “micro” in nature – should be collected and reported as consumer information. Additionally, bar examiner offices and the NCBE are working to improve the delivery of bar exam outcomes to law schools in ways that will continue to ease the burden of the data-gathering effort.
2. The Standard aims to protect students and the public. It is consistent with the Council's overall responsibilities. The Standard neither aims to protect law schools nor to drive them from the market.
3. Bar passage is a fundamental outcome of a legal education program. While an acceptable bar passage rate is not sufficient, standing alone, to support the accreditation of a law school, an acceptable bar passage rate should be a necessary condition for accreditation.
4. While acknowledging that some law schools have special missions that are important, no law school can be exempted from reasonable outcomes-based requirements that aim to protect students and the public.
5. It may be difficult to establish what is a minimally “acceptable” bar exam outcome standard, but that determination must be made. The Council – comprised of lawyers, judges, academics, a student, and public members – is an appropriate body with appropriate experience and professional judgment to, after study and public comment, make the decision about what an acceptable minimum pass rate should be.
6. There is no evidence to support a conclusion that law schools would use a bar pass standard as a basis for diminishing their commitment to diversity. Standards 205 and 206 remain in place to provide the Council with the opportunity and responsibility to ensure that law schools are operating in a non-discriminatory, open, and inclusive manner.

7. Available data provide no support for a concern that the revisions to Standard 316 will disproportionately impact minority students or applicants to law school. The Standards, taken together, provide significant space for law schools to admit applicants, including minority applicants, that they believe deserve an opportunity for law study. Revised Standard 316 will work in concert with Standard 501 and Interpretation 501-3 to provide this space. Interpretation 501-3 allows a law school to have up to 20 percent non-transfer attrition without concerns about violating the Standards. Revised Standard 316 requires a law school to have at least a 75 percent ultimate pass rate. The combination of these two standards creates considerable room for a law school to provide opportunity to applicants, including minority applicants, who the law school believes are deserving of that opportunity. If there are concerns that the bar examination or the scoring of the bar examination have adverse impacts on minority graduates and on diversity in the profession, those concerns are appropriately addressed to the state supreme courts and bar admissions community. One cannot be a lawyer without passing a bar exam and the Council's responsibility as an accreditor is to ensure that students/graduates complete the J.D. program and pass the bar examination in sufficient numbers to ensure applicants, the public, and the profession that law schools are not taking undue advantage of students.

8. Rule 13(b) of the ABA Rules of Procedure for the Approval of Law Schools provides a period of up to two years for a law school to take steps to cure its non-compliance with a Standard,⁶ including Standard 316. Rule 13(c) gives the Council authority to extend that period upon request of a law school and for good cause shown. Consequently, the Council determined that the provisions in current Standard 316(c), providing for an extension of time to come into compliance, were duplicative and unnecessary.

Collection of information about ultimate bar pass rates for 2013, 2014, and 2015 graduates:

Following the HOD's non-concurrence, the Council directed the Managing Director's Office to gather data that would inform the Council and address concerns that the Council had not gathered enough data to ensure there were no unintended, adverse impacts that might cause the Council to change its mind about how any revisions should be crafted.

This was done in two steps. First, following the June 2017 Council meeting, the Managing Director's Office distributed to all ABA-approved law schools a brief, voluntary ultimate bar pass survey for 2013 and 2014 graduates based on the revised Standard. The Council received a report on that survey at its October 2017 meeting.

⁶ The two-year period is a function of the requirements of the U.S. Department of Education's recognition rules for accrediting authorities, with which the Council must comply.

Second, based in part on the success of the voluntary survey, the Council approved the gathering of consumer information on bar exam outcomes under Standard 509 in the data gathering process for the 2017-2018 year that also provides data relevant to the revisions to Standard 316. That data consisted of ultimate bar pass data for the class of 2015 (bar passage outcomes for 2015 graduates over the next two years) and first-time bar pass outcomes for the 2016 and 2017 graduating classes.

Some analysis of these data is reported below. Subsequent to the collection and publication of this data, the Council and the Managing Director's Office have widely disseminated the outcomes in order to make others aware of the data. Those educational efforts and conversations will continue up to the HOD meeting.

Responses to the Voluntary Survey

Ninety-two (92) law schools responded to the voluntary survey, which is approximately 45 percent of all law schools. They reported on 19,000+ graduates for 2013 and 17,000+ graduates for 2014, which was more than 40 percent of the total number of graduates for each of those years. The aggregate data and a list of law schools who provided data was made public, but the specific law school data was not released. A range of law schools participated – from large to small, east to west, public and private, and ranging from among the most to the least selective.

Eighty-nine (89) of the 92 participating law schools had ultimate pass rates for both 2013 and 2014 graduating classes greater than the 75 percent required by revised Standard 316. One law school did not have a 75 percent ultimate pass rate for either 2013 or 2014. Two other law schools did not achieve a 75 percent pass rate for one of the two years.

The aggregate ultimate pass rate for those who sat for a bar exam was 92 percent for 2013 graduates and 89 percent for 2014 graduates. Looking at California and HBCU law schools, which were the focus of discussion during the HOD discussion in February 2017, three of the six HBCU law schools participated. Two of them had ultimate pass rates above 75 percent and one did not achieve that outcome for one of the two years covered by the survey. Eleven (11) of the 21 ABA-approved law schools in California participated, and none reported ultimate pass rates for 2013 and 2014 graduates below 75 percent.

Ultimate Bar Passage Outcomes for the Graduating Class of 2015

In January 2018, law schools reported on ultimate bar pass outcomes for 2015 graduates for the two years after graduation. Law schools reported on as many of their 2015 graduates as they could find with reasonable efforts. In the aggregate, they reported on 97.5 percent of all graduates. In the aggregate, 97 percent of all those graduates had sat for a bar exam within the two-year period. Of that group, 88.3 percent had passed a bar examination.

Looking at the individual law school reports, 183 of the 202 law schools reported an ultimate pass rate of 75 percent or higher. Of the 19 law schools below that threshold,

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one had an ultimate pass rate of 59.75 percent and seven more law schools had rates between 60 and 69 percent. The other 10 law schools that did not reach 75 percent had ultimate pass rates in the 70-74.9 percent range. Of the six HBCU law schools, four reported ultimate pass rates of 75 percent or higher and two reported ultimate pass rates below 75 percent. Of the 21 ABA-approved law schools in California, 19 reported ultimate pass rates of 75 percent or above, and two reported ultimate pass rates below 75 percent.

First-time Bar Passage Outcomes for the Graduating Classes of 2016 and 2017

Law schools have also reported first-time bar passage outcomes for 2016 and 2017 graduates. The first-time data is an important piece of consumer information, apart from the accreditation standard on bar passage, but it also provides data on how a law school is progressing toward meeting the 75 percent threshold.

For 2016, 106 of 202 law schools met the 75 percent threshold in the first year following graduation. For the other 96 law schools, the majority had first-time pass rates in the 65-74 percent range. The 2015 ultimate pass rate data supports the position that law schools will have sufficient repeat-takers who pass or graduates who passed and had not sat for the exam in the first year following graduation to meet or exceed the 75 percent threshold after two years. There are, however, some concerning outcomes. Twenty-one (21) law schools had first-time rates for 2016 graduates below 50 percent. Of those, one is an HBCU and six are California law schools.

For 2017, the overall picture is marginally better. One hundred twenty-two (122) of 203 law schools had first-time pass rates at or above 75 percent after one year. However, there continue to be a number of law schools (15 for 2017) with first-time pass rates below 50 percent. (See <http://www.abarequireddisclosures.org/>.)

There are 11 law schools with sub-50 percent first-time pass rates for both 2016 and 2017. One is an HBCU and 4 are California law schools.

This bar passage data is publicly available on the Section's website in the Statistics section. (See <http://www.abarequireddisclosures.org/>.)

Summary and Conclusion:

Bar passage is an essential component of the accreditation requirements for law schools. The Council has identified several fundamental problems with the existing Standard: lack of full reporting of outcomes, an unnecessarily long review period, and an ineffective first-time bar pass compliance option. The revised Standard addresses these problems. Going forward, law schools will have the burden of demonstrating that their programs achieve the modest outcomes required by the revised Standard. The revised Standard appropriately protects students and the public. If bar passage rates decline, the solution is not to adapt a reasonable standard to make it more likely that law schools will comply or to continue a standard that, as it is written, allows law schools with very low pass rates to avoid the concerns of the Council and the accreditation process. Rather, the solution

is for law schools, state supreme courts, the bar examiner community, and the Council to work together to determine the cause(s) of the decline and take steps to address them.

Respectfully submitted,

Jeffrey E. Lewis
Chair, Council of the Section of Legal Education and Admissions to the Bar
January 2019

GENERAL INFORMATION FORM

Submitting Entity: American Bar Association
Section of Legal Education and Admissions to the Bar

Submitted By: Jeffrey E. Lewis, Chair

1. Summary of Resolution(s).

Under Rule 45.9(b) of the Rules of Procedure of the House of Delegates, the resolution seeks concurrence in the action of the Council of the Section of Legal Education and Admissions to the Bar in making amendments dated January 2019 to Standard 316 (Bar Passage) of the *ABA Standards and Rules of Procedure for Approval of Law Schools*.

2. Approval by Submitting Entity.

Yes. The amendments were approved by the Council for Notice and Comment during its meetings held on March 11-12, 2016, and June 3-4, 2016. A public hearing was held on August 6, 2016. The Council approved the amendments at its meeting on October 20-22, 2016. The Council reaffirmed its approval at the September 13-15, 2018 meeting.

3. Has this or a similar resolution been submitted to the House or Board previously?

Yes. This resolution was submitted to the House of Delegates at its February 2017 meeting. The House of Delegates did not concur.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

The amendments modify the existing *ABA Standards and Rules of Procedure for Approval of Law Schools*.

5. If this is a late report, what urgency exists which requires action at this meeting of the House?

Not applicable.

6. Status of Legislation. (If applicable)

Not applicable.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the

House of Delegates.

The Council will notify ABA-approved law schools and other interested entities of the approved changes to the *ABA Standards and Rules of Procedure for Approval of Law Schools*. The Council and the Managing Director's Office will prepare guidance memoranda and training materials regarding the revised Standards.

8. Cost to the Association. (Both direct and indirect costs)

Not applicable.

9. Disclosure of Interest. (If applicable)

Not applicable.

10. Referrals.

ABA Diversity and Inclusion Center (and related groups)
ABA Law Student Division
ABA Section Directors and Delegates
ABA Standing and Special Committees, Task Forces, and Commission Chairs
ABA Young Lawyers Division
AccessLex Institute
American Association of Law Libraries
Association of American Law Schools
Association of Legal Writing Directors
Clinical Legal Education Association
Conference of Chief Justices
Conference of State Delegates
Deans and Associate Deans of Law Schools
Law School Admission Council
Minority Caucus
National Association for Law Placement
National Association of Bar Executives
National Caucus of State Bar Associations
National Conference of Bar Examiners
National Conference of Bar Presidents
SBA Presidents
Society of American Law Teachers
University Presidents

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11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

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12. Contact Name and Address Information. (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)

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EXECUTIVE SUMMARY

1. Summary of the Resolution

Under Rule 45.9(b) of the Rules of Procedure of the House of Delegates, the resolution seeks concurrence in the action of the Council of the Section of Legal Education and Admissions to the Bar in making amendments dated January 2019 to Standard 316 (Bar Passage) of the *ABA Standards and Rules of Procedure for Approval of Law Schools*.

2. Summary of the Issue that the Resolution Addresses

The resolution addresses Standard 316 (Bar Passage) of the *ABA Standards and Rules of Procedure for Approval of Law Schools*. In accordance with Internal Operating Practice 8, the Council engages in an ongoing review of the Standards.

3. Please Explain How the Proposed Policy Position will address the issue

The proposals amend the 2018-2019 *ABA Standards and Rules of Procedure for Approval of Law Schools*.

4. Summary of Minority Views

At the time of this submission, the Council has not been notified by any ABA or other entity that it is opposed to this resolution. That said, and as indicated in the Report, opposition to the change to Standard 316 when it was first considered, centered principally on the following concerns: the lack of studies on how the proposed change would affect diversity and law school curricula; the lack of data on how law schools in states with low bar passage rates would be impacted; the lack of data that two years is sufficient for graduates to take a bar exam in that there is anecdotal evidence that graduates do not take the bar in consecutive administrations; and the lack of data on how the Uniform Bar Exam will affect law schools' bar passage rates.