

**SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR
AMERICAN BAR ASSOCIATION**

MEMORANDUM

To: Council
From: Barry Currier, Managing Director
Re: Standard 316 (Bar Passage)
Date: October 20, 2017

This memorandum reminds you of the history of efforts to revise Standard 316; reports on a survey of bar passage outcomes completed over the summer-fall of 2017; briefly outlines the current state of the bar pass/cut score issue in California; and sets up the discussion of next steps for the Council, which will take place at your upcoming November meeting.

Recent Standard 316 history

After considerable process, including extensive notice and comment and a public hearing, the Council approved major revisions to Standard 316 (Bar Passage) at its October 2016 meeting. The revisions were forwarded to the ABA House of Delegates for “concurrence,” as required by Rule 45.9(b) of the ABA House of Delegates Rules of Procedure and Rule 57 of the Rules of Procedure for the Approval of Law Schools.

Attached to this memorandum is the report that went to the House, which includes the prior language of the standard, the proposed changes, and the revisions adopted by the Council.

The revised standard is straightforward and simple. Compliance requires that at least 75 percent of a law school’s graduates in a calendar year who sat for a bar examination within two calendar years of the calendar year of their graduation must have passed a bar examination.

The House considered the matter at the ABA Midyear Meeting in Miami in February 2017. After debate and by a divided voice vote, the House declined to concur. The proposal was, consequently, referred back to the Council for further consideration, as the rules require.

The Council received a report of the House debate at its March 2017 meeting and discussed the matter further at its June 2017 meeting. No interest was expressed in revisiting the substance of the revisions that the Council had approved. Rather, the Council considered whether it could gather additional information that would better inform the House about the revisions.

In the House debate, although there were concerns about the substantive changes in the standard (e.g., shortening the standard’s measuring period from five to two years, removing the ability to comply by first-time pass rates that were within 15 percentage points of the state’s overall ABA school first-time pass rate), more of the questions related to how the new standard might impact individual law schools.

In particular, the focus was on schools that were historically minority-serving institutions and law schools in California, which has a high cut score (passing score) on the bar exam.

At its June 2017 meeting, the Council agreed that a voluntary survey that would collect information about how schools' most recent classes of graduates would fare under the revised standard would provide information that would address these questions. It directed the Managing Director's office to conduct such a survey.

Survey of Schools

By email dated June 27, 2017, I sent a survey to schools asking for their help in gathering bar passage information based on the standard that the Council had approved. A copy of the email and the survey are attached.

The survey was voluntary. It required work from schools, so we expected that many schools that knew that the proposed standard would not be a concern for them would opt not to provide the information. Schools that might have difficulty meeting the standard, we posited, would be incentivized to respond, to provide data to support the narratives that they were offering about how the potential adverse impact that the revised standard have on them.

Eventually, more than 90 schools responded. The Council has been given, as part of the closed session materials, a detailed report on the outcomes, including:

- The passing percentages reported by school for graduates in the 2013 and 2014 calendar years (the two most recent cohorts whose data is mature under the proposed standard);
- The percentage of the graduates from those years on which the school had no information;
- The percentage of graduates from those years that the school determined had not sat for a bar examination within the two-calendar year period;
- The current bar exam "cut score" for the state in which the school is located; and
- The Fall 2016 25th percentile LSAT score reported by the school.

The school names were omitted from that spreadsheet, but I attach here a list of the participating schools. Because the data that we collected is not now required to be reported (under either current Standard 316 or Standard 509), we did not want to make the data public without Council discussion. The Council can determine how much of the information that it has received it wants publicly reported.

We can, however, provide a summary of the data:

1. We have bar pass rates for 92 schools (out of 204 approved schools) for 2 cohorts of graduates – 184 data points.
2. Of those 184 data points, only 3 are below the revised Standard's 75% minimum acceptable pass rate. Only 14 data points are below 80% and only 1 school had passage rates below 80% for both cohorts (but only one of them was below 75%). By contrast, 36 data points are at or above 95%.
3. 146 of the 184 data points are at or above 85%.
4. More than half (58/92) reported that they had information for 95% or more of the graduates in these two cohorts.

5. Approximately two-thirds (63/92) reported that 95% or more of the graduates in these two cohorts sat for a bar exam within the two-year window used in the revised standard.
6. Approximately half (11/21) of the California-located ABA-approved law schools participated.
7. The participating schools varied by type (public/private) entering credentials (highly ranked to unranked), size, geography, and cut score. Several HBCU law schools.

While many of the non-responding schools fall into the category of schools that would easily meet the revised standard, one cannot assume that all non-respondents fall into that category. I heard a range of reasons offered for not participating. That said, the number and range of schools that did respond and the data that was collected suggests that the narrative that was part of the discussion during the 2017 mid-year meeting that the standard would have an adverse impact on, perhaps, a large number of schools and, in particular, on the group of minority-serving schools or law schools located in California was not borne out by the data that we collected.

Further, concerns that were expressed about shortening the review period (i.e., schools suggesting that many graduates do not sit for the bar exam within two years of graduation), and about the difficulty of finding graduates were not suggested by the outcomes.

The California situation

California has a bar exam cut score equal to 144, the second highest in the country. That score and recent bar exam outcomes have generated considerable controversy, and a process is underway to review the matter. The California Supreme Court has just issued a letter reporting that, for now, the cut score will remain at 144.

The letter notes that the 144 cut score has been in place for a long time, and pass rates have risen and fallen over that period of time. During much of this time, the cut score was not a matter of controversy. Further, the lower pass rates in recent administrations appears to the court to be consistent with the national pattern. The text of the letter is included with your agenda materials.

Next steps for the Council

You have several options:

1. Confirm the continuing support for the revisions to the Standard that you approved in October 2016 and resubmit the matter to the House of Delegates at the 2018 ABA Midyear Meeting next February;
2. Continue to study the matter with the intention of resubmitting the matter to the House at the 2018 Annual Meeting next August;
3. Abandon the matter and stick with the current version of Standard 316; or
4. Refer the matter back to the Standards Review Committee for further work, providing direction about how the revisions that you had previously approved might be changed considering the House debate, the survey, and other events (the California study; more general reports in the news and blogs expressing generalized concerns about the bar exam).

If you choose alternative 1 or 2 and resubmit the revisions that you previously approved, that would be the House of Delegates' second opportunity to review the proposal. If the House concurred, the revisions would become effective at the adjournment of the House's meeting. If the House again did not

concur, then the matter would be returned to the Council. The Council could choose at that time to study the matter further and adopt a different set of revisions or abandon the matter. Or, under House Rule 45.9 our Rule of Procedure 57, there having been two references back to the Council, the Council could then adopt the revisions. Your decision is then final and the revisions become operative.