

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 action of
2 the Council of the Section of Legal Education and Admissions to the Bar in making amendments
3 dated February 2017 to Standard 316 (Bar Passage) of the *ABA Standards and Rules of*
4 *Procedure for Approval of Law Schools.*

American Bar Association
 Section of Legal Education and Admissions to the Bar
 Revised Standards for Approval of Law Schools
 February 2017

Standard 316. BAR PASSAGE

At least 75 percent of a law school's graduates in a calendar year who sat for a bar examination must have passed a bar examination administered within two years of their date of graduation.

~~(a) A law school's bar passage rate shall be sufficient, for purposes of Standard 301(a), if the school demonstrates that it meets any one of the following tests:~~

~~(1) That for students who graduated from the law school within the five most recently completed calendar years:~~

~~(i) 75 percent or more of these graduates who sat for the bar passed a bar examination; or~~

~~(ii) In at least three of these calendar years, 75 percent of the students graduating in those years and sitting for the bar have passed a bar examination.~~

~~In demonstrating compliance under sections (1)(i) and (ii), the school must report bar passage results from as many jurisdictions as necessary to account for at least 70 percent of its graduates each year, starting with the jurisdiction in which the highest number of graduates took the bar exam and proceeding in descending order of frequency.~~

~~(2) That in three or more of the five most recently completed calendar years, the school's annual first-time bar passage rate in the jurisdictions reported by the school is no more than 15 points below the average first-time bar passage rates for graduates of ABA-approved law schools taking the bar examination in these same jurisdictions.~~

~~In demonstrating compliance under section (2), the school must report first-time bar passage data from as many jurisdictions as necessary to account for at least 70 percent of its graduates each year, starting with the jurisdiction in which the highest number of graduates took the bar exam and proceeding in descending order of frequency. When more than one jurisdiction is reported, the weighted average of the results in each of the reported jurisdictions shall be used to determine compliance.~~

~~(b) A school shall be out of compliance with this Standard if it is unable to demonstrate that it meets the requirements of paragraph (a)(1) or (2).~~

~~(c) A school found out of compliance under paragraph (b) and that has not been able to come into compliance within the two-year period specified in Rule 13(b) of the Rules of Procedure for Approval of Law Schools, may seek to demonstrate good cause for extending the period the law school has to demonstrate compliance by submitting evidence of:~~

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

Standard 316. BAR PASSAGE

The revised Standard moves to a clear and straightforward statement of the bar passage rate required of a law school for the purposes of accreditation. It looks to an ultimate pass rate for each graduating class of a law school after a period of two years following that class's graduation. While first-time pass rate is important for consumers and is (and will continue to be) disclosed under Standard 509 (Required Disclosures), the revision provides that, for the purposes of accreditation, an ultimate pass rate within the two-year period is the more appropriate measure of whether a school is operating a sound program of legal education.

The revision makes no attempt to 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 expected of a law school for accreditation purposes.

The features of the revised Standard are:

1. The requirement of an ultimate passage rate of 75 percent remains unchanged from the requirement of current Standard 316(a)(1), at least for the present time. Further work would need to be done to gather and analyze data and to gather the views of various constituencies before it would be appropriate to recommend a change to what the current Standard requires in this regard.

There is data to support the proposition that a 75 percent ultimate pass rates is appropriate and will not have an adverse impact on law schools' continuing commitment to assist in diversifying the profession. The New York Advisory Committee on the Uniform Bar Examination reviewed data regarding the cumulative passing rates, by demographic group, of

¹ "2016-2017 ABA Standards and Rules of Procedure for Approval of Law Schools," http://www.americanbar.org/groups/legal_education/resources/standards.html

candidates who graduated from ABA-approved law schools. Specifically, the Advisory Committee looked at graduates who took the bar exam for the first time in July from 2010 to 2013 and followed each annual cohort through the immediately following February bar exam.

The cumulative passing rates after two attempts (or opportunities) were as follows:

- Asian/Pacific Islander: 88.8%
- Black/African American: 79.6%
- Caucasian/White: 93.9%
- Hispanic/Latino: 87.4%

In no year did any group have less than a 75 percent passing rate after two attempts/opportunities. The lowest was the Black/African American group with a 76.8 percent passing rate after the July 2012/February 2013 cycle.²

The recent data from New York closely matches a study done in 1998 by the Law School Admission Council (LSAC), which provided assistance in setting the original target of 75 percent when Standard 316 [formerly Interpretation 301-6] was first developed. The LSAC National Longitudinal Bar Passage Study was undertaken primarily in response to anecdotal reports suggesting that bar passage rates were so low among examinees of color that potential applicants were questioning the wisdom of investing the time and resources necessary to obtain a legal education.

While dated, the LSAC Study is the only national bar passage study that looks at the performance of minority law school graduates both in terms of first-time and eventual bar passage rates. The study included data from 93 percent of the fall 1991 entering class.

The eventual passage rates for racial and ethnic groups were: American Indian, 82.2 percent (88 of 107); Asian American, 91.9 percent (883 of 961); black, 77.6 percent (1062 of 1368); Mexican American, 88.4 percent (352 of 398); Puerto Rican, 79.7 percent (102 of 128); Hispanic, 89.0 percent (463 of 520); white, 96.7 percent (18,664 of 19,285); and other, 91.5 percent (292 of 319).

The Study also noted that among those examinees of color who eventually passed, between 94 and 97 percent passed after one or two attempts and 99 percent passed by the third attempt. Among those who failed the first time but eventually passed, nearly three-quarters passed on their second attempt.³

In light of the need to ensure that schools are adequately preparing students to become lawyers, the Council views the change as necessary to promote confidence that an ABA-approved law school will, at a minimum, be accountable for 75 percent of its graduates passing a state bar examination within two years of graduation. The Council continues to be concerned that even under the proposed changes, a law school can remain in compliance with the bar passage standard even if 25 percent of its graduates who sit for the bar exam cannot pass it during this

² Data from NYSBLE, <https://www.nycourts.gov/ip/bar-exam/Appendices/14DataFromNYSBLE.pdf>

³ “LSAC National Longitudinal Bar Passage Study,” <http://www.unc.edu/edp/pdf/NLBPS.pdf>

two-year period, a result that is all the more problematic considering the high cost of legal education and the challenging job market that law graduates currently face.

2. The period of time within which a 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, and the option of a school to show that the classes in three out of five of those years achieved a 75 percent passage rate is eliminated. The data available to the Council showed that the number of non-passers who persist in taking the MBE drops dramatically after the second attempt, with only about five percent taking it more than twice and a negligible number attempting the exam after four attempts. The data before the Council showed that the fall-off in persistence in re-taking the bar examination does not vary substantially on the basis of gender, race, or ethnicity. The Council believes that two years is an appropriate period of time within which to require that 75 percent of graduates of each law school taking a bar exam should have passed it for purposes of accreditation. That time frame provides a period during which almost all of a school's bar outcomes for a graduating class will be determined; the ultimate pass rate for a class will not be significantly improved by allowing a longer period. The two-year period to achieve compliance with the Standard has the advantage of providing a shorter timeline for the Council and the Accreditation Committee to initiate action against a school based on concerns that the law school may be admitting students who are not capable of passing a bar exam, or is offering a program that is not sufficiently rigorous to prepare its students for the exam.

Recent findings, also from New York, suggest that it is unlikely that this change will have a significant effect on schools' overall bar passage rates that must be accounted for under the Standard. The New York data show that the average passing rate of graduates of ABA-approved law schools taking the bar exam for the first time in July over the period 2004 to 2013 was 85 percent. Including February first-time takers, the passing rate for ABA graduates is 84 percent over that same period.

3. The ability of a law school to report its ultimate pass rate based on only 70 percent of its graduates is eliminated. The revised Standard does not require a law school to account for 100 percent of its graduates. It does, however, require them to account for as many as possible and, for accreditation purposes, to demonstrate that 75 percent of the members of the class who sat for a bar exam passed it within the two-year period. Schools that cannot, after making reasonable efforts, obtain bar passage data for all of their graduates will simply be asked to explain their efforts. Schools are able to obtain employment data from almost 100 percent of their graduates and will be able to do the same with bar passage information. A goal of this effort is that statistics for all schools, including those who are able to meet the Standard after just one year, will be maintained so that uniform information regarding ultimate passage rate is available for all schools.
4. For a number of reasons, the opportunity for a school to satisfy its obligations under Standard 316 on the basis of its bar pass rate for first-time takers is eliminated. The reliance on the results in these instances for accreditation purposes, based as it is on a comparison with statewide results, has many flaws. As a starting point, the question of accreditation should be based on the performance of the graduates of a law school without comparison to the graduates of any other law school. The Standards have moved away from comparisons between law schools in

all others areas of evaluation (expenditures, volume count, etc.) and it should do so in this area as well. The value of using a statewide average as a baseline also has been questioned since it includes the pass rate of the school being evaluated. The use of this information also is of questionable value when there is only one law school in a jurisdiction.

5. The recitation of reasons in 316(c) for which a law school may request an extension of the period within which it may come into compliance beyond the two years set out in Rule of Procedure 14(b) is felt to be unnecessary, and the revision removes them. Rule 14(b) adequately describes the process for seeking an extension and, indeed, reasons that show good cause for an extension are not set out for any other Standard. If additional guidelines are believed to be warranted, they will be provided through a Guidance Memo instead of the Standard.

The Council acknowledges that some law schools will see the requirement that information be maintained and reported for a period of two years as an unnecessary burden if they regularly achieve a bar pass rate exceeding 75 percent for first-time takers. The Council believes, however, that this type of information has been kept regularly by the schools who have had to rely on ultimate bar pass rate to meet the Standard and that it is not overly burdensome.

Finally, the Council understands that there are some concerns that it would take seven years, the length of time between sabbatical visits, for the Accreditation Committee to become aware of the failure by a school to meet this Standard. However, the interim monitoring system currently being used by the Accreditation Committee has proven very successful in tracking schools that might be experiencing difficulty meeting the Standards, and it should be equally successful with this requirement.

The Council received written comments from 23 individual or organizations, most opposing the change in the Standard. The 14 speakers at the public hearing also opposed the recommendation. The opposition to the change 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 showing 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.

Respectfully submitted,

Gregory G. Murphy, Esq.

Billings, Montana

Chair, Council of the Section of Legal Education and Admissions to the Bar

February 2017

GENERAL INFORMATION FORM

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

Submitted By: Gregory G. Murphy, Esq., 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 February 2017 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.

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

Not applicable.

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.

The amendments were posted on the Section's website and circulated for Notice and Comment to the following interested persons and entities: ABA Standing and Special Committees, Task Forces, and Commission Chairs; ABA Section Directors and Delegates; Conference of Chief Justices; National Conference of Bar Presidents; National Association of Bar Executives; Law Student Division; SBA Presidents; National Conference of Bar Examiners; University Presidents; Deans and Associate Deans; and Section Affiliated Organizations, including Access Group, Inc., American Association of Law Libraries, Association of American Law Schools, Association of Legal Writing Directors, Clinical Legal Education Association, Law School Admission Council, National Association for Law Placement, National Conference of Bar Examiners, and Society of American Law Teachers.

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.)

The Honorable Christine M. Durham
Justice
Supreme Court of Utah
Scott Matheson Courthouse
450 South State Street

Salt Lake City, UT 84114
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Email: jdurham@email.utcourts.gov

The Honorable Solomon Oliver, Jr.
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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 February 2017 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 2016-2017 *ABA Standards and Rules of Procedure for Approval of Law Schools*.

4. Summary of Minority Views

As indicated in the Report, opposition to the change to Standard 316 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.