April 15, 2013

Dean Kent Syverud, Chair  
ABA Council of the Section of Legal Education and Admissions to the Bar  
Dean, Washington University School of Law  
Campus Box 1120  
One Brookings Drive  
St. Louis, MO 63130-4899

Re: Standards Review & Diversity in the Legal Profession  
Standards 309 (New), 503, 302 and 307 (New)

Dear Dean Syverud:

I am writing on behalf of the State Bar of California Council on Access & Fairness. One of the Council’s charges is to increase the numbers of individuals from diverse backgrounds in our profession. I write to express our concerns about revisions to the ABA accreditation standards that could adversely impact diversity. We offer the following commentary as you continue to consider draft proposed revisions for review and approval for eventual issuing for official public comment.

BAR PASSAGE – NEW STANDARD 309:

We support the current bar passage standards as set forth in Standard 301-6. This Standard has only been in effect for five years and we believe that there is no evidentiary basis for making the proposed revisions. Research about the effectiveness of the current provision has not been done and it is therefore premature to determine if any revisions are necessary. If any revisions are discussed by the SRC, we suggest that the committee take into account the following considerations.

Fixed first-time passage rate - Any revisions to the first-time pass rate must include an alternative standard allowing a school to show that its pass rate is within a specific number of points (currently 15) of the average for first-time graduates of ABA-approved schools taking the exam in the same jurisdiction. Each jurisdiction has the freedom to determine its own minimum passing score and jurisdictions have in fact set differing passing scores. Establishing a bright line that applies to every jurisdiction would unfairly penalize those schools in jurisdictions that set a higher score for passing, which results in the law schools in that jurisdiction having lower bar pass rates.
The proposal to establish a fixed 70% first-time passage rate would adversely affect California schools. Based on the 2012 passage rates alone, six of the 21 ABA-approved or ABA-provisional law schools would be in jeopardy of losing their status. Furthermore, two additional schools are within a couple of points of the 70% mark.

Furthermore, a revision that requires a strict and specific minimum passage rate ignores the current enrollment instability in which law schools are operating. Just over two years ago, many schools over-enrolled students because more applicants than anticipated decided to accept the admissions’ invitation and enrolled in school. These extra students stretched schools’ resources, e.g., by necessitating the opening of additional course sections and hiring new professors. Less than two years later, schools are now scrambling to fill their entering classes. Many schools have chosen to reduce the size of the entering class in an effort to maintain quality; others have been forced to decrease class size or are admitting students with lower grade point averages and other indicators. With smaller entering classes, all schools must now find creative ways to utilize their decreasing resources to adequately serve their students. It remains to be seen how these fluctuations will affect bar passage.

Smaller entering classes could result in a major redistribution of students after their first year of studies. For instance, in an effort to maintain higher standards for entering classes, larger law schools have not admitted certain students into their first-year classes. Instead these schools engage in recruitment of students from smaller, lower-ranked schools after the students have successfully completed the first year of law school. Over the last several years, lower-ranked schools have lost numerous high performing first-year students through transfers to higher-ranked schools. Standard 301-6 acknowledges this reality in 301-6 (C)(vi) “…demonstrated likelihood that the school’s students who transfer to other ABA-approved schools will pass the bar examination….“ It is highly likely that the number of transfers will increase even more now as higher-ranked schools with reduced first-year enrollments attempt to build up enrollment. The lower-ranked schools will suffer by losing the top students from their already smaller classes.

**Eventual pass rate** – A revision to the eventual passage rate should be based upon reliable data related to the purpose of this Standard. The current Standard of 75% was adopted based on reports that showed that it was a reasonable rate that would not adversely impact students of color.

**Maintaining minimum passage rates for consecutive years** – Within each jurisdiction, passage rates fluctuate from year to year. A revision that requires schools to comply with the minimum passage rate for consecutive years without any variance to adjust for fluctuating bar pass rates is inherently unfair. Requiring schools to maintain a minimum passage rate, for example 70% over five consecutive years, would place more than half of the California ABA-approved or ABA

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1. Golden Gate University School of Law, Southwestern Law School, Thomas Jefferson School of Law, University of La Verne College of Law, University of San Francisco School of Law, and Whittier Law School.
2. Santa Clara University School of Law and University of the Pacific - McGeorge School of Law.
provisional schools in jeopardy. Over the past five years, 11 of the 21 California schools\(^3\) did not achieve this minimum pass rate in one or more years.

**Counting of graduates sitting for the bar exam** - A revision that requires schools to account for all of its graduates would ignore the current inconsistencies among jurisdictions in reporting the names of successful and unsuccessful takers. Not all jurisdictions notify every law school of the names of graduates sitting for the bar exam. Until a uniform method of reporting bar results is developed, penalizing a school for not being able to account for all of its graduates is unreasonable. Further, some graduates who sit for the exam once and do not pass never take it again. It is also unreasonable to count these graduates against a school in determining an eventual pass rate since they have not persisted in taking the bar exam until they passed.

**Factors for extending the time for compliance** – Presently, the Standard allows for an extension of time for compliance if a school submits evidence related to eight factors. A revision that modifies or eliminates this process or any of the eight factors undermines the core purpose for adopting such a Standard.

Currently, the Standard allows for schools to show “efforts by the school to provide broader access to legal education….” 301-6 (C)(v) and “…other factors, consistent with the school’s demonstrated and sustained missions, which the school considers relevant in explaining it deficient bar passage results…..” 301-6 (C)(viii). These two provisions acknowledge the reality that some schools provide access for students, usually students from diverse backgrounds, who might not otherwise be admitted to law school. Any revision that would eliminate these provisions would undercut the important goal of diversifying the legal profession.

Adding a provision encouraging schools to take “effective and sustained actions to address the inadequate bar passage results of its graduates in the form of pervasive academic support and bar preparation efforts involving the entire faculty” is laudable. We agree that schools should have pervasive academic support and bar preparation efforts and that these programs should involve the entire faculty. These measures would benefit all students, including students of color. However, we encourage the SRC to consider incorporating these other methods elsewhere in the Standards to ensure effective academic support and bar preparation efforts, rather than including them in this bar passage provision, which serves as a blunt instrument to sanction law schools.

**Effect of non-compliance** - ABA probation for non-compliance is devastating to a school and loss of ABA accreditation is likely to be the death knell for a law school. Although a law school on probation may eventually retain its ABA status, it faces serious immediate challenges, e.g. repairing its reputation, recruiting new well-qualified students, retaining current students and faculty, and restoring institutional moral.

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\(^3\) California Western School of Law, Chapman University School of Law, Golden Gate University School of Law, University of the Pacific - McGeorge School of Law, Southwestern Law School, Thomas Jefferson School of Law, University of La Verne College of Law, University of San Diego School of Law, University of San Francisco School of Law, Western State University College of Law, and Whittier Law School.
The impact of these proposed revisions on large populations of students of color would be extreme. Currently, 35% of students enrolled in California ABA-approved or ABA-provisional schools are students of color. If the 11 schools listed above were to lose their ABA accreditation, 2820 students of color, or nearly 50% of all students of color enrolled in California ABA schools, would likely not become lawyers.

We are concerned that a revision that increases minimum bar passage requirements, whether first-time or eventual, will discourage schools from admitting students with lower pre-law indicators even though some of these indicators, like the LSAT, are not predictive of a student's potential to succeed in law practice. Data clearly demonstrate the difficulty faced by students of color in gaining admission to law school: nearly two-thirds of all African-American applicants and nearly one-half of all Hispanic applicants are shut out of every ABA-approved school to which they apply based on very small variations in their LSAT scores. If the new proposal were adopted, schools may be further deterred from taking a chance on promising students of color with slightly lower LSAT scores.

Bar Passage Recommendations:

Given these concerns, we ask that your Committee refrain from moving forward on any proposed revisions that have the clear potential impact of lessening diversity in law schools and the legal profession. We also request that future discussions on any revisions to the bar pass standards include:

- Conducting a comprehensive study about the overall impact of current Standard 301-6, which would include research related to the impact of changes on diversity in law schools and entering the legal profession;
- Careful review and consideration of such a study prior to proposal of any revisions to the current Standard;
- Articulation of the rationale for any proposed revisions and data that support this rationale;
- Development of alternatives for addressing express stated need(s) for revising this Standard; and
- Ways in which the ABA can support the critical responsibility of law schools to increase diversity.

4 Statistics based on data from the current ABA-LSAC Official Guide to Law Schools
ADMISSIONS - STANDARD 503:

As your Council continues its deliberations on Chapter 5, we ask that you consider a change in the language in Standard 503, which currently says that law schools “shall” require a test, to providing that law schools “may” require a test. In 2010 the Standards Review Committee was entertaining such a proposal.

In our prior commentary in a letter sent to the SRC on March 8, 2010 we noted the following:

“One of the root causes for the lack of improvement in the representation of minorities in the legal profession is the continued over-reliance on traditional testing measures for entry into law school. This over-reliance persists in the face of a growing body of information that shows the lack of alignment between those measures and what it takes to be a good lawyer. Recent studies by Professor Marjorie Shultz (UC Berkeley School of Law) and Professor Sheldon Zedeck (UC Berkeley) identify the qualities that matter to the successful practice of law. The Council supports the expansion of this research and the use of its findings as the basis for developing viable alternatives to the current standardized test, the Law School Admission Test. (see Shultz study at http://www.law.berkeley.edu/admissions_study.htm)

As your committee continues its deliberations on Chapter 5, we ask that you consider a change in the language in Standard 503, which currently says that law schools “shall” require a test, to providing that law schools “may” require a test. Further we ask that you allow law schools to consider additional documented factors that are indicators of an applicant’s potential for success in law school and the practice of law. Many schools already have pilot programs under which they evaluate holistically a student’s potential for success. This holistic approach to assessing applicants’ potential better serves the needs of the legal profession and avoids categorizing applicants in a broad and overly simplistic manner, much as the US Supreme Court suggested in the Grutter case.

We are asking this committee to start the critical work of plugging this leak in the diversity pipeline by allowing law schools to rethink restrictive admission practices, using all available tools to meet the current and future needs of our profession and those we serve. “

The Council on Access & Fairness continues to offer the same recommendations for changes to language in Standard 503 as follows:

Chapter 5: Standard 503. ADMISSION TEST
A law school shall–may require each applicant for admission as a first-year J.D. student to take a valid and reliable admission test to assist the school and the applicant in assessing the applicant's capability of satisfactorily completing the school’s educational program. The law school may also consider additional factors that indicate the potential for success in law school and in the practice of law. In making admissions decisions, a law school shall use test results in a manner that is consistent with the current guidelines regarding proper use of the test results provided by the agency that developed the test.
LEARNING OUTCOMES – NEW STANDARD 302:

Our Council on Access & Fairness continues to applaud the move to articulated outcomes as both sound educational policy and a foundation for opening up the legal profession to a more diverse and talented pool of lawyers. We support the Standards Review Committee’s acknowledgement of the value of outcome measures for a wider range of competencies beyond traditional legal analysis, which is the focus of the LSAT and many other traditional law school examinations. Incorporation and assessment of other critical competencies will better prepare law school graduates for practice in an increasingly demanding economy and complex legal environment. In particular, we support the specific inclusion of "multicultural competence" as a critical skill for law school graduates who will enter into practice in an increasingly diverse world.

ASSESSMENT OF STUDENT LEARNING – NEW STANDARD 307:

Our Council on Access & Fairness supports requiring schools to conduct formative and summative assessments. Combined with the new Standard on learning outcomes, students will know exactly what they are supposed to learn at different points during the student’s time at the school and whether they are actually meeting those objectives. The requirement of meaningful feedback provides the students with opportunities to assess their progress and to make changes, if needed. These provisions are important to students of color, who often do not have access to mentors or advisors.

On behalf of the State Bar Council on Access & Fairness, we thank you for your time and consideration of these important issues, and we look forward to the opportunity for ongoing dialogue as you formulate and issue your final draft proposals for official public comment.

Sincerely,

Audrea J. Golding
Audrea J. Golding, Chair
Council on Access & Fairness
The State Bar of California

cc:  Sen. Joe Dunn (Ret.), Executive Director and CEO, The State Bar of California
     Ginnie Yee, Assistant Secretary, The State Bar of California
     Patricia Lee, Special Assistant for Diversity & Bar Relations, The State Bar of California
     Dean Jeffrey Lewis, Chair, ABA Standards Review Committee
     Catherine Carpenter, Chair, Bar Passage Committee, ABA Standards Review Committee
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