AMERICAN BAR ASSOCIATION

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in the Educational Pipeline
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July 29, 2016

The Hon. Rebecca White Berch
Chairperson, Council of the Section of Legal Education and Admissions
c/o JR Clark at jr.clark@americanbar.org
321 N. Clark Street
Chicago, IL 60654

Dear Judge Berch:

In 2013, my predecessor, wrote on behalf of the ABA Council for Racial and Ethnic Diversity in the Educational Pipeline ("Pipeline Council") to express concern regarding the ABA Section of Legal Education and Admissions to the Bar Standards Review Council work related to bar passage requirements. In the letter, the Pipeline Council acknowledged the changes that had been made to the latest draft of proposed Standard 316, but went on to respectfully request the conducting of "an impact study to better learn the effect of the proposed revisions on students of color." This request harmonized with the Pipeline Council's core mission: to foster a more diverse educational pipeline into the legal profession and to provide a forum in which to address related issues.

Today, I write to you as the current Pipeline Council Chair, to respectfully ask the Section to consider the request for an impact study. The reasons for such a study are highlighted in the attached data compiled by our working committee. Granting our request for a study will not only alleviate the concerns of others who oppose the proposed standard, but will clearly honor the commitment expressed by the American Bar Association in its Goal III: "to promote full and equal participation in the association, our profession, and the justice system by all persons."

Thank you for your consideration.

Sincerely,

Kenneth G. Standard
Chair, ABA Council for Racial and Ethnic Diversity in the Educational Pipeline

Attachment

Comments from the ABA Council for Racial and Ethnic Diversity in the Educational Pipeline

The proposed changes to Standard 316 are contrary to ABA Goal III and presents significant impediments to increasing diversity in the legal profession. ABA Goal III states as an objective: "Promote full and equal participation in the association, our profession, and the justice system by all persons." Yet, as described below, proposed Standard 316 would adversely impact efforts to diversify our profession.

1. The proposed Standard 316 would disproportionately penalize schools with substantial minority student bodies.

Data shows that students of color generally perform worse on the bar exam than white students. Data from states that release bar data by race confirms this. For example, in California, one of the few states that releases demographic data, first time takers from California ABA-approved law schools on the July 2015 bar exam, passed at 68.2%. Breaking down the data by race reveals the success of racial groups: Whites – 71.8%, Blacks – 53.4%, Hispanics – 61.3%, Asians 65.9%, Other Minorities – 63.1%. For graduates from out-of-state ABA –approved schools, the breakdown was Whites – 66.4%, Blacks – 33.3%, Hispanics – 46.9%, Asians – 59.6%, Other Minorities – 50.0%.[1] These numbers are mirrored in other jurisdictions and speak for themselves.

Recognizing that the proposed Standard requires eventual pass rates after two years, we can look to the repeat taker rates to get a sense of how different racial groups perform on subsequent takings. On the July 2015 bar exam: Whites – 28.9%, Blacks – 20.7%, Hispanics – 14.7%, Asians 20.1%, Other Minorities – 23.2%. Granted the eventual pass rates after two years cannot be determine from this data, as required in the proposed Standard, but the differences in performance among racial groups is clear.

Schools with high minority student bodies would disproportionately face probation, sanctions, or even loss of accreditation. Again, in California, the nine schools out of twenty-one ABA-Approved law school with the lowest first time pass rates on the July 2015 bar exam were schools with large minority student bodies (Overall minorities/Blacks/Hispanics): California Western (35.8%/6.1%/18.5%/), Golden Gate (49.1%/6.6%/17.8%), Southwestern (46.1%/6.8%/22.9%), Thomas Jefferson (50.8%/12.1%/23.4%); University of California – Hastings (43.8%/4.4%/15.7%), La Verne (57.9%/10.8%/32.5%), San Francisco (51.9%/7.4%/20.3%), Western State (58.3%/7.1%/32.0%), and Whittier (50.2%/6.1%/28.7%).

Since schools have not calculated their bar results based on eventual pass rates over a two year period, we cannot determine if these schools would be able to achieve the proposed Standard. Nevertheless, one could easily surmise that the proposed Standard would adversely impact many of these schools with high diversity populations.

2. A uniform standard further penalizes schools in states with higher cut scores.

According to the National Conference of Bar Examiners Comprehensive Guide to Bar Admission Requirements 2016, sixteen different cut scores for bar passage, adjusted by the NCBE to a 200-point scale to permit valid comparisons, are used by different jurisdictions around the country. These range from a low of 129 to a high of 145.[2]
The Council recognized this variance when it adopted the initial bar passage Standard 301-6, acknowledging that "... the school's annual first time bar passage rate in the jurisdiction reported by the school is no more than 15 points below the average first time passage rates for graduates of ABA-approved law schools…" Eliminating the requirement based on

[1] http://admissions.calbar.ca.gov/Portals/4/documents/Statistics/JULY2015STATS.121715.pdf
[2] See NCBE Comprehensive Guide 2016, Chart 9: Grading and Scoring, pp. 29-30.

the different cut scores and replacing it with a one-size-fits-all bright line is blatantly unfair to schools with higher cut scores.

The Council cites the difficulty in enforcing the current bar passage requirements and the potential abuse. It prefers a "clear and straightforward statement of the bar passage rate required…." Yet, eliminating the entire Standard because it is difficult to enforce or it not clear and straightforward does not require the elimination of all of its provisions just for convenience or clarity. Fairness should be an overriding consideration. With such high differences among jurisdictions, schools in states with high cut scores, such as Delaware and California, will be penalized simply based on its location. As we have shown, California schools are some of the most racially diverse.

3. The proposed Standard 316 will further discourage schools from admitting students of color.

As asserted in numerous reports and articles, including Law School Transparency and U.S. News & World Report, there is a strong perception in the correlation between LSAT scores and bar passage. Even the NCBE based its "less able" statement on the overall drop in LSAT scores. Schools wanting to increase their bar results would, based on this perception, prefer to admit students will higher LSAT scores. Or putting it another way, these schools would prefer to not admit students with lower LSAT scores. Unfortunately, the applicants with lower LSAT scores tend to be Hispanic, Puerto Rican, Mexican, and African-Americans and studies have shown that any increase in LSAT scores "shuts-out" these students from being admitted to law school.[3]

The strategy to increase bar results by increasing LSAT scores plays right into the hands of schools that want to remain highly ranked or even rise in the rankings. USNWR rankings rely heavily on input data, e.g. LSAT scores and undergraduate GPAs. Thus a school could justify its policy to increase applicants' LSAT scores as a way of increasing its bar results. In any event, any increase in LSAT scores would impact the number of Hispanic, Puerto Rican, Mexican, and African-Americans students being admitted.

4. The 75% requirement has not been studied to determine its effectiveness in achieving the Council's goals.

The Council provides its reasons for this proposed Standard as preventing law schools from "admitting students who are not capable of passing the bar exam or is offering a program that is not sufficiently rigorous to prepare its students for the exam." These goals are important and we fully agreed with the principles. However, we are not convinced that proposed Standard 316 is the best way to achieve these goals.

Bar passage rates have been dropping across the country in the last couple of years. The NCBE has described the students as "less able" and law schools have been actively searching for the cause of the drop. Yet, in this volatile environment, with declining LSAT scores and the admissions of "less able" students, the Council chooses to adopt a Standard that has not been studied to determine its effectiveness in achieving its stated purpose. The Council concedes that "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." But what study supported the 75% requirement initially and is that study valid with recent declining bar results?

[3] Nussbaumer and Johnson, *The Door to Law School*, 6 Trends and Issues in Education and the Law 1 (2013)

For example, graduates of ABA-approved law schools in 2015 had an average pass rate of 64%. In addition, only 10 of 51 states[4], including the District of Columbia, had pass rates at or above 75%. [5] Granted this figure does not represent the eventual pass rate proposed by the Standard. But it does show how low the pass rates have fallen. The NCBE has reported that the mean score on the
February 2016 administration of the MBE fell to 135, the lowest average score on a February exam since 1983. This score is down 1.2 points since last year's February test. Comparatively, the mean score on the July 2015 exam saw its lowest mean score in almost 30 years, down by 1.6 points from the prior year's exam, to 139.9. This reveals how potentially devastating this proposed Standard might be when applied to law schools based on today's bar exam trends. This data convincingly supports the need for a comprehensive study before adoption.

5. There are alternative ways of achieving the Council's goals without enacting proposed Standard 316.

In 2010, the Council enacted Standard 302, which requires law schools to establish learning outcomes consistent with and support the stated mission and goals of the law school, and Standard 304, which requires schools to assess the learning outcomes and the school's educational effectiveness. These two standards combined reflect the best practices in current learning theory and the accreditation standards applied by regional accrediting agencies. They insure good teaching practices and that schools are rigorous in preparing its students for the bar exam and the profession. Despite being enacted in 2010, the Council has delayed enforcement of these Standards, or at the least, leaves the reviews of compliance to every seven years during a sabbatical visit cycle.

If the Council were genuinely concerned with "admitting students who are not capable of passing the bar exam or is offering a program that is not sufficiently rigorous to prepare its students for the exam" it would monitor compliance of these and related accreditation Standards more aggressively. Rigorous enforcement of teaching quality and academic rigor would help all students and ideally would help those students with lower LSAT scores even more.

6. The Council must determine whether schools can comply with the proposed Standard.

Currently, not all states release bar performance data to law schools where at least one of its students has sat for the exam. Obtaining such information is left to the law school administration, requiring it to track its own students. The difficulty in tracking graduates has been shown in attempting to compile accurate employment data under Standard 509. The Council is aware of this challenge and "… also acknowledges that some law school will report that it is impossible to achieve a goal of locating all graduates and determining their status. However, as noted above, the Standard does not require the reporting of 100% of graduates to demonstrate compliance."

In California, the Committee of Bar Examiners abides by the state's recently enacted Business and Professions Code section 6026.11, which makes the State Bar subject to the California Public Records Act, and the concomitant Admissions statute (B&P Code § 6060.25), which prohibits the release of information regarding bar admission applicants. As a result of these new laws, the bar examination pass list will not be posted on the State Bar's website. More relevant to the proposed Standard, examination result information will not be shared with law schools regarding their allocated students, which includes their students' pass/fail status and the number of times the students have taken the examination. In sum, law schools in California will not be able to compile any bar pass data for individual students making it virtually impossible to comply with the proposed Standard. Based on comments from the various California

[4] Alabama (77%), Connecticut (76%), Illinois (75%), Iowa (82%), Kansas (78%), Mississippi (75%), Missouri (83%), Nebraska (76%), New Mexico (75), Utah (76%).
[5] The Bar Examiner, March 2016, p. 18-19.

law schools after the administration of the February 2016 bar exam, only a small number of graduates have informed their school of their bar results.

At national schools, where its graduates sit for bar exams in many states across the country, these schools may not receive bar results from each jurisdiction, thus requiring them to rely on their graduates to report in. It is conceivable that countless hours of administrative time will be spent tracking graduates if the states do not come together to uniformly release bar results. It is also possible that national school might not be able to comply with the proposed Standard because it cannot verify student performance if 26% of its students take the bar exam in jurisdictions that do not release bar data. Thus any consideration of the proposed Standard must include these logistical concerns.