July 29, 2016

The Hon. Rebecca White Berch
Chairperson
Council for the Section of Legal Education and Admissions to the Bar
c/o JR Clark at jr.clark@americanbar.org

Dear Your Honor and Council Members:

We, the undersigned deans of ABA-approved law schools, the National Bar Association, the Society of American Law Teachers, East Bay La Raza Lawyers Association, and former Associate Justice Cruz Reynoso of the California Supreme Court, strongly object to the Council’s proposed changes to Standard 316. In contrast to the American Bar Association’s history of narrowing the opportunity of minorities to enter the legal profession through law-school admissions quotas and other barriers, the ABA today extols the virtues of diversity and the need to welcome more African Americans, Hispanics, and Native Americans into the profession, which, disturbingly, remains one of the least diverse in the country.

The Council of the Section of Legal Education and Admissions to the Bar has, nonetheless, proposed a set of changes to Standard 316 that would, if adopted, jeopardize the existence of traditionally minority law schools and ultimately erase the profession’s modest gains in diversity over the last several decades. Moreover, the proposal would place minority bar examinees at a distinct disadvantage relative to their non-minority counterparts.

A. Diversity Set Back Decades

Blacks and Hispanics/Latinos currently constitute a little over 30 percent of the country’s population. According to the federal Bureau of Labor Statistics, however, a mere 4.6 percent of American lawyers are African American and 5.1 percent are Hispanic or Latino, and the ABA has made little recent progress in improving these numbers. Over the last fifteen years, for example, the number of black lawyers has grown an anemic 1.2 percent and the number of Hispanic lawyers has increased by less than one percent. Minority communities, it should come as no surprise, remain woefully underserved.

Were it not for the existence of traditionally black law schools, predominantly Hispanic/Latino law schools, and other law schools with unusually large numbers of black and Hispanic students, the picture would be much bleaker. Twenty-two law schools, for example, enroll a third or more minority students (i.e., black, Hispanic, Native American, Eskimo, and Pacific Islander) and have an average bar passage rate among first-time takers at or below 65 percent for one or more of the past five years, and thus face an uphill battle to reach 75 percent after three more
administrations of the test. The group includes all 12 schools designed to serve historically underrepresented minority populations.

Under the Council’s proposed changes to Standard 316, however, a great many of the 24 schools in the group, and a number of others with substantial minority populations, are likely to lose accreditation and ultimately close their doors. Indeed, if only a dozen of the most endangered schools with the highest minority enrollment were shut down as a result of the new rule, the total minority enrollment in all 205 ABA-accredited law schools would drop by 20 percent. As a percentage of total enrollment, minority enrollment would thus have declined almost two decades to its late-1990’s level.

And the decline wouldn’t stop there. A number of schools actively recruit rising 2L minorities from lower-ranked schools. As one administrator quoted in Espeland and Sauder’s “Engines of Anxiety” explained:

It is not a terribly well-kept secret that many upper-tier law schools or aspiring upper-tier law schools will take no chances at all on their entering classes and then will raid places like here for students of color who have done well . . . . Then they can report that their overall student population has diversity even though their first-year class looks very white.

Since many of the prime feeder schools in the gambit are the minority schools that will be shut down under the Council’s proposal, the decline in minority enrollment will reverberate far beyond the walls of the most endangered institutions. And with it, over time, the moderate increase in the last several decades of African Americans, Latinos, and Native Americans in the legal profession would – despite all of the ABA’s pronouncements on the importance of diversity – be erased.

B. Uneven Playing Field

Advocates of the proposed standard paint a rosier picture: no school or group, either minority or non-minority, need suffer. Alumni who fail the bar the first time around can take it three more times within the abbreviated two-year period where passage will count toward their alma mater’s passage rate. What’s more, they claim, not many grads sit for the exam a four or fifth time, anyway.

In a more perfect world, this might be true. Presently, though, the argument ignores yet another racial reality. Sitting for consecutive administrations of the bar exam requires significant financial resources well beyond the fees charged by state bars and private bar review companies. A graduate must, during the six months between exams, work less, if at all, and often utilize, when available, financial assistance from family members. Blacks, Hispanics, and Native Americans, however, do not, generally speaking, have the financial resources of their white counterparts who are thus able to sit for more consecutive administrations of the bar exam. In effect,
compared to schools with smaller minority populations, the graduates of heavily minority law schools are likely to have fewer opportunities to raise their school’s sub-75 percent passage rates among first-time takers. The Council’s proposal tilts the playing field.

C. Diversity and Standardized Test Scores

Race, as the Supreme Court has just reaffirmed, is a legitimate consideration in school admissions. The value law schools place on diversity in admissions recognizes and, to a degree, corrects for the marked disparity in the LSAT scores of minority and non-minority applicants. For example, according to a study in the Law School Admission Council’s “LSAT Technical Report Series” issued in 2015, the mean score for African Americans on the LSAT is eleven points lower than for white test-takers, Hispanics/Latinos score seven points less than whites, and Puerto Ricans score 14 points lower than their Caucasian counterparts.

Imagine that, in the face of this disparity, the Council adopted a rigid, colorblind LSAT-score cutoff for admission to law school. A strict, across-the-board required score would necessarily either (1) deny admission to many minorities possessing the same ability as admitted white applicants who scored just above the cutoff or (2) represent the unacceptable notion that the higher scores of whites on standardized tests reflects that, as a group, they have greater ability.

The principle is the same with law schools and bar passage. The Council’s strict, 75 percent, across-the-board cut off for a school’s bar passage rate, regardless of whether the school is heavily minority and its students generally score lower on the standardized bar exam or the school is whiter and tends to score higher, produces the same unacceptable result; it necessarily either (1) denies accreditation to schools with minority students of comparable ability to those of whiter institutions that remain accredited, or (2) says that students of color are not, in general, as capable their non-minority counterparts.

D. Holes in the Safety Net

The proposed Standard includes a provision that would allow traditionally minority schools that have fallen out of compliance more time to comply with the 75 percent requirement: such schools “may seek to demonstrate good cause for extending the period . . . by submitting evidence of . . . [e]fforts by the law school to provide broader access to legal education while maintaining academic rigor.” The provision is not an exemption for minority schools whose graduates generally underperform the bar passage scores of Caucasian grads; it is merely an extension of time to meet the 75 percent mark.

The safety net for heavily minority schools thus has a couple of big holes in it. It implies that the rigorous law school experience that enables graduates of whiter schools to pass the bar at 75 percent is missing from the heavily minority schools,
and that a couple years under the new rule will erase the race-based disparity in
standardized test scores that traces back through centuries of discrimination,
inferior, underfunded neighborhood schools, and cultural bias in testing.

E. Impersonating an Objective Standard

Even if the Council remains indifferent to the plight of diversity under the proposed
standard and to the disparity in minority and non-minority performance on
standardized exams, there are compelling reasons to retain the second prong of the
present standard. Under the second prong, a school remains in compliance if its
graduates’ first-time passage rate is no more than 15 percent below the state
average for three of the last five years. The Council’s proposal would eliminate the
second prong on the grounds that “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 Council correctly recognizes that the competence of a law school’s graduates to
practice law is to be measured against an objective standard of performance; after
all, simply because the graduates of one school pass the bar at a higher or lower rate
than those of other law schools is not, in itself, determinative of whether any of the
schools are worthy of accreditation.

The problem here is that the proposed rule only masquerades as a fixed, objective
standard, while the second prong of the current rule is the real thing.

Although the proposed rule is based upon a fixed, 75 percent passage rate, state
passage rates float on a sea of different Multistate Bar Exam passing marks –
Wisconsin’s, for example, is 129, whereas Delaware’s is 145 – and on state-law
portions of the exam. A fixed, objective standard treats equally performing parties
the same. Under the Council’s proposal, though, the bar passage rate of graduates of
a law school in a jurisdiction that has set a high passing score on the MBE may well
average under 75 percent over the two years following their graduation, while the
passage rate of the very same group of graduates taking the exam in a state with a
low passing score may well average over 75 percent in the same period. The
Council’s proposal thus produces the very problem it purports to solve: rather than
measuring a law school’s performance by a fixed standard producing consistent
outcomes for the same performance, the Standard becomes a moving target that is
easier or harder to hit depending on the jurisdiction one is aiming from. In contrast,
as the Council clearly understood when it adopted the present rule nine years ago,
requiring a school to fall close to the state average adds a fixed, objective measure of
performance to the moving target of the 75 percent rule.

No state has a corner on competent law grads or good test takers, and none is
burdened by exclusively unsuitable grads or poor examinees. It is fair to presume,
given the large number of bar examinees spread across the country, that a
comparable cross-section of abilities exists from state to state. Accordingly, if school
A is located in a state with an average bar passage rate of 75 percent and school B is in a state with an average passage rate of 50 percent, and the alumni of schools A and B happen to pass at a rate of 75 percent and 50 percent respectively, the graduates of A and B have nonetheless demonstrated comparable skills and their two schools presumably performed roughly the same in training them. Under the second prong of Standard 316, both law schools would be treated the same, as they should be. However, under the Council’s rule, which eliminates the objective yardstick of the second prong, similarly performing schools would often experience opposite fates.

As necessary as the second prong is, one may legitimately ask exactly what level of performance is sufficient. Should a law school be required to meet or exceed the state average, and, if not, just how close to the average should a school be required to come? Drawing the line at or above the state average, however, would produce a one-year half-life for legal education itself. Each year in each state, somewhere around half the schools would, by definition, underperform the state average and fall out of compliance. If, on the other hand, the mark is set too far below the state average, then the Council would be handing schools a blank check with regard to bar preparation.

The present requirement of no more than 15 percent below the state average seems to draw a reasonable line. It treats comparable programs equally, while, at the same time, preventing schools from lagging too far behind in bar performance. With regard to the second prong of the current standard, the Council should adhere to the adage “if it ain’t broke, don’t fix it.”

F. Bad Math

Many law students of all backgrounds transfer to another school following a strong performance in their first year of study. Despite the fact that their initial school played a special role in preparing them for the most highly tested subjects on the bar exam, only the second institution can count their performance on the bar toward its bar passage rate. Whether or not the second school should continue to be able to count the transferee’s bar exam performance, fairness requires that the initial institution should be able to.

The ABA Standards presently concede as much, without actually correcting the problem. Standard 316(c)(6) now recognizes that, when a school’s bar passage rate dips below the acceptable level, “transfers by students with a strong likelihood of passing the bar will be considered in the [initial] school’s favor.” In eliminating 316(c)(6) in its proposal, the Council would be taking another step backward.

Conclusion

We fully recognize that, coming off a deep recession and in light of significant change in the delivery of legal services, law grads face unprecedented difficulties in
the form of high debt and unemployment, and we fully recognize our role in ameliorating their plight and ensuring that the consumers of legal services receive high quality representation. Indeed, we are actively addressing these issues through the nationwide reduction in the size of entering classes, significant curricular innovation and academic support, and enhanced placement efforts, among other measures.

At the same time, institutional insensitivity to minority concerns will not, in today's racially charged climate, be ignored. We must oppose intemperate reaction to public opinion and insist on fair, responsible, and non-discriminatory solutions to the challenges we face. Reducing the competition for positions in a tight and uncertain legal job market is a legitimate goal, but doing so by further narrowing the opportunity of traditionally underrepresented groups to enter the profession is not a legitimate solution.

Accordingly, we oppose the Council's proposed revision of Standard 316 and petition the Council to retain the Standard in its present form. Forging ahead with the proposal can only, as we have explained, endanger the law schools at the forefront of providing minority opportunity, set diversification in the legal profession back several decades, place minority bar examinees at an inherent disadvantage, and replace the sound and objective measurement of bar exam performance with an unworkable standard.

Thank you for your consideration.

Respectfully,

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<th>Law Schools</th>
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<td>Dean Alfredo Garcia</td>
<td>National Bar Association (NBA)</td>
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<td>St. Thomas University School of Law</td>
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<td>Dean Dannye Holley</td>
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<td>Thurgood Marshall School of Law of Texas Southern</td>
<td>Cruz Reynoso, former Associate Justice of the California</td>
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<td>University</td>
<td>Supreme Court, Vice-Chair of the U.S. Commission on Civil</td>
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<td>Chancellor John Pierre</td>
<td>Rights, and Professor of Law Emeritus at the UC Davis</td>
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<td>Dean Katherine Broderick</td>
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