Comments re Proposed Standard 316

Michael Lewyn, Associate Professor, Touro Law Center

The “75 percent rule” is designed to prevent law schools from admitting students who are incapable of passing the bar exam. However, this rule is both overinclusive and underinclusive: it may discourage law schools from admitting students who are fully capable of passing the bar exam, yet at the same time does not prevent schools from “gaming the system” by admitting unqualified students. In addition, the rule will distort legal education in other ways, forcing schools to be so focused on bar preparation that they cannot adequately educate students for practice. Finally, I propose an alternative rule that would be more narrowly tailored to the admissions problem: a rule that actually prohibits the admission of students whose LSATs are so low that their chances of passing the bar are truly minimal.

1. The rule is overinclusive

Under the “75 percent rule”, a school that admits a group of fairly low-risk law students will still not be in compliance. For example, imagine a school where every student has an LSAT over 150, and the median LSAT is 155. Even Law School Transparency, a supporter of stricter bar passage regulations, admits that low-150s students are only at “modest risk” of failing the Bar exam. It follows that a student with an LSAT of 150 will probably pass the bar if she applies herself, and the ABA need not discourage the admission of such students.

But because schools with modest-risk students often have bar pass rates below 75%, a school that admits such students will not be in compliance with the proposed rule- especially if the school is in a state with an unusually difficult Bar exam, such as California. For example, Pepperdine (where the median LSAT is 159, and 75 percent of students have LSATs above 154) had a July 2015 bar pass rate in the high 60s, which means it might not be in compliance with the proposed standard.

A better rule, by contrast, would target not the “modest risk” students who can pass the Bar with effort, but the students who have very little chance to pass the bar- not the students with a 50-75 percent chance, but the students whose chances of passing the bar are well below 50 percent.
The rule’s failure to consider different states’ bar pass rules is a possible source of anticompetitive behavior. A state that favors its law schools could set passing scores so low that all the schools in its state could pass the 75 percent bar with ease, while a state wishing to create a law school monopoly could use bar passage rates as a way to put disfavored schools of business.

2. The rule is underinclusive

It could be argued that even if the Rule goes too far, it at least prevents high-risk students from wasting their money on law school and then failing the bar exam. This might not be the case. A highly prestigious school could admit a huge number of very-low-risk students, but add additional revenue by allowing 10 or 20 percent of its students to be extremely high-risk.

For example, a high-end school with 100 admissions slots could admit 90 students with LSATs of 170 (95 percent of whom will pass the bar) and 10 with LSATs of 140 or below (only two of whom will pass the Bar). 88 of the 100 students will pass the Bar— even though 10 percent of the students probably have no business in law school.

3. The rule may distort legal education

Many schools have bar pass rates lower than 75 percent; for example, in California, only 6 of 21 schools were above this mark in July 2015 (though an unknown number of these schools will be in compliance if enough of these students pass the Bar on their second or third try.) Although the decline in Bar passage is primarily a result of less selective admissions, the less favored schools will nevertheless focus their curricula on bar passage, taking resources away from other, more practice-oriented uses.

Because these schools’ teachers will feel the need to cover as many bar-related rules as possible, experiential learning will get short shrift. And schools located in Uniform Bar Exam (UBE) jurisdictions will have a strong incentive to focus curricula on the national common law tested in the UBE, which means that their teachers will devote little if any class time to state law. For example, a trusts and estates teacher focused on the UBE will not be able to cover state law or ask her students to draft wills and trusts, because every minute of class time will be devoted to teaching “bar exam” rules that may be very different from the law of a relevant state.
4. There is an alternative

If plunging bar pass rates are a result of inputs (i.e. schools admitting less qualified students) it seems to me that the ABA should focus directly on inputs, rather than distorting legal education.

Thus, I propose that, before enacting a new rule, the ABA should collect enough data to ascertain exactly what LSAT score\(^1\) is so low that bar passage is highly unlikely – so much so that a student with that score should generally not be admitted to law school. After discovering this data point, the ABA should strongly discourage, if not prohibit, the admission of students with such LSAT scores.

For example, assume for the sake of argument that (1) admission of a student with a less than a 30 percent chance of passing the Bar would be unfair to that student, and (2) students with below a LSAT score of X have a 30 percent chance of passing the Bar. The new Standard 316 would begin: “Law schools should generally not admit students with an LSAT below X.”

A more difficult issue is how much flexibility law schools should have to admit students with lower scores. I suggest two possible rules for discussion:

1. Requiring schools to explain to the ABA the admission of students with LSAT scores below X, and in particular to explain why the school believes such students are reasonably likely to pass the Bar.

2. Allowing schools to admit students with lower LSATs, but adding that if such students fail the Bar, law schools should take responsibility for their admissions error by refunding some percentage of the tuition to those students. This rule would give schools a strong incentive to give such students additional preparation, or to not admit such students absent extraordinary circumstances.

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\(^1\) I am assuming for the sake of argument that LSATs are the only truly useful item of data that is available to law schools at the time of admission. If this assumption is incorrect, Standard 316 could certainly be amended to allow consideration of other data.