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Hon. Rebecca White Berch
Chair
Council of the Section of Legal Education
and Admission to the Bar
321 North Clark Street
Chicago, IL 60654

Attn: J.R. Clark

Dear Judge Berch:

The New York State Bar Association has serious concerns about adopting the proposed Standard 316 at this time. Far too much is currently unknown and the facts needed for informed decision-making are lacking. For New York, there probably could not be a more inappropriate time to impose any new standards.

As I am sure members of the Council know, New York recently adopted a new bar exam, which was taken by more than 10,000 individuals last week. This exam – the Uniform Bar Exam (UBE) – had never been given before. Thus, we know nothing about the impact it will have – and that impact could be significant.

First, we have no idea what the pass rate will be for this exam compared to the old New York bar exam. Therefore, history cannot serve as a guide, with the State having entered a new era.

In addition, we do not know how this change will affect specific law schools. Students from some may do much better, while students from others might not do as well. It is not clear, in these early years of administration of a new bar exam, whether the schools have been able to fully integrate curricular changes made necessary by the imposition of the new bar exam more than half-way through current test-takers' education. Furthermore, this year's results may not reflect the long-term outlook for students at any particular school. Schools whose students do not do well this year are likely to continue to make adjustments in their approach to teaching, and there may be significant changes over the next few years as schools learn to adjust to the new format.

Finally, there is a total lack of knowledge of the effect of this new exam with regard to disparate impact. The New York State Bar Association had asked the New York Board of Law Examiners not to impose the new exam until a study had been completed to determine its likely impact on minority students. The Board rejected our proposal and implemented the exam with a promise to do a study. The Board has now announced that it will be conducting this study, but the results will not be known until sometime in the future. Thus, as of now, we have no knowledge whatsoever with regard to the impact on minorities. Furthermore, we have no idea what the Board would do if the study were to show that the new exam had a significantly negative impact on minorities.

This void in our current knowledge means that it is impossible to make an informed judgment as to imposing any new standard affecting New York at this time. We also note that a number of other states have similarly adopted the UBE to replace their state bar exam. We would expect that that these states, as well, would be concerned with a change in the standard while the bar results are in flux.

But this lack of knowledge is not limited to the effect of a new standard on New York and other states that recently adopted the UBE. The Council, to date, has not studied the potential impact on minorities of proposed Standard 316. This is a nationwide concern. Our Association is aware of the serious concerns that others have expressed with regard to this critical factor. We are also cognizant of the issues that were raised and addressed in 2007 when the proposed standard was last considered. Consequently, we make the same request to you that we made to the Board of Law Examiners before they imposed the UBE in New York – do not impose new standards without first conducting a thorough and independent study of the likely effect of such a standard on minority enrollment. The American Bar Association should not take a step that poses a serious risk of diminishing diversity in our profession. Such a result would be counter to the ABA's well-recognized policy and the efforts of so many lawyers and bar associations to take steps to increase diversity.

Doing a study before imposing a new standard would avoid the potential serious problem of having to repeal a recently-adopted standard if a post-adoption study were to show that it, in fact, resulted in a disparate impact. This would be the worst of all worlds, as it would not only force the ABA to correct a terrible error, but also would result in a public embarrassment to the ABA. Why would anyone want to take this risk?

Our Association realizes that the Council is interested in reviewing its current standard to try to assure that accredited schools are adequately preparing their students for the bar exam and the practice of law, which is, without doubt, an appropriate objective. However, this objective must be achieved in a manner that does not have the potential for terribly negative consequences.

In sum, the New York State Bar Association urges the Council to step back at this time from submitting to the House of Delegates a revised Standard 316 and take the time to develop the facts necessary to make a judgment that will be informed and well-supported by studies and historical data.

Yours truly,

A handwritten signature in cursive script that reads "Claire P. Gutekunst".

Claire P. Gutekunst