August 4, 2016

JR Clark  
Council of the Section of Legal Education  
and Admissions to the Bar  
American Bar Association  
321 Clark Street  
Chicago, IL 60654-7598

RE: Factual Correction

Dear Mr. Clark:

I write to apologize for and correct a factual error in the letter I submitted on July 26, 2016. I referred in that letter to the percentage of minority students enrolled in law schools with a first-time bar passage rate of less than 60%. In my calculation, however, I inadvertently used the bar passage rates for 2013 rather than those for 2014. For the most recent year, the correct data are:

In 2015, 90.5% of the nation’s minority law graduates obtained their degrees from schools with a first-time bar passage rate of at least 60%.

I apologize for the confusion and hope this clarifies the record. Thank you again for the opportunity to comment on these proposed standards.

Sincerely yours,

Deborah J. Merritt  
John Deaver Drinko/Baker & Hostetler  
Chair in Law

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1 I calculated this statistic from data reported on the ABA Section of Legal Education’s website for “ABA Required Disclosures,” [http://abarequireddisclosures.org/](http://abarequireddisclosures.org/) (last visited July 24, 2016). I derived first-time bar success from the composite average pass rates for each school in 2014, the most recent year for which bar data were available. Twelve schools had first-time pass rates falling below 60% that year. In making this calculation, I excluded the three law schools located in Puerto Rico. Although graduates of those schools admirably serve the island’s legal needs, very few of them move to other states; it seems inappropriate to rely upon them to remedy the historic underrepresentation of minority lawyers in the fifty states and District of Columbia.
J R Clark  
Council of the Section of Legal Education  
and Admissions to the Bar  
American Bar Association  
321 Clark Street  
Chicago, IL  60654-7598

Dear Mr. Clark:

I strongly support the Council’s proposed revisions to Standards 316 and 501 of the ABA Standards and Rules of Procedure for Approval of Law Schools. These changes are essential to fulfill our professional duty to law students, our graduates’ clients, government lenders, and the general public. All of these groups depend upon ABA accreditation to assure both a threshold level of educational quality and a professional community that thoughtfully supervises that quality.

Critics of our accreditation process sometimes complain that the standards needlessly raise the cost of legal education by accommodating faculty interests, rather than attending to the needs of students, clients, and the public. I do not agree with all of those criticisms, but they voice a legitimate concern. We should weigh all standards carefully to assure that they protect the interests of the many constituents we serve.

Revised standards 316 and 501 will do just that. Standard 316 focuses appropriately on educational outputs: Can a school’s graduates pass the licensing exam for our profession? The proposed standard simplifies that key measure and sets a very modest target. Graduates have two years—four opportunities—to pass the exam. They may take the exam in any state. Schools, finally, only need to demonstrate that three-quarters of graduates who chose to take the bar exam achieved their goal within a two-year window. The rule does not penalize schools for graduates who choose to use their degrees without seeking bar admission.

This modest standard builds on findings from the most comprehensive study of bar exam results ever conducted. That study, undertaken by LSAC during the 1990s, found that 94.8% of exam takers eventually succeeded in passing the bar exam.¹ Among examinees of color, the success

rate was 84.7%. No racial or ethnic group had a pass rate below 75%. When examinees succeeded, moreover, they almost always did so within three tries.

In that context, proposed Standard 316 sets a very modest threshold for ABA accreditation. The standard is 20 points lower than the overall success rate documented by LSAC, ten points lower than the one identified for minority students, and several points below the pass rate for any racial or ethnic group. Schools that cannot meet this reasonable standard are not serving the students who devote considerable time and money to completing their degrees. Nor are they serving potential clients, the general public, or the taxpayers who underwrite loans for these programs.

Proposed Standard 501, similarly, offers important protection to students, lenders, and the public. With the sharp decline in law school applicants, law schools have an incentive to admit less qualified students—without investing the resources needed to prepare those students adequately for bar passage. Accreditation promises that we as a community will police that incentive, assuring that schools admit only students who appear capable of completing the school’s educational program and securing bar admission.

The proposed standard and interpretations, notably, do not focus on applicant test scores. Interpretations 501-1 and 501-2 describe a holistic assessment of a school’s varied admissions criteria, academic attrition rate, bar passage rate, and academic support programs. The only bright line—a 20% non-transfer attrition rate—simply shifts the burden of proof to a law school exceeding that threshold. Careful investigation is appropriate in those circumstances because of the high cost of law school tuition: students who leave law school without completing the JD suffer substantial costs for very low return. Prospective students, clients, lenders, and the public have no interest in fostering this type of educational practice.

In the rest of this letter I address two concerns about the proposed standards.

Legal Education, the Bar Exam, and Lawyer Competence

The bar exam, unfortunately, offers a very flawed test of lawyer competence. It requires too much memorization while undervaluing skills essential to law practice. States have also raised passing scores and added subjects to the bar in a way that disadvantages recent graduates. These aspects of the bar exam trouble me greatly.

We cannot remedy the bar exam, however, by ignoring its impact on our graduates. Graduates who fail the bar exam cannot practice law—no matter how flawed we think the exam might be.

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2 Id.
3 Id.
4 Id.
Maintaining accreditation for law schools with low bar passage rates, similarly, does not change either the bar exam or the quality of practicing lawyers.

If anything, the proposed tightening of Standard 316 will encourage law schools to focus more directly on the relationships among legal education, the bar exam, and professional competence. In the short run, some schools will develop programs to enhance bar passage; this will improve prospects for their graduates. In the longer term, we can focus on working with state supreme courts to develop better tests of professional competence. Whatever the nature of those tests, however, ABA-accredited law schools should be able to show that at least 75% of graduates choosing to take the test are able to succeed within two years.

Diversity of the Legal Profession

The most serious concern raised about the proposed standards is that they will reduce racial and ethnic diversity in a profession that is still struggling to diversify. In 2010, white non-Hispanic lawyers still comprised an overwhelming majority (88%) of our profession.\(^6\) If some law schools lose accreditation due to low bar passage rates—or the admission of too many students who appear incapable of securing bar admission—will those losses slow diversification of our profession?

This seems unlikely for three reasons. First, most minority students attend law schools that risk no loss of accreditation through proposed Standards 316 and 501. In 2015, 95% of the nation’s minority law graduates obtained their degrees from schools with a first-time bar passage rate of at least 60%.\(^7\) Although it is challenging to convert first-time pass rates to eventual pass rates, a first-time rate of 60% is quite likely to produce an eventual pass rate of at least 75%.\(^8\) The overwhelming majority of minority law graduates, therefore, attend institutions that will not be affected by the proposed standards.

Indeed, our nation’s highest ranked law schools (all with excellent bar passage records) produce a disproportionate number of our minority graduates. Harvard Law School graduated 182 minority students in 2015—the second highest total in the nation.\(^9\) The top fifteen law schools, as ranked by US News, collectively graduated 1,453 minority students during the same year. Those schools comprise only 7.5% of ABA-accredited schools, yet they produced 13.8% of our minority graduates. Minority students succeed at a wide range of law schools, including our most competitive institutions.

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\(^7\) I calculated this statistic from data reported on the ABA Section of Legal Education’s website for “ABA Required Disclosures,” http://abarequireddisclosures.org/ (last visited July 24, 2016). I derived first-time bar success from the composite average pass rates for each school in 2014, the most recent year for which bar data were available. Six schools had first-time pass rates falling below 60% that year.

\(^8\) See, e.g., WIGHTMAN, supra note 1, at 27, 32 (60.4% of African American examinees passed the bar on the first try; 77.6% did so eventually).

\(^9\) This figure, along with others cited in this paragraph, derives from the website of “ABA Required Disclosures” cited in note 7 supra.
Second, several studies demonstrate that thoughtful pedagogies can improve bar passage rates.\textsuperscript{10} Law school is not simply a tunnel that channels students with fixed abilities to the bar exam; good education makes a difference. The proposed standards will encourage at-risk law schools to adopt programs that enhance bar success. Since minority graduates find the bar exam more challenging than white students,\textsuperscript{11} these changes will disproportionately help minority graduates enter the profession.

Schools with low bar passage rates, finally, do little to diversify the profession. Arizona Summit Law School, for example, conferred JDs on 151 minority graduates in 2015.\textsuperscript{12} That is a promising number of minority graduates, but the school’s first-time pass rate was just 30.6% on the July 2015 Arizona bar exam.\textsuperscript{13} Graduates who fail the bar exam cannot diversify the profession. Instead, these graduates suffer substantial personal and financial costs. We should not sacrifice the welfare of these minority students in the name of diversity—especially when so many minority students succeed at institutions with excellent bar passage rates.

The Council, together with law schools, could take many steps to improve diversity in our profession. Pedagogies that improve bar performance would greatly aid minority students; so would a close examination of the factors that impair minority students’ classroom achievement.\textsuperscript{14} A renewed focus on need-based scholarships, finally, would greatly enhance access to the legal profession for minority students.\textsuperscript{15}

Maintaining the accreditation of law schools with poor bar passage rates, on the contrary, is a counterproductive way to diversify the profession. We owe minority students the best our educational system has to offer—not programs with low success rates.

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\textsuperscript{11} See, e.g., WIGHTMAN, supra note 1.

\textsuperscript{12} See ABA Required Disclosures, http://abarequireddisclosures.org/ (last visited July 24, 2016).

\textsuperscript{13} Examination Statistics, AZ COURTS.GOV, http://www.azcourts.gov/cld/Attorney-Admissions/Examination-Statistics (last visited July 24, 2016). Although some of the failed test takers will retake the bar, it is unlikely that Arizona Summit’s eventual bar passage rate will reach 50%. Only 18.6% of the school’s repeaters passed the bar in February 2016.

\textsuperscript{14} Numerous studies have shown that minority students obtain lower law school grades than white students—even after controlling for LSAT score, UGPA, and other entering credentials. For discussion of some of these studies, see Deborah J. Merritt, The White Bias in Legal Education, LAW SCHOOL CAFE, http://www.lawschoolcafe.org/2015/07/16/the-white-bias-in-legal-education/ (July 16, 2015); Deborah J. Merritt, More Evidence of the White Bias in Legal Education, LAW SCHOOL CAFE, http://www.lawschoolcafe.org/2016/05/01/more-evidence-of-the-white-bias-in-legal-education/ (May 1, 2016).

Thank you for the opportunity to comment on these proposed standards. The Council has done an excellent job of drafting standards that are clear and concise. Most important, the proposed standards will protect the interests of the students, clients, taxpayers, and public that we serve.

Sincerely yours,

[Signature]
Deborah J. Merritt
John Deaver Drinko/Baker & Hostetler
Chair in Law