TO: ABA COUNCIL CHAIR, THE HONORABLE REBECA WHITE BERCH  
FROM: WILLIAM WESLEY PATTON¹  
RE: STANDARDS REVIEW COMMITTEE PROPOSED AMENDMENTS TO STANDARD 316 (BAR PASSAGE)  
DATE: MARCH 19, 2016

ANALYSIS IN OPPOSITION TO AMENDMENTS TO STANDARD 316

The California State Bar Association is in crisis regarding the ratio of the California Hispanic population and the embarrassing and dangerously low percentage of California Hispanic attorneys.² According to the United States Census the percentage of Hispanics in California increased from 32.4% in 2000 to 37.6% in 2010³, and in 2014 comprised 38.6% of the California population.⁴ However, according to the California State Bar Association, Hispanics comprised 3% of California’s attorneys in 1999⁵, 3.7% in 2001, 3.8% in 2006⁶, and in 2011, the most recent survey, Hispanics comprised only 4.2% of California attorneys.⁷ There are currently 186,600 attorneys licensed to practice law in California⁸, therefore, there are only

¹ Although I am currently a Professor at Whittier Law School, as of July 1, 2016, I am retiring and no longer will be affiliated with the law school. I will not teach there and will not receive a pension from the College. I disclose these facts to demonstrate that I no longer have a financial interest that might conflict with my opinion that the Council should deny the proposed amendment to Standard 316. This analysis is my own, does not necessarily represent the views of Whittier Law School, and I did not consult with any Whittier professors or administrators in drafting this analysis. I will continue in my position as an Assistant Clinical Vol Professor at the UCLA David Geffen School of Medicine, Department of Psychiatry after my retirement from the law school.

² This study focuses on the impact of the amendment to Standard 316 on California Hispanic law school applicants. Others will, I assume, present this Committee with the similar devastating impact on Black/African American law school applicants.

³ www.census.gov/prod/cen2010/doc/sf1.pdf, at Table 2.

⁴ U. S. Census Bureau (http://www.census.gov/quickfacts/table/PST045215/06#headnote-js-b).


⁶ Member Services Survey, Feb. 2006, at 12 http://www.calbar.ca.gov/LinkClick.aspx?fileticket=AG4sVakYtc%3D&tabid=212.


⁸ (http://www.calbar.ca.gov/AboutUs/BarNumbers.aspx).
7,837 (4.2%) Hispanic attorneys even though there are 14,013,719 Hispanics in California. In addition, Hispanics (39%) are the largest group served by low income access to justice programs in California.

Although there is also a national crisis in the number of Hispanics taking the LSAT, applying to law school [7,210 in 2010 v. 6,330 in 2014], matriculating, graduating, and passing the bar examination, nowhere is the scenario as precarious as in California where approximately 32.9% of all Mexican-American law school graduates took the bar examination according to one study. However, we are on the brink of two dramatic events that will substantially reduce the number of Hispanics attending and graduating from California law schools and passing the California bar examination, thus dramatically reducing the number and percentage of Hispanic attorneys:

1. An amendment to ABA Standard 316 to change the bar passage standard to one of 75% of law school graduates in two years of graduation; and,

2. A change by the California State Bar Association increasing the percentage of the MBE portion of the California Bar Examination from 35% to 50%.

Although the Council does not control the nature of the California Bar Examination, that change should be considered by this Committee in determining whether to reject the Standards Review Committee’s request for an over-aggressive amendment to Standard 316.

9 Supra., note 3.
10 Equal Access Fund Partnership Grants..., at 54 (http://www.calbar.ca.gov/LinkClick.aspx?fileticket=yWNOa4EQF2o%3D&tabid=736).
11 In 2000 Hispanics consisted of 3.4% of attorneys, in 2010 3.7%, and in 2014 5.6% even though they represented 17.4% of the United States population. LSAC JD Minority Enrollment (http://www.lsac.org/lsacresources/data), at 1; ABA Lawyer Demographics, Number of Licensed Lawyers – 2010.
I. The Council Should Reject the Amendment to Standard 316 Because It Will Have a Devastating Impact on the Percentage and Number of New California Hispanic Attorneys.

The ABA is not only responsible for promulgating standards that will assure access to justice and competent and zealous advocacy, it is also carries the burden of assuring that minorities have fair access to law schools and admission to the bar. The Council at its March 2016 meeting stated that it will “continue consideration of proposed changes to Standard § 205 and 206 related to equal opportunity, non-discrimination, and diversity and inclusion” in law school admissions. It is irrational to consider Standards 205 and 206 without also considering the dramatic effect on minorities of accepting the Standards Review Committees proposed 75% within 2 year bar passage rate change in Standard 316. Of equal importance is the Council’s and ABA’s duty to treat minority law school candidates equally and not to promulgate standards that the ABA knows will substantially disadvantage minorities in some states such as California.

The following analysis demonstrates that the 75% in 2 years proposed standard will single out California Hispanic law students unfairly.

California is unique in a variety of ways which have prohibited an increase in the number of Hispanics practicing law:

First, the California bar examination is one of the most difficult in the nation. For more than 3 decades it has had one of the lowest first-time bar passage rates in the nation. The average first-time bar passage rate in California from 2005 to 2014 was 65%\(^{13}\) compared with many states whose bar passage rates are between 80-90%\(^ {14}\).


\(^{14}\) Id.
Second, for reason not explained by the California State Bar Association, the California scaled score on the MBE is one of the highest in the nation, thus reducing even further the chances that Hispanic and other minority attorney representation will ever increase. For instance, the California MBE scaled bar passage score is **144**, but in other states the scaled scores average in the mid **130’s**. In fact, only five other states (Alaska, Delaware, Idaho, Nevada, and Virginia) have scaled MBE scores in the low 140’s). In contrast to the California 144 scaled score, the national median scaled scores from 2005 to 2014 averaged just **141.7**.

Third, the California State Bar Association has just increased the percentage the MBE counts on the bar examination from 35% to 50%. This change will further dramatically reduce the chances that Hispanic law school graduates will pass the California bar examination for several reasons:

1. There is a relationship between MBE cut (scaled) scores and bar passage.

Therefore, in California as the extremely high MBE scaled score increases from 35% to 50%, the expected bar passage will decrease for certain law taker groups. Although a shifting of the percentage of the MBE on a bar examination will not change the state’s bar passage rate, it will change which of those graduates taking the examination will fail. “Changing the weights of the components will affect **who passes**, but it will not affect the percentage of those who pass.”

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15 *Comprehensive Bar Admission Requirements 2016, at 29-30 (Nat. Conf. of Bar Examiners & ABA).*
16 Supra., note 10, at 35.
2. If a state scales its bar exam essay scores to its MBE cut scores it will not affect the percentage of applicants who fail, but “the particular examinees who fail will be different from those who fail strictly from the MBE alone. The written score will have an impact on who passes proportionate to its weight.”

This “triple effect” of California’s high MBE scaled score, scaling of the essay portion to the MBE, and reducing the weight of the essay portion of the exam will dramatically reduce the California Hispanic bar passage rate because Hispanic bar applicants historically score much higher on the essay portion of the exam than on the MBE portion. For instance, in one study when the essay portion was scaled to the MBE portion of the bar examination Hispanics’ bar examination scores were reduced more than any other racial minority. In July 2014 only 52% of Hispanics passed the California bar examination, and in July 2015 only 51.7% passed. Therefore, we should expect Hispanics to fail the California bar examination at even higher rates in the future based upon the changes in bar examination grading procedures.

3. There is a very strong relationship between Hispanic LSAT scores and projected Hispanic MBE scores. For decades Hispanics have been the second lowest scoring racial/ethnic subgroup on the LSAT and have substantially lagged the scores of White applicants (2000-2001 mean White LSAT score 153.9 vs. Hispanic score of 148.3, and 2009-2010 mean White LSAT score 155.3 v. Hispanic 149.5). Therefore, we should expect that the increasing

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reliance on the MBE in California to determine first-time bar passage rates will result in lower passage rates for Hispanic applicants.

II. *If the Council Approves the Standards Review Committee’s Amendment to Standard 316, California Law Schools Will Substantially Reduce the Number of Hispanics Admitted to California ABA Law Schools.*

There is a constant pressure on ABA approved law schools to deny access to students who have LSAT scores below what many have identified as scores which provide students with an excellent chance to pass the bar examination. For instance, Law School Transparency has issued a report that states that law students with LSAT scores of between 147-149 are at “high risk” of failing the bar examination.\(^{26}\) Obviously, in states like California with an extremely high percentage of Hispanic citizens, the decision not to admit students in this “high risk” category would mean that few Hispanics would be admitted into California ABA law schools since the Hispanic mean LSAT is only 149.5. In fact, if law schools use such an LSAT admission target, the California Hispanic bar will begin to wither.

If the Council adopts the amendment to Standard 316, California law schools will be under the threat of loss of accreditation if they seek to perform the important public policy objective of increasing Hispanic state bar representation. The loss of Hispanic matriculates is not merely theoretical. Those 5 ABA schools most at risk of violating proposed amended

Standard 316 (Golden Gate, Southwestern, Thomas Jefferson, LaVerne, and Whittier) currently enroll **29.8% of all Hispanics attending ABA approved law schools in California.**

The 5 California ABA accredited law schools listed above are at risk of failing the amended Standard 316 bar passage of 75% within two years if they continue their public policy objective of increasing minority representation in the California bar. For example, the 9-year first-time July bar passage average [2007-2015] of those schools is: Golden Gate 60.55%; Southwestern 62.8%; Thomas Jefferson 51.5%; LaVerne 55%; and Whittier 58.2%. Meeting the “75% within two years” standard will be difficult for these schools, and one way that they can assure a higher bar passage rate is to abandon their historical social policy objective of increasing minority bar representation. In addition, as demonstrated in Part I, supra, the chances of minority applicants passing the California bar examination will be substantially reduced as the exam shifts to a 50% allocation for the MBE and a reduction of the percentage of the essay exam upon which Hispanics perform at a higher level.

III. **The Standards Review Committee Relied on Two Empirically Flawed Studies to Conclude that Minorities Do Not Persist in Taking the Bar Examination Beyond Two Years.**

The Standards Review Committee relies heavily upon one of the least statistically reliable studies that I have ever read to justify its dramatic reduction from the current 5-year bar passage window to its proposed 2-year window. In that study, Susan M. Case, *The Testing Column: Persistence On The Bar Exam*, The Bar Examiner, December 2012, pp. 20-24, the author admits

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27 This data on Hispanic enrollment in California ABA approved law schools is derived from [http://www.abarequireddisclosures.org/](http://www.abarequireddisclosures.org/). A total of 2132 Hispanic law students were enrolled in California ABA approved law schools in 2015, and 635 Hispanics were enrolled in 2015 in the above 5 ABA law schools that risk violation of the new 75% bar passage rate within 2 years
that its finding are preliminary and that the conclusions are based upon many guesses and assumptions, not hard evidence. The author admits that: (1) the study is based upon incomplete data because “neither candidates nor jurisdictions provide NCBE with information about the individuals’ bar admission status”; (2) the sample only includes “those examinees with appropriately coded Social Security numbers”; and (3) they are only guessing [“we must assume”] that those students who only took the bar examination once passed the examination.

One need only examine the study’s conclusions about minority persisters to demonstrate that its simplistic assumptions and lack of complete data cast a broad shadow upon its conclusions. The study found that only 670 minority candidates in the study sample took the MBE examination at least twice over the “11 administrations” between July 2007 and July 2012. However, during that testing period in California alone, the following numbers of minority applicants repeated the California bar examination:

THE NUMBER OF MINORITIES REPEATING THE CALIFORNIA BAR EXAMINATION\(^{28}\)

<table>
<thead>
<tr>
<th></th>
<th>Black</th>
<th>Hispanic</th>
<th>Asian</th>
</tr>
</thead>
<tbody>
<tr>
<td>July 2007</td>
<td>250</td>
<td>119</td>
<td>142</td>
</tr>
<tr>
<td>Feb. 2008</td>
<td>304</td>
<td>393</td>
<td>482</td>
</tr>
<tr>
<td>July 2008</td>
<td>260</td>
<td>304</td>
<td>404</td>
</tr>
<tr>
<td>Feb. 2009</td>
<td>242</td>
<td>350</td>
<td>444</td>
</tr>
<tr>
<td>July 2009</td>
<td>258</td>
<td>354</td>
<td>413</td>
</tr>
<tr>
<td>Feb. 2010</td>
<td>249</td>
<td>376</td>
<td>433</td>
</tr>
<tr>
<td>July 2010</td>
<td>247</td>
<td>337</td>
<td>383</td>
</tr>
<tr>
<td>Feb. 2011</td>
<td>255</td>
<td>426</td>
<td>492</td>
</tr>
<tr>
<td>July 2011</td>
<td>241</td>
<td>339</td>
<td>366</td>
</tr>
</tbody>
</table>

This data regarding minority repeaters on the California bar examination explodes the conclusions of the Case study relied upon by the Standards Review Committee in determining

\(^{28}\) This data is derived from the California State Bar Association web page compiled for each California bar examination under the title “General Statistics Report…California Bar Examination”. (http://admissions.calbar.ca.gov/LinkClick.aspx?fileticket=PL6VLVgQEIM%3d&tabid=2269&mid=3159).
that since few bar applicants persist in retaking the bar examination that a shorter bar window should be used in Standard 316. The Case study draws this very suspicious conclusion: “Assuming that most of them [MBE takers] pass, we may conclude that most examinees pass the bar exam on their first attempt.” It is obvious that the Case study did not rely on data from those states, like California, that have consistently low bar passage rates and which have even lower bar passage rates among minority applicants. According to the Case study one would conclude that most of the 1945 Black, Hispanic, and Asian minority California bar test takers in June 2015 passed the exam. In fact, 937 of those minority applicants failed that bar exam. In addition, in contrast to the Case study, the chart above demonstrates that minority applicants that fail the California bar examination continue to retake that examination.

The second law student persistence study relied upon by the Standards Review Committee, Douglas Ripkey, *Explorations of MBE Attempt Patterns: July 2010 and July 2011 First-Taker Groups*, is equally flawed. The Ripkey study is based upon a biased sample of states that overall have very high first-time test taker passage rates, and does not include any states, such as California which have low bar passage rates and high numbers of minority test takers. The Case study and the Ripkey study are thus statistically designed in a manner to assure that a conclusion that minority test takers do not persist because most pass bar examination within a few administrations unlike in states with more difficult bar passage rates. Here is the sample used by Ripkey:
<table>
<thead>
<tr>
<th>STATE</th>
<th>FIRST-TIME BAR PASSAGE RATE JULY 2007</th>
</tr>
</thead>
<tbody>
<tr>
<td>Georgia</td>
<td>86%</td>
</tr>
<tr>
<td>Hawaii</td>
<td>77%</td>
</tr>
<tr>
<td>Kentucky</td>
<td>87%</td>
</tr>
<tr>
<td>Michigan</td>
<td>87%</td>
</tr>
<tr>
<td>New Hampshire</td>
<td>84%</td>
</tr>
<tr>
<td>New Mexico</td>
<td>83%</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>91%</td>
</tr>
<tr>
<td>South Carolina</td>
<td>82%</td>
</tr>
<tr>
<td>Tennessee</td>
<td>80%</td>
</tr>
<tr>
<td>Texas</td>
<td>84%</td>
</tr>
<tr>
<td>Wyoming</td>
<td>70%</td>
</tr>
<tr>
<td>Vermont</td>
<td>76%</td>
</tr>
</tbody>
</table>

In contrast the California first-time passage rate on the July 2007 examination was 66%.

Further, the Ripkey study included a total of 1107 Hispanic first-time takers, whereas in California alone, **497 Hispanics** took that July 2007 bar exam for the first-time and only **54.3% passed**. Although the Ripkey study shows that only 26.9% of Hispanics repeated the test up to four times, in California 284 Hispanics retook the exam and the repeat passage rate was only 20.4%. Because the California bar passage rate is so low, and because the Hispanic bar passage rate is so low, in California Hispanics repeat and persister rates are much higher than those demonstrated by the Case and Ripkey studies. The Hispanic repeater rate has been consistently high in California:

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31 Id.
This California bar examination data demonstrates that: (1) the first-time passage rate of Hispanics has been consistently very low; (2) the Hispanic repeater passage rate has been historically low; (3) the number of Hispanics who repeat the examination has been historically very high. This pattern of California low first-time and repeater Hispanic bar passage is obviously inconsistent with the Case and Ripkey studies that only looked at states with substantially higher bar passage rates. **It does not take a psychometrician to determine that the persistence of minority bar passage testers will be very low in states with high bar passage rates since students who pass the test are not eligible to repeat the exam.**

It is clear that the Standards Review Committee relied very heavily on the Case and the Ripkey studies for its decision to propose a drastic reduction in the bar passage window of the current 5 year standard to one of only two years. In fact, the Committee even included the

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32 The data released by the California bar examiners does not specifically track the persistence patterns among Hispanic law students. The ABA and/or the NCBE should work with the California State Bar Association and the California Supreme Court in sharing the cost of producing that needed empirical data.
studies in its February 22, 2016 memo and attachments to this Council regarding its proposed amendment of Standard 316. Because the Standards Review Committee’s conclusion is heavily based upon the flawed studies, I request that the Council return the proposed amendment to Standard 316 to the Standards Review Committee for reconsidering in light of data, such as that presented in the chart above, that demonstrates that minority applicants in states with very low bar passage rates do in fact persist in retaking the bar examination for multiple administrations. At the very least this Committee should either refuse to rely on such methodologically and empirically meager data presented on minority bar examination persistence, or it should seek a more sound analysis of a complete data set of minority repeaters within the 50 states and territories before radically changing the bar pass standard.

VI. The Standards Review Committee’s Earlier Decision Not to Count Non-Persisters Was Correct, and This Committee Should Modify the Proposed Amendment to Exclude Non-Persisters in Calculating Bar Passage Rates.

The Standards Review Committee’s proposed amendment that non-persistent bar examination test takers be counted against law school bar passage rates should be abrogated. Law schools cannot control law students who fail the bar examination once and decide not to retake the examination. The strongest argument against counting non-persistent test takers was ironically made by the Standards Review Committee itself on January 30, 2008:

[T]he Committee recommends in the Commentary [to former bar passage Standard 301-6]...that “non-persisters” (those graduates who take a bar examination once and fail, but do not take a bar exam again in any jurisdiction over the next two examination opportunities) not be counted
when calculating compliance with ultimate bar pass rates.\textsuperscript{33}

The Standards Review Committee was correct in 2008 in deleting non-persisters from compliance calculations, and the Committee has presented insufficient justification for taking a contrary and extremely unfair position in its current proposed amendment to Standard 316.

**CONCLUSION**

I am well aware of the consumer concerns that have been raised by many about the need to provide more transparency to prospective law students before they spend tens of thousands of dollars and incur a tremendous student debt in light of bar passage predictions and fewer job prospects. I fully support the U.S. Commission on Civil Rights call for law schools to disclose to the public and potential applicants data on “student academic performance, attrition, graduation, bar passage, student loan default, and future income disaggregated by academic credentials”, as well as any other material data that will assist in an intelligent cost/benefit analysis of whether to enroll in law school.\textsuperscript{34} The American Bar Association has already mandated disclosure of much of that data. Even Brian Z. Tamanaha, one of the harshest critics of law school recruitment and admissions and author of *Failing Law Schools*, recently stated “[t]ransparency has substantially increased in the last few years. Students can now easily compare law school outcomes.”\textsuperscript{35}

However, I am strongly opposed to many of the recent calls for a national minimum LSAT score to attend an ABA accredited law school since such policy will exclude thousands of

\textsuperscript{33} Letter from Dick Morgan, Chair, Standards Review Committee to Council Members, January 30, 2008 regarding amendments to ABA Standard 301-6 (Bar Passage). The January 30, 2008 recommendation changed the Standards Review Committee’s earlier decision that non-persisters should be counted for bar examination rate compliance. See December 3, 2007 letter from Hulett H. Askew, Consultant on Legal Education and Richard J. Morgan, Chair, Standards Review Committee to Deans of ABA-Approved Law Schools.

\textsuperscript{34} U.S. Commission On Civil Rights Affirmative Action in American Law Schools, at 6 (April 2007).

minorities who now have transparent information regarding law school attendance, performance, bar examination, and jobs prospects. Such proposals are not merely paternalistic, they are a form of “institutional racism” since although they appear neutral, they have a “disproportionately negative impact on members of a racial or ethnic minority group.”


The proposed amendment to Standard 316 will have a similarly institutional racist impact since it will, at least in California, provide an ABA sword that threatens dis-accreditation to schools that attempt to remedy over 100 years of exclusion of Hispanics as members of the California State Bar even if they provide sufficient information to prospective students regarding the risks of law school attendance.

The Council needs to determine which is more important – capitulating to the almost daily attacks by Law School Transparency and like-minded bloggers to radically alter law school admissions, or instead permitting ABA approved law schools, like those in California, to continue their effort at providing an more educational opportunity for Hispanics to become attorneys while at the same time requiring schools to provide sufficient consumer information to permit a reasoned cost/benefit analysis by prospective students.

I suggest the following amendment to the Standards Review Committee’s proposed amendment to Standard 316. Instead of a standard of achieving a 75% bar passage rate within 2 years, the standard should be modified to achieving a 75% bar passage within 4 years. This less drastic alternative is more reasonable because at this time in which the California bar examination is being modified in a way that will substantially reduce minority bar passage, it will still permit law schools to admit minority candidates whose admission statistics (UGPA, LSAT, and relevant other characteristics) demonstrate a reasonable chance of graduating and of
passing the bar examination within the above time frame. However, at a minimum, this Committee in balancing the national disgrace regarding the paucity of Hispanic and other minority members of the bar should at the most approve a standard requiring a 75% bar passage within 3 years, not the current proposal of 2 years.

There is simply no current exigency supporting the dramatic and destructive standard proposed by the Standards Review Committee. The lesser drastic proposals that I proffer will permit the ABA to determine the effects of a moderate ratcheting up of the bar passage standard on minority law school enrollment, graduation, and bar passage without unnecessarily gutting law schools’ attempts to bring minority law school applicants out of the pipeline and into the profession.