TO: ABA COUNCIL  
FROM: WILLIAM WESLEY PATTON¹  
RE: STANDARDS REVIEW COMMITTEE PROPOSED AMENDMENTS TO STANDARD 316 (BAR PASSAGE)  
DATE: APRIL 22, 2016

ANALYSIS IN OPPOSITION TO AMENDMENTS TO STANDARD 316

INTRODUCTION

State bar associations for decades have justified increasing the rigorousness of their bar examinations as necessary measures for consumer protection. Thus, states like California have several times increased their state MBE passing cut scores well beyond national medians. No state has provided any empirical evidence that increasing the difficulty of a bar examination has any relationship with increasing consumer protection (decreasing attorney discipline based upon incompetency and/or ethical violations). This study of the Wisconsin State Bar disciplinary system demonstrates for the first time that there is no statistical correlation between passing a bar examination and the percentage of attorneys disciplined. This research is critical to the discussion of the proposed changes to Standard 316 (bar passage) because it demonstrates that many state bar associations have sacrificed the ABA’s historical goal of increasing minority bar membership for an unproven method of consumer protection, needlessly increasing the difficult of their bar examinations well beyond national norms. The ABA Council has a responsibility to assure that its own standards do not exacerbate the negative impact of these unproven and unjustified state bar examination standards on minority law school applicants and upon the percentage of minority representation in the bar.

The Council has never publicly debated the current crisis in minority law school enrollment caused by non-consumer based bar examination passage rate manipulation by state bar associations seeking attorney monopolies by stemming the flow of new admittees. Inherent in Standard 316 (bar passage) is the assumption that state bar regulators will not promulgate bar passage standards that unreasonably restrict new and minority attorneys into the practice of law for unlawful or illegitimate public policy reasons.

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States with very low bar passage rates and very high MBE cut scores [MBECS]\(^2\) have fended off allegations of attorney monopoly by the state bar association by justifying low bar passage rates as necessary for consumer protection. “According to Oklahoma Supreme Court Justice Steven Taylor, ‘the purpose of the bar examination is to screen applicants in such a way to protect the public and to protect the reputation of the legal profession.’”\(^3\) No low bar passage rate or high MBECS state has presented any empirical evidence that substantially increasing cut scores provides more protection for the public.\(^4\) For example, California has not produced any empirical data to demonstrate that raising its cut score from the national median MBECS of

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\(^2\) MBE cut scores or "minimum passing scores" are decided by each state. "Using the MBE's 200-point scale, the Summer 2001 cut scores ranged from 118 (South Carolina) to 150 (Nevada) out of 200, with a median of 133." Gary S. Rosin, *Unpacking The Bar: Of Cut Scores and Competence*, 32 J. Legal Prof. (2008) (http://ssrn.com/abstract=914224), at p. 5.

\(^3\) *What Do Lower Bar Passage Rates For the Bar Exam Really Mean?*, April 8, 2016 (https://openobvious.wordpress.com/2016/04/08/what-do-lower-pass-rates-for-the-bar-exam-really-mean/). “Licensing processes, including most significantly the test instruments that are administered, should exist solely to meet the objectives of consumer protection.” Erica Moeser, *Rethinking Assessments and Alternatives to Assessments from the Perspective of a Bar Examiner*, 20 Ga. St. U. L. Rev. 1051 (2004). The State Bar of California prides itself on having one of the most difficult bar exams in the country: “To practice law in California, State Bar applicants must pass a rigorous three-day examination …considered one of the toughest in the nation, is administered by the Committee of Bar Examiners (CBE).” (http://www.calbar.ca.gov/AboutUs/StateBarOverview.aspx).

\(^4\) “Although bar examiners have proffered…general arguments about attorney competence and the need for stricter bar admission standards, none has produced concrete evidence that existing standards are ineffective in preventing unqualified individuals from practicing law. Boards, for example, have not cited evidence that disciplinary complaints based on competence have been unacceptably high under current passing standards.” Deborah J. Merritt, Lowell L. Hargensa, and Barbara F. Reskin, *Raising the Bar: A Social Science Critique of Recent Increases to Passing Scores on the Bar Exam*, 69 U. Cin. L. Rev. 929, 940 (2001).
135 to 144 provides consumers with any increased protection from incompetent and/or unethical attorneys.  

Unfortunately, the ABA has never challenged very high cut score states to demonstrate that high MBECS are reasonable or whether they constitute good public policy since those out-of-the norm standards lead to a system in which racial and ethnic minorities have not become a greater percentage of the practicing bar. However, since the Council is now considering radically increasing its bar passage standard (75% in 5 years to 75% in 2 years), it must now consider that proposal in light of the cumulative effect of that proposed standard on minorities in states with excessively high MBECS scores. Although the Council has no power to regulate state bar passage standards, it does have the power to assure that its own Standards do not exacerbate the effect of those state standards on the admission of minorities to the bar.

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5 The national median MBE scaled passage score was derived from Chart 9 in COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 2016, at 29-30 (National Conference of Bar Examiners and ABA Section of Legal Education and Admission to the Bar) by averaging the 48 states that reported “Minimum Passing Standards” for the “200 Point Scale. California’s desire to limit the licensing of new attorneys, although not relevant on the issue of consumer protection, is understandable since it has the second most active attorneys licensed to practice law. Lawyers Per Capita By State (https://lawschooltuitionbubble.wordpress.com/original-research-updated/lawyers-per-capita-by-state/).

6 In the debate about a proposal to substantially raise Florida’s cut score one study demonstrated that: “According to the data submitted by Lawrence, at the current 131 pass/fail line, all minority first-time test-takers had a 58-percent passage rate, raising the pass/file line to 133 dropped it to 48 percent, and raising it further to 136 showed only 42 percent would have passed.” Jan Pudlow, Raising the Bar Passage Standard, 28 The Florida Bar News (Aug. 1, 2001).
This is the first study to empirically demonstrate that passage of a bar examination is not correlated to the percentage of state attorney disciplinary actions. This empirical data is critically important to the ABA Council’s consideration of the proposed amendments to Standard 316 (bar passage) because it places in context the ABA’s critical need to balance consumer rights (the public and law students) with the ABA’s historical role in attempting to increase minority attorney representation. In particular, the proposed Standard 316 “75% within 2 year” bar passage rule will have a devastating impact on the number of minority law students in states like California that have very low bar passage rates and very high MBECS (See my previous letters to the Council on March 19, 2016 and April 6, 2016).

I. **There Is No Statistically Significant Correlation Between Wisconsin Attorney Discipline and the Method of Admitting Members Into the Bar (Diploma Privilege v. Bar Examination).**

This is the first study to empirically demonstrate that passage of a bar examination is not correlated to the percentage of state attorney disciplinary actions. This empirical data is critically important to the ABA Council’s consideration of the proposed amendments to Standard 316 (bar passage) because it places in context the ABA’s critical need to balance consumer rights (the public and law students) with the ABA’s historical role in attempting to increase minority attorney representation. In particular, the proposed Standard 316 “75% within 2 year” bar passage rule will have a devastating impact on the number of minority law students in states like California that have very low bar passage rates and very high MBECS (See my previous letters to the Council on March 19, 2016 and April 6, 2016).

This study analyzes Wisconsin disciplined attorneys from January 2013 to March 2016 in relation to Wisconsin's four methods for admitting attorneys into the practice of law. Only two
New Hampshire and Wisconsin, provide students who attend those states’ law schools a "Diploma Privilege" that automatically admits those law school graduates as members of the bar without the requirement of passing the state's bar examination.\(^7\) In addition, Wisconsin provides three other methods for admission to the Wisconsin bar: (1) passage of the Wisconsin bar examination; (2) admission of an attorney licensed and experienced from another jurisdiction; and (3) admission based on the applicant's Universal Bar Examination (UBE) score.\(^8\) Admission to the Wisconsin bar from 2013 to 2015 demonstrates: (1) 54.6% were admitted per the Diploma Privilege; (2) 22.9% were admitted by passing the Wisconsin bar examination; and (3) 22.5% were admitted through either Admission by Motion or UBE bar examination score from another state:

<table>
<thead>
<tr>
<th>METHOD OF ATTORNEY ENTRY(^9)</th>
<th>2013</th>
<th>2014</th>
<th>2015</th>
<th>Total</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Diploma Privilege</td>
<td>461</td>
<td>417</td>
<td>457</td>
<td>1335</td>
<td>54.6</td>
</tr>
<tr>
<td>Wisconsin Bar Examination</td>
<td>213</td>
<td>204</td>
<td>144</td>
<td>561</td>
<td>22.9</td>
</tr>
<tr>
<td>Motion and UBE</td>
<td>167</td>
<td>154</td>
<td>230</td>
<td>551</td>
<td>22.5</td>
</tr>
</tbody>
</table>

This study analyses whether the percentage of attorneys admitted to the Wisconsin bar through the Diploma Privilege versus all those admitted after taking a bar examination have


\(^8\) Id., at 35

\(^9\) This data is obtained from 2015 Statistics, at 35.
higher or lower rates of attorney discipline.\textsuperscript{10} According to state bar examiners who justify the bar examination as necessary to protect consumers, the hypothesis is that attorneys who are admitted by passing a bar examination will have a much smaller percentage of disciplinary violations than a group of attorneys admitted through the diploma privilege without taking a bar examination. As this study demonstrates, empirical data does not support that hypothesis.

Wisconsin publishes an online list of attorneys who have been disciplined from January 2013 to March 2016.\textsuperscript{11} A survey of that data demonstrates that:

(1) During that approximate three-year period a total of 131 attorneys were publicly disciplined\textsuperscript{12};

(2) 81 out of the 1335 attorneys admitted to the bar under the diploma privilege were disciplined;

(3) 50 out of the 1112 attorneys admitted after the passage of a bar examination were disciplined.\textsuperscript{13}

A statistical analysis of this comparative disciplinary data between those Wisconsin attorneys admitted pursuant to the diploma privilege and through passage of a state bar examination.

\textsuperscript{10} The three categories of Wisconsin attorneys admitted after a bar examination are: (1) those who took the Wisconsin bar examination; (2) those who took another state bar examination who are admitted by motion; and, (3) those who were admitted by submitting their UBE scores.


\textsuperscript{12} Id.

\textsuperscript{13} All three groups for this category took and passed a bar examination and none were admitted through a diploma privilege. The method used to determine whether a disciplined attorney was admitted by the Diploma Privilege or through one of the other three methods of bar certification was by consulting the State Bar of Wisconsin Lawyer Search which lists the laws school from which each of the disciplined attorneys graduated. (http://www.wisbar.org/directories/pages/lawyerprofile.aspx?).
examination demonstrates **no statistical significance** between the disciplinary rates among those admitted by diploma privilege or those taking a bar examination. The bar examination admittees were thus from states that formed a cross-section of high, moderate and difficult bar examinations and MBECS standards.\(^{14}\)

The statistical chi square analysis for this study is\(^{15}\):

\[
X^2 = \sum_{i=1}^p \sum_{j=1}^q \frac{(O_{i,j} - E_{i,j})^2}{E_{i,j}}.
\]

The chi-square statistic is 2.9551. The \(p\)-value is .085608. This result is not significant at \(p < .05\).

The p-value, or statistical significance between the variables of methods of bar admission (diploma privilege versus bar examination) and attorney discipline, is 58% away from demonstrating a valid statistical relationship (\(<.05\) demonstrates statistical significance versus the

<table>
<thead>
<tr>
<th>Not Disciplined</th>
<th>Disciplined</th>
<th>Marginal Row Totals</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Diploma Privilege</strong></td>
<td>1254 (1263.53) [0.07] 81 (71.47) [1.27] 1335</td>
<td></td>
</tr>
<tr>
<td><strong>Bar Exam</strong></td>
<td>1062 (1052.47) [0.09] 50 (59.53) [1.53] 1112</td>
<td></td>
</tr>
<tr>
<td><strong>Marginal Column Totals</strong></td>
<td>2316</td>
<td>131</td>
</tr>
</tbody>
</table>

14 The ten-year median bar passage rate in Wisconsin is 87.1% and the 10-year median bar passage rates among the fifty non-diploma admitted Wisconsin attorneys’ states ranged from 89.9% (Iowa) to 65.3% (D.C.). The 10-year median state bar passage rates were derived from the data published in *2015 STATISTICS*, at 30-33 (The Bar Examiner, March 2016). This list of non-diploma admitted Wisconsin attorneys is based upon the information obtained on the Wisconsin Court System web page (https://wicourts.gov/services/public/lawyering/statuspublic) and the Wisconsin State Bar web pages (http://www.wisbar.org/Pages/default.aspx). The 50 out-of-state attorneys attended law schools in the following states (Arizona 1; Illinois 8; California 3; Vermont 1; Minnesota 10; Indiana 4; Georgia 1; Washington 2; Michigan 6; Oregon 1; Iowa 2; Texas 2; Oklahoma 3; Utah 1; Pennsylvania 1; Ohio 1; Colorado 2, and D.C. 1.

15 For the methodological calculation, see (http://www.socscistatistics.com/tests/chisquare/Default2.aspx)
test result of .0856 that shows no statistical significance in the variables). 16 In other words, passing a bar examination had no statistical correlation with attorney disciplinary rates (unethical and/or incompetent representation) in Wisconsin.

States, like California, that have low bar passage rates and very high MBECS standards well above the national median justify those aberrant rates and standards on the unsupported claim that much higher than national bar examination standards protect consumers. 17 However, not a single state with low bar passage rates and high MBECS has produced any empirical evidence to demonstrate an actual correlation between much more rigorous bar examination standards and the level of state disciplinary rates.

This study of Wisconsin disciplinary data is the first evidence to disprove the “low bar passage rate/better consumer protection” rationale. 18 The burden has now shifted to state bar

16 “Most authors refer to statistically significant as P < 0.05 and statistically highly significant as P < 0.001 (less than one in a thousand chance of being wrong).” (http://www.statsdirect.com/help/default.htm#basics/p_values.htm).

17 “[O]ne might be forgiven for wondering whether the efforts to increase the failure rates on bar examinations are motivated not by a desire to protect the public from incompetent lawyers, but by a desire to protect practicing lawyers from competition with bright, better-educated, new entrants into the legal profession.” Terence L. Blackburn, Make Tests Relevant, 85-JAN Mich. B.J. 54.

18 Theresa M. Gronkiewicz, Deputy Regulation Counsel, ABA Center for Professional Responsibility, said that she is “not aware of any studies tracking or linking law schools, LSAT scores or bar passage rates to lawyers who were subsequently disciplined for engaging in any misconduct, including incompetence.” Email response to Professor William Wesley Patton on March 12, 2016 at 2:48 p.m. The scope of this study was limited by the necessity to publish the results to the Council in time for consideration regarding the proposed changes to Standard 316. I intend to complete an expanded version of this study in the future regarding ten to fifteen years of Wisconsin state bar disciplinary records. That research is more difficult because those records are not electronically available.
associations to provide empirical rebuttal evidence to support their policy of severely limiting access to the bar with its concomitant effect of excluding minority candidates. Until states meet that burden the ABA Council should not simply presume good faith regarding these bar examination standards that substantially exceed national norms. In addition, the Council should be extremely cautious of promulgating its own standards that will exacerbate the anti-minority effects of these unreasonable state standards.

II. Based Upon This Empirical Study of Wisconsin State Bar Disciplinary Data the Council Can No Longer Assume That Specific High MBECs State Bar Exam Standards Are Essential Or Even Reasonable Means of Protecting Consumer Safety, and Instead Those State Standards Represent An Unjustified Barrier to Minority Bar Representation.

This study of Wisconsin disciplinary data is the first evidence to disprove the “low bar passage rate/better consumer protection” rationale. The burden has now shifted to state bar associations to provide empirical rebuttal evidence to support their policy of limited bar access and the concomitant effect of excluding minority candidates. Until states meet that burden the ABA Council should not simply presume good faith regarding these over-rigorous bar examination standards that substantially exceed national norms. In addition, the Council should

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CONCLUSION

In light of California’s aberrantly high and empirically unsupported bar passage rules, passage of the proposed ABA “75% within 2 year” bar passage standard will have a devastating impact on minority law school applicants and minority bar representation. I respectfully request that the Council send the proposed changes to Standard 316 (bar passage) back to the Standards Review Committee for reconsideration or that the Council amend the proposal to a “75% within 4 years” standard so that student consumers will be better protected without seriously damaging minority law school admission policies and future minority attorney bar representation.