TO: ABA COUNCIL
FROM: WILLIAM WESLEY PATTON
RE: STANDARDS REVIEW COMMITTEE PROPOSED AMENDMENTS TO STANDARD 316 (BAR PASSAGE)
DATE: JULY 24, 2016

ANALYSIS IN OPPOSITION TO AMENDMENTS TO STANDARD 316

PRÉCIS

The Standards Review Committee’s [SRC] 75% in 2 year proposed bar passage standard is based upon statistically flawed National Conference of Bar Examiners’ [NCBE] persistence studies. Those studies are based upon a false premise (described as a “belief” by its author), not scientific proof, that the number of MBE test takers is the same as the number of bar examination test takers and that MBE scores reflect bar passage scores. The following analysis demonstrates that the NCBE studies’ data is inconsistent with bar examination test taker data reported by the California Bar Examiners and that the NCBE’s statistical errors substantially underestimate the persistence rate of Hispanic and Black bar examination test takers. In contrast, as demonstrated below, Klein’s study of Hispanic and Black bar examination test takers uses the actual bar examination statistics provided by the California Bar Examiners and demonstrates a 26% increase in bar passage rates for both groups if the window of repeat test taker data is extended from 3 administrations to 7 administrations. The Council should therefore reject the SRC statistically flawed findings on minority persistence and either remand the issue to the SRC or adopt a bar examination standard of 75% in 4 years which is consistent with Klein’s persistence study.

INTRODUCTION

Although law student bar examination test takers’ persistence is a relevant issue, the much more important issue is how many administrations of the bar examination are necessary in order to incentivize and protect law schools that want to admit Hispanic and Black law students in states with high MBE cut scores and low bar passage rates. A standard with a too short reporting period will result in a drastic reduction in the number of minority law students and attorneys.
QUICK LIST OF METHODOLOGICAL AND STATISTICAL FLAWS IN THE THREE NCBE’S PERSISTENCE STUDIES

1. The Feb. 2, 2016 and Nov. 6, 2012 Fifteen State NCBE Persistence Studies’ Weaknesses:
   
   A. They focus on states with high first-time bar passage rates [mean of 82.3%], and therefore since few students fail those bar examinations the NCBE studies **significantly underestimate** national persistence rates;²
   
   B. They focus on states with very low MBE cut scores [mean of 133], and therefore the persistence studies are **not predictive** of persistence and ultimate bar passage rates in states like California that has an MBE cut score of 144²;
   
   C. They base their persistence conclusions on an **unproven postulate** that the number of times a student takes the MBE equals the number of times that student takes a bar examination [the authors admit that this is their “belief” but do not provide empirical evidence to prove their premise]. The analysis, infra., demonstrates the statistical errors in the NCBE’s premise.

2. The Nov. 6, 2012 NCBE study of California persistence rates is **based on inaccurate information**:
   
   A. The NCBE study of California first-time MBE test takers is inconsistent with the number of first-time California bar examination test takers reported by the California Bar Examiners, and therefore has no credibility on bar taker persistence. The NCBE study compares apples [MBE administrations] with oranges [actual bar examination administrations]:

   1. The **NCBE 2006 study** underestimates the number of White first-time CA bar test takers by 8.5%, underestimates the number of Hispanic CA bar test takers by 8.6%, and overestimates the number of Black CA first-time test takers by 8.5%. [see infra, for comparative statistics];
   
   2. The **NCBE 2007 study** underestimates the number of White CA bar test takers by 8.9%, underestimates the number of CA Hispanic bar test takers by 9%, and underestimates the number of Black CA first-time test takers by 9%.

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¹ Citations for these bar passage rates are in my March 19, 2016 analysis submitted to the Council, at 10.
² The MBE cuts scores are from COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 2016 (NCBE & ABA), at 30-31.
B. The NCBE’s persistence studies are based on the “BELIEF” that state bar passage is directly tied to MBE scores. In 12 out of the 15 states included in the NCBE studies the MBE comprises 50% of the bar examination scoring and in 1 of those states it counts 40% of an applicant’s total bar score. The problem is that the NCBE methodology did not factor the MBE percentage variable into its prediction of California bar examination persistence. Unlike the states in the multi-state persistence studies, currently California only counts the MBE as 35% of the examination. The authors failed to discuss how this lower MBE percentage affects projections of California examination persistence when persistence is predicted only on MBE administrations, not on bar examination administrations.

C. The credibility of NCBE studies published in the Bar Examiner is also questionable for three reasons:

1. The methodological and scientific accuracy of NCBE studies is not subject to outside peer review. Instead, NCBE staff judge the credibility of their own published statistical studies. According to Claire J. Guback, editor of the NCBE journal The Bar Exam, “Should an article require evaluation of a psychometric nature, we would engage NCBE psychometric staff to participate in the review;”\(^3\)

2. The NCBE refuses to provide independent scholars with any data that can be used to determine the statistical and methodological accuracy of its bar examination studies;\(^4\) and,

3. Since the majority of the NCBE’s annual $21 million income is based on test administration, they have an interest in not permitting independent scholars to access their test data since it might demonstrate inaccuracies and/or racial or ethnic biases in their tests and in their own studies of their tests.\(^5\)

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\(^3\) Email from Claire J. Guback, NCBE Editor of The Bar Exam, to William Wesley Patton on July 25, 2016 at 12:09P.M.

\(^4\) See note 19, infra.

\(^5\) See notes 20-23, infra.

The California Bar Association [CAB] maintains complete records of all applicants who take, pass and/or fail the California bar examination. The CAB publishes detailed statistics on each administration of its bar examination, including: (1) how many first-time test takers by race and ethnicity took the examination for the first time, and (2) how many repeaters by race and ethnicity took the examination. Based upon that complete data set Stephen P. Klein, one of the most respected bar examination psychometrician in the country\(^6\), wrote a longitudinal persistence study of California minority bar examination test takers.\(^7\) His study of four different discrete groups of minority bar takers clearly demonstrated not only that minorities persist in taking the test multiple times, but most importantly he demonstrated that overall minority pass rates were dramatically affected by how many administrations of the exam were counted in determining ultimate minority bar passage results. Specifically, Dr. Klein determined that:

(A) The cumulative total of Hispanic and Black students who pass the California bar examination increases an additional 26% when the rate is calculated on 7 bar administrations rather than only on 3 administrations\(^8\); and,

\(^6\) Stephen P. Klein for years has been the California State Bar Association’s “psychometric consultant.” HISTORY OF STRUCTURE AND PASS/FAIL RULES FOR THE CALIFORNIA BAR EXAMINATION, at 3 (November 4 and 5, 2005).

\(^7\) Stephen P. Klein and Roger Bolus, A Comparison of Initial and Eventual Passing Rates on the California Bar Examination (October 30, 1987).

\(^8\) Id., at 10, Table 8. The 1977 Hispanic group that took the exam up to 7 times had an eventual bar passage rate of 80%, but the passage rate for the 1982 group that was tracked for only 3 administrations was just 54%. Similarly, the 1977 group of Blacks who took the exam up to 7 times had a 64% passage rate, but the 1982 group that only took the test up to 3 times had just a 38% bar passage rate.
(B) The cumulative total of White students who pass the bar examination after 7 administrations rather than after 3 tests increases only 9% compared with the 26% increase for Hispanic and Black test takers.9

Why is the Klein study so important? First, it reframes the Standards Review Committee’s focus solely on persistence of exam testing to a question about how persistence in high MBE cut score states affects the minority bar passage rates that law schools will use to meet the new requirements of ABA Standard 316. As I have demonstrated in my other analyses, if the ABA selects a too short reporting period (2 years versus the current 5 years), California ABA law schools will reduce minority law school enrollment in order to meet Standard 316. Using the Klein study, a California ABA law school would be risk averse to admit many Hispanic and Black law students if the proposed 75% in 2 year standard is adopted since the Klein study predicts a passage rate for Hispanics between 54% (3 administrations) and 61% (5 administrations), not the 80% after 7 examination administrations that his study demonstrated. The same choice exists for Black law students (38% for 3 administrations) and (48% for 5 administrations) rather than 65% for 7 administrations.

This data demonstrates that if the Council approves a change from the current 75% in 5 years to a 75% in 4 years (8 exams) that it should have little impact on California ABA law schools’ willingness to admit the current level of Hispanic and Black law students. A 75% in 4 years standard would enable ABA law schools to report minority bar passage rates sufficient, when combined with the White test taker results, to meet that new Standard 316 requirements. Put another way, a change to a 4 year reporting period will increase law student consumer

9 Id., at 10, Table 8. The 1977 White group that took the exam up to 7 times had a 90% passage rate, and the 1982 White group that took the test only 3 times had an 81% passage rate – a difference of only 9%.
protection and maintain Hispanic and Black law school admission rates in states with high MBE cut scores and low first-time bar passage rates.

II. The 2012 Ripkey & Case Persistence Study of California Law Students Is Statistically Flawed and Cannot Be Used to Predict Minority Bar Passage Rates.10

Ripkey and Case (R & C) studied persistence patterns of the July 2006 and July 2007 California students who took the MBE, but they did not use data supplied by the California Bar Examiners on who actually failed or passed the California bar examination. There are several reasons why this study has limited reliability and has no predictive value for Hispanic and Black bar passage rates based upon the number of times those groups take the California bar examination. Unfortunately, the Standards Review Committee relied on the R & C persistence data rather than on the richer and more reliable Klein study, supra, in determining the appropriate bar passage percentage reporting period.

Unlike the Klein study, the R & C study does not use information provided by the California Bar Association in determining test taker statistics. Instead, R & C used the database created and maintained by the National Council of Bar Examiners regarding its MBE test. Case admits that their data is incomplete and that the R & C study is not based on data “which would help confirm which individuals have passed or not passed the bar exam....”11 Further, R & C make very modest claims about their study because their data is only sufficient to make “some preliminary explorations about ultimate pass rates.”12

12 Id.
The R & C study states that in **July 2006** the following California law school graduates took the MBE for the first time\textsuperscript{13}:

1. 4288 total first-time test takers;
2. 2106 White;
3. 265 Hispanic; and
4. 110 Black tested.

This data conflicts with the California Bar Examiners’ report on the number of first-time test takers on the California July 2006 bar examination\textsuperscript{14}:

1. 6261 total first-time test takers (3982 CA ABA test takers);
2. 3837 White (2486 CA ABA test takers);
3. 483 Hispanic (309 CA ABA test takers);
4. 253 Black (127 CA ABA test takers).

The data reported in the R & C persistence study of the **July 2007** California MBE results is also inconsistent with the data published by the California Bar Examiners on the number of first-time bar test takers\textsuperscript{15}:

1. 4224 total first-time test takers;
2. 2044 White;
3. 266 Hispanic; and
4. 84 Black.

These NCBE MBE test taker statistics conflict with the California Bar Examiners’ July 2007 first-time test taker data\textsuperscript{16}:

1. 6040 total first-time test takers (3716 CA ABA test takers);
2. 3649 White (2292 CA ABA test takers);
3. 497 Hispanic (295 CA ABA test takers);
4. 217 Black (93 CA ABA test takers).

\textsuperscript{13} Ripkey, supra, note 5, at 5.
\textsuperscript{14} (http://admissions.calbar.ca.gov/Examinations/Statistics.aspx).
\textsuperscript{15} Ripkey, supra, note 5, at 5.
\textsuperscript{16} (http://admissions.calbar.ca.gov/Examinations/Statistics.aspx).
There is no correspondence between the R & C study population who they claim took the July 2006 and 2007 MBE and the report by the California Bar Examiners regarding how many first-time takers actually took the July 2006 and 2007 California bar examination. This critical statistical disparity in the groups of test takers puts in question the reliability of the R & C persistence study.

On July 31, 2012 Professor Gary S. Rosin in his bar examination persistence analysis explained to the Standards Review Committee why studies on MBE test taker persistence are inaccurate indicators of actual bar examination test taker persistence. He stated that since “many states accept transfers of prior MBE scores for up to five years, Bar repeaters do not necessarily have to sit for the MBE every time they retake the Bar exam.” Therefore, the R & S study of the number of MBE administrations a tester takes does not accurately calculate the actual number of times a student takes a bar examination since a student may transfer his/her MBE score to another state. For instance, the February 25, 2016 NCBE persistence study included 9 states that accept out-of-state transfers of MBE scores. And the November 6, 2012 NCBE persistence study included seven MBE transfer states. A total of 25 states permit the transfer of MBE scores from another state bar examination.

Therefore, if a student fails a bar examination, for instance in California, but takes and passes a bar examination in another state that accepts a prior MBE score, the R & C persistence study based on MBE administrations, will result in a flawed statistical conclusion and under-

estimate bar taker persistence. For instance, the National Conference of Bar Examiners’ persistence study of the New York bar examination stated that the ultimate bar passage rates were undervalued because the data does not include bar passage by students who failed the New York bar but passed another state bar examination because they are “unidentifiable” and because bar passage rates are calculated by assuming that non-persisters failed.

Making matters worse, there is no way to verify the reliability of the NCBE persistence studies. The NCBE is a private non-profit corporation that refuses the public access to its testing data. For example, I recently sought information on minority passage rates by state on the NCBE’s MPRE. The NCBE refused to supply me with any information, and I was informed that the NCBE does not provide the public with data requests not already published on its web site: “The information on our web site is the only data available to the public.”

The public must, therefore, take NCBE studies at face value even though the NCBE has a conflict of interest in assuring that the validity of its testing instruments is not questioned. The National Conference of Bar Examiners is a multi-million dollar “non-profit” corporation that in 2014 reported approximately $21-25 million in income and has assets of approximately $84 million dollars.¹² 19.5% of NCBE employees are paid over $100,000, and its annual income eclipses other similar organizations such as the American Bar Foundation and the Public Justice Foundation.¹³ Like other corporations, the NCBE jealously protects its monopoly on the law examination testing market by vigorously litigating its copyrights.¹⁴ One must wonder whether

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¹¹ Email from Kellie Early, NCBE to William Wesley Patton on May 24, 2016, 10:28 am.
¹³ Id., at 17.
the NCBE’s economic incentive could bias its decision not to provide the public and researchers empirical data that might demonstrate that NCBE exams and studies of their exams are statistically flawed or that they have an unjustified disparate impact on minority applicants. As Tamara Tabo aptly stated in her article about the NCBE, *When Bar Scores Plummet, Who Will Examine the Examiners?*25: “Maybe we should stop taking the NCBE at its word.”

Since I have demonstrated significant flaws in the research design and errors in the statistics relied upon in the NCBE’s persistence studies of bar examination test takers, the Council should not rely upon those studies in determining the appropriate reporting period for bar examination purposes.

**CONCLUSION**

The Council has been presented with conflicting expert information on minority bar passage persistence. The Klein report is based on actual California bar examination data and clearly demonstrates that there is a significant disparity in bar examination persistence success between White bar test takers and Black and Hispanic testers. Unlike White bar applicants Black and Hispanic test takers often need up to 7 bar admission in high MBE cut score states to achieve a sufficiently high bar passage rate to provide ABA law schools an incentive and protection to continue to enroll minority candidates while still meeting ABA Standard 316. The empirical design of the Klein study is simple – it determines how many times a group of minority test takers took the California bar examination and determines their passage rates according to the number of administrations of the examination they took.

The design and results of the R & S study require faith and several logic leaps. The authors admit that their data is not complete, but argue that the sample is sufficiently large to be

reliable. Since they admit that they do not have data regarding whether students passed or failed the bar examination they must rely on the assumption ("we believe")\(^{26}\) that MBE statistics reliably predict bar passage and bar examination test taking persistence.\(^{27}\) What research is cited for their “belief” in the reliability of their persistence study – the author’s own article published by her employer, the NCBE?\(^{28}\) The R & S California persistence study is not based on actual California bar passage data, but rather is based upon its own testing with the MBE. The number of California MBE test takers used in the R & S study is inconsistent with the number of actual California bar examination test takers reported by the California Bar Examiners and underestimates the number of bar administrations that Black and Hispanic students need to reach bar passage rates near or above the 75% rate of Standard 316 as determined by Klein.

Relying on the Klein study has two advantages: (1) the data is more reliable; and (2) it provides data that supports a more modest amendment to Standard 316 that will equally balance the ABA’s commitment to increasing bar diversity while also meeting its commitment to providing students more consumer protection.

Since the Standards Review Committee relied exclusively on unreliable NCBE persistence studies and did not even acknowledge the more accurate Klein California bar persistence study, the Committee’s conclusion that a 75% in 2 year bar passage standard is sound public policy has no empirical support or credibility. The Council should either remand the proposal to the SRC for further consideration or amend Standard 316 to a bar passage standard

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\(^{26}\) Case, supra, note 6, at 22.

\(^{27}\) “We do not have a complete data set that indicates who passed the exam. However, we do have MBE records of a large sample of examinees. The correlation between MBE scores and written scores is high, and based on other research findings, we believe the trends noted above would not change with more complete data.” Case, supra, note 6, at 22.

\(^{28}\) Case, supra, note 6, at 22, note 1. Susan Case “is the Director of Testing for the National Conference of Bar Examiners.” Id., at 22.
of 75% in 4 years which is consistent with the Klein minority bar persistence data and will together with the increased ABA transparency standards provide student consumers with sufficient protection.