Mr. Barry A. Currier  
Managing Director  
American Bar Association  
Section of Legal Education and Admissions to the Bar  
321 Clark Street  
Chicago, IL  60654-7598

July 21, 2016

Dear Mr. Currier:

I write in opposition to the March 2016 proposed changes to ABA Standard 501 and its accompanying Interpretations.

**Standard 501 Today**

Current Standard 501 is based upon a flawed premise—that the factors involved in law school admissions decisions can be used to predict bar examination success. This flawed premise is most frequently asserted regarding the use of LSAT scores as predictors of future bar results. The supposed connection between LSAT scores and bar results is not supported by either documentation or correlation studies. It is folklore.

Standard 503 mandates that “[i]n making admissions decisions, a law school shall use the test results in a manner that is consistent with the current guidelines regarding proper use of the test results provided by the agency that developed the test.” The Law School Admissions Council’s cautionary policies, applicable to all who use the LSAT as a factor in admissions decisions, clearly state that the LSAT is properly used only to assist in admissions decisions and that any other use is improper. Accordingly, use of the LSAT to predict bar results is improper. According to LSAC President Daniel Bernstine, “[t]he LSAT does not measure all attributes that can predict the probability of eventual bar passage . . . .”

Unfortunately, concerns about bar passage too often and invalidly focus on LSAT scores of those admitted to law school, despite the clear admonition of the test’s creators, who assert such a connection is a false claim. Using LSAT scores to predict bar results is the prime example of misusing a factor important in predicting law school academic success for another purpose, contrary to Law School Admissions Council cautionary policies.

Law school academic success is the overriding predictor of bar examination success. Essentially, the higher the law school grade point average or class rank, the greater the likelihood of success on the bar examination. Legal education is an intervening variable that renders consideration of other admission factors insignificant in predicting success on a bar examination. To ensure law school success, we have Standards and Interpretations that impose requirements regarding the educational program and curriculum of law school. The Standards also require that law schools provide adequate basic student services, including academic advising, counseling, and support.
The Council of the Section on Legal Education and Admission to the Bar should abide by the LSAC cautionary policies, which the Council itself cites and publishes in its Standards and Rules of Procedure for Approval of Law Schools. The Council should take the initiative to put an end to the improper use of the LSAT as a supposed predictor of bar results and revise the Standards to completely separate admissions from bar results.

Current Standard 501 reflects an improper connection between admissions and bar results, which should properly be treated as separate, stand-alone considerations. The better alternative for Council action regarding Standard 501 would be to eliminate the words “and being admitted to the bar” from Standard 501(b). This would rescind the 1996 addition of those words and treat admissions and bar results as separate considerations, as was originally the practice.

Proposed Changes to Standard 501 and its Interpretations

By removing the phrase “and being admitted to the bar” from Standard 501(b), as I have suggested above, the proposed added sentence to Interpretation 501-1 regarding compliance with Standard 316 becomes unnecessary.

If that sentence is to remain, should not compliant bar results create a presumption that the admissions practices likewise are compliant, at least in the absence of excessive academic attrition? Given the current emphasis on bar results evidenced by the Council’s recent actions, the added sentence is oddly disconnected and inconsistent. Perhaps the Council is aware of a circumstance that involved the assertion that successful bar results demonstrated compliance with the current language in Standard 501. That cannot be discerned from the language that accompanies the proposal.

Without adequate explanation, the Council proposes to change Standard 501, add new language to Interpretation 501-1, and add Interpretation 501-3. Standard 501 is of long-standing duration and was reviewed during the comprehensive review of all the Standards recently completed. It would be helpful to know what now motivates the proposed changes and why the particular language was chosen. In this day of heightened concerns about transparency, the reasons for substantial changes should be clearly and publicly stated. And in keeping with the new emphasis on outputs, proposed changes should be based on analysis of results.

Most troubling, a new Interpretation 501-3 with a 20% attrition presumption is proposed without adequate explanation or justification. Selecting any particular percentage without justification is arbitrary. Here is how that term was defined by the Supreme Court: “without adequate determining principle . . . Fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance, . . . decisive but unreasoned.” United States v. Carmack, 329 U.S. 230 (1946).

All that is said in the terse description that attempts to justify the change is that it provides “a means of enforcing the Standard,” but that is not accurate. It provides a rebuttable presumption with an arbitrary cut score. The means of enforcement are unchanged—schools already bear the burden to show compliance with every Standard. The new Interpretation adds nothing in that regard. What is proposed is simply a unilateral ipse dixit that 20% non-transfer attrition is a meaningful criterion.

No justification is offered regarding this arbitrary percentage, which could just as justifiably be 10% or 40%. Not long ago, to motivate new students to study hard in law school, entering students were
told “look to your left and look to your right, one of you won’t make it.” Bad advice then and now, but in those days of low transfer rates, it at least implied an academic attrition rate of 33%.

And why use “non-transfer” attrition rate rather than “academic” attrition rate? Students leave law school for many reasons not related to their capability to complete the program. They leave for personal reasons, family complications, and new jobs in new locations. They may have health issues. They may find that law study is not what they expected. They may lose their financial support. They may even be students who transferred to another school unknown to the reporting school.

The concern embodied in Standard 501 has always been about academic capability. Academic attrition should be the focus of any change in Standard 501. The current questionnaire requires that schools report as academic attrition all students who discontinued their studies not in academic good standing. The academic attrition requirement is already broadly inclusive because it includes students who were eligible to remain enrolled and achieve good standing and those whose attrition was due to some form of misbehavior, not academic performance.

Proposed Interpretation 501-3 considerably broadens the traditional academic performance definition applied by the Council and alters the concept of academic attrition. In fact, it conflicts with Interpretation 501-1, which specifically refers to the school’s academic attrition rate. To include attrition for non-academic reasons in the calculation is unreasonable and unjustified, because the “other” reasons for attrition are not within the control of the law schools. If Interpretation 501-3 is to be adopted with an arbitrarily-determined 20% attrition presumption, the measure should at least be limited to academic attrition and read something like: “[a] law school having an academic attrition rate above 20% . . . .”

Also, there are inherent standardization problems. What “year” is involved? Some schools have different starting times for entering classes, such as January and May. Does the 20% apply to JD1 students only? Does it make a difference if the students are part-time or full-time? How will readmitted students who succeed be considered? Will the Council and Accreditation Committee use bar results as an aspect of their review of those schools attempting to overcome the 20% presumption? If so, it will perpetuate the misuse of the LSAT in this context as well.

A 20% limit essentially establishes that schools must reject four applicants who would succeed because one applicant would not. How can we justify that? The natural response of schools to this new requirement will either be to deny admission altogether to the 80% of students who would succeed or to reduce academic rigor regarding those admitted—both of which are undesirable policy decisions.

Rather than set forth arbitrary percentages, the Council should adopt as Interpretation 501-3 language that requires each school to develop admissions policies that are based on the academic outcomes of their past students, using either the LSAC correlation formula or a similar formula involving regression analysis. Schools should then be required to inform each student they admit of their potential likelihood of success, based on the performance of similarly credentialed students. We should treat law school applicants as capable of making their own decisions.

Finally, and perhaps most importantly, proposed Interpretation 501-3 directly conflicts with Standard 206 (a) and Interpretation 206-2. Standard 206 (a) states:
Consistent with sound legal education policy and the Standards, a law school shall demonstrate by concrete action a commitment to diversity and inclusion by providing full opportunities for the study of law and entry into the profession by members of underrepresented groups, particularly racial and ethnic minorities, and a commitment to having a student body that is diverse with respect to gender, race, and ethnicity.

Proposed Interpretation 501-3, as currently worded, dampens incentive for law schools to enroll students of color. It will also have the effect of conflicting with the stated Mission and Goals of the ABA. The lack of diversity in the profession is highlighted by American Bar Association’s stated Mission and Goal III, which is to **Eliminate Bias and Enhance Diversity**. ABA Goal III seeks to “[p]romote full and equal participation in the association, our profession, and the justice system by all persons,” and “[e]liminate bias in the legal profession and the justice system.”

To achieve Goal III, the American Bar Association has dedicated extensive resources, including:

- An Office of Diversity and Inclusion, with a Managing Director and 2 staffers ([http://www.americanbar.org/groups/diversity.html](http://www.americanbar.org/groups/diversity.html))
- A Center for Racial and Ethnic Diversity, with a 15-member Board ([http://www.americanbar.org/groups/diversity/about_us.html](http://www.americanbar.org/groups/diversity/about_us.html))
- A Commission on Racial and Ethnic Diversity in the Profession, with a Staff Director and Program Associate ([http://www.americanbar.org/groups/diversity/DiversityCommission.html](http://www.americanbar.org/groups/diversity/DiversityCommission.html))
- A Council for Racial And Ethnic Diversity in the Educational Pipeline, with a Staff Director ([http://www.americanbar.org/groups/diversity/diversity_pipeline.html](http://www.americanbar.org/groups/diversity/diversity_pipeline.html))
- Numerous diversity-related projects, events, forums, reports, initiatives, and awards

The Council is surely aware that this change will affect minority candidates the most, since those candidates are most likely to have lower admissions profiles, mainly due to the challenges and bias of standardized tests. When all agree that the profession should be doing whatever it can to increase the numbers of minority lawyers, and when the need for lawyers to protect the civil rights of minority individuals is so evident, the proposal is ill-timed and ill-advised.

Do we really want to be an organization that says to four minority candidates you cannot attend law school because one other minority candidate might fail?

The Council and Standards Review Committee should consider the negative impact of these proposed changes, particularly the adverse impact they will have on diversity in the legal profession.

Sincerely,

Don LeDuc