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**AMERICAN BAR ASSOCIATION**  
**HEARING ON PROPOSED AMENDMENTS TO THE ABA STANDARDS**  
**AND**  
**RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS**

**HELD ON**  
**SATURDAY, AUGUST 6, 2016**  
**12:30 P.M.**

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**APPEARANCES**

Pamela Lysaght, Chair  
William Adams, ABA Staff  
Gregory Murphy, Council  
Rebecca Berch, Council  
Becky Stretch, ABA Staff

1                   **AMERICAN BAR ASSOCIATION**  
2                   **HEARING ON PROPOSED AMENDMENTS**  
3                   **TO THE ABA STANDARDS**  
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9                   **12:30 P.M.**

10

11                   **MS. LYSAGHT:** All right. We will now go  
12 on the record.

13                   Good afternoon. My name is Pamela  
14 Lysaght. I just completed six years on the  
15 Accreditation Committee and I am the incoming chair  
16 of the Standards Review Committee and I have been  
17 asked to chair this hearing.

18                   The Council -- the Council of the Section  
19 of Legal Education and Admissions to the Bar has  
20 approved for notice and comment the proposed  
21 revisions to the following parts of the ABA  
22 Standards and Rules of Procedure for Approval of Law  
23 Schools; Standard 204, Standard 303, Interpretation  
24 303-1, Standard 311, Standard 316, Standard 501, use  
25 of the term "Full-time faculty," in the Standards.

1 Explanations of the changes as well as red-line  
2 versions showing the changes have been widely  
3 published and we received many written comments.

4 This hearing is part of a process designed  
5 to ensure that every individual group that wishes to  
6 do so has a meaningful opportunity to have its  
7 position heard. This hearing is being transcribed.

8 Just as a reminder to those speakers who  
9 have submitted written comments, we have read your  
10 comments and they will be part of the formal record.

11 I will now ask those at the head table to  
12 introduce themselves.

13 **MR. ADAMS:** I'm Bill Adams. I'm the  
14 Deputy Managing Director at the Section.

15 **MR. MURPHY:** I'm Greg Murphy, I'm Chair-  
16 Elect of the Council and, barring something of the  
17 San Andreas Fault, will take office at the close of  
18 the business meeting at the House of Delegates on  
19 Tuesday.

20 **MS. BERCH:** I'm Rebecca Berch. I'm the  
21 current Chair of the Council and, as you just heard,  
22 I'll be superseded in just a matter of days now as  
23 chair by Greg Murphy. Thank you all for coming.

24 **MS. LYSAGHT:** We also have a few Council  
25 members present. I would ask that they stand and

1 introduce themselves.

2 **MS. O'ROURKE:** I'm Maureen O'Rourke. I'm  
3 the Dean at Boston University School of Law. I am  
4 the Vice-Chair of the Council, and the incoming  
5 Chair-Elect.

6 **MR. NASH:** Charles Nash, I'm Vice-  
7 Chancellor for Academic and Student Affairs at the  
8 University of Alabama System. I'm a public member of  
9 the Council.

10 **MR. ADAMS:** Tony.

11 **MS. LYSAGHT:** Tony.

12 **MR. ADAMS:** Tony, would you introduce  
13 yourself.

14 **MR. GARCIA-PADILLA:** Tony Garcia, I am --  
15 I teach law at the University of Puerto Rico.

16 **MS. LYSAGHT:** Thank you. And Camille,  
17 would you introduce yourself, and Becky.

18 **MS. DEJORNA:** Of course. I'm Camille  
19 deJorna. I'm the Associate Consultant at the  
20 Section.

21 **MS. LYSAGHT:** And Becky.

22 **MS. STRETCH:** And I'm Becky Stretch, also  
23 a consultant at the Section.

24 **MS. LYSAGHT:** Thank you for attending this  
25 hearing. The ABA staff has allowed ten minutes for

1 each speaker. Additional time has been set aside  
2 for questions from this panel should the need arise.  
3 At the conclusion of the hearing, should any time  
4 remain, those present wishing to speak but who did  
5 not request time prior to this hearing will be  
6 allowed five minutes. If you wish to speak, please  
7 see Becky, who has also agreed to be our timekeeper.

8 We have received nine official requests to  
9 speak so we will begin with, slight change in the  
10 order, but we are going to begin with Dean Gilbert  
11 Holmes.

12 **MR. HOLMES:** Good afternoon, I'm Gilbert  
13 Holmes. I'm the Dean at University of La Verne  
14 College of Law. And I want to thank you for this  
15 opportunity to speak before you. I am going to be  
16 talking about the proposed revisions for Standard  
17 316. And I'll be speaking both in my capacity as  
18 dean at La Verne and also on behalf of the 25  
19 individuals and entities that signed a letter that  
20 was sent in dated July 29. Dean Al Garcia at St.  
21 Thomas University was the lead person in generating  
22 that letter. So I give you his name to help you  
23 identify exactly which document I'm referring to.

24 I'm -- I assume, and as has been  
25 indicated, that you've read the letter, and so I do

1 not plan to read the letter word by word, even go  
2 down it point by point, but rather I have two major  
3 points that I wish to make about the proposed  
4 revision.

5 It is my opinion and the opinion of those  
6 that I represent that the proposed revision is  
7 fundamentally unfair because it imposes a false  
8 national standard for bar performance.

9 Secondly, we oppose the standard because  
10 it disadvantages those schools that have an access  
11 mission in general, and particularly those schools  
12 that have an access mission in states that have a  
13 low state bar pass rate.

14 As to the fundamental unfairness  
15 component, the standard seeks to treat all  
16 accredited law schools the same with -- regarding  
17 the bar pass performance using the ultimate bar pass  
18 rate of 75 percent, regardless of the jurisdiction  
19 that the schools happen to be in. This is very  
20 similar to when employers seek to set a standard for  
21 interviewing, let's say, 3.25 GPA regardless of the  
22 grading standards of the individual schools. Such  
23 an approach advantages some schools or advantages  
24 some individuals in that interview process and  
25 disadvantages others based on the place where they

1 are, not based on the standard itself.

2           So using -- in my analogy, a school that  
3 has 3. -- or excuse me, an employer that has a 3.25  
4 GPA requirement for interviewing may get from one  
5 school the top five percent and from another school,  
6 the top 50 percent, and such a -- such an approach  
7 really does not come out as being fair, although it  
8 appears to be a uniform standard.

9           And similarly, this attempt at a uniform  
10 standard for bar pass, for bar performance, is doing  
11 the same thing. So the schools that are located in  
12 jurisdictions that have a high first-time bar pass  
13 rate, where they would automatically meet the  
14 ultimate standard by their first-time bar pass rate,  
15 are advantaged over schools that are located in  
16 jurisdictions that have a first-time bar pass rate  
17 that's less than 75 percent. And so it really  
18 forces schools that are in jurisdictions with a less  
19 than 75 percent first-time bar pass rate to expend  
20 resources to track and assist their graduates so  
21 that they can attain the ultimate 75 percent bar  
22 pass rate.

23           Now, schools should do those kinds of  
24 things. I'm not saying that they shouldn't. But  
25 it's different -- there's a difference between what



1 you should do or what you decide to do voluntarily  
2 and what you're mandated to do as a result of a  
3 change in the standard.

4 The second point I want to make -- how am  
5 doing, Becky?

6 **MS. STRETCH:** Six minutes and 17 seconds  
7 left.

8 **MR. HOLMES:** Thank you. I promised her I  
9 would take less than 10 minutes.

10 Additionally, the schools that have an  
11 access mission are really hampered by this standard.  
12 We all recognize the disparity of performance on  
13 standardized tests by students or individuals from  
14 underrepresented groups, students of color and the  
15 like. And it's always dangerous to start talking  
16 about differences in performance based on race or  
17 ethnicity, because those that would -- are opposed,  
18 for example, to affirmative action, would like to  
19 take that information and use it to their benefit.  
20 But we cannot ignore the fact that there are these  
21 historical disparities in performance that start as  
22 early as third grade and continue through licensing  
23 exams, well after graduation from undergraduate and  
24 professional schools.

25 And so if you're in a -- if you're a

1 school that has an access mission, you are admitting  
2 students who you know are likely to perform poorer  
3 on the standardized test, the bar exam, than others.  
4 And you are also providing resources to help them  
5 meet that -- meet that standard. The imposition of  
6 just an ultimate bar pass rate creates a greater  
7 burden on schools with an access mission,  
8 particularly those schools that are in states that  
9 have a lower first-time bar pass rate than otherwise  
10 is necessary.

11 In fact, I find myself in the enviable  
12 position or the ironic position of arguing for, and  
13 this is my suggestion, arguing for the continuance  
14 of the 15 points below the state average prong,  
15 because that gives a school an opportunity to  
16 perform in a manner in which that state has decided  
17 is the appropriate standard for competence to  
18 practice law in the jurisdiction. And if the school  
19 meets that prong, but does not meet the ultimate bar  
20 pass rate, then you have an interesting situation of  
21 meeting what the state says is required but not  
22 meeting this purportedly appropriate or fair  
23 national standard. And I just think that that is  
24 not the way we should be operating as an accrediting  
25 body for licensing schools.

1 The University of La Verne is a school  
2 that has an access mission. Sixty percent of our  
3 students are students of color. More than 40  
4 percent of our students are Hispanic, which  
5 qualifies us to be a Hispanic-serving institution  
6 under the federal guidelines. So we -- we  
7 understand and are committed to providing an  
8 opportunity for underrepresented individuals. I --  
9 I am really concerned that we have -- we will have  
10 to dedicate even more resources than we already do  
11 to ensuring that our students are able to make it  
12 all the way through to becoming licensed attorneys.

13 And the allocation -- the expending of  
14 those resources is problematic because we have other  
15 things that we need to do to try and provide a broad  
16 base access of quality, transformative education  
17 that leads to personal and professional success.

18 So if we're now required to dedicate more  
19 of our resources to making sure that our -- they're  
20 following up and making sure that our graduates who  
21 don't pass the bar exam the first time are able to  
22 pass it in the future, then we're unable to do other  
23 things that would be beneficial to our community and  
24 beneficial to our mission.

25 In fact, the proposed revision for schools

1 like La Verne that have an access mission creates a  
2 double whammy for us. We're really hit twice on  
3 this because we are in California. And in  
4 California, the first-time bar pass rate over the  
5 last five years has never exceeded 75 percent for  
6 graduates of ABA law schools.

7 I mean, there's a lot of discussion about  
8 California's bar pass rate, you know, of 53 percent.  
9 That's for everybody. But for the graduates of ABA  
10 law schools, over the -- over the past five years it  
11 has been 67.8 percent first-time bar pass rate.  
12 That means that for a school that comes within even  
13 10 points of the state average, we're starting 18  
14 points below the ultimate standard of 75 percent.  
15 And that means we have to make that up through  
16 follow-up and work with our graduates; whereas,  
17 schools in other jurisdictions don't have to have  
18 that burden to make up the difference between the  
19 first-time bar pass rate and the -- and the ultimate  
20 bar pass rate. And so I find it ironic that I'm in  
21 the position of advocating for the 15-point  
22 standard.

23 When I first started at La Verne, the  
24 effort there was to use the ultimate bar pass rate  
25 with a five-year time frame because they had

1 difficulty in meeting the first -- the 15-point  
2 prong. We have overcome that, as you know, from my  
3 having appeared before you in March on our full  
4 accreditation, and thank you for granting us that,  
5 but now it's kind of like we first -- the 15-point  
6 prong may become the safety net for -- at schools  
7 with an access mission as opposed to what was in the  
8 past the ultimate bar pass rate was the safety net.

9           And since I have one minute left, just one  
10 additional point to think about. I know that it's  
11 been written that the effort to create this ultimate  
12 bar pass rate is to get away from comparing schools  
13 to schools. And -- and the standards have done that.  
14 They've gotten away from comparing volume and  
15 expenditures and the like. But that's a different  
16 comparison school to school than comparing the  
17 school to what the state says is the appropriate  
18 measure of performance on the bar exam for all of  
19 the graduates that take it within that jurisdiction.

20           So thank you very much.

21           **MS. LYSAGHT:** Thank you.

22           All right. Mr. Derick Dailey.

23           **MS. STRETCH:** Whoa, sorry.

24           **MR. DAILEY:** Are you ready?

25           **MS. STRETCH:** Yeah. I'll wait until you

1 start.

2 **MR. DAILEY:** Good afternoon. I am Derick  
3 Daily. I am a 3L at Fordham University School of  
4 Law in New York City, and today I am here in both my  
5 capacity as a law student, but also in my capacity  
6 as the National Chair of the National Black Law  
7 Students Association.

8 In 1968, students at NYU School of Law  
9 committed themselves to the work of racial justice  
10 and racial equity by forming the National Black Law  
11 Students Association. Shortly thereafter, students  
12 across the country, Howard, UCLA, University of  
13 Chicago, Harvard, and Yale also formed BLSA  
14 chapters. Today, BLSA encompasses the vast  
15 diversity that makes up black diaspora and is one of  
16 the largest student-run organizations in the world,  
17 boasting nearly 200 affiliates and chapters around  
18 the globe, in countries like Haiti and Canada, South  
19 Africa, Nigeria and the Bahamas.

20 NBLSA is nearly half a century old and  
21 today we are more committed than ever to the work of  
22 racial justice and social impact. The same work  
23 that roots our founding, and that's why I'm here  
24 today.

25 I'm here because racial justice is central

1 to the work of NBLSA. I'm here because racial  
2 justice is not merely relegated to the unbearable  
3 videos that we see on TV with respect to police-  
4 involved shootings and murders. I'm here because  
5 racial injustice is not just about the prison  
6 industrial complex or mass incarceration or a bail  
7 system run amok. Racial justice is not merely about  
8 access to quality food, technology and housing, but  
9 it is about quality legal education.

10 Racial justice is central to daily life.  
11 It permeates everything that we do and consequently,  
12 NBLSA centers a racial justice. It foregrounds  
13 racial justice in everything that it does. So, yes,  
14 racial justice is about our legal system. Racial  
15 justice is about the kind of legal system, the kind  
16 of legal education that we intend to provide here in  
17 America.

18 So today as many of you know, the ABA is  
19 considering a number of rules, and one of them that  
20 I'd like to speak directly to is Rule 316. The  
21 proposed change, in our opinion, would lead to  
22 disproportionate adverse impact, particularly to law  
23 schools of color and law schools that service  
24 majority black and brown populations. Populations  
25 that are underrepresented in the legal community.

1 Populations that need legal minds and legal  
2 services, and populations that, in sum, are  
3 desperate need of the assurance that the law works  
4 for them too.

5 In short, if this rule is adopted, there  
6 will be fewer diverse law students. With increased  
7 focus on the bar passage rates, law schools will  
8 focus more on the LSAT. Why? Because the LSAT, as  
9 most of you know, is considered to be an indication  
10 as to whether or not you will be able to pass the  
11 bar.

12 It's worth noting that historically law  
13 students of color score much lower on the LSAT than  
14 our counterparts. Not as a result of preparation or  
15 incompetence, but rather because nearly every so-  
16 called objective standardized test in this country,  
17 whether it's the ACT, the SAT, the MCAT, the LSAT or  
18 the bar, is racially and culturally biased against  
19 students of color. Adopting this measure would lead  
20 to a grave reduction in diversity in law schools and  
21 the legal profession as a whole.

22 I would like for you to think for a moment  
23 about a few numbers. Our team took a look at bar  
24 passage rates between 2012 and 2015. And of the 64  
25 schools that had a bar passage rate that did not



1 meet the 75 percent threshold within those years,  
2 over 20 of those schools have student bodies that  
3 are more than 30 percent diverse. If the ABA closes  
4 these schools through the denial of accreditation,  
5 the ABA would be creating a blockage to diversity in  
6 the legal profession, and doing more damage than  
7 they could imagine to communities of color.  
8 Creating this blockage would not only preclude  
9 talented, bright and skilled legal minds from  
10 pursuing the law, but it would further erode public  
11 trust, confidence and the perception of fairness in  
12 the legal system within communities of color.

13 NBLSA stands with the American Bar  
14 Association in principle that law schools that prey  
15 on students by selling a legal education that merely  
16 prioritizes profits over access should be held  
17 accountable. NBLSA also believes, though, that  
18 while holding those schools accountable, that should  
19 not happen at the expense of law schools that are  
20 doing the very best they can within a system that is  
21 rigged against them.

22 So on behalf of NBLSA's nearly 6,000  
23 students, alumni, its global partners, six regents,  
24 the men and women who blazed the trail for us to  
25 pursue law, people like A.J. Cooper, Constance Baker

1 Motley, Teresa Cropper, Barbara Jordan, the list  
2 goes on and on and on, we oppose the proposed change  
3 to Standard 316.

4 We humbly ask that this Council would  
5 create a task force to offer comprehensive  
6 recommendations to the ABA on how it might address  
7 systemic and institutional racism and inequity that  
8 pervades our legal culture through missions,  
9 testing, curriculum and the bar exam.

10 So with that, I'll yield the floor and I'm  
11 happy to stand for any questions.

12 **MS. LYSAGHT:** Thank you. Questions?

13 **MR. DAILEY:** Thank you.

14 **MS. LYSAGHT:** Thank you very much.

15 Maritza Karmely.

16 **MS. KARMELY:** Hi, good afternoon. Thank  
17 you for the opportunity to be here today.

18 My name is Maritza Karmely. I'm a  
19 Clinical Professor at Suffolk University Law School  
20 in Boston. I'm here in my capacity as co-president  
21 of CLEA. As many of you know, CLEA -- our  
22 organization, we represent about 1300 dues-paying  
23 members and we are the nation's largest organization  
24 of law professors.

25 We had submitted a written report in late

1 July and I'm here just to highlight a few of the  
2 points. But we are opposed to the revisions in  
3 Standard 316. While we agree that the ABA standards  
4 should discourage predatory admission practices in  
5 law school that admit law students who cannot make  
6 their way through law school and can't pass the bar,  
7 this proposed change, however, will not accomplish  
8 this result. Instead the proposed change may have  
9 unintended and possibly damaging consequences on  
10 school curriculum design and on diversity in the  
11 legal profession.

12 We urge that the ABA, first, consider  
13 conducting an evidence-based inquiry or an impact  
14 study into the immediate impact of the proposed  
15 standard on schools with low bar passage rates and  
16 the impact on diversity of the law school. There is  
17 no question that data is needed to predict how this  
18 new standard will affect these two issues.

19 Second, consider more systemically whether  
20 the bar as the exclusive means of assessing  
21 readiness to practice law is too limited in testing  
22 who should or shouldn't enter the legal profession.

23 And third, if the ABA adopts this more  
24 streamlined approach as proposed, the new standard  
25 should preserve the good cause factors for extending

1 time to law schools to demonstrate compliance.

2           Simply put, the ABA does not have data to  
3 show the impact of a flat bar passage requirement of  
4 75 percent over a two-year period on schools either  
5 with low first-time bar passage rates for students  
6 of color. As you may know, in 2015, the bar pass  
7 rate for first-time takers was 75 percent -- below  
8 75 percent in 25 states and in District of Columbia.  
9 Since each state sets its passing scores at  
10 different levels, the difference of the graduates'  
11 pass rates from state to state may -- may more  
12 directly be the basis of the problem as opposed to  
13 the location -- I'm sorry. The location of the  
14 school as opposed to the quality of the education.

15           Until now, the standard has -- the 316  
16 Standard has permitted a safe harbor for schools  
17 whose bar passage rates fall within this acceptable  
18 range of behavior. Unless there's data to suggest  
19 otherwise, the dramatic differences in the state bar  
20 pass rates should continue to be a factor for  
21 accreditation.

22           And second, with respect to diversity in  
23 law schools, requiring a 75 percent pass rate over a  
24 two-year period simply jeopardizes diversity in law  
25 school admission. Unless there is a thorough

1 analysis to justify such a drastic change in the  
2 accreditation standards, students of colors will be  
3 unfairly impacted.

4           Now, I don't want to go too much in this.  
5 I know you've seen and read a lot of comments on  
6 this issue and we share in the concerns -- CLEA  
7 shares in the concerns of these -- of our comments  
8 and our colleagues. We only want to emphasize that  
9 there's a risk that the new proposed standard will  
10 lead to a decline in students of colors -- students  
11 of color.

12           The proposed Standard 316 also may shift  
13 away legal education from courses that integrate  
14 doctrine, theory and skills that prepare students  
15 for practice. The bar exam has been criticized for  
16 its ineffectiveness in assessing whether applicants  
17 can be competent and professional attorneys. This  
18 mirrors a long-standing critique of legal education.  
19 Starting back in 1921, the Reed report said that law  
20 schools were lacking in skills and professional  
21 training. And most recently, as we know, the  
22 Carnegie Foundation report documented the need for  
23 integration of theoretical practical legal knowledge  
24 and professional identity. Thankfully, based on  
25 this work, most law schools are doing incredibly

1 good work as unbiased as they are offering  
2 experiential education.

3           And the ABA, thankfully, is also  
4 supportive of getting students practice ready. And  
5 the ABA's recent adoption of a six-credit  
6 experiential course requirement is in step with the  
7 need of getting students practice ready and prepared  
8 for practice. An over-emphasis on bar passage,  
9 however, threatens these important advantages --  
10 these important advances in legal education.

11           And finally, deliberating a change to 316  
12 provides an opportunity to the Council to consider  
13 the relationship and your leadership role in law  
14 licensing. Other professions, as I'm sure you know,  
15 in the United States and in legal professions in  
16 other countries demand a deeper experience in  
17 practice for professional licensing.

18           For example, in England and Wales, a  
19 barrister is required to take a practical training  
20 class prior to admission. In six Australian states,  
21 also as an example -- states as an example, there's  
22 a practical training requirement that students can  
23 fulfill either by taking a practical course or  
24 taking up to two years, again, under a supervising  
25 attorney. And as I'm sure we all know as well, in

1 the United States doctors must complete a residency  
2 of three to six years; an engineer must have at  
3 least four years of post-college work to be eligible  
4 to sit for a licensing exam; and an architect must  
5 document working under a registered architect.

6 We encourage the ABA to engage in a  
7 dialogue with the bar admission officials, other  
8 stakeholders and experts to begin to develop and --  
9 and model a more comprehensive, skills-focused  
10 licensed -- licensing strategy for the legal  
11 profession.

12 So in conclusion, 316 should not be  
13 revised in the -- in the form currently proposed  
14 until that proposal has undergone an evidence-based  
15 analysis that ensures it will have the kind of -- it  
16 will not have, I'm sorry, the kind of adverse  
17 impacts on diversity and curriculum. Thank you.

18 **MS. LYSAGHT:** Thank you very much.

19 Mr. William Wesley Patton.

20 **MR. PATTON:** Good afternoon. I'm Bill  
21 Patton, probably to committee members, aka, William  
22 Wesley Patton. I'm no longer a professor and my  
23 last homework assignment was that 100 pages of  
24 analysis that I gave your committee. I, again, am  
25 not representing a law school, although I teach at

1 the UCLA David Geffen School of Medicine, Department  
2 of Psychiatry. These comments are solely  
3 representative of my own.

4 I first want to make a sad comment that  
5 I'm embarrassed to be a member of the California Bar  
6 Association. They're a few blocks away, didn't take  
7 the time to even write a letter about the effects on  
8 Hispanic law students in the state with the most  
9 Hispanics in the nation, and the most Hispanic law  
10 students who might be affected by the modification  
11 to Standard 316. So shame on them.

12 Secondly, I want to make another  
13 observation. The only comments that this committee  
14 has received in favor of the proposed amendments to  
15 316 are from people associated with a single  
16 organization, Law School Transparency. Kyle  
17 McDermott, David Frakt, Deborah Merritt and Susan  
18 Case are either on the executive committee or on the  
19 board of advisors of that organization. Since they  
20 filed their comments so late, I was not able to  
21 address their comments. So I want to shortly  
22 analyze some of the comments by Law School  
23 Transparency.

24 We know that a radical change in the  
25 dialogue of support for 316 changed once the



1 Standards Review Committee looked at the data  
2 created by Susan Case and by Ripkey in terms of the  
3 persistence of law students, and I want to focus on  
4 that. Even some of my -- I analyzed it in my  
5 writing. I think we need to look at that again.

6 In press comments that were put out by the  
7 Council, you now say that we have evidence from a  
8 two-year MBE persistence study.

9 **(Cell phone interruption)**

10 Wish I could dance.

11 A two-year MBE persistence study that  
12 indicates that few law students take the exam past  
13 four administrations and that the predominant number  
14 of law students who take the exam pass after four  
15 administrations.

16 There's a real problem with her study.  
17 First, it is a study that is not peer reviewed.  
18 Second, it is a study that -- the very first study  
19 was published by her own employer, the National  
20 Conference of Bar Examiners, without peer review.  
21 And they have refused me any of the data so that I  
22 as a social scientist can look at that study to give  
23 the Council any indication of whether it's accurate  
24 or not. So my comments are my analysis of what they  
25 publish, which is very little.

1 Now, we know the Standards Review  
2 Committee relied heavily on this because they  
3 appended it to its report. And the Council gave us  
4 a snippet of Susan Case's and Ripkey's conclusions  
5 in terms of the analysis. The problem is their  
6 methodology is not scientifically sound. They  
7 suggest that if we look at persistence on the MBE,  
8 it will be equivalent of the persistence in bar-test  
9 taking.

10 My short analysis -- and again, I don't  
11 have sufficient access to data. My short analysis  
12 shows that their data is 17 percent inaccurate in  
13 terms of that correlation between MBE persistent  
14 test takers and test takers in the California bar  
15 examination. It is 8.5 percent in overestimating  
16 the number of white test takers and 9.5 percent  
17 inaccurate in terms of the number of black test  
18 takers. And when we're doing comparative analysis  
19 of persistence rates, that's a 17 percent accuracy  
20 rate.

21 That study would never be accepted in a  
22 peer-reviewed social science study. So if that's  
23 what you're basing your conclusion that we can now  
24 safely say that most law students pass in four  
25 administrations, I highly caution you not to give

1 that kind of credibility and reliance until we have  
2 more time to look at her study and get the data upon  
3 what the study is based.

4           The other thing is her study is  
5 statistically biased. I could have told you before  
6 she conducted the study what the result would be.  
7 She took jurisdictions that have a very, very low  
8 MBE cut score, a mean of 133, lower than the  
9 national mean, and states that had very high first-  
10 time bar passage rate, 82.5 percent. Well, it  
11 doesn't take a psychometrician to tell you if it's  
12 an easy bar and everybody passes it, persistence  
13 rates are going to be rather low. It has no  
14 correlation with states like California that have a  
15 144 MBE cut score and then have an extremely low bar  
16 passage rate, as Mr. Holmes testified, below 75  
17 percent in every single administration. So it is  
18 statistically biased.

19           It's methodologically flawed. And she even  
20 says in her own study that she believes -- she  
21 believes. She's a social scientist -- she believes  
22 that there's a correlation between MBE persistence  
23 and bar persistence, but can't prove it. We simply  
24 can't make this kind of social justice change in the  
25 way that we're going to allow students to go to law

1 school, based on a non-published, speculative social  
2 science study.

3           Now, I know it's an old study, but  
4 everyone is citing to -- the Council cites to it.  
5 The LSE cites to it -- the longitudinal study, an  
6 old study, in terms of bar persistence. Steven  
7 Klein's study is still highly relevant for our  
8 consideration. Steven Klein's study, PR-87-5,  
9 indicates that there is a difference of 26 percent  
10 in bar passage rate between blacks and Hispanics who  
11 are given three opportunities versus seven  
12 opportunities to take the bar exam.

13           Now think about it a minute. Twenty-six  
14 percent on the California bar examination is the  
15 difference between providing a law student a  
16 disincentive to have high minority population and  
17 the opportunity to provide those students a chance  
18 to go to law school. It's the difference between --  
19 26 percent -- it's the difference between keeping  
20 accreditation under the proposed standard and losing  
21 accreditation under the proposed standard.

22           So what I suggest is that that's a study  
23 the Council should be very interested in because  
24 unlike everyone else who is basically arguing we  
25 should study more, and I agree with that, I think it

1 does support a little more rigorous standard of 75  
2 percent within four years. That's the only  
3 empirical study that suggests that a period lower or  
4 shorter than five years would not have a dramatic  
5 impact on the admission of minorities into ABA law  
6 schools. So I strongly suggest that the committee -  
7 - and again, this wasn't cited in any of the  
8 Standards Review materials and wasn't studied by the  
9 Council. I suggest you go back and look at that.

10 Now I want to answer Deborah Merritt who  
11 filed a letter. Again, these were filed so late, I  
12 apologize, I wasn't able to get written comments  
13 out. Her vision is that if a law school can't meet  
14 the 75 percent within five -- within four  
15 administrations, they simply should lose  
16 accreditation. She is excited that 13.8 percent of  
17 minority law students go to top 15 law schools.

18 Again, that's very, very few. In fact, in  
19 California, do you know how many black law students  
20 that is? Seventy-five law students at Berkeley and  
21 at UCLA. That's certainly not going to change the  
22 demographics of lawyers in the state of California.

23 But she does something which is an  
24 admission she didn't expect. She cites that we can  
25 expect that law schools will change pedagogy, it

1 will increase bar passage, and what does she cite?  
2 She cites a study by Professor Mainero at Chapman  
3 Law School, and says, Look, here's a law school that  
4 radically altered its bar passage.

5           And let me ask you on the Council: Do any  
6 of you know in the 509 ABA report for Chapman Law  
7 School for 2015, how many black law students attend  
8 that law school? The one that Law School  
9 Transparency is putting forward as the model for  
10 California? One black law student.

11           That is a way you can do it. Let's just  
12 have high-achieving, white law students in  
13 California law schools, we'll have no problem  
14 getting a 75 percent bar passage rate in two years.  
15 And this isn't about competence. There is no one  
16 who can demonstrate that the students at ABA law  
17 schools, even though they don't have a 75 bar  
18 passage rate, are less competent than students at  
19 other schools.

20           Let's take a look at WASU, one of the top  
21 law schools in the nation. It has a -- for the past  
22 10 years, it has a 96.5 percent bar passage rate in  
23 its home bar exam. When they come to California,  
24 I'm not talking about one or two students, I'm  
25 talking about almost 120 students that are reported

1 by the California bar exam, they have a bar pass  
2 rate of 63 percent. One of the top law schools in  
3 the country, when they come to California, pass the  
4 first-time bar exam in California at 63 percent. A  
5 reduction of 32 percent from their home state.

6 Well -- so again, I think that we have to  
7 be very careful in relying on the case study. We  
8 need more studies to determine what persistence  
9 really is and I strongly hope that this committee  
10 will reject the Standard Review Committee proposal.

11 Thank you very much.

12 **MS. LYSAGHT:** Thank you, Professor Patton.

13 Just a reminder, could we all perhaps put  
14 our phones on mute. We would appreciate that.  
15 That's number one. And number two, I see that we've  
16 been joined by a few other Council members, one  
17 incoming Council member and I believe one exiting  
18 Council member. So if you could stand and introduce  
19 yourselves. Jeff.

20 **MR. LEWIS:** Jeff Lewis.

21 **MS. STRETCH:** Daniel.

22 **MS. LYSAGHT:** Daniel.

23 **MR. THIES:** I'm Daniel Thies. I'm  
24 outgoing liaison to the Section of Council from the  
25 Young Lawyers Division. I don't have a vote, but

1 I'm going to be (inaudible).

2 **MS. LYSAGHT:** Thank you. All right.

3 Denise Roy.

4 **MS. ROY:** Good afternoon. I'm Denise Roy.

5 I am on the faculty at brand new Mitchell-Hamline  
6 School of Law. And we there very much appreciate  
7 the Council's support, both on the merger itself,  
8 which is going very well, and on our effort to  
9 address access problems through our hybrid program,  
10 allowing students from rural areas, from Indian  
11 reservations and so on to go to law school without  
12 leaving home.

13 But today I'm here to talk on behalf of  
14 SALT. I'm one of the co-presidents. Sara Rankin at  
15 Seattle U is the other co-president. On behalf of  
16 SALT, I want to thank you for the opportunity to  
17 participate in this very important and very  
18 difficult discussion.

19 As the standards already provide in 301,  
20 law schools do have the obligation to prepare  
21 students for admission to the bar and for effective  
22 ethical and responsible participation in the  
23 profession and not to admit students who cannot --  
24 who they believe cannot successfully prepare to  
25 practice -- pass the licensing exam. And the



1 accreditation standards, generally, certainly must  
2 help schools maintain that high standard and fulfill  
3 those obligations.

4 I have two main points. One -- number  
5 one, there's just too much that we don't know about  
6 the effects of this proposal. There's too much at  
7 risk and the stakes are too high to take that risk.  
8 My second point -- and there's a number of effects  
9 that I'll mention. The second point is along with  
10 CLEA, this is a great opportunity for leadership on  
11 the question of more effective means of assessing  
12 graduates' competence to practice law. And there  
13 are -- I can speak more about that later.

14 On the question of what we don't know, the  
15 simplicity of the proposed 316 certainly has appeal.  
16 It also may have substantial unintended  
17 consequences. We don't know what effect it will  
18 have to shorten the compliance window when bar  
19 results sometimes swing widely, and we don't know  
20 whether test takers who persist and succeed in  
21 taking the bar exam are able to do so within two  
22 years.

23 We don't know the effect on schools  
24 serving populations and individuals who are  
25 disadvantaged by standardized testing to measure

1 competence. Let me emphasize that. They're  
2 disadvantaged by use of standardized testing to  
3 measure competence. And we don't know what effect  
4 it will have on schools in states with relatively  
5 high MBE cut scores. So we urge the Council to  
6 study the effects of the proposal before adopting it  
7 to ensure it works fairly and appropriately.

8           So one of the most serious questions is,  
9 as you've been hearing, about the impact in -- of a  
10 proposed national standard on schools in states that  
11 consistently have annual pass rates below 75  
12 percent. This standard should not be enacted until  
13 we have more data to ensure that the standard will  
14 not inadvertently disadvantage schools in states  
15 with overall low pass rates.

16           2015 data from the NCBE indicates that  
17 first-time test takers from ABA-approved schools in  
18 21 states plus the District of Columbia had overall  
19 pass rates under 75 percent. The general --  
20 generally available data about passage focuses on  
21 first-time test takers, as you well know, or on  
22 results from a single administration and not on  
23 ultimate pass rates. So we don't know whether  
24 ultimate pass rates for schools in those states will  
25 meet or could meet the proposed standard. We just

1 don't know. So we urge the Council to request that  
2 both the NCBE and individual schools compel data on  
3 test takers' eventual pass rate in sample states to  
4 determine the impact of the proposed rule.

5 The uncertainty about the proposal's  
6 effect is exacerbated by the uncertain impact of the  
7 UBE. And in by no means am I criticizing the UBE  
8 here, but we are in a transitional period. And, in  
9 fact, we heard yesterday from the NCBE that the UBE  
10 has been adopted in 25 states and that there are  
11 likely more to come. So we haven't had a chance yet  
12 to study the impact of the UBE but we do see that  
13 bar pass rates fall in states that administer the  
14 UBE for the first time. And we certainly saw this  
15 in Minnesota.

16 Schools in the states that have adopted  
17 the UBE are adjusting their curricula to deal with  
18 the changes in the bar exam. And, for instance, in  
19 New York, schools are having to alter their coverage  
20 in subjects like trusts and estates and business  
21 organizations because the UBE tests more general  
22 principles rather than the very different state-  
23 specific New York -- the state-specific New York  
24 rules.

25 So this transition may have an effect on

1 bar passage for a time and this may not be the best  
2 time in which to change the standard as schools are  
3 adjusting to -- importantly adjusting to the UBE.  
4 It may be better to continue with the flexibility in  
5 the current standard as we see the effect of the UBE  
6 on bar passage.

7           We, along with many others, are concerned  
8 about the impact the proposed standard may have on  
9 schools' willingness to provide opportunities to  
10 students who perform less well on standardized tests  
11 such as the LSAT, but, importantly, who may be  
12 capable of succeeding as lawyers. So LSAT scores  
13 are one of the few data points schools have to  
14 determine admissions, and if the new standard is  
15 more difficult for schools to satisfy or if they  
16 worry that it's more difficult to satisfy, they may  
17 rely more heavily on LSAT scores.

18           What impact will this have on the  
19 admissions process? What impact will it have on the  
20 admission of students from diverse, economically  
21 disadvantaged and other non-traditional backgrounds?  
22 And I'm here to say at a school that has served  
23 working students, there are many non-traditional  
24 students who are disadvantaged with standardized  
25 testing. It's certainly a concern about people of

1 color and ethnic minorities, but it's also a concern  
2 about people who return to school to -- to try a new  
3 career or develop their skills in law for their own  
4 career as they are older in life and further away  
5 from standardized tests.

6           So I call this the baby-with-the-bathwater  
7 problem. I'm concerned that if we undermine schools  
8 that are willing to take risks on students who can  
9 succeed, we may dramatically reduce opportunities  
10 for those students to attend law school.

11           A note about the persistence data which  
12 you've heard. We -- we know that -- excuse me --  
13 the data that you have doesn't necessarily support  
14 the proposal because we don't know how long it takes  
15 for takers to persist over four exams. It's  
16 unlikely that they can do it in two years. It may  
17 be that it takes three or four because of the  
18 expense, because of the difficulty along with jobs  
19 and so on, and you've heard that.

20           And with CLEA, we are very concerned with  
21 the effect on law school curriculum. The new  
22 learning outcome standards, which we love, encourage  
23 schools to think broadly and carefully about  
24 preparing students for practice.

25           The bar exam pass rate standard is the

1 only bright-line accreditation standard with respect  
2 to student learning outcomes. By eliminating the  
3 leeway for schools in states with historically low  
4 pass rates, the standard may lead schools to focus  
5 on bar-type courses and methods for their students  
6 and limit the growth of experiential learning,  
7 despite the emphasis on experiential and skills-  
8 oriented learning recently -- that the recently-  
9 adopted accreditations standards encourage and  
10 require.

11           While the bar exam may be an adjunct to  
12 legal education, as suggested yesterday by the NCBE,  
13 it does have a substantial effect on what and how  
14 law schools teach and on what law students choose to  
15 study during law school.

16           And finally, we also encourage retention  
17 of the list of factors that may be taken into  
18 account as good cause for extending the period the  
19 law school may seek to demonstrate compliance. It's  
20 a very useful, thoughtful list that will help  
21 schools judge when choices they make are valid  
22 choices to take risks and when they're not.

23           The big point, finally. We continue to  
24 have fundamental concerns about the limitations of  
25 the current system of licensing lawyers through the

1 bar exam. This discussion about 316 provides an  
2 opportunity for the Council, legal academia and the  
3 legal community to engage in a more extensive and  
4 much needed discussion about law licensing reform  
5 and methods that would better measure lawyer  
6 competence.

7 And we know there are schools that are  
8 trying this, as in New Hampshire, and CLEA gave some  
9 examples of other countries and other professions  
10 that provide models that we can look to. But the  
11 concern here is that the current licensure exam may  
12 eliminate the ability to practice of students who  
13 are competent in that it emphasizes the skills of  
14 speededness and comprehensive rote memorization  
15 rather than other important skills such as legal  
16 research, negotiation and client counseling.

17 So -- oh, I want to quote the Law School  
18 Transparency -- time is up. "If diverse candidates  
19 who would make competent attorneys cannot pass the  
20 bar exam as implemented today, we must collectively  
21 fight for fairer, minimum passing scores or a more  
22 desirable examination."

23 Let's make sure our testing matches our  
24 goals in learning and teaching. Thank you very  
25 much.

1           **MS. LYSAGHT:** Thank you.

2           All right. Marc-Tizoc Gonzalez.

3           **MR. GONZALEZ:** Good afternoon.

4           **MS. STRETCH:** Good afternoon.

5           **MR. GONZALEZ:** My name is Marc-Tizoc  
6 Gonzalez and I am an Associate Professor of Law at  
7 the St. Thomas University School of Law in Miami.  
8 I'm also a member of the board of directors of  
9 Latina and Latino Critical Legal Theory. Prior to  
10 moving from California in 2011 to Florida, I was  
11 very active in the San Francisco Bay Area Diversity  
12 Bars. Among them the Berkeley Law Foundation, the  
13 East Bay La Raza Lawyers Association, the Centro  
14 Legal de la Raza in Oakland, the National Lawyers  
15 Guild. And I mention these because I also helped  
16 with the American Bar Association's study on new  
17 directions in diversity. I was one of the three  
18 legal scholars who was asked to help co-author that  
19 report, along with Margaret Montoya and Tucker  
20 Culbertson.

21           So in turns out that I was here testifying  
22 against a similar proposal in 2007. You may or may  
23 not recall that. I imagine the people in the room  
24 do and I'll be referencing that several times  
25 because it provides the context that I bring to my



1 opposition to the proposed reform of Standard 316.

2           So I oppose the proposed reform for three  
3 principle reasons. I'll discuss each in turn but  
4 first I want to refresh everyone's recollection that  
5 in 2007, what we were considering was a first-time  
6 bar passage rule interpretation. That was going to  
7 set a 70 percent first-time bar passage requirement,  
8 and that 70 percent figure cut very neatly between  
9 several of the various racialized ethnic groups that  
10 exist in the United States.

11           As I recall, the Warren Institute and the  
12 Thelton Henderson Center, both at the University of  
13 California Berkeley School of Law, showed clearly  
14 that that 70 percent rate would cut just between  
15 groups that are racialized as white or Asian, which  
16 would generally pass that standard, and groups that  
17 were racialized as African American, Latino or  
18 Native American, which would generally fall below  
19 it. So that's the kind of context that I have for  
20 the second of my opposition points.

21           The first, however, is that I believe that  
22 this is an irrational proposal. It's irrational  
23 because you have a complex phenomenon. Or if you  
24 want to use it in the plural, complex phenomena.  
25 Fifty-plus jurisdictions, all with their own bar

1 passage rates, that's what we're trying to address.  
2 That's the social fact. That's the reality of it.  
3 And so although some proponents of the reform  
4 indicate that the clarity of a single sentence is  
5 the -- is the benefit, that national standard,  
6 because you have such a complex phenomena, because  
7 of our federalism, we cannot have a single sentence.  
8 We instead need a complex regulation to validly and  
9 rationally regulate the conduct at hand.

10 My second main point really goes to the  
11 predictable, deleterious impacts on various  
12 racialized groups. Now, other written comments and  
13 others who will testify, you know, can provide many  
14 of the particular details. But we know from our  
15 recent history that we will inadvertently perhaps,  
16 but nevertheless, predictably impact various  
17 racialized groups if we adopt a standard without due  
18 regard.

19 So, for example, when Professor Patton  
20 says if you look at that four-year possibility as  
21 one that helps to regulate the conduct in a more  
22 scrutinous way, and yet does not have the  
23 deleterious racial impacts, well, then that clearly  
24 looks to me like a far better regulation than one  
25 where we either don't know, as has been discussed by

1 several of the testifying people today, or where in  
2 my position, it's highly predictable that we will  
3 have those deleterious impacts.

4 My third reason really goes to what we  
5 talked about in the new directions report as the  
6 democratic rationale for diversity. I believe that  
7 the proposed reform is something that imperils the  
8 democratic legitimacy of our profession. And I  
9 cherish our profession. As you know, the Magna  
10 Carta was recently celebrating, right, it's 800th  
11 year. And as several of the books that discussed  
12 that highlighted, it's not the rule of law that we  
13 are trying to protect. It's the rule of law over  
14 authority. It's the rule of law over fiat.

15 We're discussing what might seem like a  
16 very small and technical component to the mainstream  
17 society, but it is in a presidential election year  
18 where we have a national candidate who is saying  
19 outrageous, pandering things that will continue to  
20 disunify and to raise acrimony between various  
21 racialized ethnic groups in our country.

22 Now, I'm looking to practice law, to  
23 teach, you know, to be engaged in our profession for  
24 at least 30 more years. My life insurance, my  
25 retirement funds, they have a particular number,

1 that's my life expectancy. Right? And so at least  
2 for 30 more years, I'm looking to be doing that kind  
3 of work. And I know that the kind of change that  
4 you're making today will have an impact that will  
5 ripple at least upon the next decade.

6           And is this the time that we want to turn  
7 away from the moderate gains in diversification of  
8 our profession, or is this a time when we want to  
9 create standards that very properly regulate our  
10 profession and the new admittance of lawyers into  
11 it, but in a way that does not have the deleterious  
12 impacts that were the second main reason that I  
13 oppose this reform?

14           Now, I think that there are many people  
15 here who are willing to help with crafting that.  
16 And I think that, you know, the proposal that has  
17 come before us and has generated these comments and  
18 is generating this testimony gives us a real  
19 opportunity to see that there are ways that we can  
20 do what is necessary to make it more consumer  
21 protective, right, legal education, and yet not have  
22 the kinds of effects that have resulted in actually  
23 defeating several past proposals and creating the  
24 current Standard 316, that although may seem  
25 complicated, it reflects the kind of complexity of

1 the phenomena that we need to regulate.

2 I also want to comment briefly because we  
3 already have the data or we could do that analysis  
4 to show who fails right now if the proposed standard  
5 was the law today. And so are those the schools  
6 that we find to be most troubling in terms of the  
7 consumer protection issues? If so, then I guess  
8 that's, you know, a standard that really meets the  
9 problem. But if not, and if it gains too many  
10 additional schools and imperils their accreditation,  
11 well, then again, that's further evidence that's  
12 just, to me, that we really need to change that  
13 proposal into one that will not have those impacts.

14 And, you know, I was -- I was reflecting  
15 on one of those ABA hearings, there were four across  
16 the country for the president's initiative on  
17 diversity in 2009-2010, and it was -- it was really  
18 interesting because Christopher Arriola, who is an  
19 Assistant District Attorney in Santa Clara County,  
20 here in California, and was a past president of  
21 Santa Clara Bar Association and the Santa Clara La  
22 Raza Lawyers Association and the California La Raza  
23 Lawyers Association, in a very moderate way that I'm  
24 sure I will not able to replicate, just said: Look,  
25 as a profession that's self-regulating, if we fail

1 to do the kinds of things to make a more diverse  
2 profession in this century, then a coming majority  
3 will change it. And I was really struck by this  
4 very mild mannered, you know, district attorney  
5 saying in effect, the state bars are creatures of  
6 their populous, ultimately.

7           So this citizenry, through our elected  
8 officials, if we are able to have a politics that  
9 works, may well change the rules completely. And I  
10 don't think that that is necessary in this -- in  
11 this moment in time, but I do think the proposed  
12 standard is the wrong standard for the next decade.  
13 Thank you very much.

14           **MS. LYSAGHT:** Thank you.

15           Beverly McQueary Smith.

16           **MS. SMITH:** Good afternoon. I am Beverly  
17 McQueary Smith. I'm a member of the Council on  
18 Racial and Ethnic Diversity and Educational  
19 Pipeline, and I was asked by the chair, Ken  
20 Standard, a former president of the New York State  
21 Bar Association, to speak on the Council's behalf.

22           First, I want to thank you for holding  
23 this hearing on a very important set of issues  
24 affecting legal education and the profession. I  
25 served as president of the National Bar Association

1 from 1998 to 1999. And I'm pleased to introduce  
2 Kevin Judd, our incumbent president -- Kevin, please  
3 stand -- from Washington, D.C., who was just  
4 installed in the last couple of weeks as its new  
5 president.

6 Under the leadership of ABA president Bill  
7 Paul, I worked as a member of the legal education  
8 opportunities scholarship program at its inception.  
9 I'm an elected member of the American Law Institute,  
10 a former chair of the Section of Women in Legal  
11 Education of AALS, and a member by examination of  
12 the bar in four jurisdictions; the District of  
13 Columbia, West Virginia, Texas and New Jersey.

14 I am a native of Jersey City, New Jersey  
15 and a product of its public schools. I earned my BA  
16 from Jersey City State College, now New Jersey City  
17 University. I earned a master's degree in English  
18 literature from Rutgers the State University  
19 Graduate School of Arts and Sciences, a jurist  
20 doctor from New York University School of Law, and  
21 an LLM from Harvard University.

22 Before I began to study law, I worked in  
23 three education institutions where I helped students  
24 who were returning to school become acclimated to  
25 college. I did as part of the Educational

1 Opportunity Fund at Jersey City State, as part of  
2 the Urban Institute at Essex County College in North  
3 New Jersey, and at Rutgers University College. In  
4 sum, my experience dealing with educationally-  
5 challenged students dates back to 1966.

6           When I earned my undergraduate degree, I  
7 also completed the requirements to become certified  
8 to teach English and French in the state of New  
9 Jersey up through 12th grade. My certification to  
10 teach in the public schools of New Jersey is still  
11 valid. Thus, when I left the faculty at Rutgers  
12 University College to study law, I had five years of  
13 experience working with adult learners.

14           After law school graduation, I worked for  
15 the federal government for seven years prior to  
16 entering full-time law teaching in 1984. I served  
17 as the director of the Council of Legal Education  
18 Opportunity fund, otherwise known as CLEO, for SUN  
19 Institute at Touro Law Center in Huntington, New  
20 York, in 1992. At that time, Howard Glickstein was  
21 the dean. He now is dean emeritus.

22           CLEO prepared minority or economically  
23 disadvantaged students to enter law school after a  
24 six-week, intensive residential learning program. I  
25 retired from full-time law teaching in 2013 from



1 Touro Law Center in Central Islip, New York, and I'm  
2 also pleased to have with me today, Dean Patty  
3 Salkin of the law school, who is going to be leaving  
4 that post in about three days to become the provost  
5 of the college.

6           Dean Patty, please stand.

7           I hold the title of Professor Emerita from  
8 Touro. In March 2016, I returned to the work force  
9 from Texas to serve as program director of the New  
10 York Legal Education Opportunity Program, otherwise  
11 known as New York LEO, hosted by the New York State  
12 Judicial Institute in White Plains, New York, in  
13 conjunction with the Elisabeth Haub School of Law at  
14 Pace University. The program ended on July 15th,  
15 2016. Twenty wannabe lawyers completed New York  
16 LEO, thus, it is with a heavy heart I come to ask  
17 that you not destroy their chances to become members  
18 of our profession at the birth of their legal  
19 careers.

20           To me programs like LEO and CLEO try to  
21 close the educational gap and strengthen students'  
22 likelihood of success in law school even if their  
23 scores on the LSAT are not as strong as we would  
24 like them to be. The tutelage and mentorship CLEO  
25 and LEO faculty provide helps students develop the

1 discipline and structure they need to be prepared  
2 when they attend their first day of law school.

3           Regrettably, all law graduates who sit for  
4 the bar in their respective jurisdictions do not  
5 pass it the first time. All too often, the  
6 disproportionately high number of unsuccessful  
7 students come from black and brown communities,  
8 given that the quality of one's public school  
9 education -- which ties you back to why I'm  
10 certified to teach in New Jersey, English and  
11 French, through 12th grade, is relevant to today's  
12 remarks -- the quality of one's public school  
13 education is linked to one's ZIP code.

14           Students who begin the race toward  
15 academic success 50 yards behind the starting line  
16 in preschool or kindergarten should not be expected  
17 to pass the bar examination at the same rate as  
18 those who start school at the starting line or 50 --  
19 pardon me -- or 50 years ahead of the starting line  
20 already beginning school as readers.

21           Apropos of which, while I was directing  
22 the CLEO Summit -- the New York LEO Summit  
23 Institute, I overheard a conversation between one of  
24 my faculty members and her daughter. Her daughter  
25 has an undergraduate degree from Howard University

1 and a master's degree from University of Texas at  
2 Austin. She teaches in the public schools of south  
3 -- of Charlotte, North Carolina. This summer she  
4 agreed to teach summer school at the JH Gunn School.  
5 It was called the BELL program. And it deals with  
6 the need to achieve. Basically, that school system  
7 uses two measures; one, an end-of-grade test and the  
8 other is a need-to-achieve test. The kids that are  
9 in the summer program failed their need-to-achieve  
10 test, which means they could not get into the fourth  
11 grade or move into the third grade because they  
12 flunked.

13           She was supposed to try to help them close  
14 that performance gap over the summer. That means  
15 teach them how to read. She had 20 students.  
16 Ninety-five percent were Hispanic and five were  
17 black -- five percent were black. The program was  
18 five weeks. It took three weeks for North Carolina  
19 to deliver the books. I overheard the conversation  
20 where she's there day two or day three and said:  
21 How am I supposed to teach them to read with no  
22 books?

23           I suggest to you that if your educational  
24 outcome is determined by your ZIP code and what  
25 color you are and what language you speak in your

1 household, you do not end up at the end of the gate  
2 when you take the bar exam the same way as the kid  
3 who goes to your house and sees all those books in  
4 your bookcase. Those kids do not have books in  
5 their households. And they may not have them in  
6 English and Spanish or Spanish translated into  
7 English. It is not the same race.

8           You have already heard people talk about  
9 the system is not fair, it is rigged. We have to --  
10 we have a chance and the power with all of these  
11 minds and energy in this room and all the people who  
12 spend time doing the statistical analyses and the  
13 reports -- I envy that poor guy who does that.  
14 Bully for him. I wouldn't want to do that kind of  
15 work, counting up who passed and who flunked or  
16 whatever.

17           But I will tell you that I understand the  
18 educational process and prerogatives and what makes  
19 learning effective, and what we're doing at the  
20 front end is coming out with bad outcomes on the  
21 back end. But this particular solution, the  
22 proposed revision of Standard 316 in its present  
23 form is not narrowly tailored to address the  
24 problems.

25           Thank you for your time. I remain

1 available to answer any questions.

2 **MS. LYSAGHT:** Susan Prager.

3 **MS. PRAGER:** Thank you for this  
4 opportunity. I had intended to focus on the proposed  
5 changes to Standard 501 relating to admissions, but  
6 as I worked with this, I realized that the concerns  
7 that I have relating to 316 are very great. And one  
8 of the things I'd like to urge you to do is to  
9 consider deferring consideration of 316 until you --  
10 you have more opportunity to think about these also  
11 in conjunction with one another.

12 As many of you know, from its inception  
13 more than 100 years ago, Southwestern has been a  
14 place of access and opportunity. It was one of  
15 those many schools around the country formed to  
16 enable people who had the intellectual capacity to  
17 do so, to attend law school at a time when many in  
18 this society thought that was not appropriate for  
19 them to do. Our symbol for that is that the first  
20 graduate of the school is female.

21 I want to -- I want to thank all of those  
22 who contributed written comments. They were very  
23 informative. I have not been able to wade all the  
24 way through them yet. I'm maybe only halfway  
25 through Bill Patton's comments, for example. But

1 today, I do want to -- want to emphasize the  
2 seriousness of the potential impact of these changes  
3 and associate myself with the concerns about  
4 diversity and more.

5 We all know that first-time taker rates  
6 for bar passage can never tell the complete story of  
7 who will be able to enter the profession. But this  
8 is an all the more important point to consider in a  
9 state with a difficult bar exam. That was true  
10 throughout my 16 years as dean at UCLA from 1982 to  
11 1988 and it is true at the Southwestern of today.

12 And as overall pass rates have declined very  
13 recently, we are seeing that it is taking our -- our  
14 graduates longer to ultimately pass, more attempts.

15 Our attempts to assess what's happening in  
16 this regard, though, are being hampered because, as  
17 everyone has heard today, the California bar is no  
18 longer sharing with schools -- pass-fail data with  
19 us on our own students. And in the case of  
20 repeaters, this is an even bigger problem because we  
21 don't necessarily know who is repeating and when.  
22 This it not the fault of the bar and the bar is  
23 trying to correct this through legislation. It  
24 relates to a Public Records Act change.

25 Now, as Bill Patton has -- has emphasized

1 in his paper and in his presentation today, the  
2 difficulty of the California bar should not just be  
3 dismissed as a California problem because so many  
4 schools have large numbers of takers. Out-of-state  
5 schools have takers in California. It affects us  
6 all and it seems to affect the out-of-state schools  
7 more severely, looking at Bill's data.

8 In your policymaking, I hope you will not  
9 assume that the bar exam is remaining constant, and  
10 I want to give two examples. With respect to the  
11 multi-state, we all know yet another subject has  
12 been added to the multi-state. And one has to  
13 prepare differently for multiple choice tests. But  
14 within subjects, I realized, in coming back to the  
15 front lines of legal education, that the multi-state  
16 has grown and grown and grown. So when we're trying  
17 to use how people have done on earlier tests, I  
18 think we also need to appreciate that we're really  
19 not necessarily comparing apples to apples.

20 The California change that I will cite is  
21 a byproduct of the way that California is moving  
22 next summer to a two-day exam. They're going to  
23 weight the multi-state more, which will certainly  
24 hurt a population like ours where we have lots of  
25 data that our students do the best on a performance

1 test, next best on the essays and the worst on the  
2 multi-state.

3           The other -- the other change is the  
4 restriction of the opportunities for the essays and  
5 in particular, the reduction in the performance  
6 test, where not only is one question eliminated, but  
7 the one that remains will be shortened in time,  
8 which is likely to put much more of a premium on how  
9 fast you are, which is another problem with using  
10 the types of testing that we do.

11           So what I wanted to convey that I think  
12 has not been mentioned yet today, unless I missed  
13 it, is that LSAT is not the best predictor or LSAT  
14 and GPA are not the best predictor of how someone is  
15 going to do in law school. And yet the critics in  
16 Law School Transparency think it's everything. That  
17 theme runs through.

18           So to give you just a little window into  
19 this, and we are doing more work with this and will  
20 provide it to you, when I first came to Southwestern  
21 not yet three years ago, I noted that people in some  
22 of our lower LSAT range were every year at the end  
23 of the first year appearing in the top 10 percent  
24 and the top 20 percent of the class. So that's a  
25 very concrete demonstration that as a -- as a



1 predictor of how well someone is going to do or if  
2 they're going to do well, we're seeing great  
3 variations.

4           So what we've looked at recently -- so  
5 we've looked at three years and we've found that the  
6 performance in the first year of law school was  
7 almost two and a half times as powerful in  
8 predicting first-time bar exam performance as LSAT  
9 and undergraduate GPA combined. In our instance,  
10 three years or four years, for some of our programs  
11 of law school, shows an even greater predictive  
12 value, three times more effective than LSAT and  
13 grades.

14           And I suspect that this is the experience  
15 of a lot of the nation's law schools, particularly  
16 the ones that are more like ours. We're not --  
17 we're not high up the food chain and -- and we do  
18 believe that it's important for us to take some  
19 risks, and so this is where I am concerned about the  
20 interplay of credentials coming in and attrition,  
21 and continuing to make sure that schools have  
22 adequate latitude in that.

23           The -- the thing that I thought I would  
24 specifically share with you -- and I'm looking at  
25 Becky to see how much time I have left. Two

1 minutes.

2           Well, I'll just use a few examples. In  
3 our part-time program in the last entering class, we  
4 looked at how people did after the first semester.  
5 We had six people who had 147 LSATs. All six were  
6 in the top half of the class at the end of the first  
7 semester. But the 149s, we had -- we had those, and  
8 there was one of them in each of the top four  
9 deciles of the class and four of them were in the  
10 bottom four deciles of the class. So we're just  
11 seeing it everywhere. And these are people who were  
12 interviewed before admission because we're trying to  
13 figure out how can we pick among -- among people.

14           I have more along that -- along that line  
15 but I'm going to -- I'm going to stop that part and  
16 -- and say in these recent years, I've also become  
17 much more sensitive to two additional issues. One  
18 of them is the impact of English as a second  
19 language and what that might mean in terms of the  
20 need for a greater period of attempts.

21           And secondly, we are -- we are all, and I  
22 think this will happen now everywhere after the  
23 lawsuit relating to accommodation and the LSAT,  
24 we're all experiencing larger student -- larger  
25 numbers in our populations of students who are

1 deserving of accommodation.

2           And with respect to accommodation, I began  
3 to realize even while I was at UCLA, which is a long  
4 time ago now, that by definition, the students who  
5 come to all of our schools are bright and they've  
6 accommodated in undergrad without even sometimes  
7 recognizing that they have something that -- where  
8 they should be assisted. Or if they know it, they  
9 don't want to disclose it because of the stigma and  
10 fears that people will think they're not bright.

11           And in the law school world, we see both  
12 of these phenomena, and that means that in some ways  
13 people are doing the first year with one hand tied  
14 behind their back or worse. And so I think that's  
15 an area that we need to do a lot more work with  
16 respect to.

17           And I have a few more things, but I'm  
18 going to write them to you because I'm out of time.

19           **MS. LYSAGHT:** Thank you, Susan.

20           All right. I believe we're going to hear  
21 from the HBCU law deans now and Dean Holley-Walker,  
22 you're speaking for them. And the staff informs me  
23 that they've been given 20 minutes because they  
24 represent two deans.

25           **MS. STRETCH:** Does that mean you want to

1 take a break before that or should we just keep  
2 going?

3 **MS. LYSAGHT:** No.

4 **MS. STRETCH:** Okay.

5 **MS. LYSAGHT:** We'll keep going.

6 **MS. HOLLEY-WALKER:** Good afternoon. I'm  
7 Danielle Holley-Walker. I'm the Dean of Howard  
8 University School of Law and I'm here on behalf of  
9 all of the law schools that are connected with  
10 historically black colleges and universities, so I  
11 want to introduce my decanal colleagues who are here  
12 with me.

13 First, Shelly Broderick from University of  
14 District of Columbia, Dean Danye Holley from Texas  
15 Southern University, Thurgood Marshall School of  
16 Law, and Phyllis Craig-Taylor is also here from  
17 North Carolina Central University. We're joined --  
18 I don't see them in the room -- John Pierre from  
19 Southern University Law Center and also Felecia  
20 Epps, from Florida A&M. And we have joined together  
21 in a letter and we have also signed on to the letter  
22 that was primarily drafted by Dean Garcia from St.  
23 Thomas School of Law.

24 So I want to make several points and I  
25 will not go back into -- in detail everything that's

1 included in our letter. We do support most of the  
2 comments that were made here today very strongly,  
3 but I think the primary thing that we want to say,  
4 and I think it's really important for this group to  
5 hear, is that the consumer concerns that are raised  
6 by Law School Transparency of basically turning  
7 students through law schools, admitting students  
8 that should not be there knowing that they will not  
9 become attorneys, that they will not be able to pass  
10 the bar exam, high attrition rates, the story that  
11 is told by Law School Transparency doesn't in any  
12 way resemble our law schools.

13           And at the same time, that story is being  
14 to used to drive changes, very significant,  
15 important changes to the ABA accreditation standards  
16 like Rule 316. We cannot allow those generalized  
17 consumer concerns to really negatively impact  
18 schools like ours that are doing the heavy lifting  
19 in terms of diversity, and have been committed to  
20 our missions for a long time.

21           At Howard University School of Law, we've  
22 been committed to our mission for almost 150 years.  
23 So the idea that our schools would be put in  
24 jeopardy of losing accreditation or being under  
25 constant monitoring towards accreditation, is

1 something that is unjustified and is something that  
2 cannot be seen as anything that is positive for our  
3 schools and our missions that we have been committed  
4 to for a long time.

5           So with that as our overarching point that  
6 we consider all of those consumer concerns very  
7 carefully -- and actually, our schools, the kind of  
8 ironic part about this, is that our schools would be  
9 hurt by this change to 316, and our schools actually  
10 are schools in the entire law school universe that  
11 really meets some of the other concerns that are  
12 there in terms of affordability, and some other  
13 concerns that are raised in terms of consumer  
14 concerns in the marketplace, and I'll highlight some  
15 of those.

16           So first I want to talk about the two-year  
17 time frame because I think that is something that  
18 has not been as emphasized in this hearing. I think  
19 one of the kind of negative parts of the two-year  
20 time frame, it is -- is that it has been least  
21 studied. We have not been asked -- while we have  
22 seen this general comment that was in the study that  
23 was referred to by Professor Patton, that the  
24 committee says that -- that the two-year time frame  
25 provides a period during which almost all of the

1 schools' bar outcomes for a graduating class will be  
2 determined, when as a group we talked about that, we  
3 were not asked for our specific information about  
4 our schools. We know that not to be true for our  
5 schools, and I'll give you the primary reason that  
6 this again is a consumer concern.

7           The primary reason why four  
8 administrations will not be sufficient for many of  
9 the students at our schools is because they cannot  
10 afford to do four consecutive administrations of the  
11 bar exam. Just to give you an idea of what it would  
12 cost for a student to do that right now, bar prep  
13 course, over \$3,000. You have deferred income if  
14 they can't work. And also to even sit for a bar  
15 exam in California, that bar application fee is  
16 \$677.

17           So you start talking about consecutive  
18 administrations of the bar exam, you're asking  
19 students who are at the lower socioeconomic range  
20 who do not have the safety net of parent,  
21 grandparents, other people in their families who can  
22 help to support them during the bar exam, like some  
23 of us were lucky enough to have. That's an extreme  
24 kind of requirement for students to sit for four  
25 consecutive administrations of the bar exam in order

1 to make sure that their schools are not held  
2 accountable in terms of accreditation.

3           And one of the other letters made the  
4 point that as law schools, we don't have very much  
5 control over when our graduates sit for the bar  
6 exam. So to require four consecutive  
7 administrations to essentially be able to meet this  
8 two-year time frame, that's something that if I went  
9 to my graduates, I would not have very much leverage  
10 as a dean to ask them: We understand that you can't  
11 afford to sit for the next administration of the bar  
12 exam. However, you will put your law school's  
13 accreditation in jeopardy if you don't demonstrate  
14 that you can pass.

15           And by the way, the current bar passage  
16 standard is one in which all of our schools are able  
17 to meet that standard. And so I'll make that my  
18 second point. I think now what more of the law  
19 school deans have been asking for -- and this isn't  
20 just our groups of deans, but all over we see  
21 schools like University of Arizona that want to go  
22 to a GRE standard. We're asking for less one-size-  
23 fits-all kind of accreditation standards because we  
24 have a lot of different missions to meet.

25           And so currently, we have not seen a study



1 of what has been the impact of the current 316. In  
2 many ways the current 316 is a great standard  
3 because it does not require a one-size-fits-all  
4 mentality. And I'll give you an example from my own  
5 career.

6           So before I came to Howard, I was the  
7 associate dean for academic affairs at University of  
8 South Carolina. At University of South Carolina,  
9 we're the only public school in the state. There's  
10 only two law schools in the entire state. Whatever  
11 the bar passage rate is for the University of South  
12 Carolina becomes the average bar passage rate.

13           So under the new 316, schools like  
14 University of South Carolina, as much as I love it,  
15 Montana, other schools like that, will have an  
16 automatic passage on this standard. Whereas, you  
17 may have a very good school in a jurisdiction that  
18 has many law schools. So in Florida, New York,  
19 California, Texas, and many people have talked about  
20 California in particular, where you may have a  
21 school that is a performing very well, giving their  
22 students lots of bar prep, academic support, et  
23 cetera, but because there are many schools in their  
24 jurisdiction, they don't set that cut standard and  
25 they'll fall below the standard.

1 So that's an example of how the one-size-  
2 fits-all mentality, when it comes to bar passage, is  
3 not something that is fair for schools that are in  
4 these larger jurisdictions with many law schools  
5 when you have other law schools that basically set  
6 the pace in terms of bar passage.

7 I think one of our biggest concerns is  
8 obviously the elimination of the gap standard, which  
9 now falls under the bar passage rule which allows  
10 for 15 percent comparison to the state average.  
11 Probably the biggest concern right now is we are in  
12 such a time of flux in terms of what's happening on  
13 bar the exams. As Dean Prager just said, we see  
14 this incredible shift in terms of the scores on the  
15 multi-state bar exam going down, maybe partially  
16 caused by the inclusion of civil procedure. ô

17 Also, when we look at first-time bar  
18 passage rates in many jurisdictions, they are  
19 continuing to go down. So in New York in July 2012,  
20 it was 83 percent. That same rate was 79 percent in  
21 July 2015. In Texas, the first-time bar passage  
22 rate in July 2012 was 83.8 percent. In July 2015,  
23 it was 76.8 percent. North Carolina has seen the  
24 lowest bar passage in 30 years in July 2015, with a  
25 69 percent bar passage rate. Which means that if we

1 adopt this new standard, what we would have is a  
2 situation where you could possibly be at state  
3 average as your law school, meeting state average in  
4 your -- but you would still fall below the  
5 accreditation standard.

6           And that seems fundamentally unfair to  
7 require that all jurisdictions -- to push  
8 jurisdictions to adopt the same cut rates so that  
9 they would be able to not disadvantage the law  
10 schools in their states with graduates who primarily  
11 take that bar exam.

12           I think the other uncertainty that's there  
13 is coming from the adoption of the UBE. As we  
14 heard, more and more jurisdictions are adopting the  
15 UBE. I would commend you to look at the New York  
16 Bar Association's letter to this committee in which  
17 they are opposing due to the uncertainty created by  
18 their adoption of the UBE. The Texas Supreme Court  
19 has just decided that things are so unstable in the  
20 bar passage rates there that they needed to appoint  
21 a statewide bar task force.

22           So we have a recognition by the individual  
23 states that with declining bar passage rates, we  
24 need to take a close look. And I cannot agree  
25 enough with the many people who have spoken to this

1 committee that say that we need at least two types  
2 of studies I believe before we move forward into a  
3 new bar passage standard.

4           The first is a sunset study to look at  
5 what has been the impact of the current 316. So is  
6 it, as the Law School Transparency people have  
7 argued, that we have many schools who are falling  
8 well below what this Council would consider to be a  
9 kind of objective, if there is such a thing -- which  
10 I don't think there is because it's a state-by-state  
11 consideration of what is a sufficient bar passage  
12 rate -- or is it that, as we've seen, most of us at  
13 all these schools have 85 to 90 percent of our  
14 students who are able to pass and we are able to  
15 meet the current bar passage standard?

16           I would present to you that considering  
17 the fact that some of us take students who are at  
18 the most risk, students who have below LSAT averages  
19 of 147, 145, the work that we're able to do with  
20 those students and to demonstrate 85 to 90 percent  
21 bar passage after a five-year period is tremendous  
22 work that is being done by schools that are taking  
23 students who have the least opportunity and will go  
24 out into the marketplace and provide opportunity,  
25 provide legal services to those who most need it.

1 And so that sunset study on the current  
2 316, and also, we have to be able to provide people  
3 with an idea of what will happen if we adopt this  
4 current rule. I think to present uncertainty to  
5 schools that are already struggling with resources,  
6 struggling with admission, struggling in other ways,  
7 it is unfair to those schools and puts a real cost  
8 on terms of these particular HBCU schools.

9 I'll commend to you one other part from  
10 Dean Garcia's letter. He says, and it's true, that  
11 there are 22 law schools in the nation that enroll a  
12 third or more minority students and they have an  
13 average bar passage rate among first-time takers at  
14 or below 65 percent and, thus, would face an uphill  
15 battle to reach the 75 percent. This group includes  
16 all 12 schools designed to serve historically  
17 underrepresented minority populations.

18 So under the Council's current proposal, a  
19 great many of those 22 schools in the group and a  
20 number of others are likely to either lose  
21 accreditation or be put under this constant  
22 monitoring. That could decrease total minority  
23 enrollment in all 205 ABA schools by 20 percent. So  
24 if you consider a 20 percent drop in minority  
25 populations in our -- overall in the 205 ABA

1 accredited schools, that is a very serious outcome.  
2 One that doesn't just affect law schools, but one  
3 that affects the ability to provide legal services  
4 to marginalized and underserved communities across  
5 the country and we cannot take that lightly.

6 I think there has to be a study, and  
7 particularly a study that looks specifically at what  
8 the impact would be on schools that admit large  
9 numbers of minority students and they're, thus,  
10 serving -- one of the core principles of the ABA-  
11 accredited law schools is to promote diversity. And  
12 to ask those schools to begin to take on a standard  
13 like this one that would actually be in conflict  
14 with the diversity standard, I think, is a very  
15 serious concern.

16 Finally, I wanted to address the DOE  
17 justification or the DOE concerns. So we've all  
18 been reading a lot about the DOE urging the ABA to  
19 have more outcome standards. And my reading of  
20 those standards is that they are encouraging the ABA  
21 to look carefully at accrediting new law schools and  
22 the ability for those law schools to be able to meet  
23 the standards. But as we've said, the current law  
24 schools under the current 316, our law schools have  
25 been able to meet the 85 to 90 percent mark. So we

1 are above what's necessary in terms of the 75  
2 percent mark over from three to five years, that  
3 particular mark that's been set.

4           So I would say the DOE does not intend --  
5 I cannot believe from everything that I've read that  
6 it intends to jeopardize the accreditation of  
7 schools that have been accredited for a very long  
8 time and are serving the particular mission of being  
9 able to educate minority populations and populations  
10 that are currently lacking in legal services,  
11 opportunity to receive legal services, and that to  
12 put those two in conflict -- because diversity is  
13 also an outcome. So I think that's the other part  
14 of it is, yes, we all want to meet learning  
15 outcomes, and we are meeting those outcomes. But  
16 the diversity of our profession is also an outcome  
17 that has to be carefully looked at.

18           If we change the bar passage rates and we  
19 see a decrease in diversity in a profession that is  
20 already suffering from lack of diversity, that would  
21 be an outcome that would be detrimental for the  
22 profession, detrimental for legal education, and is  
23 not something that we should do on the backs of  
24 these schools that have been doing the heavy lifting  
25 in terms of the diversity work.

1           So finally, I will say that as the HBCU  
2 law schools -- and this is a concern that I know  
3 many of our law school colleagues share -- we are  
4 very committed to making sure that we have good  
5 consumer practices. We want to admit students who  
6 we believe will, number one, graduate; number two,  
7 pass the bar. We have committed tremendous  
8 resources. If you will look at the academic support  
9 and bar preparation that the schools have put into  
10 place to ensure bar passage, we've committed  
11 tremendous resources to making sure that that  
12 happens.

13           So the intent of our schools, the mission  
14 of our schools and what we've done over time to  
15 ensure that our students are well served is a  
16 substantial record. And I think it is very difficult  
17 to look at the record of our schools and to say that  
18 we adopt a bar passage standard that will put those  
19 schools at risk, schools that have been models of  
20 how we incorporate, how we make our profession more  
21 inclusive, to put those schools at risk is something  
22 that I know that the Council does not want to do.

23           And so I would ask, at a minimum, for more  
24 study in terms of the sunset study of 316, the  
25 current standard, and a new study for this rate.



1 But more importantly, for us to set aside any bar  
2 passage standard of this kind that attempts to make  
3 uniform what cannot be uniform, in the sense that  
4 the states have ultimate control of where they  
5 should set their cut rates for the bar. And any  
6 standard that attempts to change that is one that  
7 does not do a benefit to the states, and certainly  
8 does not benefit the law schools that are associated  
9 with historically black colleges and universities.

10 So, thank you.

11 **MS. LYSAGHT:** Thank you.

12 Before we take a break, Becky, has anybody  
13 signed up?

14 **MS. STRETCH:** I have not been advised that  
15 any --

16 **MS. SALKIN:** I would like to speak if  
17 possible.

18 **MS. LYSAGHT:** Okay. Then we'll take --

19 **MR. ADAMS:** Take a break and decide --

20 **MS. STRETCH:** If you want to --

21 **MS. LYSAGHT:** We'll take a 10-minute  
22 break.

23 **MS. STRETCH:** Not everyone was here at the  
24 very beginning. If you -- if want to, there will be  
25 five minutes so come let me know.

1 (Whereupon, recess taken.)

2 MS. LYSAGHT: All right. We are now back  
3 on the record. And we have three speakers who have  
4 signed up and we are -- since we have a little extra  
5 time, we're going to give each of them 10 minutes.

6 So, Patricia Salkin.

7 MS. SALKIN: Good afternoon. My name is  
8 Patty Salkin and, as Professor McQueary Smith  
9 alluded to, I have 34 hours left as dean of Touro  
10 Law Center, but I can't help myself because of the  
11 passion that I feel about this issue.

12 I've been in legal education for 26 years,  
13 22 at Albany Law School and the last four at Touro,  
14 and I really developed a very different appreciation  
15 for the work that schools that have an access  
16 mission do, having been at Touro for the last fours  
17 years. And the stories that I have heard from our  
18 graduates who -- some of whom have said to me, I  
19 didn't get into any other law school. Touro took a  
20 chance on me. And I look at them today and, without  
21 naming names and giving you information that would  
22 be connecting people, they are leaders in the  
23 profession. They are leaders in the business  
24 community. They are leaders in government. They  
25 are -- stories are written about them in major

1 magazines.

2           And but for the complexities of the way  
3 the narrative has been going in the media over the  
4 last couple of years, trying to tie these LSAT  
5 scores to bar pass, whether it's on the first time  
6 or the second time or the fourth time, I'm here to  
7 also stand with some of my colleagues to tell you  
8 that it just simply is not true.

9           Although I'm speaking for myself, I co-  
10 chair the New York State Bar Association's Committee  
11 on Legal Education and Admission to the Bar and I  
12 did see and participate in the drafting of the  
13 letter from the New York State Bar Association that  
14 you received this week, and I want to emphasize what  
15 Dean Prager and SALT alluded to.

16           You know, New York just gave the UBE for  
17 the first time in July. We have no idea what our  
18 new normal is going to be in terms of our state pass  
19 rate. We know what some of my other colleagues have  
20 spoken to earlier in that many states, when they  
21 went to the UBE for the first time, the statewide  
22 pass rate decreased.

23           I also acknowledge, as all of us do, that  
24 there is a movement to get more and more states on  
25 board with the Uniform Bar Exam, and many states,

1 like Texas, have a task force currently looking at  
2 that. Until we get a better picture of where we're  
3 going with the bar exam and whether it's going to be  
4 the Uniform Bar Exam with more states in the next  
5 couple of years, I, too, urge you to slow down so  
6 that we can collect data.

7 Another important point that was in the  
8 New York Bar Association's letter that has not been  
9 heard yet today, is that the New York State Court of  
10 Appeals agreed, when they decided to adopt the  
11 Uniform Bar Exam, to conduct a study on disparate  
12 impact. Unfortunately, they did not choose to do  
13 that before they adopted the Uniform Bar Exam, but  
14 we're grateful that they are doing that study.

15 But the study hasn't taken place yet, and  
16 so in the spirit of the impact not just on diversity  
17 but also on socioeconomic status and the critically  
18 important issues with access to the profession for  
19 all of us, regardless of race and ethnicity, I think  
20 it's critically important that we slow down, see  
21 what that study is.

22 The scope of the study has not been shared  
23 with us. We don't know what exactly it's going to  
24 be. I understand that NCBE is going to be conducting  
25 that study for the State Board of Law Examiners. It

1 might have been better to have an outside group take  
2 a look at the impact of the Uniform Bar Exam since  
3 it's drafted by NCBE, but neither here nor there,  
4 I'm open minded to see what happens with the study  
5 and the data when it comes out.

6 I also would like to emphasize something  
7 that Dean Prager pointed out, and that was the  
8 weighting of the bar exam and that changed in New  
9 York also this year. So our MBE scores used to  
10 count for 40 percent towards the passing score, now  
11 it counts as 50 percent. We don't know what the  
12 impact of that is going to be either.

13 Another point that I don't think was  
14 brought out by anybody here, there was an article  
15 written by Professor Suzanne Darrow-Kleinhaus that  
16 was just on Law 360 last week that also points to  
17 the fact that states scale the grading of their bar  
18 exams different. So not only do we have different  
19 passing scores, but the scores -- the exams  
20 themselves are scaled differently within the states.

21 And so one of the things that we can all  
22 do in this room, as there's a desire perhaps to move  
23 towards national standards in licensing and whether  
24 that is one particular test, that one particular  
25 test is still not administered uniformly in that

1 it's not graded uniformly. The score -- passing  
2 score is not uniform. The amount of time you have  
3 to be admitted to a particular jurisdiction is not  
4 uniform. You know, there's a lot about words that  
5 mean different things to different people, and when  
6 you look at what it really is, it's not always  
7 apparent.

8           So without taking more time, I really echo  
9 everything that everybody said here. I know that  
10 serving on the Council and on the Standards Review  
11 Committee sometimes feels like a thankless job. You  
12 guys do a tremendous amount of really good work and  
13 positive things for all of us in legal education and  
14 we appreciate it, aAnd we just know that we all  
15 sometimes have to work together to get everything  
16 just right. And right now, I think the time is to  
17 slow down on 316 and wait for more data to come.  
18 Thank you.

19           **MS. LYSAGHT:** Thank you, Patty.

20           Mr. Robert Furnier.

21           **MR. FURNIER:** Good afternoon. My name is  
22 Bob Furnier. I've been practicing law for 34 years.  
23 I am Chair of the ABA Law Practice Division  
24 Diversity Inclusion Committee, I sit on its  
25 governing body in the Council, and I spend a lot of

1 time dealing with organizations that promote  
2 diversity inclusion in the legal profession. And  
3 last week I was at the -- at a symposium on the  
4 state of diversity in the legal profession put on by  
5 my dear friend Sandra Yamate's Institute for  
6 Inclusion in the Legal Profession, and we were  
7 talking about some of the impediments I think for  
8 opening the pipeline to diversity at my end, where  
9 we're practicing law, where we're -- where we're  
10 trying to diversify the largest trade association  
11 for attorneys in the world, and we're woefully  
12 failing at that goal.

13           And I brought up the standard because I'd  
14 written an article for the Law Practice Today  
15 webzine, talking about -- in its diversity issue  
16 this month -- talking about the clash between  
17 Standard 206, which requires law schools to embrace  
18 diversity, you know, within their schools, and to  
19 take extra steps to make sure that happens, and how  
20 that is clashing with 316.

21           And I was speaking briefly to this issue  
22 to a number of folks, and a member of the ABA House  
23 of Delegates -- which, as you know, does not have  
24 ultimate authority over whether the standard passes.  
25 Ultimately, it's up to the Council to decide whether

1 the standard will pass. This must go before the ABA  
2 House of Delegates and they can refer it back two  
3 times, but ultimately the decision as to whether  
4 this standard will pass depends upon you.

5 In any event, a member of the House of  
6 Delegates happened to be in the office and he came  
7 up to me and said, Bob, you know, I hear your  
8 concerns about the standard, but, you know, don't  
9 you think it's a good thing that we -- you know,  
10 we're -- we protect the public and we have a high  
11 bar passage rate that's required?

12 And I started to explain to him in more  
13 detail, because my comment was more of an offhand  
14 comment to the group than it was a detailed  
15 discussion. As I talked to the member of the House  
16 of Delegates, his eyes obviously started to open and  
17 he began to understand that this standard is a  
18 diversity issue. It really is.

19 And I can guarantee you that if the  
20 members of the ABA, the practicing attorneys, you  
21 know, who are trying to do what I'm trying to do,  
22 and that's promote diversity in the legal  
23 profession, understood the impact of 316, if they  
24 could hear what we've heard today, that they would  
25 give you a different perspective about the



1 importance of taking a very, very careful look at  
2 this standard. They would be less paternalistic  
3 about protecting would-be law students who might,  
4 you know, borrow excessive amounts of money and not  
5 find work, and they would give a different  
6 perspective on the future of the legal profession,  
7 how more jobs might be available.

8 I'm Vice-Chair of the ABA Tech Show and I  
9 will tell you with AVVO, LegalZoom and Rocket Lawyer  
10 creating new markets for lawyers to help them go  
11 back to their -- law students to go back to their  
12 communities and serve underserved communities at a  
13 low -- much lower price than most of us charge, if  
14 we -- if we could have the opportunity to speak to  
15 this very, very important issue, I think you would  
16 get a different perspective. Today we've only heard,  
17 quite capably, from the academe, but the rest of the  
18 profession, I believe, needs to be heard on this  
19 very important issue.

20 The House of Delegates, I suspect, if this  
21 were to pass, and I hope it won't, but if this were  
22 to pass and go before their consideration for  
23 ratification, most wouldn't understand, you know,  
24 the other side of this, the impact upon diversity,  
25 because it wouldn't necessarily be presented in that

1 way because, quite naturally, if you don't spend the  
2 time that you spend on these issues or that the rest  
3 of this group spends on this issue, you would think  
4 it was a good thing to protect law students from,  
5 you know, predatory recruitment practices. You  
6 would think it would be a good thing to protect the  
7 consumers, you know, against, you know, law schools  
8 that are putting out unqualified students.

9 But if you asked my colleagues, and there  
10 are many of us, -- every section, every division has  
11 a diversity committee of some sort, a diversity  
12 director, and every one of those sections is  
13 committed to promoting diversity in the profession.  
14 And I will tell you, we have failed. We are the  
15 least diverse profession in America by far. I look  
16 at this. I write about it. I work with  
17 organizations promoting diversity inclusion in the  
18 profession. We are failing. If those groups  
19 understood the diversity impact that this would have  
20 or the adverse effect that this would have, you'd  
21 get a different message.

22 So I've spoken too much. I'm going to  
23 encourage you, okay, if you're not willing to study  
24 in careful detail, you know, the actual impact from  
25 a -- on the student body and the impact that it

1 might have on our law schools, please put this out  
2 to the general -- and I know there's a -- there's a  
3 wall set up so that you're not supposed to have too  
4 much dialogue. But put this out to the rest of the  
5 ABA and ask them to look -- look at this standard as  
6 a -- you know, based on its impact on diversity and  
7 listen to those groups, my colleagues, and see what  
8 they have to say.

9           We have a -- I'm the chair of the, you  
10 know, the Commission on Racial and Ethnic Diversity  
11 in the -- in Legal Education, but I think if you  
12 heard from all of the groups and you took the time  
13 to do that and to survey them, you would hear a much  
14 different -- you would hear different voices that I  
15 think need to be heard about why we need to keep the  
16 pipeline open.

17           Thank you very much.

18           **MS. LYSAGHT:** Thank you.

19           And Michael McLoughlin.

20           **MR. MCLOUGHLIN:** Hafa adai. Tirow woomi.  
21 Salutations. I'm Michael McLoughlin from the small  
22 but vital bar of the Commonwealth of the Northern  
23 Mariana Islands.

24           **MS. LYSAGHT:** Welcome.

25           **MR. MCLOUGHLIN:** If you want to get more

1 of an associate's degree in the Marianas, you have  
2 to at least go to Guam. You have to leave ZIP code  
3 96950. If you want a law degree, you have to come  
4 to the mainland, which is where I happen to live,  
5 here in San Francisco, where the State Bar of  
6 California exclusively reserves the right to limit  
7 the number of attorneys practicing in this state.

8 Quota systems are illegal, so the only way  
9 they can do that is to use the bar exam, not as a  
10 means of ensuring minimum competency, but as a means  
11 of keeping people out. It's part of the system to  
12 limit the number. And in the immortal words of  
13 Hamlet, Ay, there's the rub. And as we just heard,  
14 even the Uniform Bar Exam is not uniform.

15 I don't think a bright-line national  
16 standard is possible. It might, however, be  
17 possible to develop some type of formula at national  
18 level -- at Council level, which could then  
19 subsequently be applied locally. I have no idea how  
20 you would do that. I'm speaking off the top of my  
21 head. But I have a sense that -- that might be  
22 possible. But I don't think a bright-line standard  
23 of 75 percent or even a national standard of 65  
24 percent would really be workable. I think you'd  
25 lose too many law schools.

1 The other thing I would point out is that  
2 although I live in California now, I'm originally  
3 from Washtenaw County, Michigan, where we believe  
4 that the prime directive of education is the  
5 collective improvement of society by the individual  
6 improvement of its members. In other words, it's  
7 not a matter of the more you know the better you do,  
8 but the more you know the better you are.

9 And so I would leave you with the thought  
10 of considering how legal education is part of that  
11 collective improvement of society through the  
12 individual improvement of its members, not just as  
13 means to an end, but a means to overall social  
14 improvement. Thank you.

15 **MS. LYSAGHT:** Thank you very much.

16 I would like to thank all of you for  
17 attending, especially the deans. I know many people  
18 traveled far and wide to attend, so thank you. It's  
19 a critical part of our process. And with that, we  
20 are off the record.

21 **(Whereupon, the ABA Hearing concluded at**  
22 **2:35 p.m.)**  
23  
24  
25

1 CERTIFICATE

2  
3 I, Kimberly R. McLain, do hereby certify  
4 that I reported all proceedings adduced in the foregoing  
5 matter and that the foregoing transcript pages constitutes  
6 a full, true and accurate record of said proceedings to  
7 the best of my ability.

8  
9 I further certify that I am neither related  
10 to counsel or any party to the proceedings nor have any  
11 interest in the outcome of the proceedings.

12  
13 IN WITNESS HEREOF, I have hereunto set my  
14 hand this 10th day of August, 2016.

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17 

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19 \_\_\_\_\_  
20 Kimberly R. McLain  
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