May 13, 2019

Dean Jeffrey Lewis, Chair
Members of the Council
Barry Currier, Managing Director
Council of the Section of Legal Education and Admissions to the Bar
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RE: SALT Opposition to Revision to Standard 316

Dear Dean Lewis and Members of the Council:

We write on behalf of the Society of American Law Teachers (SALT) to express our opposition to the proposed amendment of Standard 316 on bar passage. In past submissions, we have raised a variety of concerns about the proposal, including its potential impact on the diversity of the profession. Recent empirical data and analysis now confirm the seriousness of that concern.

According to the ABA’s own data on 2018 bar passage rates, 49 ABA schools are at risk of falling below the proposed “75% in 2-year” bar passage standard in 2020. Those schools reportedly enroll 37% of all African American first year students and 35% of all Latinx first year students. The loss of accreditation of even some of those schools would have a devastating impact on the diversity of the profession.

The impact on diversity is brought into stark relief by focusing on the likely effects in California. According to the ABA’s own predictive model, nine California schools are at serious risk of de-accreditation in 2020. Those nine schools enroll a staggering 59% of Latinx and 51% of African American first year California ABA law students.

1 Council Report, SECTION OF LEGAL EDUCATION AND ADMISSION TO THE BAR, AMERICAN BAR ASSOCIATION, Revisions to Standard 316: Bar Passage, at 6.
3 California Western, Golden Gate, LaVerne, Southwestern, Thomas Jefferson, USF, Western State, U.C. Hastings, and McGeorge.
4 ABA 509 data (http://abarequireddisclosures.org/).
In the three years since the Council first proposed the “75% in 2-year” standard, SALT and many other organizations questioned whether the change would affect the diversity of the profession and urged the Council to study this issue before adopting the proposal. The House of Delegates emphasized this concern when it twice rejected the proposal. As recently as February 20, 2019, 12 organizations, including many ABA commissions and divisions, submitted a memorandum to the Council that urged “restraint and care” before adoption of the proposed standard, referencing in particular the “overwhelming negative vote of the House of Delegates” based in part on “the potential impact on the diversity of our profession” and “the lack of study or evidence of what language in Standard 316 (two or three or four years for compliance, for example) would minimize the negative impact on diversity.”

We now have the data to show that the concerns about impact on diversity were justified. The analysis that has been missing in the debate (as summarized above and explored in detail in the Patton memo) confirms the impact of this proposal on schools that enroll a substantial percentage of students of color. This new data is compelling evidence of the need to explore other options that would promote the stated goal of consumer protection without having such an impact.

In addition to its likely devastating impact on the diversity of the profession, the “75% in 2-year” rule would have other unintended negative consequences. Chief among them is the exacerbation of the pressure exerted on teaching to the MBE multiple choice test rather than teaching critical lawyering skills. Non-elite schools have de-emphasized and even abandoned curricula and pedagogy aimed at training students for the practice of law and instead focused on drilling students on passing multiple-choice tests. This is particularly true at access schools (schools that enroll a large number of non-traditional students). Experiential learning of all types – clinics, field placements, and simulation courses – has been reduced to leave room for “bar prep” training. Formative assessments are being increasingly used – a positive development – but what is being assessed is the ability to answer bar exam questions, not lawyering skills. Making Standard 316 more difficult to satisfy only exacerbates this serious problem.

Yet another flaw in the proposal is the undisputed unfairness of applying a flat 75% rule to jurisdictions with widely varying pass scores. Again, California provides the clearest example. A comparison of the bar passage performance of Southwestern Law School in California, which utilizes a cut score of 144, with Mercer Law School in Georgia, which utilizes a cut score of 135, demonstrates that Southwestern would be at risk of de-accreditation even though its students outperformed Mercer’s students on the MBE. Mercer’s mean MBE score on the July 2017 exam was 140.2 compared to Southwestern’s

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5 The full list of organizations includes: the ABA Coalition on Racial and Ethnic Justice; the ABA Commission on Disability Rights; the ABA Commission on Hispanic Legal Rights & Responsibilities; the ABA Commission on Sexual Orientation & Gender Identity; the ABA Commission on Women in the Profession; the ABA Council for Diversity in the Educational Pipeline; the ABA Law Student Division; Clinical Legal Education Association; HBCU Law Deans Gary Bledsoe, John C. Brittain, Danielle Holley-Walker, Elaine O’Neal, John Pierre, LeRoy Pernell; the Hispanic National Bar Association, and the Society of American Law Teachers.

6 See pages 11-12 of the Patton Memo, supra note 2.
141.9. Yet Mercer’s first-time bar passage was 82.4% compared to Southwestern’s 57.0%. The explanation is simple: Georgia’s cut score is 9 points lower than California’s.

A comparison of Southwestern and the University of Connecticut also highlights this problem as well as the impact on diversity discussed above. Even though Connecticut students have significantly higher LSAT scores and undergraduate GPAs, Southwestern students outperformed Connecticut students by more than 3 points on the July 2018 MBE, suggesting that Southwestern is offering a real “value-added” legal education. Yet, because Connecticut’s cut score is 132 and California’s is 144, Southwestern would be at risk of losing its accreditation whereas Connecticut would not, even though Southwestern students outperformed Connecticut students. What compounds the problem is that Connecticut’s student of color enrollment is dramatically lower than Southwestern’s. The anomalous result is that Connecticut fares better under the proposed standard even though its students were outperformed by a school with students with lower predictor scores and a dramatically more diverse student body.

The comparisons between Southwestern, Mercer, and Connecticut reveal the injustice of applying a bright line 75% rule to schools in states with widely varying cut scores. The current Standard 316 avoids the problem by permitting schools to satisfy the standard if they come within 15 points of the average pass rate in that jurisdiction. There is no reason to abandon that approach.

We have previously questioned the timing of the proposal to amend Standard 316. Bar passage rates are declining nationally with no clear explanation; questions about the validity of the traditional bar exam are being raised in many quarters; the ABA Commission on the Future of Legal Education and task forces around the country are examining questions of how to assess lawyer competencies. It makes little sense to make this dramatic change when questions abound and answers are not yet available.

We respectfully urge the Council to withdraw its proposed amendment to Standard 316 in order to adequately assess and consider the impact of the change on the diversity of the profession, access to justice, and legal education, and to explore other options.

Thank you for your consideration.

Sincerely,

Davida Finger
Co-President

Matthew Charity
Co-President

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7 Connecticut enrolled 14.6% Hispanic and African/American students in 2015 in contrast to Southwestern’s 30.8%. Id. at 13 -14.

8 The range in cut scores is 145 (Delaware) to 125 (South Carolina).