



Legal Education and Admissions to the Bar

Revisions to Standard 316

Frequently Asked Questions

1. Q: Why do the ABA Standards for Approval of Law Schools require ABA-accredited law schools to collect and report bar examination outcomes?

A: There are at least three reasons:

- i. Standard 316 (Bar Passage) requires a law school's bar passage outcomes to reach a defined minimum level because how a law school's graduates perform on the bar examination is likely the single best outcome measure to consider in assessing whether a law school is maintaining a "rigorous program of legal education that prepares its students ... for admission to the bar ..." as required by ABA Standard 301(a). Bar passage rates are also directly relevant to Standard 501(b) which states, "A law school shall only admit applicants capable of satisfactorily completing its program of legal education and *being admitted to the bar*. (Emphasis added.)
- ii. How a law school's graduates perform on the bar examination is one of the critical pieces of consumer information that prospective law students should consider in deciding where to study law. For that reason, bar passage outcomes are required to be reported under Standard 509.
- iii. Bar passage outcomes are an important element in the Council's satisfying the criteria of the United States Department of Education (DOE) for recognition as an approved accrediting agency. Section 34 of the Code of Federal Regulations (CFR), Part 602 sets forth the requirements and standards accrediting agencies must meet in the discharge of their duties. Section 602.16 of the CFR requires an accreditor to:

(a) . . . demonstrate that it has standards for accreditation . . . that are sufficiently rigorous to ensure that the agency is a reliable authority regarding the quality of the education or training provided by the institutions or programs it accredits. The agency meets this requirement if -

(1) The agency's accreditation standards effectively address the quality of the institution or program in the following areas:

(i) Success with respect to student achievement in relation to the institution's mission, which may include different standards for different institutions or programs, as established by the institution, including, as appropriate, consideration of State licensing examinations, course completion, and job placement rates. . . .

34 C.F.R. §602.16(a) (2010).

2. Q: Could the Council repeal Standard 316 and, instead of making schools meet a threshold level of bar passage outcomes an accreditation requirement, simply require schools to disclose consumer information about bar passage outcomes under Standard 509? Alternatively, could the Council adopt standards related to graduation rates or job placement outcomes in lieu of a standard on bar passage outcomes?

A: Although 34 CFR Sec. 602.16(a) does not mandate the Council adopt bar passage outcomes, it does require an accreditor to have outcome-based measures to help in the assessment of the quality of an accredited program. The Council concluded that bar passage outcomes are better measures than either graduation rates or employment results to meet the DOE's requirements. Those other important outcomes are not as directly relevant as bar pass outcomes to determining whether a law school is offering an educational program that is comprehensive and sufficiently rigorous to merit accreditation. In general, and contrasted with many undergraduate institutions and programs, law schools have high graduation rates. Those rates can be controlled by the law school through graduation requirements and academic standards. Employment outcomes may relate to whether a law school's enrollment is right-sized for the current market and whether the market/profession accepts the rigor of a school's program by hiring its graduates. Employment outcomes, however, are far enough removed from the school's control to make them inapt measures of the comprehensiveness and rigor of a law school's education program.

The Standards do pay attention to both graduation rates and job outcomes. With respect to graduation rates, Interpretation 501-3 provides that "a law school having a cumulative non-transfer attrition rate above 20 percent for a class creates a rebuttable presumption that the law school is not in compliance with Standard [501]." Standard 509 requires that schools collect and publish employment outcomes as an important matter of consumer information for prospective law students. Standard 508 (Student Support Services) requires law schools, *inter alia*, to provide students with "career counseling [services] to assist them in making sound career choices and obtaining employment."

If the Council chose to use outcomes in lieu of bar passage to demonstrate compliance with 34 CFR §602.16(a), it certainly could, and no doubt would, continue to require bar

passage outcomes to be publicly reported under Standard 509. Indeed, several years ago the National Advisory Council on Institutional Quality and Integrity (NACIQI), which advises the Secretary of Education about the efficacy of accrediting agencies, expressed concerns about what it perceived as the Council's reticence to adopt outcome standards. NACIQI signaled to the Council that it considers bar pass outcomes important indicators in assessing law school programs and expected the Council to have a rational and enforceable bar pass standard.

While Council members realize that applicants to law school are adults and, given good information, should be free to make their own decisions, including decisions about risk and debt, they also accept that in today's world the Council's responsibility extends beyond just supplying information. The Council plays a critical role, paternalistic though it may be, in protecting prospective and current law students as a consumer protection matter. It strongly believes that they are entitled not only to be informed of law schools' bar pass rates and other relevant information, but also to an education that provides them with a reasonable chance of passing the bar and entering the profession.

As many entities, including the ABA, have noted, law students often incur substantial debt to earn a law degree. Whether students pass the bar influences their future livelihood and quality of life immensely, including their abilities to pay back their loans while maintaining an acceptable quality of life.

3. Q: Will the Council continue to require schools to publish bar pass outcomes to help prospective students make informed choices, whether or not Standard 316 remains part of the standards?

A: Yes. The proposed revisions to Standard 316 will only mean that consumer information about bar pass outcomes will increase. The Council will continue to publish first-time results but will also publish meaningful ultimate bar pass data. Further, the outcomes will reflect close to 100% of the student body, not the smaller 70% number that is allowed by C316.

Over time, the Council will consider how to further expand the data that is collected and reported, including considering how it might usefully require disclosure of detailed information linking entering credentials to bar pass results and collecting and publishing outcomes broken down in other ways, including race and gender.

4. Q: What does the Council view as the shortcomings of current Standard 316 (C316)?

A: The Council believes C316 has become suboptimal in several respects:

- C316 uses a five-year measuring period to assess compliance with the standard. Establishing non-compliance with any standard takes time because the

accreditation process rightly provides due process to schools. Additionally, the process is governed by a council of volunteer lawyers, judges, academics, and public members that meets only several times each year. Once non-compliance is finally established, a school is generally given two years in which to bring itself into compliance. The result is that more than seven years may elapse from the time of students' admissions to the conclusion of an analysis of whether they experienced success on the exam that serves as the gateway to the profession they went to school to enter. The Council believes this more than seven-year period is too long to wait to determine whether a school is operating a rigorous program that prepares students for admission to practice; that period is not consistent with the Council's understanding of its responsibilities to prospective law students.

Fortunately, such a long period of review is not necessary given data about persistence in sitting for the bar exam by those who are unsuccessful on their first attempt.

- C316 allows schools to report on as low as 70% of their graduates when schools, with reasonable effort, can gather outcomes for all, or almost all, of their graduates. Theoretically, a school may meet C316 with an actual "all-in" bar pass rate of 52.5% (75% pass rate * 70% of the graduates – assuming the school reported results for 70% of their graduates and the remaining 30% did not pass).

As the Council has collected ultimate bar pass data, it has become apparent that schools, with reasonable effort, can obtain bar exam outcomes for all graduates. A standard based on 100% of graduates is better than one based on only 70% of them.

- The opportunity for schools to satisfy a bar pass standard with first-time pass rates allowed by C316(a)(2) is ceasing to be a reasonable proxy for the 75% ultimate pass rate that is the fundamental requirement of Standard 316. See C316(a)(1). Ultimate pass rates, in the Council's view, are the more appropriate measure. First-time pass rates, particularly first-time pass rates that compare a school's outcomes to other schools rather than requiring a minimum absolute pass rate, is an incomplete basis on which to evaluate a school's success. Focusing compliance on first-time performance also provides a disincentive for schools to continue to assist graduates that fail the bar on their first efforts. This is particularly true in two situations:
 - In jurisdictions with one or very few law schools, where that school(s) set the average by having the overwhelming number of total takers in the jurisdiction. Such schools could meet C316(a)(2) even with objectively very low pass rates because they would likely never be "more than 15 points below the average . . ." as the C316 allows. There are 14 jurisdictions with one law school and 11 jurisdictions with two ABA-approved law schools. The Council believes this renders this part of C316 unsound.

- In jurisdictions where the first-time bar pass rates have declined significantly in recent years. The decline in bar pass rates is an issue that bears close examination. But, as the rate falls, for whatever reasons, C316's allowing schools the safe harbor of compliance if their first-time pass rate is within 15 percentage points of the state average may obscure some fundamental long-term issues at a law school that the Council should consider. For example, there is a meaningful difference between a law school with a 50% first-time pass rate and an ultimate pass rate of 75% and a law school with a 50% first-time pass rate and an ultimate pass rate of 55%. Yet, if the comparative measure allowed by C316(a)(2) is operative, both schools would be "in compliance" if the overall state pass rate was 65%. That does not make sense to the Council.
- As bar passage rates have fallen around the country since C316 was adopted, the expectation that a first-time pass rate within 15 percentage points of the state average was a proxy for outcomes that would likely lead to an overall ultimate pass rate of 75% as required by C316(a)(1) likely no longer holds. For example, while the aggregate 1st-time pass rate nationally for graduates of ABA-approved law schools in 2017 was above 70%, there were several jurisdictions (not including California and Puerto Rico) with 1st-time pass rates in the mid-60% range. In those jurisdictions, a pass rate of 50% would be within the 15 percentage-point range that is used in C316(a)(2), too low perhaps to rely on such a rate as a proxy for a likely 75% ultimate pass rate that eases schools' data gathering and reporting burden. This, the Council believes, is inconsistent with the requirements of Standard 301(a)'s requirement of a rigorous program that leads to bar admission.
- The Council recognizes that, to a certain extent, C316's approach reflected the conditions at the time of its adoption. Conditions have changed and, consistent with the Council's responsibilities, so, too, must the bar passage standard change.

5. Q: How does proposed revised Standard 316 (R316) modify current Standard 316 (C316)?

A: R316:

- Eliminates:
 - allowing schools to base compliance on being within 15% of the relevant state's average first-time bar pass rate;
 - permitting a law schools to have its compliance based on the performance of 70% of its graduates; and
 - C316(c), related to the extension of time to come into compliance.
- Shortens the period of time to show that it has achieved a 75% passage rate from five calendar years to two years from the date of graduation.

R316 leaves intact the requirement of an ultimate passage rate of 75% (with the shorter time frame for compliance as noted above): “At least 75 percent of a law school’s graduates in a calendar year who sat for a bar examination must have passed a bar examination administered within two years of their date of graduation.” R316.

While R316 removes C316(c), discussing causes for an extension of the period a school may be given to demonstrate compliance, Rule of Procedure 13(c) provides that authority and C316(c) is redundant and not needed.

6. Q: How did the Council arrive at the 75% requirement?

A: Seventy-five percent is the requirement of C316(a)(1), which was intended to be the primary measure of compliance when the standard was enacted. The Council acknowledges that reasonable minds may differ on the appropriate ultimate bar pass percentage. For example, the Standards Review Committee believed 80% the appropriate standard. The Council, in the exercise of its professional judgement as lawyers, judges, academics, a student, and public members, settled on 75% as a reasonable place to draw the line after public comment and Council discussion. That percentage has long been in the Standard. It provides room for schools to provide broad opportunities to students. Together with the attrition requirements of Interpretation 501-3, for example, a school that admits 100 students; academically dismisses 20 of them; graduates the remaining 80, all of whom sit for a bar exam; need only have 60 of those 80 pass a bar exam to record an ultimate pass rate of 75% of graduates who sit for a bar exam. Surely it is not an unreasonable expectation of a rigorous program of legal education that prepares graduates for admission to the bar to expect it to succeed with 60 of the 100 students that it originally admitted.

7. Q: How did the Council arrive at the two-year measuring period?

A: The data the Council had before it when R316 was first adopted, primarily from the NCBE, supported the conclusion that extending the measuring period beyond two years would not materially change school outcomes. Subsequently, the Council collected two-year outcome data for classes graduating in 2015 and 2016. That data reports that the overwhelming percentage of law school graduates have taken and passed a bar exam with two-years of graduation. For 2015 graduates, the aggregate percent of graduates who had not sat for the bar exam or for whom the school had no information was 5.3%. Only 5 schools reported that more than 10% of the graduates for whom they had data had not sat for a bar exam within 2 years of graduation. For 2016 graduates, those outcomes were 4.5% and six schools.

Some have suggested that, while it may make sense to shorten the period in which a law school must demonstrate compliance, the standard should speak in terms of attempts by graduate, rather than a set number of administrations of the exam or a time period. That might be a reasonable alternative, but the Council’s judgment was that a

time period was fair to schools, much easier to administer for the ABA staff and the schools, and would allow the period to be short enough that it could begin conversations with schools that had issues around bar passage more quickly. Measuring attempts would still require a cut off period. Otherwise, the books would never close on any graduate who took the bar exam and did not succeed. What would that measuring period be?

The Council hastens to add that the Standard says nothing about how many attempts a graduate can make at passing a bar exam. The Standard is aimed at the school's outcome data. Anecdotes about graduates who passed after many attempts or after many years were offered all along the way in the discussion about this standard. Those anecdotes are testaments to the persistence of those graduates. They are not a strong argument for extending the time beyond two years.

7. Q: What would the effect of R316 be on diversity in student enrollment?

A: For several reasons, the Council does not believe that R316 would have a negative effect on enrollment by under-represented minority students who schools reasonably determine meet the threshold requirement of Standard 501 of being capable of completing the J.D. program and being admitted to the profession.

First, the Council enforces Standards 205 and 206 vigorously. Standard 205: (i) prohibits schools from precluding admission of applicants or retaining students on the basis of, *inter alia*, race; and (ii) requires equality of opportunity. Standard 206 demands:

demonstration by concrete action [of] a commitment to diversity and inclusion by providing full opportunities for the study of law and entry into the profession by members of underrepresented groups, particularly racial and ethnic minorities, and a commitment to having a student body that is diverse with respect to gender, race, and ethnicity.

ABA Standards and Rules of Procedure for Approval of Law Schools 2018-2019 at Standard 206 (2018).

The Council's enforcement of these Standards is usually out of the public's view because it occurs in connection the periodic comprehensive review of every law school's program, which includes a site visit to the school and review of considerable data that allows the Council to assess compliance with all of the Standards. The Council often requires schools to provide further information on their admissions and other policies regarding diversity and inclusion, including specifics about the concrete steps they have taken to ensure a diverse student body. Schools are sometimes on a "report back" obligation when the Council does not believe they have made sufficient progress.

In recent years, the Council has noted significant efforts by law schools to enhance the diversity of their student bodies. The Council speculates that the Standards, regional accreditor criteria, and university and independent law school's boards all combine to push schools to take diversity seriously. Additionally, the Council believes that most

schools it has reviewed value diversity in its own right apart from accreditation requirements.

Second, Standards 205-206 do not stand alone. The Standards, taken together, provide significant space for law schools to admit applicants, including minority applicants, that they believe deserve an opportunity for law study. Standard 501 and Interpretation 501-3 provide this space. Interpretation 501-3 allows a law school to have up to a 20 percent non-transfer attrition without concerns about violating the Standards. The Council is conscious of the need for a Standards structure that affords opportunity while not facilitating exploitation. It believes that the Standards, including R316, when viewed in their entirety, do so.

Third, if R316 is adopted, the Council will direct the Managing Director to issue a Guidance Memo emphasizing that Standards 205 and 206 remain in full force and effect. The memo will provide, *inter alia*, that schools may not use R316 as an excuse to decrease their commitments to affording opportunity to under-represented groups.

Fourth, although R316 does not list the factors potentially showing good cause for non-compliance that appear in C316, should R316 be adopted, the Council will direct the Managing Director to issue a Guidance Memo indicating to Schools that those factors continue to be relevant. They include items the school considers relevant, including its “demonstrated and sustained mission.” *Id.* at 316(c).

It is worth noting that currently no one source collects information regarding under-represented minority graduates’ performance on the bar exam. Some states collect demographic information; others do not. The law schools, however, do have this information. Regardless of whether R316 is adopted, the Council is likely to direct the Managing Director to require schools to submit demographic information and bar performance. The Council will consider the information gathered and develop a policy for under what circumstances and with whom it will be shared.

The Council supports the ABA’s Goal III to enhance diversity in the profession. The bar exam is, of course, the gateway to the profession. The exam itself is outside the Council’s control. States exert tremendous influence over who is admitted to practice by setting their cut scores. The Council respectfully notes that addressing the question of diversity in the profession is the responsibility of the entire ecosystem, not just the accreditation process or the law schools.

8. Q: Won’t schools in jurisdictions with high cut scores be disadvantaged?

A: Current data does not show that schools in any particular jurisdiction are over-represented in the population of schools that might have difficulty complying with R316.

The Council believes that law schools must meet the market that they serve, and that requiring 75% of graduates taking the bar to have passed in within 2 years is a reasonable standard.

9. Q: Can law schools obtain the necessary data?

A: Yes. In the winter/spring of both 2018 and 2019, law schools filed bar passage questionnaires that reported first-time and two-year ultimate bar exam outcomes. The data showed that law schools, with reasonable effort, located, in the aggregate, 97-98 percent of all graduates. In turn, 97% of that group had sat for a bar exam within the two-year period in the aggregate, for both of those years, more than 88% of those who sat for a bar exam had passed a bar exam.

10. Q: Does the Council have particular law schools it is targeting with R316?

A: No. The Standard aims to protect students and the public. The Standard neither aims to protect law schools nor to drive them from the market.

11. Q: What happens if a law school does not meet R316?

A: If the data a law school reports to the Council suggests non-compliance with R316, as is true with C316 or any Standard, the Council will write the school and ask for an explanation. If the Council subsequently determines that the school is out of compliance with R316, public notice of that fact will be given. The school will be given a period of two-years to take steps to demonstrate that the school has subsequently brought itself back into compliance. That will primarily be determined by the bar exam outcomes for the following year. If, at the end of the two-year period, the school remains out of compliance the Council would remove the school's accreditation unless the school can establish extraordinary circumstances that would lead it to conclude that the school should be given an additional period of time to demonstrate compliance.

12. Q: Does the Council offer any assistance to a non-complying school?

A: The Council does not itself offer assistance. Schools are responsible for operating in compliance with the Standards. There is a robust and growing group of academic success professionals who work for law schools on programs to improve bar outcomes. There are numerous conferences, articles, and other resources available to schools.

13. Q: If R316 is adopted, how will the Council administer the change from C316? What are the transition rules?

A: R316 will be effective at the conclusion of the Council meeting where the revisions to the Standard are confirmed, by analogy to the fact that changes to the Standards adopted by the Council and concurred in by the House become effective at the adjourning of the ABA meeting at which they were considered.

Bar exam outcomes are collected and reviewed once each year, in the spring. The Council expects that the first time schools will be subject to the R316 will be the Spring of 2020, when schools file reports of ultimate outcomes for 2017 graduates. As explained above, schools not apparently complying with R316 will be afforded process, time to report additional outcomes, and time to consider programs that are designed to improve performance.