



## Revisions to Standard 316: Bar Passage (revised 5/6/2019)

This document addresses revisions to Standard 316 and incorporates the latest data collected on bar pass outcomes. It is useful to leave the history reported in earlier versions in this document, but because the important matters relate to this recent data, the memorandum begins there.

### **The revised standard:**

The revised standard (R316) adopted by the Council in October 2016, straightforwardly and simply, states:

At least 75 percent of a law school's graduates who sat for a bar examination must have passed a bar examination administered within two years of their date of graduation.

The revised standard replaces one (referred to here as “current 316” or “C316”) with multiple methods for complying, based on different cohorts of students and different time frames, as more fully discussed below following the discussion of the data.

### **Recent Data – 2018 1<sup>st</sup>-time and 2016 2-year ultimate outcomes:**

In March 2019, law schools filed the bar pass questionnaire that gathered data for first-time takers from 2018 and ultimate 2-year bar pass data for the class of 2016. The outcomes reported, in the aggregate are consistent with prior reports.

Under the authority of Standard 509, the Council approved collecting both 2-year ultimate outcomes and 1<sup>st</sup>-time taker outcomes for all a school's graduates. This data has now been collected for two years. The new and most recent data shows:

#### Aggregate 2-year ultimate outcomes for 2016 graduates:

- Percent sitting for the bar within 2 years of graduation: 95.5%
- Percent not taking within 2 years: 3%
- Percent not found and reported: 1.5%
- Percent of takers passing within 2 years: 88.6%

- Number of schools reporting > 75% pass rate: 178
- Number of schools reporting < 75% pass rate: 24

Aggregate 1<sup>st</sup>-time taker outcomes for 2018 graduates:

- Percent report sitting for a bar exam: 86.1%
- Percent not taking: 11.7%
- Percent not found and reported: 2.2%
- Percent of takers passing: 74.8%
- Number of schools with pass rates > 75%: 101
- Number of schools with pass rates < 75%: 101
- Number of schools not within 15 percentage points of weighted state average: 30
- Number of schools with rate below 50%: 21

One can look at how ABA-approved law schools would fare under R316, were it in effect for the class of 2016 and how many schools would have 1<sup>st</sup>-time pass rates for 2018 that fail to satisfy the 1<sup>st</sup>-time passer safe harbor of C316 (being within 15 percentage points of the weighted state average pass rate for the school's takers. The data shows:

14 schools would fail R316 AND not have 1<sup>st</sup>-time rates protect by C316 for 3 of the preceding 5 years:

*Appalachian, Arizona Summit, Atlanta's John Marshall, Barry, Dayton, University of the District of Columbia, Golden Gate, New England/Boston, San Francisco, Thomas Jefferson, La Verne, Valparaiso, WMU Cooley, and Whittier.*

8 schools would have met R316 BUT have 1<sup>st</sup>-time outcomes for 3 years or more that below the safe-harbor 1<sup>st</sup>-time pass rate differential (school pass rate being within 15 percentage points of the weighted state average pass rates for jurisdictions where its graduates sat for the bar):

*Faulkner, Florida A&M, Hofstra, New York Law School, Southern Illinois, Southern, Suffolk, and Touro.*

10 schools would fail R316 BUT would be protected by the 1<sup>st</sup>-time pass rate safe harbor of C316(a)(2):

*Ave Maria, Elon, Florida Coastal, Howard, InterAmerican Puerto Rico, Pacific-McGeorge, Pontifical Catholic Puerto Rico, U Puerto Rico, South Dakota, and Vermont Law School.*

Two cohorts of schools have been a focus of discussion with respect to R316: HBCU law schools and law schools located in California. For those schools on this data:

- HBCU schools' aggregate 2016 2-year ultimate pass rate: 77.3% [2 of 6 were below 75%]
- HBCU schools' aggregate 2018 1<sup>st</sup>-time: pass rate: 56.2%
- HBCU schools' 1<sup>st</sup>-time pass rate more than 15 percentage points below weighted state average: 4 of 6

- CA ABA-approved schools aggregate 2016 2-year ultimate pass rate: 85.6% [6 of 21 were below 75%]
- CA ABA-approved schools aggregate 2018 1<sup>st</sup>-time pass rate: 64.7%
- CA ABA—approved schools' 1<sup>st</sup>-time pass rate more than 15 percentage points below weighted state average pass rate: 5 of 21

It is useful to compare the first-time pass rate data for 2016 grads with the eventual ultimate pass data reported above. 106 of 202 schools had a 75 percent or better 1<sup>st</sup>-time pass rate for 2016. The majority of the 96 other schools had first-time pass rates in the 65-74 percent range at the end of the first year. Twenty-one (21) schools had first-time rates for 2016 graduates below 50 percent. Fast forward to the ultimate data reported above, and one sees that 72 of the 96 schools with 1<sup>st</sup>-time pass rates below 75% reached that 75% mark in the 2-year review period provided by R316.

Several observations and comments: (a) some schools are likely out of compliance with 316 this year under either R316 or C316(a)(2); (b) several schools will be put to the effort to demonstrate ultimate compliance under C316 who should easily meet it, as the R316 data shows; (c) the 1<sup>st</sup>-time pass rate safe harbor of C316 is sheltering some school with low ultimate pass rates – the proxy that the safe harbor provided, basically because of the perceived difficult of collecting ultimate data is proving not to be a good proxy for an acceptable ultimate rate.

#### **Data for 2017 1<sup>st</sup>-time and 2015 2-year ultimate outcomes:**

In March 2018, law schools filed the bar pass questionnaire that gathered data for first-time takers from 2017 and ultimate 2-year bar pass data for the 2015 graduates. These outcomes were:

##### Aggregate 2-year ultimate outcomes for 2015 graduates:

- Percent sitting for the bar within 2 years of graduation: 94.7%
- Percent not taking within 2 years: 2.4%
- Percent not found and reported: 2.9%
- Percent of takers passing within 2 years: 88.5%
- Number of schools reporting > 75% pass rate: 186
- Number of schools reporting < 75% pass rate: 16

##### Aggregate 1<sup>st</sup>-time taker outcomes for 2017 graduates:

- Percent report sitting for a bar exam: 84.8%
- Percent not taking: 11.2%
- Percent not found and reported: 4%
- Percent of takers passing: 77.3%
- Number of schools with pass rates > 75%: 122
- Number of schools with pass rates < 75%: 81
- Number of schools not within 15 percentage points of weighted state average: 27
- Number of schools with rate below 50%: 15

Two cohorts of schools have been a focus of discussion with respect to R316: HBCU law schools and law schools located in California. For those schools on this data:

- HBCU schools' aggregate 2015 2-year ultimate pass rate: 75.2% [2 of 6 were below 75%]
- HBCU schools' aggregate 2017 1<sup>st</sup>-time: pass rate: 57.9%
- HBCU schools' 1<sup>st</sup>-time pass rates more than 15 percentage points below weighted state averages: 4 of 6
- CA ABA-approved schools aggregate 2015 2-year ultimate pass rate: 86.3% [2 of 21 were below 75%]
- CA ABA-approved schools aggregate 2017 1<sup>st</sup>-time pass rate: 69%
- CA ABA—approved schools more than 15 percentage points below weighted state pass rate: 4 of 21

#### **Smaller, voluntary data collection for 2013 and 2014 graduates:**

Following the House of Delegates non-concurrence in R316 at the 2017 ABA Midyear meeting, at the direction of the Council, the Managing Director's Office gathered data to help inform the Council and address the concerns in the House about the perceived lack of data to support the changes the Council approved. This information was reported to the Council in October 2017, and it is basically consistent with what the 2-year ultimate outcomes data collected for classes of 2015 and 2016 reported above.

Ninety-two (92) schools responded to the voluntary survey, approximately 45 percent of all schools. They reported on 19,000+ graduates for 2013, and 17,000+ graduates for 2014, over 40 percent of the total of graduates for each year. A range of schools participated – from large to small, east to west, public and private, and ranging from among the most to the least selective.

Eighty-nine (89) of the 92 participating schools had ultimate pass rates for both 2013 and 2014 graduating classes greater than the 75 percent required by revised Standard 316. One school did not have a 75 percent ultimate pass rate for either 2013 or 2014. Two other schools did not achieve a 75 percent pass rate for one of the two years.

The aggregate ultimate pass rate for those who sat for a bar exam was 92 percent for 2013 year and 89 percent for 2014. Looking at California and HBCU law schools, 3 of 6 HBCU law schools participated. Two had ultimate pass rates above 75 percent and one did not achieve that outcome for only one of the two years covered by the survey. Eleven (11) of the 21 ABA-approved law schools in California participated, and none reported ultimate pass rates for graduates of 2013 and 2014 below 75 percent.

#### **History of the current proposed revision:**

[Following is a reprise of the report from earlier versions of this memorandum about the history of the revisions to Standard 316.]

The Council adopted revised Standard 316 at its October 2016 meeting following considerable work, discussion, and public comment over a several-year period at both the Standards Review Committee (SRC) and the Council levels.

The SRC was charged as early as 2010 with reviewing the current bar passage standard, which was, at that time addressed by Interpretation 301-6 to Standard 301. This charge was part of a project to complete a comprehensive review the Standards and Rules of Procedure. That overall review took considerable time; eventually as the overall project was coming to conclusion but work on the bar

passage standard was not finished, the Council carved out the bar passage standard and continue working on it following the wrap-up of the comprehensive review. As a first step to reform and in recognition of the importance of bar passage outcomes in regulating law schools, Int. 301-6 was moved into the black letter as Standard 316. The substance of the regulation, at least for the time being, remained unchanged.

Then the SRC spent considerable time reviewing data and discussing various revisions for consideration. The current proposal was recommended by the SRC in February 2016 and approved for Notice and Comment by the Council in March 2016. A special hearing was held in August 2016 at the ABA Annual Meeting.

After reviewing the comments and testimony, including the testimony offered at the hearing during the 2016 ABA Annual Meeting, the SRC unanimously recommended that the Council adopt the proposed changes and send the revised standard to the House of Delegates for concurrence. In making this recommendation, the SRC expressed respect for the concerns of some commenters, but “viewed the change as necessary to promote confidence that an ABA-approved law school will, at a minimum, be accountable for 75% of its graduates passing a state bar examination within two years of graduation.” The SRC stated its concern that even under the revised standard, “law schools would be permitted to allow 25% of its graduates to fail the bar exam during this two-year period and yet still meet accreditation requirements of the Standard. This effectively means that potentially 25% of a graduating class, after attrition, may not reap the benefits of licensure, a result that is more problematic considering the high cost of legal education.”

The Council, at its October 2016 meeting, voted overwhelming to approve the proposed changes and to send revised Standard 316 to the House of Delegates at the ABA Midyear meeting in February 2017. At that meeting, the House of Delegates did not concur in the revisions and referred the matter back to the Council for further consideration.

Since the House’s refusal at the 2017 ABA Midyear meeting to concur in the changes approved by the Council action, these steps have been taken: (a) data has been collected on ultimate bar passage within two years of graduation for graduates of 2013, 2014, 2015, and 2016; (b) more complete data on first-time passage rates by school than we have previously had has been collected for 2016-2018 graduates; (c) members of the Council and staff have engaged in conversations with some law school deans and some key ABA leaders, and other groups interested in legal education; (d) the number of UBE jurisdictions has continued to increase and now stands at 36; and, (e) some other states have lowered their “cut” scores.

At its September 2018 meeting, the Council affirmed its commitment to the revised standard and directed that it be resubmitted to the ABA House of Delegates for concurrence at the 2018 ABA Midyear Meeting in February 2019. The Council and members of staff conducted a useful and broad outreach to delegates at that meeting. Nonetheless, the House declined for a second time to concur in R316.

#### **Review of the revisions to the standard:**

The revisions adopted by the Council do not change the basic requirement in C316 [see 316(a)(1)] that a law school must achieve at least a 75 percent ultimate bar pass rate. This standard is not only an appropriate and independent accreditation requirement, but also is an important piece of a set of

outcomes connected and relevant to the fundamental question of whether a law school's program is sound. The other relevant and related outcomes are admissions (Standard 501), attrition (Int. 501-3), and academic support and program of legal education (Standards 309 and 301). There is an obvious continuum inherent in these provisions from admissions, through law school, concluding with the licensing exam.

While the ultimate passage rate (75%) remains unchanged in R316, the revisions do make important changes to measuring law school graduate success on the bar exam for law school accreditation:

- a. The period for demonstrating compliance is shortened from five years to two. NCBE data and the data the Council has collected support this change. Some suggested that the standard should focus on pass rates based on "attempts," rather than a pass rate over a period of time. Others have urged a 3-year window. There are arguments for both approaches. But, as the data the Council has collected shows, the two-year period provides an appropriate measuring period. Such an approach, but there are practical problems with using attempts. Further, the data we have now collected show that, in reality, most students do not extend their bar-taking beyond two years after graduation, and that such a period is a fair way to measure the success of schools' graduates on this critical licensing exam.
- b. The previous requirement that a school needed to report on only 70 percent of its graduating class is struck. That requirement, largely, reflected the difficulty that many law schools reported in gathering bar exam outcomes. R316 requires a school to make reasonable efforts to find and report on all its graduates. The recent reporting that schools have done shows this is a reasonable expectation. Full reporting is appropriate and presents a more accurate picture of how a school's graduates are doing.
- c. Perhaps the most significant change is removing C316(a)(2), eliminating the opportunity for a law school to comply with a bar pass standard based on first-time pass rates and by showing the school's rate is within 15 points of the pass rate in the jurisdiction(s) where its graduates took the bar exam, regardless of the school's ultimate pass rate (whether measured over a 2 or 5 year period). This change was subject to notice and comment, and the reasons for this change were discussed when the Council adopted the revised standard. First-time pass rates will continue to be collected and reported as consumer information. Compliance with the bar passage standard, however, will be based exclusively on the ultimate pass rate for a school's graduates who sat for the bar exam.

In part and as was true with the 70 percent reporting requirement, the "first-time taker" option was provided because of difficulties schools reported in collecting data. First-time rates are more easily collected, largely because they are more regularly reported by bar examiner offices to schools. In effect, first-time pass rates became a proxy for the eventual, overall success of a school's graduates on the bar exam. Recent experience confirms, however, that ultimate passage data, at least for the two-year period that is part of the revised standard, can be gathered with reasonable efforts by law schools.

A different, more substantive reason for C316(a)(2) advanced by some is that a “relative standard” is necessary because absolute pass rates may misrepresent student learning and exam performance because the bar exam varies among the states. States using the same exam have different requirements for passing (the “cut score” issue) so equal performances on the same exam may lead to “pass” in one state and “fail” in another, for example. So long as states have the authority to determine a passing score, it remains the case that graduates must pass the state’s licensing exam to become a member of the legal profession in that jurisdiction, and it is appropriate to assess the law school’s program by measuring the success its graduates have on whatever bar exam they choose to take.

**The House of Delegates reactions and opposition to the Council’s revisions during the concurrence process:**

- a. The uncertainty of how the revised standard would affect particular law schools, specifically those in California, where the passing score (cut score) is comparatively high, and those schools that are designated minority-serving institutions (particularly HBCUs).
- b. The revised standard could have a disproportionate impact on minority students, and comments that the Council had not done enough study to ascertain the extent to which that was so.
- c. The revised standard was not fair to schools in states with high cut scores, like California, because it sets an absolute percentage that does not vary with state passing rates (where one is simply comparing schools against each other).
- d. The revised standard would place additional burdens on law schools to collect data.
- e. The current standard was adequate and the case for a change had not been made.

**Responses to the concerns expressed:**

Several general points can be made:

- 1. While some additional work is required for schools to collect additional data, the effort is reasonable given the significance of the information. Perhaps more data – complete and more micro – should be collected and reported as consumer information. And bar examiner offices and the NCBE are improving the delivery of bar exam outcomes to law schools in ways that will continue to ease the burden of the data-gathering effort.
- 2. The Standard aims to protect students and the public. It is consistent with the Council’s overall responsibilities. The Standard does not aim to protect law schools nor to drive them from the market.
- 3. Bar passage is a fundamental outcome of a legal education program. While an acceptable bar passage rate is not enough, standing alone, to support the accreditation of a law school, an acceptable bar passage rate should be a necessary condition for accreditation.
- 4. While acknowledging that some law schools’ special missions are important, no law school can be exempted from reasonable outcomes-based requirements that aim to protect students and the public. Concerns about the validity or the appropriateness of the bar exam are not a reason

to leave in place or water down a bar passage standard that allows those concerns to be set to the side.

5. It may be difficult to establish what is a minimally “acceptable” bar exam outcome standard, but that determination must be made. The Council – comprised of lawyers, judges, academics, a student, and public members – is an appropriate body with appropriate experience and professional judgment to, after study and public comment, decide what an acceptable minimum pass rate should be.
6. There is no evidence to support a conclusion that a law school would use a bar pass standard as a basis to diminish its commitment to diversity. Standards 205 and 206 remain in place to provide the Council with the opportunity and responsibility to assure that law schools are operating in a non-discriminatory, open and inclusive manner.

#### **Jurisdiction-level developments:**

Several states have ongoing task forces or committees examining various aspects of legal education and bar admissions. California has engaged in studies responding to concerns about its cut score which at 144 is the second highest in the country. At the completion of a round of studies, including a standard setting exercise, the state supreme court determined that the cut score will remain at 144 for the present time. Other jurisdictions (Idaho, Montana, Nevada, Oregon, and perhaps others) have recently lowered their cut scores.

#### **Operation of the revised Standard:**

Following is a brief outline of how the R316 would be administered and applied to schools.

1. Schools report ultimate pass rate to ABA. Based on graduates from two years prior who sat for a bar exam.
2. The standard is binary – either the pass rate is 75 percent or better (compliance) or below 75 percent (out of compliance).
3. Likely at the Council’s May meeting each year, out of compliance schools would be sent a letter reporting potential non-compliance (either Rule 5 or 6), asking for a report under Rule 11(a)(3). That report would be the opportunity for the school to dispute the data, describe steps being taken to improve bar pass outcomes, and/or to request additional time beyond two years to demonstrate compliance [Rule 13(c)].
4. The Council would review school responses, likely at its August meeting. Unless there was a data reporting error, it is likely a school with a less than 75% 2-year ultimate pass rate would be found out of compliance [Rule 11(a)(4)]. Because bar passage is a core standard, that finding of non-compliance would become a matter of public record. [Rule 48(b)(7)], and the two-year clock for returning to compliance would begin to run from the date of the letter [Rule 13(a)(1) and (b)].
5. School would be asked to file a reliable plan for coming back into compliance within the 2-year period [Rule 13(a)(2)].
6. If the report for the next cohorts do not show compliance, the school’s accreditation will be removed [Rule XX] unless an extension of time is requested by the school and granted by the Council for good cause shown [Rule 13(c)].



The school returns to compliance by showing that a subsequent two-year cohort has a 75% ultimate pass rate. No further analysis is done of the class that failed to reach 75% and caused the finding of non-compliance. The standard is a snapshot at the two-year mark.

**Conclusion:**

The Council (and the former SRC) spent considerable time studying this matter. Notice and comment were solicited and considered by the Council. The Council has identified several fundamental problems with C316: lack of full reporting of outcomes, review period is unnecessarily long, first-time bar pass compliance option is not effective. These concerns are addressed by R316. Data has been collected to show how the revised standard would have affected law schools. Going forward, it will be up to schools to assure that their programs will achieve the modest outcomes required by the revised standard.