

SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR
AMERICAN BAR ASSOCIATION

Revisions to Standard 316: Bar Passage

This document addresses revisions to Standard 316. After providing a brief history of the modified Standard adopted by the Council and a review of the House of Delegates' concerns resulting in the HOD not concurring in the Council's decision, the document examines school-level and aggregate bar exam outcome information collected over the last 18 months or so.

The revised standard 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.

History of the current proposed revision:

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 decided to carve 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 the regulation of 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.

Subsequently, 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 went on to state 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, the following steps have been taken: (a) data has been collected on ultimate bar passage within two years of graduation for graduates of 2013, 2014, and 2015 [data for the ultimate pass rates for 2016 will be collected this cycle]; (b) more complete data on first-time passage rates by school than we have previously had has been collected for the 2016 and 2017 graduates; (c) members of the Council and staff have engaged in conversations with some law school deans and some key ABA leaders and groups about the matter; (d) several state bar admissions processes have become UBE jurisdictions and, (e) some other states have taken action to lower 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. The Council also encouraged the leadership and the staff to organize a plan for providing information to the delegates about the revisions, the reasons for them, and an analysis of the data that has been collected.

Review of the revisions to the standard:

The revisions adopted by the Council do not change the basic requirement in current Standard 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 that are 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 the revised standard, the revisions do make important changes to measuring law school graduate success on the bar exam for purposes of law school accreditation:

- a. The period for demonstrating compliance is shortened from five years to two. NCBE data supports this change, showing only a small fraction of takers persist and retake the exam more than twice. Some suggested that the standard should focus on pass rates based on “attempts,” rather than a pass rate over a period of time. There is an argument for such an approach, but there are practical problems with using attempts. Further, the data that 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, in large part, reflected the difficulty that many law schools reported in gathering bar exam outcomes. The revised standard requires a school to make reasonable efforts to find and report on all its graduates. The recent reporting that schools have done shows that this is a reasonable expectation. Full reporting is appropriate and certainly presents a more accurate picture of how a school's graduates are doing.
- c. Perhaps the most significant change is removing current Standard 316(a)(2) from the revised Standard thereby 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. This change was subject to notice and comment, and the reasons for this change were discussed in depth 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, in large part 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 the existing Std. 316(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 that equal performances on the same exam may lead to "pass" in one state and "fail" in another, for example. At present, it is not practicable to establish an ABA standard for the raw scores of bar takers across the country. Further, 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 impact 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 a sufficient 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, in essence, 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:

Since data were collected, responses to some of the concerns related to the data are discussed in the analysis of the data below. Several general points, however, 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. If anything, perhaps more data – more complete and more micro in nature – should be collected and reported as consumer information. Additionally, bar examiner offices and the NCBE are working to improve 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 sufficient, 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 have special missions that 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, make the decision about what an acceptable minimum pass rate should be.
6. There is no evidence to support a conclusion that law schools would use a bar pass standard as a basis for diminishing 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.

Collection of information about “ultimate” bar pass rates for 2013, 2014, and 2015 graduates:

Following the House of Delegates non-concurrence, the Council directed the Managing Director’s Office to gather data that would inform the Council and address the concerns of some that the Council had not sought to gather enough data to assure there were no adverse (unintended) impacts that might cause the Council to change its mind about how any revisions should be crafted. That was done. Further, the Council approved the gathering of consumer information on bar exam outcomes under Standard 509 in the data gathering process for the 2017-2018 year. That information basically conforms to what the revised standard would be. Ultimate bar pass data for the class of 2015 and first-time bar pass information for the 2016 and 2017 graduating classes was collected. The results of these data gatherings are reported below.

Following the June 2017 Council meeting, the Managing Director’s Office distributed a brief, voluntary bar pass survey for 2013 and 2014 graduates based on the revised standard to ABA law school deans.

The Council received a report at its October 2017 meeting of the outcomes of that survey. Subsequently, the Council approved revisions to the ABA questionnaire system and established a separate bar pass questionnaire, breaking out the reporting of bar pass information from the Annual Questionnaire. This change allowed more current information to be collected and reported. This questionnaire includes, for the first time, reporting on ultimate pass rates by law schools. That questionnaire was administered for the first time in 2018.

The following sections report some data and conclusions from these data collection efforts.

Responses to the Voluntary Survey

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, more than 40 percent of the total number of graduates for each of those years. The aggregate data and a list of schools who provided data was public, but the specific school data was not released. 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. We appreciated the extra work that schools undertook to provide this data.

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, which were the focus of discussion when the revised standard was taken to the House of Delegates, three of the six HBCU law schools participated. Two of them 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.

Ultimate Bar Passage Outcomes for the Graduating Class of 2015

Law schools have reported on ultimate bar pass outcomes for 2015 graduates, two years after graduation. Schools reported on as many of their 2015 graduates as they could find with reasonable efforts. In the aggregate, they reported on 97.5 percent of all graduates. In the aggregate, 97 percent of all those graduates had sat for a bar exam within the two-year period. Of that group, 88.3 percent had passed a bar examination.

Looking at the individual school reports, 183 of the 202 schools reported an ultimate pass rate of 75 percent or higher. Of the 19 schools below that threshold, one had an ultimate pass rate of 59.75 percent and seven more schools had rates between 60 and 69 percent. The other ten schools that did not reach 75 percent had ultimate pass rates in the 70-74.9 percent range. Of the six HBCU law schools, four reported ultimate pass rates of 75 percent or higher and two reported ultimate pass rates below 75 percent. Of the 21 ABA-approved law schools in California, 19 reported ultimate pass rates of 75 percent or above, and two reported ultimate pass rates below 75 percent.

First-time Bar Passage Outcomes for the Graduating Classes of 2016 and 2017

Schools have also reported first-time bar passage outcomes for 2016 and 2017 graduates. Recall that the revised standard will require a 75 percent ultimate passage rate for a school's graduates who attempt the bar exam within two years of graduation. The first-time data is an important piece of consumer information, apart from the accreditation standard on bar passage, but it also provides data on how a school is progressing toward meeting the 75 percent threshold.

For 2016, 106 of 202 schools met the 75 percent threshold in the first year. For the other 96 schools, the majority had first-time pass rates in the 65-74 percent range and, based on experience, should have sufficient repeat-takers who pass or graduates who passed and had not sat for the exam in the first year following graduation to meet or exceed the 75 percent threshold after two years. The 2015 ultimate pass rate data certainly suggests this. There are, however, some concerning outcomes. Twenty-one (21) schools had first-time rates for 2016 graduates below 50 percent. Of those, one is an HBCU and six are California schools.

For 2017, the overall picture is marginally better. One hundred twenty-two (122) of 203 schools had first-time pass rates at or above 75 percent after one year. However, there continue to be a number of schools (15 for 2017) with first-time pass rates below 50 percent.

There are 11 schools with sub-50 percent first-time pass rates for both 2016 and 2017. One is an HBCU, and 4 are California schools.

This bar passage data is publicly available on the Section's website in the Statistics section.

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:

1. Report ultimate pass rate to ABA. Based on graduates from two years prior who sat for a bar exam.
2. Standard is binary – either the pass rate is 75 percent or better (compliance) or below 75 percent (out of compliance).
3. 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 and/or to request additional time beyond two years to demonstrate compliance [Rule 13(c)].
4. At next Council meeting, the school data and response would be reviewed. Likely outcome is finding of non-compliance [Rule 11(a)(4)]. Outcome would be made public [Rule 48(b)(7)], and the two-year clock for returning to compliance begins to run [Rule 13(a)(1) and (b)].
5. School would be asked to file a reliable plan and to appear at a hearing to consider that plan and whether further sanctions should be imposed [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].
7. The Council, at the point where the two-year period has expired, may extend the period for demonstrating compliance [Rule 16].

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

Conclusion:

The Council (and the 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 the current standard: 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 the revised standard. Data has been collected to show how the revised standard would have impacted 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. The revised standard is appropriate because it protects students and the public.