MEMORANDUM

DATE: September 4, 2019

TO: Interested Persons and Entities

FROM: Barry A. Currier, Managing Director of Accreditation and Legal Education

SUBJECT: Standard 316, Bar Passage

At its meeting in May 2019, the Council approved amendments to Standard 316 of the *ABA Standards and Rules of Procedure for Approval of Law Schools*, effective upon approval (Law Schools will be subject to revised Standard 316 beginning in the spring of 2020).

The amendments were approved by the Council for Notice and Comment during its meetings held on March 11-12, 2016, and June 3-4, 2016. A public hearing was held on August 6, 2016. The Council approved the amendments at its meeting on October 20-22, 2016. The changes were submitted to the ABA House of Delegates (“HOD”) for concurrence at the 2017 Midyear meeting in Miami. The HOD did not concur in the changes and referred the matter back to the Council. After review, gathering of data, and discussion, the Council reaffirmed its approval at its meeting on September 13-15, 2018. The changes were submitted to the HOD for concurrence at the January 2019 Midyear meeting in Las Vegas. The HOD did not concur in the changes and referred the matter back to the Council for a final time.

Attached are an explanation of changes and a redlined version of the amended Standard.
Explanation of Changes, Standard 316

The revised Standard 316 on bar exam outcomes provides a clear and straightforward statement of the bar passage rate required of a law school for the purposes of accreditation. It is clear, simple, and appropriate. It provides an ultimate pass rate for each graduating class of a law school over the two-year period following that class’ graduation. First-time pass rates are important information that will continue to be disclosed under Standard 509 (Required Disclosures). However, for purposes of assessing whether a law school is operating a sound program of legal education, the revision provides that the most appropriate measure of a law school’s performance is the ultimate pass rate and that a two-year period is the optimal period over which to measure that performance for accreditation purposes.

The revised Standard does not place a limit on the number of times that an individual may sit for a bar exam. The Standard never has. That is a matter for each state to determine as part of its lawyer licensing process. The Standard speaks only to the ultimate bar passage rate required of a law school for accreditation purposes.

**Features of the revised Standard:**

1. The requirement of an ultimate passage rate of 75 percent remains unchanged from the requirement of current Standard 316(a)(1).

2. The period of time within which a law school must show that it has achieved a 75 percent passage rate is reduced from five calendar years to two years from the date of graduation.

3. The ability of a law school to report its ultimate pass rate based on only 70 percent of its graduates is eliminated.

4. The opportunity for a law school to satisfy its obligations under Standard 316 on the basis of it’s bar pass rate for first-time takers is eliminated.

5. Rule 13(c) provides for an extension for good cause shown. Current Standard 316(c) is, therefore, unnecessary and redundant.

**Analysis of the revisions:**

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 an appropriate independent accreditation requirement; it also is also an important component of a set of outcomes, which are connected and relevant to the fundamental question of whether a law school’s program is sound.¹ The other relevant and related outcomes are

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¹ Standard 301(a) – Objectives of Program of Legal Education provides: “A law school shall maintain a rigorous program of legal education that prepares its students, upon graduation, for admission to the bar ….”
admissions (Standard 501), attrition (Interpretation 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, with the licensing exam.

While the ultimate passage rate (75 percent) 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. The National Conference of Bar Examiners (NCBE) data supports this change. It shows only a small fraction of takers who fail the exam persist and retake the exam more than twice. The data that the Section has collected also supports this change, with law schools in the aggregate reporting for the year 2015 that 97 percent of graduates had taken a bar exam within two years of graduating. In the development of these revisions, some suggested that the Standard should focus on “attempts” for each graduate, rather than a pass rate over a period of time. That is also a sensible approach, but there are practical problems with requiring a law school to track graduates by attempts. The data gathered by the Section and the NCBE demonstrate that a two-year period captures almost all graduates and assesses their success on the bar exam. It is a fair and appropriate piece of a revised bar passage standard.

b. The revision strikes the previous requirement that a law school needed to report on only 70 percent of its graduating class. That requirement, in large part, reflected the difficulty that many law schools reported in gathering bar exam outcomes. The data that the Section collected from law schools for 2015 graduates shows that law schools, in the aggregate, had information for 97.5 percent of graduates. The data collected show that the revision is a reasonable expectation. Full reporting is appropriate and certainly presents a more accurate picture of how a law school’s graduates are doing on the bar exam.

c. A significant change in the revised Standard is the elimination of current Standard 316(a)(2), which allows a law school to comply on the basis of first-time outcomes by showing that the law school’s first-time pass rate is within 15 percentage points of the pass rate in the jurisdiction(s) where its graduates took the bar exam for three of the preceding five years. For example, if a state bar pass rate for a particular year is 75 percent, then a law school would comply for that year if its first-time pass rate was 60 percent. This change was subject to notice and comment and generated considerable

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2 E.g., continuing to track graduates over longer periods of time, coordination of data across jurisdictions.

3 Considered on a school-by-school basis, just eight of the 203 ABA-approved law schools reported not locating more than 10 percent of that cohort. On the other hand, more than 160 law schools reported locating at least 97 percent of their 2015 graduates. In practice, the revised Standard will require a law school to make reasonable efforts to find and report on all its graduates; law schools making reasonable efforts will not be non-complaint because a small number of graduates could not be tracked.

4 A weighted average is computed for a law school based on the number of graduates sitting in a jurisdiction and that jurisdiction’s outcomes.
discussion. The reasons for this change were discussed in depth when the Council adopted the revised Standard. While the Council appreciated and understood the concerns of those who opposed this change, after considering the arguments on both sides and in the exercise of its informed judgment, the Council concluded that this change was not only appropriate, but also was necessary. First-time pass rates will continue to be collected and reported as consumer information. Compliance with the revised Standard, however, will be based exclusively on the ultimate pass rate for a law 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 at the time the Standard was first put in place because of difficulties law schools reported in collecting ultimate bar pass data. First-time rates were more easily collected because they were more regularly reported by bar examiner offices to law schools. In effect, first-time pass rates served as a proxy for the eventual, overall success of a law school’s graduates on the bar exam, which was the primary focus of the Standard. 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 suggested by Standard 316(a)(2) is that a relative performance standard that measured a law school’s outcomes against the outcomes of other law schools on the same exam was necessary to avoid penalizing law schools located in jurisdictions with “more difficult” bar exams or where the passing (or “cut” score) on the exam was higher than the passing score on the same exam in other jurisdictions. The rise of the NCBE’s Uniform Bar Exam (UBE) has exacerbated this concern, but at present it is not possible to have a bar passage standard that is based on bar exam cut scores. Further, so long as jurisdictions have the authority to determine their passing scores, graduates must obtain a score that meets whatever passing score is required in the jurisdiction where they want to practice.

Finally, the option provided by current Standard 316(a)(2) is not acceptable in some specific situations. For example, in states with one law school where the majority of takers are that law school’s graduates, it is almost impossible for the law school’s outcomes to be more than 15 percentage points below the overall state first-time bar pass rate, regardless of how low the law school’s first-time pass rate might be. An appropriate standard does not simply evaluate one institution against others, it sets an acceptable minimal level of performance that a law school must meet to be approved. The revised Standard accepts that level of performance as the 75 percent passage rate that has been in the Standards for many years.

**Standard 316. BAR PASSAGE**

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.
(a) A law school’s bar passage rate shall be sufficient, for purposes of Standard 301(a), if the school demonstrates that it meets any one of the following tests:

(1) That for students who graduated from the law school within the five most recently completed calendar years:
   (i) 75 percent or more of these graduates who sat for the bar passed a bar examination; or
   (ii) In at least three of these calendar years, 75 percent of the students graduating in those years and sitting for the bar have passed a bar examination.

In demonstrating compliance under sections (1)(i) and (ii), the school must report bar passage results from as many jurisdictions as necessary to account for at least 70 percent of its graduates each year, starting with the jurisdiction in which the highest number of graduates took the bar exam and proceeding in descending order of frequency.

(2) That in three or more of the five most recently completed calendar years, the school’s annual first-time bar passage rate in the jurisdictions reported by the school is no more than 15 points below the average first-time bar passage rates for graduates of ABA-approved law schools taking the bar examination in these same jurisdictions.

In demonstrating compliance under section (2), the school must report first-time bar passage data from as many jurisdictions as necessary to account for at least 70 percent of its graduates each year, starting with the jurisdiction in which the highest number of graduates took the bar exam and proceeding in descending order of frequency. When more than one jurisdiction is reported, the weighted average of the results in each of the reported jurisdictions shall be used to determine compliance.

(b) A school shall be out of compliance with this Standard if it is unable to demonstrate that it meets the requirements of paragraph (a)(1) or (2).

(c) A school found out of compliance under paragraph (b) and that has not been able to come into compliance within the two year period specified in Rule 13(b) of the Rules of Procedure for Approval of Law Schools, may seek to demonstrate good cause for extending the period the law school has to demonstrate compliance by submitting evidence of:

(1) The law school’s trend in bar passage rates for both first time and subsequent takers: a clear trend of improvement will be considered in the school’s favor, a declining or flat trend against it.

(2) The length of time the law school’s bar passage rates have been below the first time and ultimate rates established in paragraph A: a shorter time period will be considered in the school’s favor, a longer period against it.

(3) Actions by the law school to address bar passage, particularly the law school’s academic rigor and the demonstrated value and effectiveness of its academic support and bar preparation programs; value-added, effective, sustained and pervasive actions to address bar passage problems will be considered in the law school’s favor; ineffective or only marginally effective programs or limited action by the law school against it.
(4) Efforts by the law school to facilitate bar passage for its graduates who did not pass the bar on prior attempts: effective and sustained efforts by the law school will be considered in the school’s favor; ineffective or limited efforts by the law school against it.

(5) Efforts by the law school to provide broader access to legal education while maintaining academic rigor; sustained meaningful efforts will be viewed in the law school’s favor intermittent or limited efforts by the law school against it.

(6) The demonstrated likelihood that the law school’s students who transfer to other ABA-approved schools will pass the bar examination: transfers by students with a strong likelihood of passing the bar will be considered in the school’s favor, providing the law school has undertaken counseling and other appropriate efforts to retain its well-performing students.

(7) Temporary circumstances beyond the control of the law school, but which the law school is addressing: for example, a natural disaster that disrupts operations or a significant increase in the standard for passing the relevant bar examination(s).

Other factors, consistent with a law school’s demonstrated and sustained mission, which the school considers relevant in explaining its deficient bar passage results and in explaining the school’s efforts to improve them.