

January 11, 2019

Jeffrey E. Lewis
Professor & Dean Emeritus
Saint Louis University School of Law
100 North Tucker Blvd.
St. Louis, MO 63101

Re: ABA Accreditation Standard 316 – Proposed Bar Passage Rule

Dear Prof. Lewis:

As Chairs of the ABA Goal III entities, we write to express our concerns about the Council's resubmission of proposed Standard 316 to the House of Delegates at the ABA Midyear Meeting in Las Vegas in January 2019. The proposed changes to Standard 316, the bar passage rule, will have an adverse impact upon diversity within legal education, the legal profession, and the entire educational pipeline. We have shared our concerns on previous occasions and continue to have serious misgivings about any attempt to modify the existing standard. We encourage the Council to abandon the revised bar passage rule at least until it conducts further analysis of the effects of proposed changes on access to the profession for underrepresented lawyers. We also urge the Council to consider proposed revisions to Standard 316 in the context of the important broader conversation about whether the bar exam should be the primary vehicle for obtaining a license to practice law.

We acknowledge the work of the Council and ABA staff in preparing the latest memorandum and accompanying data as rationale for the proposed revisions. We have carefully reviewed the data and are alarmed by the possible outcomes and the impact on diversity in the legal profession if proposed changes to Standard 316 are adopted. In response to the Council's latest attempt to justify the changes to Standard 316, we offer the following points in support of our continued opposition to the proposal:

- Despite our repeated requests, there has, in fact, been no proper study conducted on the impact of the proposed changes to Standard 316 on diversity in the profession and the educational pipeline;
- The Council's data analysis is incomplete and does not support moving forward with the proposal;
- The proposed changes unfairly fail to account for significant differences in state cut scores;
- The proposed changes jettison important provisions of the current Standard 316;
- Other standards are more appropriately the focus for ensuring an institution's educational soundness; and
- The proposed changes fail to take into account the important debate about whether the bar exam as currently administered is the appropriate vehicle for determining access to the profession.

No Disparate-Impact Study

In two of our previously submitted comments,¹ we requested a thorough study on the proposed standard's impact on diversity in the profession and in the educational pipeline. This request was echoed by the other commenters, including the State Bar of California in a letter to Jeffrey Lewis, dated October 3, 2013, and by the HBCU Deans in an article published in the National Law Journal, dated October 19, 2016. The recent memo and analysis provided by the Council refers to HBCU schools, but it is well short of a thorough study of the impact on diversity. In addition to the HBCU schools, there are other schools that have significant minority enrollments, such as schools in Puerto Rico, most of the schools in California, and other schools across the country. The impact of Standard 316 upon these schools must be studied.

Moreover, merely looking at whether particular law schools could have met the new standard in the past does not address the impact the new standard could have on schools' future efforts to reach out to and matriculate diverse applicants. The likely result of the proposed changes to Standard 316 is that law schools facing pressure to increase bar passage to maintain accreditation will adjust admissions standards in a way that decreases the diversity of their student bodies. This potential impact of the proposed changes on diversity in the educational pipeline is left completely unaddressed in the Council's justification.

Incomplete Data Analysis

The Council's memo includes an analysis of the data of the bar performance from 2013 through 2017, but falls far short of a complete and thorough study. The data consists of voluntary surveys, not representative of all schools, and analysis that contains gaps in the data as described below.

- 2013 & 2014 Data

The memo contains data regarding the 2013 and 2014 bar exam. However, as noted in a previous correspondence, the survey findings are incomplete. The voluntary surveys included responses from only 45% of the schools for 2013 and only 40% of the schools for 2014, representing just a small snapshot of the entire landscape.²

- 2015 Data

The ultimate pass rates reported in 2015 revealed that 19 schools failed to reach the requirements in the proposed standard. Had the proposed revisions to Standard 316 been in effect, these 19 schools could have lost their accreditation. Although the memo notes that four of six HBCU law schools and 19 of 21 ABA-approved California law schools reported ultimate

¹ Letter to Jeffrey Lewis, dated October 10, 2013, and letter to Maureen O'Rourke, dated November 2, 2017.

² Legal Ed Standard 316 Memo, page 5. In addition, the 2013 bar results were comprised primarily of students matriculating in 2010, the highpoint of admissions. The pre-law indicators, assuming these indicators have some correlation to bar performance, have since declined. The 2014 bar results were comprised primarily of students matriculating in 2011, the start of the downturn in admissions and the corresponding drop in admissions credentials. As Erica Moser, former President of the National Conference of Bar Examiner's prophetically predicted in her President's Message of March 2013, "It is reasonable to prepare for a dip in the performance of the graduates on the July examinations in 2015 and 2016 as the September 2012 and 2013 matriculants complete their degrees." Thus, analysis over these two years may not be measuring cohorts with comparable characteristics. Instead, the analysis should focus on the data beginning with the 2015 graduating class.

pass rates of 75% or higher,³ taking a closer look at some of the 19 schools below the revised standard's threshold reveals that 11 of the 19 schools had significant populations of students of color, i.e., at least 30% students of color.⁴ If these schools had lost their accreditation, this would have considerably harmed efforts to diversify the legal profession.

- 2016 Data

The 2016 data reveals some gaps and lots of uncertainty. The analysis describes two categories of schools, those schools in the 65% - 74% range and those schools below 50%. The memo noted "some concerning outcomes," with 21 schools having "first-time rates for 2016 graduates below 50 percent," including one HBCU and six California schools.⁵ But the analysis does not account for the 37 schools with first-time pass rates between 50% and 65%. If the assumption is that graduates at those schools between 65% and 74% are likely to pass and exceed the 75% threshold and that those graduates at schools below 50% are not likely to reach the 75% threshold, what do we conclude about the graduates at the 37 schools between 50% and 65%? What is the likelihood that these schools will be able to reach the 75% level within the proposed two-year period?

When we examine the entire group of 58 schools with bar passage rates below 65%, we find five more HBCU schools (one at 50.47% and one at 50.95%), one more Puerto Rican school, and five additional California schools (one at 52.30%). When all of these schools below 65% are considered together, the totals are alarming. Six of the six HBCU schools, three of the three Puerto Rican schools, and twelve of the twenty-one California schools⁶ are in danger of not reaching the threshold and losing their accreditation. In addition to these, there are other schools with significant numbers of minority students. Based on these numbers, there is little doubt that the proposed changes to Standard 316 would have a significant impact on diversity in the profession.

- 2017 Data

The data and analysis for 2017 provides, according to the memo, a "marginally better" overall picture:

One hundred twenty-two (122) of 203 schools had first-time pass rates at or above 75 percent after one year. However, there continues to be a number of schools (15 for 2017) with first-time pass rates below 50 percent... Of those, one is an HBCU and four are California schools.⁷

³ Legal Ed Standard 316 Memo, page 6.

⁴ American (34.9); Arizona Summit (34); Atlanta's John Marshall (50.7); Barry (34.5); District of Columbia (50.7); Florida Coastal (37.2); Golden Gate (36.2); Howard (92.9); Inter American – PR (100); Pontifical Catholic – PR (100); and Whittier (44.4).

⁵ Legal Ed Standard 316 Memo, page 6. The number of California schools in this group is actually seven: Western State, Southwestern, Thomas Jefferson, Golden Gate, San Francisco, La Verne, and Whittier.

⁶ California – Hastings (52.30); California Western (63.07); Chapman (58.33); Golden Gate (35.40), La Verne (32.66), McGeorge (58.74); San Francisco (34.82), Santa Clara (63.72); Southwestern (38.26), Thomas Jefferson (37.32), Western State (45.46), Whittier (22.66).

⁷ Legal Ed Standard 316 Memo, page 6.

Similar to the analysis of the 2016 data, what about the 29 schools with first-time pass rates between 50% and 65%? Which way do they tend to track? In this group, there are four additional HBCU schools, and seven more California schools. These schools below 65% include five of six HBCU schools,⁸ three of three Puerto Rican schools, and eleven of twenty-one California law schools.⁹

- Combined 2016 and 2017 Data

The memo goes on to note that, “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.”¹⁰

But again, considering schools in the range from 50% to 65%, there are 25 additional schools with graduates with first-time pass rates between 50% and 65% in both 2016 and 2017. Combined there are 36 schools that were below 65% in both years. Four more are HBCU schools and 7 more are California schools. The memo neglects to mention that all three schools in Puerto Rico are in this group, two were below 50% and the other between 50% and 65%. In 2017, all three were below 50%.

Thus, the potential number of schools that may fail to satisfy proposed Standard 316 in both 2016 and 2017 could include five of the six HBCUs,¹¹ all three of the Puerto Rican schools, and 11 of the 21 California schools.¹² There are also additional schools with significant populations of minority students. This possibility is alarming and should generate enough concern to further study the impact of the proposed standard on diversity.

- Bar Results Declined in 2018

Bar exam results from 2018 show that results have declined across the nation based on a 2.2-point decline in MBE scores. The national data showed declines from 2017 in such states as Florida (down 4.1 points to 67.2%), Texas (down 3 points to 77.87%), and New York (down 3 points to 83%). In California, which produces an eighth of the graduates nationwide, the first-time pass rate for graduates of California ABA-accredited law schools dropped 6 percentage points from July 2017 to July 2018 (70% to 64%).

What will the trend be for future graduates sitting for the bar exam? Perhaps looking back at the pre-law indicators may provide some insights. Have the pre-law indicators of matriculants changed over the past years? We urge that a disparate impact study take into account the future trends of bar performance, since schools will be evaluated on their performance in the future.

⁸ District of Columbia (38.46); Florida A&M (51.24); North Carolina Central (57.14); Southern (57.81); Texas Southern (60.00).

⁹ California – Hastings (60.59); California Western (59.69); Chapman (63.88); Golden Gate (35.40), La Verne (42.11), McGeorge (62.20); San Francisco (52.05), Southwestern (52.78), Thomas Jefferson (29.17), Western State (58.66), Whittier (35.26).

¹⁰ Legal Ed Standard 316 Memo, page 6.

¹¹ District of Columbia, Florida A&M, North Carolina Central, Southern, Texas Southern.

¹² California – Hastings, California Western, Chapman; Golden Gate, La Verne, McGeorge, San Francisco, Southwestern, Thomas Jefferson, Western State, Whittier.

Disparity with State Cut Scores

In the original Standard 301-6 and now Standard 316(a)(2), the Council acknowledged the challenges posed by variances among state cut scores and continues to make allowances for schools to be within fifteen points of the state average for ABA graduates. The latest memo does not address the disparity in state cut scores other than to note that it exists.¹³

The Council does not explain why it has not retained provisions for the variances in cut score other than to infer that states could lower their cut score to prevent losing schools. This approach does not guarantee that states will necessarily follow course since rational market pressures to equalize licensing standards do not appear to play a significant role in a person's decision on where to sit for the bar. Data shows, for example, that five of the states with the lowest bar passage rates (DC, CA, NY, MD, and FL) are also the same states with the highest number of test takers. Indeed, DC, which in 2016 held the number one spot for the lowest bar passage rate also held the number one spot for the number of test takers. And California, with the second lowest bar passage rate, is also the state with the highest number of failed test takers.¹⁴

These variances among state cut scores will result in a disparity in the impact of proposed Standard 316. With an average first-time pass rate of 64% for California ABA-accredited law school graduates in July 2018, it is likely that half the California ABA-accredited law schools will have first-time pass rates below 64%, which happens to be below the safe range of 65% or above as suggested by the memo, i.e. "based on experience, [schools] 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."¹⁵

Given this data, it is possible that when the eventual pass rates for the twenty-one California schools are tallied for the 2018 graduates, ten of the twenty-one California schools may fail to reach the 75% threshold within the proposed two years. Given the wide variances in state cut scores, any revised standard should make allowances for states with higher than average cut scores.

Retain Provisions from the Current Standard 316

Rather than replacing the entire Standard 316 and ignoring the considerations that went into developing the current provisions, the Council should retain some of the provision from Standard 316(c), specifically sections (3), (4), (6), (7), and (8). These provisions provide guidance for the schools for enhancing bar performance and address some of the challenges and reality of bar passage.

- Standard 316 (c)(3) provides guidance for both the school and the Council to assess the actions taken by the school.
- Standard 316 (c)(4) ensures that graduates who do not pass are not abandoned by their school after failing the exam.

¹³ Legal Ed Standard 316 Memo, page 6.

¹⁴ Jeff Kerr, Bar Exam Analysis: Washington DC has the Lowest Bar Rate, California has the Most Failed Test Takers, Nov. 21, 2016, CaseFleet, <https://www.casefleet.com/blog/bar-exam-analysis-state-breakdown-pass-fail-rates>.

¹⁵ Legal Ed Standard 316 Memo, page 6.

- Standard 316 (c)(6) addresses the prevalent practice of top students transferring to another school after a successful first year.
- Standard 316 (c)(7) provides relief for schools that have endured natural disasters, such as recent hurricanes and fires.
- Standard 316 (c)(8) acknowledges the educational mission of the school.

Enforce Other Means of Ensuring a Sound Program of Education

The memo noted that Standard 316 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).”¹⁶ We agree and also suggest including Standards covering Learning Outcomes (302), Assessment of Student Learning (314), and Evaluation of Program of Legal Education (315) in the list to ensure a complete, quality legal education consistent with the intent of the accreditation standards and the expectations of potential students. Furthermore, we encourage the Council to assess, monitor, and actively enforce all of these Standards during accreditation visits.

The Validity of the Bar Exam and its Effect on Legal Education is Debated

Consistent with the ABA’s important work to promote the adoption of sound learning outcomes and assessment as part of a good legal education, the ABA’s Commission on the Future of Legal Education has also considered how law schools should respond to the dramatic changes anticipated in the legal profession in the next decade and beyond. This important conversation has not shied away from the elephant in the room: the need to assess whether the bar examination as a licensing tool is effectively measuring and keeping pace with the skills that lawyers will need to practice law today and in the future. Questions over the validity of the bar exam as a measure of good lawyering have been well studied for decades,¹⁷ and they assume increasing urgency today in light of the disparate impact of the bar exam on the diversity of the legal profession, as well as its effect to stall teaching innovation in the classroom as more law schools struggle to satisfy Standard 316, while largely emphasizing teaching to the exam.

* * *

In conclusion, we appreciate the memo and data provided by the Council in support of the revisions to Standard 316. But the data is incomplete and does not provide sufficient rationale for the revisions. Implementation of the proposed standard would provide a very uncertain future for schools with large populations of diverse students—especially the HBCUs and those schools in Puerto Rico and California. The proposed standard continues to threaten attempts to diversify law schools and ultimately the legal profession.

We ask that the Council continue with data collection and complete a full analysis of the impact of any changes to Standard 316 on diversity in the legal profession and the access to justice on the part of our diverse communities. At the same time, we urge the Council to ensure law school compliance with all accreditation standards to ensure that students receive a quality, sound legal education as envisioned by the standards. Finally, we ask that the Council engage in

¹⁶ Legal Ed Standard 316 Memo, page 2.

¹⁷ See, e.g., <https://diversity.ucdavis.edu/news/when-more-half-law-graduates-fail-california-bar-exam>.

conversations with appropriate entities to focus on other viable options for determining qualifications for the license to practice law, while ensuring increased diversity in the legal profession.

Thank you for this opportunity to comment on the Council's proposed revisions to Standard 316. Please feel free to contact Matthew Archer Beck, Chair, Council for Diversity in the Education Pipeline at archerbeckm@sec.gov or Pedro Windsor at pedro.windsor@americanbar.org should you have any questions or need further information from the Goal III entities.

Sincerely,



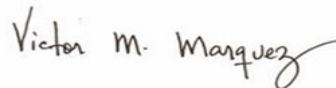
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