

ANALYSIS IN OPPOSITION TO HOUSE OF DELEGATES RESOLUTION 105, PROPOSED REVISION TO ABA STANDARD 316

EXECUTIVE SUMMARY

This white paper analyzes House of Delegates Resolution 105, by which the Council of the Section of Legal Education and Admissions to the Bar seeks House concurrence in a proposed revision to ABA Standard 316. This revision will, among other things, drastically reduce—from five years to two years—the period of time during which 75% of each law school’s bar examinees must pass a bar exam for the school to be in compliance. The Council has proposed the revision without any bona fide study of its consequences. Its adoption will be seriously detrimental to both legal education and the diversity of the legal profession. For a number of reasons as set forth in this white paper, the House should reject the Council’s unjustified attempt to turn back a standard that has served legal education for more than a decade. Here is a summary of the reasons, with white paper page numbers where more detailed information can be found:

- The Council’s proposal is identical to the one the House soundly rejected less than two years ago. (p.1)
- The Council gives no reason to resubmit its proposal and has failed to address the multitude of objections and concerns that the House and over one hundred law schools, educators, and legislators raised in 2017. (pp.3-10)
- The Council has provided no meaningful data supporting the change, or even the need for a change, from the current standard which was adopted after years of study, input, negotiation, and compromise amongst the schools and including consultations with the U.S. Department of Education. (pp.3-5)
- The Council’s Report in support of Resolution 105 misleadingly suggests that there is no opposition to it, when in fact the proposal was and is strongly opposed by law schools from all tiers, legal educators and educational associations, state and specialty bar associations, legislators including the Congressional Black Caucus, and even the ABA’s own Council for Racial and Ethnic Diversity in the Educational Pipeline. (p.1)
- The Council gave the law schools no notice that it was re-submitting the proposal for House reconsideration, and it failed to hold any public hearings, invite comment from the law schools, and consult with other stakeholders, contrary to the process it used in 2016-17 that led to House rejection. (pp.1-2)
- The proposed standard fails to recognize that the lack of consistency in bar examinations across 56 different jurisdictions weighs against a single bar-pass rate requirement. (pp.5-6)
- The Council has not studied how bar pass rates nationally have been affected by adoption of the Uniform Bar Examination for use in more than half of the states. (p.6)
- The proposed standard fails to take into account the stated missions of law schools in accreditation decisions and thus violates the Higher Education Act and its regulations. (p.10)
- The Council removed important procedural safeguards articulated in the current standard regarding the time for showing compliance, a particular problem because the Council has provided no transition plan for the application of the new version. (pp.10-11)

- The Council removed the first-time passage compliance alternative, by which a school currently complies if its first-time bar pass rate is within 15% of the state-wide pass rate average, but leaves in place a subjective and undefined admissions standard that schools not admit those who do not “appear capable” of being admitted to practice, which has been used as a de facto first-time bar passage determinant. (p.9)
- The Council’s adoption of the revised standard will *ex post facto* immediately place 19 law schools in danger of non-compliance based on 2015 graduate data, while at the same time removing protections that recognize the inconsistencies in bar exam administration and the differing missions of law schools that explain varying pass rates. Another 13 schools had 2015 ultimate pass rates below 80%, putting at least 32 schools in the danger zone for immediate non-compliance based on 2016 ultimate pass data. (p.5)
- The combined minority student enrollment for those 32 law schools represents over 31% of all minority law students in the United States. (p.5)
- The disparate impact on minority admissions will lead to a severe reduction of diversity in the legal profession, directly contrary to ABA Goal III which seeks to increase diversity. (p.4)

The following pages of this white paper provide detailed elaboration on these points, supported by citations to a vast amount of compiled data. We urge the House of Delegates to refuse to concur in Resolution 105 and, instead, do any or all of the following:

1. Ask the Council to withdraw Resolution 105;
2. Ask the Council to conduct more extensive study about the need for, efficacy of, and consequences of proposed changes to the bar pass standards, as the Council itself suggested in its Resolution 105 Report;
3. Create a diverse, collaborative task force of stakeholders consisting of at least the law schools, law teachers, state supreme courts, the Law School Admissions Council, the National Conference of Bar Examiners, the ABA Council for Racial and Ethnic Diversity in the Educational Pipeline, and the Council of the Section of Legal Education and Admissions to the Bar, to conduct a thorough, statistically valid study of the issues surrounding bar passage, including studying the bar exam as an appropriate measure of a law graduate’s preparation for law practice, perhaps similar to the ABA’s Task Force on the Future of Legal Education;
4. Vote to table Resolution 105 until item 3 is completed; or
5. Vote to reject Resolution 105.

Thank you for your consideration.

I. Introduction: The HOD Should Reject the Flawed Proposal from the Council of the Section of Legal Education

Resolution 105 seeks ABA House of Delegates (“House”) concurrence in a proposal by the Council of the Section of Legal Education and Admissions to the Bar (“Council”) to overturn current ABA bar passage Standard 316. This is the identical proposal the House of Delegates rejected in 2017.² The Council has resubmitted the proposal to the House despite having made no changes to it; having given no consideration to the concerns the House expressed in 2017; having ignored the substantial objections raised by a multitude of legal organizations, educational groups, law schools, legislators, and the ABA’s own Council for Racial and Ethnic Diversity in the Educational Pipeline (“Pipeline Council”); and having failed to give the law schools it regulates fair notice of resubmission to the House.

The current Standard, approved by the House in 2008, was the product of a long, well-considered process amongst many parties involved in legal education. Even a cursory review of the Council’s Report in Support of Resolution 105 (“Resolution Report” or “Resolution 105 Report”) shows how lacking it is in supporting resurrection of the flawed proposed changes that the House so resoundingly rejected less than two years ago.³ We urge the House to again reject the Council’s attempt to amend Standard 316 and refuse to concur in the Council’s action. We invite the House to ask the Council to withdraw the Resolution and undertake more study (as the Council’s Resolution Report says should be done)⁴ of the larger range of issues surrounding bar passage, and vote to table Resolution 105 until that study can be completed.

The Resolution Report also states “[a]t the time of this submission, the Council has not been notified by any ABA or other entity that it is opposed to this resolution.”⁵ This statement is misleading, because the Council provided no prior notice to the law schools or to any “ABA or other entities” that it was bringing Resolution 105 to the House at the January 2019 Mid-Year Meeting. The Council has held no public hearings on the matter since before the proposal was rejected by the House in February 2017. The Council has provided no opportunity for entities to comment on its currently proposed Standard 316 revision (Resolution 105) or accompanying Resolution Report. The only opportunity to comment on proposed changes to Standard 316 was provided during the summer of 2016. At that time, the comments submitted—both in writing and at the only public hearing in August 2016—overwhelmingly opposed the proposed change.⁶ Opposing groups were numerous, vocal, and varied, and included:

- ABA Council for Racial and Ethnic Diversity in the Educational Pipeline;⁷
- Members of the U.S. Congressional Black Caucus;⁸
- Congressman Henry Cueller, U.S. House of Representatives;⁹
- National Black Law Student Association;¹⁰
- Association of American Law Schools, signed by 94 law school deans, including the deans from Harvard, Yale, Columbia, Stanford, UC Berkeley, and NYU;¹¹
- Society of American Law Teachers (“SALT”);¹²
- Clinical Legal Education Association (“CLEA”);¹³
- The Deans of the Law Schools at Historically Black Colleges & Universities: University of District Columbia, North Carolina Central University, Florida A&M University, Thurgood Marshall School of Law, Howard University School of Law, and Southern University Law Center (“HCBU Deans”);¹⁴
- New York State Bar Association;¹⁵
- Southern University Board of Supervisors;¹⁶
- Hispanic Bar Association of Houston;¹⁷
- Mexican-American Bar Association of Texas;¹⁸
- A coalition comprising twenty Law School Deans and the National Bar Association, the Society of American Law Teachers, the East Bay La Raza Lawyers Association, and former California Supreme Court Justice Cruz Reynoso;¹⁹
- Law school deans, associate deans, and professors from Whittier Law School;²⁰ Tuoro Law Center;²¹ Texas Southern University;²² Loyola University New Orleans;²³ Western Michigan University Cooley Law School;²⁴ and La Verne College of Law.²⁵

All testimony at the August 6, 2016 hearing before the Council's Standards Review Committee opposed the proposed bar passage standard revision.²⁶ The same reasons for opposition were voiced on the floor during the resolution and debate session at the House meeting on February 6, 2017.²⁷

Of primary concern was the impact on diversity in the profession and access to justice, and the Council's failure to conduct an impact study of the proposed changes or provide any compelling data to support them. Additional significant concerns about the proposed change were:

- The impact of reducing from a 5-year to a 2-year period for compliance;²⁸
- The recent volatility of bar exam passage rates and the variance in scoring and bar exam cut scores across jurisdictions;²⁹
- That the revised standard would discourage law schools from their recent embrace of experiential learning and practice preparation;³⁰
- That the proposed change removes all the procedural protections for schools that fall below the 75% threshold for compliance;³¹ and
- Whether the bar exam should be such a singular focus for licensure in the first place.³²

Contrary to statements made in its Resolution 105 report, the Council has not adequately addressed the concerns expressed by the House when it rejected the Council's identical proposal in February 2017.

II. A Brief History of the Bar Passage Standard that the Counsel Unjustifiably Seeks To Overturn

In 2008, after a two-year, sometimes contentious, but ultimately valuable review process, the Council requested House concurrence on a new bar passage standard—today's current Standard 316. The Council's request then described extensive revisions of drafts, recounted considerable negotiations with the law schools, multiple hearings and opportunities for law schools to provide written comments, and also considerable consultation with the U.S. Department of Education at each stage of the drafting process.³³ The 2008 version of the Standard was considered by the Standards Review Committee over approximately two years and at six of its meetings. Back then, the Council issued at least three notice and comment opportunities before adoption.³⁴

Contrast that process with the process leading to Resolution 105. There has been no dialogue with the schools either before the 2017 submission to the House or before this submission. No comments have been solicited by the Council since before the 2017 submission, at which time the commentary was overwhelmingly opposed. The Council's Resolution Report states: "Council reaffirmed its approval at its meeting on September 13-15, 2018."³⁵ However, Standard 316 was not mentioned in February 2018, May 2018, August 2018, or September 2018 Council meeting minutes. The publicly available history shows that the Council deferred action on revised Standard 316 at its June 2017 meeting, that Managing Director Barry Currier provided the Council with a brief update on the collection of the voluntary bar outcomes survey at the August 2017 meeting, and the Council again deferred action on the matter at its November 2017 meeting.³⁶ The November 16, 2018 Council Meeting Agenda simply stated, "Council discussion of Standards for the 2018-2019 work agenda...Standard 316 Discussion."³⁷ A draft of the Council's memo was attached to the agenda. Nothing in either document included language to suggest the Council was sending proposed Standard 316 back to the House of Delegates in January 2019.³⁸ Since February 2017, the Council has also concentrated power in itself, eliminating both the Accreditation Committee and the Standards Review Committee in August 2018, with the concurrence of the House of Delegates.

Over the past ten-plus years, there have been several Council attempts to change the compromise that is the current Standard 316, all unsuccessful due to overwhelming and vocal opposition.

Current Standard 316 contains alternative ways for schools to demonstrate compliance³⁹ and specific procedural protections for schools that fall out of compliance.⁴⁰ Resolution 105 removes the alternative means for demonstrating compliance and eliminates the procedural protections that were included in the current standard as a result of negotiated and informed process. The Council's Resolution Report states:

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 its [sic] 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.⁴¹

The Resolution Report fails to include that under the current Standard, law schools can demonstrate compliance by any one of three alternative methods:

1. **Standard 316 (1)(i)** – in the 5 most recently completed calendar years, 75% or more of its graduates who sat for the bar exam passed
2. **Standard 316 (1)(ii)** – in at least 3 of the 5 most recently completed calendar years, 75% or more of its graduates who sat for the bar exam passed
3. **Standard 316 (2)** – in 3 or more of the 5 most recently completed calendar years, the school's annual first-time bar passage rate in the jurisdiction 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 those same jurisdictions.

In short, schools can currently show compliance by either demonstrating a 75% overall ultimate 5-year pass rate, achieving a 75% ultimate pass rate in 3 out of 5 years, or by the first-time method. Resolution 105 not only reduces the compliance period from 5 years to 2 years, but *also* removes the first-passage compliance option and the 3 out of 5 years option. The 3 out of 5 years option was a negotiated inclusion to help account for variances in state exam scoring or other circumstances outside the control of law schools.⁴² Further, Resolution 105 removes the procedural protections provided by current Standard 316(c).

III. The Council Has Failed to Address Broad-Based Concerns about Resolution 105

Resolution 105 Report states: “. . . *the solution is for law schools, state supreme courts, the bar examiner community, and the Council to work together to determine the cause(s) of the decline and take steps to address them.*”⁴³ The irony of this Council statement is that most opposition groups would welcome this approach, but the Council has done none of these things or even offered to do so. This is exactly what the House of Delegates asked the Council to do when it rejected this identical proposal in 2017, but it has not done. The proper course for the Council would be to undertake such a project—perhaps by creating a task force to study the matter—and then after a comprehensive analysis of the data, propose a change to the bar passage standard that reflects the findings, not before.

The Council lists the House concerns in its Resolution Report,⁴⁴ but the discussion below demonstrates that it has addressed none of those concerns.

- a. *“There was a concern that more information about how the revised Standard would impact particular law schools, specifically those in California, where the passing score (cut score) is comparatively high, and those law schools that are designated minority-serving institutions, particularly historically black colleges and universities (HBCU).*
- b. *There was a concern that the revised Standard could have a disproportionate impact on minority students and a desire for information on that topic.*

First, the Council undertook no studies and has produced no data to address these concerns, despite many requests to do so over the last decade. The Council publicly acknowledged this concern in the 2008 Resolution Report it submitted to the House of Delegates prior to its concurrence with the current bar passage standard.⁴⁵ It made a conclusory statement in its Resolution 105 Report: “[a]vailable data provide no support for a concern that the revisions

to Standard 316 will disproportionately impact minority students or applicants to law school,"⁴⁶ but it did not include any data or cite any source to support this conclusion. Publicly available data contradicts the Council's conclusory statement, as does its own 2008 Resolution Report, in which the Council discussed two studies showing lower bar passage rates for African-American takers in New York and nationally.⁴⁷ That the national average LSAT score is statistically significantly lower for students of color, compared to white students, is well-established.⁴⁸

Second, the proposed change conflicts with ABA Goal III⁴⁹ and is opposed by the ABA Council for Racial and Ethnic Diversity in the Educational Pipeline, one of the ABA groups charged with ensuring that Goal III is fulfilled.⁵⁰ The Chair of that body submitted six arguments opposing adoption of the amendment to the Council of the Section on Legal Education and Admissions to the Bar, all premised on the fact that this action is contrary to ABA Goal III. The proposed amendments will adversely impact efforts to diversify the profession. The Council of the Section on Legal Education and Admissions to the Bar even rejected, without comment, the Pipeline Council's request that the Legal Education's Council undertake an impact study on the proposal's effect on diversity in the profession and the educational pipeline.

Third, the strong opposition to this proposal among minority organizations was widespread and clearly articulated. The Council ignored that commentary. Similar opposition from these groups led to the withdrawal of a similar proposed amendment in 2013. Apparently, no consideration was given to either the current or the previous opposition, or to the record compiled in 2008 when the current standard was adopted.

The collective judgment of those committed to improving racial diversity in the legal profession is reflected in their unanimous opposition to this amendment, all to no avail. The Council ignored the House of Delegates' request to study this important issue and the fervent written and oral input that was presented to it in 2016, which primarily sought only modest requests for the development of data, study of possible consequences, and consideration of the impact on diversity. The Council's failure should not, in turn, be ignored by the House of Delegates. The proposed changes will most certainly have a disproportionately negative impact on minorities and law schools with large minority enrollment, the effect of which will be fewer minority admissions to law school.⁵¹

The only comprehensive, statistically valid, national longitudinal bar passage study ever conducted was completed by the LSAC in 1998 using students who entered law school in the fall of 1991.⁵² That study found that both first-time and ultimate bar passage rates for graduates of color was statistically significantly lower than that for white graduates. The study stated "[a]lthough the failure rate among black first-time takers makes the largest cell contribution to the overall chi-square statistic, the differences between pass rates for whites and pass rates for other ethnic groups are substantial. The relationship between ethnicity and pass or fail outcome remains statistically significant ($p < .001$) even when black examinees are excluded from the analysis."⁵³

Since that study was completed twenty years ago, there have been tremendous changes in the bar examination, national pass rates, and law school demographics. The changes in law school demographics from 1994 to 2017 are described in the table below.

Law School and Graduate Demographic Differences:⁵⁴

Race/Ethnicity	1991 Matriculant Bar Exam Takers in 1998 LSAC Study (1994 Graduates)	2017 ABA Law Schools J.D. Degrees Earned
White	19,285 (83.5%)	21,796 (62.3%)
Hispanics ⁵⁵	1,046 (4.5%)	3,940 (11.3%)
Black or African-American	1,368 (5.9%)	2,783 (8.0%)
All Others	1,387 (6.0%)	6,446 (18.4%)
TOTAL	23,086	34,965

Because of these changes, if an identical study were to be conducted today, the results would likely show an even wider gap between white and non-white bar passage rates. Based on the analysis in the LSAC study, the proposed change to Standard 316 would likely reduce the number of minority student admitted to law school.

During the 2016 notice and comment period, the Council was provided with several studies that showed the proposed change would have a disparate negative impact on minorities in California.⁵⁶

The concerns about the proposed change's impact on minorities in the educational pipeline require the House's further scrutiny in light of the Council's recent non-compliance actions against schools under Standard 501, which have greatly impacted law schools with significant minority enrollment. The Council's recent actions under Standard 501 have already had a demonstrable effect on minority law school admissions.⁵⁷ Schools that unquestionably comply with current Standard 316 have been found out of compliance with Standard 501's "appear capable of being admitted to the bar" language.⁵⁸

Based upon the ABA's 2015 ultimate bar passage data, there are 19 currently ABA-accredited schools that do not meet the proposed Standard. There are an additional 13 schools within five percentage points of not meeting the standard with an ultimate bar passage rate under 80%⁵⁹ that are now in the danger zone of non-compliance, especially in light of falling national first-time bar passage rates. **The combined minority student enrollment for these 32 law schools represents over 31% of all minority law students in the country.**⁶⁰ In 2018, these 32 law schools enrolled 26% of all African-American law students, 24% of all Hispanic law students and 30% of all Pacific Islanders enrolled in ABA-accredited law schools.⁶¹ The number of schools in the ultimate-pass danger zone is likely to increase for the 2016 graduate cohort, because of comparatively lower first-time 2016 bar results.⁶² Fifty-seven schools had 2016 first-time pass rates less than 65% and 95 schools had 2016 first-time pass rates less than 75%.

Based on this same 2015 data, the proposed standard would have an alarming effect on diversity within the state bar associations.⁶³

- Every ABA accredited law school in Puerto Rico is on the list of 32 schools in the compliance danger zone.
- The four California schools on this list enroll 23.5% of all African-American law students in California.
- The five Florida law schools on this list enroll 56% of all African-American law students in Florida, 37% of all Hispanic law students, 58% of all Native American law students, and 38% of all Asian law students in Florida.⁶⁴
- The Michigan school on this list enrolls 70% of all African-American law students in Michigan, 64% of students of 2 or More Races, 33% of all Hispanic law students, and 30% of all Asian law students in Michigan.⁶⁵
- The Louisiana school on this list enrolls 50% of all minority law students enrolled in Louisiana ABA-accredited law school. That school enrolls 68% of all African-American law students in Louisiana, and 48% of 2 or more races.
- The Georgia school on this list enrolls 26% of all minority law students enrolled in a Georgia ABA-accredited law school. That school enrolls 97% of all Pacific Islanders, 44% of all Native American law students, 37% of all African-American law students, and 24% of all Asian law students in Georgia.
- The two District of Columbia schools on this list enroll 42% of all minority law students enrolled in a DC ABA-accredited law school. Those two schools enroll 52% of all African-American law students, 57% of 2 or more races, and 43% of all Hispanic law students in DC.

Contrary to ABA Goal III, which seeks to increase diversity in the legal profession, the ABA's own annual data shows that Resolution 105 would likely have a devastating impact on minority law school enrollment nationally and in individual states, particularly the enrollment of Black or African-American students.

c. There was a concern that law schools in California retain a "relative" standard, in light of the high cut score in California and the California Supreme Court's unwillingness to lower it.

The Council undertook no study and has produced no data to address this concern. Unlike current Standard 316, the proposed changes fail to account for significant differences in state cut scores. The Council also failed to address the expressed concerns about bar examination changes and issues concerning the bar exam's effectiveness as a gateway to licensure.

Fundamentally, there is no such thing as "the" bar exam. The 56 different U.S. jurisdictions independently determine the requirements for licensure, and each jurisdiction's examination and scoring are unique. The Council recognized the problem with having a single bar passage measure for all law schools in its 2008 Resolution Report, stating:

“Each jurisdiction establishes its own benchmark for passage, with the requisite bar examination “cut” score varying widely among jurisdictions. Each jurisdiction also determines the components of the exam and how those components will be graded and how the scores will be combined for a final score. There is no standardized or national score for bar exam passage. As a result, for example, ***it would be problematic to require that schools with a large proportion of graduates taking the bar examination in a jurisdiction with a very high threshold for a passing score on the exam demonstrate the same passage rate as may be appropriate for schools whose graduates tend to take the bar examination in a jurisdiction with a relatively low threshold for passing.***”⁶⁶ (emphasis added)

Incredibly, the Council now asks the House to approve a standard that is exactly what it told the House in 2008 would be problematic—a single bar passage measure for all law schools.⁶⁷

The introduction of the Uniform Bar Examination (UBE) in 2011 has made an already inconsistent process even more so.⁶⁸ The table below shows the growth of jurisdictions that have adopted the UBE since the 1998 LSAC study.

	1991 Law School Matriculants (1994 1 st Bar Exam)	2012 Law School Matriculants (2015 1 st Bar Exam)	2014 Law School Matriculants (2017 1 st Bar Exam)	2017 Law School Matriculants (2020 1 st Bar Exam)
Bar Exam	No UBE	UBE in 7 Jurisdictions	UBE in 27 Jurisdictions	UBE in 34 Jurisdictions

Twenty-eight jurisdictions currently use the UBE, but only three did in 2011, and no states used it before that. From 2012-16, 14 additional jurisdictions implemented the UBE, another 14 added it between 2016 and 2018, and 6 more are slated to do so in 2019 and 2020. Thirty-four jurisdictions will utilize the UBE by the end 2020.

The most recent statistics from the National Conference on Bar Examiners show that from 2008 to 2017, the overall national average pass rate on state bar exams went down 12% and the first-time pass rate went down 10%.⁶⁹ Some states have decreased more than 20%, and one has even decreased 30%, since 2008.⁷⁰ It is interesting to note the significant decreases in pass rates for states that adopted the UBE. Review the table in Appendix A to see how your state’s rates have changed.

This shift to the UBE is a huge change. There are no national data to show the UBE’s effect on bar passage, particularly among minority takers. The effect of UBE adoption on pass rates has never been studied by the Council.⁷¹ With such volatility in bar examination content and scoring, the decrease in national bar passage rates, and no explanations for that decrease, proposing changes to Standard 316 before the impact of the UBE on first-time and ultimate bar passage has been studied is premature.

In addition, there are currently two ongoing national studies related to bar examinations that could shed light on some of these issues. AccessLex is conducting a 3-year study to explore of the impact of student engagement on bar passage.⁷² This study focuses on law schools with less than a 75% first-time bar passage rate in at least two of three calendar years prior to the study. The second study has been undertaken by the NCBE, which created a Testing Task Force to conduct a three-year study to ensure that the bar examination continues to test the knowledge, skills, and abilities required for competent entry-level legal practice in the 21st century.⁷³ For the Council to change the bar passage standard before the results of these two national studies are published and their impact on legal education is analyzed is premature.

d. There was a concern expressed by a few law schools about a perceived burden of gathering data under the revised Standard.

The Council produced some data on this issue, but their data is incomplete and did not take into account data to address this concern. Instead, it stated: “[a]dditionally, 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.”⁷⁴ The Council has provided the law schools with no information regarding any joint efforts of the ABA and NCBE in assisting school with collecting results. It has failed to identify a single example of improvement. The NCBE publishes no detailed data about law schools, bar results of minorities, or bar results by the profiles of the test-takers.

e. There were concerns that the case for changing the Standard had not been made.

The Council’s Resolution Report has offered either woefully inadequate support, or no support at all, for its explanations of why the change to the bar passage Standard is needed at this time. The Report also identifies several purported problems with the existing Standard (which was the result of months of discussion and negotiations): (1) lack of full reporting of outcomes, (2) an unnecessarily long review period, and (3) an ineffective first-time bar pass compliance option.⁷⁵ We address each of these specific explanations as well as their more generalized explanations in turn below.

- (1) *Lack of Full Reporting Outcomes:* The provisions of Current Standard 316 resulted from a compromise because of the dreadful state of comprehensive reporting of bar examination results by the 56 jurisdictions that administer them. While some aspects have improved, others have deteriorated, often due to concerns about examinee privacy. The reality is that the examination authorities do not keep track of ultimate bar results. The reporting burden is heavy, especially for law schools that have large portions of graduates taking bar exams outside the school’s home state. Nearly all of each law school’s graduates will take an examination in a handful of jurisdictions, the remaining 30% will be outside the school’s home state, thus the decision to create the 70% minimum reporting requirement of current Standard 316.

The Council offered the House only a single year’s worth of bar passage data (2015) to support a 100% reporting requirement, and even that data showed that bar passage information was missing for 2.5% of graduates. Several jurisdictions have withheld all bar results from law schools not located there, some jurisdictions release individual results to law schools only for their graduates who sign a voluntary release, and some jurisdictions have passed laws that prevent bar examiners from releasing results for privacy reasons.⁷⁶

The Council offers no specific reasons why the reporting change must be from 70% of graduates to 100% and not some other percentage between 70% and 100%.

- (2) *Unnecessarily Long Review Period:* The Council’s statement that five years is an “unnecessarily” long review period lacks both context and meaning. Perhaps most notable is the Council’s turnaround on this point. The Council’s 2008 submission to the House of Delegates urged using an ultimate pass rate that incorporated what it called a five-year look-back period to evaluate results, ostensibly to account for significant variation in annual first-time passage rates.⁷⁷ That period is now compressed to two years based on questionable reasoning and flawed data. Examining authorities control the frequency of examinations, the reported number of attempts in that jurisdiction, and whether an examinee must pass all or only a portion of the examination upon repeating.

There was no comprehensive study of the retaking practices of all graduates or whether the practices of any sub-sets of graduates might differ significantly from the overall practices. Specifically, the Council has not investigated whether the re-take behavior of minority graduates differs from that of white graduates, whether the re-take behavior of graduates who were first-generation college students differs from non-first-generation students, or whether the re-take behavior of graduates who worked full-time during law school differs from those who did not work or who worked only part-time. There is also a significant economic cost to re-taking the bar examination that affect some groups more than others, and that impact on re-taking behavior has never been studied. The schools with larger numbers of students in these sub-sets will accordingly be disproportionately affected.

By compressing the measuring time period from five years to two years, the proposed amendment puts schools with large numbers of graduates in states with low first-time passage rates in a rate deficit that leaves them too little time in which to reach the 75% ultimate passage rate. There is no indication that anything was done to get more complete bar passage information—not from the NCBE, from the 56 jurisdictions that offer bar examinations, from state supreme courts, or from the law schools.

In 2017, the data relied on by the Standards Review Committee regarding retakers and on persistence was incomplete at best.⁷⁸ Since the House rejected proposed Standard 316 in February 2017, the Council and Standards Review Committee seem to have relied on a sample of New York bar exam data from July 2006, July 2007, or NCBE data from July 2010, and July 2011.⁷⁹ Most of it was badly out of date, and it is incomplete because it included only July data and not February.⁸⁰ The Council's 2017 data also excluded a large percentage of takers—completely excluding the results from 14 states and all 5 U.S. territories.⁸¹

The data relied upon in 2017 was over five years old and was based on exams that took place before states implemented the Uniform Bar Examination (UBE).⁸² Twenty-eight jurisdictions (including D.C. and the U.S. Virgin Islands) currently use the UBE, but only three states did in 2011, and no states used it before that.⁸³ From 2012-16, 14 additional jurisdictions implemented the UBE, another 14 added it between 2016 and 2018, and 6 more are slated to do so in 2019 and 2020.

While use of this data is ill-advised, it actually confirms the large gap in African-American bar passage rates, which are lower than the pass rates for all takers, particularly on the multiple-choice test. The July 2011 data relied on by the Council shows that African-American takers passed the bar examination at a rate that was 6 percentage points lower than white takers. The data also showed that only 3.2% of white takers took the exam more than twice, whereas 14.1% of black takers took the exam more than twice. That data perhaps presages what the law schools will need to do to improve bar passage--deny admission--again contrary to American Bar Association diversity goals.

The Council offers some data it collected in a voluntary survey on 2013 and 2014 ultimate bar passage to show that it has studied the 2-year vs. 5-year reporting period. This data is *inadequate* to support the Council's conclusion because they collected no data by gender, race, or ethnicity, despite this information being readily available from the law schools. The 2013 and 2014 data is also *unreliable* because it was not peer reviewed, contained no statistical analysis (e.g. a correlation or other statistical analysis), the full data was not shared publicly, and the conclusions reached from sample collected were potentially *biased* due to the nature of the voluntary collection methodology. This is particularly concerning because the law schools were asked to participate in the Council's voluntary bar passage survey in the summer of 2017, a period of time in which the Council had issued a large number of adverse actions against law schools, which likely deterred schools with larger minority populations from responding to the survey for fear of reprisal. This potentially skewed the data collected to the extent that the conclusions reached can only fairly be applied to the law schools that participated in the survey and cannot be attributed to the schools that did not participate or to all ABA law schools combined.

Finally, since the House rejected this proposal in 2017, the Council made no effort to explore the five-year results for any graduate cohort, nor to add the ultimate results for the 2011 or 2012 cohorts. The Council has never annually collected five years worth of ultimate bar passage information from all law schools, so it has no points of comparison to the 2-year data from the one partial graduate cohort (2013) and one full graduate cohort it did collect (2015). No longitudinal trend analysis was completed, nor did the Council attempt to compare 2013 first-time to 2013 ultimate or 2015 first-time to 2015 ultimate.⁸⁴ It collected no bar passage data whatsoever by gender, race, or ethnicity, despite the law schools readily having this information.⁸⁵

The Resolution 105 Report also fails to articulate that, despite the House's rejection of these same changes in 2017, it has changed its annual data collection practices to mirror these desired and proposed changes and not those in current standard 316. Prior to 2017, the Council annually collected only first-time bar passage data from the law schools in its Annual Questionnaire (AQ) each October. Each school was required to report 70% of its first-time bar results for its graduates from the prior year, in order of the jurisdiction with the most takers and continuing with the next most, and the next, until the school reached the 70% threshold.⁸⁶ No ultimate results were reported in the AQ at all.

Bar passage was eliminated from the October 2017 AQ and collected in a new Bar Passage Questionnaire (BPQ) in February of 2018. The 2018 BPQ collected 2016 and 2017 first-time and 2015 ultimate bar passage data. Law schools were required to report ultimate results for those who graduated during calendar year 2015, and indicate the number who passed within one year after graduation and within two years after graduation. The

Council has never collected 5-year ultimate passage data in the BPQ. Moving the BPQ deadline also accelerated the 2-year compliance time period by eight months.

- (3) *Ineffective first-time bar pass compliance option:* No school has been found out of compliance with Standard 316.⁸⁷ Among the arguments submitted by the Council in its 2008 request for concurrence with current Standard 316 was the suitability of using a single measure to evaluate bar passage results, in which they stated that "passage of a bar examination is not a national or standardized measure. Each jurisdiction establishes its own benchmark for passage, with the requisite bar examination "cut" score varying widely among jurisdictions."⁸⁸

They continued at the time that "[t]here is no standardized or national score for bar passage. It would be problematic to require schools in a jurisdiction with high passing score requirements to meet the same passage requirement as schools with low passage requirements."⁸⁹ Contrary to this 2008 argument, the current proposed amendment requires exactly that which they said was problematic in 2008 – it uses only a single measure for every school.⁹⁰

The Council is now unhappy with the first-time bar passage standard compromise language that it engineered and that the House of Delegates concurred with in 2008. There is no legitimate case for a change, and first-time passage was not the subject of serious consideration by the Council. Whether or not the Council is correct or wrong, it could abolish the first-time bar passage option in Standard 316(a)(2) without making any changes to the ultimate passage standard in Standard 316(a)(1).

The truth is that the Council wants a first-time passage rate standard, but cannot figure out how to state it in an equitable way with 56 different jurisdiction examinations and while knowing of the achievement gap in first-time bar passage for graduates of color.⁹¹ Instead, the Council has, over the last three years, used admissions Standard 501 as an additional, unapproved first-time bar passage standard by finding schools out of compliance with Standard 501(b)'s "appear capable" language.⁹² The Resolution Report states that schools will continue to report first-time results even though they are eliminated from the proposed Standard.⁹³ If the current first-time measure is ineffective, the Council should admit that it is and thus should abandon its focus on first-time results under the bar passage standard *and* under Standard 501. By stating its concern but not having a replacement first-time standard directly on point, the Council compounds the problem and makes it even more difficult for law schools to know when they are in danger of non-compliance. Eliminating the first-time bar passage standard but still using an undefined first-time bar passage rate as a factor to determine accreditation compliance flies in the face of transparency and U.S. Department of Education Regulations. In a June 20, 2007 letter to the Council, the U.S. Department of Education admonished the Council for failing to comply with its Regulations, including its "failure to maintain effective controls against inconsistent application" of its Standards.⁹⁴

The Council also offered some other, more general explanations for its Resolution but again fails to provide any support for those explanations:

- (4) *Standard 316 aims to protect students and the public:* While this may be true, the Council states neither why the current Standard 316 fails to adequately protect students and the public nor how the proposed changes would provide better protection.⁹⁵ The Council states that the proposed standard neither aims to protect law schools nor to drive them from the market,⁹⁶ but it makes this statement without having studied the impact of such a change on diversity in the profession or the educational pipeline. The Council has already driven five law schools, most of which had significant minority enrollment, from the market.⁹⁷ In a January 14, 2019 Wall Street Journal article, ABA Managing Director Barry Currier stated: "[t]he Council can't just sit back and allow schools with a significant failure rate to continue to exist."⁹⁸

The Council has often cited consumer protection as its justification for Standards changes but has never provided any data to support specific claims to this end, such as the cost of legal education, student loan default, and lack of jobs.⁹⁹ In fact, all three of these claims can be debunked using publicly available data from the U.S. Department of Labor (lawyer unemployment), the U.S. Department of Education (student loan default rates), and the ABA's Required Disclosures web page (tuition and scholarship data).¹⁰⁰

- (5) *Bar passage is a fundamental outcome of a legal education program.* The Council states: “[w]hile 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.”¹⁰¹ Regardless of whether this statement even makes sense for all jurisdictions, the Council has failed to state why the current Standard’s first-time and ultimate bar passage rates are unacceptable for purposes of accreditation.¹⁰²
- (6) *Reasonable Outcomes Standard:* The Council states: “[w]hile 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.”¹⁰³ No opposition to the proposed change has stated that any law school should be exempted from a reasonable outcomes standard—the issue is not exemption, but the reasonableness of the standard. The Council has failed to state how the current Standard 316 is unreasonable or how it fails to adequately protect students and the public. The Council’s 2008 submission to the House also noted that schools have widely varying missions that impact the make-up of their enrollments, including the diversity of their student bodies.¹⁰⁴ It also stated: “... law schools often have widely varying missions, some serve specific populations and some appeal to students who bring certain life experiences and qualifications. The [Standard] should, therefore strive to assure consumer protection while taking these legal education factors into account.”¹⁰⁵ The proposed standard before the House no longer takes the mission of a law school or these other factors—including diversity—into account. The Council’s failure to take law school mission into account in accreditation matters would be a violation of the Higher Education Act, 20 U.S.C. § 1099b, and its implementing regulations, specifically 34 C.F.R. § 602.16-.18. The Council is aware of this requirement, having quoted the Regulation and discussed it in its 2008 Resolution Report:

In order to maintain this accrediting authority, the Section’s accreditation project must comply with recognition criteria established by DOE and contained in 34 CFR 602. Section 602.16 states:

“The agency [i.e. the ABA] must 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*, including, as appropriate, consideration of course completion, State licensing examination and job placement rates...” (Emphasis added.)¹⁰⁶

- (7) *Establishing a Minimally Acceptable Bar Exam Standard:* In support of Resolution 105, the Council states: “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.” Current Standard 316 was drafted and re-drafted multiple times after study, negotiation with stakeholders, extensive consultation with the U.S. Department of Education, and public comment, but Resolution 105 was not.¹⁰⁷ There has been no opportunity for comment since 2016, at which time there was overwhelming opposition to these changes during the Notice and Comment period and on the floor of the House of Delegates in 2017.¹⁰⁸ The Council has failed to state why the current standard is not “minimally acceptable.”

IV. Proposed Standard 316 is an Ex Post Facto Standard that will Immediately Place a Large Number of Law Schools out of Compliance Without any Protections or a Stated Transition Period in Which to Comply

Currently, no publicly available information shows that any ABA-accredited law school is out of compliance with Standard 316.¹⁰⁹ Should the House concur in Resolution 105, 19 law schools would be immediately out of compliance with the new standard based on 2015 graduate data.¹¹⁰ As many as 57 law schools could immediately be found out of compliance with the new Standard for 2016 graduates, due to comparatively lower first-time bar pass rates in 2016.¹¹¹ The Council has offered no statement on a timeline for implementing the new standard or any plan for a grace period or otherwise dealing with the immediate non-compliance issue.¹¹²

ABA Rule 16 sanctions could unfairly be imposed on any school that did not improve its ultimate bar passage rate to 75% within two years of Resolution 105 being implemented. This is problematic because changing any school's bar results by adjusting the admissions profile adjustment takes at least four years--longer for schools with significant part-time student populations.

Further, the current Standard provides schools procedural protections that the Council's proposed changes eliminate. In its Resolution 105 Report, the Council concludes that "Rule 13(c) provides for an extension for good cause shown. Current Standard 316(c) is, therefore, unnecessary and redundant." This statement fails to identify that eliminating Standard 316(c) discards important provisions that spell out the specific procedures, mitigating factors, and extension of time to come back into compliance for non-compliant law schools. The Council's Resolution Report states that its Rule 13(c) provides adequate protection for the law schools.¹¹³ It does not. Rule 13(b) states that the period of time to come back into compliance is two years.¹¹⁴ Rule 13(c) states simply that law schools can request an extension of the two-year period by showing good cause.¹¹⁵

Current Standard 316(c) provides law schools with specific factors the Council will consider in its decision to grant an extension of that two-year compliance period--factors were included in Standard 316 after many months of negotiation and compromise:

- a) 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.
- b) 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.
- c) 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.
- d) 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.
- e) 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.
- f) 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.
- g) 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).
- h) 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.¹¹⁶

The Council explained the rationale for including these factors in its 2008 Resolution Report,¹¹⁷ but now ask the House to agree to concur in completely eliminating all of these factors, leaving law schools at the mercy of the Council's secret process, and leaving a new standard void of factors the Council will consider in determining whether law schools can have more than two years to come into compliance. This is particularly alarming given the fact that (1) the Council's decisions are kept secret, so law schools have no means of determining what factors would support a favorable decision, and (2) the Council is not bound by precedent, so schools have no means of knowing whether Council decisions are consistent from school to school. The lack of an articulated grace period and the elimination of the Standard 316(c) time-extension good-cause factors make it difficult for schools to determine whether or not they would be granted additional time to bring themselves back into compliance. Further, both of these concerns lead to the potential for both abuse of discretion and arbitrary and capricious decision-making by the Council. The U.S. Department of Education

expressed similar concerns about the Council's unfair use of unarticulated and unpublished accreditation standards, in violation of their Regulations.¹¹⁸

V. CONCLUSION

The proposed changes to Standard 316 contemplated by Resolution 105 would overturn the thoughtful compromise worked out in 2008 and reinforced in 2013 during a previous period of reconsideration. The changes are unjustified in light of the very justifications the Council offered the House of Delegates in 2008 for the current Standard. The arguments made by the Council in its 2008 submission refute the premises now made in support of the proposed change. Essentially, the current Resolution 105 asks the House of Delegates to reverse its previous endorsement of that compromise. Since February 2017 when the House soundly rejected the Council's proposed changes to Standard 316, the Council has done nothing to address the substantive and procedural concerns raised by the House and the many interested organizations and individuals, including another section of the ABA, who were opposed to it. The House should refuse to concur in Resolution 105 and instead do any or all of the following:

6. Ask the Council to withdraw Resolution 105;
7. Ask the Council to conduct more extensive study about the need for, efficacy of, and consequences of proposed changes to the bar pass standards, as the Council itself suggested in Resolution 105 Report;
8. Create a diverse, collaborative task force of stakeholders consisting of at least the law schools, law teachers, state supreme courts, the Law School Admissions Council, the National Conference of Bar Examiners, the ABA Council for Racial and Ethnic Diversity in the Educational Pipeline, and the Council of the Section of Legal Education and Admissions to the Bar, to conduct a thorough, statistically valid study of the issues surrounding bar passage, including studying the bar exam as an appropriate measure of a law graduate's preparation for law practice, perhaps similar to the ABA's Task Force on the Future of Legal Education;
9. Vote to table Resolution 105 until item 3 is completed; or
10. Vote to reject Resolution 105.

REFERENCES

¹ The information in this paper was compiled from publicly available sources by Western Michigan University Thomas M. Cooley Law School on January 17, 2019.

² February 2017 Resolution 110B, available at:

<https://www.americanbar.org/content/dam/aba/images/abanews/2017%20Midyear%20Meeting%20Resolutions/110b.pdf> . *See also* https://www.americanbar.org/news/abanews/aba-news-archives/2017/02/bar_passage_proposal0/

³ *Id.*

⁴ Resolution Report, pp. 8-9.

⁵ Council Report in support of Resolution 105, at 13.

⁶ Council Memorandum from The Hon. Rebecca White Berch and Barry Currier, dated June 14, 2016, available at:

https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/20160614_notice_and_comment.pdf

⁷ Letter dated July 29, 2016, available at:

https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/comments/201607_comment_s316_aba_council_racial_ethnic_diversity_educational_pipeline.pdf

⁸ Letter dated October 18, 2016, available at:

https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/comments/20161018_comment_s316_congressional_black_caucus.pdf

⁹ Letter dated October 20, 2016, available at:

https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/comments/20161024_comment_s316_congressman_henry_cuellar.pdf

¹⁰ Undated letter, available at:

https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/comments/201607_comment_s316_national_black_law_students_association.pdf

¹¹ Letter dated January 13, 2017, available at: [http://www.cleaweb.org/resources/Documents/2017-01-13_AALS_Steering_Committee_Letter\[2\].pdf](http://www.cleaweb.org/resources/Documents/2017-01-13_AALS_Steering_Committee_Letter[2].pdf)

¹² Letter dated June 8, 2016, available at:

https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/comments/201607_comment_s316_salt.pdf

¹³ Comment dated July 27, 2016, available at:

https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/comments/201607_comment_s316_clea.pdf

¹⁴ Letter dated June 29, 2016, available at:

https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/comments/201607_comment_s316_hbcu_law_deans.pdf

¹⁵ Letter dated August 2, 2016, available at:

https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/comments/201607_comment_s316_new_york_state_bar_association.pdf

¹⁶ Resolution, dated July 29, 2016, available at:

https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/comments/201608_comment_s316_southern_university_board_supervisors.pdf

¹⁷ Letter dated October 7, 2016, available at:

https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/comments/20161011_comment_s316_hispanic_bar_association_houston.pdf

¹⁸ Letter dated October 7, 2016, available at:

https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/comments/20161011_comment_s316_mexican_american_bar_association_texas.pdf

¹⁹ Letter dated July 29, 2016, available at:

https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/comments/201607_comment_s316_concerned_law_schools_nba_salt_cruz_reynoso.pdf

Dean Signatories: St. Thomas University School of Law, Howard University School of Law, Thurgood Marshall School of Law of Texas Southern University, Southern University Law Center, University of the District of Columbia School of Law, North Carolina Central University School of Law, Florida A&M University College of Law, Loyola University New Orleans College of Law, Barry University School of Law, Widener University Delaware Law School, Golden Gate School of Law, Vermont Law School, Western State College of Law, Mississippi College School of Law, California Western School of Law, Whittier College School of Law, Touro Law Center, University of La Verne College of Law, Thomas Jefferson, Florida Coastal School of Law.

²⁰ Eight submissions dated between March 18 and July 24, 2016, available at:

https://www.americanbar.org/groups/legal_education/resources/notice_and_comment/notice_comment_archive/

²¹ Undated comment, available at:

https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/comments/201607_comment_s316_michael_lewyn.pdf

²² Letter dated October 3, 2016, available at:

https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/comments/20161006_comment_s316_lupe_s_salinas.pdf

²³ Letter dated July 29, 2016, available at:

https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/comments/201607_comment_s204_s303_s316_m_isabel_medina.pdf

²⁴ Letter dated July 25, 2016, available at:
https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/comments/201607_comment_s316_don_leduc.pdf

²⁵ Email dated July 23, 2016, available at:
https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/comments/201607_comment_s316_jendayi_saada.pdf

²⁶ Transcript of the hearing available at:
https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/comments/20160806_hearing_transcript.pdf

²⁷ See *supra*, note 1.

²⁸ Concerned Deans, HCBU Deans, SALT, Congressman Cueller, Dean Saada, Professor Patton, and Professor Salinas.

²⁹ Pipeline Council, Concerned Deans, HBCU Deans, SALT, Southern University Board of Governors, and Dean Saad.

³⁰ SALT and CLEA.

³¹ Concerned Deans.

³² CLEA, SALT, and Professor Patton

³³ 2008 Resolution Report, pp. 12-16.

³⁴ See 2008 Resolution Report 113, pp 12-15. The Council’s 2008 Report contained three pages describing the extensive steps taken by the Council and Standards Review Committee prior to brining the bar passage standard proposal to the House of Delegates.

³⁵ Resolution Report, page 1.

³⁶ See https://www.americanbar.org/groups/legal_education/about_us/leadership/council_meetings/.

³⁷ Council November 2018 Open Meeting Agenda, available at:
https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/nov18opensesion/18-nov-council-open-session-agenda.pdf

³⁸ See November 2018 Council Standard 316 Memo, available at:
https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/nov18opensesion/18-nov-316-memo.pdf

³⁹ Standard 316 (a).

⁴⁰ Standard 316 (c).

⁴¹ Resolution Report, page 2.

⁴² E.g., the State of Michigan significantly changed its scoring on the July 2012 bar exam, causing the sate pass rate to drop from pass percentages in the mid-80s to the mid-60s.

⁴³ *Id.*, at 8, 9.

⁴⁴ *Id.*, at 4.

⁴⁵ February 2008 Resolution Report 113, at 15, which states: “The other major concern raised in the comments was the effect that the bright line (“up or down”) test may have on diversity in the legal profession and on the willingness of schools to recruit and enroll minority students.”

⁴⁶ *Id.*, at 6.

⁴⁷ 2008 Resolution Report 113, at 15-16, in which the Council discussed the 2006 study by the new York State Board of Law Examiners and the 1998 LSAC National Longitudinal Bar Passage Study.

⁴⁸ See discussion of national average LSAT scores in Appendix C.

⁴⁹ https://www.americanbar.org/about_the_aba/aba-mission-goals/.

⁵⁰ https://www.americanbar.org/groups/diversity/diversity_pipeline/.

⁵¹ The disparate negative impact on minority law school enrollment is already evident in the ABA’s own public data on J.D. enrollment. This issue is discussed in detail in a separate paper on this issue, available on request.

⁵² LINDA F. WIGHTMAN, LAW SCH. ADMISSION COUNCIL, LSAC LONGITUDINAL BAR PASSAGE STUDY, 1998.

⁵³ *Id.* at 28.

⁵⁴ WIGHTMAN at 27, and <http://www.abarequireddisclosures.org/>

⁵⁵ Data shown is combined 1998 LSAC study total for Hispanics, Mexican-American, and Puerto Rican, because IPEDS and ABA now report these groups together as “Hispanics of Any Race.”

⁵⁶ See Patton, *supra* note 16.

⁵⁷ See *supra* Appendix B.

⁵⁸ See *id.*

⁵⁹ See *supra*, Appendix D.

⁶⁰ 2018 ABA Standard 509 Reports. In 2018, there were 203 law schools, these 32 schools comprise 15.8% of the total.

⁶¹ See 2018 JD enrollment spreadsheet, downloadable from <http://www.abarequireddisclosures.org/>.

⁶² 2018 ABA Bar Passage Outcomes Report, available at https://www.americanbar.org/groups/legal_education/resources/statistics/.

⁶³ *Id.*

⁶⁴ Number does not include WMU-Cooley Law School, which has a campus in Florida.

⁶⁵ Number includes students enrolled at WMU-Cooley’s Florida campus.

⁶⁶ 2008 Resolution Report, at 5.

⁶⁷ The Council’s November 2018 memo even described the proposal standard as “binary.” Revisions to Standard 316: Bar Passage, at 7, available at: https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/nov18opensesion/18-nov-316-memo.pdf

⁶⁸ Even the UBE is not always uniform, in that state examiners have the option on the Multistate Essay Examination portion of the UBE of choosing between grading essay questions based on common law or the state law of that jurisdiction, and grading the MEE is done by the jurisdiction, not the NCBE. See MEE taker instructions, available at: <http://www.ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F25>.

⁶⁹ See 2017 NCBE Bar Exam Statistics, pp. 24-27, available at: <http://www.ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F218>; and NCBE 2018 Bar Admission Guide, available at: <http://www.ncbex.org/publications/bar-admissions-guide/>; and <http://www.ncbex.org/exams/ube/https://>; and chart at en.wikipedia.org/wiki/Uniform_Bar_Examination#cite_note-39.

⁷⁰ *Id.*

⁷¹ See Resolution Report, which lacks any mention of the UBE.

⁷² <http://lsse.indiana.edu/accesslexlsse-bar-exam-success-initiative/>.

⁷³ <https://www.testingtaskforce.org/>

⁷⁴ Resolution Report, at 5.

⁷⁵ *Id.*, at 8.

⁷⁶ California withheld 2016 and 2017 individual bar exam results from law schools due to new privacy laws, which have since been amended. Bar examiners are at the mercy of state legislation.

⁷⁷ 2008 Resolution Report, at 6.

⁷⁸ See Resolution Report 110B, pp. 1-3, which discussed data from New York and the WIGHTMAN study.

⁷⁹ See *id.*, at 4. The 2015 NYSBLE Report is available at: http://www.nycourts.gov/ip/bar-exam/pdf/FINAL%20REPORT_DRAFT_April_28.pdf, but Appendix 14, the data on cumulative bar passage, is missing and the link to that Appendix is broken.

⁸⁰ See NYSBLE Report and NCBE data discussed at the March 11, 2016 ABA Council Meeting Agenda, which is no longer posted on the website. Spreadsheet available upon request.

⁸¹ See *id.*

⁸² See Resolution Report 110B, pp. 3-4.

⁸³ See Note 61.

⁸⁴ Resolution Report, pp. 7-8.

⁸⁵ *Id.*

⁸⁶ The AQ instructions were explicit on this, and contrary to statements of some commentators, schools could not achieve a higher bar passage rate by “cherry-picking” what results it reported. The 2016 AQ collected first-time bar results for 2015 graduates.

⁸⁷ See Appendix B, *supra*, compiled from information located at: https://www.americanbar.org/groups/legal_education/news_announcements/

⁸⁸ Report on House of Delegates Resolution 113, February 2008, at 5, available at: https://taxprof.typepad.com/taxprof_blog/files/113.pdf

⁸⁹ *Id.*

⁹⁰ Resolution Report, pp. 2-4.

⁹¹ See findings of WIGHTMAN, *supra*. See also *infra* Explanation (7), p.9. The Council’s 2008 Resolution Report refers to the Wightman study on page 16.

⁹² See Council findings from 20014 to present at https://www.americanbar.org/groups/legal_education/accreditation/accreditation_archives/

⁹³ Resolution Report, at 1.

⁹⁴ June 20, 2017 Letter from U.S. Secretary of Education, Margaret Spellings, pp 1-3, available at: https://s3.amazonaws.com/new-america-composer/attachments_archive/Spellings_ABA_letter_06_20_07.pdf, and the U.S.D.O.E. 2006 Staff Report to NACIQI identified additional transparency-related problems, pp.3-4, available at: https://s3.amazonaws.com/new-america-composer/attachments_archive/12%2006%20DoED%20Staff%20Analysis%20pp%201-4.pdf

⁹⁵ *Id.*, at 5.

⁹⁶ *Id.*

⁹⁷ Closed: Arizona Summit Law School (, Charlotte Law School, Savannah Law School, Valparaiso Law School, Whittier Law School.

⁹⁸ <https://www.wsj.com/articles/new-test-for-law-schools-do-enough-graduates-pass-the-bar-11547391600>

⁹⁹ See, e.g., <https://www.ft.com/content/8afeb534-c925-11e7-ab18-7a9fb7d6163e>

¹⁰⁰ See Appendix E, which uses data from the following sources: U.S. Department of Labor, Bureau of Labor Statistics (lawyer unemployment) <https://www.bls.gov/cps/>, The U.S Department of Education (student loan default rates) https://nslds.ed.gov/nslds/nslds_SA/defaultmanagement/cohortdata_3yr.cfm, and the ABA’s Required Disclosures web page (tuition and scholarship data) <http://www.abarequireddisclosures.org/>.

¹⁰¹ Resolution Report, at 5.

¹⁰² For example, graduates of Wisconsin law schools do not need to take a bar examination for licensure in that state.

¹⁰³ *Id.*

¹⁰⁴ 2008 Resolution Report 113, at 5.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*, at 4.

¹⁰⁷ 2008 Resolution Report, pp.12-18.

¹⁰⁸ See *supra* detailed discussion, pp.1-4.

¹⁰⁹ See Note 71.

¹¹⁰ 2018 ABA Bar Passage Outcomes Report, available at https://www.americanbar.org/groups/legal_education/resources/statistics/.

¹¹¹ See *Id.* The number could fall in the danger zone of non-compliance with the proposed Standard could potentially be higher: 57 schools had 2016 first-time pass rates less than 65%; 95 schools had 2016 first-time pass rates less than 75%.

¹¹² See Resolution Report, which includes no discussion on this issue.

¹¹³ Resolution Report, at 2, 8.

¹¹⁴ This 2-year compliance timeframe is established by 34 C.F.R. § 602.20.

¹¹⁵ ABA Standards and Rules of Procedure for Approval of Law Schools 2018-19, Rule 13.

¹¹⁶ *Id.*, Standard 316(c).

¹¹⁷ 2008 Resolution Report, pp 11-12.

¹¹⁸ See *supra*, note 91.

APPENDIX A: NCBE 10-year average bar pass rates 2008-2017¹

Jurisdiction*	Bar Result	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	Change 2008 to 2017	Date State Exam Changed to UBE
Alabama	Overall	67%	65%	67%	65%	64%	64%	62%	54%	53%	52%	-15%	2011 July
	First-Time	79%	77%	78%	77%	76%	78%	79%	71%	70%	70%	-9%	
Alaska	Overall	70%	58%	71%	59%	67%	66%	66%	62%	61%	53%	-17%	2014 July
	First-Time	80%	72%	81%	71%	78%	80%	78%	76%	71%	62%	-18%	
Arizona	Overall	76%	73%	73%	70%	75%	73%	67%	57%	51%	50%	-26%	2012 July
	First-Time	84%	80%	81%	76%	80%	78%	73%	66%	63%	64%	-20%	
Arkansas	Overall	72%	67%	65%	71%	68%	65%	63%	65%	57%	63%	-9%	
	First-Time	83%	74%	72%	84%	76%	76%	76%	77%	69%	77%	-6%	
California	Overall	54%	49%	49%	51%	51%	51%	47%	44%	40%	44%	-10%	
	First-Time	71%	66%	65%	67%	65%	65%	60%	57%	54%	58%	-13%	
Colorado	Overall	73%	74%	74%	79%	77%	76%	74%	69%	69%	69%	-4%	2012 February
	First-Time	83%	85%	83%	86%	84%	82%	78%	76%	76%	75%	-8%	
Connecticut	Overall	78%	75%	71%	71%	73%	73%	75%	72%	67%	64%	-14%	2017 February
	First-Time	87%	83%	81%	82%	82%	81%	86%	82%	77%	76%	-11%	
Delaware	Overall	73%	63%	66%	67%	63%	72%	63%	66%	66%	69%	-4%	
	First-Time	80%	71%	72%	73%	69%	78%	69%	73%	69%	76%	-4%	
District of Columbia	Overall	56%	49%	41%	48%	51%	47%	40%	42%	57%	64%	8%	2016 July
	First-Time	70%	65%	60%	69%	68%	61%	57%	55%	68%	70%	0%	
Florida	Overall	71%	68%	69%	72%	71%	70%	65%	59%	54%	55%	-16%	
	First-Time	81%	78%	78%	80%	79%	78%	72%	68%	66%	68%	-13%	
Georgia	Overall	79%	76%	75%	76%	75%	76%	71%	64%	62%	58%	-21%	
	First-Time	89%	86%	84%	85%	84%	85%	80%	76%	71%	72%	-17%	
Hawaii	Overall	76%	76%	68%	75%	68%	73%	67%	66%	71%	68%	-8%	
	First-Time	88%	86%	77%	83%	75%	81%	74%	76%	79%	76%	-12%	
Idaho	Overall	72%	81%	78%	79%	80%	79%	68%	69%	72%	74%	2%	2012 February
	First-Time	80%	86%	83%	85%	86%	83%	73%	72%	79%	79%	-1%	
Illinois	Overall	85%	84%	84%	83%	81%	82%	79%	74%	69%	69%	-16%	Will be 2019 July
	First-Time	91%	91%	89%	89%	87%	88%	85%	80%	77%	79%	-12%	
Indiana	Overall	78%	75%	75%	74%	72%	74%	69%	71%	61%	61%	-17%	
	First-Time	84%	83%	81%	83%	79%	83%	79%	79%	70%	73%	-11%	
Iowa	Overall	85%	88%	87%	84%	88%	88%	83%	82%	68%	78%	-7%	2016 February
	First-Time	90%	93%	91%	90%	92%	93%	84%	89%	74%	86%	-4%	
Kansas	Overall	86%	82%	84%	86%	84%	85%	82%	78%	72%	75%	-11%	2016 February
	First-Time	89%	86%	90%	89%	89%	89%	86%	82%	77%	82%	-7%	

¹ See 2017 NCBE Bar Exam Statistics, pp. 24-27, available at: <http://www.ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F218>; and NCBE 2018 Bar Admission Guide, available at: <http://www.ncbex.org/publications/bar-admissions-guide/>; and <http://www.ncbex.org/exams/ube/https://>; and chart at: http://en.wikipedia.org/wiki/Uniform_Bar_Examination#cite_note-39.

Kentucky	Overall	77%	77%	77%	80%	76%	75%	76%	71%	70%	61%	-16%	
	First-Time	83%	86%	82%	86%	82%	81%	81%	76%	74%	69%	-14%	
Louisiana	Overall	62%	69%	61%	66%	59%	50%	62%	63%	65%	68%	6%	
	First-Time	66%	72%	65%	70%	63%	58%	69%	68%	72%	77%	11%	
Maine	Overall	86%	77%	88%	68%	68%	76%	71%	61%	68%	63%	-23%	2017 July
	First-Time	91%	82%	89%	73%	73%	81%	76%	69%	76%	74%	-17%	
Maryland	Overall	75%	69%	71%	74%	71%	73%	69%	58%	60%	55%	-20%	Will be 2019 July
	First-Time	85%	78%	80%	81%	78%	80%	76%	65%	70%	66%	-19%	
Massachusetts	Overall	80%	79%	81%	80%	77%	78%	73%	68%	65%	64%	-16%	2018 July
	First-Time	89%	87%	88%	87%	83%	85%	81%	77%	76%	77%	-12%	
Michigan	Overall	72%	81%	80%	76%	58%	62%	64%	61%	65%	64%	-8%	
	First-Time	82%	89%	85%	82%	64%	69%	72%	72%	75%	75%	-7%	
Minnesota	Overall	87%	85%	86%	88%	85%	85%	79%	73%	71%	68%	-19%	2014 February
	First-Time	91%	90%	92%	93%	91%	90%	84%	81%	79%	80%	-11%	
Mississippi	Overall	82%	78%	76%	73%	73%	77%	79%	75%	69%	52%	-30%	
	First-Time	88%	85%	80%	81%	81%	85%	87%	84%	75%	64%	-24%	
Missouri	Overall	87%	87%	86%	89%	89%	87%	84%	83%	78%	79%	-8%	2011 February
	First-Time	91%	91%	90%	93%	92%	90%	87%	87%	83%	86%	-5%	
Montana	Overall	91%	87%	89%	90%	91%	85%	65%	66%	74%	77%	-14%	2013 July
	First-Time	92%	89%	93%	91%	93%	89%	70%	70%	80%	83%	-9%	
Nebraska	Overall	84%	78%	81%	78%	73%	74%	70%	76%	77%	74%	-10%	2012 February
	First-Time	89%	88%	90%	83%	83%	77%	77%	82%	83%	82%	-7%	
Nevada	Overall	64%	60%	59%	65%	64%	61%	57%	60%	52%	59%	-5%	
	First-Time	77%	73%	73%	76%	73%	73%	68%	71%	60%	71%	-6%	
New Hampshire	Overall	88%	84%	80%	78%	82%	71%	81%	67%	68%	68%	-20%	2014 February
	First-Time	88%	85%	82%	81%	84%	75%	86%	70%	72%	75%	-13%	
New Jersey	Overall	77%	77%	76%	77%	71%	75%	71%	65%	58%	58%	-19%	2017 February
	First-Time	85%	84%	82%	84%	78%	79%	76%	71%	67%	70%	-15%	
New Mexico	Overall	85%	84%	81%	82%	84%	83%	83%	75%	66%	77%	-8%	2016 February
	First-Time	92%	91%	88%	88%	89%	91%	88%	82%	73%	86%	-6%	
New York	Overall	69%	65%	65%	64%	61%	64%	60%	56%	57%	61%	-8%	2016 July
	First-Time	81%	77%	76%	76%	74%	76%	73%	68%	71%	76%	-5%	
North Carolina	Overall	71%	67%	68%	70%	65%	59%	60%	53%	52%	52%	-19%	2019 February
	First-Time	83%	77%	78%	80%	75%	69%	69%	65%	62%	65%	-18%	
North Dakota	Overall	77%	80%	78%	83%	78%	72%	63%	64%	58%	54%	-23%	2011 February
	First-Time	85%	87%	84%	85%	81%	80%	65%	80%	73%	71%	-14%	
Ohio	Overall	79%	76%	78%	79%	76%	79%	73%	71%	67%	65%	-14%	Will be 2020 July
	First-Time	88%	86%	86%	86%	84%	86%	81%	78%	75%	75%	-13%	
Oklahoma	Overall	89%	80%	82%	83%	80%	81%	76%	68%	68%	81%	-8%	
	First-Time	93%	87%	89%	88%	84%	86%	84%	75%	77%	87%	-6%	

Oregon	Overall	71%	69%	68%	68%	72%	73%	65%	61%	58%	75%	4%	2017 July
	First-Time	78%	77%	75%	78%	81%	80%	73%	68%	64%	82%	4%	
Pennsylvania	Overall	77%	76%	74%	77%	73%	73%	71%	66%	66%	68%	-9%	
	First-Time	87%	86%	83%	85%	82%	81%	81%	77%	75%	80%	-7%	
Rhode Island	Overall	75%	74%	74%	69%	78%	71%	73%	63%	58%	58%	-17%	2019 February
	First-Time	79%	78%	79%	74%	83%	76%	77%	69%	65%	65%	-14%	
South Carolina	Overall	75%	72%	73%	73%	67%	75%	68%	69%	63%	65%	-10%	2017 February
	First-Time	82%	78%	80%	77%	73%	79%	73%	73%	71%	72%	-10%	
South Dakota	Overall	88%	83%	94%	94%	83%	87%	72%	56%	50%	58%	-30%	
	First-Time	95%	90%	99%	94%	86%	91%	75%	70%	55%	68%	-27%	
Tennessee	Overall	76%	68%	70%	69%	68%	73%	66%	61%	59%	60%	-16%	2019 February
	First-Time	83%	77%	79%	77%	73%	82%	72%	72%	72%	74%	-9%	
Texas	Overall	78%	78%	76%	80%	75%	80%	70%	65%	66%	65%	-13%	
	First-Time	84%	85%	83%	86%	82%	85%	77%	71%	75%	75%	-9%	
Utah	Overall	83%	83%	82%	84%	77%	82%	80%	76%	71%	76%	-7%	2013 February
	First-Time	87%	89%	89%	88%	82%	87%	87%	79%	78%	83%	-4%	
Vermont	Overall	65%	61%	76%	68%	65%	76%	67%	50%	65%	59%	-6%	2016 July
	First-Time	79%	68%	87%	71%	69%	83%	75%	57%	68%	69%	-10%	
Virginia	Overall	73%	69%	70%	72%	69%	71%	66%	68%	68%	66%	-7%	
	First-Time	82%	76%	77%	79%	77%	77%	72%	74%	75%	76%	-6%	
Washington	Overall	73%	67%	71%	66%	64%	76%	76%	73%	67%	68%	-5%	2013 July
	First-Time	74%	69%	70%	67%	66%	82%	80%	79%	74%	74%	0%	
West Virginia	Overall	67%	73%	65%	74%	72%	68%	73%	68%	63%	65%	-2%	2017 July
	First-Time	79%	81%	75%	83%	82%	76%	82%	78%	73%	75%	-4%	
Wisconsin	Overall	89%	89%	90%	84%	83%	83%	74%	68%	61%	69%	-20%	
	First-Time	92%	93%	92%	88%	86%	88%	81%	77%	70%	77%	-15%	
Wyoming	Overall	64%	75%	71%	62%	53%	81%	72%	74%	70%	63%	-1%	2013 July
	First-Time	67%	79%	75%	62%	60%	84%	78%	77%	72%	73%	6%	
Guam	Overall	75%	52%	80%	67%	57%	63%	68%	50%	58%	72%	-3%	
	First-Time	73%	60%	90%	81%	60%	64%	77%	56%	83%	85%	12%	
N. Mariana Islands	Overall	83%	100%	63%	83%	100%	92%	88%	100%	100%	67%	-16%	
	First-Time	83%	100%	57%	100%	100%	92%	88%	100%	100%	67%	-16%	
Palau	Overall	67%	17%	57%	25%	30%	63%	18%	8%	0%	10%	-57%	
	First-Time	50%	17%	67%	0%	38%	67%	15%	20%	0%	25%	-25%	
Puerto Rico	Overall	44%	41%	42%	44%	36%	40%	39%	34%	36%	35%	-9%	
	First-Time	52%	48%	50%	50%	45%	45%	45%	38%	39%	40%	-12%	
Virgin Islands	Overall	76%	65%	71%	49%	64%	61%	73%	74%	58%	50%	-26%	2017 July
	First-Time	84%	70%	77%	52%	70%	70%	77%	76%	57%	52%	-32%	
AVERAGES	Overall	71%	68%	68%	69%	67%	68%	64%	59%	58%	59%	-12%	
	First-Time	82%	79%	79%	79%	77%	78%	74%	70%	69%	72%	-10%	

Appendix B: List of Schools found Out of Compliance with Standard 501¹

Count	Law School
1	Appalachian-2017
2	Arizona Summit (closing)-2017
3	Atlanta's John Marshall-2017
4	Ave Maria-2016
5	Charlotte School of Law (closed)-2016
6	Lincoln Memorial University-Duncan School of Law-2018
7	Florida Coastal-2017
8	Golden Gate-2018
9	North Carolina Central University-2018
10	Texas Southern-2017
11	Thomas Jefferson-2017
12	University of Puerto Rico-2018
13	Valparaiso (closing)-2016
14	Western Michigan University-2017

¹ ABA Council public notice of adverse actions, available at: https://www.americanbar.org/groups/legal_education/news_announcements/ and https://www.americanbar.org/groups/legal_education/news_announcements/Archive/

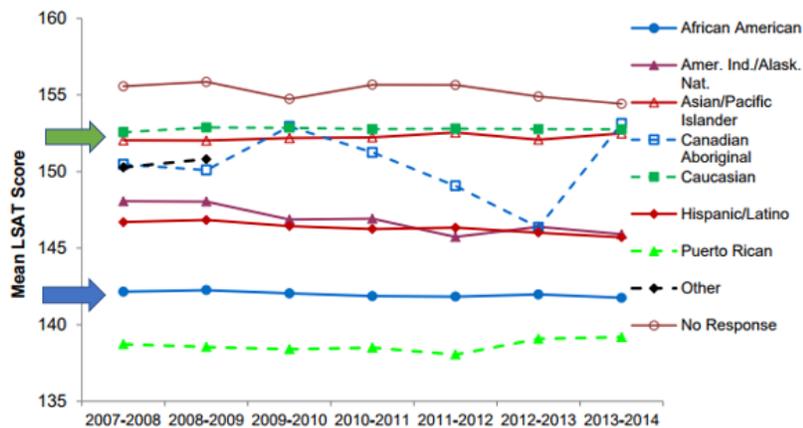
Appendix C: LSAT SCORES FOR WHITE VS MINORITY STUDENTS¹

The House of Delegates of the American Bar Association in 2008 adopted four goals that continue in place today: Goal I: Serve Our Members; Goal II: Improve Our Profession; **Goal III: Eliminate Bias and Enhance Diversity**; and Goal IV: Advance the Rule of Law. The Commitment of America’s lawyers, expressed by their largest member organization, is undeniable.

The ABA Section of Legal Education and Admission to the Bar considers itself to be in “the forefront of encouraging diversity in legal education through the law school accreditation process and through Section-sponsored programs and initiatives,” according to the Section’s Diversity Plan. The ABA Council’s Standard 206 supports diversity and inclusion and “requires law schools to demonstrate, by concrete action, a commitment to 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 and a faculty that are diverse with respect to gender, race, and ethnicity.”

Any attempt to limit access according to LSAT scores or lower entering credentials is not consistent with a commitment to diversity and inclusion. The data is clear that the LSAT is a barrier to admissions, made evident by its differential impact on minorities and by the racial make-up of the student body at every accredited law school.

African American LSAT scores have been 10 – 11 points lower than Caucasian LSAT scores for decades. The Law Studies Admission Council (LSAC) released its report in October 2014 entitled *LSAT Performance with Regional, Gender, and Racial/Ethnic Breakdowns: 2007–2008 Through 2013–2014 Testing Years*. The report included the following chart, visually illustrating the disparity between Caucasian test-takers (green) and African American test-takers (blue).



Former ABA President, Paulette Brown (2015-16) led the ABA’s Diversity and Inclusion 360 Commission in its one-year inquiry into how to develop sustainable action plans that would advance diversity and inclusion in the legal profession, the judicial system and the ABA itself. She said, “I have grown weary of discussing statistics that have not changed in decades and of wondering why strategies used have not caused our profession to be fully inclusive of everyone without regard to race, national origin, ethnicity, sex, religion, age, disability, sexual orientation, gender identity, gender expression, marital status, or socioeconomic status. My impatience and the growing disenchantment among young people and people of color about the fairness of our justice system were an impetus to act.” (Diversity and Inclusion 360 Commission website)

For the years 2009-2013, the average mean score on the LSAT for Caucasian test takers was 152.8. For Black/African American test takers it was 141.9. LSAC’s table showing the mean LSAT score by testing year is below:²

¹ The Law Studies Admission Council (LSAC) Report: *LSAT Performance with Regional, Gender, and Racial/Ethnic Breakdowns: 2007–2008 Through 2013–2014 Testing Years* (2014).

² *Law School Admission Council LSAT Technical Report 14-02*, October 2014, *LSAT Performance With Regional, Gender, and Racial/Ethnic Breakdowns: 2007–2008 Through 2013–2014 Testing Years*, Susan P. Dalessandro, Lisa C. Anthony, and Lynda M. Reese, at p.42.

TABLE 4B
 Number of test takers and means and standard deviations (SDs) of LSAT scores by race/ethnicity and testing year, 2009–2010 through 2013–2014

Race/Ethnicity	2009–10	2010–11	2011–12	2012–13	2013–14
American Indian/Alaskan Native					
<i>N</i>	636	589	475	413	333
Mean	146.87	146.92	145.73	146.4	145.91
<i>SD</i>	9.05	8.94	9.2	9.4	10.03
Asian					
<i>N</i>	10,749	9,260	7,522	6,414	6,147
Mean	152.37	152.36	152.67	152.21	152.63
<i>SD</i>	10.74	10.42	10.52	10.59	10.84
Black/African American					
<i>N</i>	14,618	13,524	11,473	9,839	9,273
Mean	142.05	141.87	141.83	141.98	141.76
<i>SD</i>	8.74	8.64	8.68	8.6	8.97
Canadian Aboriginal					
<i>N</i>	50	34	17	25	20
Mean	152.94	151.25	149.06	146.36	153.13
<i>SD</i>	10.03	8.73	9.99	11.6	8.12
Native Hawaiian/Other Pacific Islander					
<i>N</i>	341	155	147	133	111
Mean	146.44	144.86	146.28	145.93	144.71
<i>SD</i>	9.28	9.36	9.6	9.15	10.32
Hispanic/Latino					
<i>N</i>	9,296	8,179	7,236	6,611	6,225
Mean	146.44	146.25	146.34	146.01	145.71
<i>SD</i>	9.65	9.28	9.26	9.07	9.44
Puerto Rican					
<i>N</i>	2,353	2,080	1,865	1,519	1,279
Mean	138.4	138.51	138.05	139.07	139.19
<i>SD</i>	9.93	10.05	9.68	9.61	9.69
White/Caucasian					
<i>N</i>	80,108	69,321	57,149	47,819	42,064
Mean	152.86	152.77	152.8	152.77	152.75
<i>SD</i>	9.33	9.17	9.27	9.06	9.39
Multiple Ethnicities					
<i>N</i>	5,476	6,839	6,498	5,825	5,936
Mean	150.81	149.97	149.66	149.69	149.47
<i>SD</i>	10.08	9.92	9.89	9.66	10.13
No Response					
<i>N</i>	3,283	2,308	1,440	1,151	2,271
Mean	154.73	155.67	155.65	154.89	154.42
<i>SD</i>	10.11	9.36	9.5	9.7	9.69

Note: The 420 test takers who took the Spanish LSAT in Puerto Rico in February 2014 are not included in this table. Results presented in this table may differ from results in previous reports, since test takers who received an accommodation of extra testing time are included in all years of this table.

Appendix D: Law Schools with <80% 2015 Ultimate Pass Rate¹

Count	SCHOOL	State	% Passed
1	TOURO COLLEGE	NY	79.12%
2	LA VERNE, UNIVERSITY OF	CA	78.95%
3	ST. THOMAS UNIVERSITY (FLORIDA)	FL	78.57%
4	CHARLESTON SCHOOL OF LAW	NC	78.42%
5	APPALACHIAN SCHOOL OF LAW	VA	78.33%
6	FLORIDA A&M UNIVERSITY	FL	78.33%
7	PUERTO RICO, UNIVERSITY OF	PR	77.58%
8	DAYTON, UNIVERSITY OF	OH	77.27%
9	MISSISSIPPI COLLEGE	MS	77.19%
10	SOUTHERN UNIVERSITY	LA	76.76%
11	THOMAS JEFFERSON SCHOOL OF LAW	CA	76.75%
12	AVE MARIA SCHOOL OF LAW	FL	75.90%
13	DUQUESNE UNIVERSITY	PA	75.54%
14	AMERICAN UNIVERSITY	DC	74.94%
15	WHITTIER LAW SCHOOL	CA	74.26%
16	BARRY UNIVERSITY	FL	73.50%
17	NORTH DAKOTA, UNIVERSITY OF	ND	73.21%
18	HOWARD UNIVERSITY	DC	72.88%
19	SOUTH DAKOTA, UNIVERSITY OF	SD	72.73%
20	GOLDEN GATE UNIVERSITY	CA	72.26%
21	FLORIDA COASTAL SCHOOL OF LAW	FL	72.08%
22	OHIO NORTHERN UNIVERSITY	OH	71.88%
23	SYRACUSE UNIVERSITY	NY	71.20%
24	WESTERN MICHIGAN UNIVERSITY	MI	69.75%
25	VALPARAISO UNIVERSITY	IN	69.35%
26	WYOMING, UNIVERSITY OF	WY	68.92%
27	ATLANTA'S JOHN MARSHALL LAW SCHOOL	GA	67.50%
28	DISTRICT OF COLUMBIA, UNIVERSITY OF	DC	64.71%
29	INTER AMERICAN UNIVERSITY OF PUERTO RICO	PR	63.87%
30	PONTIFICAL CATHOLIC UNIVERSITY OF P.R.	PR	60.73%
31	NEW ENGLAND LAW BOSTON	MA	60.26%
31	ARIZONA SUMMIT LAW SCHOOL	AZ	59.75%

¹ 2018 ABA Bar Passage Outcomes Report, 2015 Ultimate Bar Passage spreadsheet, available at https://www.americanbar.org/groups/legal_education/resources/statistics/.

APPENDIX E: GENERAL CONSUMER PROTECTION CLAIMS

CLAIM 1: Law Graduates Can't Repay Their Loans

THE FACTS:

The U.S. Department of Education (USDOE) calculates student loan default rates for all schools. The most recent three years' worth of default rates are publicly available on their website. Here are some facts about the most recent USDOE default rates from 9/26/2018:

- Most recently available cohort default rate is for fiscal year 2015 ("FY 2015"), and the national average default rate for all schools is 10.8%.
- The Fiscal Year 2015 national federal student loan cohort default rate ("CDR") decreased by 6.1 percent compared to the FY 2014 national rate, from 11.5 percent to **10.8 percent**. The FY 2015 CDR represents *the lowest national cohort default rate since the three-year rate was first released in 2012*.

(SOURCE: <https://www.ed.gov/news/press-releases/national-student-loan-cohort-default-rate-falls>)

- ABA collects the cohort default rates ONLY from independent schools not affiliated with a university. It does not have data on the default rates for all ABA-accredited law schools. The Council has never explained why it does not collect student loan default information from all law schools.
- The USDOE default rate website is searchable by keyword, using "law" as the search criteria, there are 22 that ABA-Accredited law schools for which the USDOE calculated a student loan default rate. No law school has a USDOE default rate greater than the national average of 10.8%. 21 of 22 schools have default rates of 3.1% or lower.

LAW SCHOOL	FY2015
SOUTHWESTERN LAW SCHOOL	0.2%
JOHN MARSHALL LAW SCHOOL (THE)	1.7%
MITCHELL HAMLINE SCHOOL OF LAW	1.3%
BROOKLYN LAW SCHOOL	0.8%
NEW YORK LAW SCHOOL	3.0%
ALBANY LAW SCHOOL OF UNION UNIVERSITY	0.4%
UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW	1.2%
SOUTH TEXAS COLLEGE OF LAW HOUSTON	0.8%
NEW ENGLAND LAW BOSTON	2.9%
THOMAS JEFFERSON SCHOOL OF LAW	3.1%
VERMONT LAW SCHOOL	1.8%
THOMAS M. COOLEY LAW SCHOOL	2.5%
CALIFORNIA WESTERN SCHOOL OF LAW	1.0%
ATLANTA'S JOHN MARSHALL LAW SCHOOL	2.2%
CUNY SCHOOL OF LAW '(THE)'	2.1%
FLORIDA COASTAL SCHOOL OF LAW	2.5%
APPALACHIAN SCHOOL OF LAW	0.8%
AVE MARIA SCHOOL OF LAW	1.9%
CHARLESTON SCHOOL OF LAW	1.0%
ARIZONA SUMMIT LAW SCHOOL	1.2%
INTER AMERICAN UNIVERSITY OF PUERTO RICO - SCHOOL OF LAW	9.2%
MICHIGAN STATE UNIVERISTY COLLEGE OF LAW	1.8%

(Source: https://nslds.ed.gov/nslds/nslds_SA/defaultmanagement/cohortdata_3yr.cfm, using "law" as the sole word in the School name search box.)

CLAIM 2. Law Graduates Can't Find Jobs

THE FACTS:

The U.S. Department of Labor collects national unemployment data, quarterly, for all professions through its Current Population Survey (CPS).

- **The 2018 BLS national annual unemployment rate for lawyers was 0.9%.**

(Source: Table 3. Employed and experienced unemployed persons by detailed occupation and class of worker, Annual Average 2018 (Source: Current Population Survey), page 10, table available on request from BLS).

The ABA and NALP also collect employment data on recent graduates, and this data is publicly available. ABA data shows the following:

- 90.9% of 2017 grads (with known employment status) who sought jobs were employed within ten months of graduation.
- 85.8% of 2017 grads (with known employment status) who sought jobs were employed in full-time positions.
- 82.6% of 2017 grads (with known employment status) who sought jobs were employed in full-time, long-term positions.

(Source: <http://abarequireddisclosures.org/EmploymentOutcomes.aspx> for class of 2017, the most recently collected year.)

- NALP reported 2017 graduate employment rate as 88.6% the best since the recession, with its Executive Director, James G. Leipold, stating “[t]he employment outcomes findings for members of the Class of 2017 are surprisingly strong. Most notable is a bar passage required employment rate that jumped more than four percentage points from the previous year, and a private practice employment rate that has now increased for six years in a row.”

(Source: <https://www.nalp.org/uploads/SelectedFindingsPressReleaseClassof2017.pdf>)

CLAIM 3. Tuition is Expensive

THE FACTS:

Legal education is expensive, but the Council and the U.S. Department of Education do not regulate law school or general education expenses. The Council has no standards or interpretations regarding the cost of legal education. Nor has it ever engaged in comparisons to other types of professional education, such as medical, dental, or veterinary education.

The reality is that a school's "sticker price" rarely reflects the true picture of educational expense at any school. Tuition subsidization is a practice known by many names, but by far those most common is tuition discounting. Discounting is a key method by which schools attract students and compete with one another for those students during the admissions process. The schools may characterize these discounts as grants or scholarships. Virtually all schools offer scholarships, and some may provide discounts to nearly their full student body.

Tuition and scholarship data is collected each year by the ABA, though the ABA changed how it collects tuition information in 2018, making a longitudinal apples-to-apples comparison difficult. Tuition discounting has increased enormously during the past six or so years. Adjusting for both discounting and for grants and scholarships, many schools charge students less today than they did in 2010. For the 2017-18 academic year:

- 71% of law students received scholarship grants
- 43% of law students received scholarships of half tuition or greater.
- 38% of law students received scholarships of less than half tuition.

(Source: <http://www.abarequireddisclosures.org/Disclosure509.aspx>, 2013-2018 tuition and grants and scholarships spreadsheets)

Despite legal education being expensive, the low rate of student loan default for law graduates (see Claim 1 above) is evidence that this is not, overall, a significant consumer protection issue.