



FROM: Kyle McEntee, Executive Director; David Frakt, Chair, LST's National Advisory Council

TO: Council of the ABA Section on Legal Education and Admissions to the Bar

RE: Comments on Proposed Revisions to Standards 316 and 501

We write in support of the proposed revision to Standards 316 and 501. The proposed revision to Standard 316 significantly simplifies and strengthens the current standard, closing several of the loopholes available under the current standard and its interpretations. The proposed revision to Standard 501 creates a meaningful, objective check on law school admissions and retention policies. Together these revisions will significantly improve the state of legal education.

Overview

Perhaps the most significant problem with legal education today is the exploitative, financially-driven admission and retention policies currently practiced at many law schools. In October 2015, we released an investigation into these practices that clearly articulated the extent of the problem. Many accredited law schools are currently matriculating large numbers of students with very poor prospects for passing the bar based on predictive, statistically-significant indicators (LSAT and UGPA). After our thorough investigation, we determined that the majority of these schools are doing so with little or no concern for any negative repercussions from the ABA.

In addition, many schools are retaining law students with poor prospects of passing the bar, as demonstrated by their academic performance in law school, allowing them to complete their studies and earn their degree, only to then fail the bar examination repeatedly. The admission and retention of students with poor aptitude for the study of law has resulted in plummeting bar passage rates at law schools nationwide, particularly among the least selective law schools. The trend is all but certain to significantly worsen this year and the next, with subsequent years remaining low until schools change their admission and retention policies.

In response to this trend and need, LST called for the ABA Section of Legal Education and Admissions to the Bar to tighten and more strictly enforce both Standard 316 and Standard 501, particularly 501(b), which states "A law school shall not admit an applicant who does not appear capable of satisfactorily completing its program of legal education and being admitted to the bar."

These standards are designed to complement one another. Standard 501 is a consumer protection rule designed to ensure that law schools do not admit students unless they have reasonable prospects of becoming licensed attorneys. Standard 316 is a consumer protection measure designed to ensure that law schools adequately prepare students for entry into the legal profession by imparting the substantive knowledge and analytical skills required to pass a bar examination. Standard 316 is based on a theory that a school's bar passage rate reflects, in part, the quality of the educational program of the school. Given that the overwhelming majority of students who attend law school do so with the goal of being admitted to the bar, it is reasonable for the accrediting agency to use bar passage rates to measure the degree of the school's success in meeting the educational and

professional goals of its students. That the ABA adopted these standards in the first place demonstrates astute foresight.

Assuming that a law school only admitted students with reasonable capacity to complete law school and pass the bar, it would be eminently reasonable to expect a substantial majority of the students who completed the J.D. to pass the bar examination in their first couple of attempts. Data show that the number of examinees passing the bar after two years is vanishingly small. According to the LSAC National Longitudinal Bar Passage Study, 99.9% of people who pass the bar exam have done so by the fourth attempt. After three attempts, the figure is 99.3%. Allowing up to ten attempts is unreasonably generous. Requiring 75% of graduates taking the bar to pass it within two years would be a very modest and easily achievable requirement for any school that complies in good faith with Standard 501.

The problem with the current Standard 501 is not the theory it rests on, but the implementation. In part this stems from the challenge the ABA faces in applying an objective standard. But the lack of enforcement has led to readily apparent abuse. Indeed, by all appearances, acknowledging we are not privy to private accreditation matters, the ABA has simply not enforced ABA Standard 501 at all. This perception, whether true or false, weakens the public's perception of the ABA, legal education, and the legal profession. The ABA cannot allow long-term damage to any of these institutions. Not revising and judiciously enforcing these two standards risks even more evaporation of public trust, which jeopardizes the rule of law and initiatives to expand access to justice. After all, these initiatives usually depend on public funding.

Given the challenges of applying an objective standard from the text of Standard 501, the ABA has chosen to focus on bar passage rates to determine 501 compliance. But Standard 316 has proven to be a completely ineffective mechanism for controlling admissions practices. It has also proven to be ineffective as a way to keep bar passage rates at reasonable levels; indeed, pass rates at many schools have plummeted to appallingly low levels while the schools have remained in technical compliance with the standard. For these reasons, it has become clear that both 316 and 501 need to be revised.

The Current Standard 316

We start with a discussion of several of the problems with the current version of Standard 316 and note how the proposed revision would address these problems.

In our report, *The State of Legal Education 2015*,¹ we noted several problems with Standard 316 as currently written and enforced, concluding, “The current ABA standard allows very low performing law schools to remain in compliance, potentially allowing law schools to engage in exploitative admission and retention practices.” The report identified several loopholes in the current standard:

Loophole 1: Schools can cherry pick the bar passage rate data reported for accreditation purposes. Under both Standard 316 tests, a school must report bar passage results from as many jurisdictions as necessary to account for at least 70% of its graduates, starting with the jurisdiction in which the highest number of graduates took the bar exam and proceeding in descending order of frequency. However, once 70% is achieved, a school may choose to report (or not report) any state-by-state

¹ <http://www.lawschooltransparency.com/reform/projects/investigations/2015/>

outcomes it wants. That is not what the ABA instructs schools to do during its data policy trainings, but reasonable daylight exists for schools to manipulate.

The result: A school can report a higher first-time or cumulative bar passage rate than it knows its graduates achieved.

The proposed standard will eliminate this loophole.

Loophole 2: Staying within 15% of the statewide average is not a meaningful signal of success when the state average drops due to lower admission standards across the board. Consider the example of Southern University Law Center. For 2013, the school's first-time pass rate in Louisiana was 46.6%, 12.1% less than the state's first-time pass rate of 58.7%. Under the current standard, SULC exceeds the minimum standard even though less than half of its graduates passed the bar.

Result: A low-performing school remains in compliance because its peers also perform poorly.

The proposed standard eliminates this loophole.

Loophole 3: Even when other schools in the state don't significantly lower their standards, a low-performing school (especially one with a large graduating class) can skew the state-wide average such that the school ends up within 15% of the state average solely because so many of its own graduates failed the bar, as in the following hypothetical, but highly realistic example: There are three law schools in a state: A, B and C. School A has a first-time pass rate of 80% (80/100). School B also has a first-time pass rate of 80% (80/100). School C, which is twice the size of School A and B, has a first-time pass rate of 50% (100/200). The overall state pass rate is 65% (260/400). School C is within 15% of the state average and in compliance with Standard 316 despite being 30 percentage points lower than the other two schools.

Result: A low-performing school benefits from its own bar failures.

The proposed standard eliminates this loophole.

Loophole 4: There are 14 states that have only one ABA-approved law school. These schools will by definition always be able to meet the second test of being within 15% of the state average because there are no other schools to increase or decrease the state average. Imagine that a new law school opens in Alaska and has a first-time bar passage rate for its first three graduating classes of 30%, 25% and 20%, respectively. Assuming that over 70% of the school's graduates who took a bar took the Alaska bar (see *Loophole 1*) the school would seemingly be in compliance with Standard 316 without even reporting from any other jurisdiction, despite the abysmal and steadily decreasing performance of its graduates on the bar exam.

Result: Fourteen law schools are essentially exempt from enforcement of any minimum bar passage standard by virtue of being the only law school in a state.

The proposed standard eliminates this loophole.

Loophole 5: Law schools are permitted to exclude certain bar-takers when calculating the ultimate bar passage rate.² If a graduate fails the bar exam in July 2013, but does not take the bar exam again by July 2014, that graduate's failing performance will never count.

Result: Schools benefit from discouraged graduates or those that fail the bar exam and cannot afford to study full-time after the first failure.

The proposed standard eliminates this loophole.

Responding to the critics of revised Standard 316

Critics of the proposed standard are concerned that some law schools will not be able to comply with the standard if they continue their current admission practices. No doubt this is true. That's a feature, not a bug. Critics also worry that the revised standard will make diversifying our profession—an immensely important goal—more challenging. This is not true. If a school cannot attract diverse candidates who can pass the bar exam after up to four attempts, the school needs to attract stronger diverse applicants. If diverse candidates who would make competent attorneys cannot pass the bar exam as implemented today, we must collectively fight for fairer minimum passing scores or a more desirable examination. Either way this objection to the revised Standard 316 ignores reality: a large number of law school graduates from ABA-approved law schools will not pass the bar exam, yet still need to repay their debts and overcome the opportunity costs of taking three to five years out of the labor market. LST acknowledges that our profession has a diversity problem. LST also strongly supports the goal of increasing diversity in the legal profession. But admitting significant numbers of poorly prepared minority students into law school in the hope that a few will eventually become members of the bar is not an effective way of addressing the lack of diversity in the profession. The focus should be on substantially reducing the cost of acquiring a law degree and improving job placement outcomes to make law school a more attractive career option for the many high-achieving minority college graduates selecting against law school today.

75% within two years is not too rigorous a standard. In practice, what kind of first-time pass rate will be required to get to 75% within two years?

Based on our review of bar pass statistics, any school with a 60% or higher first-time rate should have no problem meeting the new standard. The pass rate for subsequent attempts is typically substantially lower than for first attempts, sometimes dropping by as much as half. Even using a very pessimistic scenario of a 50% drop in the pass rate for each successive attempt, a school with a 60% initial pass rate would still be able to make the 75% rate within four exam administrations, as illustrated by the following hypothetical example. *Law School A has a graduating class of 100, all of whom take the bar exam. Assume that 60% pass the first time (60/100). If the forty graduates who failed take the exam over, and have a pass rate of 30% (half the passing rate for first-time takers) the second time, another dozen will pass (12/40). If the 28 remaining repeat failers take the exam again a third time and pass at a 15% rate, another four will pass, for a total of 76 passers. Of course, some graduates are likely to give up after two failures. But if even 20 persist to take the exam a third time and 15% pass (3/20), that will yield 75 passers (60 + 12 + 3 = 75) by the third administration. If Law School A's graduates still fell short after three examinations, the school*

² ABA Standards and Rules of Procedure For Approval of Law Schools, http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2014_2015_aba_standards_and_rules_of_procedure_for_approval_of_law_schools_bookmarked.authcheckdam.pdf (page 197)

would have one more administration of the examination for its students to reach the required 75% mark. Even with a dismal 7.5% pass rate for the fourth attempt, if 12 or more students take the exam again, one is likely to pass.

Comments on Proposed Standard 501

Standard 501 exists to ensure schools do not exploit students who do not have a reasonable chance of earning a degree and law license merely because they can pay tuition. Unfortunately, due to the vagueness of the current standard, the ABA has not prevented law schools from engaging in exploitative admissions practices as applications have declined in recent years. LST's 2015 *State of Legal Education* report chronicled the alarming drop in admissions standards at many law schools during the period 2010-2014. In the report we called upon the ABA to vigorously enforce Standard 501. The proposed changes to this rule should make it easier to do so, and we therefore support the proposed revisions.

Standard 501(a). The requirement to that schools “adopt, publish, and adhere to” sound admissions policies and practices is an improvement. According to the memo inviting notice and comment on this proposed language, the “changes clarify that a law school must make available to a site team and to the Accreditation Committee, its admission policies and practices and that they be consistent with the Standards, including the Standard regarding the admission of qualified applicants.” The simple act of forcing law schools to actually put their admissions policies in writing has the potential to go a long way towards curbing abuses in admissions. We are hopeful that the awareness that admission policies may have to be defended not only to the ABA and internally, but also in potential lawsuits, will force law schools currently engaging in exploitative admissions to reconsider the wisdom of these practices. Although this language is a significant step, we could encourage the ABA to go even further. As an organization dedicated to promoting transparency in law school operations, **we would recommend that the ABA require law schools to make their written admission policies and practices public.**

Revised Interpretation 501-1. The addition of the language “Compliance with Standard 316 is not alone sufficient to comply with the Standard” is an enormously important and welcome clarification. It is also a tacit acknowledgment of the widespread understanding that the ABA heretofore would not closely scrutinize admission practices so long as a school was meeting the minimum bar passage rates set forth in Standard 316. Given the long lag time between admission to law school and bar results, this language is a meaningful improvement

New Interpretation 501-3. LST supports the new interpretation, which states: “A law school having a non-transfer attrition rate above 20% percent bears the burden of demonstrating that it is in compliance with the Standard.” Interpretation 501-1 already states that “the academic attrition rate of the law school’s students” is among the factors to be considered in assessing compliance with the standard on admissions, but placing the burden on law schools to explain a very high attrition rate is important. And by creating a rebuttable presumption, the ABA can account for justifiable variances.

Currently, attrition can be used by law schools to mask exploitative admission policies. A very high attrition rate is obviously one indicator that a law school may be admitting students without reasonable aptitude for the study of law. But just as important as the rate of attrition is the timing of attrition. Law students who lack the capacity and or motivation to succeed in law school should be identified as early as possible. Ideally, students with minimal likelihood of success should be

identified by their first semester grades. Students with very poor performance should be academically dismissed immediately. Students with marginal performance should be given one semester of academic probation, coupled with robust academic support, to determine if they can raise their performance to a level likely to result in bar passage. LST is concerned that some law schools may be using attrition in the third year of law school as a way of protecting their bar pass rates, after a student has made an enormous investment of time and money in pursuing a J.D. Attrition after the third semester should be very closely scrutinized by ABA site visitation teams to ensure that attrition policies are applied fairly. Importantly, the revisions to Standard 501 should limit the most flagrant abuses. However, the creation of the 20% rebuttable presumption runs the risk of creating an impression that any attrition level below 20% will be deemed acceptable by the ABA. LST recommends adding a sentence to the interpretation to the effect of “academic attrition rates below 20% may still be problematic and may trigger additional explanation if certain criteria, as determined by the staff of the Section of Legal Education, are met.”