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- SALT -

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January 25, 2014

Dean Emeritus Jeffrey E. Lewis
Chair, Standards Review Committee
St. Louis University School of Law
3700 Lindell Boulevard
St. Louis, MO 63108

RE: Proposed Standard 316—Bar Passage

Dear Dean Lewis:

We write on behalf of the Society of American Law Teachers (SALT) and the Clinical Legal Education Association (CLEA) to provide the Standards Review Committee (SRC) comments on proposed Standard 316 Bar Passage. We appreciate that the Committee is now proposing to retain the 75% pass rate, in view of the concerns we and others have expressed about the impact of the previous proposals on the diversity of law school student bodies and graduates. We think the new proposal is a major step in the right direction. However, we are concerned that requiring a school to meet the 75% rate in each and every law school graduating class (rather than for all graduates in the previous five years or for each graduating class in three of the previous five years, as in the current rule) may still have unintended and unknown consequences. We offer with this letter additional data that counsels against changing the reporting time frame without an evidence-based examination of the likely impact that the proposed changes would have on racial and ethnic diversity in the legal profession. Imposing the 75% pass requirement on every graduating class without such a study is ill-advised. We also offer this information as additional support for rejecting the 80% pass rate requirement previously proposed.

The attached five-year study, compiled by a SALT member before the release of the most recent draft of Standard 316, uses National Conference of Bar Examiners (NCBE) data to document significant differences in first-time pass rates from one jurisdiction to the next that would make it fundamentally unfair to increase the ultimate pass rate requirement from 75% to 80% and suggests the risks of requiring schools to meet the 75% target for each graduating class. These differences are due in part to the existence of 13 different cut scores for passing the exam (ranging from 128 to 144), five different formulas for weighting the Multistate Bar Exam (MBE) component versus the state component, and the fact that 19 jurisdictions do not include a separate state component at all. The net result is a wide range of first-time annual pass rates, with significant numbers of jurisdictions having pass rates of less than 80%, many less than 75%.

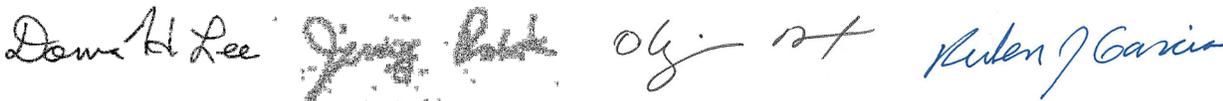
For example, in 2012, the most recent year for which NCBE data is available, 21 jurisdictions had annual first-time pass rates of less than 80%. The average pass rate among these 21 jurisdictions was just 73%. Nine of these 21 states had individual pass rates of less than 75%, with five having pass rates less than 70%,¹ which has implications for requiring the 75% pass rate for each graduating class. The numbers gain even greater significance when viewed cumulatively. Over the five years studied, 25 jurisdictions had first-time annual pass rates of less than 80% in at least one year; 20 jurisdictions fell below the 80% mark in multiple years; 15 fell below that mark in three or more years; and 6 fell below that mark in all five years. Thirteen jurisdictions fell below the 75% mark in at least one year; eleven did so in two, three, or four of those years. Six jurisdictions fell below 70% in at least one year; four of them in two or three years.

Raising the ultimate pass rate requirement from 75% to 80%, when so many jurisdictions have first-time pass rates substantially below the 80% mark would unfairly penalize schools whose graduates sit for the exam in these lower pass rate jurisdictions. Moreover, first-time pass rates have changed dramatically over the past five years. During this period, the number of states with annual first-time pass rates below 80% has nearly *tripled*, from just 8 states in 2008 to 21 states in 2012. At the same time, the number of states with annual first-time pass rates of 85% or higher has decreased by fully half, from 28 states in 2008 to just 14 in 2012.

It is our understanding that the National Bar Association has submitted a detailed analysis of the purported data justifications for proposed standard 316, concluding that law schools that currently graduate relatively large numbers of students of color would be disparately impacted by proposed standard 316. This study persuasively demonstrates why an impact study is so critical before the SRC moves forward.

This data and its implications argue strongly for some flexibility in the number of graduating classes that must achieve whatever ultimate pass rate mark the SRC decides to recommend. These issues require more study, including an evidence-based examination of the likely impact any new proposal would have on racial and ethnic diversity in the legal profession and, relatedly, legal education.

Sincerely,



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¹ The states with the noted pass rates are California (71%), Delaware (69%), Louisiana (64%), Maine (74%), Michigan (64%), Nevada (74%), South Carolina (73%), Washington (60%), and Wyoming (60%).

Analysis of the Differences in First-Time Bar Passage Rates (2008-2012)

1. The first-time bar passage rate playing field is too uneven from one jurisdiction to the next to fairly support an across-the-board increase of the ultimate pass rate requirement from 75% to 80%.
 - According to the National Conference of Bar Examiners Comprehensive Guide to Bar Admission Requirements 2013, thirteen different cut scores for bar passage, adjusted by the NCBE to a 200-point scale to permit valid comparisons, are used by different jurisdictions around the country. These range from a low of 128 to a high of 145.²
 - Five different formulas are used for weighting the MBE component vs. the state written component, ranging from 33% MBE/67% written component to 50% MBE /50% written component.³
 - Nineteen jurisdictions do not include a separate state component at all as part of the examination.⁴
 - As Table One, attached, shows, this results in a wide range of first-time annual pass rates from one jurisdiction to the next, with significant numbers of jurisdictions in a given year having pass rates of less than 80%.
 - For example, as Table One shows, in 2012, the most recent year for which NCBE data is available, 21 jurisdictions had first-time annual pass rates of less than 80%, ranging from 60-79%, with an average of just 73%. Cumulatively, as the footnotes in Table One show, for the five-year period of 2008-2012, 25 different jurisdictions had first-time annual pass rates of less than 80% in at least one year, 20 jurisdictions fell below the 80% mark in multiple years, 15 fell below that mark in three or more years, and 6 fell below that mark in all five years.
 - Raising the ultimate pass rate across-the-board from 75% to 80%, when many jurisdictions have first-time pass rates substantially below the 80% mark, will unfairly disadvantage the schools with graduates sitting for the bar in those jurisdictions.

2. A rigid and inflexible rule that every calendar-year cohort of graduates achieve an 80% ultimate pass rate is inconsistent with the dramatically changing nature of first-time pass rates around the country.

² See NCBE Comprehensive Guide 2013, Chart 9: Grading and Scoring, pp. 29-30.

³ NCBE Comprehensive Guide 2013, Chart 9: Grading and Scoring, pp. 29-30.

⁴ NCBE Comprehensive Guide 2013, Chart 8: Composition of the Examination, pp. 25-26.

- As Table One shows, the number of jurisdictions with annual first-time pass rates below 80% has nearly tripled between 2008 and 2012, from just 8 jurisdictions in 2008 to 21 in 2012.
- At the same time, the number of jurisdictions with annual first-time pass rates of 85% or greater has decreased by half, from 28 jurisdictions in 2008 to 14 in 2012.
- These changes coincide with the employment downturn experienced by lawyers during the same period of time, and cannot be explained by either changes in the credentials of the graduates sitting for the exam or changes in the cut scores for the exams.
- This data, and its implications, argue strongly for some flexibility in the number of graduating classes that must achieve whatever ultimate pass rate mark is recommended by the committee.
- Failing to make some adjustment in the number of graduating classes that must meet the required mark will unfairly advantage the schools in less challenging jurisdictions with pass rates that consistently equal or exceed 85%, and unfairly disadvantage schools in more challenging low-pass-rate jurisdictions.

**Table One – Jurisdictional Annual First-Time Pass Rates
(Graduates of ABA-Approved Law Schools 2008-2012)⁵**

Year	# < 80%	Range	Average	# = / > 85%	Range	Average
2008	8 ⁶	67-79%	74%	28 ⁷	85-95%	89%
2009	16 ⁸	68-79%	75%	28 ⁹	85-93%	88%
2010	15 ¹⁰	65-78%	74%	20 ¹¹	85-99%	89%

⁵ All data obtained from the National Conference of Bar Examiners Annual Bar Examination and Admission Statistics, found at: <http://www.ncbex.org/publications/statistics/>.

⁶ California (78%), District of Columbia (72%), Louisiana (67%), Nevada (77%), Oregon (79%), Washington (74%), West Virginia (79%), and Wyoming (67%).

⁷ Alabama (89%), Connecticut (88%), Georgia (89%), Hawaii (88%), Illinois (91%), Iowa (90%), Kansas (89%), Maine (91%), Maryland (86%), Massachusetts (92%), Minnesota (91%), Mississippi (88%), Missouri (92%), Montana (92%), Nebraska (89%), New Hampshire (88%), New Jersey (85%), New Mexico (92%), New York (89%), North Dakota (85%), Ohio (88%), Oklahoma (93%), Pennsylvania (87%), South Dakota (95%), Tennessee (88%), Texas (85%), Utah (87%), and Wisconsin (92%).

⁸ Alaska (73%), Arkansas (74%), California (73%), Delaware (71%), District of Columbia (68%), Florida (78%), Louisiana (74%), Maryland (78%), Nevada (73%), North Carolina (77%), Oregon (77%), South Carolina (78%), Vermont (73%), Virginia (77%), Washington (74%), and Wyoming (79%).

⁹ Alabama (87%), Colorado (86%), Connecticut (86%), Georgia (86%), Hawaii (86%), Idaho (86%), Illinois (91%), Iowa, (93%), Kansas (86%), Kentucky (86%), Massachusetts (90%), Michigan (89%), Minnesota (90%), Mississippi (85%), Missouri (92%), Montana (89%), Nebraska (88%), New Hampshire (87%), New Mexico (91%), New York (87%), North Dakota (87%), Ohio (86%), Oklahoma (87%), Pennsylvania (86%), South Dakota (90%), Texas (85%), Utah (89%), and Wisconsin (91%).

¹⁰ Arkansas (72%), California (71%), Delaware (72%), District of Columbia (65%), Florida (78%), Hawaii (77%), Louisiana (66%), Nevada (73%), North Carolina (78%), Oregon (75%), Rhode Island (77%), Virginia (78%), Washington (71%), West Virginia (75%), and Wyoming (75%).

2011	14 ¹²	62-78%	72%	23 ¹³	85-94%	88%
2012	21 ¹⁴	60-79%	73%	14 ¹⁵	85-93%	88%

¹¹ Alabama (85%), Connecticut (85%), Illinois (89%), Iowa (91%), Kansas (90%), Maine (88%), Massachusetts (90%), Michigan (85%), Minnesota (92%), Missouri (90%), Montana (93%), Nebraska (90%), New Mexico (88%), New York (85%), Ohio (86%), Oklahoma (89%), South Dakota (99%), Utah (89%), Vermont (89%), and Wisconsin (93%).

¹² Alaska (70%), Arizona (76%), California (72%), Delaware (73%), District of Columbia (75%), Louisiana (70%), Maine (73%), Nevada (76%), Oregon (78%), Rhode Island (76%), South Carolina (77%), Vermont (71%), Washington (64%), and Wyoming (62%).

¹³ Alabama (88%), Colorado (86%), Connecticut (85%), Georgia (85%), Idaho (85%), Illinois (89%), Iowa (90%), Kansas (89%), Kentucky (86%), Massachusetts (88%), Minnesota (93%), Missouri (93%), Montana (91%), New Mexico (88%), New York (85%), North Dakota (85%), Ohio (86%), Oklahoma (88%), Pennsylvania (85%), South Dakota (94%), Texas (86%), Utah (88%), and Wisconsin (88%).

¹⁴ Alaska (78%), Arkansas (76%), California (71%), Delaware (69%), District of Columbia (76%), Florida (79%), Hawaii (75%), Indiana (79%), Louisiana (64%), Maine (74%), Maryland (78%), Michigan (64%), Nevada (74%), New Jersey (78%), North Carolina (79%), South Carolina (73%), Tennessee (77%), Vermont (76%), Virginia (78%), Washington (60%), and Wyoming (60%).

¹⁵ Alabama (88%), Connecticut (85%), Idaho (86%), Illinois (87%), Iowa (92%), Kansas (89%), Massachusetts (85%), Minnesota (91%), Missouri (92%), Montana (93%), New Hampshire (86%), New Mexico (89%), South Dakota (86%), and Wisconsin (86%).