

# - CLEA -

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# - SALT -

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October 8, 2013

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 reiterate our serious concerns about proposed Standard 316 regarding bar passage. Our letter dated June 25, 2013, explained our concerns that increasing the bar passage percentage would impede necessary curricular reform and the development of educationally sound student learning outcomes. Those arguments are even more salient in view of the new draft's proposal to make the requirement even more stringent, but we refer you to that letter rather than repeating those particular points here.

In this submission, we focus on the risk that the current proposal would exacerbate the diversity crisis in legal education and the legal profession and make compliance extremely burdensome and difficult because of heightened compliance reporting requirements. We reiterate the need for an evidence-based analysis of its potential impact on diversity. Despite claims to the contrary, there was insufficient data to support the need for or impact of the change proposed and discussed at the July 2013 meeting. The newest draft raises the stakes further by requiring a school to demonstrate that *every* graduating class passes the bar exam at an 80% rate within 5 administrations. While the materials and arguments presented to the SRC at its July 2013 meeting support shortening the time-to-passage window to two calendar years following graduation, they simply do not address the concerns repeatedly raised by SALT, CLEA and others about the impact on racial and ethnic diversity, of increasing the percentage of graduates who must pass the bar exam within that window, and of requiring compliance with that higher percentage each and every year.

A two-calendar-years-after graduation window offers students five chances to take and pass the exam, and your data reveals that very few students persist after five administrations (though many will take the exam only some of the available dates). What the data does not support, however, is the claim that raising the passing rate from 75% to 80% will have little or no detrimental effect on diversity. Indeed, in the section of the materials entitled “Addressing Concerns About the Impact of Change,” a mere two sentences dismisses the diversity concerns as unfounded and points out that schools found out of compliance may qualify for additional time. Acknowledging that multiple commentators have expressed reservations and noting the lack of data proving detrimental impact is not a substitute for designing and conducting a study of the impact this proposed change will have on racial and ethnic diversity.<sup>1</sup>

The data cited by the SRC in support of its proposed change purports to show that the overall first-time-taker pass rate for graduates of ABA-approved law schools has ranged from 79% to 85% over the past five calendar years and the repeater rate has ranged from 38% to 44%. From those figures, the drafters conclude that it is not unreasonable to require a school to hit an ultimate pass rate of 80%. However, a close examination of the supporting data demonstrates that many schools may fall below 80%, depending on which state bar exam the bulk of their students take. The document titled “2012 First-Time Exam Takers and Repeaters” demonstrates that only *seventeen* states show pass rates of 80% or above on each administration of the exam and only *thirty* states show a pass rate of 80% when the February and July administrations are combined. Even more significantly, the submitted data tells us nothing about the impact of the proposed change on particular schools, including those with a demonstrated commitment to diversity and those whose students take the bar exam in states with lower pass rates.<sup>2</sup> Further, the data fails to account for fluctuations in national aggregate pass rates, with aggregate rates falling below 80% in some years. For example, according to the NCBE’s 2012 statistics, in the ten year period between 2003 and 2012, the national aggregate rates were 75% in 2003, 75% in 2004 and 76% in 2005.<sup>3</sup> Requiring that a school demonstrate compliance with the 80% rate for each graduating class exacerbates this problem by denying the possibility of fluctuation in pass rates over time.

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<sup>1</sup> The commentators expressing concern include the National Bar Association, Hispanic National Bar Association, National Asian Pacific American Bar Association, and National Native American Bar Association, as well as U.S. Representatives John Conyers, Jr. and Sheila Jackson Lee, the Congressional Tri-Caucus and Progressive Caucus, and the ABA’s own Council on Racial and Ethnic Diversity in the Educational Pipeline. See [www.americanbar.org/groups/legal\\_education/committees/standards\\_review/comments.html](http://www.americanbar.org/groups/legal_education/committees/standards_review/comments.html)

<sup>2</sup> The October 1, 2013 letter from the Michigan law school deans makes this point with respect to Michigan, which has a recent first-time pass rate of 64 percent. Any law school that had many or most of its graduates take the bar exam in such a jurisdiction would find it especially difficult to show an 80% pass rate.

<sup>3</sup> See <http://www.ncbex.org/publications/statistics>.

Most importantly, the data does not even purport to address with any seriousness the concern raised by SALT, CLEA, the National Bar Association, and Representative John Conyers, among others, that raising bar passage requirements will discourage schools from providing access to underrepresented racial and ethnic groups. Facing a requirement that every law school class pass the bar exam at an 80% rate within two calendar years after graduation will almost certainly cause schools to concentrate admissions on students whose past performance on standardized tests predict a higher likelihood of success on the bar exam rather than provide opportunity, education, and support for students whose performance may put the law school at risk. As Representative Conyers pointed out, "A lack of racial and ethnic diversity in our legal system deprives our justice system of the myriad experiences and viewpoints that would improve the quality of justice and ensure equal justice under law. Any undertaking of a change to law school accreditation standards must include a thorough consideration of the potential impact the change may have on students of color." The compilation of data regarding the percentage of bar examinees who take the Multistate Bar Exam one or more times, and the breakdown of this data by ethnic group, in figures 1 through 4 of the SRC's July 2013 materials related to then-proposed Standard 315, illustrates the kind of consideration and analysis that should be done to assess the likely impact on diversity. With respect to any future studies that may be conducted, we note that the wide variations in scoring and pass rates on state bar examinations must also be accounted for when considering the potential effect of racial and ethnic diversity at law schools in various states.

Comments made on the proposed standard at the July 2013 SRC meeting suggested that in the overwhelming number of recent accreditation reviews, schools under review were able to achieve an 80% pass rate. That would seem to support the claim that an 80% pass rate will not cause difficulties for any school. What that discussion ignores, however, is that those previous reviews were based on counting and calculation rules applicable to existing Interpretation 301-6, not according to the changes required by Proposed Standard 316. Among the notable differences between the two counting methodologies are the following:

1. Proposed Standard 316 would require schools to report on all of their graduates until they demonstrate the 80% pass rate, not on 70% as is currently the case under Interpretation 301-6.
2. Proposed Standard 316 would eliminate the alternatives for demonstrating compliance (75% pass rate in each of three years, 75% pass rate overall for five years, or first-year-passage within 15 points of the state-wide first-year pass rate).
3. Proposed Standard 316 would count those graduates who pass after the two-year window as failers, not as passers as they are currently counted under Interpretation 301-6.
4. Proposed Standard 316 would count non-persisters as failers against the school, contrary to the current scheme, which factors them out of the school's calculations.

There is no data to show that the accreditation reviews would have produced the same results had the calculation rules contained in proposed Standard 316 been used. Before concluding that schools undergoing review in recent years would have satisfied the proposed 80% pass rate, as suggested at the July 2013 meeting, the SRC should ask for a demonstration that calculating bar pass rates according to

the proposed counting and calculation scheme would not cause significantly different outcomes than under Interpretation 301-6.

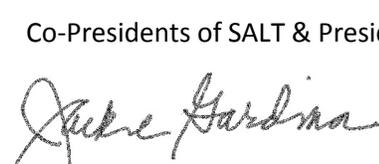
The proposed standard creates additional burdens by requiring schools to report results for all of its graduates known to have taken a bar exam. The deans of Michigan's five law schools, which represent a wide range of institutions with varying missions and student bodies, have submitted comments dated June 17, 2013 and October 1, 2013, in which they explain the heavy administrative burdens of accounting for all of their graduates, rather than a percentage as currently required under Interpretation 301-6. Despite the statements provided in the SRC's July 2013 materials regarding the practices of various state bar examiners in providing the name-specific information necessary to meet proposed Standard 316, the actual experiences of these deans and their schools is otherwise. Some jurisdictions do not report name-specific data, some require waivers from applicants that may not be provided, and some report only those who pass, meaning that those who do not take the exam or are rejected for other reasons must either be reported as failing or not reported at all. This discrepancy further supports the need for additional study of the potential impact of proposed Standard 316. Moreover, schools with pass rates close to 80%—typically those with an expressed and demonstrated commitment to serving underserved populations as well as those with graduates who take the bar in jurisdictions with low pass rates—are likely to suffer the most from the combined requirements, as they will have to track all their graduates in order to establish that 80% passed.

We ask, once again, that the SRC refrain from making the proposed changes until those supporting the changes generate and analyze data regarding the likely effect on racial and ethnic diversity of implementing these changes, including especially the 80% bar pass rate requirement. We hope that the SRC will not vote to increase bar passage rates without first thoroughly studying the effects of any proposed changes on efforts to diversify the profession.

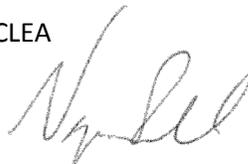
Thank you for your consideration.

Sincerely,

Co-Presidents of SALT & President of CLEA



Jackie Gardina  
SALT Co-President



Ngai Pindell  
SALT Co-President



Katherine Kruse  
CLEA President