

# C L E A

Clinical Legal Education Association

## COMMENT OF CLINICAL LEGAL EDUCATION ASSOCIATION ON PROPOSED STANDARD 316 July 27, 2016

The Clinical Legal Education Association, with more than 1,300 dues-paying members, is the nation's largest association of law professors. It submits this comment on the March 25, 2016 proposed revisions to Standard 316, under which an accredited law school would have to demonstrate that 75% of the members of each graduating class that sat for the bar passed within two years of graduation.

The ABA's accreditation standards should, of course, discourage predatory admissions practices by law schools that admit students who will be unable ever to pass the bar and practice law. However, the proposed change currently before the Council may have unintended and possibly quite damaging consequences on law school curricular design and the diversity of the legal profession. We therefore urge that the Council: (1) conduct an evidence-based inquiry into the immediate impact of proposed Standard 316 on schools in states with low bar pass rates and on the diversity of law schools; and (2) consider more systemically whether the bar examination, as the exclusive means of assessing readiness to practice law, is too limited in the proficiencies it assesses for entry into the legal profession.

As the Society of American Law Teachers has pointed out in its recent comment on Standard 316, data is needed to accurately predict the new standard's affect on schools in states with low bar passage rates, on student admission criteria, and on the opportunities of applicants of color. While the Council has examined some evidence to support proposed Standard 316, that data falls short of an impact study that examines the effects that it would have on racial and ethnic diversity in law schools and in the legal profession. The only discussion of impact in the Council's memo for notice and comment is based on persistence rates. The persistence data reveals only that non-passers rarely persist in taking the MBE more than twice, and that the fall-off in persistence does not "vary substantially on the basis of gender, race, or ethnicity."

The Council does not have available any data to show the impact of a flat bar passage requirement of 75% over a two-year period on schools in states with low first-time bar pass rates. States are free to set their passing scores at different levels on the same test. The 2015 average bar pass rate for first-time takers was below 75% in 25 states and the District of Columbia.<sup>1</sup> To compound the problem, over the past few years, states have experienced an unprecedented decline in bar passage rates for first-time bar exam takers, which have not been satisfactorily explained by a decline in student credentials. As a result, the variance in graduates' pass rates from state to state may be more closely related to the location of a law school than to the quality of the education it provides. Until now, the ABA's Standard 316 has recognized this variability by permitting a safe harbor for schools whose bar passage rates fall within an acceptable range of

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<sup>1</sup> See National Conference of Bar Examiners, *2015 Statistics*, The Bar Examiner, March 2016, available at [http://www.ncbex.org/assets/media\\_files/Bar-Examiner/articles/2016/BE-March2016-2015Statistics.pdf](http://www.ncbex.org/assets/media_files/Bar-Examiner/articles/2016/BE-March2016-2015Statistics.pdf), pp. 17-20.

the average bar passage rate in the state where their students primarily sit for the bar. The dramatic differences in state bar pass rates should continue to be a factor in the bar pass accreditation standard.

Requiring a 75% pass rate over a two-year period also jeopardizes diversity in law school admissions. Law schools, especially those in states with low bar pass rates, will consider placing a greater emphasis on LSAT scores in admissions decisions as a predictor of bar passage. Over-reliance on LSAT scores will exacerbate the existing underrepresentation of students of color because they have disproportionately low LSAT scores even though many of these students excel in law school and pass the bar exam. The risk is that the proposed revisions to Standard 316 will result in a decline in students of color in law school and ultimately in an even less diverse legal profession. The Council should examine this potential risk because lawyers already are overwhelmingly white.<sup>2</sup>

Proposed Standard 316 may also shift legal education away from courses that integrate doctrine, theory, and skills that prepare students for practice. The bar exam has long been criticized for its ineffectiveness in assessing whether applicants will be competent and professional attorneys.<sup>3</sup> This critique mirrors a longstanding critique of legal education. As long ago as the Reed Report in 1921, law schools were found lacking in their skills and professionalism training.<sup>4</sup> Echoing the 1992 MacCrate Report<sup>5</sup> of the ABA Section of Legal Education and Admissions to the Bar, the 2007 Carnegie Foundation Report also documented the need for integration of “theoretical and practical legal knowledge and professional identity.”<sup>6</sup> Law schools are now offering more experiential education, spurred on by the ABA’s recent adoption of a six-credit experiential course requirement. Under Standard 301, the ABA demands that law schools “maintain a rigorous program of legal education that prepares students, upon graduation” not only for admission to the bar, but also “for effective, ethical, responsible participation as members of the legal profession.” Over-emphasis on bar passage threatens these important advances in legal education.

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<sup>2</sup> ABA Market Research Dept., *Lawyer Demographics: Number of Licensed Lawyers* (2016) (finding that eighty-eight percent of the lawyers in the U.S. are white), [http://www.americanbar.org/content/dam/aba/administrative/market\\_research/lawyer-demographics-tables-2016.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/market_research/lawyer-demographics-tables-2016.authcheckdam.pdf); ABA Standing Comm. on Judicial Independence, National Database on Judicial Diversity in State Courts (2010) (finding that in state trial courts in the U.S., eighty-six percent of the judges are white, seven percent are African-American and seven percent of the judges are another minority, i.e., Asian/Pacific Islander, Hispanic American, or Native American), <http://apps.americanbar.org/abanet/jd/display/national.cfm>. Deborah L. Rhode & Lucy Buford Ricca, Diversity in the Legal Profession: Perspectives from Managing Partners and General Counsel, 83 *Fordham L. Rev.* 2483, 2484-85 (2015) (finding extreme racial and gender disparities among lawyers at law firms and in-house legal departments, with African Americans constituting only three percent of associates and 1.9 percent of partners, and women constituting only seventeen percent of partners).

<sup>3</sup> ROY STUCKEY, ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP 8-10 (2007).

<sup>4</sup> Alfred Z. Reed, *Training for the Public Profession of the Law: Historical Development and Principal Contemporary Problems of Legal Education in the United States, With Some Account of Conditions in England and Canada*, Bulletin No. 15 (1921).

<sup>5</sup> Section of Legal Educ. and Admissions to the Bar, Am. Bar Ass'n, *Legal Educ. and Prof'l Dev.-An Educ. Continuum* (Report of the Task Force on Law Schools and the Profession: Narrowing the Gap, 1992).

<sup>6</sup> WILLIAM M. SULLIVAN, ET AL., EDUCATING LAWYERS (2007).

Finally, the discussion of proposed Standard 316 provides an opportunity for the Council (which by its very title has some responsibility over “admissions to the bar”) to consider its leadership role in law licensing. Other professions in the United States, and the legal profession in other countries, demand deeper experience in practice for professional licensing.<sup>7</sup> For example, in England and Wales, a barrister or solicitor is required to take a practical training skills class and one or two years of training under the close supervision or “pupilage” of a solicitor or barrister prior to admission.<sup>8</sup> In six Australian states, there is a practical training requirement that students can fulfill with either a practical training course that can take up to two years to complete or an in-house clerkship under a supervising attorney.<sup>9</sup> In the United States, doctors must complete a residency of three to six years before their final licensing exam; an engineer must have at least four years of post-college work to be eligible to sit for the licensing exam; and an architect must document training under a registered architect.<sup>10</sup> The ABA should engage in a dialogue with bar admissions officials in the states and with other stakeholders and experts to begin to develop and model more comprehensive and skills-focused licensing strategies for the legal profession.

Current Standard 316 is dense, complex, and difficult. It should be revised. But it should not be revised in the form currently proposed until that proposal has undergone an evidence-based analysis that ensures it will not have the kinds of adverse impacts on diversity and curriculum we have raised here. We urge the Council to defer action on Standard 316 until a careful, reliable, and comprehensive study of its impacts can be conducted.

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<sup>7</sup> Yoonsuk Choo, et al., *Admission to the Bar: A Cross-Jurisdictional and Cross-Professional Survey*, a paper prepared for Harvard’s Legal Profession Course (*on file with CLEA*) (Spring 2011).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*