

- CLEA -

CLINICAL LEGAL EDUCATION ASSOCIATION

at
HAMLINE UNIVERSITY LAW SCHOOL
1536 HEWITT AVE
ST. PAUL, MN 55104
WWW.CLEAWEBSITE.ORG

- SALT -

SOCIETY OF AMERICAN LAW TEACHERS

at
WILLIAM S. BOYD SCHOOL OF LAW, UNLV
BOX 451098 4505 S MARYLAND PKWY
LAS VEGAS, NV 89154
WWW.SALTLAW.ORG

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

Dear Dean Lewis:

We write on behalf of the Society of American Law Teachers (SALT) and the Clinical Legal Education Association (CLEA) to address comments made in the Standards Review Committee (SRC) suggesting that the standard governing bar passage is insufficiently rigorous. Compliance with a bar exam passage standard should not be made more difficult. The current bright-line standard already emphasizes student performance on the bar exam over all other measures of student learning, in direct contravention of the SRC's proposed changes to Chapter 3 focused on student learning outcomes. It pushes law schools to "teach to the test" rather than to develop their programs to teach and assess the broader range of skills required for the competent practice of law. The most recently suggested alternative—requiring, in each of the previous five years, that 70% of the school's graduates pass the bar the first time they take it or that 85% of the school's graduates who took a bar exam were successful within 2 years of obtaining their degrees—will also undermine efforts to diversify the profession by discouraging schools from seeking to provide access to underrepresented groups. The SRC should explore thoroughly the impact any proposed change will have on law school curricula and on those schools with a diversity mission before recommending it to the Council.

Increasing the bar passage requirements of the current standard is unnecessary. The fact that most schools are able to satisfy the standard is not evidence that the requirement lacks rigor. The adoption of bar passage as a bright-line accreditation measure has caused law schools to devote substantial resources to bar passage, as reflected in the bar-exam preparation courses offered at many schools, the extent to which students are counseled or required to enroll in bar-related substantive courses, the amount of academic support focused on bar passage, and the use of multiple choice exams that help students to take the multiple choice bar exam. Law schools are taking seriously their obligation to enable students to pass the bar and will continue to do so. If the goal of a bar passage standard is to help ensure law schools have academic programs adequate to serve their student bodies, the current standard has accomplished that objective.

The current bright-line bar passage accreditation measure already impedes the ability of the Accreditation Committee to focus on the full range of a school's academic program. While Standard 309 was not intended to serve as a stand-alone proxy for a school's academic success, it arguably has had that effect. A more difficult standard will only magnify the tendency on the part both of schools and of regulators to regard satisfaction of the standard as demonstrating adequacy irrespective of other aspects of program quality. Rather than tinkering with the bright line bar passage measure itself, the SRC should consider proposals that will ensure that bar passage is one of several measures of the extent to which a school has achieved the student learning outcomes that are necessary for entry into the profession.

As it considers the bar passage standard, the SRC must also be certain about the impact that proposed changes would have on the racial and ethnic diversity of our student bodies, which already is far too low.¹ The ABA has a long and proud history of advancing diversity in the bench and bar.² The Council is cognizant of that history, as just five years ago it rejected proposals to change the bar passage standard, in large part due to the likely detrimental impact it would have on diversity. Current proposals before the SRC would jeopardize racial and ethnic diversity in law schools by effectively forcing some schools—those that seek to serve populations with non-traditional backgrounds who statistically may be more challenged on the bar exam—to turn such applicants away for fear of risking compliance with a tougher standard.

Current proposals under discussion by the SRC to create a five-year look-back period with higher bright line passage requirements imposed for both first-time and multiple exam takers is particularly ill-advised. For first-time takers, law schools would be required to meet a nationwide bar pass percentage of seventy percent in each of those past five years, regardless of the bar pass percentages in the state in which the law school is situated and in which most graduates sit for the bar.³ With regard to ultimate bar pass rates, law schools would be required to meet a nationwide average of eighty-five percent in each of the past five years.⁴

These proposals are likely to have dire consequences on law schools with racially diverse student populations. If the seventy percent first-time rate had been in effect for the past five years for which data is available, ten of the thirteen ABA-approved schools with Hispanic or African-American enrollment of twenty percent or more would have been out of compliance.⁵ The same consequence would result from the alternate requirement of eighty-five percent for ultimate bar pass rate. Statistical studies examining African-American bar passage reveal an ultimate bar passage rate of 77.6% nationally

¹ For data about declining minority enrolment in Law schools, see "A Disturbing Trend in Law School Admissions" available at <http://blogs.law.columbia.edu/salt/>.

² See ABA Presidential Diversity Initiative's report entitled *Diversity in the Legal Profession: The Next Steps*, available at http://www.americanbar.org/content/dam/aba/administrative/diversity/next_steps_2011.authcheckdam.pdf.

³ The current standard provides some flexibility by requiring that the first-time pass rate standard be met in three of the past five years. The current standard additionally accounts for state-by-state differences in bar pass rates by examining whether a school was within fifteen points of the state average among ABA-approved law schools. Since bar examinations are "norm referenced" rather than "criterion referenced" tests, performance is measured relative to the performance of others in the jurisdiction where the particular exam is administered. The statistics from California show the potentially negative effects of using a nationwide rather than state specific standard. See data submitted by Erica Moser in her November 12, 2012 Memorandum to the members of the SRC.

⁴ As with first-time bar pass rates, the current standard for ultimate bar pass rates permits consideration of three of the past five years, and sets the rate at seventy-five percent, rather than eighty-five percent.

⁵ See the attached charts whose data is taken from the ABA Official Guide.

for those who started law school in 1991,⁶ and 75.1% in July 2006 for candidates taking the New York bar for the first time in July 2005.⁷ These numbers starkly present the potentially negative effects that adopting the proposal would have on African-American admission.⁸ Law schools—particularly those that have bar passage rates close to the proposed line—would be far less willing to “take a chance” on admitting students with lower predictors – students who might become fine lawyers but whose first-time performance on the bar exam might jeopardize accreditation. Provisions for temporary exemptions from such a standard do not solve this problem; the possibility of an after-the-fact “fix” will not reassure schools that risk losing accreditation by admitting minority students. Passage of these proposed changes would have a certain disproportionate impact on schools with missions to provide access to underrepresented groups.

In addition to affecting who will attend law school, raising the bar passage standard will affect what is taught to law students. Many schools would have little choice but to further tailor curricula to meet the new bar exam benchmarks, focusing on teaching bar subjects rather than providing students with the broad range of skills necessary to prepare them for the practice of law. In part because of pressure from the bench and bar and the rapidly changing legal market, schools across the country are reconstructing curricula to offer (and, in some instances, require) more experiential courses and programs. Law schools are also expanding lawyering experiences through clinical courses and externship programs, with the goals of teaching the complex, interrelated skills necessary to prepare students for legal practice. The SRC has recognized the importance of this change by recommending the accreditation standards incorporate a focus on a broad range of student learning outcomes. Making the bar pass standards higher now would send a message, whether intended or not, that curricular innovation is less important than ensuring that in every single year the requisite number of first-time takers pass the bar exam. Imposing stricter bar passage benchmarks would increase pressure on schools to steer students towards bar preparation—learning to display knowledge of bar subjects in the narrow form in which it is tested on that exam—at the expense of the range of theoretical, analytical and practice-rooted courses students need to meet the demands of the profession and the needs of their future clients. The legal academy and the law school regulation system do not serve law students and the profession by privileging bar preparation courses over the clinical and other experiential courses that constitute critical components of readying students for the profession.

Bar passage is, of course, important, and law schools have a responsibility to admit students who will be able to earn a living as practicing lawyers and educate them effectively to allow them to do so. But a bright-line pass requirement is a poor tool to ensure those goals are met; indeed, it undermines law school efforts to diversify and strengthen their curricula and Accreditation Committee efforts to evaluate the full range of law school programming. Raising the standard also threatens the

⁶ Wrightman, *LSAC National Longitudinal Bar Passage Study (1998)*, Executive Summary at p. viii.
<http://www.unc.edu/edp/pdf/NLBPS.pdf>.

⁷ *Impact of the Increase in the Passing Score on the New York Bar Examination (2007)*, pp. 5-6 (NCBE study conducted for New York Board of Law Examiners). See <http://www.nybarexam.org/press/summary2.pdf>. Data provided to the SRC by Erica Moeser in her November 12, 2012 Memorandum show even lower minority passing rates on the MBE. According to this data, in July 2006 and 2007, the percentage of African American first-time bar takers who passed *nationally* was 68.7% and 70.3%. In contrast the percentage of African Americans who passed during this same time period in *California* was 56.7% and 53.8%. For those who identified as Hispanic, the relative passing percentages in July 2006 and 2007 nationally and in California were 75.4% and 79.4% versus 64.0% and 64.3%, respectively.

⁸ The fact that the proposed revision is anything but “benign” is illustrated by a recently released accreditation report available at <http://www.famu.edu/index.cfm?OfficeOfCommunications&Report>.

diversity of the population that will enter law school and later the legal profession. The Standards Review Committee should not increase the passage rates without first studying the effects of the change on efforts to diversify the profession and should consider the extent to which overemphasis on bar passage serves to undercut efforts to develop other learning outcomes that represent the wide range of skills required for the competent practice of law.

Thank you for your consideration.

Sincerely,

Co-Presidents of SALT & President of CLEA



Katherine Kruse
CLEA President



Jackie Gardina
SALT Co-President



Ngai Pindell
SALT Co-President