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July 5, 2011

VIA EMAIL AND FIRST CLASS MAIL

Donald J. Polden, Dean
Santa Clara Law School
Santa Clara University
500 El Camino Real
Santa Clara, CA 95053

Re: Proposed Changes to ABA Bar Passage Requirements

Dear Dean Polden:

The Clinical Legal Education Association (CLEA) submits this statement in opposition to the proposal now before the Standards Review Committee (SRC) to increase the ultimate bar passage rate requirement in Interpretation 301-6(A)(1) from 75% to 80%, and to raise the first-time bar passage rate requirement in Interpretation 301-6(A)(2) by permitting rates no more than 10 points, as opposed to the current standard of 15 points, below comparable state averages. These proposed amendments reflect overly narrow conceptions of readiness for the legal profession and distort admissions and curricular decision-making in a manner likely to suppress needed curricular innovation and exacerbate the lack of diversity in the profession.

Members of the bar, the bench, and legal educators all recognize that law school graduates who have no experience with how the law operates in real-world contexts have difficulty applying what they learned in law school to practice. Additionally, data reveal that there has been a downward trend in law school enrollment by African-American and Mexican-American students over the period of time that the current bar passage requirements have been in effect.[1] Absent a compelling and immediate need to weight bar passage even more heavily in assessing law school effectiveness, it does not make sense to implement a change that risks (a) discouraging important educational initiatives designed to better equip future lawyers with the knowledge, skills and values they need for practice, and (b) incentivizing decisions likely to result in even less diversity in the legal profession.

Just as it is considering its bar passage proposal, the SRC is also considering proposed outcome measures that are designed, in part, to better align legal education with the realities of legal practice – a move consistent

[1] *A Disturbing Trend in Law School Diversity,* available at http://blogs.law.columbia.edu/salt/(last visited June 26, 2011).

CLEA is the nation's largest association of law teachers, representing over 900 dues-paying faculty at over 180 law schools. CLEA is committed to legal education that trains law students to be competent, ethical practitioners and to promoting access to legal representation. Its membership consists of law professors who teach students in their role as lawyers and who devote their energy and attention to identifying, teaching, and assessing proficiency in the skills and values essential to lawyering.

with the trend in many law schools to introduce curricular innovations. At the same time, the lack of racial diversity in law schools and in practice continues to trouble the legal profession and has been cited as a concern by members of the SRC. In light of these realities, new standards proposed during the current comprehensive review should be designed to insure that law graduates are prepared to serve clients and to otherwise meet the demands of twenty-first century law practice and to promote the racial diversity of the bar. Paradoxically, the proposed amendments to Interpretation 301-6 would have just the opposite effect: if adopted, they will motivate law schools to prioritize bar passage over curricular innovation and will undercut diversity efforts.

A. The proposed amendments would discourage curricular reform and diminish the ability of law graduates to meet the demands of twenty-first century law practice.

The proposed amendments to Interpretation 301-6 stand in stark contrast with the other outcome measures that the SRC is considering in its efforts to improve legal education. Other proposed changes to Standard 301 and Interpretation 301-1 specify that an acceptable bar passage rate is not the only condition sufficient to prepare students for "effective, ethical and responsible participation in the legal profession," and encourage schools to define and implement outcome measures that focus on students' readiness for law practice. The proposed bar passage amendments work at cross-purposes with these other proposed revisions to Standard 301. Instead of encouraging innovation, stricter bar passage benchmarks increase the pressure on law schools to satisfy 301-6 at the expense of providing students with the knowledge, values, and skills necessary to practice ethically and effectively. The stricter bar passage standard motivates law schools – particularly those at risk of falling short of the proposed benchmarks – to recalibrate their curricula to focus disproportionately on teaching test-taking skills. Schools will steer students to courses that teach bar preparation rather than those that provide the deep and solid foundation – theory, analysis and practice-rooted experiences – on which law graduates can build the skills necessary to representing clients effectively and the values necessary to enhancing the legal profession.

By inhibiting a broader understanding of what an effective legal education entails, the proposed amendments would reinforce the oversimplifications and, ultimately, distortions that are involved when studying law in order to pass a bar exam. Even those who believe that the bar examination adequately and justifiably tests an agreed-upon body of substantive law that every lawyer must know surely will nonetheless acknowledge that the manner in which this knowledge is tested is limited. Teaching to and learning for the bar exam requires adopting a static and unambiguous conception of the law. Few would dispute that this notion has no place in law practice. Lawyers routinely work in contexts of deep ambiguity in the law, in the facts, and in the desires and goals of their clients and others. The legal academy ill serves its students and the profession by privileging bar preparation courses over the clinical and other experiential courses that constitute critical components of readying for the profession. One risk of raising bar passage benchmarks is that it will press law schools to do just that.

If adopted these amendments will thus exacerbate the disconnect between legal education and the legal profession exposed in detail by the Carnegie Foundation and other critics of the standard form

of legal education.[2] In response to the critique, many law schools have redesigned curricula. Numerous conferences and meetings have explored the kinds of changes in legal education that might better prepare students for the profession; for example, last month, the American Association of Law Schools convened a mid-year meeting in which the clinical and curriculum sections held a joint conference that focused on experiential learning and readiness for the profession. The legal profession has changed dramatically over the last decade and will continue to change. The proposed amendments to Interpretation 301-6 would disrupt innovative efforts to address these changes by emphasizing bar passage at the expense of the balanced and broad legal education that is vital to preparing students to engage the complex, cross-cutting and increasingly interconnected legal issues of the twenty-first century.[3]

B. *The proposed amendments would deepen the diversity crisis facing legal education and the legal profession.*

The challenge regarding racial diversity in the legal procession cannot be overstated.[4] Legal education is confronting a diversity crisis.[5] In a recent submission to the SRC, the Society of American Law Teachers (SALT) cites data gathered by SALT and the Lawyering in the Digital Age Clinic at Columbia Law School.[6] The data, set out in graphs and a narrative entitled *A Disturbing Trend in Law School Diversity*, show that the percentages of African-American and Mexican-American enrollment in law

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[2] *See generally* WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007); *see also* ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP (2007).

[3] As one commentator and current member of the SRC noted a decade ago, when bar pass cut scores are raised, "students will typically have more courses with multiple-choice exams and will take fewer clinical and perspective courses that may better prepare them for the realities of law practice." Steven C. Bahls, *Standard Setting: The Impact of Higher Standards on the Quality of Legal Education*, 70 THE BAR EXAMINER No. 4, 15, 15 (2001).

[4] *A Disturbing Trend in Law School Diversity*, Graph 4 (there was a 7.5% decrease and an 11.7% decrease in the proportion of African-Americans and Mexican-Americans, respectively, in the entering class in 2008 as compared to the entering class in 1993) *available at* http://blogs.law.columbia.edu/salt/(last visited June 26, 2011). There was also a slight decrease in real numbers in these entering classes. There was a combined total of 4,060 African-American and Mexican-American students in the entering 2008 class, down from 4,142 in 1993. *Id.*

[5] The lack of diversity in the legal profession includes the legal academy. In a previous submission to the Standards Review Committee regarding proposed changes to Standard 405, the American Bar Association's Committee on Clinical Skills highlighted the lack of racial diversity in the legal academy. Comments of Committee on Clinical Skills On Security of Position, Academic Freedom and Attract and Retain Faculty, submitted for the April 2, 2011 meeting of the Standards Review Committee, at pp. 2-3.

[6] Society of American Law Teachers, Statement on Bar Passage Interpretation 301-6, submitted for the April 2, 2011 meeting of the Standards Review Committee, at pp. 3-4. *See also* Bahls, *supra* note 3 at 15 ("[M]any . . . potentially strong lawyers are . . . denied admission to law school because of the need to raise the median GPAs and LSAT scores of incoming students to improve bar performance.")

schools has dropped dramatically over the past three decades, even as the number of accredited law schools in the United States has increased over this period and law school applications by these groups have remained relatively steady over the past fifteen years. An elevated bar passage standard, unjustified by data supporting its necessity, may exacerbate this disturbing trend without a compelling reason. [7]

In the midst of this crisis, the SRC is considering amendments to Interpretation 301-6 that would increase bar passage benchmarks that were implemented only four years ago and whose effect on minority enrollments remains uncertain and unstudied. Further increasing these benchmarks runs the risk of causing law schools – particularly those schools with missions to educate students who have traditionally lacked access to legal education and therefore tend to admit some students with lower Law School Admission Test (LSAT) scores – to focus admission policies on students who present the *least* risk of failing a bar exam. The LSAT will further drive admission decisions and increasingly shut out applicants with less developed standardized testing skills. Because of the racial scoring gap on the LSAT – applicants of color, specifically African-American applicants, score lower on the LSAT than white applicants – the burden of a school's risk-averseness would fall disproportionately on African-American applicants,[8] with the result that our law schools and our profession might become even less diverse than at present.[9]

Before risking these consequences, the ABA should undertake a reliable study of the impact that increased bar passage requirements would have on racial diversity. The current standard is only four years old; schools are taking measures to satisfy it, and the impact of these measures warrants examination. The fact that schools are successfully meeting the 75%/15 point standard may mean that law school academic support and other programs are succeeding in preparing high-risk students to pass the bar in greater numbers. But it may also mean that schools are admitting fewer high-risk students to law school in the first place. Any further change to the bar passage threshold should come only after identifying the policy and practice changes that law schools have implemented in response to the 2007

[7] We understand that the SRC has evidence that in the past three years only one out of 100 schools would not have met the 80% bar passage requirement. We do not agree that this fact compels the proposed increase in the standard. We have found no study correlating either first-time or ultimate bar passage with preparedness for practice. Nor are we aware of any study correlating bar failure with an inability to practice at a prevailing level of competence. Any concern a law school undeserving of accreditation based on its students' incompetence might continue to receive it should be addressed by implementing outcome measures that actually correlate with insuring graduates' ability to meet standards of professional competence.

[8] Indeed, although African-American and Mexican-American LSAT scores rose steadily from 1990 to 2008, their percentages in first year J.D. classes dropped during that same period. *A Disturbing Trend in Law School Diversity, supra* note 5.

[9] As Steve Bahls has noted, "the bar exam remains a formidable barrier to the profession in realizing the diversity that is necessary for all segments of the public to have confidence in the legal profession." Bahls, *supra* note 3 at 16.

interpretations, particularly with respect to curriculum and admissions, and then considering the diversity-related implications of these changes. Although data from the past three years is available, the hard work of compiling and analyzing this data has yet to be done.

A number of unanswered questions militate against implementing additional changes before the impact of changes already made are understood.[10] In terms of ascertaining the effect of the changes on diversity, the obvious lag time between admission to law school and sitting for the bar must be taken into account. Moreover, small sample sizes at individual law schools and variability in statewide bar pass rates mean that a statistical analysis of admissions decisions and program reforms would require a longitudinal study of at least several years of data. The bar examination landscape is not static, and differences in the difficulty levels and cut rates in various states complicate any analysis of the effect that heightening the ABA's bar passage rate requirements might have.[11] It seems evident that because LSAT and bar passage are not perfectly correlated, and because predictions based on undergraduate indicators are not perfectly accurate, a law school seeking to insure a 75% bar passage rate must already shoot for 80%.

Conclusion

There is no demonstrated, much less a compelling, need to increase the bar passage benchmarks in the accreditation standards. By elevating a bright-line standard that at best measures only a part of a law school's educational enterprise, the ABA would send an unintended but powerful message that a school's bar passage rate is more important than achieving the educational reform, practice preparedness, and diversity that are critical to the long-term health of the legal profession. Instead, the ABA should focus on problems that evidence shows do exist: the failure of law schools reliably to graduate practice-ready lawyers and to include sufficiently among its graduates people who will bring the diversity of the bar more in line with the diversity of the nation. The Standards Review Committee and the Council, with the help of organizations and individuals deeply committed to improving and broadening access to legal education, should consider ways to develop an array of

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[10] At a January 2011 meeting, the Subcommittee on Bar Passage noted the need for more data regarding a variety of different issues, including the requirement of reporting data on 70% of graduates, the two-year time period for data collection for provisionally approved schools, and the significance and impact of "non-persisters," law graduates who decide not to retake the bar examination after failing once.

[11] For example, although in 2007 the New York State Bar Examiners explicitly raised the bar passage score, *see generally* Summary of Three Studies by the National Conference of Bar Examiners for the New York State Board of Law Examiners Regarding the Impact of the Increase in the Passing Score on the New York Examination (July 2007), since then there has been no subsequent increase in the passing score. Nevertheless, in July, 2010, a dozen New York law schools saw a decrease in the first-time pass rates of their graduates – seven by significant margins. It seems unlikely that these schools were all admitting students whose indicators did not predict success on the bar exam. A more likely explanation is that other aspects of the bar exam, including possible changes in its level of difficulty or its performance standards, invalidated those predictions. The takeaway for law schools from experiences like this is that they need to build in a margin of error in their admissions processes.

outcome measures – including bar passage measures – that will prepare law graduates to enter and enhance the legal profession.

Sincerely,

Ian Weinstein

CLEA President