

January 27, 2019

Dear Members of the American Bar Association House of Delegates:

We write on behalf of the Clinical Legal Education Association (CLEA), the nation's largest association of law professors, to urge rejection of Resolution 105.¹ The Resolution, which was considered and rejected by the House of Delegates two years ago, would increase reliance on the high stakes, written bar examination, would make it even harder to diversify our profession, and would encourage a focus on test-taking ability, not lawyering skills. The proposal would require nationally accredited law schools to demonstrate that 75% of the members of each graduation class who sat for the bar passed within two years of graduation.

Since the House of Delegates rejected this proposal, the record has not significantly changed. As CLEA argued in its comment to the Council,² the change will result in unintended and damaging consequences for law school curricular design and the diversity of the legal profession. These consequences are not counterbalanced by any demonstrable advantages. It might impress some that the profession looks tough, but it will not help solve the problems we face. In this letter, we note four significant omissions from the Council's supporting materials and highlight the negative effects of this proposal on diversity in the profession and law school curricula.

First, the Council represents in its resolution that, "At the time of this submission, the Council has not been notified by any ABA or other entity that it is opposed to this resolution."³ We are not sure how the Council can make this claim. The Council did not seek notice and comment on its decision to send the proposed changes back to the House of Delegates, did not follow up with constituencies that had previously commented in opposition to the proposed change, chose to discuss the matter in closed session during its September 2018 meeting, and did not publicly announce its decision to propose the resolution until the Council's November 2018 open meeting.⁴ The process lacked transparency and discouraged input.

¹ Section of Legal Education and Admissions to the Bar, American Bar Association, Report to the House of Delegates on Standard 316: Bar Passage ("2019 ABA Report to the House of Delegates for Resolution 105") at https://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/resolutions/2019-midyear/2019-midyear-105.pdf

² Comment of Clinical Legal Education Association on Proposed Standard 316 (July 27, 2016) at <http://www.cleaweb.org/resources/Documents/CLEA%20Comment.Standard%20316.pdf>

³ 2019 ABA Report to the House of Delegates for Resolution 105 Executive Summary at 13.

⁴ Apparently, during the closed session discussion "[a]t its September 2018 meeting, the Council affirmed its commitment to the revised standard and directed that it be resubmitted to the ABA House of Delegates for concurrence at the 2018 ABA Midyear Meeting in February." Section of Legal Education and Admissions to the Bar, American Bar Association, Memorandum on Revisions to Standard 316: Bar Passage at 2. (https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/nov18opensesion/18-nov-316-memo.pdf)

Second, the Council has not produced data that meaningfully address the concerns voiced by numerous constituencies. The data in the Council’s “brief, voluntary ultimate bar pass survey for 2013 and 2014 graduates based on the revised Standard” reflect a self-selected subset of law schools.⁵ Less than half of all schools responded, and the voluntary nature made the sample unreliable. Drawing any conclusions from this sample, as the Council did, is highly problematic. Given the voluntary nature, the results likely skewed toward schools with higher pass rates. Among the 92 respondents, 89 had ultimate pass rates for both 2013 and 2014 graduating classes greater than 75%, two had ultimate pass rates greater than 75% for one of the two years and only one did not meet the 75% threshold.

Relying solely on law school numbers regarding the 2015 ultimate pass rate, the Council concluded that “law schools will have sufficient repeat-takers who pass or graduates who passed and had not sat for the exam in the first year following graduation to meet or exceed the 75 percent threshold in two years.”⁶ This flies in the face of the data reported for 2016 and 2017 graduates. While 183 of the 202 law schools reported an ultimate pass rate of 75% or higher for 2015 graduates, the first-time pass rates for 2016 and 2017 graduates was significantly lower (106 of 202 law schools for 2016 graduates and 122 of 203 law schools for 2017 graduates). It remains to be seen how the 2015 ultimate pass rate numbers account for this significant drop.

Third, the data do not address the state-to-state variations in pass rates. A school’s location often outweighs other factors in determining its pass rate. For 2017, data from the NCBE⁷ show that there were nineteen states and four of five territories in which less than 75% of first-time takers from ABA-approved law schools passed the bar. In a handful more, the bar pass rate hovered just above 75%. Until now, Standard 316 has recognized this variability by permitting a safe harbor for schools with bar passage rates that fall within an acceptable range of the average bar passage rate in the state in which their students primarily sit for the bar. While the Council did look at law schools in California, it ignored all other jurisdictions with low first-time pass rates. Again, no one can really say how all this would play out, given the current state of the record.

Fourth, the Council’s representation that, “for purposes of assessing whether a law school is operating a sound program of legal education, the revision provides that the most appropriate measure of a law school’s performance is the ultimate pass rate and that a two-year period is the optimal period over which to measure that performance for accreditation purposes”⁸ does not have any foundation in the data it collected and fails to take into account the potential negative impact that this strict requirement is likely to have on law schools’ educational programs, student admission criteria, and opportunities for diverse and economically-disadvantaged applicants.

⁵ *Id.* at 7.

⁶ 2019 ABA Report to the House of Delegates for Resolution 105 at 7.

⁷ <http://www.ncbex.org/statistics-and-research/statistics/mbe-statistics/>.

⁸ 2019 ABA Report to the House of Delegates for Resolution 105 at 1.



CLEA remains concerned about the impact on diversity. Experience shows that one way law schools respond to pressure on bar passage rates, especially when located in states with low bar pass rates, is by emphasizing LSAT scores in admissions decisions. The LSAT predicts school success, not professional competence. Over-reliance on LSAT scores exacerbates underrepresentation of students of color, who have disproportionately lower LSAT scores, even though many students with low predictors excel in law school, pass the bar exam and make important contributions to their community. The proposed revisions to Standard 316, if adopted, will create a significant risk of a decline of students of color in law schools, leading to an even less diverse legal profession. The Council’s data do nothing to address or dispel this concern.

Moreover, CLEA remains concerned that proposed Standard 316 will shift legal education away from courses that integrate doctrine, theory, and skills and prepare students for the practice of law. The bar exam has long been criticized for its ineffectiveness in assessing whether applicants will be competent professional attorneys. Spurred by the ABA’s adoption of a six-credit experiential course requirement in Standard 303(a)(3), law schools are now offering more experiential education. 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 of bar passage threatens this balance.

Finally, the proposed changes to Standard 316 do not facilitate the Council’s suggested “solution” to the bar passage problem. While CLEA agrees that “law schools, state supreme courts, the bar examiner community, and the Council” should “work together to determine the cause(s) of the decline and take steps to address them,” it also believes that the real focus of this inquiry needs to be the bar exam itself. The Council’s resolution does nothing to address this core problem or to confirm that there will not be an adverse impact on law school curricula or diversity in law schools and the legal profession.

Thank you for your willingness to consider the aforementioned concerns.

Sincerely,

Lisa Martin and Daniel Schaffzin
Co-Presidents