

# Clinical Legal Education Association

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November 1, 2012

Jeffrey E. Lewis  
Dean Emeritus and Professor of Law  
Chair, ABA Standards Review Committee  
Saint Louis University School of Law  
3700 Lindell Blvd  
St. Louis, MO 63108

Re: Proposed Standard 309 (Bar Passage)

Dear Dean Lewis:

The Clinical Legal Education Association (CLEA) writes to support the written bar examination provisions of Chapter 3 that were discussed during the Standards Review Committee's (SRC) July 2012 meeting.<sup>1</sup> CLEA opposes the oral suggestion made at the July meeting to assess compliance with bar pass standards within a three-year, rather than a five-year period.<sup>2</sup> We continue to support maintaining the bar passage rate requirements at current levels based on our on-going concern that raising these requirements would suppress needed curricular reform and exacerbate the lack of diversity in the profession. CLEA would particularly object to adopting changes based on data that has not been made available to, and fully examined by the various stakeholders in the standards review process.<sup>3</sup> The values of legitimacy and public confidence require a process that is evidence-based and transparent. We provide this comment, hoping that it will be helpful particularly to new SRC members, and understanding that those who have read our previous submissions will find much of it familiar.

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, regardless of their success on the bar examination. The data that is currently available simply does not support privileging bar passage above other measures of law school effectiveness, such as the important reforms the SRC is considering with respect to outcome measures designed to better align legal education with the realities of legal practice. Any proposals regarding bar passage must be examined to ensure they are not at cross-purposes with curricular reform. Additionally, the impact of potentially raising bar passage requirements must be carefully analyzed to avoid contributing to the diversity crisis in law schools and the legal profession. Data reveal that there has already

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<sup>1</sup> The substantive bar pass provisions in the draft before the SRC in July 2012 were essentially the same as those before the SRC in January 2012, and we assume they will not be significantly changed in the November 2012 draft.

<sup>2</sup> See Mark Hansen, *ABA Committee to Revisit Bar Passage Accreditation Standard*, available at [www.abajournal.com/news/article/aba\\_committee\\_to\\_revisit\\_bar\\_passage\\_standard/](http://www.abajournal.com/news/article/aba_committee_to_revisit_bar_passage_standard/) (last visited October 25, 2012).

<sup>3</sup> In a letter dated September 7, 2012, CLEA joined with the Society of American Law Teachers (SALT) and requested the data regarding individual multistate bar examination test takers that had been orally referenced at the July 2012 meeting. Although we understand that the data will not be released at this time, we would be particularly concerned if the SRC were planning to rely on conclusions drawn from this data at the November 2012 meeting.

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.<sup>4</sup>

CLEA asks the SRC to consider more broadly the impact of bar pass requirements on institutions whose mission is to diversify the profession, as opposed to viewing it more narrowly as an enforcement tool against predatory law schools. For the former, narrowing the time frame for measuring bar passage from five to three years pushes law schools, that are seeking to create greater opportunity for those underrepresented in the legal profession, to focus on quantitative bar pass predictors in their admissions process which may make it harder to do the work of diversifying the profession. For law schools at the other end of the spectrum which may warrant a consumer protection response, adding outcome measure requirements in combination with current bar passage provisions would create an accreditation process that is calibrated more closely with assessing students' readiness to practice law, without risking unintended diversity consequences.

*A. Changing bar passage requirements would discourage curricular reform and diminish the ability of law graduates to meet the demands of twenty-first century law practice.*

The bar passage standards should be considered in close relation to the other outcome measures that the SRC is considering in its efforts to improve the basic standards for legal education. Other proposed changes to Chapter 3 recognize that an acceptable bar passage rate is insufficient on its own (Interpretation 309-1) to demonstrate that a school adequately prepares students for "effective ethical and responsible participation in the legal profession," (Standard 301) and encourage schools to define, implement, and assess outcome measures that implicitly focus on students' readiness for law practice (Standard 308). Any heightening of the bar passage standard would impede these other proposed revisions to the standards.

Stricter bar passage benchmarks would increase pressure on law schools to satisfy the bar requirements at the expense of providing students with the knowledge, values, and skills necessary to practice ethically and effectively. A 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 would 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 represent clients effectively and the values necessary to enhance the legal profession.

The cost of raising the bar passage requirements would be to inhibit a broader conception of what an effective legal education entails, and to reinforce the oversimplifications and, ultimately, distortions that are involved when studying law in order to pass a bar exam. Regardless of whether the bar examination adequately and justifiably tests an agreed-upon body of substantive law that every lawyer should know, 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.

It is critical that the standards for the law school curriculum address 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.<sup>5</sup> In response to the critique, many law schools have redesigned curricula. Numerous conferences and meetings, such as the American Association of Law Schools' joint clinical and curriculum section conference in June 2011, have explored the kinds of changes in legal education that might better prepare students for the profession. A heightened bar exam standard would disrupt innovative curricular efforts by emphasizing bar passage at the expense of the balanced and broad legal education that is vital to preparing students to engage with the complex, cross-cutting and increasingly interconnected legal issues of the twenty-first century.<sup>6</sup>

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<sup>4</sup> *A Disturbing Trend in Law School Diversity*, available at <http://blogs.law.columbia.edu/salt> (last visited Oct. 24, 2012).

<sup>5</sup> 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).

<sup>6</sup> As one commentator and long-time former 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

B. *Raising the bar passage standard would deepen the diversity crisis facing legal education and the legal profession.*

The challenge regarding racial diversity in the legal profession cannot be overstated.<sup>7</sup> A joint project of the SALT and the Lawyering in the Digital Age Clinic at Columbia Law School gathered and analyzed data, set out in graphs and a narrative entitled, *A Disturbing Trend in Law School Diversity*, showing dramatic drops in African-American and Mexican-American law school enrollment, even as the number of law school applications by these groups have remained relatively steady over the last 15 years, and the number of accredited law schools in the United States has increased.<sup>8</sup>

Statistics available on the Law School Admissions Council (LSAC) website confirm the diversity crisis in law schools. In fall 2011, the number of racially and ethnically diverse law school applicants declined from fall of 2010 as follows: American Indian/Alaska Native (-7.0%), Asian (-4.8%), Black/African American (-6.2%), Hispanic/Latino (-10.1%), Native Hawaiian/Other Pacific Islander (-21.65%), Puerto Rican (-4.4%), and Canadian Aboriginal (-7.7%). While these trends are consistent with the overall decline in applicants to ABA-approved law schools, from 87,900 to 78,500, the larger percentage decrease in Caucasian/White applicants (-18.1%) still leaves disproportionate gaps in the actual numbers with 43,200 Caucasian/White applicants, compared with 9,100 Black/African American applicants and 5,500 Hispanic/Latino applicants.<sup>9</sup> The percentages of matriculants by ethnicity also declined during this same period, for example, Black/African American (-7.7%) and Hispanic/Latino (-11.4%), demonstrating that the trend is opposite to the direction in which the legal profession needs to move.<sup>10</sup>

The April 2010 Report of the ABA Presidential Diversity Initiative, titled *Diversity in the Legal Profession: The Next Steps*, similarly confirms the diversity crisis in the legal profession, noting that racial and ethnic groups, among others, “continue to be vastly underrepresented in the legal profession.”<sup>11</sup> Although the data collected by the National Association for Law Placement (NALP), focuses on the law firm segment of the legal profession, it is instructive in terms of providing a snap shot of diversity in this particular segment. Among all employers listed in the 2011-2012 NALP Directory of Legal Employers, just 6.56% of partners were minorities. Although minority representation, defined as Black, Hispanic, Native American, Asian, Native Hawaiian/Pacific Islander, and multi-racial, among associates was 19.90% in 2011, the largest portion of this figure was Asian (9.65%) with Black/African-American (4.29%) and Hispanic (3.83%) falling significantly below the 5% mark.<sup>12</sup> The percentages for Black/African-American and Hispanic fall far below 2010 Census Data which indicates that, within the U.S. Census Bureau’s categories, Black or African American comprises 12.6% and Hispanic or Latino comprises 16.3% of the United States population in 2010.<sup>13</sup>

The current bar passage benchmarks were implemented following their proposal less than five years ago in 2007, and their effect on the enrollment of students of color 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

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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).

<sup>7</sup> *A Disturbing Trend in Law School Diversity*, *supra* note 4, Graph 4 (Change in Proportion of Matriculants) (revealing 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).

<sup>8</sup> *A Disturbing Trend in Law School Diversity*, *supra* note 4, Graph 1 (Steady Demand).

<sup>9</sup> LSAT Volume Summary: Applicants by Ethnic and Gender Group, available at <http://www.lsac.org/lisacresources/data/vs-ethnic-gender-applicants.asp> (last visited October 22, 2012).

<sup>10</sup> LSAT Volume Summary: Matriculants by Ethnic and Gender Group, available at <http://www.lsac.org/lisacresources/data/vs-ethnic-gender-matrices.asp> (last visited October 22, 2012). The lack of diversity in law schools includes within the legal academy. See Comment of Committee on Clinical Skills on draft addressing Security of Position, Academic Freedom and Attract and Retain Faculty (Standard 405) for the SRC’s April 2011 meeting, at 2-3 (highlighting lack of racial diversity in the legal academy).

<sup>11</sup> *Diversity in the Legal Profession: The Next Steps*, at 5, available at [http://www.americanbar.org/advocacy/diversity\\_initiatives/presidential\\_diversity\\_initiative.html](http://www.americanbar.org/advocacy/diversity_initiatives/presidential_diversity_initiative.html) (last visited October 22, 2012).

<sup>12</sup> Women and Minorities in Law Firms – By Race and Ethnicity, January 2012, available at [http://www.nalp.org/women\\_minorities\\_jan2012](http://www.nalp.org/women_minorities_jan2012) (last visited October 22, 2012).

<sup>13</sup> Overview of Race and Hispanic Origin: 2010, issued March 2011, available at <http://2010.census.gov/2010census/data/>, Table 1 (last visited October 22, 2012).

would 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, tend to score lower on the LSAT than white applicants – the burden of a school’s risk-averseness would fall disproportionately on African-American applicants,<sup>14</sup> with the result that our law schools and the legal profession might become even less diverse than at present. The LSAC data referenced above demonstrates decreasing matriculation rates among African American and Latino applicants. Heightening the bar passage standard would likely exacerbate this disturbing trend without any evidence demonstrating a compelling need to make this change.<sup>15</sup>

Before risking these consequences, the ABA should undertake a reliable study of the impact that increased bar passage requirements would have on racial diversity. Schools are taking measures to satisfy the current bar pass standards, and the impact of these measures warrants examination. The fact that law schools are successfully meeting these standards may mean that 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 law schools are admitting fewer of these students in the first place. Any further heightening of the bar passage threshold should come only after identifying the policy and practice changes that law schools have implemented in response to the 2007 provisions, particularly with respect to curriculum and admissions, and then analyzing the diversity-related implications of these changes.<sup>16</sup>

### *Conclusion*

There is no demonstrated, much less a compelling, need to increase the bar passage benchmarks in the accreditation standards. We hope that the committee will continue to reject any efforts to do so. 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.

We are grateful for the committee’s consideration of our views and look forward to working with you as the comprehensive review continues.

Sincerely,



Leigh Goodmark  
CLEA President, 2012

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<sup>14</sup> 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 4.

<sup>15</sup> We are not aware of any study or data correlating bar failure with an inability to practice law at a prevailing level of competence. Any concern that a predatory law school, undeserving of accreditation based on its students’ incompetence should be addressed by implementing outcome measures that actually correlate with insuring graduates’ ability to meet standards of professional competence.

<sup>16</sup> The issue raised orally at the July 2012 meeting appears to relate to those who fail the bar exam and decide not to take it again. It is unclear; however, why the measurement of a law school’s effectiveness should be keyed to individual exam takers, as opposed to graduating classes of bar exam takers whom law schools have educated over a period of three years.