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## SALT - Society of American Law Teachers

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January 21, 2019

Dear Members of the American Bar Association House of Delegates:

We write on behalf of the Society of American Law Teachers (SALT) to advise you of our views about the decision by the Council of the Section of Legal Education and Admissions to the Bar to bring back to the ABA House of Delegates the proposed amendment of accreditation Standard 316 on bar passage that the House rejected in 2017. SALT is disappointed that the Council continues to promote this proposal without having addressed the serious concerns about diversity and access to the profession that SALT raised in its communication to the Council in 2016 and that led to the rejection of this proposal by the House of Delegates in 2017.

As an initial matter, we note that the Council made its decision to resubmit this proposal without first inviting comment from or seeking discussion with interested parties, including SALT. You therefore will be voting on this proposal without benefit of solicited input from experts and groups who have information useful to your consideration.

We renew here for your review the criticisms of the proposed amendments that we submitted to the Council in 2016.<sup>1</sup> We summarize those concerns below:

- Adopting the proposed standard will have substantial negative impact on HBCU and other law schools with significant enrollment of people of color, including the law schools in Puerto Rico. Rather than allaying concerns, the data shared by the Council reveal the seriousness of that potential impact. *See Letter from Chairs of ABA Goal III Entities* (Jan. 2019) (extensive discussion of ABA data).
- Bar exams are not created equal; instead, they vary widely from state-to-state in their degree of difficulty. The proposed streamlined 75% rule ignores these wide disparities in passing standards (“cut scores”). Even states that have adopted the UBE have not adopted a uniform passing score. Current Standard 316 contains some flexibility, including the ability to establish compliance with a pass rate within 15 points of the pass rates of the states in which a school’s graduates took the bar exam. Elimination of this option endangers law schools in jurisdictions, like California, with passing rates significantly below 75%.
- Now is a bad and puzzling time to enact this change. The customarily

stable world of bar examinations is in disarray, with historic, unexplained declines in 2018 bar passage and increased questions about the validity of traditional bar exams to establish competence for the changing profession. The Uniform Bar Exam juggernaut has been adopted in 34 jurisdictions in a very short time. Significant and long overdue bar exam validity and scope studies are currently being undertaken by the State Bar of California and the National Conference of Bar Examiners. Many law schools already face significant pressure from the current, more flexible, Standard 316. Implementation questions remain, including how bar passage should be counted for graduates with UBE scores sufficient for some jurisdictions but not others. Why push this change now, especially after it was previously rejected by the House of Delegates?

- Recent studies by the State Bar of California, by researchers at St. Mary's Law School in San Antonio, and from the University of Cincinnati College of Law show that declining admissions credentials (LSAT and UGPA) explain only a fraction of bar passage declines. Yet without documentation of what else explains the decline, law schools facing even greater pressure from the cruder, blunter Standard 316 are likely to increase their reliance on the LSAT in admissions. Given the disparate impact LSAT scores have on under-served communities, even greater reliance on LSAT scores in the admissions process is likely to increase its disparate effect on who is allowed to attend law school.
- The revised standard will have the greatest impact on schools with the mission of admitting students with lower predictors of success, often students from under-served communities. Those schools often devote substantial resources to assisting those students to overcome barriers and develop the skills they need to succeed in law school and later pass the bar exam. The students who perform best with that assistance often transfer to other higher-ranked schools, which then receive credit for their successful performance on the bar exam, leaving their original schools with lower bar-pass rates and the risk of failing the new, less flexible bar pass standard. Such schools may thus be forced to shrink or eliminate the pipeline to success they have offered to students from under-served communities.
- Law schools should be judged on the bar exam success of the students they enrolled and taught in the crucial 1L year, not just the bar results of the less successful students who are not poached by other law schools. Although the transfer market is in decline, 4% of students who enrolled nationally in 2017 transferred to a different law school after their 1L year. That 4% is not evenly distributed; instead, the problem of losing students who transfer out is concentrated in particularly vulnerable law schools that routinely lose dozens of their most successful 1L students. The proposed Standard 316 goes backwards in eliminating the explicit consideration in current Standard 316 (c)(6) of the likely bar exam success of students who have transferred out.

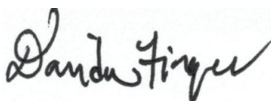
Bar passage standards for law schools implicate protection of two kinds of consumers: (1) potential law students who are poised to invest substantial sums to become licensed attorneys; and (2) the public, who as consumers of legal services need competent, client-centered, affordable attorneys available in all communities. Recent changes – including adoption of the 75% bar passage requirement in current Standard 316 -- are already providing significant new

protection to potential law students, resulting in some law school closures, accreditation pressure on more law schools, significantly declines in law school enrollment, and dramatically expanded academic success and bar preparation programs in law schools to support students in their quest to become attorneys. We should let those protections take full effect before ratcheting the requirements further.

As for protecting the public, flaws in the current bar exam and licensing model are serious. The public is hurt by our lack of student practice requirements, outmoded testing methods that require memorization of doctrine no longer considered fundamental, unfair cut score disparities, and persistent racial and gender disparities in passage rates on tests whose relationship to attorney competence has been assumed, but never established. Bar examiners, courts, legal educators, and members of the profession are confronting these issues, with growing momentum for serious licensing reform. The proposed Standard 316 revision exacerbates these licensing problems, rather than addressing them.

Thank you for your consideration of our concerns.

Sincerely,



Davida Finger  
Co-President



Matthew Charity  
Co-President

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<sup>1</sup> SALT's concerns about the bar exam are longstanding. See, e.g., *Society of American Law Teachers' Statement on the Bar Exam*, 52 J. OF LEGAL EDUC. 446 (2002). Although that article was written 17 years ago, neither the fundamental approach of the bar exam, nor SALT's concerns, have changed. The adoption of the UBE in some states has only exacerbated the fundamental problems by more heavily weighting the multiple-choice portion of the test and by overemphasizing speed as a factor.