

## **FAQ on House of Delegates Report 113 regarding the Proposed Interpretation of Standard 301-6**

### ***What is Proposed Interpretation 301-6?***

Proposed Interpretation 301-6 provides guidance to law schools on keeping in compliance with Standard 301(a), which requires that a law school maintain an educational program that “prepares its students for admission to the bar.”

### ***What does the new proposal say?***

Under the proposed Interpretation 301-6, a school can demonstrate compliance by meeting any one of three tests, two of which are framed in terms of ultimate bar examination pass rates and one in terms of first-time bar examination pass rates.

#### **Ultimate bar examination passage rates:**

In response to comments we received that some law school graduates, particularly students of color, pass the bar examination but not necessarily on their first try, two of the tests for demonstrating compliance are explicitly tied to ultimate (as opposed to first-time) pass rates. Generally stated:

- at least 75% of a school’s graduates must ultimately pass the bar examination over the most recent five calendar years; or
- that, in each of three of the most recent five calendar years, at least 75% must ultimately pass.

#### **First-time taker bar examination passage rates:**

The proposed Interpretation also permits a school to demonstrate compliance through first-time bar examination passage rates. In three or more of the five most recently completed calendar years, the school’s annual first-time bar passage rate in the jurisdictions reported by the school must be no more than 15 points below the average first-time bar passage rates for graduates of ABA-approved law schools taking the bar examination in the same jurisdictions.

### ***Why has the Council proposed this Interpretation on bar examination passage rates?***

The *Standards* have included a review of school bar examination passage rates for more than 20 years. Throughout this time, the Council and Accreditation Committee have been enforcing the bar examination passage standard. Two schools were recently put on probation due to bar examination passage rates that were not in compliance with the Standards. The Section recognized the need for, and began work in 2006, on an Interpretation that would provide guidance to schools on compliance with Standard 301(a).

Two schools complained to the U.S. Department of Education that the bar examination passage Standard was not clear – i.e., that they could not tell when they were out of compliance and what it would take to bring them into compliance. They argued, and the DOE agreed, that a process that calls for “further review” if certain criteria are not met is not sufficiently measurable to permit a school or the public to determine when a school is in, or not in, compliance with Standard 301(a).

As a result of the complaints, the Council's work in preparing an Interpretation to clarify the application of the bar examination passage standard has been closely monitored by the DOE, which requires a standard to be measurable, transparent and applied consistently.

***What action is being requested by the House of Delegates?***

The rules of the House of Delegates stipulate that the Council of the ABA Section of Legal Education and Admissions to the Bar shall file a Report with Recommendations to the House seeking concurrence of the House in any actions of the Council. Such actions may include those seeking to adopt, revise or repeal the Standards, Interpretations or Rules of Procedure for Approval of Law Schools.

The House shall either concur with the Council's decision or refer the decision back to the Council for further consideration with a statement setting forth the reasons for its referral.

The House, therefore, is being asked to concur in the Council's action to adopt the new Interpretation 301-6, regarding law school bar examination passage rates.

***Why is the ABA involved in law school accreditation?***

Under Title 34, Chapter VI, §602 of the Code of Federal Regulations, the Council and the Accreditation Committee of the ABA Section of Legal Education and Admissions to the Bar are recognized by the United States Department of Education as the accrediting agency for programs that lead to the first professional degree in law. The Council has maintained this recognition since first receiving it in 1952 and the Accreditation Committee was added as a recognized agency in 2007.

In the accreditation function, the Council and the Section are separate and independent of the ABA, as required by DOE regulations. The Council must be re-certified by the DOE approximately every five years.

Adoption of a measurable, transparent and consistently applied bar examination passage interpretation is a requirement for DOE re-certification.

***Why is recognition of the Council and the Accreditation Committee important?***

The majority of the highest courts of the states rely upon ABA approval of a law school to determine whether the jurisdiction's legal education requirement for admission to the bar is satisfied. Whether a jurisdiction requires education at an ABA-approved law school is a decision made by a jurisdiction's bar admission authority and not by the Council or the ABA.

***How are pass rates in the states determined?***

Each state develops its own bar examination passage standard. States have widely different "cut scores" for passage of the examination. The proposed Interpretation takes into consideration the fact that state bar examination passage rates vary widely. For example, for first-time bar examination passage rates, a school must be within 15 points of the ABA average. Thus, it does not matter if a state's first-time bar examination passage rate is 85 percent, 75 percent, or 65 percent as long as the school's rate is within 15 points.

***How were the ultimate pass rate of 75% and the first-time taker rate of no more than 15 points below the state average for ABA accredited schools determined?***

In settling on an ultimate bar examination pass rate, the original proposal from the Standards Review Committee was 85% and the Council reduced it first to 80% and then to the current 75%. The 75% was ultimately decided upon after reviewing first-time pass rates for states; after reviewing the Law School Admissions Council national bar examination pass study (which involved 163 law schools with results from 50 jurisdictions); after reviewing the recently conducted New York bar examination study; and after consultation with law school deans, current and former members of the Accreditation Committee, Section staff, and many, many others interested in this matter.

In terms of first-time rates for states, a recent review of combined July 2006 and February 2007 results (the most recent data we have available), showed that 42 states had a FIRST-TIME rate at or above 75%, so an ultimate pass rate of 75% would appear to be quite modest, certainly so in the case of 42 states. However, the assessment was far more detailed than a one-time review of state-wide rates. For example, in the LSAC study, the ultimate pass rate for all participants was 94.8%, for persons of color it was 84.7% and for Black/African American participants specifically, the eventual pass rate was 77.6%. The study showed that of the persons of color who ultimately passed, between 94 and 97 percent passed after one or two attempts, and 99 percent passed by the third attempt. In contrast, the proposed Interpretation provides for as many as nine attempts over a five-year period.

The recent New York study revealed similar results to those of the earlier LSAC study. It showed that in July 2005, first-time takers from ABA-approved law schools (excluding foreign-educated LL.M. students), passed at a rate of 83%. After three takings the cumulative pass rate was 91.1%. When this review focused on race/ethnicity, the ultimate pass rate ranged from 93.4% for Caucasians to 75.1% for Black/African Americans. Further, if non-persisters are removed when considering ultimate bar examination pass rates over the three tests (July 2005, February 2006 and July 2006), the overall pass rate increases to 94.7% and the Black/African American group increases to 82.6%. So, the proposed ultimate bar examination pass rate of 75% over *five* years is nearly eight points below the Black/African American ultimate pass rate for three tests when non-persisters are excluded and nearly 20 points below the overall rate.

As noted above, the proposed Interpretation also permits a school to demonstrate compliance through first-time bar examination passage rates (generally stated: not more than 15 points below the average first-time bar examination passage rates for graduates of ABA-approved law schools in the jurisdictions the school reports). This methodology – no more than 15 points below the first-time ABA state average -- takes into account the differences in first-time pass rates among jurisdictions. Thus, for first-time pass rates it does not matter that State A has a first-time rate of 65%, State B 75% and State C 85%. The issue is whether a school is within 15 points of those rates for first-time takers.

***How will the new Interpretation be implemented?***

When the Accreditation Committee has a concern about a school's compliance with a newly adopted Standard or Interpretation, the Committee asks a school to report back at a later date with additional information about the school's compliance with that Standard or Interpretation. When the school reports back, if the Committee has reason to believe under Rule 13(a) of the

*Rules of Procedure for Approval of Law Schools*, that a school has not demonstrated compliance with the standard or interpretation, the school is informed that it has not demonstrated compliance and is given six to 12 months to provide further information in order to demonstrate compliance.

If, upon a review of the information furnished by the law school in response to the Committee's request and other relevant information, the Committee determines under Rule 13(b) of the *Rules of Procedure for Approval of Law Schools* that the school is not in compliance with the *Standards*, the school shall be required to appear at a hearing before the Committee to show cause why the school should not be required to take appropriate remedial action, have sanctions imposed upon it or be placed on probation, or be removed from the list of law schools approved by the Association.

After a determination under Rule 13(b) that a law school is not in compliance with the *Standards*, the school shall have a period of time -- not to exceed two years -- as set by the Committee, to come into compliance. If the law school does not demonstrate compliance by the end of that period, the Committee shall recommend to the Council that the law school be removed from the list of approved law schools unless the Committee, or the Council, extends the period for demonstrating compliance for good cause shown.

***How does a school demonstrate good cause to be given additional time to demonstrate compliance?***

The Interpretation lists eight factors that can provide a basis for a good cause extension, including "other factors, consistent with a school's demonstrated and sustained mission, which the school considers relevant in explaining its deficient bar passage results and in explaining the school's efforts to improve them."

***If the House concurs with the proposed interpretation, will the effect of the new Interpretation be monitored by the Council?***

Yes. The Accreditation Committee, as with all Standard changes, will follow closely the effect of the Standard and will report to the Council on those results. In addition, the Standards Review Committee will begin a comprehensive review of all of the Standards in September 2008.

***What steps are being taken to assist schools in improving their bar examination passage rates?***

The Accreditation Committee and Council have seen many schools, including many schools with large minority enrollments, improve their bar examination passage results through the implementation of enhanced academic support and other programs.

These programs include providing more frequent feedback (rather than a single exam) to students, writing and study skills workshops, bar examination passage courses, practice tests, and offering bar examination scholarships to students who cannot afford a bar examination review course. In many cases these programs have shown real success.

***What opportunities were offered for to provide comments?***

The Interpretation is the beneficiary of this substantial amount of public comment and Committee and Council consideration. The Standards Review Committee held open meetings

where it considered versions of this Interpretation in November 2006, January 2007, May 2007, July 2007, September 2007, November 2007 and January 2008. Public hearings on this or prior versions of the Interpretation were also held.

The Council considered versions of the Interpretation brought forward by the Standards Review Committee at six meetings over a period of more than a year. The Council will consider the Interpretation in February 2008 prior to the meeting of the ABA House of Delegates.

***What types of comments were received about this Interpretation?***

The comments received previous drafts of Interpretation 301-6 highlighted three major concerns with the proposal. The first major concern raised in the comments was the effect that the Interpretation may have on diversity in the legal profession and on the willingness of schools to recruit and enroll minority students. The majority of these concerns were raised on drafts that included an eventual bar examination passage rate of 80% or on drafts that did not include an eventual bar examination passage rate.

A second concern was the difficulty of data collection and a concern for the statistical reliability of the information gathered for “national” schools that would be required to track 100% of their graduates.

An additional concern was over reliance on bar examination passage rates to the exclusion of other outcome measures in determining the effectiveness of a law school’s program of legal education.

***How has the Council responded to comments and concerns?***

The Committee has made a number of changes to the Interpretation in response to comments and concerns. The two tests that look at a school’s eventual bar examination passage rates were added in response to concerns that looking only at passage rates of first-time takes did not provide a complete picture of a school’s program of legal education. The passage rate for eventual bar examination passage was lowered from 80% to 75% and the differential for the passage rates for first-time takes was lowered from 10 points to 15 points in response to longitudinal studies that have been done on bar examination passage rates.

The number of students that must be tracked was changed from 80% to 70% in response to concerns about data collection. In addition, the Section is working with the National Conference of Bar Examiners and the Law School Admissions Council to improve the process of collecting data about bar examination results from the various states.

The Commentary was revised to clarify how 301-6 will apply to provisional schools applying for full approval and to explain that “non-persisters” (graduates who take a bar exam once and fail but do not take a bar examination again in any jurisdiction over the next two opportunities) will not be included for purposes of demonstrating ultimate bar passage compliance.

Council Chair, Justice Ruth McGregor, has appointed a special committee on outcome measures to study possible additional outcome measures (in addition to attrition, placement, and bar examination passage rates) that could possibly be added to the *Standards*.