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Dawn Hinko
1111 East 60th Street
Chicago, IL 60637
Phone: 773-834-3583
Fax: 773-834-3607
dhinko@law.uchicago.edu

May 4, 2007

Hulett H. Askew
Consultant on Legal Education and Admissions to the Bar
American Bar Association
321 North Clark Street, 21st Floor
Chicago, IL 60610-4714

Re: *ABA Interpretation 301-6*

Dear Bucky:

On behalf of the Board of Directors of the American Law Deans Association, I enclose our comments on the proposed Interpretation 301-6. As you know, ALDA is an association of law deans from over 120 law schools in the United States. These comments, however, express the views of the Board of Directors alone, and have not been reviewed or agreed to by the entire membership of ALDA.

Please let me know if we can be of further assistance in this matter.

Very truly,

David E. Van Zandt
President

enclosure
cc: ALDA Board

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MEMORANDUM

President
David E. Van Zandt
Northwestern University

May 11, 2006

Vice President
Rick Matasar
New York Law School

To: Bucky Askew

Secretary-Treasurer
Patricia D. White
Arizona State University

From: Richard A. Matasar
On Behalf of the ALDA Board of Directors

Katharine T. Bartlett
Duke University

Re: Comments on Proposed Interpretation 301-6

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Standard 301(a) requires that “a law school shall maintain an educational program that prepares its students for admission to the bar” Standard 501(b) requires that “a law school shall not admit applicants who do not appear capable of ... being admitted to the bar.” Interpretation 301-3 points to a law school’s bar passage rates as indicative of whether its program complies with Standard 301(a) and raises issues concerning Standard 501(b). Proposed Interpretation 301-6 attempts to formalize, clarify, and codify the Accreditation Committee’s long-standing practices in evaluating a school’s bar passage rate and compliance with Standards 301(a) and 501(b)

ALDA believes strongly that transparency in the Accreditation Committee’s practices is desirable. By making its unwritten practices explicit the Committee provides better guidance to law schools and allows those being regulated to understand what is expected of them. Therefore, providing guidance as to how Standard 301(a) has been interpreted is an important step in the right direction. Nonetheless, we believe that proposed Standard 301(a) can be improved substantially. The Interpretation’s trigger of further investigation of schools whose “first-time bar passage rates frequently are seventy percent or below”

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1111 East 60th Street
Chicago, IL 60637
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Fax: 773-834-3607
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- suppresses the importance of the wide variability in bar passage results that are caused by the extraordinarily different standards among the states for admission to the bar,
- accounts inadequately for the varying missions of law schools, especially those relating to opportunity in admissions,
- and fails to take account of the multitude of reasons affecting an overall first-time bar passage rate that are caused by the method by which the count is made and undervalues the value added that schools provide to at risk students.

We detail these objections below.

Differences by State

There is a fundamental problem with using a 70% first-time bar pass rate as a trigger to further investigation of whether a school is preparing its students for admission to the bar: bar pass rates are often a function of **where** a school's students take the bar, not **whether** they are prepared for admission. This is because the states are free to choose cut scores on their bar examinations that vary substantially from each other. Students taking the exam in a state with a low cut score will pass at significantly higher rates than will students taking the exam in states, like California, with high cut scores. A student with the same multi-state score can be admitted in some states and not in others. Accordingly, bar pass rate may often have little to do with the program of study and everything to do with where a school is located or where its students choose to take the bar examination. Focus on a particular passing percentage, therefore, is not apt, in and of itself, in assessing a school's performance.

It is critical to understand a grading system before assessing whether a school is performing well or poorly. Normal law school grading illustrates the problem. We would never assume that one professor is superior to another because higher percentages of his or her students received "A" grades unless we understood the grading curve of each of the teachers and had an objective way of measuring which was an easy grader and which was a hard grader. Similarly, we would never assume one school was superior to another school because 70% of the students at the first school had "B+" grade point averages and only 50% of the students at the second school had "B+" averages unless we understood the grading practices of the schools.

Creating a trigger that fails to account for the problem of relative grading scales is too inflexible: it is perhaps both under and over-inclusive. In a state with a low cut score, in which nearly 90% of the students at most schools pass the bar examination, a school with a 71% pass rate may be doing a poor job of preparing its students. On the other hand, in a state with a high cut score, in which only 75% of all students pass the bar examination on the first try, a pass rate of 65% may be a better performance than the school with the 71% pass rate in the low cut score state. Simply put: without looking at the state's cut score, an overall first-time bar pass rate trigger is inappropriate.

The Committee should look at ways to refine its triggering mechanism to take account of relative performance. Perhaps it can look for ways to assess the multi-state bar examination scores of the school's students against national performance standards. Perhaps it can do a relative performance assessment by measuring how far from the state's median bar pass rate a school falls—if it is within 10% or some such number of the state's median, it is adequately preparing its students; if it falls below that percentage, the trigger for further investigation kicks in. At any rate, proposed Interpretation 301-6 should not be adopted until the problem of relative state bar grading variability is addressed.

Varying Missions

There is a relationship between LSAT scores, law school performance, and first-time bar passage. Generally the higher an entering student's LSAT score, the better he or she will perform in school; the better the student performs in school, the higher the likelihood that he or she will pass the bar examination on the first try. These general trends vary widely by school given the range of admission differences among students and the required cut score of the state in which the students take the bar examination. Nonetheless, it is clear that the ABA Accreditation Standards understand the relationship between first-time bar passage and admission credentials because they implicitly link Standards 301 and 501.

Proposed Interpretation 301-6 risks creating unintended consequences and interference in the admissions choices of schools by creating an incentive for them to take fewer risks in the admissions process. This already has taken place at schools in states in which bar authorities have been raising the cut score. Knowing of the relationship between LSAT scores and law school performance and the similar relationship between law school performance and first-time bar passage, some schools have decided to take fewer students with lower LSAT scores in order to reduce the risk that students will have bar pass problems.

This is problematic for several reasons: first, it may simply be irrational for schools in which the predictive force of the LSAT is low (because they have a narrow range of admitted students); second, it may interfere with the mission of schools that seek to provide opportunities to students who might not otherwise be able to attend law school; and third, it may run counter to other Standards that promote affirmative action by schools.

Proposed Interpretation 301-6 may exacerbate the problems already extant in legal education that makes schools risk averse in the admissions process—like increasing cut scores and the effect of the U.S. News and World Report on seeking higher LSAT scores for admitted students. Creating yet another incentive to avoid taking risk is a high price to pay, especially where an overall pass rate is a very inaccurate way to portray to individual students what the likelihood is that they will pass the exam. The data show fairly consistently that the pass rates of all students at all law schools are high if those students have done well in law school. Most of the failures take place in the bottom quartile of a school's student body. Therefore, assessing the effectiveness of a school by the performance of its weakest students is a particularly risky venture—especially if the school purposefully is seeking to provide opportunities to students who might not otherwise have a chance to join the profession.

We believe that proposed Interpretation 301-6, while laudable in attempting to provide guidance to schools about the meaning of “an educational program that prepares its students for admission to the bar,” may unduly interfere with other important mission goals chosen by the school, especially those that relate to providing greater educational opportunities. Such schools often greatly outperform the likely predicted outcomes for their students that most other law schools will not accept. If almost all of the students that they accept would have failed had they attended

another law school at which they may not have performed well, even a school with a low pass rate may be doing a terrific job in preparing its graduates for admission to the bar. In such situations, as a matter of consumer information or transparency in their admissions policies, schools might be required to disclose to their applicants what their chances of bar pass might be, based on their entry credentials, but the school should not be deemed inadequate if high risk students decide to take the risk.

Assessing Pass Rate by Value Added

In calculating the pass rate, proposed Interpretation 301-6 looks to a school's overall pass rate in assessing whether the school is adequately preparing its students for admission to the bar. This may not be the most effective measure of a school's performance. Drilling deeper into the data can reveal whether the overall pass rate is reflected throughout the whole graduating class—those at the top and those at the bottom. The Interpretation ought to seek more information about who passes and who fails. If all failures come from the bottom of the class, but top performing students succeed, it is hard to lay the blame on the program of the school rather than individual student performances. The bar examination is a scaled exam built off of a standardized test base. It reflects the same range of performances on other such tests. Those with higher predicted scores coming in will generally perform better than those with lower scores. Thus a truer measure of what a school does is to ask whether the school adds value or increases the chances of success of its students. A school whose best students would have entry credentials in the bottom quartile of the class of another school and whose pass rate is within percentage points of the school with better students might be doing a better job of providing value than the school with the higher bar pass rate.

Three other factors may influence overall pass rates. Many schools lose their best students to other schools through transfers. Almost all transfer students have done well at the school from which they transfer. Their bar pass rates, therefore, are often higher than the overall rate of the school from which they transfer and at which they learned the basic law that is tested on the bar exam. Yet, these students' performances are attributed to the school to which they transfer, not the school from which they transferred. Second, schools with part-time programs disproportionately have students who may have to work while they are studying for the bar exam. Without sufficient wealth to take time off from work or the inability to bear the opportunity costs of studying for the exam, these students may depress a school's overall pass rate through no fault in the school's program. Finally, the proposal to look to a school's performance in the top three states in which its students take the bar examination may not make sense if one state bears a disproportionate share of test takers or no three states taken together cover a sufficiently large enough percentage of the school's graduates to cover a higher percentage of those taking the bar examination.

Before adopting proposed Interpretation 301-6, the Committee should think of ways of integrating these factors into its calculation.

* * *

The ALDA Board reiterates its support of greater transparency in the Standards and their application. It believes that proposed Interpretation 301-6 should be redrafted to: (1) deal with the problem of varying state bar admission cut scores; (2) account for varying missions of schools, especially on their willingness to provide opportunities for students who otherwise might not be admitted to their schools; and (3) incorporate greater flexibility in counting first-time bar passage rates to assure that schools are credited for the value they add through the educational program.

To help guide in redrafting the proposed Interpretation, we suggest the following considerations:

- The trigger mechanism be made more flexible to account for varying state cut scores. The Committee should look to the school's overall pass rate for first-time takers. If the pass rate is above 70%, but considerably below the state average pass rate (10-15% points or similar), the Committee might seek further information from a school. However, if the school were below 70% but within some percentage (5-10%) of the state average, it might look no further. Obviously, the drafters should look at actual performance to determine the proper metrics above or below the 70% line, depending on performance within the state.
- When the trigger kicks in, the Committee needs to look to the mission of the school. If the school is accepting students whose predictors suggest that they have a high likelihood of passing the bar and it is not performing well, a bar preparation issue is raised. If it is accepting students whose predictors show them to be at risk, the Committee should look to the school's mission to determine if this is in furtherance of a diversity or opportunity mission. If so, it should require that the school make this mission transparent (and give at risk students a clear indication of the risks they face in failing the bar) to serve consumer protection goals.
- Neither low nor high bar passage rates alone should assure compliance or violation of the standards. The drafters should also seek to measure whether a school is performing up to predicted outcomes for the students it admits, is underperforming those predictions, or is outperforming those predictions. The precise metric for measuring performance needs further research, but rests on assessing bar passage data given the profile of admissions credentials of the school's students.

Please do not hesitate to call on ALDA to help in the process of redrafting this proposed Interpretation.