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July 16, 2007

To: Bucky Askew
From: ALDA Board
Re: Comments on Proposed Interpretation 301-6

The American Law Dean's Association ("ALDA") is an association of the deans from over 130 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.

As detailed in its memorandum of June 18, 2007, the Section of Legal Education and Admissions to the Bar ("the Section") has been struggling over the last several months to devise an interpretation of Standard 301(a)'s requirement that schools prepare their students for admission to the bar. This task has been complicated by the conflicting goals asserted by law schools, which prefer that any interpretation of 301(a) be sufficiently flexible to account for variations among states and the differing missions of schools and the Department of Education's preference for a bright line measurable standard. The new interpretation has gone through several drafts and the Section has asked for feedback on its most recent proposal. This response, on behalf of the ALDA Board of Directors, is supportive of the Section's efforts, but believes that the proposal should be redrafted once again. We detail our reasons below.

Background

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). This is consistent with the Department of Education's requirement that the ABA demonstrate that it has standards that are "sufficiently rigorous to endure that the [ABA] is a reliable authority regarding the quality of the institutions or programs it accredits." 34 CFR 602.16. Among the factors in assessing whether the ABA is fulfilling its responsibility is whether it "effectively address[es] the quality of [schools] in ... State licensing examination" Id.

Proposed Interpretation 301-6 is complicated. A school is in compliance with Standard 301(a) if: 80% (or more) of its graduates take the bar examination in a primary state, and for three of the most recent five years, its graduate first-time takers pass at a rate of no more than 10 points below the average first-time bar passage rates of ABA-approved law schools taking the exam in the same jurisdiction. However, if more than 20% of a school's graduates take the examination in a jurisdiction other than the primary jurisdiction, the school must demonstrate that its graduates passed the examinations at a first-time bar passage rate of 70% or higher in the two most recent testings. If a school does not comply with this requirement, it may satisfy 301(a) if it shows its graduates pass a bar examination at a rate of 80% or more within three sittings and within three years of graduation.

While recognizing the laudable desire to provide a measurable standard, the ALDA Board believes that proposed Interpretation 301-6 needs further refinement for the following reasons: (1) the first-time bar passage of ABA schools benchmark may not be the best measure; (2) schools will have a difficult time collecting appropriate data without significant changes in the way bar authorities provide information to schools; and (3) the ultimate pass rate within three administrations is too restrictive. In addition to these problems, we urge the ABA to consider a "value-added" approach to measuring school performance in the process of redrafting the interpretation of Standard 301(a).

I. Complications in Assessing First-time Pass Rates

Proposed Interpretation 301-6 requires benchmarking a school's first-time pass rates against those of ABA schools' first time takers within the jurisdiction. This information is not available in some states. Moreover, the ABA itself has been comparing a school's pass rate against the overall pass rate within the state, not just that of ABA schools. Accordingly, schools have been benchmarking for many years against the overall first-time pass rates within a state. Moving to a comparison with ABA schools is a significant change and a distortion of the way schools have been measured for their performance for many years. The object of the bright line is to give clear information to members of the public of the overall chance for success within a jurisdiction. Where a jurisdiction has many takers who do not graduate from an ABA school, this information is relevant to an applicant in assessing their likelihood of passing the examination in that state. The goal is not to array the school against ABA schools only, but against the bar examination within that jurisdiction. Perhaps the rule would be strengthened by requiring schools to benchmark against both the overall and the ABA school pass rates.

In addition to this problem, the rule seems to contemplate that a student will be a first-time taker in only one state at a time. This is simply not true in states like New York, New Jersey, and Connecticut that permit students to take their exams on successive days in multiple states. Under the rule, how these students are counted is critical. If sufficient numbers of them are deemed to be taking the examination in a state other than the primary state, a school may move from the within 10% rule to the rule requiring an overall pass rate of 70% (or perhaps both). If a school can pick and choose, it might be able to manipulate the results to achieve its most desirable result.

Finally, a school with a national student body, may have students who take the examination only in states with low first-time bar passage rates. One could imagine a school whose graduates pass within 10% points of the ABA school first-time takers in every state in which they sit for the exam yet who fails to pass at a rate of 70% or higher. This does not seem fair. Like prior proposed interpretations, this proposal may need greater attention to the individual differences of the states. A school should be assessed by its graduates' performances, not by their choice of where to practice law.

We suggest that for such schools, the proposed interpretation could be improved by marking performance in every state by the "within 10%" rule. If this is too difficult to accomplish, given the data collection process, the interpretation might require a within 10% rule within a limited number of states in which the total number of students taking the exam reaches 80% of the student body. This would ameliorate the need to collect data from every state and give schools the opportunity to negotiate with bar authorities to gain the information needed to comply with the interpretation.

II. Data Collection Problems

As suggested above, the proposed interpretation will require a school to collect information that currently is not available to it or reported publicly—an especially vexing problem for "national" law schools, whose graduates take bar examinations throughout the country. Among the data collection problems are the following:

- States do not have a uniform reporting system.
- Some states do not give schools reports on individual takers, or do not do so for out of state law schools.
- Some states will not report data on students who fail.
- Some states report people as first-time takers even though they have taken the bar examinations in other states or have passed bar examinations in other states.
- Some states list only those who pass the examination, not the number of times that they have taken the bar examination.

Hence, if schools are required to benchmark against ABA first-time takers, the ABA must work with the NCBE or other organizations to assure that data are collected uniformly throughout the country and that the reporting agencies have a way to determine which schools each taker is from, whether the taker is a first-time taker, and how many examinations the person has taken across the country. None of this information is currently uniformly collected. Moreover, it would be extremely burdensome (and perhaps impossible, given graduates' unwillingness to share information with their schools after graduation) for schools to accurately collect this information on their own. If the proposed standard is adopted, the ABA must work to create a uniform reporting system before imposing the interpretation on schools.

The report of the ABA task force reviewing the accreditation standards of the section emphasized that we must be mindful of imposing standards and interpretations that unnecessarily

raise the costs of legal education. Creating a new interpretation requiring hand counting, individual phone calls to graduates over a multiple year period, and an ability to store and access this data, are a high cost to impose without a method in place to assure the accuracy of the data collected.

III. More Flexible Eventual Pass Rate

The proposed interpretation recognizes that eventual pass rates are a legitimate way of assessing whether graduates are adequately prepared to become lawyers. We agree that three years is an appropriate period of time within which to assess a student's performance. However, limiting assessment to three tries may be unwarranted in some circumstances. In New York, for example, students often take more than one examination at a time. Hence, if a student were to take the New York and New Jersey bar examinations simultaneously, fail both, retake both on the next administration, and pass one of the examinations, it is unclear whether the student will comply with the three administration rule since she or he has taken four examinations. In such situations, the student and school should not be penalized because of the ease in which more than one examination can be taken. Further, if a student were to decide to take the bar examination two times a year for three years and ultimately pass the examination within that time, it is not clear why a school should not receive credit for their bar pass. Although most students will pass within three times taking the examination, stories are commonplace of students who have taken the examination without being prepared – for financial reasons or otherwise – who might eventually pass the examination, sometimes after their third attempt. An eventual pass rate interpretation should be a temporal requirement only.¹

Some Suggestions in the Redrafting Process

Over the years, ALDA and the ALDA Board have commented on numerous proposals for modification of the accreditation standards and interpretations. We have consistently advocated for: minimal standards to assure a quality legal education, transparency, and an opportunity for schools to innovate in their missions and performance (consistent with transparency in their dealing with students). Having a standard dealing with bar passage, as a part of measuring a school's outputs, is a step in the right direction.

However, a clear, uniform, bright line requirement for bar passage, may overemphasize one output at the expense of innovation and institutional self-determination. In developing an alternative interpretation to Standard 301(a), the ALDA Board urges the section to consider an approach that focuses on the "value added" by a school through its education. This approach

¹Even a temporal rule may be complicated by measuring decisions students make about when to take a bar examination. Some graduate in one calendar year and take a bar examination in another year. Others take an examination and decide to delay for some time when they will make a second attempt. Perhaps this part of the interpretation could be improved by making the rule three years from the graduate's first attempt to take a bar examination. See Memorandum of John Nussbaumer to Dick Morgan p. 11 (July 6, 2007).

would also look to outputs—the performance of students on the bar examination—but in the context of a school’s mission. For example, to comply with Standards 211 and 212 a school might take students with lower LSAT scores to provide them with an opportunity that they might not otherwise have to become a lawyer. Such a school would be adding value if such students—who might otherwise never have become a lawyer or who most likely would have failed the bar exam if they attended another school—if they pass the bar examination. In assessing the performance of a school with this mission, any interpretation of 301 should be sufficiently flexible to recognize the value added by the school. But to be fair to the students and applicants of schools, their missions should be clear. So too should the school’s bar passage rate be disclosed.

We believe that the ABA should work with the LSAC and NCBE to develop methods of assessing “value-added” and that as the interpretations of Standard 301(a) emerge this approach be adopted to better fulfill mandate recognized by both the DOE and the ABA that standards take account of the missions of the schools that are being regulated.²

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The ALDA Board recognizes the complexity of creating a one size fits all, measurable standard, dealing with bar passage. The proposed standard is much improved over prior drafts. As suggested above, however, we believe it must be improved by assuring adequate data collection procedures, rational counting of first-time takers, and if possible, greater assessment of bar passage in relation to the value added by the school’s education.

If this is not possible, the Board believes that the proposed interpretation would be improved by adopting an interpretation that makes each of the proposed interpretation’s parts an alternative to the other. Hence a school could be in compliance if its first time takers passed within 10% points of its primary state’s pass rate, or its overall pass rate was 70%, or its three year rate was 80%.³ While not a perfect approach, this would provide several ways for schools to comply and would better take account of the varying circumstances of the administration of the bar examination across the country.

²The DOE recognizes the principle that assessing performance must be tempered by looking to a school’s mission. As 34 CFR 602.16 states: “The agency meets this requirement if: (1) the agency’s accreditation standards effectively address the quality of the institution in the following areas: ... Success with respect to student achievement **in relation to the institution’s mission**, including ... State licensing examination” (Emphasis added). The Section has also recognized this principle in the memorandum accompanying the proposed new interpretation 301-6: “law schools often have widely varying missions, some serve specific populations and some appeal to students who bring certain life experiences and qualifications. The Interpretation, should, therefore, strive to assure consumer protection while taking these legal education factors into account.”

³Whatever alternative is developed must minimally deal with the potential unfairness to national schools by benchmarking them using the with 10% approach suggested above.