

December 3, 2007

MEMORANDUM

TO: Deans of ABA-Approved Law Schools
University Presidents
Chief Justices of State Supreme Courts
Bar Admission Authorities
Student Bar Association Presidents
Deans of Unapproved Law Schools
Leaders of Other Organizations Interested in ABA Standards
Standards Review Committee

FROM: Hulett H. Askew, Consultant on Legal Education
Richard J. Morgan, Chair, Standards Review Committee

SUBJECT: Proposed Revisions to the ABA Standards for the Approval of
Law Schools – Interpretation 301-6

At its December 1, 2007 meeting the Council considered the report of the Standards Review Committee with respect to Interpretation 301-6. After discussion, the Council agreed to publish for notice and comment a new Interpretation 301-6. This proposal is published on the Section's website, www.abanet.org/legaled.

We solicit your comments on the new Interpretation, which is attached along with Commentary that describes the lengthy process of adoption and the details of the Interpretation.

New Interpretation 301-6.

Standard 301(a) states that “a law school shall maintain an educational program that prepares its students for admission to the bar...”. Interpretation 301-3 in part states: “Among the factors to be considered in assessing the extent to which a law school complies with this Standard are ... the bar passage rates of its graduates.” The Standards Review Committee considered versions of this Interpretation at its November, 2006, January 2007, May, 2007, July 2007, September 2007 and November 2007 meetings. A public hearing on a prior version of the Interpretation was held in May at the American Law Institute Annual Meeting in San Francisco, CA. The Council has considered versions of the Interpretation brought forward by the Standards Review Committee at its February 2007, June 2007, August 2007 and December 2007 meetings. The version published today is the beneficiary of this substantial amount of public comment and Committee and Council consideration.

This new Interpretation is intended to give notice as to how the Accreditation Committee will handle bar passage information in determining compliance with that portion of Standard 301(a). The goal of the Council in proposing and ultimately adopting an Interpretation on bar passage is to provide a “measurable benchmark” that establishes a consistent and transparent methodology for reviewing a school’s compliance with Standards 301(a) related to “...admission to the bar”.

We solicit comments on the new Interpretation 301-6 by letter, e-mail or through an appearance at a hearing that will be conducted by the Standards Review Committee during the Annual Meeting of the Association of American Law Schools (AALS). The hearing is scheduled for January 3, 2008 at 3:15pm in Conference Room E, Executive Conference Center, Sheraton New York Hotel. Please address written comments on the Interpretation, and requests to speak at the hearing, to Becky Stretch, Assistant Consultant, at our Chicago office or at StretchC@staff.abanet.org.

Comments on this Interpretation should be submitted no later than January 1, 2008. All comments will be provided to and reviewed by the Standards Review Committee when it meets following the January hearing to finalize its recommendations to the Council on these matters. We expect that final Council action on these matters will occur at the Council meeting

scheduled for February 9-10, 2008 in Los Angeles, CA and will then be submitted to the House of Delegates of the ABA for concurrence at the February 2008 meeting of the House.

In addition to the Standards for Approval of Law Schools, the United States Department of Education (DOE) also plays a key role in accreditation, including, in this instance, measurement of success on the bar exam. The Council of the ABA Section of Legal Education and Admissions to the Bar is the United States Department of Education recognized accrediting agency for programs that lead to the first professional degree in law. In order to maintain this accrediting authority, the Section's accreditation project must comply with recognition criteria established by DOE and contained in 34 CFR 602. Section 602.16 states:

“The agency [i.e. the ABA] must demonstrate that it has standards for accreditation... that are sufficiently rigorous to ensure that the agency is a reliable authority regarding the quality of the education or training provided by the institutions or programs it accredits. The agency meets this requirement if: (1) the agency's accreditation standards effectively address the quality of the institution or program in the following areas: (i) Success with respect to student achievement in relation to the institution's mission, including, as appropriate, consideration of course completion, State licensing examination and job placement rates...” (Emphasis added.)

Thus, student achievement, as measured by success on State licensing examinations, is a benchmark to be measured by the Standards pursuant to these DOE regulations. In addition, the Department has, in recent years, placed increased emphasis on agency responsibility for measurement of student assessment and achievement (output measures) through the accreditation process. Whatever benchmarks the agency may adopt, the DOE regulations also require that they be transparent and consistently applied.

As discussed in the Commentary and in previous transmittals of this Interpretation, the Section of Legal Education and Admissions to the Bar is committed to more broadly addressing the quality of the academic programs of law schools based on transparent and consistently applied outcomes that measure success with respect to student achievement beyond such factors as bar passage, attrition and placement. Special committees on

outcome measures and transparency have been appointed by the Chair of the Section and have begun their work. The committees are scheduled to deliver their recommendations to the Section Council by June 2008 and the Council will make a determination as to which recommendations to send forward for potential implementation. The Council will refer its recommendations to the Section's Standards Review Committee, which will craft the proposed Standard, Interpretation or other changes. The Council will review the proposals from Standards Review, make changes it believes appropriate and initiate the public hearing and notice and comment process with the relevant constituencies, including legal educators, the Conference of Chief Justices and interested members of the profession (i.e. state bar organizations, independent bar associations and other appropriate professional groups as well as with individual lawyers). The Section expects this broad based consultation process will culminate in the presentation of final proposals to the House of Delegates for concurrence as early as its August 2009 annual meeting

Thank you.

cc: Ruth McGregor, Council Chairperson
Dan Freehling, Deputy Consultant

Proposed Interpretation 301-6

(Approved for Notice & Comment 12-1-07)

A. A law school's bar passage rate shall be sufficient, for purposes of Standard 301(a), if the school demonstrates that it meets any one of the following tests:

1) That for students who graduated from the law school within the five most recently completed calendar years:

(a) 75 percent or more of these graduates who sat for the bar passed a bar examination, or

(b) in at least three of these calendar years, 75 percent of the students graduating in those years and sitting for the bar have passed a bar examination.

In demonstrating compliance under sections (1)(a) and (b), the school must report bar passage results from as many jurisdictions as necessary to account for at least 70% of its graduates each year, starting with the jurisdiction in which the highest number of graduates took the bar exam and proceeding in descending order of frequency.

2) That 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 is 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 these same jurisdictions.

In demonstrating compliance under section (2), the school must report first-time bar passage data from as many jurisdictions as necessary to account for at least 70 percent of its graduates each year, starting with the jurisdiction in which the highest number of graduates took the bar exam and proceeding in descending order of frequency. When more than one jurisdiction is reported, the weighted average of the results in each of the reported jurisdictions shall be used to determine compliance.

B. A school shall be out of compliance with the bar passage portion of Standard 301(a) if it is unable to demonstrate that it meets the requirements of paragraph A (1) or (2).

C. A school found out of compliance under paragraph B, and that has not been able to come into compliance within the two year period specified in Rule 13(b) of the *Rules of Procedure for Approval of Law Schools*, may seek to demonstrate good cause for extending the period the school has to demonstrate compliance by submitting evidence of:

(i) The school's trend in bar passage rates for both first-time and subsequent takers: a clear trend of improvement will be considered in the school's favor, a declining or flat trend against it.

(ii) The length of time the school's bar passage rates have been below the first-time and ultimate rates established in paragraph A: a shorter time period will be considered in the school's favor, a longer period against it.

(iii) Actions by the school to address bar passage, particularly the school's academic rigor and the demonstrated value and effectiveness of the school's academic support and bar preparation programs: value-added, effective, sustained and pervasive actions to address bar passage problems will be considered in the school's favor; ineffective or only marginally effective programs or limited action by the school against it.

(iv) Efforts by the school to facilitate bar passage for its graduates who did not pass the bar on prior attempts: effective and sustained efforts by the school will be considered in the school's favor; ineffective or limited efforts by the school against it.

(v) Efforts by the school to provide broader access to legal education while maintaining academic rigor: sustained meaningful efforts will be viewed in the school's favor; intermittent or limited efforts against it.

(vi) The demonstrated likelihood that the school's students who transfer to other ABA-approved schools will pass the bar examination: transfers by students with a strong likelihood of passing the bar will be considered in the school's favor, providing the school has undertaken counseling and other appropriate efforts to retain its well-performing students.

(vii) Temporary circumstances beyond the control of the school, but which the school is addressing: for example, a natural disaster that disrupts the school's operations or a significant increase in the standard for passing the relevant bar examination(s).

(viii) 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.

EXPLANATION OF PROPOSED INTERPRETATION 301-6

(Approved with Proposed Interpretation 301-6
for Notice and Comment, 12/1/07)

Proposed Interpretation 301-6 establishes several alternatives under which a law school can demonstrate compliance with Standard 301(a) as it relates to bar passage. Compliance may be demonstrated under any of these alternatives.

A. Demonstrating Compliance with 301-6(A)(1)(a) and (b)

The first listed alternative for demonstrating compliance focuses on repeat-takers, within a five-year look-back period, for purposes of establishing compliance. In demonstrating compliance under (A)(1)(a) and (b), the school must first account for at least 70 percent of its graduates each year, starting with the jurisdiction in which the highest number of graduates took the bar exam and proceeding in descending order of frequency. Under this alternative a school can demonstrate compliance with the bar exam passage portion of Standard 301(a) by demonstrating *either*:

- that for the most recently completed five calendar years, 75% or more of the school's students who graduated during this period and sat for a bar exam, passed a bar exam [301-6(A)(1)(a)];

OR

- by showing that for at least three of those same five calendar years, 75% or more of the school's students who graduated during those years and sat for a bar exam, passed a bar exam. [301-6(A)(1)(b)].

Again, under both alternatives, the school must first report bar passage results from as many jurisdictions as necessary to account for a cohort of at least 70 percent of its graduates and then, within that cohort, pass at a rate of 75 percent or better over the entire five calendar years or 75 percent for at least three of those years. In addition, under both of these

alternatives, the look-back period is the five most recently completed calendar years. Thus, in a matter before the Accreditation Committee in 2008, the look-back period would be 2003-2007.

As noted above, for purposes of demonstrating compliance under 301-6(A)(1), the performance of repeat-takers of the bar exam is taken into account. This alternative is responsive to third-party comments that noted that bar exam pass rates for many of their students increase significantly on the second (or, possibly, subsequent) testing. To avail itself of the alternative methods for demonstrating compliance in 301-6(A)(1), a law school would be required to “track” its graduates and provide reliable data indicating a graduate’s bar exam pass status. Schools must make their best efforts to locate and provide reliable data on the bar pass status of their graduates, starting with the jurisdiction in which the highest number of graduates took the bar exam and proceeding in descending order of frequency until *at least* 70 percent of the school’s graduates in the relevant time period are accounted for. Schools must report on all students that make up the “at least 70 percent” cohort (even those for whom their pass status is unknown). Once a jurisdiction is included in the computation for a given year, all of the school’s graduates taking the bar in that jurisdiction in that year must be reported, even if a student’s status is unknown and even if it results in the school reporting on more than 70 percent of its graduates taking a bar exam. A cohort of 70 percent takes into account the difficulties, expressed by several commentators, a school may experience in locating all of its graduates over a period of years, and in getting appropriate data from bar admissions authorities. Note that the Section is working actively with the National Conference of Bar Examiners and state Supreme Courts to develop a mechanism for improved reporting of bar passage data. Pending the implementation of such a mechanism, schools, as noted above, must make their best efforts to locate and provide reliable data on the bar pass status of their graduates when demonstrating compliance under 301-6.

Note that the five-years is a rolling time frame for both (A)(1)(a) and (A)(1)(b) – e.g., if a school came before the Accreditation Committee in 2008, the time frame would be 2003-2007; if the school was not in compliance with 301(a) at that time, and came before the Committee again in 2009, the look-back period for demonstrating compliance under 301-6(A) would be 2004-2008, and so on. Also, note that since one purpose of this alternative for meeting the bar exam passage portion of Standard 301(a) is to demonstrate an achieved pass rate for repeat-takers, once a graduate takes a bar exam, he or she is counted even if the graduate fails on this first attempt and never tries again. On the other hand, if a graduate elects never to sit for a bar examination, he or she is not counted in computing the school's pass rate.

B. Demonstrating Compliance with Standard 301-6(A)(2)

The next alternative [301-6(A)(2)] for demonstrating compliance with the bar exam passage portion of Standard 301(a) focuses on annual (i.e., combined February and July) first-time bar pass rates. In the case of demonstrating compliance using first-time pass rates, there is one way (discussed below) to demonstrate compliance.

In order to demonstrate compliance under A(2), a school would have to show that in at least three of the most recently completed five calendar years, in the jurisdiction(s) which account for at least 70 percent of the school's graduates who take the bar exam for the first time:

- the school's pass rate is not more than 15 points below the first-time bar pass rate for graduates of ABA-approved law schools taking the bar exam in the same jurisdiction(s) in the relevant years.

In demonstrating compliance under sections (A)(2), the school must report first-time bar passage data from as many jurisdictions as necessary to account for *at least* 70 percent of its graduates each year, starting with the jurisdiction in which the highest number of graduates took the bar exam and proceeding in descending order of frequency. Once a jurisdiction is included in the computation for a given year, *all* of the school's graduates taking the bar exam in that jurisdiction for the first time must be reported.

As was noted above, a cohort of 70 percent was chosen in response to comments about the difficulties of getting data for 100 percent of a school's graduates, particularly when a graduating class may sit for the bar exam in numerous jurisdictions and the number sitting in many of those jurisdictions may be quite limited. This, too, is being addressed in discussions with NCBE and state Supreme Courts.

When 70 percent or more of a school's graduates take the bar exam in the same jurisdiction, the determination of whether this performance requirement is met is easy to compute. By way of illustration, consider the following chart reflecting hypothetical annual first-time bar exam pass rates from 2002 to 2006, for a school being reviewed in 2007 where 70 percent or more of its graduates sit for the exam in a single jurisdiction.

Year	School's Annual 1 st Time	ABA 1st Time	Rate Difference
2002	73	79	(-6)*
2003	63	81	(-18)
2004	70	77	(-7)*
2005	67	84	(-17)
2006	71	78	(-7)*

In the three years marked by asterisks, the school's annual (combined February/July of the same year) first-time bar pass rate is no more than 15 points below the average first-time bar passage rates for graduates of ABA-approved law schools taking the bar exam in the same jurisdiction. Hence, under 301-6(A)(2) the school would be in compliance with the bar pass portion of 301(a).

For some schools, however, graduates may sit for the bar exam for the first time in a variety of jurisdictions, and the percent taking the bar exam in any one jurisdiction may be less than 70 percent of the cohort. In this situation 301-6(A)(2) requires the school to report first-time bar passage data from as many jurisdictions as necessary to account for *at least* 70 percent of its graduates, starting with the jurisdiction in which the highest number of graduates took the bar exam and proceeding in descending order of frequency. The weighted average of the results in each jurisdiction will be applied to determine whether a school complies with the Standard. The following illustrations demonstrate how 301-6(A)(2) would work in this circumstance.

Illustration 1: Assume a school had 250 graduates in a given year who took the bar exam for the first time, 90 in State A, 45 in State B, 45 in State C, 30 in State D, and the other 40 scattered in multiple jurisdictions. The 90 from State A represent 36% of the graduates. The additional 45 each from States B and C would bring the number of graduates taking the bar in these three states to 72% of the graduates (180 of 250, or 72%). Thus, this school would have to report the bar exam pass data for its graduates taking the exam in States A, B, and C, but not for those taking the bar exam in State D or other jurisdictions.

In order to measure compliance with the performance requirement of 301-6(A)(2), the Interpretation requires a comparison of the weighted average first-time pass rate for the 180 graduates of this school who took the bar exam in States A, B, and C, with the comparable weighted average of the overall first-time pass rate for graduates of ABA-approved law schools in the same three states. The following table for 2006 illustrates how the weighted averages for the school and for the states would be calculated.

Year = 2006

	State A	State B	State C	Weighted Average
Weighted average				
# takers from school	90	45	45	
% takers from school	50	25	25	
# passers from school	81	27	18	
Pass rate for school	90%	60%	40%	
Weighted average for school	45%	15%	10%	70%
ABA pass rate for states	90%	80%	60%	
Weighted average for states	45%	20%	15%	80%

The weighted average for the school is calculated by taking the pass rate for the school in the three states and weighting it in proportion to the number of students taking the bar exam in the three states. Here, of the 180 graduates taking the bar exam in these three states, 50% took the exam in State A, 25% took the exam in State B, and 25% took the exam in State C.

So, by multiplying the pass rate for the school in each state by its proportional weight, and adding those results together, one arrives at a weighted average pass rate of 70 percent for graduates of the school who took the bar exam in these three states.

The school can demonstrate compliance under 301-6(A)(2) by showing that it is no more than 15 points below the overall first-time taker pass rates for graduates of ABA-approved law schools in these states (i.e., in the example above, states A, B and C) using the same weighted average formula. Using the hypothetical data in the example above for 2006, in order to compare the 70% pass rate for the school's graduates with the performance of all first-time takers from ABA-approved law schools in these three states, one must take the overall first-time taker pass rates for graduates of ABA-approved schools in these states and calculate a weighted average, based on the same weighting applied to determine the school's weighted average pass rate. So, by multiplying the overall pass rate in each state by the proportional weight determined by looking at the number of the school's graduates who took the exam in each state (here, 50%, 25%, and 25%), and adding those results together, one arrives at a weighted average pass rate of 80 percent for all first-time takers from ABA-approved law schools in these three states.

Since, for this hypothetical year, the school's weighted average for its graduates taking the bar in these three states is not more than 15 points below the first-time ABA weighted average for these same states, the performance requirement would be met for this year. Compliance with 301-6(A)(2) would be determined by doing a similar calculation for the most recently completed five calendar years, to ascertain whether the school could meet the "not more than 15 points below" standard in at least three of those five years.

Illustration 2: Assume a school had 100 graduates in a given year who took the bar exam for the first time in several jurisdictions, 50 in State A, 20 in State B, and the other 30 in several other states (none with more than 20, or that state would be number two on the list). The 50 from State A represent 50% of the graduates. The additional 20 from State B bring the number of graduates taking the bar exam in these two states to 70% of the graduates. Thus, this school would have to report the bar pass data for its graduates taking the bar exam in States A and B, but not those taking the bar exam in other jurisdictions.

Assume the following first-time bar pass data for the graduates of this school in State A and B, and for all takers in States A and B.

Year = 2005

	State A	State B	Weighted Average
# takers from school	50	20	
# passers from school	40	8	
Pass rate for school	80%	40%	
Weighted average for school	57.1%	11.4%	68.6%
ABA pass rate for states	80.0%	70.0%	
Weighted average for states	57.1%	20.0%	77.1%

The passing rate for graduates of the school in State A is identical to the state-wide passing rate. By comparison, the passing rate for the school in State B is 30% below the state-wide passing rate. However, only two in seven graduates of this school who took the bar exam in either of these two states elected to take it in State B. So, the weighted average pass rate for the graduates of this school who took the bar in these two states is $5/7^{\text{th}}$ (.71430) weighting to the pass rate in State A, and $2/7^{\text{th}}$ (.28572) weight to the pass rate in State B. And, similarly, when comparing the school's graduates in these two states to the overall performance of test takers in these two states, the pass rate for State A is given $5/7^{\text{th}}$ weight, and the pass rate for State B is $2/7^{\text{th}}$ weight. Thus, the weighted average for graduates of this school taking the bar exam in States A and B is 68.6%, and the weighted average for all takers in these two states is 77.1%.

Since for this hypothetical year, the school's weighted average for its graduates taking the bar in these two states is "no more than 15 points below" the weighted average for these three states, the performance requirement would be met for this year. Again, compliance with 301-6(A)(2) would be determined by doing a similar calculation for the most recent five year period, to ascertain whether the school could meet the not more than 15 points below standard in at least three of those five years.

C. Noncompliance Under 301-6 (B) and (C)

A school that is unable to demonstrate compliance under any of the tests set out in 301-6 (A), after having had an opportunity to do so, will be found out of compliance with Standard 301(a). If a school is found to be out of compliance with Standard 301(a) (or any other Standard), Rule 13(b) of the *Rules of Procedure for the Approval of Law Schools*, provides that a school has two years to demonstrate compliance unless the Accreditation Committee or Council “extends the period for demonstrating compliance for good cause shown.” This two-year limitation is mandated by DOE regulations (34 CFR 602.20). If a school fails to demonstrate compliance with a Standard within two years (unless the time for achieving compliance is extended for good cause) the Accreditation Committee must recommend to the Council that the school be removed from the list of accredited law schools.

If a school is found out of compliance for two years, 301-6 (C) provides that a school may seek to demonstrate good cause for extending the period for coming into compliance. 301-6 (C) (i – viii) provide guidance to schools as to how they may be able to demonstrate good cause. Note that a good cause extension is not automatic nor is it indefinite in its duration.

301-6 (C) sets out the types of evidence the school may use to seek to demonstrate “good cause” for extension of time to come into compliance with the bar passage portion of Standard 301(a). Examples of this evidence include: the trend (up or down) in the school’s bar passage rates; the length of time the school’s bar passage rate has been marginal or poor; effectiveness and value of the school’s academic support and bar preparation programs; and efforts by the school to facilitate bar passage of its graduates who were unsuccessful in their attempts to pass the bar in previous attempts. This last example -- the school’s efforts to facilitate bar passage of its graduates who were unsuccessful in previous attempts -- warrants additional comment. Schools that rely on second or subsequent bar pass rates in order to demonstrate compliance with the bar pass portion of Standard 301(a) must not only track their graduates but they may also be asked to provide information regarding post-graduation support programs they offer to their graduates who are unsuccessful in their first attempt to pass the bar.

Finally, while not part of proposed Interpretation 301-6, Rule 27 of the *Rules of Procedure for Approval of Law Schools* permits the Accreditation Committee and Council to require a school to report-back on its bar passage status. Thus, if a school were otherwise in compliance but was near noncompliance or had shown a pattern of decline in bar exam passage results, the Accreditation Committee or Council may require the school to report back so that the school's continued compliance can be tracked.

COMMENTARY

The Council of the ABA Section of Legal Education and Admissions to the Bar performs its function of approving law schools with a strong sense of responsibility for several important missions. Among these important missions is consumer protection, in this instance protection of law students as consumers of legal education as well as protection of the public as consumers of legal services. Standard 301 establishes the responsibility of law schools to “. . . maintain an educational program that prepares its students for admission to the bar, and effective and responsible participation in the legal profession.” Passing a bar examination is a major factor in determining compliance with Standard 301(a). For example, Interpretation 301-3 states in part: “Among the factors to be considered in assessing the extent to which a law school complies with this Standard are . . . the bar passage rates of its graduates.” In addition, Standard 501(b) states that “A law school shall not admit applicants who do not appear capable of . . . and being admitted to the bar.”

In addition to the Standards for Approval of Law Schools, the United States Department of Education (DOE) also plays a key role in accreditation, including, in this instance, measurement of success on the bar exam. The Council of the ABA Section of Legal Education and Admissions to the Bar is the United States Department of Education recognized accrediting agency for programs that lead to the first professional degree in law. In order to maintain this accrediting authority, the Section’s accreditation project must comply with recognition criteria established by DOE and contained in 34 CFR 602. Section 602.16 states:

“The agency [i.e. the ABA] must demonstrate that it has standards for accreditation... that are sufficiently rigorous to ensure that the agency is a reliable authority regarding the quality of the education or training provided by the institutions or programs it accredits. The agency meets this requirement if: (1) the agency’s accreditation standards effectively address the quality of the institution or program in the following areas: (i) Success with respect to student achievement in relation to the institution’s mission, including, as appropriate, consideration of course completion, State licensing examination and job placement rates...” (Emphasis added.)

Thus, student achievement, as measured by success on State licensing examinations, is a benchmark to be measured by the Standards pursuant to these DOE regulations. In addition, the Department has, in recent years, placed increased emphasis on agency responsibility for measurement of student assessment and achievement (output measures) through the accreditation process. Whatever benchmarks the agency may adopt, the DOE regulations also require that they be transparent and consistently applied.

The bar examination provides an important (but not exclusive) role in assessing students' understanding of and ability to apply substantive knowledge of the law to typical legal issues confronting practicing lawyers. Just as law graduates are evaluated based on their measurable performance, law schools can and should be evaluated on the measurable performance of their graduates, and the bar exam is one way to accomplish this. At the same time, it is important to understand that passage of a bar examination is not a national or standardized measure. Each jurisdiction establishes its own benchmark for passage, with the requisite bar examination "cut" score varying widely among jurisdictions. Each jurisdiction also determines the components of the exam and how those components will be graded and how the scores will be combined for a final score. There is no standardized or national score for bar exam passage. As a result, for example, it would be problematic to require that schools with a large proportion of graduates taking the bar examination in a jurisdiction with a very high threshold for a passing score on the exam demonstrate the same passage rate as may be appropriate for schools whose graduates tend to take the bar examination in a jurisdiction with a relatively low threshold for passing. In the same vein, 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.

ADOPTION PROCESS TO DATE

In November, 2006 the Standards Review Committee adopted and sent forward to the Council a draft Interpretation on bar passage (Interpretation 301-6). The Council at its February 10, 2007 meeting considered the Standards Review Committee draft and made two changes:

- It moved one the proposed benchmarks (i.e. the threshold prompting further review) from 60% first-time bar passage to 70%; and
- It removed the benchmark of 10 points or more below the state ABA-approved law school average.

The redrafted Interpretation was approved by the Council for publication at the February 10, 2007 Council meeting. It was distributed for notice and comment on March 13, 2007, with comments due by May 10, 2007. Over 50 written comments were received, all either in opposition to the Interpretation or recommending changes to it. At the public hearing held on May 16, 2007, 19 third parties signed up to make statements and 16 of them were present and spoke about the proposed Interpretation. Most, if not all, of the presenters had submitted written comments in advance, and all opposed, or suggested changes to, the Interpretation.

In addition to many comments from within legal education, comments were received from the General Motors General Counsel; the Section's own Diversity Committee; the Ohio African American Committee for Optimum Health, Inc.; California Committee for Bar Examiners; State Bar of California; ABA Presidential Advisory Council on Diversity in the Profession; National Legal Aid and Defender Association; The United People of Color Caucus; The Princeton Review Foundation; Wolverine Bar Association; Anti-Racism Committee of the National Lawyers Guild; the Speaker of the Assembly of California; Bar Association of San Francisco; Minority Bar Coalition of San Francisco; and Charles Houston Bar Association. The comments, and the transcript of the San Francisco hearing, have been posted on the Section website (<http://www.abanet.org/legaled/home.html>).

The comments raised several issues that the Standards Review Committee considered:

- a) Should there be a benchmark that accounts for the wide variety of bar exam cut scores nationally, and is setting a national 70% (or any) line that does not account for that inappropriate? In any event, is 70% too high a benchmark for first-time bar passage?

- b) Should first-time passage be the exclusive target? Should there be a benchmark that considers bar passage after multiple testings?
- c) Will the benchmarks have a disparate impact on schools that have significant minority enrollments and perhaps influence schools to admit fewer minority applicants?
- d) Should there be *any* Interpretation on bar passage (a position taken by some commentators)?

In addition, the Chair of the Accreditation Committee, Greg Murphy, submitted a memorandum to Dick Morgan, the Chair of the Standards Review Committee, in which Chair Murphy expressed the views of the Accreditation Committee regarding the proposed Interpretation 301-6, particularly with respect to the past practices of the Committee. The Standards Review Committee considered all these comments as it discussed proposed Interpretation 301-6. In addition, also before the Committee at its meeting was that portion of the Department of Education's Staff Analysis of the Section's application for re-recognition which relates to bar passage. The Committee paid particular attention to the DOE concerns since they relate directly to ABA compliance with DOE regulations applicable to accrediting agencies.

The Standards Review Committee, after reviewing this history, discussing the comments that had been received and considering the concerns of DOE, voted to approve a new draft Interpretation 301-6. That draft made several notable changes in the Interpretation adopted by the Council in February. All the changes were in the context of the substantial amount of third party comment received, including the recommendations of the Accreditation Committee, and the concerns expressed in the DOE Staff Analysis.

The notable changes in the Standards Review Committee proposal of May 16, 2007 were:

- First-time bar passage was no longer the sole measurable benchmark (i.e., the threshold for prompting further review) in the Interpretation, although still a very important one. The Committee was convinced, based on the comments received, that consideration should be given to

“repeat-taker” bar passage data. Whereas a school may demonstrate compliance by a first-time bar passage rate over 70% in its three largest jurisdictions over three years and being within 10 points of the ABA state average, it also would be presented the opportunity to demonstrate compliance by producing information documenting an 85% bar passage within three “sittings” (i.e. exam-takings) by a graduate. The Committee believed Standard 301(a) does not require bar passage the first time a graduate takes the exam, but also does not permit an unlimited number of takings to demonstrate compliance. Thus, “85% passage within three sittings” was determined to be a reasonable expectation of “ultimate” passage within a reasonable amount of time.

- The Committee decided to add back in the measurable benchmark of “frequently more than ten points below the average first-time bar passage rates ABA-Approved law schools ---.” The comments received, particularly the recommendation of the Accreditation Committee, persuaded the Committee that consideration should be given to the wide variation in pass rates among the jurisdictions and to schools that operate within a state that has set, for whatever reason, an unusually high bar passage “cut score” that often results in statewide pass rates at or below 70%. Being within 10 points of the statewide ABA average accomplishes this and provides a fair and measurable benchmark for comparison.

The Committee added a sentence at the end of the Interpretation stating that the Accreditation Committee would “review the totality of all these factors” in determining compliance. This stated the practice of how the Accreditation Committee had functioned and would continue to function under the proposed Interpretation as put forth by the Standards Review Committee. The measurable benchmarks identified in the Interpretation (70%; 10 points; 85%) would lead to further inquiry and review by the Committee. The critical decision regarding compliance or non-compliance would be made only after a review of the totality of the factors (e.g. attrition, academic support, bar prep programs, etc.) as noted in the Interpretation. The Committee also added some additional factors which a

school would report such as “student population served” and “transfer rates”. This proposed Interpretation would permit a school to make a full showing of all the factors that may ultimately affect the school’s bar passage rate.

After the Standards Review Committee meeting, the Consultant’s Office staff had continuing discussions with Department of Education staff regarding compliance with 34 CFR 602.16 and 602.18. Of particular importance was the Staff Analysis prepared by the DOE in November, 2006 in which concern was expressed that the Accreditation Committee review of bar passage information was in need of more transparency and consistency in application, including a measurable standard.

The Interpretation adopted by the Standards Review Committee was a serious effort to meet the concerns expressed in the DOE Staff Analysis as well as respond to the third party comments and the needs of the Accreditation Committee. However, the DOE staff continued to express doubts about the approach taken in the proposed Interpretation, specifically:

1. DOE staff expressed significant concern over the use of “triggers” that lead to further inquiry, stating that this approach is not sufficient to be a measurable standard that describes to a school or the public when a school is in, or not in, compliance with Standard 301(a). Benchmarks or “triggers” as indicia for further review are not sufficient.
2. If a school does not reach whatever reasonable benchmarks are set, there must be a finding of noncompliance pursuant to Rule 13(b), rather than the school being asked to provide more information. That is, rather than a “trigger” for further review, a “bright line” is required which would determine, in itself, whether a school was or was not in compliance with 301(a). In addition, the use of the term “frequently” (as in “*frequently* more than ten points below the average first-time bar passage rate for ABA graduates”) was not sufficiently concrete to insure transparency and consistency.

3. DOE staff raised additional concerns that a first-time bar passage rate of 60%, as a measurable benchmark, was too low a standard for compliance.

Following an in-person meeting with DOE staff, the Consultant's Office staff continued to work on language that would satisfy the concerns raised by the DOE. Ultimately a draft Interpretation was developed that we anticipate will meet DOE concerns and is an appropriate reflection of the legal education goals and objectives as represented in the Standards, responds to the comments heard throughout the public comment period, and follows the lead provided by the Standards Review Committee recommendation in many respects. That version was presented to and adopted for notice and comment at the Council meeting of June 9, 2007. The proposed Interpretation (attached), approved by the Council for publication, has been forwarded to DOE and our interactions with its staff continues.