

October 23, 2015

TO: The Honorable Rebecca Berch
CC: Barry Currier, Greg Murphy, Maureen O'Rourke, Edward Tucker, Joan Howland, Rebecca Hanner White
FROM: Kyle McEntee
RE: Interpreting and Enforcing ABA Standard 501(b)

This memorandum addresses the current application of ABA Standard 501(b) by the ABA Section of Legal Education and Admissions to the Bar's Council and Accreditation Committee (together the "ABA"). That Standard provides the ABA its best opportunity to hold law schools accountable when they admit students who do not appear capable of being admitted to the bar. While revising Standard 316 and increasing consumer information about student success and employment outcomes remain vital to improving legal education, neither action compares to the importance of properly interpreting and enforcing Standard 501(b).

Standard 501(b): "A law school shall not admit an applicant who does not appear capable of satisfactorily completing its program of legal education and being admitted to the bar."

Interpretation 501-1: "Among the factors to consider in assessing compliance with this Standard are the academic and admission test credentials of the law school's entering students, the academic attrition rate of the law school's students, the bar passage rate of its graduates, and the effectiveness of the law school's academic support program."

The ABA equates an entering applicant's "capability" for the purposes of Standard 501(b) with a school's graduates' bar passage rate as measured by the school's compliance with Standard 316. In other words, if a standard-satisfying percentage of graduates who took the bar exam passed, the school is compliant with Standard 501(b). This interpretation is incorrect for a variety of reasons.

First, this application of Standard 501(b) ignores the plain text of the standard. The plain text requires schools to consider the abilities of an individual applicant at the time of admission, not the abilities of the collective graduating class that chooses to take the bar exam. Recognizing this distinction, Interpretation 501-1 identifies pre-enrollment predictors of program completion and bar admittance, specifically "academic and admission test credentials of the law school's entering students." These pre-enrollment predictors – the LSAT and undergraduate GPA, in practice – are specifically named as factors for measuring compliance with Standard 501(b) in Interpretation 501-1. Additional named factors for measuring compliance with Standard 501(b) include bar passage rates, attrition, and academic support systems.

Interpretation 501-1 does not explicitly refer to Standard 316 and its minimum collective bar passage requirements. Instead, Interpretation 501-1 uses the general phrase, “bar passage rate of [a school’s] graduates.” Thus compliance with Standard 316 is a factor in a school’s compliance with Standard 501(b), but there is no textual basis – in the Standard or in its Interpretation – to conclude that Standard 316 compliance is all that matters under Standard 501(b). By way of contrast, the ABA Standards explicitly link Standard 301(a) to Standard 316 in exactly that way. The ABA Standards explicitly state that compliance with Standard 316 is sufficient for compliance with Standard 301(a).

Even if compliance with Standard 316 were sufficient to comply with the “bar passage rate” identified in Interpretation 501-1, Standard 501(b)’s “admission to the bar” refers to more than merely passing the bar exam. Indeed, an applicant to the bar must also pass a professional responsibility exam as well as a character and fitness requirement. Thus, equating Standard 316 with Standard 501(b) has no textual support.

Second, this application of Standard 501(b) ignores the prong of the Standard addressing those who do not appear capable of completing the J.D. program. Even if Standard 316 were the only factor in evaluating “bar passage rate of [a school’s] graduates” according to Interpretation 501-1, Standard 501(b) also requires an applicant to appear capable of completing their legal education, not just passing the bar exam. If 80% of a school’s students failed out, and the remaining 20% passed the bar exam on the first try, it is difficult to imagine this scenario satisfying Standard 501(b). In other words, under the current application of Standard 501(b), schools may admit (and charge tuition for) as many students as they want, regardless of their ultimate ability to be admitted to the bar, as long as those students do not eventually graduate and take the bar exam, thus affecting the reported bar passage rate. The ABA’s application of Standard 501(b) erroneously creates this loophole.

Third, as a matter of policy, treating Standard 501(b) as coextensive with Standard 316 ignores the fact that Standard 316 is an all-but impossible standard to fail. Consider Southern University’s 2013 bar passage rate. Although less than half of the school’s bar-takers passed, its passage rate of 46.6% does not jeopardize compliance with Standard 316 because it is within 15% of the state average. Consider, also, Florida Coastal School of Law’s July 2014 bar passage rate in Florida. The school’s rate in 2014 of 58% satisfied Standard 316 even though it was 13.8% below the state average.¹ However, Florida Coastal would not satisfy Standard 316(a)(2) if its own poor performance were excluded from the average of other Florida law schools.² In practice, Standard 316(a)(2) insulates schools like Florida Coastal from poor bar passage rates

¹ Florida Bar Exam Results, July 2014 Examination <https://www.law.ufl.edu/news/wp-content/uploads/2014/09/Summer2014BarExaminationResults.pdf>.

² The state average including Florida Coastal was 71.8%; without the school it was 73.2%. With a bar passage rate of 58%, Florida Coastal’s bar passage rate is more than 15% lower than the state average when the average does not include the school’s performance. Equation: $(2057-149)/(2864-257)=73.2\%$.

because their own numbers skew the average to which compliance is tied. This effect is doubly troubling if numerous schools race to the bottom together. As lax as the first-time bar passage standard appears to be, the ultimate bar passage standard may be even less rigorous.

Fourth, this application of Standard 501(b) treats individuals as expendable. As long as the rest of the class passes at a high enough rate, admitting many others who do not pass (but do not jeopardize compliance with Standard 316 because the volume is low enough) would be adequate, even if the individual student(s) faces extraordinarily long odds of completing school or passing the bar, and even if the school is fully aware of those long odds. Standard 501(b) is written to protect students from exploitation by law schools who would admit them. However, in practice, treating compliance with Standard 316 as sufficient to comply with Standard 501(b) does nothing to protect individual students and instead allows schools to exploit students who faces significant risk of not becoming lawyers. If the ABA's application of the Standard were correct, the ABA could do nothing about a school that takes even just a few students who they know have no hope for admission to the bar.

Fifth, even if Standard 316 alone were suitable to use to measure Standard 501(b) compliance, doing so only makes sense when entering students' academic and admission test credentials remain steady over time. However, *The State of Legal Education in 2015* contradicts this assumption: LSAT scores of incoming law students have fallen precipitously and meaningfully at many programs; undergraduate GPA changes predict an exacerbation of those LSAT score declines, rather than mitigation of those declines; and attrition rates have not increased to mitigate the increasing risk profiles of entering students at those schools.³

When using Standard 316 to test compliance with Standard 501(b), the ABA effectively uses a school's admissions choices from many years ago to determine whether a school's admissions choices today are exploitative. When entering class credentials stay the same, this may be effective. But when the admissions credentials dramatically decline, Standard 316 loses its utility for establishing a school's current Standard 501(b) compliance.

In summary, equating Standard 316 and Standard 501(b) is not supported by the text or broader policy considerations. Standard 316 evaluates whether schools properly prepare their graduates to pass the bar exam. Standard 501(b) is supposed to evaluate whether schools take advantage of incoming students who desire a law degree and/or law license by accepting and charging tuition for students who are unlikely to be admitted to the bar. To continue applying Standard 501(b) in contravention of the text and in favor of schools instead of applicants is to allow schools to hide their exploitation of incoming students until they have already collected tuition dollars and left the students saddled with debt and unable to be admitted to the bar.

³ LST's *The State of Legal Education in 2015*, <http://www.lawschooltransparency.com/reform/projects/investigations/2015/analysis>.