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Via Electronic Mail

Opposition to Resolution 110B

Dear Fellow ABA Delegates:

I am concerned about the total lack of information, research, data, and due process, concerning an apparent resolution being introduced for passage and approval at the ABA Mid-Year meeting coming up in February in Miami. My concerns are addressed herein.

Resolution 110B. The Council of the Section on Legal Education and Admissions to the Bar has submitted a resolution asking that the American Bar Association's House of Delegates concur in a proposed amendment gutting current Standard 316 governing bar passage rates. I urge that the House of Delegates decline to provide its concurrence to what is now listed as Resolution 110B. The effect of that action would be to refer the matter back to the Council for further consideration, which according to current procedure can occur twice before the amendment takes effect. The result will be an opportunity for what was missing in the formulation of this proposed amendment: development of valid, relevant data; study of potential outcomes for students, law schools, and the profession; analysis of implications for the continued admissions practice, operations, and viability of law schools; and, most importantly, serious consideration of the drastic consequences of this rash proposal on diversity in our profession and our law schools.

Lack of thorough and fair process. In 2008, a long, sometimes contentious, and ultimately valuable review process led to the current bar passage standard. The 2008 Council request for concurrence made to the House of Delegates described extensive revisions of drafts, recounted considerable negotiations with the law schools, and informed of consultation with the Department of Education. The 2008 version of the Standard was considered by the Standards Review Committee over approximately two years and at six of its meetings. The Council issued at least three notice and comment opportunities before adoption.

Compared to the 2008 action, the review process was precipitous, perfunctory, and meaningless. The review process for the amendment now proposed was inadequate. The process was completed without amendment, consultation, or negotiation, and only a single hearing was held.

Like Athena springing from the head of Zeus, fully formed and clad for battle, the proposed amendment was fully formed when it was introduced in March 2016. The outcome appears to have been predetermined by the time it was submitted for public notice. Despite overwhelmingly negative testimony and comments submitted in opposition, it was adopted by the Council in October 2016 with exactly the same language as originally written. The deadline for comments was mid-summer, when the great majority of schools and professors were on their summer break; the hearing was held on August 2, 2016, prime vacation time.

Unresolved conflict with another ABA entity and with the Goals of the ABA. The proposed change is not supported by another ABA governing body—the ABA Council for Racial and Ethnic Diversity in the Educational Pipeline. The Chair of that body submitted six arguments opposing adoption of the amendment to the Council of the Section on Legal Education and Admissions to the Bar, all premised on the fact that this action is contrary to ABA Goal III. The proposed amendments will adversely impact efforts to diversify the profession. The Council of the Section on Legal Education and Admissions to the Bar even rejected without comment the Pipeline Council's request that the Legal Education's Council undertake an impact study. Referring this matter back to the Section on Legal Education would provide an opportunity for it to further consider the views of a peer organization within the ABA and to undertake the impact study the Pipeline Council respectfully sought.

Strong opposition to this proposal among minority organizations was widespread and clearly articulated. This commentary was ignored. Similar opposition from these groups led to the withdrawal of a similar proposed amendment in 2013. Apparently, no consideration was given to either the current or the previous opposition, or to the record compiled in 2008 when the current standard was adopted.

The collective judgment of those committed to improving the lack of racial disparity in the legal profession is reflected in their unanimous opposition to this amendment, all to no avail. In addition to the Council for Racial and Ethnic Diversity in the Educational Pipeline and me, opposition was voiced through submissions from:

The Clinical Legal Education Association (CLEA);

Collectively a group of twenty concerned law schools (mostly those serving substantial minority students), who were joined by the National Bar Association, the Society of American Law Teachers (SALT), East Bay La Raza Lawyers Association, former California Supreme Court Associate Justice Cruz Reynozo (Vice-Chair of the U.S. Civil Rights Commission);

The Congressional Black Caucus
Congressman Henry Cuellar
The Historically Black College and University Law Deans (HBCU)
The Hispanic Bar Association of Houston
Professor Jendayi Saada
Professor Lupe Salina
Professor M. Isabel Medina
The Mexican Bar Association of Texas
Professor Michael Lewyn
The National Black Law Students Association (NBLSA)
The Society of American Law Teachers (separately)
The Southern University Board of Supervisors
Professor William Patton

All testimony at the public hearing opposed the amendment, including that of:

Dean Gilbert Holmes, representing his school and the group of deans who submitted comments
Student Derick Dailey representing NBLSA
Professor Marzita Karmely, representing CLEA
Professor William Patton
Professor Denise Roy, representing SALT
Professor Marc-Tizoc Gonzalez
Professor Beverly McQueary Smith, representing the ABA Council on Ethnic and Racial Diversity and the Educational Pipeline
Professor Susan Prager
Dean Danielle Holley-Walker, representing the HBCU law school deans
Professor Patricia Salkin

Robert Furnier (Chair of the ABA Law Practice Division's Diversity and Inclusion Committee and member of its Council)
Michael McLoughlin, a member of the Northern Marianas Islands Bar

The Council of the Section on Legal Education and Admissions to the Bar ignored this fervent written and oral input, which primarily sought only modest requests for the development of data, study of possible consequences, and consideration of the impact on diversity. It should not be ignored in turn by the House of Delegates, which should insist on exactly that.

Inconsistency. The proposed amendment overturns a thoughtful, recent compromise worked out in 2008 and reinforced in 2013 during a previous reconsideration. The proposed 2016 change is unjustified in light of the very justifications offered by the Council in 2008. In that 2008 request, the Council asked that the House of Delegates concur in its then-proposed amendment to the former bar passage Standard. The arguments made by the Council in its 2008 submission refute the premises now made in support of the proposed change. Essentially, this resolution asks the House of Delegates to reverse its previous endorsement of that compromise.

Among the arguments submitted by the Council in its 2008 request for concurrence was the suitability of using a single measure to evaluate bar passage results, in which they stated 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."

They continued that "[t]here is no standardized or national score for bar passage. It would be problematic to require schools in a jurisdiction with high passing score requirements to meet the same passage requirement as schools with low passage requirements." Contrary to their 2008 argument, the 2016 proposed amendment does exactly that, using only a single measure for every school, a requirement the Council called "problematic" in 2008.

The Council's 2008 submission to the House also noted that schools have widely varying missions that impact the make-up of their enrollments, including the diversity of their student bodies. The 2016 proposed standard no longer takes the mission of a law school or these other factors, including diversity, into account.

In addition, the 2008 submission urged using an ultimate pass rate that incorporated what it called a five-year look-back period to evaluate results, ostensibly to account for significant variation in annual first-time passage rates. That period is now compressed to two years based on questionable reasoning and flawed data. The Standards Review Committee data on retakers and on persistence is incomplete at best. The Council and Standards Review Committee seem to have relied on a sample of bar exam data from July 2006, July 2007, July 2010, and July 2011. Most of it is badly out of date, and it is incomplete because it includes only July data and not February. It also excludes a large percentage of takers—completely excluding the results from 14 states and all 5 U.S territories.

The data relied upon is over five years old and is based on exams that took place before states implemented the Uniform Bar Examination (UBE). Twenty states currently use the UBE, but only three states did in 2011 (and no states used it before that). From 2012-16, 17 additional jurisdictions have implemented the UBE and six of them did so only in 2016. Six more are slated to do so in July 2018.

This shift is a huge change. There is no data to show the UBE's effect on bar passage. Using data from 2011 and earlier—before 85% of the states adopted the UBE—as the rationale for any decision on bar passage is misguided and misleading.

While use of this data is ill-advised, it ironically confirms the large gap for African-American bar passage rates, which are lower than overall rates, particularly on the multiple-choice test. The July 2011 data relied on by the Council shows that African-American takers passed the bar examination at a rate that was 6 percentage points lower than while takers. The data also showed that only 3.2% of white takers took the exam more than twice, whereas 14.1% of black takers took the exam more than twice. That data perhaps presages what the law schools will need to do to improve bar passage, again going against the grain of American Bar Association diversity goals.

Furthermore, at the time of its 2008 submission, the Council of the Section stressed that it was working with the National Conference of Bar Examiners and state Supreme Courts to get better bar passage reporting, a significant problem at the time. If anything, the challenge presented in getting good bar results' information and data has gone the other way, with more jurisdictions now citing privacy reasons for denying law schools access to the results reports. The 2008 submission noted the wide range of first-time passing rates both within and among the jurisdictions offering examinations.

By compressing the measuring time period time, the proposed amendment puts schools from low-passage rate states in a rate deficit that leaves them too little time in which to recover. There is no indication that anything was done to get better bar passage information—not from the NCBE, from the 55 jurisdictions that offer bar examinations, from State Supreme Courts, or from the law schools. The effort made by the Council to get ultimate passing rate information was deficient and flawed, as the comments submitted to the Standards Review Committee and the testimony at the one hearing established.

Lack of merit. The proposed amendment removes all former safeguards from Standard 316. The proposed new standard completely eliminates the language of current Standard 316 (c) that assures that schools not in compliance have two years to correct the situation. Two years is a minimal time period given that the cycle from admissions, to education, to graduation and the bar examination is three to four years. Also eliminated is the language from Standard 316 (c) that identifies the grounds for a good-cause extension and that lists examples of justifications that might be appropriate. Thus, the Standard currently guarantees that non-compliance with the bar results standard is tied to a two-year safe harbor and identifies exactly what might authorize an extension. In place of the binding and explicit language in the current Standard, the Council now asserts that its general rules of procedures allow for a compliance period, but that assertion is questionable since Rule 14 no specific details about bar passage. The Council also asserts that a Managing Director's directive about implementation might be substituted for the current standard language. But as the organization repeatedly asserts, staff advisories are not binding on the Council, unlike the effect of the current language in Standard 316.

In addition, the emphasis on bar results imposes the entire burden on law schools, which provide only one of the three components that affect bar results. Law schools are responsible for providing the basic knowledge of bar examination content their graduates face. But adequate student preparation for a bar examination, particularly after graduation, is a major contributor to success and is the major contributor to increased ultimate success. And, as the 2008 submission to the House suggests, the quality, content, scoring, and cut score determinations of the 55 jurisdictions offering the examination are a third, and at least equal contributing component. The proposed standard will exacerbate the untoward emphasis on an outcome measure that the law schools only control in part.

In the eight years since its adoption of the current language, the Council has collected no data about ultimate bar results from law schools, none at all. Nor has it cited any comprehensive data collected by anyone, anywhere, on ultimate bar results. Although it has reviewed some limited data (see the discussion of data flaws above) on the number of times the examination has been repeated (which in part contradicts their own premise), it did not collect or identify the time period involved in repeating the examination. And the assertions made about the behavior and successes of repeaters are directly contrary to our actual experience about ultimate results over time, information we included in our comments submitted to the Standards Review Committee.

Reliance. The law schools have adjusted to, and relied upon, the language of current Standard 316 in their mission articulation. They have structured their admissions practices around that language, both regarding the current first-time passing rate alternative and the five-year measuring period. They have redone their academic programs to meet the passing requirements established in 2008. Schools have introduced or restructured their bar preparation offerings to help their students meet these requirements. Many have made adjustments in their long-range planning. This sudden, draconian moving of the goalposts is unwarranted. The Council has not identified any failings in this regard in its submission to the House of Delegates.

This sudden change in Standard 316 is capricious and the new Standard 316 is an arbitrary, one-size fits all Procrustean bed. The proposed new standard: (1) completely eliminates the first-time passing rate alternative, (2) reduces the measuring time to determine compliance from five to two years without relevant data, (3) uses a single measuring device despite constantly changing bar examination standards and practices, and (4) eliminates the acceptability of covering at least 70% of graduates as the minimum reporting level to impose a 100% requirement just as a number of jurisdictions are making bar passage data harder to obtain. The Council proposes this change without providing any supporting data on ultimate bar passage.

Adequate notice. The proposed change was adopted in October without adequate notice to the Section members and without an adequate opportunity to submit further comments to the Council at its October meeting. No specific notice was given that the Council would consider amending Standard 316, either in October or at any other time. The minutes of the August 5, 2016, Council meeting open session do not mention Standard 316, do not describe any consideration of Standard 316 undertaken at that meeting, and provide no indication that the Council intended to take action upon the proposed amendment to Standard 316 at its next scheduled meeting in October 2016.

The agenda for the Council meeting at which its approval occurred specifically identified four standards that would be discussed at its forthcoming October 20-22 meeting—Standards 501 and 503 and Standards 205 and 206. The agenda refers to a Standards Review Committee memo to the Council, but the agenda does not identify that Memo by date or content, nor does it state that any specific item within that memo will be voted upon.

The agenda itself does not even mention Standard 316. It provides no warning that an amendment of that standard was to be adopted. A reader looking at that agenda would assume that only the four standards that are specifically mentioned were being considered for action. The lack of notice misled readers and deprived many of those in opposition from offering additional comments at or before the October meeting, particularly those who had no idea that October would mark the end of the line. Adequate notice is a hallmark of fair process. There was no indication that the Council intended to ignore the nearly unanimous opposition to this proposal. This was a hidden ball trick.

Conclusion. As the proponent of this change, the Council of the Section of Legal Education and Admissions to the Bar should bear the burden of persuasion. In light of the Council's careful consideration of the current standard in 2008, its meager effort in 2016, and the overwhelming opposition in the review process, it has failed to make its case. Unfortunately, under the current process, the American Bar Association has precious little control regarding legal education. In this situation, it should exercise the limited authority it has, and should not lightly defer to one of its Councils when the Association's key goals and fundamental values are threatened.

Sincerely,

Lawrence P. Nolan
President
State Bar of Michigan

LPN/pjw