Society of American Law Teachers—SALT—Supplemental Comments on Contested Standard 301(a) and Proposed Interpretation 301-6, dated February 1, 2008

SALT supplements its December 28, 2007, statement with the following additional comments about the proposed change to Interpretation 301-6.

THE ISSUES:

1. The Department of Education’s Threat to Decertify the ABA Can and Should Be Challenged

The ABA recognizes that Proposed Interpretation 301-6 may be problematic, but believes that there is a risk that the Department of Education will decertify the Council as the accrediting agency of law schools if it fails to adopt a bright-line bar passage standard.

The Department of Education regulations state that an accrediting agency, such as 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. 34 CFR 602.16

While the DOE regulation mentions state licensing examinations as one measure of the quality of education, it does not require or insist that such licensing examinations be the exclusive or sole measure of the quality of education provided by a professional school. In fact, the regulation suggests the opposite. Multiple measures rather than a sole or unitary standard are most appropriate. Indeed the Secretary of the Department of Education has publicly declared her opposition to the use of "one size fits all" measures.

Virtually everyone who testified against this proposal emphasized the need for multiple measures of student success. Indeed, the ABA has conceded the impropriety of relying on a single measure and recently established an Outcome

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Measures Committee whose charge includes determining "whether and how we can use output measures, other than bar passage and job placement, in the accreditation process." It makes no sense to use bar passage as the exclusive measure of success before this Committee has had an opportunity to study alternative ways to judge the quality of the education provided by law schools.

Now, under pressure from the Department of Education, the Council is poised to adopt Interpretation 301-6, which makes bar passage rate the exclusive measure of the quality of legal education. Schools that fail to comply with the institutional bar passage rate risk losing their accreditation. Instead of rushing precipitously to accommodate the Department of Education, the Council should wait until the report from the Outcome Measures Committee. At a minimum, any adoption of Interpretation 301-6 is premature; at worst, it is ill-advised because of the adverse impact its adoption will have on legal education.

While SALT recognizes the severe pressure that the DOE has exerted on the Council, SALT believes that the threat from the DOE is not as serious as the ABA believes for a number of reasons:

- The DOE pressure is directly contrary to the DOE’s own regulations and thus legally, the DOE is in a tenuous position. The ABA can (and should) challenge the DOE’s action, which would avert an immediate take-over.

- The leadership of the DOE is likely to change before the threat to remove the ABA and substitute a new accrediting body could be fully implemented.

- Congress is increasingly showing a willingness to oversee the operations of the DOE. In particular, there are proposals to amend the Higher Education Act in a way that would diminish the Secretary of Education’s control over NACIQI and limit the DOE’s ability to micro-manage the accreditation process.  

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2 In both the House and Senate versions of the College Opportunity and Affordability Act, the amendment to and extension of the Higher Education Act of 1965, HR 4137 and S 1642, the Secretary of Education no longer has authority to appoint all of the members of NACIQI, and both versions also limit the Secretary’s ability to determine the standards that accrediting agencies or associations can use to assess any institution’s success with respect to student achievement. H.R. 4137, § 496 amends the language in the Higher Education Act of 1965 to state that “success with respect to student achievement in relation to the institution’s mission, which may include different standards for different programs, as established by the institution....”
2. The Bar Examination Should Not Be the Only Outcome Measure for Accreditation

Proposed Interpretation 301-6 makes the percentage of graduates from a law school who pass the bar the measure of the quality of that school. A school can be denied accreditation or have its accreditation suspended if the institutional bar pass rate set out in the Interpretation is not met. Bar passage rate then becomes the most significant measure of whether students are receiving a quality legal education.

The bar examination cannot be the measure of the quality of legal education for a number of reasons, which have been a matter of public debate for many years. Given the extent and nature of the controversy over the bar examinations: the non-standardized method by which exams are created, the absence of any proof that the examinations are valid or reliable as predictors of success in the practice of law, the absence of any proof that the test measures the competencies that novice lawyers should have, and the ability of bar examiners to change the score that must be earned to pass the examination in any year, it is inappropriate to use the bar examination as the measure of the quality of a legal education. This standard cannot be applied in a way that is fair or predictable because the rule will apply no matter what the circumstances are in any individual state.

3. The Interpretation Is Not The Best Way to Protect Consumers of Legal Education

The ABA justifies the institutional bar passage standard of Interpretation 301-6 on consumer protection grounds. The Standards explain that the Rule is meant to protect students from predatory practices of avaricious schools that take students’ money when the students have little hope of passing the bar exam.

SALT agrees that law schools should act responsibly and help all those that it admits to become licensed. However, Interpretation 301-6 is not necessary to protect prospective law students. Given the projected impact of the Interpretation on diversity discussed below, the ABA could achieve its goals by more narrowly tailored solutions. For example, the ABA could:
• Require all schools to clearly post bar passage rates on their home web pages so that prospective consumers would have the necessary information to make informed choices.

• Require schools with a certain bar passage rate to expend additional funds on academic support.

• Require the school to offer free bar preparation courses and financial aid for students studying for the bar exam.

These and similar solutions – ones aimed directly at the problem – make much more sense than closing a school’s doors and thus depriving all students of the opportunity to even take the bar exam.

4. The Interpretation May Pose a Serious Threat to Diversifying the Bench and Bar

Diversity in the bench and bar is critical to our justice system. It is indisputable that people of color are severely under-represented in the profession. This trend of under-representation continues and has been exacerbated in recent years. A lack of diversity in the profession necessarily leads to a lack of diversity in the judiciary. A diverse judiciary is critical to the appearance of fairness in a legal system and a democracy.

The proposed standard threatens to close the doors of law schools that admit non-traditional students, first-generation college students, older students from less affluent backgrounds, first-generation immigrants, and students of color, as well as some of the historically black college and university law schools.

There is a debate about the likely impact of the Interpretation. The ABA argues that, based on data from 2006-2007, only one school that serves large numbers of minority students would risk de-accreditation. Others argue that using data from 2005-2006, many schools that serve significant minority populations would be at risk. The bottom line is that no one can predict what the passing score will

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3 See data reported at “A Disturbing Trend in Law School Admissions,” http://www2.law.columbia.edu/civilrights/.
be for bar examinations in any state or the impact of 301-6 on the accreditation of law schools.

We can anticipate the effect of 301-6 on admissions practices. Law schools already tailor admissions in light of the methodology of the U.S. News and World Report rankings. If schools risk losing their accreditation because of 301-6, they will rely even more on what they believe to be predictors of success on the bar examination, such as the LSAT. This will further impair the chances of students of color and non-traditional students and deny them the opportunity to attend law school. The impact of the Interpretation on admissions should be studied and considered before it is adopted.

In sum, this proposal should be defeated because it is unnecessary to protect potential law students, it has the potential to have a profound, and as yet unknown, impact upon the diversity of the bench and bar, and it is a proposal that is being enacted in response to inappropriate political pressure by a government agency that is attempting to micro-manage education with potentially long-range destructive results for the future of the American justice system.