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August 17, 2017

State Bar of California
Re: California Bar Exam
180 Howard Street
San Francisco, CA 94105

Re: Should the California bar exam passing score be lowered?

Gentlemen:

My answer to the above-captioned question is an unequivocal and resounding “No.” The passing score should not be lowered. Instead, both the law schools and the bar examiners should tweak their respective curricula and examinations. If anything, the pass rate should be raised. So what that the current score is the second highest in the country. Why isn’t it the highest?

May I respectfully refer you to the commentary in the *Daily Journal* by Judge William F. Fahey (www.dailyjournal.com/articles/342590) published August 10, 2017. I agree completely with his case against lowering the passing score.

The California bar exam has already been made easier. When I passed the bar in 1982, the exam was 3 days long. Two days were essays (12 of them!) and the middle day was the Multistate. Now it is 2 days long, with 5 essays, the “practicum” and the day-long Multistate. I believe the “practicum” might well be a major source of low scores. It is unreasonable to give a 90-minute time limit within which a test taker is expected to absorb facts, read applicable (or inapplicable) law potentially related to the facts and then write an acceptable brief or other document arguing the matter. Get rid of the “practicum.” Over 100,000 of us passed the exam with just essays, which is a better test of one’s knowledge of the law and ability to analyze a situation. To make the exam even easier to pass does nothing to improve the caliber of attorneys admitted to practice and dilutes the value of we current practitioners who passed a much harder exam.

I do not believe the California bar exam is a test of one’s abilities as a lawyer. Rather, it is a test of one’s test-taking abilities. Further, the law schools do nothing to train students in how to be a lawyer. Where are the lessons and experientials in how to interview a client? Integrity? Acting as a professional? It’s no wonder there are so many incompetent lawyers out there. Now we have a 30-year-old Marin County prosecutor being sued for allegedly conning an elderly, highly drugged (mentally incompetent?) man out of his Sierra cabin. Even the accusation is an affront to all attorneys behaving professionally and with integrity. How does lowering the passing score eliminate such behavior in the future, even if as yet unproven? Yes, there is the Professional Responsibility Exam, but where are the law school classes on the topic? They should be required.

Further, many of today’s practicing attorneys are dreadful writers. I was a Teaching Assistant in Legal Writing in the fall of my third year in law school. I was absolutely appalled by

State Bar of California
Re: California Bar Exam
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my students' inabilities in grammar, punctuation and writing in general. Most of them could not write their way out of a paper bag. Perhaps the law schools should be stricter about those they admit and require some sort of writing to accompany and be an integral part of students' applications. The result might be smaller classes but potentially better lawyers and higher pass rates. I believe the law schools put too much emphasis on the bar pass rate and not enough emphasis on turning out the excellent advocates that the public needs and deserves..

As Judge Fahey said, there does not seem to be a shortage of lawyers, thereby justifying lowering the passing score. With state bar numbers in the 300,000+ range, there is more likely a surfeit than a shortage of lawyers. Indeed, the prosecutor described above has an SBN in that 300,000+ range. A rough calculation shows that on average over 5700 persons per year have been admitted to practice in the 35 years since 1982. Where are the jobs for all those 200,000+ attorneys and why should the passing rate be lowered, thereby admitting even more?

I have spoken to many non-lawyer friends, all of whom are horrified at the thought of a lower passing score and the resulting less-qualified admittees.

In summary, the passing score should not be lowered. If anything it should be raised and the law schools and bar examiners should make their offerings more realistic so as to provide the public with more highly qualified attorneys. It is a rare privilege to be able to practice law and the law schools and bar exams should reflect that thought.

Thank you for the opportunity to comment.

Very truly yours,



Barbara Tetzlaff, SBN 104957

BAT:s



CHAMBERS OF
The Superior Court

GLEN M. REISER, Judge

PROBATE COURT
4353 E. VINEYARD AVENUE
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August 15, 2017

The State Bar of California
Re: California Bar Exam
180 Howard St.
San Francisco, CA 94105
Public.Comment@calbar.ca.gov

Dear State Bar of California:

Thank you for the opportunity to provide public comment regarding the 2017 Standard Setting Study Report and related options for the California Bar Exam pass line.

Prior to 1999, I worked for more than 20 years as a civil litigator in the California state and federal courts. By the end of this year, I will have worked an additional 19 years as a California Superior Court judge, in most case types, civil, criminal, family law and probate.

Over the course of that career, both as an attorney and judge, I have also encountered a meaningful number of out-of-state attorneys appearing in California courts *pro hac vice*. I can fairly say from those decades of experience, both in terms of courtroom presence and legal writing capability, I have seen no qualitative difference between California attorneys and those attorneys licensed to practice in other states.

The very minor fractional difference required of bar passage scores by California over the vast majority of other states, in my opinion, appears less relevant to actual performance/integrity as an attorney than what could be arguably characterized as a trade barrier to limit supply in an exclusive marketplace.

Without being critical of "margin of error" reports from social scientists, some of the actual debate appears to include an "if it was good enough for me" undertone that is simply not inclusive of many otherwise qualified applicants with disadvantaged backgrounds wishing to serve under-represented communities.

By way of example, a former court employee, after moving from Mexico, grew up in a single parent household in Oxnard. She did not speak a word of English until the third grade. Because the employee was interested in helping those who could not help themselves, she attended law school at night. While bright and dedicated, the applicant was unable to pass the California bar examination on her first three attempts. Though she passed the exam on her fourth attempt last year, her scores on the first three examinations appear to have been sufficient to admit her in a number of other states. Our former employee now competently and confidently represents California farm workers.

Forcing that attorney to wait an additional two years, put her aspirations and the needs of her prospective clients on hold, by taking the state bar examination on four separate occasions, does not appear in any way beneficial to that attorney, to the State of California, or to the farm workers she now represents.

Recognizing that a written examination is an imperfect way of gauging character, integrity, honesty and work ethic, one would expect California, because of its vast diversity, to be more inclusive than other states, rather than exclusionary. Worthy people deserve a fair opportunity. I stand in support of adjusting the examination passing score in favor of greater inclusiveness, but not outside the range authorized by other states.

Judge Glen M. Reiser



*Traci I. Park, Esq. (Bar No. 216245)
1137 Harrison Avenue
Venice, CA 90291*

August 10, 2017

California State Bar
Committee of Bar Examiners
180 Howard Street
San Francisco, CA 94105

Re: State Bar Examination "Cut Score"

To the Members of the Committee,

I have recently read about the anticipated changes to the passing score for the California bar examination. As a member of the Bar, I am writing to express my opposition to lowering the cut score for the bar examination.

Yes, California historically has been one of the more difficult states in which to pass the bar examination. However, that is known to any student who elects to enroll in law school, and preparing for the bar examination is something that students can and should be preparing for from day one. If a student does not want to go to class, do the work, or take the time to adequately prepare for the test, then law school and a career as an attorney in California are not the right fit.

Ours is an elite and intellectually challenging profession that should set the highest expectations of its members. Even with the cut rate at 144, I already see young attorneys entering the workforce without the adequate writing, research, or advocacy skills. Worse even, I regularly work opposite senior attorneys who did pass the bar examination at the current cut rate, but who lack the same. Sitting through the Superior Court docket on any given weekday often makes me wonder how licensed professionals can be so unprepared and poorly skilled. The last thing we need to do is flood the field with even less prepared or skilled lawyers.

There is no shortage of attorneys here in California. A 2015 ABA report of lawyer population by state revealed that California has 165,952 active attorneys. Why would we need to add more who cannot pass a test that requires basic analysis of basic legal issues? Truly, the bar exam is not even that hard if you take the time to learn the material!

https://www.americanbar.org/content/dam/aba/administrative/market_research/national-lawyer-population-by-state-2015.authcheckdam.pdf

I understand that California law schools have advocated for reducing the cut rate. Of course they do. They make money from law students, who are less likely to attend schools with low pass rates. If the cut rate is lowered, overall law school pass rates will be higher, they will attract more students, and make more profits. That is not a valid reason to dilute the attorney population with less competent lawyers.

I read in the New York Times:

“And only 51 percent of the graduates of the University of California Hastings College of the Law passed the state’s exam in July 2016. That result, the school’s dean, David L. Faigman, wrote the California Committee of Bar Examiners last December, was “outrageous and constitutes unconscionable conduct on the part of a trade association that masquerades as a state agency.”

https://www.nytimes.com/2017/07/13/business/dealbook/california-bar-exam.html?_r=0

With all due respect to Dean Faigman, that is nothing but rhetoric and nonsense. This Committee should hold candidates for admission to the State Bar of California to the same exacting standards it always has.

Thank you for your consideration.

Sincerely,

Traci Park

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JAMES C. WARD

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August 14, 2017

The State Bar of California
180 Howard Street
San Francisco, CA 94105

RE: California Bar Exam

Dear Sir or Madame:

I would like to weigh in on the proposal to reduce the cut line on the California Bar Exam.

First, a mini background of myself and how I have the qualification to weigh in on this issue. Before I went to law school, I was an educator at Rice University teaching philosophy, specifically logic and epistemology, to primarily graduate students who were both Ph.D. candidates in Philosophy and for Ph.D. candidates in Electrical Engineering. This was in the late 1960s to early 1970s when the concepts which ultimately resulted in the creation of the personal computer, were being developed at that time originally by IBM who worked closely with Rice University since they had a research facility immediately across the Buffalo Bayou from the Rice University campus.

After a number of years of teaching I decided that was not what I wanted to do, and after taking a Sabbatical to travel in Europe and the Middle East and North Africa for over a year, I decided to return to the U.S. and study law. At that time I settled in San Francisco and one of my old friends from the University of Chicago was starting a new law school on a totally different philosophical basis that grew out of the early Johnson era Community Legal Services Programs.

Having already received a Ph.D. and various other undergraduate and graduate degrees, I was not interested in attending a traditional legal education, so I started at New College of California in its' second formative year. I, as well as many of my classmates at that time and the class before and after mine, came from an incredibly varied background, mostly who had already graduate degrees, but some who barely attended college at all. Ultimately my class from New College had every student who finished the program pass the bar exam, though one of the students took approximately three times to do so.

Starting about the July 1979 bar exam, I became a reader of the bar exam and read bar exam twice yearly until I became a member of the Committee of Bar Examiners in the early 1990s. During the time that I was a reader, I participated in the development of what became the

Performance Exam, and once it was being administered initially as a can help, but can't harm test, and thereafter when it became part of the exam, I graded mostly Performance Exam questions.

Once I was on the Committee of Bar Examiners, I initially was assigned to the Examination Subcommittee, as well as another Subcommittee which I do not recall. But over the course of my four years on the Committee of Bar Examiners, I sat in each of its subcommittees and ultimately became of the Chair of the Committee of Bar Examiners. Upon my conclusion of my term, I then went on the National Conference of Bar Examiners and served on the Multi-State Bar Exam Advisory Committee.

During my tenure on the Committee of Bar Examiners we were creating in California our own independent Multi-State Exam (obviously with a different name) since the National Conference of Bar Examiners were charging too much. Ultimately, I participated in the negotiations with the then Chair of the Committee negotiating with the National Conference of Bar Examiners to sell our materials to the National Conference and the National Conference would in addition to paying us a fee for what we had done in creating essentially the ability to create our own competing exam which we believed was a better product than the National Conference.

Then when I went on the National Conference of Bar Examiners I became associated not only with a supervisory role with the Multi State Exam where we would help develop the questions, as well as pretesting the questions for ambiguity, accuracy and any issues that would constitute bias or discrimination. On the Multi-State Exam in addition to my serving directly on the Advisory Committee, I also participated in regional forums of the various other sections of the country to familiarize them with the Performance Exam and its' differentiation from the portions of the bar exam to have a both more reliable and verifiable result from some of the many states' short essay answers.

Some time in the late 1990s, approximately twenty years ago, I wrapped up my tour with the National Conference of Bar Examiners and subsequently have not been involved in the bar exam except peripherally, and mostly that was when my alma mater ultimately ceased to exist, though I as an alumni with a number of other alumni, tried to save the law school which failed as a result of the actions of an administration that had never been fiscally responsible. We did however negotiate that the law school could be reopened under the auspices of another state accredited law school, and all of the students who wished to transfer from New College to the new institution could do so with full credit for their classes they had completed. This was done in connection with the Committee of Bar Examiners in its' oversight of the California Accredited Law Schools. Unfortunately, our ability to salvage the curriculum was short lived in that a year or two later the institution that we had negotiated to take over and run a separate law school under the New College curriculum was merged into a for profit entity which closed the public interest section of the other law school.

With that said, and having myself been an educator, I am well aware of the dumbing down of the curriculum, both with the precollege and college standards, indeed law schools have had to make up for the deficiencies of the colleges in assisting the students in learning how to critically read, analyze, organize and articulate in a logical fashion as required in a lawyer. Obviously there was varied success even when I was involved, and everything that I have seen subsequently indicates that standards have never stabilized, let alone improved.

Now it had already been that the bar exam has been shrunk from three days, as I understand it, to two days. When I was on the committee we were trying to reduce it from three days to two and a half days, and I do not know if that ever came to be before it was shrunk to the two days. But I do know that the Committee of Bar Examiners when I was still on the committee, commissioned at least two studies to see what the effects would be of reducing the length of the bar exam, and there were always trade offs for reliability and for validity in doing so. But it is actually my belief that not all of those psychometric analysis were all that justified since by that time the bar examine was considered so difficult, even though anyone involved with creating and even the law school deans and professors who participated in the calibration process with the committee, all agreed that the grading standards of the bar examine were no more difficult than those of the accredited law schools. A lot of the first time pass rate was probably more as a result of the psychological stress/test anxiety which would probably be lessened by reducing the length of the exam since clearly the stress will be built during the time that you are in test environment for three full days for anyone that is taking the testing without special accommodations.

Indeed, my tenure on the Committee of Bar Examiners was involved in the time we were just beginning to deal with the accommodations required by the Americans With Disabilities Act and were trying to build up our own expertise in how to go about doing so. California, unlike other states, especially New York at that time, did our best to comply with the provisions of ADA rather than opposing and challenging them as did New York. Ultimately, I believe appropriately, the California approach was followed by the other states.

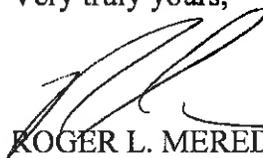
I do not know how that aspect of the poor pass rate would be effective by changing the cut line. I believe given the fact that we are over-producing attorneys as it is now, that we would not be well served by bringing in more marginally qualified individuals, especially at a time when there are fewer opportunities for attorneys to go into a mentoring situation when they finish the bar exam and more and more attorneys are hanging out their shingle shortly after graduation with little or no proctoring/mentoring available to them. All of which, comes at a cost to the public.

I note in some casual reading that I do from time to time that the whole study of the psychometrics of testing has certainly reached different conclusions than they had back when I was directly involved in testing, and some of my thoughts may be still be based upon my understanding of the studies and conclusions of the best minds of the 1990s for which those of today may disagree. And since I have not kept up in any kind of serious academic fashion, I am not able to judge any of those consequences, but certainly whatever analysis is being done in any

of the studies that would justify the dumbing down of the test by reducing the cut line needs to take into consideration what is best in that the people that are being sent out with the blessings of the bar oftentimes with no mentor, are at least minimally qualified to render the services for which we have granted them a license to serve. Indeed, I do not even know what the Committee of Bar Examiners have done on some other issues that were certainly discussed seriously by the Committee in my period, both in the state committee and of the National Conference about the possibility of admitting people provisionally, or probationary admittance, as opposed to an all or nothing approach that California had always taken. It appears to me that California is still an all or nothing and before we would dumb down the test further I would certainly think it would be better to approach this as a issue where somebody would be provisionally admitted for some probationary period of three to five years with some kind of oversight by the Committee to evaluate in the field how the newly minted attorneys are able to perform.

Clearly, most of the people that were associated with creation, and creating the bar exams, and creating the bar exams during my period are now in the last 20 years probably retired or otherwise moved on. But, in speaking to my academic friends, it is clear that students come to them both to college and in the law schools less well qualified with the diminished standards of education at every level of the educational process, where in public education at least even though they have AP classes which did not exist in my generation, too much of education is teaching to the bottom of the class rather than the top.

Very truly yours,



ROGER L. MEREDITH, ESQ.

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August 7, 2017

Committee of Bar Examiners
Senior Director, Admissions
The State Bar of California
180 Howard St.
San Francisco, CA 94105-1617

Re: Bar Passage Rate

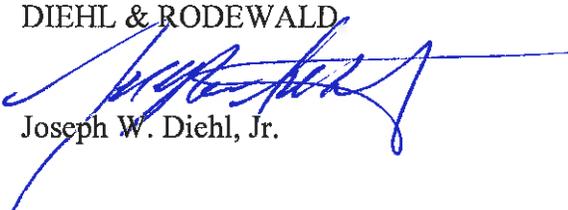
Gentlepersons:

I have been a practicing lawyer in California since 1978. I support maintaining a high standard for the California Bar. In my practice I have met literally hundreds of lawyers and experienced a wide range of competence. I am convinced though, that lawyers who have matriculated from non-accredited law schools and lower tier law schools (both of which I understand are correlated with lower test scores) have been less skilled than their counterparts matriculating from the most distinguished law schools.

It is my belief that the legal profession needs to be vigilant in maintaining the highest possible technical standards. Reducing the bar passage rate to admit lawyers with objectively demonstrated more marginal skills is not the way to accomplish that goal. Accordingly, please accept this letter in support of maintained upper limit standards for bar passage rate.

Very truly yours,

DIEHL & RODEWALD


Joseph W. Diehl, Jr.

JWD:lde

HERBERT MUREZ, Attorney at Law

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August 05, 2017

The State Bar of California
Committee of Bar Examiners
180 Howard Street
San Francisco, CA 94105

Honorable Committee Members:

I write to express my opposition to the proposed easing of the California bar examination. Doing so would hurt the public and the profession. My principal reasons:

The law is an honorable and learned profession. Lawyers are rightly held to a high level of competence and a stringent fiduciary standard. Lowering that level will not persuade more high quality students to make the law their lives' chosen career path, nor will it improve the public's attitude towards our profession. There are means of improving competence as well as public esteem, but lowering the entry level to the profession is not one of them.

There is no shortage of attorneys. Every ad for an open position in a law firm draws an avalanche of resumes, *curricula vitae* and writing samples. An increased influx of newly minted lawyers who have not achieved the academic and analytical competence of presently admitted lawyers will not serve the public nor any potential client. It will make presently admitted unemployed lawyers even less employable. The ones who will be hurt most will be the racial minorities, LGBT people, experienced but elderly lawyers, physically handicapped lawyers, in short all those who are legally protected against discrimination but who still experience it. These quasi-protected persons are still the last ones to get hired and the first ones to be dismissed when the labor supply becomes even more ample than it is now, as greater numbers of less

qualified lawyers will swell the available labor pool.

I have not observed any decline in the unlawful practice of law – quite the contrary. Areas of legal practice which require both expert knowledge and a total fiduciary obligation to the client are increasingly invaded by unlicensed persons who lack both expertise and fiduciary constraints. Immigration “notarios” come to mind, as do “typing services” for bankruptcy petitions, family law papers and the like, as well as stock brokers who advise on and prepare complex estate plans. Greater numbers of less qualified lawyers will not abate these invasions, nor better protect the public against the shoddiness and worse of these unlicensed activities.

I add a short description of my professional life as a lawyer, to show the basis of my foregoing opinions. My State Bar number is 025746. I am now 94 years old. I graduated from a law school which at the time was unaccredited. I had to work fulltime to support myself. I passed the bar examination the first time. I engaged in a general practice, sometimes solo and sometimes in a loose association with others. I no longer accept any client responsibilities, but keep up with what is happening in the law. For some years, I taught law school classes in civil procedure and remedies. Until recently and for about ten years or thereabouts, I heard FINRA arbitrations. In the late 1980s I wanted to be admitted in Nevada, and was told I could not take the bar examination in that state because I had not graduated from an ABA accredited law school. I requested and secured a hearing before the Nevada bar, which ruled that I was not qualified. I petitioned the Supreme Court of Nevada which reversed that ruling on constitutional grounds and modified the rule governing admission of persons like myself. Thereupon I took and passed the Nevada bar examination.

Respectfully,



HERBERT MUREZ

HM:dom

11728 Wilshire Boulevard, #610
Los Angeles, California 90025
August 6, 2017

California State Bar
Committee of Bar Examiners
180 Howard Street
San Francisco, California 94105

To the Committee of Bar Examiners:

The pending proposal to lower the standards for bar passage is an ill advised, ill thought out idea which should never be adopted for a number of reasons.

First, law is a learned profession and bar passage shows that the person has learned a certain volume of law and can analyze it successfully. Lowering the bar passage requirements degrades the legal profession as a learned profession by not requiring attorneys to be as knowledgeable as in the past. Adoption of the proposal will result in less qualified less educated attorneys with poorer skills joining the profession, lowering the quality of legal services, all to the detriment of the profession and the public whom the profession serves.

Second, the proposal is discriminatory in two respects. It sets a double standard where the presently admitted attorneys will have had to pass more rigorous standards than those to be admitted in the future. Additionally, the proposal encourages discrimination against older, women, minority and LGBT attorneys. When a employee shortage occurred during World War II, disadvantaged workers, namely the older, women and minority found employment in fields previously closed to them (LGBT was not acceptable back then). Flooding the profession with less qualified new attorneys will again result in older, women, minority and LGBT attorneys being denied employment and being locked out of the market

Third, there is no reason to lower the standards. The reason for the lower bar passage rates is because the applicants currently taking the bar as a group are less qualified resulting in they doing worse on the bar examination than those in the past. Since the public, whom the profession serves, is not facing a shortage of lawyers and unavailability of legal services, there is no need to resort to such desperate measures, lowering and degrading the quality of the legal profession. There is still a glut of attorneys who cannot find work and lowering the standards for admission will only add to that glut. If anything, standards for admission should be strengthened and improved, not relaxed.

August 6, 2017

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The purpose of the bar examination to protect the public and ensure that individuals entering the profession have sufficient knowledge and competency to practice law. There is no reason to decrease that protection and expose the public to persons with less knowledge and lower competency than is now required. Yet that is exactly what is being proposed. Decreasing the competence of lawyers is not the solution. The solution is to get better qualified people to want to become lawyers and enter the profession, not lowering standards. Standards for passing the bar examination should not be lowered.

Yours truly,



Paul Eisner



The Superior Court

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CHAMBERS OF
WILLIAM F. FAHEY
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(213) 633-1069

August 2, 2017

Ms. Karen M. Goodman
Chair, Committee of Bar Examiners
The State Bar of California
180 Howard St.
San Francisco, CA 94105

Re: Bar Exam Passing Score

Dear Ms. Goodman:

It has been reported that the State Bar is seeking public input on a proposal to lower the passing score on the California Bar Exam. This is an issue about which much has been written and various theories have been advanced. However, in discussing this issue with my colleagues on the bench, I have not heard that there is a shortage of lawyers in our state. Nor have I heard the proponents of a lower passing score address the likely impact on the public and the courts which would result from such a solution.

In fact, I believe an argument can be made for raising the standards for admission to the bar. As a judge who presided in the criminal and civil courts for almost 19 years, I have observed thousands of attorneys representing their clients in significant disputes. Most of these attorneys have been prepared and professional in their appearances and at trial. Unfortunately, the same cannot be said for all attorneys. I have witnessed attorneys who have failed to represent the best interests of their clients because of a failure to read and/or understand basic procedural requirements. Other attorneys have great difficulty speaking and writing in a clear and persuasive manner. Surprisingly, some of these attorneys have a hard time spelling words, using correct grammar or completing a sentence. These are not small matters. To benefit their clients, attorneys must be able to communicate effectively and ultimately persuade a judge and/or jury.

Beyond the lack of speaking and writing skills I too often observe, there are lawyers who do not understand basic black-letter law, fail to file papers or even come to court for a hearing. I have had to deal with attorneys who are incapable of obtaining a default judgment, despite being given multiple opportunities.

I have had trials where attorneys have only a passing familiarity with the evidence code,

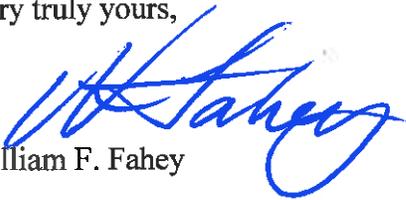
demonstrate minimal or no preparation for obtaining witnesses' testimony and have great difficulty asking a clear question on either direct or cross examination. Then there are the attorneys who have no idea how to move an exhibit into evidence or simply fail to do so before resting their case.

There seems to be growing awareness of these problems by some of our law schools. According to a recent article in the Daily Journal, the deans of state accredited law schools have proposed that skills training for law students become a requirement. Such valuable training can be had from internships, clerkships and clinics, as well as from substantive classes.

This is a good next step. But more needs to be done to make sure that lawyers are not simply "minimally competent." Instead, the goal should be that those who are admitted to the practice of law in California are able to meet the very high professional standards the public expects and deserves.

It is axiomatic that people turn to attorneys only when they have serious problems. When faced with these problems, people want and deserve excellent representation and a fair day in court. The answer is to improve the skills of all lawyers and not, in a knee jerk response to a couple of years of statistics from a few law schools, lower the standards of admission to the California Bar.

Very truly yours,


William F. Fahey

cc: James P. Fox, President of the State Bar of California; Los Angeles Daily Journal

September __, 2017

VIA OVERNIGHT DELIVERY

The Honorable Tani G. Cantil-Sakauye, Chief Justice
and Associate Justices
SUPREME COURT OF CALIFORNIA
350 McAllister Street
Room 1295
San Francisco, California 94902-4797

RE: The California Bar Exam

Dear Chief Justice and Associate Justices:

The undersigned Deans of the California Accredited Law Schools (CALS) request leave to file this Letter Brief before the Court on a matter of statewide importance and significance to the standards set by the Committee of Bar Examiners of the State Bar of California for licensing lawyers in California.

We ask the Court to exercise its inherent power to admit persons to practice law in California and to set the passing score of the California bar exam.¹ We request that in setting the passing score, the Court adjust the current minimum passing score to a score of 139 that reflects the standard of minimum competency for the first year practice of law in California. As discussed below, a minimum passing score of 139:

- 1) serves the interests of the citizens of California by providing additional qualified lawyers who support access to justice;
- 2) maintains a high standard of public protection; and
- 3) serves the interests of the legal profession by providing fair access to licensing in support of a competent and diverse legal profession.

The CALS petitioned the Court on March 2, 2017 to request that an adjustment to the minimum passing score be made from 144 to 135.² In response, the Court expressed its concern that it “lacks a fully developed analysis with supporting evidence from which to conclude that 144 or another cut score would be most appropriate for admission to the bar in California.”³ The Court directed the State Bar

¹ Amendments to the California Rules of Court, Title 9. Division 2. Chapter 2. Rule 9.3(a) and 9.6(a). (Adopted by the Supreme Court on June 21, 2017, Effective on January 1, 2018.)

² Letter from California Accredited Law School Deans to Supreme Court of California dated March 2, 2017.

³ Letter from Supreme Court of California to State Bar dated Feb. 28, 2017.

to conduct “a thorough and expedited investigation” and to “study and analyze a number of issues that bear on the matter.”⁴

The CALS have also continued to independently study and analyze this issue, including considering the additional information developed by the State Bar in response to the Court’s directive. Based on this further analysis, the CALS submit that the evidence developed to date demonstrates an objective basis for adjusting the minimum passing score from 144 to 139, not 135 as we initially proposed for the Court’s consideration. The reasons for the change are more fully developed in the analysis below, but we submit that 139 represents the intersection of policy, data, practice, and national norms. It more effectively balances the important public interests than the existing minimum passing score of 144, the State Bar’s recommended “interim” passing score 141,⁵ or the CALS previous recommendation of 135.⁶

Although we believe that the objective data and policy considerations support a change to 139, the underlying principle for the requested change in the so-called “cut score” remains the same. The current arbitrary, inordinately high minimum passing score creates immediate and continuing harm to the citizens of California, particularly those who live in communities where they are denied access to lawyers because of a growing “justice gap” in our state. (See discussion, *post*, at pp. 7-11.)

This potential for public harm is magnified when qualified individuals have: 1) graduated from CALS and ABA accredited law schools in good academic standing; 2) demonstrated through direct engagement with law faculty and clinical advisors over three or four years that they possess the competency required for the first year practice of law; 3) passed the MPRE at California’s high standard; 4) successfully completed a comprehensive moral character investigation . . . and yet are denied licensure by what appears to be an arbitrary, inordinately high minimum passing score of 144. (See discussion, *post*, at pp. 15-19.)

The CALS respectfully ask the Court to take into account the following significant factors in deciding whether adjusting the minimum passing score to 139 is warranted. Each of the factors will be discussed in sections of this brief (as noted).

⁴ Id.

⁵ Committee of Bar Examiners Open Agenda (July, 28, 2017), Staff Report, Item O-100, [hereinafter “Staff Report”], available at <http://apps.calbar.ca.gov/cbe/docs/agendaItem/Public/agendaitem1000001926.pdf>

⁶ Letter from California Accredited Law School Deans to Supreme Court of California dated March 2, 2017.

1. The public protection function of the attorney admissions process is better assured by comprehensive pre-licensure education, extensive professional ethics training and testing, mandatory continuing legal education, and rigorous character and fitness screening than it is by an arbitrarily high passing standard on the bar exam. (See discussion, *post*, at pp. 3-6.)
2. The public interest of the people of the State of California is best served by providing accessible and affordable legal services and this requires a bar exam passing standard that makes licensure and law practice more accessible to minority and disadvantaged applicants who already meet, or are subject to, the standards set for pre-licensure education, professional ethics training and testing, continuing legal education, and character and fitness screening. (See discussion, *post*, at pp. 7-12.)
3. The State Bar's Standard Setting Study, while nominally conducted using a valid methodology, was significantly flawed and efforts by the Bar to collect support for it among State Bar membership were also significantly flawed. Therefore, the Court should consider State Bar recommendations resulting from the Study as informative, but not determinative. (See discussion, *post*, pp. 12-16.)
4. The proper bar exam passing standard is one that reflects actual minimal competence, including all its attributes, validly and reliably measured through realistic testing. National standards are an important normative benchmark since: 1) the practice of law in California is highly comparable to the practice in other states; 2) there's no evidence that lower passing standards in other large states result in diminished public protection; and 3) the State permits many out-of-state attorneys to practice in California under California Rules of Court 9.46 and 9.40. (See discussion, *post*, pp. 16-23.)
5. Standard setting is not a political question and is only partly a policy question since "minimal competence" can be defined. The Court should define it, not the unified Bar. A standard setting methodology should proceed from a definition of minimal competence provided by the Court exercising its plenary power over bar admissions. (See discussion, *post*, pp. 23-24.)
6. The current bar exam tests very few of the important character, skill, and attitude characteristics of lawyer competency and thus is a poor instrument for protecting the public. An inordinately high cut score exacerbates this problem by excluding from licensure many applicants with these other valuable characteristics who would be deemed competent if these skills and characteristics were tested and properly accounted for in the measurement of competency. (See discussion, *post*, pp. 24-27.)

7. The current arbitrarily high cut score creates inordinate harm to the people of the State of California, both directly (direct cost) and indirectly (lost opportunity). The harm to the State from denying licensure to qualified CALS graduates alone is estimated to be between \$179,000,000 and \$250,000,000 per year. When all impacted ABA law school graduates are also included in the calculation, the harm to California is estimated to be two-times greater, potentially exceeding \$500,000,000 per year. (See discussion, *post*, pp. 26-28.)

Therefore . . .

8. Adjusting the minimum passing score to 139 would accomplish the following: 1) provide 95% accuracy in predicting minimum competency (according to the State Bar's Standard Setting Study); 2) address the problem of disparate impact caused by the current arbitrarily high minimum passing score; 3) align with the State Bar's existing Second-Read Policy; 4) continue the ranking of California as the highest and most rigorous standard among other large states; and 5) require minimal change in the State Bar's current grading procedures. (See discussion, *post*, pp. 28-30.)

DISCUSSION:

- 1. The public protection function of the attorney admissions process is better assured by comprehensive pre-licensure education, extensive professional ethics training and testing, mandatory continuing legal education, and rigorous character and fitness screening than it is by an arbitrarily high passing standard on the bar exam.**

Public Protection in Attorney Admissions

The Court and the State Bar are properly focused on public protection as a primary objective of the attorney admission and licensing functions of the State Bar. To protect the public, the licensing of attorneys in California includes four major qualification requirements: 1) specified pre-licensure education (including mandatory professional responsibility courses); 2) minimum competency testing (California bar exam); 3) professional ethics testing (MPRE); and 4) character and fitness investigation and screening. It is important to recognize that all four of these qualifications are critical components of protecting the public, not just the bar exam.

It is critical to note that minimum competence testing by the bar exam is only one part of securing the public's protection. It should be considered in context with the

other three critical components – pre-licensure legal education, professional ethics testing, and character and fitness determination.

Pre-Licensure Legal Education

CALS are accredited by the State Bar, meeting comprehensive and rigorous standards that ensure a sound program of legal education for all CALS graduates. The specific Rules and Guidelines for Accredited Law Schools are established by the Court, the State Bar Committee of Bar Examiners, and the Board of Trustees.⁷ CALS submit an extensive self-study report each year to the Committee of Bar Examiners and undergo a comprehensive on-site evaluation every five years. The schools' performance on admission standards, content and quality of academics and curriculum, attrition rate, grading, examinations, faculty qualifications, and bar exam pass rate are all evaluated in this comprehensive review.

The State Bar accreditation process is an important element of public protection. In order to be eligible to sit for the bar exam, each graduate must be certified by the law school as having fulfilled the rigorous academic standards established by the State Bar Committee of Bar Examiners. CALS graduates, having invested considerable time and financial resources in three to four years of law study, have established to the satisfaction of expert faculty and peers their minimal competence to enter the legal profession and serve and protect the public. They are formally certified by the law school as having met the first of the four critical standards of public protection – a rigorous pre-licensure education.

ABA law schools go through a similar rigorous accreditation process.⁸ Their graduates also must be certified as having fulfilled the demanding academic standards established by the American Bar Association.⁹ We submit that all certified ABA law school graduates also meet the first of the four critical standards of public protection – a rigorous pre-licensure education.

Moral Character and Fitness Investigation and Screening

Each candidate for licensure is thoroughly investigated by the Committee of Bar Examiners for qualities of moral character and fitness and is *not licensed* unless found to be of good moral character. "Good moral character" includes, but is not limited to, qualities of honesty, fairness, candor, trustworthiness, observance of fiduciary responsibility, respect for and obedience to the law, and respect for the

⁷ <http://www.calbar.ca.gov/Admissions/Law-School-Regulation/Law-Schools>

⁸ https://www.americanbar.org/groups/legal_education/resources/standards.html

⁹ Id.

rights of others and the judicial process.”¹⁰ The burden is on the applicant to establish his or her “good moral character” to the satisfaction of the Committee.

The moral character and fitness requirement is the second critical public protection mechanism. It is possibly more important than the bar exam in protecting the public because it focuses on the specific kinds of decisions lawyers make that could cause actual harm. As stated in the 2016 Comprehensive Guide to Bar Admissions Requirements:

The primary purpose of character and fitness screening before admission to the bar is the protection of the public and the system of justice. The lawyer licensing process is incomplete if only testing for minimal competence is undertaken. The public is inadequately protected by a system that fails to evaluate character and fitness as those elements relate to the practice of law. The public interest requires that the public be secure in its expectation that those who are admitted to the bar are worthy of the trust and confidence clients may reasonably place in their lawyers.¹¹

California already requires moral character and fitness of a very high standard. The process is implemented by the Committee of Bar Examiners that is comprised of both attorneys and public members appointed by the Court and representatives of the public. Because it is focused on the qualities of character that drive lawyer decisions and behaviors, the moral character and fitness requirement is more effective than the bar exam in protecting the public. Each candidate for licensure must pass this second of the four critical public protection mechanisms prior to being licensed as a California attorney.

The Multi-State Professional Responsibility Exam (MPRE)

The Multistate Professional Responsibility Examination (MPRE) is a two-hour, 60-question multiple-choice examination developed by the National Conference of Bar Examiners. The MPRE consists of 60 multiple-choice questions whose scope of coverage includes the following: regulation of the legal profession; the client-lawyer relationship; client confidentiality; conflicts of interest; competence, legal malpractice and other civil liability; litigation and other forms of advocacy; transactions and communications with persons other than clients; different roles of the lawyer; safekeeping funds and other property; communications about legal services; lawyers’ duties to the public and the legal system; and judicial conduct. The

¹⁰ Rules 4.40 (A) and 4.40 (B) of the Admission Rules.

¹¹ Comprehensive Guide to Bar Admission Requirements 2016, National Conference of Bar Examiners and American Bar Association Section of Legal Education and Admissions to the Bar, Code of Recommended Standards for Bar Examiners, at p. vii.

purpose of the MPRE is to measure the examinee's knowledge and understanding of established standards related to a lawyer's professional conduct.¹² MPRE scores are reported on a scale ranging from 50 (low) to 150 (high). Minimum passing scores are established by each jurisdiction and range from 75 (low) to 86 (high). California requires the highest minimum passing score (86) among all U.S. jurisdictions.¹³

Therefore, by passing the MPRE (with the highest minimum passing score among U.S. jurisdictions), applicants have met the third of the four critical standards of public protection.

- 2. The public interest of the people of the State of California is best served by providing accessible and affordable legal services and this requires a bar exam passing standard that makes licensure and law practice more accessible to minority and disadvantaged applicants who already meet the standards set for pre-licensure education, professional ethics training and testing, continuing legal education, and character and fitness screening.**

Public Protection from the Growing "Justice Gap"

Public protection and the public interest also require access to justice and affordable advocates to guide, counsel, and protect the public. It is important to recognize that one of the fundamental challenges to public protection is the growing "justice gap" in California. As stated by State Bar President James Fox and Executive Director Elizabeth Parker, "[t]he State Bar of California strongly supports access to legal services as a core part of our public protection mission. We support the promise of justice for all, including for low-income people who too often have no choice but to navigate the legal system alone."¹⁴ A fundamental principle of the mission of the State Bar is that it "works to expand, support, and improve the delivery of legal services to low- and moderate-income Californians, and promotes diversity in the legal profession."¹⁵

As much as courts continue to try to address the needs of self-represented litigants through a variety of methods – including providing attorneys in self-help centers – it is clear that many litigants need full, independent representation.¹⁶ There are many

¹² <http://www.ncbex.org/exams/mpre/>

¹³ <http://www.ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F205>

¹⁴ State Bar President James Fox and Executive Director Elizabeth Parker joint statement, California Bar Journal (February 2017), (available at <http://www.calbarjournal.com/February2017/TopHeadlines/TH4.aspx>).

¹⁵ <http://www.calbar.ca.gov/About-Us>.

¹⁶ <http://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf>

cases and procedures that are simply too complex for effective self-representation. There are also a growing number of litigants who do not have the capacity to represent themselves in court due to limited English proficiency, illiteracy, mental illness, and a variety of other personal challenges.¹⁷ In recognition of these concerns, Chief Justice Ronald M. George supported AB 590 (Fleuer) in 2009 that authorized the Judicial Council to establish pilot projects to provide representation in areas of critical human need and to develop data on how to effectively identify those litigants who need full representation and what services seem to be most effective.¹⁸

The California Commission on Access to Justice reported in its 2010 report *Improving Civil Justice in Rural California* that, “low-income Californians throughout the state have difficulty accessing legal services, but those in rural areas face additional challenges. There are fewer legal aid lawyers in rural areas than in urban areas and few private lawyers to fill the gaps.”¹⁹ The report highlighted the need for additional public protection of these vulnerable populations in saying, “Each year at least one third of low-income rural people need legal services for basic human needs. However, the availability of legal aid is extremely sparse in rural areas and legal aid programs often are only able to provide partial assistance.”²⁰ The report acknowledged the critical role that California law schools must play in protecting these communities, saying “[I]t is critical that urban law firms and bar associations, *and the state’s law schools*, partner with their rural colleagues to help address the need (*emphasis added*).”²¹

Although there is significant disparity in the access to legal representation across California counties, the following data provide a few representative examples of the disparity specifically facing many California rural counties. These representative statistics reflect the five rural counties served by three of the CALS, Monterey College of Law, San Luis Obispo College of Law, and Kern County College of Law.²²

¹⁷ Id.

¹⁸ California Law Review. Self Represented Litigants in Family Law: The Response of California's Courts (February 2010), Bonnie Hough, (available at <http://www.californialawreview.org/self-represented-litigants-in-family-law-the-response-of-californias-courts>), also see link Harvard Law Review Vol. 123, No. 6 (APRIL 2010), pp. 1532-1539

¹⁹ Improving Civil Justice in Rural California, A Report of The California Commission on Access to Justice, (September 2010), at p. 5.

²⁰ Id. at p. 7

²¹ Id. at p. 7

²² US Census Bureau Statistics (2015), State Bar of California Attorney Statistics (2015).

<u>Region</u>	<u>Population</u>	<u># Attorneys</u>	<u>Attorneys per 1000</u>
California	38,800,000	168,070	4.3
Kern County	882,176	876	0.9
Monterey County	433,898	858	1.9
San Luis Obispo County	281,401	752	2.6
Santa Cruz County	274,146	768	2.8
San Benito County	58,792	51	0.9

In addition, many of our California counties now reflect “minority majority” populations. The following are examples of the large number of California Counties that currently have “majority-minority” status:²³

<u>County Name</u>	<u>Minority (%)</u>
Colusa County	55.1%
Contra Costa County	53.7%
Fresno County	50.3%
Imperial County	80.4%
Kings County	50.9%
Madera County	53.7%
Merced County	54.9%
Monterey County	55.4%
Orange County	57.4%
Riverside County	61.2%
Sacramento County	52.7%
San Benito County	56.4%
San Diego County	52.8%
San Mateo County	58.9%
Santa Barbara County	53.5%
Stanislaus County	54.9%
Sutter County	51.4%
Tulare County	60.6%
Yolo County	51.2%

However, despite these significant changes in the demographics of California, according to the State Bar of California, Hispanics comprised only 4.2% of California attorneys and Blacks comprised only 2.7% of California attorneys.²⁴

²³ <http://www.pewresearch.org/fact-tank/2015/04/08/reflecting-a-racial-shift-78-counties-turned-majority-minority-since-2000/>

CALS and their successful graduates are uniquely qualified to address this aspect of public protection – the needs of rural and minority communities. Many of the CALS schools are regionally located and serve rural counties throughout California.

The lower salaries for public interest law and legal aid organizations also affects the ability of rural counties to serve low-income and under-represented communities.²⁵ With an average total J.D. tuition of \$63,498²⁶ CALS graduates are burdened with significantly lower student loan debt upon graduation. In addition to the lower cost, the majority of CALS students attend evening programs that allow them to work during the day and pay their tuition “as they go” rather than relying on student loans. With low or no-debt, CALS graduates are better positioned to consider working in rural communities. Public interest and legal aid groups have testified that they rely on CALS graduates for staffing rural legal aid services.²⁷ In contrast, the total J.D. tuition for California ABA law schools in 2017 ranges from \$130,050 to \$174,066.²⁸ This high cost of tuition and the heavy financial burden of student loans serves as a substantial financial barrier to working in rural legal practices for many ABA graduates.

The great harm to the citizens of California is that successful CALS graduates, many of who come from the regions that desperately need additional lawyers, are systematically and disproportionately being denied licensure because of the arbitrarily high minimum passing score of 144.

This is confirmed by the Bar’s own July 28, 2017 Staff Report to the Committee of Bar Examiners.²⁹ According to the report, the adjustment of the minimum passing score on the July 2016 bar exam from 144 to 141 would have resulted in a 31% higher pass rate for CALS graduates. Applying the same adjustment for ABA law

²⁴ US Census Bureau statistics (2015), State Bar of California Survey of Members (2011) available at https://www.calbarjournal.com/Portals/1/documents/2011-12_SBCdemosurvey_sumandfacts.pdf

²⁵ Testimony at public comment hearing, August 15, 2017, available at <https://board.calbar.ca.gov/video.aspx>

²⁶ 2016 CALS Annual Compliance Reports - Summaries and Data published by the State Bar of California Office of Admissions (January 17, 2017).

²⁷ Testimony at public comment hearing, August 15, 2017, available at <https://board.calbar.ca.gov/video.aspx>

²⁸ <https://www.ilrg.com/rankings/law/tuition/1/asc/State>

²⁹ Committee of Bar Examiners Open Agenda (July, 28, 2017), Staff Report, Item O-100, [hereinafter “Staff Report”], at p. 9, (available at <http://apps.calbar.ca.gov/cbe/docs/agendaItem/Public/agendaitem1000001926.pdf>)

school graduates would have resulted in a 7% higher pass rate. This means that adjusting the minimum passing score from 144 to 141 would have resulted in CALS graduates passing the July 2016 bar exam at a rate of increase 22% higher than ABA law school graduates.

The report also confirmed that in 2008 and 2016, while white graduates would have experienced a 5.2% and 7.2% increase in passing, Hispanic examinees would have experienced an 8.8% and 10.6% increase and Black examinees would have experienced an even a greater increase, 10.4% and 12.5% respectively.³⁰

These findings support the CALS position that the use of the arbitrarily high minimum passing score of 144 is disproportionately discriminatory for CALS graduates, particularly those who are Hispanic or Black. The State Bar has submitted no evidence contrary to this finding.

Although the State Bar Staff Report fails to provide statistics for any other minimum pass rate alternatives, using the statistics provided by the National Conference of Bar Examiners for the July 2016 MBE portion of the bar exam, it estimated that each one-point adjustment lowering the minimum passing score results in a passing rate increase of 2% for ABA law school graduates.³¹ Applying the same differential reported by the State Bar Staff Report between the pass rates of ABA vs. CALS graduates, it can be estimated that each one-point adjustment lowering the minimum passing score is likely to result in a 2.44% increase in pass rates for CALS graduates. This means that an adjustment of the minimum passing score from 144 to 139, as requested by the CALS, would have resulted in a 36% increase in the pass rate for CALS graduates on the 2016 July bar exam.

To put this in context, more than one-third of all CALS graduates – examinees who are meeting all three of the other critical public protection mechanisms – are being denied licensure based on an arbitrarily high minimum passing score. To remedy this situation, CALS respectfully submit that 139 represents an appropriate minimum passing score. The recommendation is based on the following three objective standards:

- 1) alignment with the minimum passing score standards recommended by the State Bar's July 2017 Standard Setting Study (138.8 to 150.4);
- 2) alignment within the national standards of the ten largest jurisdictions, while establishing California at the top of the scale (133 to 139); and

³⁰ Id. at p. 9.

³¹ 2016 Statistics, NCBE's Bar Examiner Magazine, (available at <http://www.ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F205>) at p. 40.

- 3) alignment with the minimum passing score standards of the State Bar's Second-Read Procedure (139 to 143).

Considering these objective standards, we submit that the minimum passing score of 144 is not validly and reliably tied to a definition of minimum competence. (See discussion, *post*, Section 3 below.) As a result, thousands of CALS and ABA graduates have been unjustly denied licensure and the opportunity to serve their communities. Furthermore, they continue to be denied these benefits of licensure today. The Court has an opportunity to remedy this injustice prospectively by establishing a minimum passing score of 139 that represents the intersection of policy, data, practice, and national norms.

- 3. The State Bar's Standard Setting Study, while nominally conducted using a valid methodology, was significantly flawed and efforts by the Bar to collect support for it among State Bar membership were also significantly flawed. Therefore, the Court should consider State Bar recommendations resulting from the Study as informative, but not determinative.**

Results of the State Bar Validation Study

In a February 28, 2017 Letter to the State Bar and in a March 10, 2017 Letter to the CALS, the Court acknowledged, "the impact of the low pass rate on law school graduates is significant." The Court further directed the State Bar to conduct "a thorough and expedited investigation" and to "study and analyze a number of issues that bear on the matter." The Court indicated its concern that it "lacks a fully developed analysis with supporting evidence from which to conclude that 144 or another cut score would be most appropriate for admission to the bar in California."³²

In response to the Court's directive, the State Bar conducted a Standard Setting Study (Study)³³ and has published the results along with a Staff Report.³⁴

The Study found that a pass line range of between 1388 (138.8) and 1504 (150.4) could be set with approximately 95% confidence.³⁵

The State Bar has submitted this Study and Staff Report to the Court as its sole evidence that 144 is the valid minimum passing score for the California bar exam. It

³² Supreme Court Letter to the State Bar, dated Feb. 28, 2017.

³³ Standard Setting Study, Dr. Chad Berkendahl (July 2017).

³⁴ Staff Report (July 2017).

³⁵ *Id.* at p. 9.

additionally submitted a recommendation that the Court utilize a statistical calculation based on the Study results to derive an “interim score” for the July 2017 bar exam of 141.4.

The CALS submit that flaws in the implementation and execution of the study identified by the Bar’s own expert outside consultant evaluators, study participants, and informed members of the legal education community render the study of limited value for setting the proper minimum passing score.

Concerns Presented during Public Comment

The following concerns regarding the Study have been submitted to the State Bar as part of the public comment process during hearings held by the State Bar July 31, 2017, August 14, 2017, and August 15, 2015:³⁶

- The participant sample is inadequate. The Study included twenty (20) lawyers out of the approximate 190,000 licensed attorneys in California. This represents the opinions of .01 of 1.0% of the practicing lawyers in California and yet is being presented as a “definitive” definition of minimum competency for the first year practice of law.
- The small sample size makes the risk of error disproportionate to each individual participant answer.
- Participant selection was not representative of licensed practitioners or the demographics of current examinees. For example, none of the participants reported practicing in several of the exam subject areas.
- Participant opinions were inherently biased because selection was limited only to attorneys who scored 144 or higher on the California bar exam. Their only frame of reference for a minimum passing score is their own experience. Other participants were much more experienced than first year lawyers and undoubtedly had difficulty remembering what level of competence they possessed in the first year of practice.
- Participants were asked to identify “minimum competencies” related to their experience of supervising first-year lawyers who, by definition, had all scored 144 or higher on the California bar exam.
- Participants reported their own lack of competence in many of the legal subject matter areas they were being asked to evaluate. These reports were confirmed by the independent observers present at the workshop.
- Participants were not given a rubric or other guidance on either the substantive law of the subject matter area they were evaluating, or even grading guidelines to help them understand what the examiners were looking for in a passing answer.

³⁶ <https://board.calbar.ca.gov/video.aspx>

- Selection of the exam papers being reviewed was conducted by non-expert statisticians and psychometricians, not competent to evaluate the accuracy of the grades originally assigned to the papers when they were tested on the actual bar exam.
- Participants reported confusion regarding the key definition of “minimally competent for the first year practice of law.”
- The recommendation of 141.4 as an “interim score” for the July 2017 bar exam is not related to any objective standard.
- The Multistate Bar Exam (MBE) – though now half of the exam – was not even considered in the standard setting study. California applicants outperform the national average substantially on the MBE,³⁷ but the minimum score calculation assumed that this extraordinary performance was the “norm” for score determination purposes – an assumption that, alone, virtually ensured the status quo was supported by the standard setting study.

Criticism by Independent Experts

The CALS are very concerned that while the two independent evaluation reports³⁸ critical of the methodology of the standard setting study have been made public, they were shared with the Committee and published only *after* the joint meeting of the Committee of Bar Examiners and the Admissions and Education Committee of the State Bar Board of Trustees on July 31, 2017. It was at this critical meeting that a staff recommendation of either retaining the status quo of 1440 (144) or adopting an “interim” standard of 1414 (141) was adopted by the two committees and authorized for publication for public comment. Neither the staff memo that was distributed a few hours before the meeting or the staff oral reports presented at the public meeting contained any substantive discussion of these independent expert criticisms. One of these reports appears to have been received by the State Bar prior to that meeting (dated July 2017) and the other (dated August 4, 2017) refers to recommendations made in May of 2017 that apparently were not implemented during the standard setting workshops. Thus, the Committee of Bar Examiners and the Admissions and Education Committee of the Board or Trustees were denied the opportunity to consider the critiques of the independent evaluators prior to making

³⁷ “The mean score for California bar takers was 142.2 [in 2015], about 2.5 points higher than the national average . . .” <http://www.latimes.com/local/lanow/la-me-adv-bar-2015-results-20151126-story.html>.

³⁸ Mary Pitoniak report available at <http://www.calbar.ca.gov/Portals/0/documents/admissions/Examinations/Review-CalBar-Standard-Setting-MaryPitoniak.pdf>. Tracy Montez report available at <http://www.calbar.ca.gov/Portals/0/documents/admissions/Examinations/Tracy-Montez-ReviewBarExamstudy.pdf>.

their decisions on the staff recommendation. This suggests that further caution is warranted in considering the Bar's minimum passing score recommendations.

The CALS question whether the Committee of Bar Examiners and Board of Trustees members would have voted in favor of the staff recommendations if they had been aware of the concerns presented by the independent experts. We respectfully submit that the Committee of Bar Examiners and the Admissions and Education Committee of the Board of Trustees should have had access to this information *before* they made their decisions.

The State Bar Member "Survey"

The recent State Bar member "survey"³⁹ and special public comment site⁴⁰ set up by the State Bar for this matter have resulted in public comments that are biased due to significant methodology and transparency errors. Neither communication – presumably distributed to over 200,000 bar members – mentioned or defined the legal standard of "minimum competence for the first year practice of law" in the context of setting minimum "cut scores". Both solicitations referred to the flawed Standard Setting Study and staff recommendation without providing any discussion of the serious concerns presented by the independent experts. In addition, the survey provided a link to the public comment site where members were only offered a "false" choice that was limited to selecting between two scores – the existing 144 or the proposed "interim" score of 141. There were no options provided for "neither" or "lower". The more serious problem is that no explanation or definition of the legal standard "minimum competency for first year practice of law" was provided anywhere in the survey or public comment form. Without the context of this legal standard, how could members be providing public comment on the minimum passing score for the first year practice of law?

Public comment collected without accurately informing the membership of the specific issues being considered by the Court may have provided interesting commentary, but it should be given limited, or no, weight by the Court.

Therefore, CALS submit that the Study and the subsequent "Member Survey" and public comment site results are neither definitive nor determinative for the purpose of setting a minimum passing score. However, from a public policy aspect, the results can be used to reflect the attitude of the Bar and its members toward

³⁹ <https://fs22.formsite.com/sbcta/form45/index.html>

⁴⁰ <http://www.calbar.ca.gov/About-Us/Our-Mission/Protecting-the-Public/Public-Comment/2017-Public-Comment/2017-10>

allowing more diversity in the profession and more access to non-traditional members.

In response to the State Bar's expected submission of this information to the Court, the CALS suggest that the Study data is best considered in combination with other objective data. The Study found that a "pass line range" of between 1388 (138.8) and 1504 (150.4) could be set with approximately 95% confidence.⁴¹ The minimum passing score in this range is 139 (rounded). It is of some interest that this finding, despite being the result of a flawed process, aligns with other objective standards.

- 4. The proper bar exam passing standard is one that reflects actual minimal competence, including all its attributes, validly and reliably measured through realistic testing. National standards are an important normative benchmark since 1) the practice of law in California is highly comparable to the practice in other states; 2) there's no evidence that lower passing standards in other large states result in diminished public protection; and 3) the State permits many out-of-state attorneys to practice in California under California Rules of Court Rules 9.46 and 9.40.**

An Analysis of National Standards

An analysis of the minimum passing scores of the ten (10) largest U.S. jurisdictions by population indicates that all nine of the jurisdictions, other than California, have established minimum passing scores of 133 to 139. California's minimum passing score of 144 is a significant outlier.

The Court has specifically directed the State Bar to provide the Court with supporting evidence from which to conclude that 144 or another cut score would be most appropriate for admission to the bar in California."⁴² This is particularly important because, as the previous section describes, the evidence is that the higher score of 144 is disproportionately discriminatory for some law school graduates, particularly those who are Hispanic or Black.

The national standard as reflected by the minimum passing scores for the ten (10) most populous states and their respective minimum competency passing scores are as follows:

⁴¹ Staff Report, at p. 9.

⁴² Supreme Court Letter to the State Bar, dated February 28, 2017.

The 10 Most Populous States on July 1, 2014⁴³

Rank	State	Population	Minimum Competency Passing Score ⁴⁴
1	California	38,802,500	144
2	Texas	26,956,958	135
3	Florida	19,893,297	136
4	New York	19,746,227	133
5	Illinois	12,880,580	133
6	Pennsylvania	12,787,209	136
7	Ohio	11,594,163	135
8	Georgia	10,097,343	135
9	North Carolina	9,943,964	139
10	Michigan	9,909,877	135

No evidence has ever been presented that suggests first year law practice in California is any more difficult, or requires any more competence, than first year practice in any of these other large jurisdictions. In fact, the contrary is likely true: that there is no valid, non-discriminatory reason or basis for California first time lawyers being required to meet a much higher standard of minimal competence than new lawyers in other large states. Barry Currier, the ABA's Managing Director of Accreditation and Legal Education, testified at the February 14, 2017 California Assembly Judiciary Committee hearing that,

"Absent a compelling reason, such as a reason to believe California test takers are less competent or that the standard to be admitted to practice in California must be a lot higher than elsewhere in the country, it seems reasonable to suggest that California should align its passing threshold with other states, particularly other large states."⁴⁵

⁴³ United States Census Bureau, "Florida Passes New York to Become the Nation's Third Most Populous State, Census Bureau Reports," Press Release No. CB 14-232 (December 23, 2014), (available at <http://www.census.gov/newsroom/press-releases/2014/cb14-232.html>).

⁴⁴ The National Conference of Bar Examiners National Data for 2015 MBE and MPRE Administrations, (available at <http://www.ncbex.org/publications/statistics>).

⁴⁵ Informational Hearing, testimony of Barry Currier, (available at <http://www.calchannel.com/video-on-demand>) at 1:07:30 - 1:18:12.

At the same hearing, Elizabeth Rindskopf Parker, Executive Director of the State Bar, testified that, "I'm embarrassed to tell you there's no good answer" to the question of why California maintains such a high passing score on the bar exam.⁴⁶

In a paper published within the past month, Joan W. Howarth, Dean Emerita at Michigan State University College of Law and Distinguished Visiting Professor at Boyd School of Law, UNLV, captured the illogic of having widely differing state minimum passing scores on professional licensing exams.

No one pretends that these disparities are justified because practicing law as a new lawyer is more difficult in California than in New York. The MBE cut score is typically more an aspect of a state bar's culture and history than a purposeful decision. State-by-state cut score disparities are fundamentally illogical. In each profession that uses a national multiple-choice test as a component of licensure, the purpose of the test is to establish minimal competence to practice the profession.⁴⁷

During the July 31, 2017 joint meeting of the Committee of Bar Examiners and the Board of Trustees Education and Admissions Committee, numerous committee members spoke to the issue of "culture and history", arguing that it was important that California continue to set "the highest standards" by not reducing the State's historic "high bar" for licensure.

The CALS fully agree with the policy of having rigorous, high standards for licensure. However, we ask the Court to consider the balance between this historical objective and the potential harm to both citizens and bar examinees created by setting a minimum passing score that is not supported by the actual needs of first year practice and which goes significantly beyond the point necessary to both protect the public and to establish California's rigorous standard.

Considering the fact that all nine of the most populous states have established minimum passing scores of 133 to 139, what policy or legal standard supports a minimum passing score higher than 139? There does not appear to be any which is valid. A minimum passing score of 139 would place California at the highest level of rigor aligned with the other major states. It also would place California substantially

⁴⁶ Informational Hearing, testimony of Elizabeth Rindskopf Parker, Executive Director, State Bar of California, <http://www.therecorder.com/more-latest-news/id=1202779158816/Frustrated-Law-Deans-Take-BarExam-Complaints-to-Lawmakers?mcode=1202617583589&curindex=6>.

⁴⁷ Howarth, Joan W., The Case for a Uniform Cut Score (July 28, 2017). Available at SSRN: <https://ssrn.com/abstract=3010168>

higher than the other five largest states that have established minimum passing scores of 133 to 136. A score of 139 would clearly achieve the stated policy objectives of the State Bar to ensure the rigor and status of the California standards.

During the public comment hearings, committee members and licensed attorneys expressed grave concern that lowering the minimum passing score to any score below 144 would place the public at greater risk of professional malpractice. This concern is understandable, but we respectfully submit that it is unsubstantiated and not supported by any facts provided by the State Bar or available from any other source. No evidence has been provided to the public or this Court that links lower bar pass scores to increases in attorney malpractice or attorney discipline, and the national experience suggests that there is no such correlation.

As of 2015, 1,094,718 out of 1,300,705 attorneys were licensed in the U.S.⁴⁸ in 41 jurisdictions that require a minimum passing score of 139 or below.⁴⁹ This represents 84% of all licensed attorneys in the U.S.

Figure 2. Passing Bar Examination Score on 200-Point Scale, by State

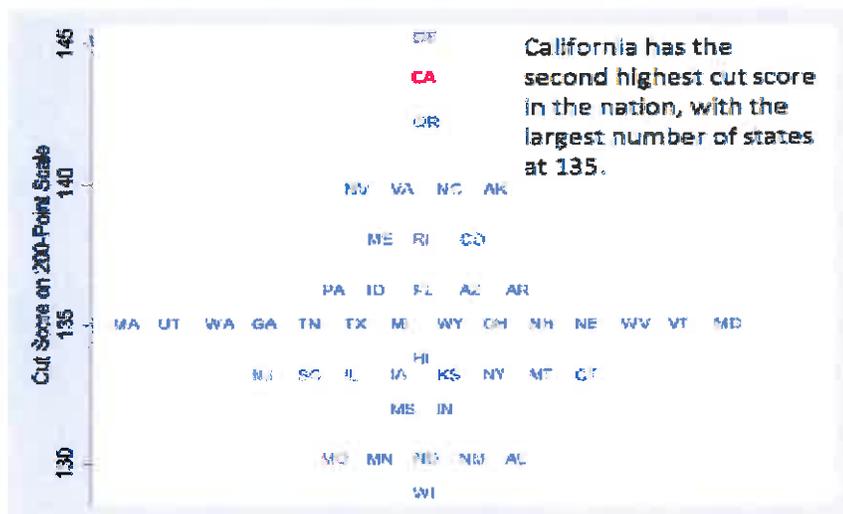


Figure from the State Bar Staff Report (July 2017)

The State Bar has provided no evidence that attorney malpractice or attorney discipline is higher in these 41 jurisdictions than in California. There is also no evidence that rates of discipline or malpractice of *first year lawyers* are higher in any

⁴⁸https://www.americanbar.org/content/dam/aba/administrative/market_research/national-lawyer-population-by-state-2015.authcheckdam.pdf

⁴⁹ Staff Report, at p. 3.

of the states with 139 and below as the minimum passing standard. To the contrary, the Standard Setting Survey report stated that “there is no empirical evidence that would support a statement that as a result of its high pass line California lawyers are more competent than those in other states, nor is there any data that suggests that there are fewer attorney discipline cases per attorney capita in this state.”⁵⁰

The CALS also ask the Court to take notice that the State Bar has a long-standing policy of licensing out-of-state attorneys who scored lower than 144 on the multi-state (MBE) section of the bar exam. The State Bar waives the MBE requirement of attorneys licensed in other states, even if the attorneys scored lower than 144.⁵¹ These scores are known to the State Bar through the National Conference of Bar Examiners prior to waiving the MBE exam requirement. Theoretically, these attorneys could have passed other state bar exams with scores as low as 129 and still receive the State Bar waiver.

The State Bar has presented no evidence that licensing these attorneys with an MBE score below 144, and in some cases substantially below 144, has created a greater public risk or that these attorneys have any higher incidents of malpractice or attorney discipline.

In addition, out-of-state attorneys can act as registered in-house counsel without taking the CA bar⁵² and attorneys unlicensed in California are allowed to appear pro hac vice in California courts.⁵³ Again, there has been no suggestion or evidence that these attorneys create a greater risk to the California public while practicing within the State.

The Standard Setting Study and the analysis of national standards both provide an objective basis for setting the minimum passing score at 139. The third objective basis supporting the use of 139 as a minimum passing score is the State Bar’s long-standing Second-Read Procedure.

Potential Variables in Scoring – Impact of the Scaling Formula

The State Bar has established a “scaling” formula to relate essay exam performance to performance on the Multistate Bar Exam (MBE). It has also long adhered to a “second read” component of the bar exam grading procedure, where examination papers from the first read that fall within a range of 139 to 143.9, are considered to

⁵⁰ Standard Setting Study, Executive Summary, at p.9.

⁵¹ <http://www.calbar.ca.gov/Admissions/Requirements/Attorney-Applicants>

⁵² <http://www.calbar.ca.gov/Admissions/Special-Admissions> and

http://www.courts.ca.gov/cms/rules/index.cfm?title=nine&linkid=rule9_46

⁵³ http://www.courts.ca.gov/cms/rules/index.cfm?title=nine&linkid=rule9_40

potentially meet the threshold of an acceptable passing score and are submitted to be re-read. According to the Staff Report, the long-standing use of the policy of re-reading exams that achieved a minimum score of 139 represents an implicit policy position of having greater tolerance for false positive errors.⁵⁴ Both of these procedures are an acknowledgement that bar exam grading is not an exact science. The difference between scoring 139 and 144 can be a few additional scaling points allocated to an essay or performance exam or as few as five additional correct answers out of the 200 questions on the MBE section of the exam.

It is also critical to recognize that under the scaling formula used for the three-day bar examination – and anticipated to be used for the two-day exam – the difference between a 1390 and a 1440 is insignificant in demonstrating minimal competence. Graders find it very difficult to distinguish an applicant at 1390 from one at 1440. To demonstrate that point, an experienced bar grader explains it this way:

“Under the 3-day formula, each raw point on the essays was worth two scaled points, and each raw point on the performance tests was worth four scaled points (because the values for performance tests are double those of essays.) Given that graders grade in five point increments, a five point difference in raw score equates to a 10 point difference in scaled score (5 raw x 2 = 10). So, each time a grader gives an essay answer a 60 rather than a 65, that is a 10 scaled point difference. For many papers, the difference between a 60 and 65 is very hard to discern and of no practical consequence in the overall determination of minimal competence. A slightly misplaced, though excellent, discussion of facts could bring the grade down, as could a single sentence, unclearly written under time pressure, or because the applicant learned English as a second language. Furthermore, if an applicant had a 10 point swing on a performance test, it would result in a 40 point scaled score swing, because 10 raw points on the Performance Test are multiplied by two, then again multiplied by two because each raw point is worth two scaled points (10 x 2 x 2 = 40). That type of difference coupled with a five-point swing on an essay would equal 50 scaled points, which is the difference between a 1390 and a 1440.

The critical point is that getting 10 extra – or fewer -- raw points on a PT coupled with five extra points on an essay is very, very common, and within the acceptable range of scores from a calibration standpoint -- but that equals the entire difference between a 1390 (failing score) and a 1440 (passing score).”⁵⁵

⁵⁴ Staff Report at p. 8.

⁵⁵ Explanation provided by Dean Barbieri, former Director of Examinations, State Bar of California during public comment hearing, August 15, 2017, summarized; available at <https://board.calbar.ca.gov/video.aspx>.

The Multistate Bar Exam (MBE) has similar impacts, magnified now that the MBE portion is weighted 50%, rather than the previous 35%, and that there are fewer scored MBE's (175 rather than the previous 190, per National Conference of Bar Examiners policy). The current point allocation for the MBE is unknown, since the two-day exam was just administered in July 2017. Under the formula for the former three-day exam, each MBE was worth three scaled points, so for the candidate with a 10-point variation on a performance test, the difference between passing and failing the bar exam was a small handful of MBE questions – *fewer than five*.

Now that the weighting of the MBE has increased to 50%, and fewer MBE questions make up the scored portion (175 and not 190), it is estimated that each MBE question will be worth as many as six scaled points. If this is true, then the difference between a 1390 and a 1440, with a 10-point variation on a performance test, *might be as few as two multiple-choice questions*, which is certainly not predictive of minimal competence.

Potential Variables in Scoring – Impact of the Second-Read Procedure

The score of 1390 (139) has long been the number used by the Committee, and accepted by the Supreme Court, as a score which warranted an applicant's examination being placed in the Phase 2, or "second read" phase. This policy was adopted because 1390 (139) has long been considered close enough to the passing standard of 1440 (144) that all of the applicants who fell between 1390 and 1439.9999 deserved to have their answers read a second time by a new set of graders. The current policy is that exam papers that are scored 1390 to 1439 are subjected to an extensive (and expensive) re-grading process, during which many of the candidates, though by no means the majority, pass the exam.

The State Bar has data that could be used to validate 139 as the appropriate minimum passing standard. The CALS believe that valid psychometric studies would show that a very large percentage of those applicants who qualify as a "persistent applicant" – meaning that they take the exam again if they fail – who achieved a score of between 1390 and 1439, ultimately pass the bar exam on a subsequent attempt. Public comments from both experts and ordinary bar takers revealed that these applicants were not smarter or more competent on subsequent attempts. Instead, they were savvier about how to take the test and pass it, how to manage test anxiety, or how to study for this exam. In fact, the effect might be one of regression on practice skills, as inordinate emphasis is placed on preparing for, and passing, the bar exam. As one test taker put it in public comment, "it is ironic that in

learning how to pass the bar exam, I became less competent in actually practicing law.”⁵⁶

In the best scenario, these previous test takers had learned from their past exam performance errors and made adjustments to their exam-taking skills that resulted in higher test scores. However, they did not become more competent to practice law – they just became better test takers. The State Bar should analyze and release data to inform the Court and public regarding the percentage of persistent test takers who scored between 1390 and 1440 on a prior attempt and subsequently passed the exam. Experts with access to exam data believe that a large percentage of these persistent test takers within the 1390 to 1440 range pass on a subsequent attempt.⁵⁷

As previously discussed, the Standard Setting Study established a range of cut scores to consider (138.8 to 150.4). The second-read procedure likewise suggests that scores between 139 and 143 meet a minimum standard that warrants additional consideration. Both of these objective standards use 139 as the minimum score for consideration.

Therefore, a minimum passing score of 139 aligns and intersects with *all three* of the objective standards discussed – the Standard Setting Study, the analysis of national minimum passing score standards, and the State Bar Scaling and Second-Read Policies.

- 5. Standard setting is not a political question and is only partly a policy question since “minimal competence” can be defined. The Court should define it, not the unified Bar. A standard setting methodology should proceed from a definition of minimal competence provided by the Court exercising its plenary power over bar admissions.**

The Additional Studies

As previously discussed, the Court instructed the State Bar “to consider and address whether 144 is a appropriate score for evaluating the minimum competence necessary for entering attorneys to practice law in California.” In response, the State Bar initiated four separate studies, (1) the Standard Setting Study, (2) the Content Validity Study, (3) the Law School Performance Study, and (4) the Sources of Variation of Passing Rates Report.

⁵⁶ <https://board.calbar.ca.gov/video.aspx>

⁵⁷ Id.

However, out of these four studies, only the Standard Setting Study is directly related to the immediate question presented to the Court. The three additional studies address the ongoing discussion related to future changes to the California bar exam. It is critical that these discussions and studies are conducted in a comprehensive, inclusive, and transparent process that involves the bench, bar, and academia. However, the process should not be rushed.

CALS support and encourage the State Bar's ongoing efforts to provide the best possible, valid, bar exam. However, we do not believe that these investigations should deter the Court from making an immediate adjustment to the minimum passing score to address the potential and actual harm that the current score of 144 is causing.

There is also concern that the law school performance study is untethered to the minimal competency issue. Whether recent law school graduates are more or less academically prepared before law school – which seems to be the chief focus of the law school performance study – does not speak to whether the current pass line for the bar exam measures minimal competence.

- 6. The current bar exam tests very few of the important character, skill, and attitude characteristics of lawyer competency and thus is a poor instrument for protecting the public. An inordinately high cut score exacerbates this problem by excluding from licensure many applicants with these other valuable characteristics who would be deemed competent if these skills and characteristics were tested and properly accounted for in the measurement of competency.**

The Limitation of Utilizing Minimum Passing Scores to Measure Competency

With California bar exam pass rates at historically low levels, either the bar exam or the law schools are improperly assessing minimum competence; it cannot be the case that both are correct. Almost the entire pool of first-time bar examinees were granted a J.D. degree from an accredited law school, and the vast majority – more than 95% – received their degrees from an ABA-approved law school. The J.D. is awarded only for successful completion of a rigorous and closely regulated program of legal education, comprising at least 80 semester units (and in most cases more) representing over 3600 hours of student learning activity and engagement with expert faculty. Law school programs feature both doctrinal and experiential courses, teaching both content and skills, and many include at least some specific evaluations of competency in practice, conducted by expert peers (as in, for example, clinics and skills courses such as advocacy.) In law school, each student is evaluated by more than a dozen experienced professional peers, and completes hundreds of hours of practice, classroom performance, clinical and experiential performance, and testing.

The process provides a thorough opportunity to evaluate student competence over the course of three or four years of engagement with the faculty.

Putting it another way, the law school graduates taking the California bar exam – and failing it in surprising and agonizing numbers – have all passed both a rigorous course of study and an extensive and in-depth professional evaluation by expert peers.

By contrast, the bar exam attempts to extrapolate the overall competence of an applicant by means of a sampling methodology, using standardized testing conducted over a two or three day period, under generally non-realistic time pressures (induced to cause separation in results, not to represent actual practice conditions.) The sampling includes a selection of subtopics and sub-subtopics within a selection of major topical and skills areas relevant only to limited areas of legal practice. The only actual professional peer evaluation is the grading of time-pressured work product on the essays and performance tests. The overall competence of an applicant is stated as a statistically-generated number, normed on that group's performance on the Multistate Bar Exam (MBE), itself a sub-portion of the test.

The validity of the bar exam and its minimum passing score naturally invites strident debate when it starts to have the effect of excluding from practice many graduates that the law schools firmly believe to be competent. For all their flaws, law faculties have no incentive to pass people who aren't competent. Therefore, when fewer than 50% of California law school graduates are able to pass the licensing exam, the licensing exam itself has to be critically examined.

We will not repeat the volumes of debate that have been written on the efficacy of the bar exam as a measure of what lawyers actually do in practice. We acknowledge that the bar exam has good technical "reliability" and some predictive "validity". (Referring here to the technical meaning of "reliability" and "validity" within the science of examinations and psychometrics.) We applaud the Court's order that the bar exam be scientifically validated because we believe that the scoring standards and content selection are the cause of this disparity between the competence law schools see – after three to four years of expert peer exposure to and evaluation of the applicant – and the results of the bar exam's sampling methodology.

We respectfully submit that if the purpose of the bar exam and other licensure procedures is to ensure that only minimally competent and morally capable lawyers are licensed, then competence must be accurately understood and an exam designed to test it must include a fair sampling of all those elements. An exam that fails to do so is not "valid" and does not protect the public.

We urge the Court to consider the following three seminal studies on lawyer competency; *A Study of the Newly Licensed Lawyer*,⁵⁸ *Identification, Development, and Validation of Predictors for Successful Lawyering*,⁵⁹ and *Foundations for Practice: The Whole Lawyer and the Character Quotient*.⁶⁰ These empirical studies reveal that the skill, attitude, habit of mind and practice, and personality domains described and explored have a great deal to do with lawyer success – and competence. Notably, in the NCBE’s own study, only two subject matter content domains ranked in the top twenty-five (25) activities of a newly licensed lawyer, one of which – Civil Procedure knowledge – was only recently and minimally added to the MBE (partly as a result of the study). The Foundations for Practice results are even more stark; of professional competencies rated as “necessary in the short term” by the more than 24,000 respondents to this study (from 37 states, including California), character mattered most, and character included entirely things the bar exam test minimally if at all. The 10 most urgent foundations – necessary in the short term – in the entire study⁶¹ were:

1. Keep information confidential
2. Arrive on time for meetings, appointments, and hearings
3. Honor commitments
4. Integrity and Trustworthiness
5. Treat others with courtesy and respect
6. Listen attentively and respectfully
7. Promptly respond to inquiries and requests
8. Diligence
9. Have a strong work ethic and put forth best effort
10. Attention to detail

⁵⁸ NCBE Job Analysis Survey Results, (July 2012), available at <http://www.ncbex.org/publications/ncbe-job-analysis>.

⁵⁹ Identification, Development, and Validation of Predictors for Successful Lawyering, Marjorie M. Shultz and Sheldon Zedeck (September 2008), available at <https://www.law.berkeley.edu/files/LSACREPORTfinal-12.pdf>.

⁶⁰ Foundations for Practice: The Whole Lawyer and the Character Quotient (July 2016), available at http://iaals.du.edu/sites/default/files/reports/foundations_for_practice_whole_lawyer_character_quotient.pdf.

⁶¹ See *Table 1: Top 10 Foundations Categorized as Necessary in the Short Term*, Institute for the Advancement of the American Legal System, Educating Tomorrow’s Lawyers Project, “Foundations for Practice: The Whole Lawyer and the Character Quotient”, 2016.

In consideration of these empirical study findings, the CALS strongly support the periodic and ongoing validation of the bar exam and the Bar's planned discussions and studies related to future changes to the California bar exam. It is critical that these activities are conducted in a comprehensive, inclusive, and transparent process that involves the bench, bar, and academia and employ good science, properly implemented. Thus, the process should not be rushed. We ask the Court to support and encourage the State Bar's ongoing efforts. However, we do not believe that these investigations should deter the Court from making an immediate adjustment to the minimum passing score to address the current and potential harm caused by the present minimum passing score of 144.

- 7. The current arbitrarily high cut score creates inordinate harm to the people of the State of California, both directly (direct cost) and indirectly (lost opportunity). The harm to the State from denying licensure to qualified CALS graduates alone is estimated to be between \$179,000,000 and \$250,000,000 per year. When all impacted ABA law school graduates are also included in the calculation, the harm to California is estimated to be four times greater, potentially exceeding \$500,000,000 per year.**

Measurement of Harm

Using the scoring distribution provided by the NCBE for the July 2016 bar exam⁶², an estimated 440 additional CALS examinees would have passed the July 2016 California bar exam if the minimum passing score had been adjusted from 144 to 139. These CALS examinees will be required to pay repeater fees of approximately \$352,000 (\$800 per examinee/per exam) and estimated travel expenses of \$396,000 (\$500 per examinee/per exam) to re-sit for the bar exam one additional time. Assuming that more than 80% of these examinees will be required to take the exam a second time to pass at 144 (based on 2016 July statistics), they will pay an additional \$598,000 in fees and travel for their second repeat.

This means that these 440 CALS examinees, who would have passed the exam the first time in July 2016 at a minimum passing score of 139, will be required to pay an additional \$1,346,000 in fees and travel expenses to be licensed (assuming that they all pass upon their second repeat). These costs do not include the additional cost of bar review courses.

Of course, the additional direct examination and travel costs are only a small portion of the harm that these unsuccessful examinees suffer. Assuming a \$30,000

⁶² 2016 Statistics, NCBE's Bar Examiner Magazine, (available at <http://www.ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F205>) at p. 40.

differential in first-year annual salary between the employment opportunity for a law school graduate working as a paralegal versus a first-year licensed attorney,⁶³ these 440 unsuccessful examinees will suffer an estimated \$13,200,000 in lost wage opportunity each year that they remain unlicensed.

The harm is not only limited to the unsuccessful CALS examinees. The citizens of California are also denied access to the legal services of these 440 law school graduates. Assuming a billable hour value of \$192 to \$275⁶⁴ and an average of 1,950 billable hours,⁶⁵ California loses an estimated \$164,736,000 to \$235,950,000 in legal services each year that these 440 unsuccessful examinees are denied licensure as attorneys.

Using the estimates detailed above, it is reasonable to calculate the potential financial harm caused to CALS examinees and the public by maintaining the minimum pass rate at 144 vs. 139 as \$179,282,000 to \$250,496,000 *per year*. Again, this estimate of harm is only for the impact related to CALS graduates. If all ABA law school graduates who have been impacted were included in the calculation, the impact on California would be an estimated two-times greater, potentially as high as \$500,000,000 per year.⁶⁶

These estimates also do not include the harm caused by potential job opportunities lost due to examinees initially failing the bar exam, the emotional cost of bar exam failure, the significant negative impact on diversity of the profession, and the growing justice gap in rural areas as discussed in the previous sections.

- 8. Adjusting the minimum passing score to 139 would accomplish the following: 1) provide 95% accuracy in predicting minimum competency (according to the State Bar's Standard Setting Study); 2) address the problem of disparate impact caused by the current arbitrarily high minimum passing score; 3) align with the State Bar's existing Second-Read Policy; 4) continue the ranking of California as the highest and**

⁶³ First-year lawyer salary, \$90,000, Salinas, CA (available at https://www.glassdoor.com/Salaries/salinas-lawyer-1st-year-salary-SRCH_IL.0.7_IM752_K08.23.htm and Paralegal II salary, \$60,500, Salinas, CA (available at <http://www1.salary.com/CA/Salinas/Paralegal-II-salary.html>)

⁶⁴ <http://www.callawyer.com/2015/11/how-to-prove-an-attorneys-reasonable-hourly-rates/>

⁶⁵ <http://www.nalp.org/2006maybillablehours>

⁶⁶ Adding ABA examinees who would pass at 139 vs. 144 would approximately double the number of additional licensees per year. See statistics available at <http://www.ncbex.org/publications/statistics/mbe-statistics> and <http://www.calbar.ca.gov/Admissions/Law-School-Regulation/Exam-Statistics>.

most rigorous standard among other large states; and 5) require minimal change in the State Bar's current grading procedures.

In Conclusion

The CALS are in support of the ongoing discussion and studies related to future changes to the California bar exam. It is critical that these discussions and studies are conducted in a comprehensive, inclusive, and transparent process that involves the bench, bar, and academia. The process should not be rushed.

However, there is an immediate and urgent need to make an adjustment to the current 144 minimum passing rate in order to limit the measurable harm to citizens and examinees. The potential financial harm caused to examinees and the public by maintaining the minimum pass rate at 144 vs. 139 is estimated to be from an estimated \$179 million to \$500 million per year and the impacts on diversity and access to justice are substantial.

We respectfully submit that the most appropriate remedy is an adjustment to a minimum competency passing score of 139 that is based on the following:

- 1) alignment with the minimum passing score standards recommended by the State Bar's Standard Setting Study (138.8 to 150.4);
- 2) alignment within the national standards of the ten largest jurisdictions, while establishing California at the top of the scale (133 to 139); and
- 3) alignment with the minimum passing score standards of the State Bar's Second-Read Procedure (139 to 143).

A minimum passing score of 139 is the intersection of all three of these objective standards. According to the State Bar's Standard Setting Study, it falls within a range that will provide 95% accuracy in measuring minimum competency. It meets the policy priority of maintaining California at the top of the scale of the most rigorous bar exams. It discontinues the use of the arbitrarily high minimum passing score of 144 that is disproportionately discriminatory for CALS graduates, particularly those who are Hispanic or Black. It provides a high standard of public protection as evidenced by the performance of more than one million attorneys licensed in jurisdictions requiring a minimum passing score of 139 or below.

By passing the California bar exam with a minimum passing score of 139, licensees will have met all four of the critical standards of public protection that have been established by the State Bar – a rigorous pre-licensure education, a comprehensive moral character and fitness investigation, passing the MPRE based on the highest minimum standard of all U.S. jurisdictions, and passing the California bar exam with the highest minimum passing score of the ten largest jurisdictions.

Therefore, the undersigned CALS Deans respectfully request that the Court adjust the current minimum passing score of 144 to a score of 139 that reflects the standard of minimum competency for the first year practice of law. A minimum passing score of 139 serves the interests of the citizens of California by providing a high standard of public protection while meeting the obligation of the legal profession to provide fair access to licensing that regulates a competent and diverse legal profession. It also effectively represents the intersection of policy, data, practice, and national norms.

Respectfully Submitted,

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California Accredited Law Schools
Letter Brief to California Supreme Court
September __, 2017

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C L E A

Clinical Legal Education Association

COMMENT OF CLINICAL LEGAL EDUCATION ASSOCIATION ON THE CALIFORNIA BAR EXAM CUT SCORES August 23, 2017

The Clinical Legal Education Association, with more than 1,300 dues-paying members, is the nation's largest association of law professors. We commend the State Bar of California for commissioning the Standard Setting Study to evaluate its bar exam including its cut score. At the same time, we urge the State Bar of California to consider the limitations of the current format of the bar exam and weigh alternative assessment options that would more accurately reflect the range of lawyering competencies that are required for legal practice.

The Final Report of Dr. Chad Buckendahl of ACS Ventures, which conducted the Standard Setting Study, noted that the "meeting results and evaluation feedback generally supported the validity of the panel's recommended passing score for use with the California Bar Examination." Final Report at 4. The external evaluators who were asked to observe and determine whether the standard setting procedure met professional guidelines and technical professional standards, however, identified shortcomings of the study.

Dr. Mary J. Pitnoiak's report presented several shortcomings of the standard setting process including its implementation methods and the failure to provide a rubric or adequate training for participants regarding the method for establishing performance standards.¹ The California Department of Consumer Affairs' external evaluator, Dr. Tracy Montez, applied the *Standards for Educational and Psychological Testing* and raised concerns with the standard setting methodology.² In particular, Dr. Montez "highly recommended" that the State Bar of California conduct a comprehensive occupational analysis to determine the knowledge and skills necessary for effective practice to determine what should be assessed by a licensing examination.

The bar exam has long been criticized, by CLEA and others, for its ineffectiveness in assessing whether applicants will be competent and professional attorneys.³ As long ago as the Reed Report in 1921,⁴ law schools have been found lacking in their skills and professionalism training. Echoing the 1992 MacCrate Report⁵ of the ABA Section of Legal Education and Admissions to the Bar, the 2007 Carnegie Foundation Report also documented the need for integration of

¹ <http://www.calbar.ca.gov/Portals/0/documents/admissions/Examinations/Review-CalBar-Standard-Setting-MaryPitoniak.pdf>

² <http://www.calbar.ca.gov/Portals/0/documents/admissions/Examinations/Tracy-Montez-ReviewBarExamstudy.pdf>

³ Roy Stuckey, et al., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP 8-10 (2007).

⁴ Alfred Z. Reed, Training for the Public Profession of the Law: Historical Development and Principal Contemporary Problems of Legal Education in the United States, With Some Account of Conditions in England and Canada, Bulletin No. 15 (1921).

⁵ Section of Legal Educ. and Admissions to the Bar, Am. Bar Ass'n, Legal Educ. and Prof'l Dev. - An Educ. Continuum (Report of the Task Force on Law Schools and the Profession: Narrowing the Gap, 1992).

“theoretical and practical legal knowledge and professional identity.”⁶ Law schools are now offering more experiential education, spurred on by the ABA’s recent adoption of a six-credit experiential course requirement. Under Standard 301, the ABA demands that law schools “maintain a rigorous program of legal education that prepares students, upon graduation” not only for admission to the bar, but also “for effective, ethical, responsible participation as members of the legal profession.” A licensing test that is solely focused on substantive law and legal analysis cannot guarantee competency in the range of skills that are necessary for competent law practice.

In considering how to assess these more foundational skills, the State Bar of California and the California Supreme Court can be guided by the recent study, *Foundations for Practice: The Whole Lawyer and the Character Quotient*, published in July 2016 by the Institute for Advancement of the American Legal System (“Foundations for Practice”).⁷ The study documents categories of necessary lawyering skills that include interviewing, counseling, negotiation, trial advocacy and contract drafting. And the Foundations for Practice research study concludes that new lawyers “need more than we once thought. Intelligence, on its own, is not enough. Technical legal skills are not enough. They require a broader set of characteristics (or, the character quotient), professional competencies, and legal skills that, when taken together, produce a whole lawyer.” *Foundations for Practice* Report at 38.

Other professions in the United States, and the legal profession in other countries, demand deeper experience in practice for professional licensing.⁸ For example, in England and Wales, barristers and solicitors are required to take practical training skills classes and one or two years of training under the close supervision or “pupilage” of a solicitor or barrister prior to admission. In six Australian states, there is a practical training requirement that can be fulfilled with either a practical training course that can take up to two years to complete or an in-house clerkship under a supervising attorney. In the United States, doctors must complete a residency of three to six years before their final licensing exam; an engineer must have at least four years of post-college work to be eligible to sit for the licensing exam; and an architect must document training under a registered architect. The State Bar of California should engage experts and begin to develop and model more comprehensive and skills-focused licensing strategies for the legal profession.

The State Bar of California should seize this opportunity to become an innovative leader in the professional licensing of lawyers by examining the bar exam’s effectiveness in assessing the knowledge and skills necessary for practice. By modeling lawyer licensing practices on those of other professions with more uniform and holistic assessment methods, California can assess bar applicants on foundational lawyering skills and competencies, not just substantive legal knowledge and analysis. A licensing scheme that better assesses the needed competencies of the profession will allow California to better guarantee that those admitted to practice will offer competent legal assistance to those they serve.

⁶ William M. Sullivan, et al., *EDUCATING LAWYERS* (2007).

⁷ Ali Gerkman and Logan Cornett, *Foundations for Practice: The Whole Lawyer and the Character Quotient*, available at

http://iaals.du.edu/sites/default/files/reports/foundations_for_practice_whole_lawyer_character_quotient.pdf

⁸ Yoonsuk Choo, et al., *Admission to the Bar: A Cross-Jurisdictional and Cross-Professional Survey*, a paper prepared for Harvard’s Legal Profession Course (*on file with CLEA*) (Spring 2011).

We appreciate the opportunity to comment on the Standard Setting Study and we share your commitment to improving the process of bar licensing.

Sincerely,

/s/

C. Benjie Louis
Hofstra University
CLEA Co-President

/s/

Beth G. Schwartz
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August 23, 2017

Ms. Elizabeth Rindskopf Parker
Executive Director
State Bar of California
180 Howard Street
San Francisco, CA 94105

re: Testimony of the Center for Public Interest Law - 2017 Standard Setting Study
Report and related options for the California Bar Exam cut score

Dear Ms. Parker,

On behalf of the Center for Public Interest Law (CPIL) at the University of San Diego School of Law, I am pleased to submit the following testimony to the Committee of Bar Examiners and the Board of Trustees of the State Bar of California regarding the California Bar Exam cut score. We were grateful for the opportunity to participate in the public hearing on August 14, 2017, and to the Supreme Court for taking on this critically important issue regarding the regulation of our legal profession. As promised, this letter provides a comprehensive summary of CPIL's recommendations with respect to the Bar Examination.

As Administrative Director of the Center for Public Interest Law, I have personally been monitoring the State Bar, with a particular interest in the antitrust implications involving the Bar exam, for the past three years. I also served as the Assembly Judiciary Committee's nominee as a Subject Matter Expert panelist on both the cut score study and the content validation study for the California Bar Exam.

I believe there is a general consensus, as observed during the July 31 joint meeting of the Committee of Bar Examiners and the Admissions and Education Committee of the Board of Trustees, as well as the two public hearings on this subject, that the determination of the proper cut score for, and the proper content of, the Bar exam is a matter of great importance, warranting a thorough and detailed validity analysis that may take years to complete. This is something that all other occupational licensing agencies in California have been legally required to undertake every five years for at least the last two decades. It is, frankly, inconceivable that the Bar exam has not been the subject of any such analyses over the past 30 years, and arguably has not ever undergone such analyses.

While the recent cut score study had some flaws, most of which were driven by the impossibly short time frame in which the study had to take place, at least two independent observers have concluded that the methodology was sound, and the recommendations therein are reliable to a 95% certainty. **We believe this is sufficient to justify a temporary cut score reduction to 139 – two standard errors below the median scores – until a thorough occupational analysis of the legal profession in California and content validation of**

the Bar exam can be completed. At that point, a second cut score study should take place – without the time constraints we experienced here – and the results of that study should be the final recommendation to the Court. The status quo is unacceptable.

CPIL Expertise in State Bar Matters

CPIL is a nonprofit, nonpartisan academic and advocacy center based at the University of San Diego School of Law. Since 1980, CPIL has examined and critiqued California’s regulatory agencies, including the State Bar of California. CPIL attorneys and student interns have attended the Bar’s meetings and followed its activities for over 35 years. From 1987 to 1992, our Executive Director, Professor Robert Fellmeth, served as the State Bar Discipline Monitor (under now-repealed Business and Professions Code section 6086.9), under appointment by then-Attorney General John Van de Kamp, with CPIL serving as the Monitor’s staff. The State Bar Discipline Monitor position was created by the Legislature and — over the course of almost five years — CPIL wrote eleven reports on the operation of the State Bar’s discipline system, reporting to the Judiciary Committees and to the Chief Justice of the California Supreme Court. We worked with Senator Robert Presley and a succession of State Bar Presidents to fashion some 40 reforms of the system, including the passage of Senate Bill 1498 (Presley), 1988 legislation creating the current independent State Bar Court. We participated actively in the proceedings and deliberations of the 2010 Governance in the Public Interest Task Force, whose work culminated in the Legislature’s passage of SB 163 (Evans) (Chapter 417, Statutes of 2011), as well as the 2016 and 2017 Governance in the Public Interest Task Forces, the recommendations of which are still being implemented today. Our work and research prompted further reforms contained in SB 387 (Jackson) (Chapter 537, Statutes of 2015), and is further reflected in the current version of SB 36 (Jackson), now pending in the Legislature. We are well aware that the Bar is part of the judicial branch under the aegis of the California Supreme Court. And we are similarly familiar with all of the executive branch agencies that license and regulate other professions and trades in California.

Be Aware of the Difference Between Protecting Consumers and Protecting the Profession

Before I get to the technical reasons for our recommendation, I want to take a minute to remind you about the overarching principles, and pitfalls, involved in the occupational licensing arena. While the purpose of occupational licensing agencies, like the State Bar, is to protect the public from incompetent licensees, states typically delegate the regulation of specific professions to boards controlled by practitioners in the regulated field.

This type of “self-regulation” is common among state licensing boards. But it has the natural tendency to become anticompetitive. Members of a guild frequently want to keep insiders in, keep outsiders out, and prop up the profession. A broad range of modern professions falls under professional licensing boards, including not just lawyers, doctors, and dentists, but also interior designers, real estate agents, floral designers, and hair braiders.

This was precisely the reason the U.S. Supreme Court, in its landmark decision in the *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, held that licensing boards that are controlled by active market participants in the regulated profession, like the State Bar, may not enjoy state action immunity from antitrust liability unless that board is independently supervised by the state. In that case, the legislature in North Carolina delegated the regulation of the dental profession to a dental board controlled by actively practicing dentists. That board established and enforced a policy to ensure that only licensed dentists could perform teeth whitening procedures in the state. While the board justified its action as a means to protect the public, in reality it was protecting dentists' share of the teeth whitening market in North Carolina.

While perhaps not as overt as the North Carolina dentists' anticompetitive practices, we are here today, considering an atypically high cut score on the Bar examination that was set – and consistently affirmed over the past 30 years – by a Committee and a Board controlled by actively practicing attorneys. And while I recognize that there are several public members serving on the Committee of Bar Examiners, and the Board of Trustees, who are deeply committed to public protection, I challenge you to consider whether you have seen any evidence to support the notion that the existing Bar exam, and its current cut score, bears any relation to public protection.

This exam is deeply engrained in our psyche as lawyers; many believe that we all had to suffer through it, and so should those who come after us. **For this reason I caution you not to place undue emphasis on the survey you sent out earlier this month to all currently licensed lawyers, which was issued without providing sufficient context for the purpose of the exam from a licensing standpoint.** But it is high time that we as a profession scrutinize this exam, and consider whether it is truly protecting the public or is it actually a significant barrier to entry, designed to limit the number of lawyers who practice in this state.

There Is No Evidence that Suggests a Lower Cut Score Will Harm the Public

Our entire mission at CPIL is centered around public protection; we would never even consider advocating for Bar exam reform, and a lowering of the cut score, if there was any evidence at all to suggest that doing so would cause a risk to the public. There is none.

In all the commentary I have read and heard over the course of the past few years of studying this issue at length, including any of the comments received during the two public hearings, I have not come across a single piece of evidence indicating that California's current cut score is doing a better job protecting the public from incompetent attorneys than any of the 48 states with lower cut scores. Nor have I seen any data to suggest that lowering the cut score below its current level would adversely impact the public. Indeed, the staff memo dated July 28, 2017 expressly recognizes this fact: "There is no empirical evidence available that would support a

statement that as a result of its high pass line California lawyers are more competent than those in other states, nor is there any data that suggests that there are fewer attorney discipline cases per attorney capita in this state.” *Id.* at pp. 8-9.

This is primarily because **the Bar has yet to complete any study validating that the content of the Bar exam is in any way an appropriate measure of minimum competence to practice law.**

Whether or not this was consciously done, we can no longer sit back and accept the status quo while thousands of students, who expended hundreds of thousands of dollars and seven years of higher education, are denied entry to practice law in California for arbitrary reasons.

There are a multitude of ways to protect Californians from incompetent and unethical lawyers; for example, revising standards for legal specialization, revamping mandatory continuing legal education, enhancing our disciplinary system, and requiring attorneys to carry malpractice insurance.

I urge you not to fall into the trap of assuming that the existing version of the Bar exam, and its current cut score, are sufficiently protecting the public. You must not ignore what is happening in other states, like New York, whose pass points are significantly below our own with no corresponding evidence of public harm.

A Thorough and Rigorous Occupational Analysis and Content Validation Study Must Be Completed Before a Final Recommendation Can Be Made

While the Bar exam studies currently underway may be somewhat unique with respect to other states’ practices across the legal profession, they are not unique to all of the other licensed professions. Indeed, Business and Professions Code section 139, which became effective nearly 20 years ago, requires the Department of Consumer Affairs to develop a policy regarding examination development and validation, and occupational analyses for each of the licensing boards under its umbrella. That policy, which is attached hereto as Exhibit A, requires all licensing boards in California to undergo an occupational analysis and content validation study every five years.

The purpose of a licensing exam like the Bar exam is to assess a candidate’s ability to practice at or above the level of minimum acceptable competence. In other words, the exam must assess whether an applicant possesses the level of knowledge, skill, and ability required of licensees that, when performed at this level, would not cause harm to the public health, safety, or welfare. *See* Department of Consumer Affairs Licensure Examination Validation Policy dated October 1, 2012 (Ex. A) at pp. 2, 4. It is not designed to evaluate training programs, evaluate mastery of content, predict success in professional practice, or ensure employability. *See* Buckendahl’s 7/28/17 Final Report, Standard Setting Study, at p. 6.

When setting a cut score, a licensing entity must follow a process that adheres to accepted technical and professional standards, and adhere to a criterion-referenced passing score methodology that uses minimum competence at an entry-level to the profession. DCA policy at 6. The DCA policy specifically notes “**An arbitrary fixed passing score or percentage, such as 70 percent, does not represent minimally acceptable competence.** Arbitrary passing scores are not legally defensible.” *Id.* (emphasis added.)

Unfortunately, the status quo cut score falls into this latter category. In fact the current cut score is even higher than 70%, and it was never determined as a result of any validation study or tied to an assessment that even attempted to define a minimally competent attorney in California.

While, arguably, the recent cut score study could retroactively support this arbitrarily-set number, there were a number of flaws with the study – as recognized by two independent observers – centered primarily upon the panelists’ lack of a cohesive understanding as to the meaning of “minimally competent candidate,” and the overall purpose of a licensing exam. *See, e.g.,* Pitoniak report at 6 (“... coming to a common conceptualization of the minimally competent candidate defined by the Performance Level Descriptor, and contextualizing it in terms of the exam, is one of the most critical, foundational activities at a standard setting workshop”).

Additionally, the study was limited by 1) the inability to link the written essay scores to the Multistate Bar Examination (MBE) scores because the National Conference of Bar Examiners would not provide this data; 2) as noted by both independent observers, the panelists may have been influenced by other panelists who appeared to have had in-depth knowledge and input into the development of the Bar Exam content over the years; 3) the panelists were limited in time and lacked the ability to discuss their responses and see how they fell within the group; and 4) there may have been a tendency among the panelists to “grade on a curve” – ensuring a more even distribution between “competent” and “non-competent” responses.

RECOMMENDATIONS:

In light of the comments and observations above, CPIL recommends the following:

- 1) ***Impose an interim cut score of 139***, which is two standard errors below the median recommended score, until a thorough, psychometrically-sound validation process is complete. 139 (or 1388) is still within the recommended range that is 95% accurate, but accounts for the potential misunderstandings among some panelists with regard to the true purpose of the licensing exam, and other flaws with regard to the cut-score study. It also takes into account important policy determinations such as increasing access to justice and diversity in the legal profession.

- 2) ***Undertake a thorough California-specific, psychometrically sound, occupational analysis***, as recommended by independent observer Tracy Montez, that is up-to-date and reflects the knowledge, skills, and abilities required of minimally competent entry level attorneys in California. *See* Montez report at p. 10, Chapter 2. Such a state-specific occupational analysis is critical to establish a baseline for making high-stakes decisions like determining content for the exam, creating a common frame of reference for a minimally competent attorney when establishing passing scores, and providing preparation and training information to law schools. This analysis should be conducted by independent psychometricians who specialize in licensing on a state level. We recommend that the State Bar contract with the Department of Consumer Affairs' Office of Professional Examination Services (OPES) to conduct this analysis, as this office is unquestioned in independence and expertise in California.
- 3) ***Postpone the Law School Performance Study Until an Occupational Analysis Has Been Conducted***. While we agree that it is important to assess the efficacy of law schools and their ability to properly train attorneys to enter the legal profession, we do not believe it should be conducted at this time. **This study, which relates to students' abilities to pass the Bar exam in its current form, is irrelevant to whether the exam itself is properly testing for minimum competence in the first place.** We recommend that any assessment of law school performance be conducted *after* an occupational analysis is complete, and the knowledge, skills, and abilities of first year lawyers is concretely defined.
- 4) ***Insist on data from the National Committee of Bar Examiners***. As you will see from the DCA's policy, it is critical to this validation process that the Bar be given access to information from all studies and reports from the NCBE, and maintain the right to review the recent examination, among other critical data regarding the Multistate Bar Examination. *See* Exhibit A at p. 6.
- 5) ***Implement an internal examination review policy with regular evaluation, and adequately fund it***. *See* Montez report at p. 10, Chapter 2. Again, CPIL recommends that the Bar contract with OPES to oversee this regular exam validation.
- 6) ***Disregard the Recent Attorney Survey***: The recent survey sent out to all California attorneys failed to contextualize the questions with a description of the purpose of licensing exams, or provide any mention of a minimally competent attorney. Without that contextualization, the results of that survey as it relates to making a psychometrically-sound recommendation to the Supreme Court, is meaningless.

Elizabeth Parker
August 23, 2017
-7-

CONCLUSION

Given all of the information you have received over the past few months, we urge you to request more time from the Supreme Court in order to ensure that you provide it with the most accurate and thoroughly-studied recommendations for the future of the Bar Examination in California. In the meantime, we recommend that you implement an interim cut score of 1388, consistent with the results of the cut-score study. We stand ready to assist the Court, and the Bar, in any way we can to ensure the exam is designed in such a way that properly measures competence to protect the people of California, without serving as an arbitrary barrier to enter the legal profession.

Sincerely,

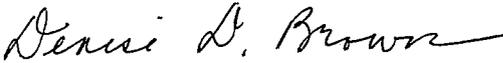


Bridget Fogarty Gramme
Administrative Director
Center for Public Interest Law

cc. Hon. Hannah-Beth Jackson, Chair, Senate Judiciary Committee
Hon. Mark Stone, Chair Assembly Judiciary Committee

EXHIBIT A



TITLE	LICENSURE EXAMINATION VALIDATION POLICY		
POLICY OWNER	OFFICE OF PROFESSIONAL EXAMINATION SERVICES		
POLICY NUMBER	OPES 12-01	SUPERCEDES	NEW
ISSUE DATE	OCTOBER 1, 2012	EFFECTIVE	IMMEDIATELY
DISTRIBUTE TO	ALL EMPLOYEES		
ORIGINAL APPROVED BY	 Denise D. Brown Director		
NUMBER OF PAGES	9	ATTACHMENTS	NONE

POLICY

It is the policy of the Department of Consumer Affairs (DCA) that occupational analyses and examination development studies are fundamental components of licensure programs. Licensure examinations with substantial validity evidence are essential in preventing unqualified individuals from obtaining a professional license. To that end, licensure examinations must be:

- Developed following an examination outline that is based on a current occupational analysis.
- Regularly evaluated.
- Updated when tasks performed or prerequisite knowledge in a profession or on a job change, or to prevent overexposure of test questions.
- Reported annually to the Legislature.

APPLICABILITY

This policy applies to all employees, governmental officials, contractors, consultants, and temporary staff of DCA; and any of its divisions, bureaus, boards, and other constituent agencies. Within this policy, the generic acronym "DCA" applies to all of these entities. For purposes of this policy, "board" shall refer to all boards, bureaus, or committees.

PURPOSE

The purpose of this policy is to meet the mandate of Business and Professions (B&P) Code section 139 (a) and (b) directing DCA to develop a policy regarding examination development and validation, and occupational analyses; and B&P Code section 139 (c) and (d) directing DCA to evaluate and report annually to the Legislature the methods used by each regulatory entity for ensuring that their licensing examinations are subject to periodic evaluations.

On September 30, 1999, the Office of Professional Examination Services (OPES) completed and distributed to its clients an internal publication "Examination Validation Policy" in compliance with B&P Code section 139 (a) and (b). In 2000, DCA policy "Licensing Examinations – Reporting Requirements" (OER-00-01) was established to meet the mandate of B&P Code section 139 (c) and (d). It has since been abolished. This new policy addresses the provisions of all four subsections of B&P Code section 139: (a), (b), (c), and (d).

AUTHORITY

- Business and Professions Code section 139 (a), (b), (c), and (d)
- Business and Professions Code section 101.6
- Government Code section 12944 (a) of the Fair Employment and Housing Act
- Uniform Guidelines on Employee Selection Procedures (1978), adopted by the Equal Employment Opportunity Commission, Civil Service Commission (EEOC), Department of Labor, and Department of Justice
- Civil Rights Act of 1964, as amended

DEFINITIONS

Content domain is the "set of behaviors, knowledge, skills, abilities, attitudes or other characteristics to be measured by a test, represented in a detailed specification, and often organized into categories by which items are classified."¹

Content-related evidence of validity is the evidence that shows the extent to which the content domains of a test are based upon tasks performed in practice and the knowledge, skills, and abilities required to perform those tasks.

Criterion-referenced passing score is the score on a licensure examination that establishes minimum competence. This score is an absolute standard and is not dependent upon the performance of the candidates who sit for the examination.

Entry level indicates minimum acceptable competence for licensure into a profession in the State of California.

Examination development specialists are individuals who are trained, experienced, and skilled in licensure-related occupational analysis; licensure-related examination planning, development, validation, administration, scoring, and analysis; and the professional and technical standards, laws, and regulations related to these tasks.

Examination outline is a detailed description for an examination that specifies the number or proportion of items required to assess each content domain.

Minimum acceptable competence is the level of knowledge, skill, and ability required of licensees that, when performed at this level, would not cause harm to the public health, safety, or welfare.

¹ American Educational Research Association, American Psychological Association, and National Council on Measurement in Education, *Standards for Educational and Psychological Testing*, Washington, DC, 1999, p. 174

Occupational analysis is a method for identifying the tasks performed in a profession and the knowledge, skills, and abilities required to perform those tasks. For occupational licensing, the term occupational analysis is preferred over job analysis or practice analysis because the scope of analysis is across a profession, not an individual job.

Reliable measurement/reliability is “the degree to which test scores for a group of test takers are consistent over repeated applications of a measurement procedure and hence are inferred to be dependable, and repeatable for an individual test taker; the degree to which scores are free of errors of measurement for a given group.”²

Review (“Audit”) of a national licensure examination is an analysis of a nationally developed and administered licensure examination for a profession. The goals of the review are (a) the identification of any critical aspects of the profession as it is performed in California that is not tested in the national examination, but should be tested to ensure safe and competent practice in California and (b) an assessment of whether professional testing standards are being met.

Subject matter experts (SMEs) are practitioners currently possessing an active license in good standing, who are active in their practice, and are representative of the diversity of the professional population in terms of years licensed, practice specialty, ethnicity, gender, and geographic area of practice. When contracting for their services, DCA refers to SMEs as Expert Consultants.

Validation is “the process by which evidence of validity is gathered, analyzed, and summarized.”³

Validity is the “degree to which accumulated evidence and theory support specific interpretations of test scores entailed by proposed uses of a test.”⁴ Validity is not a property inherent in a test; it is the degree to which the decisions based on that test are accurate. For licensing examinations, validity is interpreted as correctly differentiating between persons who are qualified to safely practice a profession from those who are not.

PROVISIONS

A. VALIDATION TOPICS

B&P Code section 139 (b) requires OPES to address eight specific topics, plus any other topics necessary to ensure that licensing examinations conducted on behalf of DCA are validated according to accepted technical and professional standards.

1. AN APPROPRIATE SCHEDULE FOR EXAMINATION VALIDATION AND OCCUPATIONAL ANALYSIS AND CIRCUMSTANCES UNDER WHICH MORE FREQUENT REVIEWS ARE APPROPRIATE

² American Educational Research Association, op.cit., p. 180

³ Society for Industrial Organizational Psychology, *Principles for the Validation and Use of Personnel Selection Procedures*, Bowling Green, OH, 2003, p. 72

⁴ American Educational Research Association, op.cit., p. 184

Occupational Analysis Schedule

Generally, an occupational analysis and examination outline should be updated every five years to be considered current; however, many factors are taken into consideration when determining the need for a shorter interval. For instance, an occupational analysis and examination outline must be updated whenever there are significant changes in a profession's job tasks and/or demands, scope of practice, equipment, technology, required knowledge, skills and abilities, or laws and regulations governing the profession. The board is responsible for promptly notifying the examination development specialist of any significant changes to the profession. This is true both for California-specific and national licensure examination-related occupational analyses.

Examination Validation Schedule

New forms of a licensure examination assist in the legal defensibility of the examination, prevent overexposure of test items, and keep the examination current. The decision to create an examination, or new forms of an examination, is made by the board responsible for the license in consultation with the examination development specialist. The creation of new examination forms depends on the needs of the testing program and the number of people taking the examination.

2. MINIMUM REQUIREMENTS FOR PSYCHOMETRICALLY SOUND EXAMINATION VALIDATION, EXAMINATION DEVELOPMENT, AND OCCUPATIONAL ANALYSES, INCLUDING STANDARDS FOR SUFFICIENT NUMBER OF TEST ITEMS

Boards have the ultimate responsibility to ensure that a licensure examination meets technical, professional, and legal standards and protects the health, safety, and welfare of the public by assessing a candidate's ability to practice at or above the level of minimum acceptable competence.

The inferences made from the resulting scores on a licensing examination are validated on a continuous basis. Gathering evidence in support of an examination and the resulting scores is an on-going process. Each examination is created from an examination outline that is based upon the results of a current occupational analysis that identifies the job-related critical tasks, and related knowledge, skills, and abilities (KSAs) necessary for safe and competent practice. Examinations are designed to assess those KSAs. To ensure that examinations are job-related, SMEs must participate in all phases of examination development.

All aspects of test development and test use, including occupational analysis, examination development, and validation, should adhere to accepted technical and professional standards to ensure that all items on the examination are psychometrically sound, job-related, and legally defensible. These standards include those found in *Standards for Educational and Psychological Testing*, referred to in this policy as the *Standards*; and the *Principles for Validation and Use of Personnel Selection Procedures*, referred to in this policy as the *Principles*.

The *Standards* and *Principles* are used as the basis of all aspects of the policies contained in this document. The EEOC *Uniform Guidelines on Employee Selection Procedures* (1978) provide direction on the legal defensibility of selection-related examinations.

Other professional literature that defines and describes testing standards and influences professionals is produced by the following organizations:

- *American Educational Research Association (AERA)*
- *American Psychological Association (APA)*
- *Council on Licensure, Enforcement, and Regulation (CLEAR)*
- *Educational Testing Service (ETS)*
- *Equal Employment Opportunity Commission (EEOC)*
- *Institute for Credentialing Excellence (ICE)*
- *National Council of Measurement in Education (NCME)*
- *Society for Industrial and Organizational Psychology (SIOP)*

Minimum Requirements for Psychometrically Sound Occupational Analysis

The minimum requirements for a psychometrically sound occupational analysis are as follows:

- Adhere to a content validation strategy or other psychometrically sound examination development method as referenced in a recognized professional source.
- Develop an examination outline from the occupational analysis.
- Gather data from a sample of current licensees in the State of California that represents the geographic, professional, and other relevant categories of the profession.

Minimum Requirements for Psychometrically Sound Examination Development and Validation

The minimum requirements for psychometrically sound examination development and validation are as follows:

- Adhere to the *Standards and Principles*.
- Document the process following recommendations in the *Standards and Principles*.
- Conduct with a trained examination development specialist in consultation with SMEs.
- Use an examination outline and psychometrically sound item-writing guidelines.
- Follow established security procedures.

Standards for Sufficient Number of Test Items

The number of items in an examination should be sufficient to ensure content coverage and provide reliable measurement. Both empirical data and the judgment and evaluation by SMEs should be used to establish the number of items within an examination. The empirical data should include results from an occupational analysis, item analysis, and test analysis.

The item bank for a licensure examination should contain a sufficient number of items such that: 1) at least one new form of the examination could be generated if a security breach occurred; and 2) items are not exposed too frequently to repeating examinees.

3. SETTING PASSING STANDARDS

Passing score standards for licensure examinations must:

- Follow a process that adheres to accepted technical and professional standards.

- Adhere to a criterion-referenced passing score methodology that uses minimum competence at an entry-level to the profession.

An arbitrary fixed passing score or percentage, such as 70 percent, does not represent minimally acceptable competence. Arbitrary passing scores are not legally defensible.

If a board has an appeals process for candidates who are not successful in their examination, once a criterion-referenced passing score has been determined for a multiple-choice examination, the board shall not change a candidate's score without consultation with the examination development specialist.

4. STANDARDS FOR REVIEW OF STATE AND NATIONAL EXAMINATIONS

All licensure examinations appropriated for use in California professions regulated by DCA should be validated according to accepted technical and professional standards, as described elsewhere in these provisions. At a minimum, the following factors must be considered in a review of state and national examination programs:

- Right to access information from all studies and reports from test vendors (local or national)
- Right of state agency to review recent examination
- Description of methodology used to establish content-related validity
- Occupational analysis report and frequency of updates
- Method to ensure standards are set for entry-level practice
- Examination outline and method to link to the occupational analysis
- Information about the sample of practitioners surveyed
- Item development process (experts used, editing methods, etc.)
- Sufficient size of item banks
- Pass-point setting methodology
- Examination security methods; examination administration processes
- Examination reliability
- Pass/fail ratio
- Statistical performance of examinations

California practice must be appropriately represented in an occupational analysis conducted on a national level in order for the results to be valid for examination development in California, and if national examinations are used, the suitability of examination content for California practice must be determined by a review of the occupational analyses, including the demographics of the practitioners upon which it is based.

5. APPROPRIATE FUNDING SOURCES FOR EXAMINATION VALIDATIONS AND OCCUPATIONAL ANALYSES

Budget line items should be designated exclusively for examination development and occupational analyses projects. To assure validity, maintain consistency, preserve security, and ensure the integrity of the examination program, the budget line items need to be continuous appropriations.

Boards should budget for costs associated with examination and occupational analysis development; contracting with a computer-based testing vendor for electronic examination administration; and projecting for expenses associated with travel and per diem for SMEs who participate in examination development and occupational analysis workshops. Boards that administer examinations by paper and pencil should also consider the expense of examination proctors, including their travel and per diem expenses; examination site rental; additional security resources; and printing costs for the preparation guides and examination booklets.

Boards must have the budgetary flexibility to adapt to unexpected or additional program needs. For example, the potential for catastrophic incidents such as a security breach and the cost to replace the compromised examination should be considered in determining overall examination-related costs.

Boards contract via intra-agency contracts (IACs) with OPES for examination-related services. Currently, boards request OPES' services and submit a Budget Change Proposal (BCP) to obtain expenditure authority if they do not already have a budget line item for these expenditures. Boards are then charged, and OPES is reimbursed through the IACs for occupational analyses, national examination reviews, and ongoing examination development, evaluation, construction, and publication services. Consulting and psychometric expertise and test scoring and item analysis (TSIA) services, among others, continue to be funded by distributed administrative costs (pro rata).

6. CONDITIONS UNDER WHICH BOARDS SHOULD USE INTERNAL AND EXTERNAL ENTITIES TO CONDUCT THESE REVIEWS

A board may choose to use external and/or internal resources for licensure examination development and/or review of state and national licensure examinations, and must determine the most logical application of those resources.

OPES is the internal resource for examination review and California-specific examination development services for DCA. OPES also conducts reviews of national examination programs to ensure compliance with California requirements.

If OPES is unable to provide the requested service, external development and review may occur. External examination development or review of a national licensure examination occurs when the board contracts with a qualified private testing firm.

7. STANDARDS FOR DETERMINING APPROPRIATE COSTS OF REVIEWS OF DIFFERENT TYPES OF EXAMINATIONS, MEASURED IN TERMS OF HOURS REQUIRED

The *Standards* provide "a basis for evaluating the quality of testing practices."⁵ These criteria can be used to identify tasks that must be performed in the development and validation of a licensure examination. Costs are applied to the performance of each task, based on its difficulty, available technology, and the complexity of the profession.

⁵ American Educational Research Association, op.cit, p. 1.

OPES has a defined fee schedule that is based on the number of hours to complete each phase of the project. An occupational analysis and an examination development project will require different tasks to be performed; therefore, the number of hours varies from one phase to another. The time and tasks required depends on the profession, type of exam, number of forms, frequency of administration, technology resources, and other factors.

8. CONDITIONS UNDER WHICH IT IS APPROPRIATE TO FUND PERMANENT AND LIMITED-TERM POSITIONS WITHIN A BOARD TO MANAGE THESE REVIEWS

Because examinations are critical to the mandate for consumer protection, it is necessary that if a board provides an examination, it should maintain examination support staff. The number of support staff needed is determined by each board's examination requirements and secured through the budget process.

Factors that may affect change in the number of staff support needed include, but are not limited to the following:

- An increase in the number of times an examination is offered.
- A change of method by which an examination is administered, for example:
 - from paper to computer-based testing administration
 - from oral panel to written examination format
 - from written-only to the addition of a practical examination
- A change of examination administration, for example:
 - from a national to a California-based examination, or vice-versa
 - a change in examination administration vendors
- A unique circumstance such as a breach of examination security.
- A change in legislative mandates.

B. YEARLY REPORTING REQUIREMENTS

B&P Code section 139 (c) specifies that every regulatory board shall submit to DCA on or before December 1 of each year its method for ensuring that every licensing examination is subject to periodic evaluation. These evaluations must include four components:

1. A description of the occupational analysis serving as the basis for the examination.
2. Sufficient item analysis data to permit a psychometric evaluation of the items.
3. An assessment of the appropriateness of prerequisites for admittance to the examination.
4. An estimate of the costs and personnel required to perform these functions.

B&P Code section 139 (d) states that the evaluation specified in section 139 (c) may be conducted either by the Board, Bureau, Committee, OPES, or a qualified private testing firm. OPES compiles this information annually into a report for the appropriate fiscal, policy, and review committees of the Legislature. This report is consolidated into DCA's Annual Report.

VIOLATIONS

Validation ensures that licensing examinations are psychometrically sound, job-related, and legally defensible. Failure to follow the provisions of this policy may result in licensing persons who do not meet the minimum level of competency required for independent and safe practice,

exposing California consumers and DCA's regulatory entities to considerable risk of harm by unqualified licensees.

REVISIONS

Determination of the need for revisions to this policy is the responsibility of OPES at (916) 575-7240. Specific questions regarding the status or maintenance of this policy should be directed to the Division of Legislative and Policy Review at (916) 574-7800.

RELATED DOCUMENTS

Departmental Policy Memorandum "Examination Security": DPM-OPES 10-01
Departmental Policy "Participation in Examination Workshops": OPES 11-01

***A Blueprint for a Fairer ABA Standard for Judging Law Graduates' Competence:
How A Standard Based On Students' Scores in Relation to the National Mean MBE
Score Properly Balances Consumer Safety with Increased Diversity in the Bar***

William Wesley Patton*

ABSTRACT

Current and a recently proposed ABA standard regarding students' bar passage rates have a significant disparate impact on states that have adopted difficult bar examination passage standards (MBE cut scores). Many scholars have demonstrated that the ABA bar passage standards have a negative impact on diversity in the bar by discouraging law schools from enrolling large numbers of minority students who have traditionally performed below state mean passage rates on the exam. This study presents a new and additional standard for the ABA to use in monitoring student outcome measures and law schools' quality of instruction: a comparison of law schools' mean MBE scores in relation to the national mean MBE score. This new metric levels the playing field among all law schools irrespective of state MBE cut scores, provides an incentive to increase diversity in the bar, and provides significant consumer protection.

INTRODUCTION

The ABA Council's 2016-17 proposed modification of ABA Standard 316 (bar passage) was recently rejected by the ABA House of Delegates after many opponents demonstrated the probable impact on diversity because many law schools with high diversity student populations would have had great difficulty meeting that proposed 75% bar passage in two-year standard.¹ Several opponents have further demonstrated that the proposed bar passage standard would have had a severe and disproportionate impact on law schools in states, like California, that have significantly higher bar passage standards (high MBE cut scores) than the national mean cut score.² It is critical that the ABA promulgate a student outcome measure that does not needlessly decrease diversity in the bar. For instance, according to the United States Census the percentage of Hispanics in California increased

from 32.4% in 2000 to 37.6% in 2010³, and in 2014 comprised **38.6% of the California population**.⁴ However, according to the California State Bar Association, Hispanics comprised 3% of California's attorneys in 1999⁵, 3.7% in 2001, 3.8% in 2006⁶, and in 2011, the most recent survey, Hispanics comprised only **4.2% of California attorneys**.⁷ There are currently 186,600 attorneys licensed to practice law in California⁸, but only **7,837 or (4.2%)** are Hispanic attorneys even though there are **14,013,719** Hispanics living in California⁹. In addition, Hispanics (39%) are the largest group served by low income access to justice programs in California.¹⁰

This article presents several new empirical analyses demonstrating the unfairness of solely using an ABA one-size-fits all bar passage standard for accreditation and proposes adding a new alternative standard that better balances the ABA's complimentary goals of consumer protection, quality legal education and increased diversity in the bar:

At least 75 percent of a law school's graduates in a calendar year who sat for a bar examination must have either passed a bar examination administered within four years of their date of graduation¹¹, or the law school's mean MBE score must be within "X" standard deviations from the national mean MBE score for 3 out of the last 5 years.¹²

The appropriate "X" standard deviation from the national MBE mean will be determined after the ABA compiles sufficient data on the annual MBE mean scores for each ABA law school in each state. Although some states, such as California, already compile that MBE score data for all in-state law schools¹³, as of February 2017 all ABA law schools will be supplied that MBE data from the National Conference of Bar Examiners (NCBE).¹⁴ Setting the appropriate standard deviation is a policy issue based upon the ABA's decision regarding students' minimal acceptable mean MBE scores as a proxy for attorney competency and the quality of law schools' program in legal education. Assume, for example, that in our sample there are 10 law schools.

School I has a mean 2017 MBE score of 160.0, school II 155.0, school III 152.5, school IV 148.5, and school V 145.0, school VI 139.5, School VII 135.5, school VIII 134.0, School IX 133.0, and school X 132.0 . The mean of all ten schools would be 143.5. One standard deviation from that 143.5 mean is 10.14. Therefore, under a 1 standard deviation rule any school with a mean 2017 MBE score below 133.36 would fail to meet the annual national mean MBE score. In this example, Schools IX and X scored below 133.36 and would be out of compliance for that year. Since 2 out of the 10 schools are out of compliance, there is a 20% failure rate under the proposed ABA standard. The ABA may determine that a much lower failure rate provides sufficient consumer protection.¹⁵ If so, the ABA could easily modify the standard deviation from the mean. For instance, if a standard deviation of 1.1 were used (11.16), or a required mean score of 132.34, only School X would violate the standard and only 1 in 10 schools, or 10% would be out of compliance for 2017. However, since under the proposed ABA standard a law school is only out of compliance if it fails to achieve the annual mean MBE score in 3 out of the last 5 years, none of the ten law schools in the sample would lose ABA accreditation based solely on failing to meet the 2017 national mean MBE score.

Part I of this paper discusses the benefits of including the national mean MBE score as a proxy for determining whether ABA law schools are providing students a sufficient education to enable them to pass a state bar examination. Part II presents an empirical analysis of four California ABA law schools that admit a high percentage of minority law students and that have frequently scored in the bottom quarter of California ABA law schools on the California bar examination. The study demonstrates that those four law schools' students usually meet or exceed the national mean MBE score and meet or exceed state MBE bar examination cut scores needed to pass other states' bar examinations. Part III demonstrates the need to have a two-part

student outcome model because only using a standard deviation from the national mean will impact some law schools with very high minority/ethnic populations who score lower than the national mean MBE score, but who nonetheless pass the bar examination. Part IV discusses new empirical evidence that demonstrates that the current and the Council's rejected proposed bar passage standards disproportionately impact law schools that provide students with lower entering LSAT and GPA's a "value-added" education defined as performance that meets or exceeds the annual national mean MBE score. This new empirical study compares California ABA law schools with several New York law schools in terms of students' entering credentials and their bar passage rates. Part V presents several empirical studies that demonstrate the devastating impact on diversity in the legal profession if the ABA substantially increases its bar examination standards similarly to the Council's recent rejected proposal. Finally, Part VI presents a blueprint for obtaining the evidence needed to determine the appropriate standard deviation from the national mean MBE score that will protect the public by demonstrating law student competency, ensure that student consumers receive a quality legal education, and permit an increase in attorney diversity. In addition, prospective law student consumers will have sufficient information regarding each law schools' mean MBE score to determine whether attending a particular law school meets that student's goal of practicing in any particular state.¹⁶

I. *The Bar Examination Landscape Is Radically Changing, and A New Standard For Judging Law Students' Competency That Levels the Playing Field Among All ABA Law Schools Must Be Promulgated.*

Until recently, state bar examinations differed greatly in structure and in content.¹⁷

Therefore, it was impossible for the ABA to promulgate a student competency outcome standard that compared all law schools using a single measure. The historical student competency proxy chosen by the ABA was law schools' bar passage rates since that data was easily obtained and

reported. The problem, of course, was that bar examination passage rates were principally determined by the “cut scores” chosen by state supreme courts and state bar associations¹⁸ rather than a comparative assessment of students to a national standardized examination like in Medical School accreditation.¹⁹ The radical difference in states’ bar examination passage “cut scores” continues today, and according to the NCBE the current MBE cut scores range from 129 (Wisconsin) to 145 (Delaware), and the national mean cut score is 134.²⁰ State bar examination passing “cut scores” are sometimes promulgated without significant empirical analysis. For instance, recently “responding in an Assembly Judiciary Committee hearing, [California] State Bar executive director Elizabeth Rindskopf Parker said there was “no good reason” for California’s higher standard.”²¹ As demonstrated in Sections III, IV, and V, *infra.*, a one-size-fits all bar examination ABA passage rate unfairly places law schools in jurisdictions with very high cut scores at a serious disadvantage in relation to all other ABA law schools and provides an incentive for those high cut score law schools to limit access to the bar for students, including many Black and Hispanic students, who have lower LSAT/GPA scores but who have a probability of passing a bar examination in almost every state. It is important to remember that the current ABA bar passage standard does not require a specific bar passage rate based on students’ in-state bar examination passage rates, but rather permits schools to cumulate their students’ bar passage rates from all state bar exams.²²

We are now in a transitional bar examination period. Almost all states’ bar examinations are becoming more and more similar. Today 25 states have adopted the Uniform Bar Examination (UBE), and most of the other states have bar exams with an almost identical format: (1) the Multi-State Bar Exam (MBE) that includes 200 multiple-choice questions written by the NCBE; (2) an essay portion written by either the state bar or the NCBE; and (3) a performance

section written either by the state bar or the NCBE.²³ The MBE is the single element of bar testing that is shared by all state bar examinations except Louisiana.²⁴ Therefore, unlike in the past, we now have an objective test for law student competency that virtually all law students attending all law schools in the United States must take. There is no longer the necessity to only use bar examination passage rates as the sole proxy for judging law students' competency and law schools' quality of instruction. However, as will be demonstrated, *infra*, abandoning bar examination passage rates and only adopting a national mean MBE standard will detrimentally affect diversity in law schools that are located in states with lower bar passage cut scores, such as Atlanta John Marshall whose students usually perform below the national mean MBE score, but who pass the Georgia bar examination at very high rates and become productive members of the bar. In order to level the playing field among law schools in different states, my proposal to use the national mean MBE score, *supra.*, creates an ABA Standard that can be met either by demonstrating a particular bar passage rate or a successful mean MBE scoring pattern.

Some may object to placing so much emphasis on MBE scores in formulating an ABA student bar examination outcome measure because they allege that the MBE is as biased against women and minorities as are similar multiple-choice examinations such as the MCAT and LSAT.²⁵ The NCBE has admitted that women and minorities perform worse on the MBE than white males. Susan M. Case, one of the NCBE's psychometricians, found that "men outperform women on the MBE by about 5 points, which is about 1/3 of a standard deviation...."²⁶ And the NCBE study of the 2005 and 2006 New York bar examination demonstrated a significant gender difference on the MBE score results. The MBE mean for men was 635.72 but was only 614.60 for women.²⁷ In addition, the NCBE has in many studies stated that Hispanic and Black test takers perform lower on the MBE, but the NCBE has determined that those lower scores are

predicted by objective non-biased factors such as minority students' lower LSAT and LGPA performance: "Minority performance on the MBE is not materially better or worse than it is on other portions of the bar examination."²⁸ The NCBE also found that in a study of repeat takers on the New York bar examination that Black test takers' MBE scores only increased an average of 4.8 points compared to the all takers repeater increase of 15 points.²⁹ Stephen P. Klein, a psychometrician who has worked with the NCBE and state bar associations for decades, concurs with the NCBE conclusion that the MBE is not racially biased, but rather reflects differences in students' LSAT and LGPA statistics.³⁰ Critics have argued that other data demonstrates that the NCBE and Klein conclusions regarding the correlation between LSAT, LGPA, and the MBE is erroneous and have demonstrated that increases in MBE scores and bar passage rates have occurred even when students' LSAT scores decreased.³¹

In addition, neither the NCBE nor Klein has discussed another inherent bias in the current bar examination – "selection bias" defined as when "persons receiving treatment...systemically differ in unmeasured but relevant ways from those who not receive that treatment... [and] [s]election bias exists only to the extent that variables that affect outcomes, or good proxies for them, are not included in a model."³² For instance, a particular testing mechanism, such as an oral examination, may help level the playing field for minority applicants, but that testing component may be rejected based on "feasibility" or "the degree to which the assessment method selected is affordable and efficient for the testing purpose...."³³ In one study Klein found that Black student performance on the California bar examination was improved when an "oral task" section was added to the exam. On the "oral task" section "blacks earned about the same average score as Asians and Latinos...."³⁴ However, Klein rejected the inclusion of an "oral task" section on the California bar because of costs, exam security, extended time for score

reporting, and reliability.³⁵ Therefore, the California Bar Examination includes selection bias because it omits oral tasks as a testing method, that might close the scoring gap among different racial/ethnic groups, and which artificially depresses Blacks' comparative bar examination scores.

And states' use of MBE scores may further lower women's and minorities' bar examination scores through the bar scaling process. The NCBE states that since the MBE is consistently more reliable than the essay portion of the bar the essay must be "scaled" to the MBE: "Scaling the written scores to the MBE takes advantage of the equating done to MBE scores so that MBE scores have a constant interpretation across test administrations."³⁶ The problem, however, is that even though scaling does not have an impact on the percentage of examinees who fail, the particular examinees that fail will be different from those who would fail strictly from the MBE alone.³⁷ Therefore, scaling together with a state's determination of the weight of the MBE on the grading process may impact which students fail the bar examination.

Other evidence demonstrates that students' increases in scaled mean essay scores increase more than their scaled mean MBE scores on repeat bar examinations. For instance, in a study of Texas bar examination repeat test takers Klein found a scaled mean essay score increase of 8.9 in students' second bar exam but only a scaled mean increase of 6.2 on the MBE.³⁸ As far as I have been able to determine, there currently is no empirical evidence studying the differential between mean MBE and mean essay exam scores among law schools in individual states, and no evidence of whether the comparison of mean MBE and mean Essay scores are different for schools that admit a large percentage of minority/ethnic students. The following study analyzes the relative MBE mean and Essay mean scores for five California ABA law schools that historically have admitted a high percentage of racial/ethnic students.

TABLE 1
A COMPARISON OF MEAN MBE AND MEAN ESSAY SCORES³⁹

<u>School</u>	<u>Exam Date</u>	<u>First Time Means</u>	
		<u>MBE</u>	<u>Essay</u>
Golden Gate	Feb. 2014	1396	1465
Whittier	Feb. 2014	1443	1475
Southwestern	Feb. 2014	1446	1479
Thomas Jefferson	Feb. 2014	1417	1463
La Verne	Feb. 2014	1543	1553
Western State	Feb. 2014	1512	1510
Golden Gate	July 2014	1414	1437
Whittier	July 2014	1405	1433
Southwestern	July 2014	1412	1456
Thomas Jefferson	July 2014	1416	1437
La Verne	July 2014	1506	1483
Western State	July 2014	1433	1417
Golden Gate	Feb. 2015	1392	1409
Whittier	Feb. 2015	1409	1361
Southwestern	Feb. 2015	1405	1443
Thomas Jefferson	Feb. 2015	1386	1445
La Verne	Feb. 2015	1496	1469
Western State	Feb. 2015	1404	1411
Golden Gate	July 2015	1394	1443
Whittier	July 2015	1390	1418
Southwestern	July 2015	1408	1445
Thomas Jefferson	July 2015	1404	1427
La Verne	July 2015	1473	1446
Western State	July 2015	1453	1480

Table 1 demonstrates that the six California ABA law schools with the highest percentages of Hispanic and Black law students usually score a much higher mean on the Essay section of the California Bar Examination than on the MBE section. Although Table 1 includes only four administrations of the California Bar Examination, these six law schools

scored higher means on the Essay than on the MBE on 18 out of the 24 (75%) administrations of the California bar examination. In addition, the examination results for La Verne are surprising and inconsistent with Klein's and the NCBE's research that found that MBE scores are predicted by students' LSAT scores.⁴⁰ La Verne outscored the other five California ABA law schools on the MBE for every test. As demonstrated in Table 2, *infra*, the entering median LSAT scores for La Verne students were lower than those of Southwestern, Golden Gate, Whittier, and Western State and only one point higher than those of Thomas Jefferson.⁴¹ The La Verne MBE data adds to the growing research demonstrating that there may not be a direct or predictive relationship between the LSAT and MBE and bar passage.⁴² The La Verne MBE mean anomaly warrants further investigation to determine whether it has identified pedagogical methodologies that increase at risk students' bar examination performance.

However, even in light of the MBE's potential differential impact on women and minorities there are three central reasons for selecting the national mean MBE score as an ABA standard for assessing law students' competency and the quality of law school pedagogy. First, all jurisdictions except Louisiana already use the MBE, and it is unlikely that the MBE will be abandoned as a part of bar testing. Further, the MBE test is the only standard currently being used by almost every state for determining minimal attorney competence, the ultimate goal of attorney licensing testing.⁴³ Second, if the MBE is biased against women and/or minorities, my proposed ABA standard can correct for that bias by selecting the appropriate standard deviation from the national MBE mean score as an appropriate accreditation standard. If we recognize that inherent in the MBE is both selection bias and performance differential, we can peg the standard deviation from the national MBE mean sufficiently to effectively mediate for effects that could lead some law schools to lower admission rates for diverse student populations.

Third, although the MBE may detrimentally affect certain demographics of students on the bar examination, a national mean within “X” standard deviation accreditation standard will provide law schools in high MBE cut score states an incentive to increase diversity in the admission process. As demonstrated, *infra*, California ABA law schools that enroll a high percentage of racial/ethnic minority students usually score near or above the national mean MBE score. Thus, adding the national median MBE score as an accreditation standard may enhance diversity in the profession in many states without sacrificing consumer protection.

Opponents of my national mean MBE standard will probably argue that it does not provide sufficient consumer protection for prospective law students because it does not require a specific minimum bar passage standard for graduates who take the bar examination in the law school’s resident state. Although this argument that a student should be able to pass the bar in the state where he/she attend lawed school has intuitive appeal, there are a number of reasons why such an ABA standard would lead to negative consequences. First, the current ABA bar passage standard does not require a specific passage rate within the state where the law school is located, but rather permits law schools to meet the minimum bar passage rate by cumulating bar passage among all jurisdictions in which students take a bar examination.⁴⁴ Even the most severe law school critics, such as Law School Transparency, do not demand a specific in-state bar passage percentage, but instead require an education that will provide students the ability to pass a bar examination: “Provide a quality education that enables bar passage and the successful practice of law.”⁴⁵ As Erica Moeser, President of the NCBE, has noted, as more jurisdictions adopt the Uniform Bar Examination [UBE], “the opportunities for graduates to take the UBE and apply for admission in a jurisdiction that has a more benign pass/fail line—as jurisdictions are free to choose—will mean that many unsuccessful examinees may be able to find a practice

home without retaking the bar examination.”⁴⁶ In addition, my proposal requires each law school to submit its annual mean MBE scores to the ABA for publication in the ABA’s Standard 509 reports that currently provide prospective students information about admission statistics, bar passage rates, employment, and attrition.⁴⁷ Student consumers will thus have information for deciding whether or not to attend a school where the student may not pass the in-state bar on the first attempt but which will provide the student a quality education that enables bar passage in one the student’s other target states within which to practice law. I reject opponents’ paternalistic argument that we simply cannot trust prospective law students to make good pedagogical decision even when armed with sufficient information about a law school’s admission requirements, attrition rates, bar passage percentages, mean MBE scores, and employment data.

Second, the ABA like other national professional accreditors should apply a uniform standard to all diploma granting institutions. “[L]aw should join every other profession in bringing uniformity to its testing for entry-level licensure while leaving the matter of actual licensing decisions to the states.”⁴⁸ The following example illustrates the absurdity of an ABA standard that is set to individual state licensing decisions. In 2003 the Florida legislature debated increasing its MBE pass/fail cut score. After considering empirical evidence, the Legislature voted to increase Florida’s 131 MBE cut score to 133 in July 2003 and to 136 in July 2004.⁴⁹ The empirical studies demonstrated that by raising the cut score from 131 to 136 that minority passage rates would decline by up to 14% compared to a decline of 11% by white examinees.⁵⁰

The Florida MBE example demonstrates both the dislocating effects of rapid state legislative changes in bar passage standards as well as the unfairness of using those state

legislative measures as the litmus test for meeting ABA national accreditation standards. Since the ABA uses a one-size-fits all 75% bar passage standard, schools like those in Florida, could fall below that ABA threshold even though they made no changes in their admission criteria and no changes in their pedagogical programs. Bluntly, law schools could be threatened with ABA dis-accreditation based upon a factor, legislative bar passage changes, totally outside the control of the law schools and unrelated to the quality of the legal education program offered.

However, my proposal which uses schools' mean MBE scores in relation to the national MBE median solves this problem by using a uniform national standard that is not affected by state legislative changes.

II. *A Longitudinal Study of California Law Schools' Mean MBE Scores in Relation to Their California State Bar Examination Passage Scores.*

This is the first study to investigate the historical relationship between a state's law schools' mean MBE scores in relation to those students' bar passage rates on the state's bar examination. This analysis includes six California law schools that have traditionally scored in the bottom one-third on the California bar examination.⁵¹ In addition, since these six law schools (Golden Gate, Southwestern, Thomas Jefferson, the University of San Francisco, the University of La Verne, and Whittier) have consistently enrolled a very large percentage of minority law students who often have lower LSAT and GPA scores, it is hypothesized that these schools will usually have both low California bar passage rates and low mean MBE scores in relation to the national mean MBE scores for each bar examination administration. If the data demonstrates that the hypothesis is untrue, then two conclusions can be drawn from that data: (1) those law schools are providing their students with a "value-added"⁵² legal education demonstrated by their MBE performance that exceeds statistical prediction; and, (2) the quality

of those law school students' performance on the MBE demonstrates their competence of legal concepts at a sufficient level that they would pass the bar examination in a majority of states that have a bar examination MBE "cut score" well below California's 144.

A. Golden Gate Law School Mean MBA Scores and CA Bar Exam Passage Rates.

TABLE 2

GOLDEN GATE

National Mean MBE	GG MBE 1st Time	GG MBE All Taker	1st/All Bar %	National Mean MBE	GG MBE 1st Time	GGMBE All Taker	1st/All Bar %
	<u>FEB. 2007</u>				<u>JULY 2007</u>		
137.6	142.2	139.3	57%/54%	143.7	147.4	143.6	57%/54%
	<u>FEB. 2008</u>				<u>JULY 2008</u>		
137.7	144.6	142.2	60%/46%	145.6	148.6	144.6	77%/60%
	<u>FEB. 2009</u>				<u>JULY 2009</u>		
135.7	142.8	140.3	51%/40%	144.5	149.1	145.1	68%/53%
	<u>FEB. 2010</u>				<u>JULY 2010</u>		
136.6	142.5	140.1	61%/41%	143.6	143.4	140.8	57%/48%
	<u>FEB. 2011</u>				<u>JULY 2011</u>		
138.6	139.0	140.3	41%/40%	143.8	148.2	144.8	66%/55%
	<u>FEB. 2012</u>				<u>JULY 2012</u>		
137.0	142.2	141.8	54%/51%	143.4	145.0	142.5	70%/57%
	<u>FEB. 2013</u>				<u>JULY 2013</u>		
138.0	138.7	138.9	50%/39%	144.3	143.1	141.2	56%/48%
	<u>FEB. 2014</u>				<u>JULY 2014</u>		
138.0	139.6	139.6	52%/50%	141.5	141.4	139.5	44%/37%
	<u>FEB. 2015</u>				<u>JULY 2015</u>		
136.2	139.2	139.5	36%/42%	139.9	139.4	138.3	39%/32%

The Golden Gate mean MBE and bar passage rates from 2007-2015 demonstrate some critical facts regarding the use of a bar percentage passage rate standard for law accreditation for law schools located in states with tremendously high MBE cut scores, like California (144).

First, Golden Gate which enrolls a very high percentage of minority law students, either equaled or surpassed the National Mean MBE score on 9 out of the 9 February Administrations of the California Bar Examination (9 out of 9 for first-time takers and 9 out of 9 for all-takers including repeaters), and 5 out of 9 July test administrations for first-time takers. Further, the four July first-time taker mean rates were barely below the national mean rates (.2 below the July 2010 national mean; 1.2 below the July 2013 national mean; .1 below the July 2014 national mean; and, .5 below the July 2015 national MBE mean).

Second, if the Golden Gate 2007-2015 MBE mean scores were applied to each of the other state's MBE "cut scores", Golden Gate first-time bar examination test takers would have scored higher than the required state MBE cut scores in every state except:

Feb. 2007: California and Delaware	July 2007: met all states
Feb. 2008: met all states	July 2008: met all states
Feb. 2009: California and Delaware	July 2009: met all states
Feb. 2010: California and Delaware	July 2010: California and Delaware
Feb. 2011: Alaska, CA, Del., Nev., N.C., Oregon, Virginia	July 2011: met all states
Feb. 2012: California and Delaware	July 2012: met all states
Feb. 2013: Alaska, CA, Del., Nev., N.C. Oregon, Virginia	July 2013: California and Delaware
Feb. 2014: Alaska, CA, Del., Nev., N.C. Oregon, Virginia	July 2014: California and Delaware
Feb. 2015: Alaska, CA, Del., Nev., N.C. Oregon, Virginia	July 2015: Alaska, CA, Del., Nev., N.C., Oregon, Virginia

This evidence is astounding since it demonstrates that even in the years of the poorest bar examination performances by Golden State students, they would have met the state MBE cut scores in 86% of states (43 out of 50), and in 18 administrations of the California bar

examination from 2007-2015 they would have met the state MBE cut scores in 48 out of 50 states in 13 out of those 18 tests (failure to meet state MBE cut scores only in California (144) and Delaware (145)).

Third, this data demonstrates the absurdity of using an ABA accreditation standard based solely on law schools' bar examination passage rates rather than also including schools' student outcome measures in relation to the national mean MBE scores. Even though Golden Gate's students met or exceeded the national MBE mean 14 out of 19 bar examinations from 2007-2015 and was very close to that national mean in the five other tests, during that period Golden Gate never had a first-time California bar passage rate of 75%, and in 12 out of those 18 tests (67%) Golden Gate had a bar passage rate below 60%, the standard published by Law School Transparency as the minimum first-time bar passage standard needed in order to have a cumulative 75% bar passage rate after 4 bar examination administrations.⁵³ A more nuanced analysis of the data in Table 2 demonstrates the lack of correspondence between meeting the national mean MBE score and successful California bar examination passage rates. For instance, in February 2007, Golden Gate students beat the national mean by 5.2% but only scored a 57% first-time passage rate on the California bar examination. That test pattern of scoring higher than the national mean MBE score but scoring less than a 60% first-time California bar passage percentage occurred in July 2007, Feb. 2009, Feb. 2011, Feb. 2012, Feb. 2013, Feb. 2014, and Feb. 2015. And in those years where Golden Gate Students almost met the national mean MBE score, they scored well below 60% on the California bar (July 2010 a GG MBE score of only .2 less than the National mean resulted in a 57% passage rate; July 2014 a GG MBE score of only .1 less than the national mean resulted in a 44% passage rate; and in July 2015 a GG MBE score of only .5 less than the national mean resulted in a 39% California bar passage rate).

Something is terribly wrong when a national accreditation standard would lead to the dis-accreditation of a law school, Golden Gate, that almost always meets or exceeds the national mean MBE score and which would result in the school's students being able to meet 48 out of 50 states' bar examination MBE passage cut scores. Instead of threats of dis-accreditation, schools like Golden Gate that admit many minority students with low predictive indices (LSAT and GPA) who outperform their predictive scores on the MBE should be congratulated for providing students an excellent value-added law school education and an opportunity to become members of the legal profession.

B. Southwestern Law School Mean MBA Scores and CA Bar Exam Passage Rates.

TABLE 3

SOUTHWESTERN

National Mean MBE	SW MBE 1st Time	SW MBE All Taker	1st/all Bar %	National Mean MBE	SW MBE 1st Time	SW MBE All Taker	1st/All Bar %
	<u>FEB. 2007</u>				<u>JULY 2007</u>		
137.6	144.3	142.8	60%/52%	143.7	145.2	144.5	56%/54%
	<u>FEB. 2008</u>				<u>JULY 2008</u>		
137.7	139.3	142.0	59%/55%	145.6	147.0	145.8	72%/65%
	<u>FEB. 2009</u>				<u>JULY 2009</u>		
135.7	138.0	137.9	53%/40%	144.5	145.7	143.6	63%/55%
	<u>FEB. 2010</u>				<u>JULY 2010</u>		
136.6	141.1	141.1	56%/41%	143.6	145.2	144.2	59%/53%
	<u>FEB. 2011</u>				<u>JULY 2011</u>		
138.6	140.9	143.2	56%/56%	143.8	145.0	143.9	64%/56%
	<u>FEB. 2012</u>				<u>JULY 2012</u>		
137.0	144.6	143.4	58%/56%	143.4	145.2	143.9	64%/56%
	<u>FEB. 2013</u>				<u>JULY 2013</u>		
138.0	144.3	143.1	68%/56%	144.3	147.7	145.7	74%/66%
	<u>FEB. 2014</u>				<u>JULY 2014</u>		
138.0	144.6	144.5	64%/61%	141.5	141.2	140.1	54%/47%
	<u>FEB. 2015</u>				<u>JULY 2015</u>		
136.2	140.5	140.3	51%/42%	139.9	140.8	140.3	51%/45%

Southwestern Law School met or beat the national mean MBE score on 17 out of 18 California bar examinations from 2007-2015 on first-time takers and met that standard on 16 out of 18 all-taker examinations. Even with that stunning student outcome measure for one of the most diverse law schools in the country, Southwestern never met the ABA 75% bar passage standard on any of the 18 California bar examinations. Southwestern students' first-time taker

mean MBE scores met or exceeded other states' MBE bar passage cut scores for almost all 18 administrations of the California bar examination:

Feb. 2007: met all but Delaware (145)	July 2007: met all states
Feb. 2008: met all but Alaska, CA, Del., NV, N.C., Oregon, Virginia	July 2008: met all states
Feb. 2009: met all but Alaska, CA, Del, NV, N.C., Oregon, Virginia	July 2009: met all states
Feb. 2010: met all but CA, Del., Oregon	July 2010: met all states
Feb. 2011: met all but CA, Del., Oregon	July 2011: met all states
Feb. 2012: met all but Del.	July 2012: met all states
Feb. 2013: met all but Del.	July 2013: met all states
Feb. 2014: met all but Del.	July 2014: met all but CA, Del., Oregon
Feb. 2015: met all but CA, Del., Oregon	July 2015: met all but CA, Del., Oregon

Even though Southwestern students' performed well above the national mean MBE score on almost every exam and above almost all states' MBE bar passage cut scores, according to Law School Transparency's required 60% first-time passage rate, Southwestern would have had a very difficult time meeting the ABA Council's rejected 75% passage rate in 2 years proposal.⁵⁴ Southwestern students scored 60% or better on only 39% of the 18 California bar examination administrations from 2007-2015 (7 out of 18). Again, an ABA standard based exclusively on a one-size-fits-all bar passage percentage would punish schools like Southwestern which enroll high numbers of students with lower GPA/LSAT scores, but who are provided a value-added education and who beat statistical MBE predictions.

C. Whittier Law School Mean MBA Scores and CA Bar Exam Passage Rates.

TABLE 4
WHITTIER

National Mean MBE	WH BE 1 st Time	WH MBE All Taker	1 st /All Bar %	National Mean MBE	WH MBE 1 st Time	WH MBE All Taker	1 st /All Bar %
	<u>FEB. 2007</u>				<u>JULY 2007</u>		
137.6	139.9	137.6	35%/29%	143.7	142.9	140.1	54%/53%
	<u>FEB. 2008</u>				<u>JULY 2008</u>		
137.7	140.8	137.6	56%/46%	145.6	149.3	144.4	84%/61%
	<u>FEB. 2009</u>				<u>JULY 2009</u>		
135.7	138.3	137.3	44%/32%	144.5	143.5	140.6	61%/47%
	<u>FEB. 2010</u>				<u>JULY 2010</u>		
136.6	133.6	136.9	13%/27%	143.6	141.3	140.2	53%/45%
	<u>FEB. 2011</u>				<u>JULY 2011</u>		
138.6	143.1	140.6	55%/42%	143.8	142.3	139.2	56%/40%
	<u>FEB. 2012</u>				<u>JULY 2012</u>		
137.0	142.5	140.4	46%/45%	143.4	146.4	144.0	70%/56%
	<u>FEB. 2013</u>				<u>JULY 2013</u>		
138.0	146.1	140.4	60%/41%	144.3	145.3	143.4	65%/57%
	<u>FEB. 2014</u>				<u>JULY 2014</u>		
138.0	144.3	142.5	76%/60%	141.5	140.5	139.7	43%/38%
	<u>FEB. 2015</u>				<u>JULY 2015</u>		
136.2	140.9	140.1	30%/36%	139.9	139.0	137.8	38%/28%

Whittier Law School first-time taker students met or exceeded the national mean MBE score on 11 of 18 California bar examination administrations (61%), and scored within one point or less of the national mean on four examinations (July 2007; July 2009; July 2014; and July 2015). Even though Whittier students met or exceeded the national MBE mean on 61% of the

examinations, Whittier's bar passage met the ABA 75% standard only twice, and scored 60% or higher on only 6 out of 18 test administrations (33.3%).

Even though Whittier's California bar passage rates seldom rose to 60%, Whittier students' first-time taker mean MBE scores met or exceeded other states' MBE bar passage cut scores for almost all 18 administrations of the California bar examination:

Feb. 2007: met all but Alaska, CA, Del. Nevada, N.C., Oregon, Virg.	July 2007: met all but CA and Del.
Feb. 2008: met all but CA, Del., Oregon	July 2008: met all states
Feb. 2009: met all but Alaska, CA, Del., Nevada, N.C., Oregon, Virg.	July 2009: met all but CA and Del.
Feb. 2010: met seventeen states' scores	July 2010: met all but CA and Del.
Feb. 2011: met all but CA and Del.	July 2011: met all but CA and Del.
Feb. 2012: met all but CA and Del.	July 2012: met all states
Feb. 2013: met all states	July 2013: met all states
Feb. 2014: met all but Del.	July 2014: met all but CA, Del, Oregon
Feb. 2015: met all but CA, Del, Oregon	July 2015: met all but Alaska, CA, Del. Nev., N.C., Oregon, Virg.

Even though Whittier's longitudinal bar passage data demonstrates that it would have likely lost accreditation under the Council's rejected 75% passage in 2 year standard, Whittier students, including a very large percentage of minority graduates, demonstrated that they received an excellent education since they outscored the national mean MBE and almost all other states' MBE cut scores regularly. Judging Whittier students on a one-size-fits all bar passage standard rather than also using a standard of the schools' mean MBE scores in relation to the national mean MBE scores would needlessly restrict access for countless minorities into the legal profession based solely on California's bar cut score.

D. Thomas Jefferson Law School Mean MBA Scores and CA Bar Exam Passage Rates.

TABLE 5
THOMAS JEFFERSON

National Mean MBE	TJ MBE 1 st Time	TJ MBE All Taker	TJ Bar %	National Mean MBE	TJ MBE 1 st Time	TJ MBE All Taker	TJ Bar %
	<u>FEB. 2007</u>				<u>JULY 2007</u>		
137.6	140.2	137.1	61%/41%	143.7	143.8	139.8	60%/58%
	<u>FEB. 2008</u>				<u>JULY 2008</u>		
137.7	143.8	139.0	61%/46%	145.6	148.7	145.5	76%/63%
	<u>FEB. 2009</u>				<u>JULY 2009</u>		
135.7	138.0	137.9	53%/40%	144.5	139.8	136.5	46%/35%
	<u>FEB. 2010</u>				<u>JULY 2010</u>		
136.6	139.3	138.2	52%/37%	143.6	143.1	139.9	58%/43%
	<u>FEB. 2011</u>				<u>JULY 2011</u>		
138.6	138.4	139.1	45%/41%	143.8	139.6	137.5	33%/25%
	<u>FEB. 2012</u>				<u>JULY 2012</u>		
137.0	142.6	141.4	59%/46%	143.4	141.3	139.3	52%/42%
	<u>FEB. 2013</u>				<u>JULY 2013</u>		
138.0	139.4	139.6	45%/40%	144.3	142.0	140.1	50%/42%
	<u>FEB. 2014</u>				<u>JULY 2014</u>		
138.0	141.7	141.2	50%/43%	141.5	141.6	139.4	45%/34%
	<u>FEB. 2015</u>				<u>JULY 2015</u>		
136.2	138.6	139.1	45%/53%	139.9	140.4	137.7	51%/34%

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The effects of California’s extremely high 144 MBE cut score are nowhere more apparent than in Thomas Jefferson students’ California bar passage rates. Even though they met or exceeded the national mean MBE score in 12 of 18 bar examination administrations (67%), they scored 60% or higher on only 4 of those 18 California bar exams (22%). Thomas Jefferson

enrolls a high number of minority students and students defined as high risk of failure by Law School Transparency. Even so, Thomas Jefferson usually beats the national mean MBE score. An ABA standard based solely on bar percentage success would lead to a substantial decrease in the number of minority students enrolled in Thomas Jefferson in order for it to assure continuing ABA accreditation.

Further, based on Thomas Jefferson students' mean MBE scores they consistently met or exceeded other states' MBE bar examination passage rate cut scores:

Feb. 2007: met all but CA, Del., Oregon	July 2007: met all but CA, Del.
Feb. 2008: met all but CA, Del.	July 2008: met all
Feb. 2009: met all but Alaska, CA., Del., Nevada, N.C., Oregon, Virg.	July 2009: met all but Alaska, CA, Del. Nevada, N.C., Oregon, Virg.
Feb. 2010: met all but Alaska, CA., Del., Nevada, N.C. Oregon, Virg.	July 2010: met all but Alaska, CA., Del.,
Feb. 2011: met all but Alaska, CA., Del. Nevada, N.C., Oregon, Virg.	July 2011: met all but Alaska, CA, Del., Nevada, N.C., Oregon, Virg.
Feb. 2012: met all but CA, Del.	July 2012: met all but CA, Del., Oregon
Feb. 2013: met all but Alaska, CA., Del. Nevada, N.C. Oregon, Virg.	July 2013: met all but CA., Del.
Feb. 2014: met all but CA, Del., Oregon	July 2014: met all but CA, Del., Oregon
Feb. 2015: met all but Alaska, CA, Del., Nevada, N.C., Oregon, Virg.	July 2015: met all but CA, Del., Oregon

Using an accreditation model that includes a comparison of a law school students' mean MBE scores in relation to the national MBE mean will support diversity in states with high MBE cut scores and provide consumer protection by assuring that law schools are producing competent lawyers whose MBE scores demonstrate the capacity to pass the bar examination in almost every other state.

III. *Maintaining the Current ABA Standard on Bar Passage Is Important In Order Not to Disrupt Admissions in Some Traditionally Black Law Schools.*

The ABA must assure that any student outcome measure does not disproportionately affect schools that historically have had a large percentage of minority law students. Under

current ABA Standard 316 many of those high minority enrollment schools meet the bar passage standard, especially if the law school is located in a state with a moderately difficult MBE cut score. However, moving exclusively to a student outcome measure that abandons bar passage percentages in favor of a national mean MBE score may detrimentally affect some of those schools. The following discussion focuses on the application of both a bar examination passage standard and a national mean standard to Atlanta John Marshall Law School.

Atlanta John Marshall enrolls a very high percentage of Black law students: (1) 2015 [52.6%]; (2) 2014 [38.6%]; (3) 2013 [30.9%]; (4) 2012 [29.2%]; (5) 2011 [28.5%].⁵⁵ As the chart below demonstrates, although Atlanta John Marshall students pass the Georgia bar examination⁵⁶ at rates above the Law School Transparency 60% litmus test, they rarely meet the annual national mean MBE score:

TABLE 6
ATLANTA JOHN MARSHALL⁵⁷

National Mean MBE	JM MBE All Taker	JM 1st Time Bar %	National Mean MBE	JM MBE All Taker	JM 1st Time Bar %
137.6	<u>FEB. 2007</u> 133.3	40.0%	143.7	<u>JULY 2007</u> 140.3	75.0%
137.7	<u>FEB. 2008</u> 138.7	92.3%	145.6	<u>JULY 2008</u> 143.8	83.1%
135.7	<u>FEB. 2009</u> 131.5	77.7%	144.5	<u>JULY 2009</u> 138.9	83.1%
136.6	<u>FEB. 2010</u> 130.9	57.1%	143.6	<u>JULY 2010</u> 136.0	59.5%
138.6	<u>FEB. 2011</u> 138.4	92.3%	143.8	<u>JULY 2011</u> 138.5	70.4%
137.0	<u>FEB. 2012</u> 134.1	67.8%	143.4	<u>JULY 2012</u> 135.8	64.3%
138.0	<u>FEB. 2013</u> 139.2	79.1%	144.3	<u>JULY 2013</u> 137.2	67.1%
138.0	<u>FEB. 2014</u> 134.0	64.5%	141.5	<u>JULY 2014</u> 133.7	59.6%
136.2	<u>FEB. 2015</u> 131.0	51.3%	139.9	<u>JULY 2015</u> 129.0	52.5%

Atlanta John Marshal scored above 60% on the bar examination on 67% (12/18) of bar administrations from 2007 to 2015. However, its students met or exceeded the national mean MBE score on only two of eighteen bar examinations. Since Atlanta John Marshall has been successful at enabling hundreds of minority law students to become members of the bar, an ABA student outcome measure that relies solely on a national mean MBE score would significantly reduce diversity in their bar. Therefore, the ABA should promulgate a dual standard that

requires law schools to meet either a standard deviation from the national mean MBE score or a minimum bar examination passage rate.

IV. *A Comparison of California and New York Law Schools' Admission Statistics and Bar Examination Passage Rates.*

The following discussion will demonstrate why the proposed national mean MBE score standard will not only cure the significant unfairness of the current one-size-fits all states bar passage rule and will illustrate why that modification will level the playing field among all ABA law schools by mollifying states' wildly divergent cut scores as a disadvantage in ABA accreditation. In order to demonstrate the effectiveness and fairness of this bar exam proposal the following discussion will compare input and output measures of five California law schools (Southwestern, Univ. of San Francisco, La Verne, Golden Gate, and Thomas Jefferson) with five New York law schools (St. Johns, SUNY-Buffalo, Pace, New York Law School, and Touro) on the July 2016 California and New York bar examinations. The MBE cut score on the California bar exam is 144 and is 133 on the New York exam. The following chart and discussion demonstrates the unfairness of the Council's recently rejected 75% in 2-year standard and shows how the addition of the national mean MBE score for 2 of the last 3 years will cure that unfairness.

TABLE 7
COMPARATIVE BAR PASSAGE RATES ON THE
JULY 2016 CALIFORNIA AND NEW YORK BAR EXAMINATIONS

<u>School</u>	<u>July 2016</u>		<u>GPA</u> ⁵⁸			<u>LSAT</u>			<u>HISPANIC</u>		<u>BLACK</u>	
	<u>NY/CA Passage</u> ⁵⁹		<u>75th</u>	<u>50th</u>	<u>25th</u>	<u>75th</u>	<u>50th</u>	<u>25th</u>	<u>Students</u>		<u>Students</u>	
									<u>#</u>	<u>%</u>	<u>#</u>	<u>%</u>
<u>CALIFORNIA LAW SCHOOLS</u>												
	<u>NY</u>	<u>CA</u>										
	<u>Bar</u>	<u>Bar</u>										
Southwestern	74%	(38%)	3.42	3.17	2.91	155	152	150	83	22.6%	16	4.4%
Univ. S.F.	72%	(36%)	3.51	3.28	2.95	158	153	151	17	21.6%	10	5.8%
UnivLaVerne	68%	(31%)	3.12	2.83	2.71	152	147	146	16	32.7%	4	8.2%
Golden Gate	67%	(31%)	3.41	3.11	2.74	153	150	147	15	16.7%	4	2.7%
Thomas Jeff.	66%	(31%)	3.16	2.81	2.62	149	146	144	63	24.7%	22	8.6%
<u>NEW YORK LAW SCHOOLS</u>												
St. Johns	76.5%		3.62	3.39	3.17	158	156	153	31	11.9%	17	6.5%
SUNY-BUFF.	73.0%		3.66	3.48	3.21	158	154	150	12	6.1%	13	6.6%
Pace	71.0%		3.51	3.21	2.92	153	151	147	17	9.4%	11	6.1%
NYLS	70.3%		3.43	3.17	2.87	153	151	149	51	15.8%	25	17.8%
Touro	62.0%		3.34	3.02	2.75	150	148	145	37	18.0%	21	10.2%

The five California law schools had passage rates on the July 2016 California bar exam so low (31%-38%) that it would be virtually impossible for them to have met the Council's proposed 75% in 2-year bar standard.⁶⁰ However, as demonstrated in the chart, those five California ABA law schools would have had passage rates of 66% to 74% if their students had taken the July 2016 New York bar examination. Those five California law schools would easily

have met the Council's proposed 75% in 2 year standard if located in New York, but would fail it miserably if judged, not by the quality of their students' scores on the MBE in relation to the national mean MBE score, but rather on the unproven and unrealistically high California MBE cut score that is out of those schools' ability to control.

There has been a great deal of discussion about the low LSAT scores of some law students who are being admitted into some of California's ABA law schools. The data in the Table 7 demonstrates that even the lowest performing California law schools are providing a value-added legal education which results in their students performing better on the MBE and on other bar examinations than students from comparable law schools in other states.

A. Southwestern v. SUNY-Buffalo

First, compare Southwestern with SUNY-Buffalo. SUNY-Buffalo had a 2013 entering class with LSAT scores of (158/154/150) which are substantially higher than Southwestern's (155/152/150). In addition, SUNY-Buffalo had entering students with much higher GPA's (3.66/3.48/3.21) than Southwestern (3.42/3.17/2.91). All predictive models would suggest that SUNY-Buffalo students would pass the New York bar at a significantly higher rate than Southwestern students. However, just the opposite occurred; Southwestern's MBE scores would result in a 74% New York bar passage rate, but SUNY-Buffalo's pass rate was only 73%.

Southwestern's New York bar passage rate is remarkable since its students passed the July 2016 California bar exam at a rate of only 38%. But another variable makes Southwestern's New York bar passage rate even more remarkable in relation to SUNY-Buffalo's. As the chart demonstrates, SUNY-Buffalo has a very small number and percentage of Black (6.6%/13) and Hispanic (6.1%/12) students compared with Southwestern (Black, 4.2%/16 students and Hispanic, 19.8%/83 students).⁶¹

Although no information has been published regarding New York law schools' mean MBE scores on the July 2016 bar examination, the California bar examiners have published the mean MBE scores for all California law schools⁶². Even though Southwestern students only passed the California bar at 38%, Southwestern students' "all taker" mean MBE score for the July 2016 exam was 139.9 compared with the national "all taker" MBE mean of 140.3.⁶³

The Southwestern analysis demonstrates the irrational and unjust consequences of the Council's proposed 75% bar passage in 2-years standard. Southwestern would have little chance of meeting that proposed ABA standard even though its students scored very close to the national mean on the MBE and even though its students, had they taken other easier bar examinations like the New York exam, would have scored higher than comparable New York law schools whose students have better entering LSAT/GPA credentials. But worse, Southwestern is one of the California law schools that admit a significant number of Black and Hispanic law students. The dis-accreditation of Southwestern would be a significant setback to not only increasing, but to merely maintaining, diversity in the California bar.

B. University of San Francisco v. NYLS.

NYLS's 2013 entering class had statistics (LSAT 153/151/149 and GPA 3.43/3.17/2.87) slightly lower than USF's (LSAT 158/153/151 and GPA 3.51/3.28/2.95). NYLS had a 70.3% passage rate on the July 2016 New York bar exam, and USF would have had a 72% passing rate on the New York exam.⁶⁴ Under the Council's proposed 75% passage rate in 2 years NYLS will easily meet that standard. However, since USF had a passage rate of only 36% on the July 2016 California bar examination, it would almost certainly fail to raise that passage rate to 75% within 3 more bar examination administrations, and would thus lose ABA accreditation.

Both NYLS and USF admit many minority law students. The 2013 NYLS entering class had a combined 23.6% of Black and Hispanic law students compared to USF's combined 27.4% Black and Hispanic students. Under the Council's proposal NYLS would have easily been able to meet the rejected 75% in 2-year bar passage standard, and New York residents would be able to enjoy and benefit from that increased diversity in the New York bar association. Even though USF's students would have scored higher than NYLS' students on the July 2016 New York bar, USF would fail the Council's 75% in 2-year standard and would lose ABA accreditation.

The five California ABA law schools studied in this report had a combined mean July 2016 California bar passage rate of 33.4% even though they would have had a combined mean rate of 69.4% on the July 2016 New York bar examination. Under the Council's proposed 75% passage in 2-year rule all five of these California ABA law schools would lose ABA accreditation. What effect on diversity in the California bar will the loss of these five law schools have? In 2014 these five California schools enrolled 208 Hispanic law students and 83 Black law students. If these five California law schools lose ABA accreditation then there will be a 36% reduction in the number of Black law students and 31% fewer Hispanic law students attending California ABA law schools.⁶⁵

C. Out-of-State ABA Students' Poor Performance on the California Bar Exam.

But it is not just students from middle to bottom tier law schools that have serious problems passing the California bar examination. Table 8 compares California ABA approved law school students' bar results with out-of-state ABA law students' California bar examination passing percentages. The 14,252 out-of-state ABA students who took the California bar examination from February 2007 to July 2015 is a statistically significant sample size to support a reliable analysis.

Table 8
Comparative First-Time CA ABA and
Out-of-State ABA Schools on
The California Bar Exam⁶⁶

Test	CA ABA ABA	Out-of-State ABA
Feb. 2007	60.8	51.6
Jul. 2007	75.9	67.3
Feb. 2008	62.2	53.4
Jul. 2008	83.2	74.9
Feb. 2009	53.2	45.2
Jul. 2009	79.3	69.4
Feb. 2010	60.1	51.1
Jul. 2010	75.2	68.1
Feb. 2011	63.4	57.6
Jul. 2011	76.2	66.1
Feb. 2012	62.1	47.5
Jul. 2012	76.9	63.6
Feb. 2013	60.6	49.1
Jul. 2013	75.9	64.2
Feb. 2014	68.6	44.3
Jul. 2014	69.4	59.9
Feb. 2015	53.9	40.5
Jul. 2015	68.2	58.8

Table 8 provides many interesting data points. First, California ABA law students have substantially outperformed out-of-state ABA students on every July California bar examination for the past 9 years. The ABA out-of-state students' mean passage rate over nine years was almost **10% lower** than CA ABA students (CA mean score was 75.6 versus an out-of-state 65.8 mean). This bar passage differential cannot be overstated. For instance, in some other states, like New York, the in-state ABA bar passage percentage is barely higher than that of the out-of-state ABA test takers:

New York Bar First-Time Bar Passage Results⁶⁷

	<u>N.Y. ABA</u>	<u>Out-of-State ABA</u>
2015	78%	78%
2014	82%	81%
2013	87%	83%
2012	83%	80%

The mean differential between the New York ABA students and the out-of-state ABA test takers is only **2.53%** (N.Y. 82.58 versus out-of-state ABA 80.05) compared to the California ABA versus out-of-state ABA differential of **10%**.

Many students from law schools rated in the top half of all law schools in the U. S. News Law School Rankings have great difficulty passing the California bar examination. For instance, the mean differential between these out-of-state ABA law school's home state bar passage rates and their passage rates on the California bar examination from February 2010 to July 2014 were: (1) Washington St. Louis 115 students (home state bar 94% but 67% CA bar); (2) Georgetown 391 students (home state bar 92% but CA 77%); (3) Northwestern 166 students (home state bar 95% but 82% CA bar); (4) George Washington 236 students (home state bar 93% but 77% CA bar).⁶⁸

One might posit a number of reasons why students from even ABA top-20 rated law schools perform much worse on the California bar examination than on their home states' bar examinations:

1. The Number of State Specific Topics on a Bar Examination.

Perhaps the California bar examination tests many "California-specific" legal topics that are not taught in out-of-state ABA law schools. However, that explanation is contradicted by the evidence. During the period of bar examinations for this study (February

2010 till July 2014) California only tested one California specific legal area, California community property. During that time there was a 10% higher mean bar passage rate for all California ABA law students taking the California bar examination than for all ABA out-of-state test takers (this includes all test takers, not just those law schools listed in the tables above).⁶⁹ But if the hypothesis is that in-state and out-of-state ABA test takers' bar passage is correlated with the numbers of "state-specific" legal areas tested, then that hypothesis is clearly disproven by the results in New York. New York has traditionally tested: New York Constitutional Law, Family Law, and New York Jurisdiction and Procedure.⁷⁰ Based on the number of state subjects tested, one would therefore predict that the New York differential between in-state ABA test takers and out-of-state ABA test takers would be substantially higher than that in California. However, the mean differential between the New York ABA and the out-of-state ABA test takers is only 2.53% (N.Y. 82.58 versus out-of-state ABA 80.05).

2. Do Only Low-Performing Out-of-State ABA Students Take the California Bar?

Another hypothesis is that only the poorest performing students from out-of-state law schools take the California bar examination. Unfortunately, the data necessary to test that hypothesis is not publicly available since California does not publish specific information about individual out-of-state test takers' UGPA, LSAT scores, or LSGPA. However, this hypothesis is inconsistent with common sense because it is unlikely that a significant percentage of poorly qualified graduates from ABA out-of-state schools would spend the thousands of dollars to take the California bar examination where the passage rate for out-of-state test takers is so low. In addition, since the out-of-state schools' samples in this study are large, for instance (Georgetown 391 students), George Washington (236 students) and American (221 students), it is unlikely that

low performing out-of-state students predominate those test takers at levels to explain the passage differentials.

3. Differences Between California’s MBE Cut Score and Out-of-State Cut Scores Account For the Low Passage Rates of Out-of-State ABA Students on the California Bar.

The third hypothesis—and, I submit, the most likely explanation for the different bar passage rates—is the differential between an out-of-state law school’s state bar MBE cut score and the much higher California MBE cut score. There is significant empirical evidence that a rise in the MBE cut score results in a lowering of a state’s bar passage rates. For instance, a decline of 2.8% in the MBE mean score on the July 2014 bar examination predicted a decrease in the bar passage rate of only 2.9% in a state with a cut score of 129, but predicted a reduction in the bar passage rate of 8.7% in a state with an MBE cut score of 145.⁷¹

My proposal to amend ABA Standard 316 by adding an alternative standard deviation from the national mean MBE score in 2 of the last 3 years will both cure the unfairness to schools which are located in states with very high MBE cut scores, and protect the public by assuring that law schools’ students perform well on the MBE in order to demonstrate their knowledge of substantive law.

V. *Increasing the Rigorousness of the ABA Bar Passage Standard Will Substantially Impact Attorney Diversity in Jurisdictions That Have Very High MBE Cut Scores.*

The ABA Council approved the ABA Standards Review Committee’s proposed modification of ABA Standard 316 and forwarded that proposal to the ABA House of Delegates for approval. That rejected proposal would have provided: “At least 75 percent of a law school’s graduates in a calendar year who sat for a bar examination must have passed a bar

examination administered within two years of their date of graduation.”⁷² The central problem with the Council’s proposal was that it would have caused tremendous upheaval for law schools, like those in California, that enroll high numbers of minority law students in a jurisdiction that has a very high MBE cut score. Chart 9 demonstrates the low first-time bar passage rates for Hispanic and Black law students in California. According to Law School Transparency, it is extremely unlikely that these bar passage percentages would rise to the required accreditation standard of 75% within just four administrations of the California bar examination.⁷³

TABLE 9
California ABA Hispanic & Black
First-Time Bar Examination Pass Rates⁷⁴

<u>EXAMINATION DATE</u>	<u>NUMBER OF TEST TAKERS</u>			
	<u>HISPANIC</u>		<u>BLACK</u>	
	<u>Number Taking</u>	<u>Passage</u>	<u>Number Taking</u>	<u>Passage</u>
FEB 2009/ JULY 2009	339	67.0%	116	56.0%
FEB 2010/ JULY 2010	389	63.0%	126	52.0%
FEB 2011/ JULY 2011	420	62.0%	149	54.0%
FEB 2012/ JULY 2012	423	67.0%	139	59.0%
FEB 2013/ JULY 2013	446	68.0%	134	55.0%
FEB 2014/ JULY 2014	460	60.0%	166	54.0%
FEB 2015/ JULY 2015	522	59.0%	158	45.0%
FEB 2016/ JULY 2016	537	50.0%	147	41.0%

TABLE 10
California ABA Hispanic & Black
Repeat Bar Examination Pass Rates⁷⁵

<u>EXAMINATION DATE</u>	<u>NUMBER OF REPEAT TEST TAKERS</u>			
	<u>HISPANIC</u>		<u>BLACK</u>	
	<u>Number Taking</u>	<u>Passage</u>	<u>Number Taking</u>	<u>Passage</u>
FEB 2009/ JULY 2009	290	32.0%	138	24.0%
FEB 2010/ JULY 2010	259	33.0%	140	20.0%
FEB 2011/ JULY 2011	301	25.0%	150	21.0%
FEB 2012/ JULY 2012	308	36.0%	156	22.0%
FEB 2013/ JULY 2013	307	40.0%	137	32.0%
FEB 2014/ JULY 2014	271	36.0%	134	35.0%
FEB 2015/ JULY 2015	376	32.0%	145	37.0%
FEB 2016/ JULY 2016	407	32.0%	154	21.0%

Tables 9 and 10 illustrate several critically important findings. According to Law School Transparency’s 60% bar passage criteria, it is clear that under California’s high 144 MBE cut score that many Black and Hispanic first-time and repeater rates will pose serious problems for the bottom six California bar examination performing law schools. The data demonstrates that the mean first-time Black bar passage rate in California from 2009-2016 was only 52% and the Black repeater mean was only 27%. In addition, the mean first-time Hispanic bar passage rate for the same years was only 62% and the Hispanic repeater mean rate was only 33%. Those Black and Hispanic bar passage rates were the California statewide ABA mean percentages which include schools such as UCLA, Berkeley, Stanford, USC, and UCI. Although California does not publish the minority bar passage rates for each California ABA law school, it is likely that many minority/ethnic students in schools at the bottom quarter of the state’s bar passage rate

score substantially lower than the statewide mean based on their lower LSAT/GPA credentials. Therefore, those minority students would almost certainly fail to meet the ABA Council's rejected 75% in two year standard.

Further, the trend in Hispanic and Black first-time and repeater California bar passage scores from 2013 to 2016 has steadily gone down. The Hispanic first-time 2013 rate of 68% fell to 50% in 2016, and the Hispanic first-time rate fell for that same period from 55% to 41%. During that same time period the Hispanic repeater rate fell from 40% to 32% and the Black repeater rate fell from 32% to 21%. Again, under the Law School Transparency bar passage model, it is clear that the Hispanic and Black bar passage rates will not come close to reaching the 75% passage within 2 years required under the Council's rejected bar examination proposal. It would be shocking if California ABA law schools in the bottom quarter of bar passage results did not consider the effects of admitting Hispanic and Black law students based on their probability of meeting more rigorous ABA bar passage standards.⁷⁶

VI. A Blueprint For Future Research On Bar Examination Student Competence Outcome Measures.

Currently, the attorney licensing system in the United States is dysfunctional for a number of reasons. First, there is currently no requirement or mechanism for the ABA, state bar associations, the NCBE and law schools to share data about bar examination statistics. The ABA does not require law schools to report certain critically important data like a law school's students' mean MBE scores because law schools do not control the data supplied to them by State Bar Associations. State Bar Associations often do not on their own collect and/or do not seek data from the NCBE, and even if they collect bar examination data they often do not publish that information. Further, the NCBE, a private "non-profit" corporation, often refuses to supply

researchers with bar examination data that the NCBE they maintain is proprietary and legally protected. Some law schools refuse to provide non-ABA required information for fear of infecting the school's reputation and/or U. S. News ranking. In order to intelligently investigate and draft better and fairer national law school accreditation standards, this lack of information vortex must end.

I propose a 3-step process for creating a bar examination information sharing ethos:

1. The ABA, the Conference of Chief Justices, the National Center for State Courts, the NCBE and the ABA Council of Legal Education and Admission to the Bar need to cohost a conference on bar examinations and law student data sharing . The conference should invite a wide range of decision makers, academics, researchers and psychometricians to present panels on the problems and possible solutions to the bar examination data gap dilemma. The bar licensing system will only improve if all stakeholders can come to consensus on the importance and procedures for data sharing.

2. Researchers and other interested persons should exhaust state remedies to seek available bar examination data that has not been published by state bar associations. "All 50 states also have public records laws which allow members of the public (including non-residents) to obtain documents and other public records from state and local government bodies."⁷⁷

Although some state public records acts have limitations on the types of data and the governmental agencies covered by the disclosure statutes, some statutes specifically include state bar associations. For instance, the "State bar is subject to the California Public Records Act..." (*California Business & Prof. Code §6026.11*).⁷⁸ In fact, the data used in Part II, supra, regarding California ABA law schools' mean MBE scores was only attainable from the California State Bar Association by filing a California Public Records Request.⁷⁹

3. Significant reform in the National Conference of Bar Examiners' monopoly over law license testing in the United States and access to NCBE's test data is required in order to intelligently assess and reform state and ABA bar examination standards. Except for states like Wisconsin who use a diploma privilege for licensing rather than a bar exam for certain students, and Louisiana that does not use portions of the NCBE bar testing machinery, every other law student in the country must take some form of licensing test written by, administered by and graded by the NCBE. Historically, until the middle of the 1970's the NCBE had little involvement in the bar licensing process. For example, California did not adopt the MBE until 1972 and until 1980, before adopting the MPRE, California wrote, administered, and graded its own professional responsibility examination.⁸⁰ However, today, according to the California State Bar Association and the NCBE, California no longer has any involvement in the writing, administering or grading of the MBE and MPRE.⁸¹

Because the NCBE now has the largest data base on bar examination statistics in the United States, researchers and public policy makers have no access to that data that would earlier have been in the possession of individual state bar associations and subject to discovery under a state public records request. Although the NCBE publishes some of its bar examination statistics, it does not provide the public or researchers access to their non-published data. When I contacted the NCBE for non-published MPRE data for an article I was writing, the NCBE responded: "The information on our web site is the only data available to the public. I am sorry we cannot be of further assistance."⁸² The lack of access to the NCBE data base is not only problematic for independent researchers, it also infects the credibility of NCBE's many statistical reports and analyses. Without access to the raw data there is no way for independent researchers to validate the NCBE reports, and the lack of outside peer review of article published in the

NCBE's journal, the Bar Examiner, raises questions regarding the neutrality and accuracy of NCBE analyses.⁸³

There is, however, a potential remedy in some states for the lack of access to NCBE non-published bar examination data. Some states prohibit governmental organizations from entering into contracts or delegating governmental work to organizations that refuse to provide public access to information otherwise discoverable if that data were maintained by the governmental agency. For instance, in California a “[s]tate or local agency may not allow another party to control the disclosure that is otherwise subject to disclosure pursuant to this chapter [California Public Records Act].”⁸⁴ In California the State Bar Act provides that the Committee of Bar Examiners [Committee] is vested with authority over three state attorney licensing functions: (1) “to administer the requirements for admission to practice law”; (2) “to examine all applicants for admission”; and, (3) “to certify to the Supreme Court for admission those applicants who fulfill the requirements.”⁸⁵ The California State Bar Committee of Bar Examiners has delegated to the NCBE its duty to “examine all applicants for admission” even though it originally exercised the function of writing, administering, and grading the California General Bar Exam. Since the Committee’s duty to examine has been transferred to the NCBE, and since the NCBE is a private corporation not directly covered by the California Public Records Act, the State Bar has violated *California Government Code § 6253.3*. However, the public and researchers have procedural remedies to cure this current violation of the California Public Records Act. First, they could attempt to negotiate with the State Bar to obtain requested information maintained by the NCBE which would otherwise be discoverable under the public records act. This option provides the State Bar an incentive to work with the data requester in order to avoid litigation that could result in a court prohibiting the State Bar Association from delegating bar testing to the NCBE. If the

negotiation fails, then a data requester could sue in superior court for a writ of mandate and/or prohibition to either obtain the data or cease the relationship between the State Bar Association and the NCBE. For instance, in *Community Youth Athletic Center v. City of National City*⁸⁶ the court found that defendant illegally retained a “private consultant” and relied on the consultant’s data to decide the City’s eminent domain redevelopment power. The trial court held that the City violated California Government Code §6253.3 because it failed to keep control of data otherwise discoverable by petitioners under the CPRA.⁸⁷ The Court of Appeal stated that no “bad faith finding” is required under the CPRA, and that the “City is not justified in arguing that it did everything it could or should have to do, or that all the fault lay with its contractor RSG.” (Id.) The Court of Appeal upheld the trial court’s declaratory relief that the City “make reasonable efforts to facilitate the location and release of the information.” (Id.). In *Sander v. State Bar of California*⁸⁸ the California Supreme Court held that the public has a legitimate interest in the state bar licensing process and that it has a right to non-confidential information regarding the reliability, fairness, and the bar examination’s possible disparate impact based upon race, ethnicity and gender. Obviously, if law suits were lodged in several states, the NCBE might be sufficiently incentivized to agree to abide by state public records acts except for disclosure of student identifying data and NCBE’s proprietary test data.

CONCLUSION

An ABA Standard based solely on law school bar percentage passage rates results in inequitable application in states that have promulgated much higher than national mean MBE cut scores. In addition, such a bar passage percentage standard creates an incentive for schools in high MBE cut score states to the admission of students with slightly lower LSAT/GPA credentials, including minority/ethnic applicants, in order to maintain ABA accreditation. The

best method of leveling the playing field among all states, maintaining and/or increasing diversity in the bar, and assuring consumer protection is to add a within “X” standard deviation from the national mean MBE score for 3 out of the last 5 years for maintaining ABA accreditation regarding students’ outcome measures as a proxy for legal competence and the quality of law school instruction. It is time for the ABA and the NCBE to combine their resources and share all existing MBE data in order to determine the appropriate “X” standard deviation from the national mean MBE score to use as a new element of Standard 316 to judge the quality of student competence on the bar examination.

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¹ Karen Sloan and Celia Ampel, *ABA Rejects Tougher Bar Passage Rule for Law Schools*, National Law Journal, Feb. 6, 2017 (<http://www.nationallawjournal.com/home/id=1202778545389/ABA-Rejects-Stricter-BarPass-Rule-for-Law-Schools?mcode=1202615035239&curindex=1&slreturn=20170122161526>). For

the many empirical analyses in opposition to proposed Standard 316, see

(http://www.americanbar.org/groups/legal_education/resources/notice_and_comment.html).

² Id.

³ (www.census.gov/prod/cen2010/doc/sf1.pdf, at Table 2.)

⁴ U. S. Census Bureau (<http://www.census.gov/quickfacts/table/PST045215/06#headnote-js-b>).

⁵ *California State Bar Journal Survey, September 10, 2001, at 4*

(<http://www.calbarjournal.com/Portals/1/documents/2001-CBJ-Survey-Summary.pdf>).

⁶ *Member Services Survey, Feb. 2006, at 12*

<http://www.calbar.ca.gov/LinkClick.aspx?fileticket=AG4sVakYctc%3D&tabid=212>.

⁷ *Survey of Members, December 2011, at 8* (

<http://www.calbarjournal.com/Portals/1/documents/2011->

[12_SBCdemosurvey_sumandfacts.pdf](http://www.calbarjournal.com/Portals/1/documents/2011-12_SBCdemosurvey_sumandfacts.pdf)).

⁸ (<http://www.calbar.ca.gov/AboutUs/BarNumbers.aspx>).

⁹ *Supra.*, note 3.

¹⁰ *Equal Access Fund Partnership Grants...*, at 54

(<http://www.calbar.ca.gov/LinkClick.aspx?fileticket=yWNOa4EQF2o%3D&tabid=736>).

¹¹ Although I do not agree with the Council's 75% in 2 year rule and have written several empirical analyses that demonstrate how that standard will reduce diversity in bar in states with high MBE cut scores, I propose an alternative standard of 75% in 4 years rather than the current ABA Standard 316 of 75% in 5 years. (See my empirical research in opposition to the 75% in 2 year rule at

(http://www.americanbar.org/groups/legal_education/resources/notice_and_comment.html).

¹² According to the National Conference of Bar Examiners, the only state not using the MBE is Louisiana. However, since the Louisiana mean bar passage rate has been 67% from 2006-2015, Louisiana law schools should have no problem meeting my proposed 75% bar passage in 4 year standard. See NCBE 2015 Statistics, at 18 and 26

(<http://www.ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F195>). The national mean MBE score standard that I propose mirrors the current three in five year review period under ABA Standard 316: “That for students who graduated from the law school within the five most recently completed calendar years:75 percent or more of these graduates who sat for the bar passed a bar examination; or 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.”

¹³ This data is not publicly published by the California State Bar Association and was only obtained by filing a California Public Records Request with the State Bar pursuant to *California Business & Prof. Code §6026.11*. On January 17, 2016 I filed a public records request with the Committee of Bar Examiners of the State Bar of California that requested information on California law schools’ bar examination results, entitled “Supplemental Statistics Report” for the years 2005-2015. (See, Request for State Bar Records, January 6, 2016 from William Wesley Patton to The Committee of Bar Examiners of the State Bar of California, at 1 (letter on file with author). See also, letter from the California State Bar to William Wesley Patton, January 17, 2016, indicating agreement to provide the data for a cost of \$8.60 (on file with author).

¹⁴ Letter from Erica Moeser, President, National Conference of Bar Examiners, to Law School Deans, August 31, 2016, at 1 (letter on file with author): “[W]e [NCBE] will be releasing information to the jurisdictions that will show the national percentile into which individual

examinees fall in each of the seven MBE subjects... [and] the decision about whether to release this information to examinees belongs to the jurisdictions.”

¹⁵ In order to determine how many standard deviations from the mean the ABA standard should employ we need to first obtain from the National Conference of Bar Examiners [NCBE] the annual MBE mean scores for each ABA approved law school. Once we have those numbers we can determine whether the curve is bell-shaped or non-bell shaped. If the curve is bell shaped, then under a “within 2 standard deviations from the national mean MBE score” it is expected that 95% of ABA approved law schools will meet that standard annually, and if a “within 3 standard deviations from the national mean MBE score” is used then 99.7% of schools would meet the standard. However, there is a chance that individual ABA schools’ mean MBE scores will not fall on a bell-shaped curve. In that case, an alternative called the “Chebyshev’s Rule or Theorem” would be used to determine the number of standard deviations from the norm to calculate the appropriate ABA standard. Under the “Chebyshev’s Rule it may require a modification of the standard deviation chosen. See, Chebyshev’s Rule (<http://flc.losrios.edu/~eitel/All%20PDFS/S-300%20PDFs/S-300%20Lectures/S-300%203-2B%20Chev%20Rule%20Lec.pdf>). See also, Amidan, Ferryman, and Cooley, *Data Outlier Detection Using the Chebyshev Theorem* (https://www.researchgate.net/publication/224624985_Data_outlier_detection_using_the_Chebyshev_theorem0).

¹⁶ For instance, if state X has an MBE cut score of 138, but a school in that state the student is considering only has a mean MBE score of 135, the student may not choose to take the risk of passing that state’s bar exam. However, under the identical hypothetical, if the student wants to

practice in another state with an MBE cut score of 133, attending the school with a mean MBE of 135 would not provide a disincentive for the student to attend that law school.

¹⁷ For a history of the bar examination in the United States, see, Roger M. Jarvis, *An Anecdotal History of the Bar Exam*, 9 Geo. J. Legal Ethics 359 (1996); Michael K. McChrystal, *Legitimizing Realities: State-Based Bar Admission, National Standards, and Multistate Practice*, 3 Geo. J. Legal Ethics 533 (1990); Dorothy E. Finnegan, *Raising and Leveling the Bar: Standards, Access, and the YMCA Evening Law Schools, 1890-1940*, 55 J. Leg. Ed. 208 (2005).

¹⁸ Gary S. Rosin, *Unpacking the Bar: Of Cut Scores and Competence*, 32 J. of Leg. Prof. 67 (2008). Professor Rosen states that “in the summer 2001 bar exams, minimum passing scores (cut scores) set by the states ranged from 119.2 in Puerto Rico to 150 in Nevada out of 200, with a median of 133.” *Id.*, at 68.

¹⁹ The Liaison Committee of Medical Examiners is the sole body authorized by the U. S. Department of Education to accredit programs in the U. S. leading to the M.D. degree. (https://www.aamc.org/members/osr/committees/48814/reports_lcme.html). All medical students in the United States take the same objective Step 1 general board examination, and the United States Medical Licensing Examination score has a minimum passing score that is accepted by all state medical licensing organizations in the United States. United States Medical Licensing, 2017 Examination, *Bulletin of Information* (www.usmle.org); (<http://www.usmle.org/transcripts>); (http://www.usmle.org/performance-data/default.aspx#2015_step1) .

²⁰ Comprehensive Guide to Bar Admission Requirements 2017, at 30-31 (NCBE 2017) (<http://www.ncbex.org/pubs/bar-admissions-guide/2017/index.html#p=42>).

²¹ William Vogeler, *California Law School Deans Push Back at the Bar Exam*

(http://blogs.findlaw.com/greedy_associates/2017/02/california-law-school-deans-push-back-at-the-bar-exam.html); Dennis Saccuzzo and Nancy Johnson, *Beyond the Cut Score: Piercing the Veil of the California Bar Exam's Validity*, *The Recorder*, Feb. 28, 2017 (<http://www.therecorder.com/printerfriendly/id=1202780183297>).

²² ABA Standard 316 (a) provides: "In demonstrating compliance under sections (1)(i) and (ii), the school must report bar passage results 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." (http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2016_2017_standards_chapter3.authcheckdam.pdf).

²³ Erica Moeser, *President's Message*, *The Bar Examiner*, September 2016, at 1-2 (http://www.ncbex.org/pdfviewer/?file=%2Fassets%2Fmedia_files%2FBar-Examiner%2Farticles%2F2016%2FBE-PresidentPage-850316.pdf); Dianne F. Bosse, *A Uniform Bar Examination: The Journey From Idea To Tipping Point*, *The Bar Examiner*, September 2016 (http://www.ncbex.org/pdfviewer/?file=%2Fassets%2Fmedia_files%2FBar-Examiner%2Farticles%2F2016%2FBE-Bosse-850316.pdf).

²⁴ (<http://www.ncbex.org/jurisdiction-information/jurisdiction/la>).

²⁵ For studies debating the bias and/or predictability of the MCAT, see, Dwight Davis, Keven Dorsey, et. al., *Do Racial and Ethnic Group Differences in Performance on the MCAT Reflect Test Bias?*, 88 *Academic Medicine* 593 (2013); J. Jon Veloski, et. al., *Close But No Bananas: Predicting Performance*, 75 *Academic Medicine* S28 (2000); Clara A. Callahan, et. al., *The*

Predictive Validity of Three Versions of the MCAT in Relation to Performance in Medical School, Residency, and Licensing Examinations: A Longitudinal Study of 36 Classes of Jefferson Medical College, 85 *Academic Medicine* 980 (2010); Tyrone Donnon, *The Predictive Validity of the MCAT for Medical School Performance and Medical Board Licensing Examinations: A Meta-Analysis of the Published Research*, 82 *Academic Medicine* 100 (2007).

For studies debating the bias and predictability of the LSAT see, Vernellia R. Randal, *The Misuse of the LSAT: Discrimination Against Blacks and Other Minorities in Law School Admissions*, 80 *St. John's L. Rev.* 107 (2006); Alex M. Johnson, Jr., *Knots in the Pipeline For Prospective Layers of Color: The LSAT is Not the Problem and Affirmative Action Is Not the Answer*, 24 *Stanford L. & Pol. Rev.* 379 (2013); Scott Johns, *Testing the Testers: The National Conference of Bar Examiners' LSAT Claim and a Roller Coaster Bar Exam Ride* (University of Denver Sturm College of Law Legal Research Paper Series, No. 16-35; Langston Hughes, *Towards Parity in Bar Passage Rates and Law School Performance: Exploring the Sources of Disparities Between Racial and Ethnic Groups*, 16 *Thurgood Marshall L. Rev.* 425, 431 (1991); Leslie G. Espinoza, *The LSAT: Narratives and Bias*, 1 *J. of Gender & Law* 121 (1993).

²⁶ Susan M. Case, *Men and Women: Differences in Performance on the MBE*, *The Bar Examiner* (May 2006), 44-46.

²⁷ Michael Kane, Andrew Mroch, Douglas Ripkey, and Susan Case, *New York Bar Examination Performance in February and July 2006 for Candidates Failing for the First Time in July 2005* (NCBE, Report prepared for the New York Board of Law Examiners, July 9, 2007), at 44.

²⁸ Erica Moeser, *President's Page*, *The Bar Examiner*, June 2016, at 7. The NCBE has consistently stated that there the MBE is "trustworthy" and that there is a "correlation between

the performance on the Law School Admission Test (LSAT) and performance on the MBE...”[and] a correlation between law school rank and the bar examination. *Id.*, at 5; Mark A. Albanese, *The Testing Column: The July 2014 MBE: Rogue Wave Or Storm Surge?*, *The Bar Examiner*, June 2015, 35-48; Douglas Ripkey and Susan M. Case, *A National Look at MBE Performance Differences Among Ethnic Groups*, 76 *The Bar Examiner* 21, August 2007.

²⁹ Kane, *supra*, note 26, at 44.

³⁰ Stephen P. Klein and Roger Bolus, *Are Bar Exam Scores Affected By Law School Admission Practices?* (PR-88-2), October 17, 1988; Klein, *An Evaluation of the Multistate Bar Examination: A Report Prepared for the National Conference of Bar Examiners* (82-7), August 30, 1982; Klein, *Factors Associated With the Differences in Passing Rate Between Anglo and Hispanic Applicants on the New Mexico Bar Examination*, 81-1-12-PR, Jan. 12, 1981; Klein & Bolus, *Analysis of July 2004 Texas Bar Exam Results By Gender and Racial/Ethnic Group*, Dec. 15, 2004 (http://www.gle.state.tx.us/one/analysis_0704tbe.htm).

³¹ Nicholas Georgakopoulos found that LSAT is a weak indicator of bar passage and that LGPA is the best indicator. Nicholas Georgakopoulos, *Bar Passage: GPA and LSAT, Not Bar Reviews*, Robert H. McKinney School of Law Legal Studies Research Paper No. 2013-30. “LSAT is overweighted compared to other, less univariate academic metrics such as a broad view of not only UGPA but college quality and college major...” Alexia Brunet Marks and Scott A. Moss, *What Predicts Law Student Success? A Longitudinal Study Correlating Law Student Applicant Data and Law School Outcomes*, 13 *J. of Empirical Leg. Studies* 205, 256 (2016). See also, William C. Kidder, *The Bar Examination and the Dream Deferred: A Critical Analysis of the MBE, Social Closure, and Racial and Ethnic Stratification*, 29 *L. & Social Inquiry* 547 (2004).

Even though students' LSAT scores remained on a downward trend, the national mean MBE score increased from 139.9 in July 2015 to 140.3 in July 2016. Kathryn Rubino, *Surprise! Despite All Expectations To The Contrary, Bar Exam Scores Went Up This Year!*, Above The Law, Sept. 1, 2016 (<http://abovethe law.com/2016/09/surprise-despite-all-expectations>). See also, Paul Caron, *July 2016 Bar Exam Scores Rise, But Remain Near All-Time Low Amidst Declining LSAT Scores*, Sept. 1, 2016 (http://taxprof.typepad_blog/2016/09/merrittmbe-score).

³² William C. Kidder and Richard O. Lempert, *The Mismatch Myth in American Higher Education: A Synthesis of Empirical Evidence at the Law School and Undergraduate Level*, Univ. of Mich. Law Public Law and Legal Theory Research Paper Series, No. 404, May 2014, at 6.

³³ John J. Norcini and Danette W. McKinley, *Assessment Methods in Medical Education*, 23 *Teaching and Teacher Education* 239, 240 (2007).

³⁴ Stephen Klein & Roger Bolus, *Minority Group Performance On The California Bar Examination*, PR-87-2, Dec. 3, 1987, at 8.

³⁵ *Id.*

³⁶ Mark A. Albanese, *The Testing Column: Scaling: It's Not Just For Fish or Mountains*, *The Bar Examiner*, Dec. 2014, at 50.

³⁷ *Id.*, at 55. "The purpose of scaling raw multiple choice scores is to adjust these scores for possible variations in average questions difficulty from one exam to the next because most of the questions asked on one exam are not the same as those asked on a prior exam."

³⁸ Klein and Bolus, *Initial and Eventual Passing Rates of July 2004 First Timers*, June 9, 2006, at 3 (<https://ble.texas.gov/klein-report-0606>).

³⁹ This data on California ABA law schools' mean MBE scores is based on the data referenced in note 13, supra.

⁴⁰ For instance, in several studies Klein has found that there is “a strong correlation between [students'] MBE and essay scores....” Klein also states that “the differences among racial/ethnic groups are just as large on the MBE...as they are on the essay and Performance sections....” Stephen P. Klein, *An Analysis of Possible Variations in Pass/Fail Standards on the California Bar Examination*, Jan. 15, 1981, (81-1PR), at 4. (http://www.seaphe.org/pdf/past-bar-research/An_Analysis_of_Possible_Variation_in_Pass-Fail_Standards_on_the_CA_Bar_Exam.pdf). See also, Klein, *An Evaluation of the Multistate Bar Examination*, Aug. 30, 1982, at 3: “MBE scores correlate well with scores on state developed essay and multiple choice bar examinations....” Klein also states that “the differences among racial/ethnic groups are just as large on the MBE...as they are on the essay and Performance sections....” Stephen P. Klein and Roger Bolus, *Minority Group Performance on the California Bar Examination*, Dec. 3, 1987 (PR-87-2), at 3. See also, ⁴⁰ Stephen P. Klein and Roger Bolus, *Minority Group Performance on the California Bar Examination*, Dec. 3, 1987 (PR-87-2), at 3. For an excellent rebuttal of both Klein's and the NCBE's explanations of racial/ethnic disparities on bar examinations, see, William C. Kidder, *The Bar Examination and the Dream Deferred: A Critical Analysis of the MBE, Social Closure and Racial and Ethnic Stratification*, 29 *Law & Soc. Inquiry* 547 (2004).

⁴¹ The LSAT medians in 2013 were: Southwestern 152, Golden Gate 150, Whittier 149, Western State 150, Thomas Jefferson 146, and La Verne 147. This LSAT data was generated at the ABA 509 law school data web page (<http://www.abarequireddisclosures.org/>).

⁴² William C. Kidder, *The Bar Examination and the Dream Deferred: A Critical Analysis of the MBE, Social Closure and Racial and Ethnic Stratification*, 29 *Law & Soc. Inquiry* 547 (2004); Merritt, Deborah J., Lowell L. Hargens and Barbara F. Reskin, *Raising the Bar: A Social Science Critique of Recent Increases to Passing Scores on the Bar Exam*, 69 *Univ. of Cincinnati L. Rev.* 929 (2001).

⁴³ “The bar admission requirements further two important goals -- assessing competence to practice law and ensuring fitness of character among practitioners.² The former goal is advanced through educational requirements and, most notably, the passage of a rigorous exam that measures minimum competency and analytic skill.” *Supreme Court Ad Hoc Committee On The Uniform Bar Examination*, at 3 (<https://www.judiciary.state.nj.us/reports2016/AdHocCommUBE.pdf>).

⁴⁴ ABA Standard 316 (a) provides: “In demonstrating compliance under sections (1)(i) and (ii), the school must report bar passage results 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.” (http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2016_2017_standards_chapter3.authcheckdam.pdf).

⁴⁵ Mission Statement, Law School Transparency (http://www.lawschooltransparency.com/who_we_are/theory_of_action/#accountability).

⁴⁶ Erica Moeser, *The President’s Page*, *The Bar Examiner*, Sept. 2016, at 6.

⁴⁷ ABA Standard 509 Reports (<http://www.abarequireddisclosures.org/>).

⁴⁸ *Id.*, at 1.

⁴⁹ Admission and Discipline, Chap. III, at III-7

(http://www1.law.umkc.edu/suni/Professional_Responsibility/Materials/Older_Materials/CHAP_TER%20III%202005%20revised%2011.pdf).

⁵⁰ Id., at III-8.

⁵¹ This data is not publicly published by the California State Bar Association and was only obtained by filing a California Public Records Request with the State Bar pursuant to *California Business & Prof. Code §6026.11*. On January 17, 2016 I filed a public records request with the Committee of Bar Examiners of the State Bar of California that requested information on California law schools' bar examination results, entitled "Supplemental Statistics Report" for the years 2005-2015. (See, Request for State Bar Records, January 6, 2016 from William Wesley Patton to The Committee of Bar Examiners of the State Bar of California, at 1 (letter on file with author). See also, letter from the California State Bar to William Wesley Patton, January 17, 2016, indicating agreement to provide the data for a cost of \$8.60 (on file with author).

⁵² Value added educational outcomes have been defined as "the contribution of institutions to students' outcomes after controlling for their incoming abilities." *Assessment of Higher Education Learning Outcomes Feasibility Study Report, Vol. 1* (OECD 2013), at 7 (<http://www.oecd.org/edu/skills-beyond-school/AHELO%20FS%20Report%20Volume%201%20Executive%20Summary.pdf>). For an extensive discussion of "value-added" educational methodology, see, *Advantages of a Multivariate Longitudinal Approach to Educational Value-Added Assessment Without Imputation*, (SAS, July 8-10, 2004)

https://www.sas.com/content/dam/SAS/en_us/doc/whitepaper1/multivariate-longitudinal-approach-evaas-1071571.pdf).

⁵³ In a letter from Kyle McEntee, Executive Director, and David Frakt, Law School Transparency’s National Advisory Council to the ABA Council regarding proposed ABA Standard 316, they stated: “Based on our review of bar pass statistics, any school with a 60% or higher first-time rate should have no problem meeting the new standard. The pass rate for subsequent attempts is typically substantially lower than for first attempts, sometimes dropping by as much as half. Even using a very pessimistic scenario of a 50% drop in the pass rate for each successive attempt, a school with a 60% initial pass rate would still be able to make the 75% rate within four exam administrations.” Letter, at 4

http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/comments/201607_comment_s316_s501_law_school_transparency_authcheckdam.pdf).

⁵⁴ See note 11.

⁵⁵ ABA Standard 509 data (<http://www.abarequireddisclosures.org/>).

⁵⁶ The Georgia bar examination MBE cut score is 135, compared to California’s 144. Comprehensive Guide to Bar Admission Requirements 2017, at 30.

⁵⁷ The John Marshall data on bar passage rates and mean MBE scores was obtained from the Georgia Bar Examination Statistics (<https://www.gabaradmissions.org/georgia-bar-examination-statistics#0716>).

⁵⁸ The GPA, LSAT, Hispanic and Black law student data was obtained from the ABA web page on 509 law school disclosure statements (<http://www.abarequireddisclosures.org/>).

⁵⁹ The projected July 2016 New York bar passage rates for California ABA approved law schools is taken from Professor Anderson's conversion of California bar test scores to the New York bar exam. (http://taxprof.typepad.com/taxprof_blog/2016/12/andersoncalifornia-law-school-bar-passage-rates-recalculated-for-new-york-usccolumbia-ucicornell.html). His data applied the July 2016 California ABA law schools' mean MBE scores to the MBE score required to pass the New York July 2016 bar examination. The National Conference of Bar Examiners has consistently stated that LSAT is directly related to MBE scores and that MBE scores are the best determinate of bar passage rates. (Mark Albanese, *The July 2014 MBE: Rogue Wave or Storm Surge*, *The Bar Examiner*, June 2015, at 35-48). **The number in parenthesis** is the California ABA law school's bar passage rate on the July 2016 California bar examination.

⁶⁰ Because of California's 144 MBE cut score, the repeat test taker passage rate is exceptionally low. In fact, the repeater rate for students from ABA law schools on the July 2016 California bar was only 22% (294 out of 1327), and the repeater rate for Black California ABA school students was only 15.3% and only 17.3% for Hispanics.

(http://admissions.calbar.ca.gov/Portals/4/documents/Statistics/JULY2016STATS120716_R.pdf).

⁶¹ It is impossible to draw any definitive conclusions about the number and percentage of minority students who were admitted to SUNY-Buffalo and to Southwestern who actually took a bar examination since that data is not available to the public. One relevant factor is the schools' academic attrition rates. SUNY-Buffalo in 2014 had no students academically disqualified, but Southwestern had 25. However, even if one were to speculate that a majority of Southwestern students academically disqualified were minority students (and there is no data to support that speculation), Southwestern would still have a substantially larger minority student population

taking the bar examination (Southwestern total Black and Hispanic students admitted [(94) minus (25 disqualified) equals **69** minority bar takers) than SUNY-Buffalo with total **30** Black and Hispanic bar takers.

⁶² The California Bar Examiners' report on California law schools' mean MBE scores can be obtained at (<https://assets.documentcloud.org/documents/3237100/CAL-LAW-SCHOOLS.pdf>).

⁶³ The national mean MBE score has fallen for the past three years. (<http://www.ncbex.org/publications/statistics/mbe-statistics/>).

⁶⁴ See note 3, supra.

⁶⁵ According to the ABA records, in 2014 in all of California ABA approved law schools 666 Hispanic students were admitted and 230 Black law students. The five California ABA law schools included in the chart on page 2 had a combined 208 Hispanic law students out of the total of 666, or 31%, and they enrolled 83 out of 230 Black entering law students, or 36%. (<http://www.abarequireddisclosures.org/>). The reduction in the number of Hispanic and Black law students enrolled in California ABA law schools is likely to be even greater since only 5 schools scored 75% or higher on the July 2016 California bar examination.

⁶⁶ This data is from (<http://admissions.calbar.ca.gov/Examinations/Statistics.aspx>).

⁶⁷ This data is from (<http://www.nybarexam.org/ExamStats/Estats.htm>).

⁶⁸ U. S. News Law School Rankings, 2017 (<http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/law-rankings?int=al1d108>). See also, ABA Standard 509 information about schools' bar passage rates (<http://www.abarequireddisclosures.org/>) and from bar passage data maintained by the California State Bar Association (<http://admissions.calbar.ca.gov/Examinations/Statistics.aspx>).

⁶⁹ The California State Bar Association publishes the percentage of California ABA law students and the percentage of out-of-state ABA law students who pass the examination for each bar administration. (<http://admissions.calbar.ca.gov/Examinations/Statistics.aspx>). It was from this cumulative data base that I calculated the out-of-state ABA law students' examination data.

⁷⁰ <http://www.newyorkbarexam.com/new-york-bar-exam/new-york-bar-exam-subjects/>).

⁷¹ Mark A. Albanese, *The July 2014 MBE: Rogue Wave or Storm Surge?*, *The Bar Examiner*, June 2015, at 35.

⁷² The Council's proposed modification of Standard 316 and its explanation for that amendment can be accessed at

(http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/20160325_notice_and_comment_memo.authcheckdam.pdf).

⁷³ See note 11, *supra*. Law School Transparency's statistical analysis concluded that a first-time bar passage rate must meet or exceed 60% in order for the 2-year bar passage rate to meet or exceed the proposed 75% bar passage in two years.

⁷⁴ This data is from the California State Bar Association

(<http://admissions.calbar.ca.gov/Examinations/Statistics.aspx>). The California State Bar individually publishes bar examination results for each February and July bar examination. The data in Chart 7 and 8 combines the individual February and July bar examination test data to calculate the annual number of Black and Hispanic test takers and their annual California bar passage rates. Compiling the annual bar passage rates is necessary in order to determine law schools' chances of meeting a specific ABA bar passage standard.

⁷⁵ Id.

⁷⁶ For example, the first-time July bar passage mean [2007-2015] of those schools is: Golden Gate 60.55%; Southwestern 62.8%; Thomas Jefferson 51.5%; LaVerne 55%; and Whittier 58.2%. This data is computed from the information published by the California State Bar Association. (<http://admissions.calbar.ca.gov/Examinations/Statistics.aspx>). The mean bar passage rates for Hispanic and Black law students from these schools is not published by the California State Bar Association.

⁷⁷ *State Records Laws* (FOIAdvocates) (<http://foiadvocates.com/records.html>). This web site lists all fifty state public records statutes.

⁷⁸ On December 25, 2015 the State Bar of California sent an email to all bar members stating that “[e]ffective January 1, 2016, the State Bar of California is subject to the California Records Act (CPRA) (Gov. Code sections 6250, et. seq.)” (email on file with author).

⁷⁹ See note 46, *supra*.

⁸⁰ See, *California Bar Examination Information and History* (The State Bar of California), at 1-2 (<http://www.calbar.ca.gov/Portals/4/documents/Bar-Exam-Info-History.pdf>). According to the California State Bar, it “intends to discontinue administration of the California Professional Responsibility Examination (CPRE), which is currently administered [by the State Bar and] disciplined attorneys [will] take and pass the Multiple Professional Responsibility Exam.” Public Comment: Bar Seeks Opinion on 10 Issues, *California Bar Journal*, October, 1996 (<http://archive.calbar.ca.gov/calbar/2cbj/2cbj/96oct/art29.htm>). Rather than working with states to modify the MBE, the NCBE makes modifications to the examination and then notifies state bar associations. “Attached for your information is a copy of a memorandum to Law School

Deans from Erica Moeser, President, National Conference of Bar Examiners, in which she advises the schools about changes to the Multistate Bar Examination (MBE) which will become effective with the February 2015 administration.” *Committee of Bar Examiners Open Session Agenda Item*, March 13, 2013, from Gayle Murphy, Senior Director, State Bar Admissions, to Committee of Bar Examiners. (Memorandum on file with author). In addition, the “NCBE has brought all MBE test development activity in-house, and...the California State Bar Committee of Examiners does not play any role.” Email from Kellie Early, NCBE, to Professor Patton on December 5, 2016 (email on file with author).

⁸¹ According to the Committee of Bar Examiners of the State Bar of California, the “MBE is owned by the National Conference of Bar Examiners (NCBE) and determines the format, scope, topics, questions, grading process.” See, Letter from the Committee of Bar Examiners of the State Bar of California to William Wesley Patton, August 29, 2016, at 1 (letter on file with author).

⁸² Email response from Kellie Early, NCBE Publications and Research, to Professor Patton, May 24, 2016 (email on file with author).

⁸³ In response to my question, “I looked at the members of the editorial board, but I did not see any experts on methodological design such as psychometricians. Is that part of the editorial process handled by the NCBE staff?, the NCBE responded, “Should an article require evaluation of a psychometric nature, we would engage NCBE psychometric staff to participate in the review.” See, email from Professor Patton to Claire J. Guback, NCBE on July 26, 2016 and email from Claire J. Guback, NCBE, to Professor Patton, on July 25, 2016 (on file with author). “The public’s interest in a fair and transparent licensing process outweighs the interests of an

entity. We need time to have this change [in UBE format] studied by a disinterested party to validate NCBE’s representatives.” Suzanne Darrow-Kleinhaus, *A Reply to the National Conference of Bar Examiners: More Talk, No Answers, so Keep on Shopping*, at 15 (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2943516).

⁸⁴ *California Government Code § 6253.3*.

⁸⁵ *State Bar Act Rule 4.1; Bus. & Prof. Code §§ 6000 et seq.*

⁸⁶ *Community Youth Athletic Center v. City of National City*, 220 Cal. App. 4th 1385 (2013).

⁸⁷ *Id.*, at 1428-1429.

⁸⁸ *Sander v. State Bar of California*⁸⁸, 54 Cal. 4th 300, 324-325 (2013).

DRAFT (8/12/17)

The Case for a Uniform Cut Score

Joan W. Howarth*

I. Introduction

Attorneys have become accustomed to indefensible state-by-state disparities in the cut score for our national, multiple choice licensing test, the Multistate Bar Exam (MBE).¹ MBE cut scores range from 129 in Wisconsin to 145 in Delaware.² The states with the most licensed attorneys,³ New York and California, use MBE cut scores of 133 and 144 respectively, landing on different sides of the national MBE score bell curve.

No one pretends that these disparities are justified because practicing law as a new lawyer is more difficult in California than in New York. The MBE cut score is typically more an aspect of a state bar's culture and history than a purposeful decision.

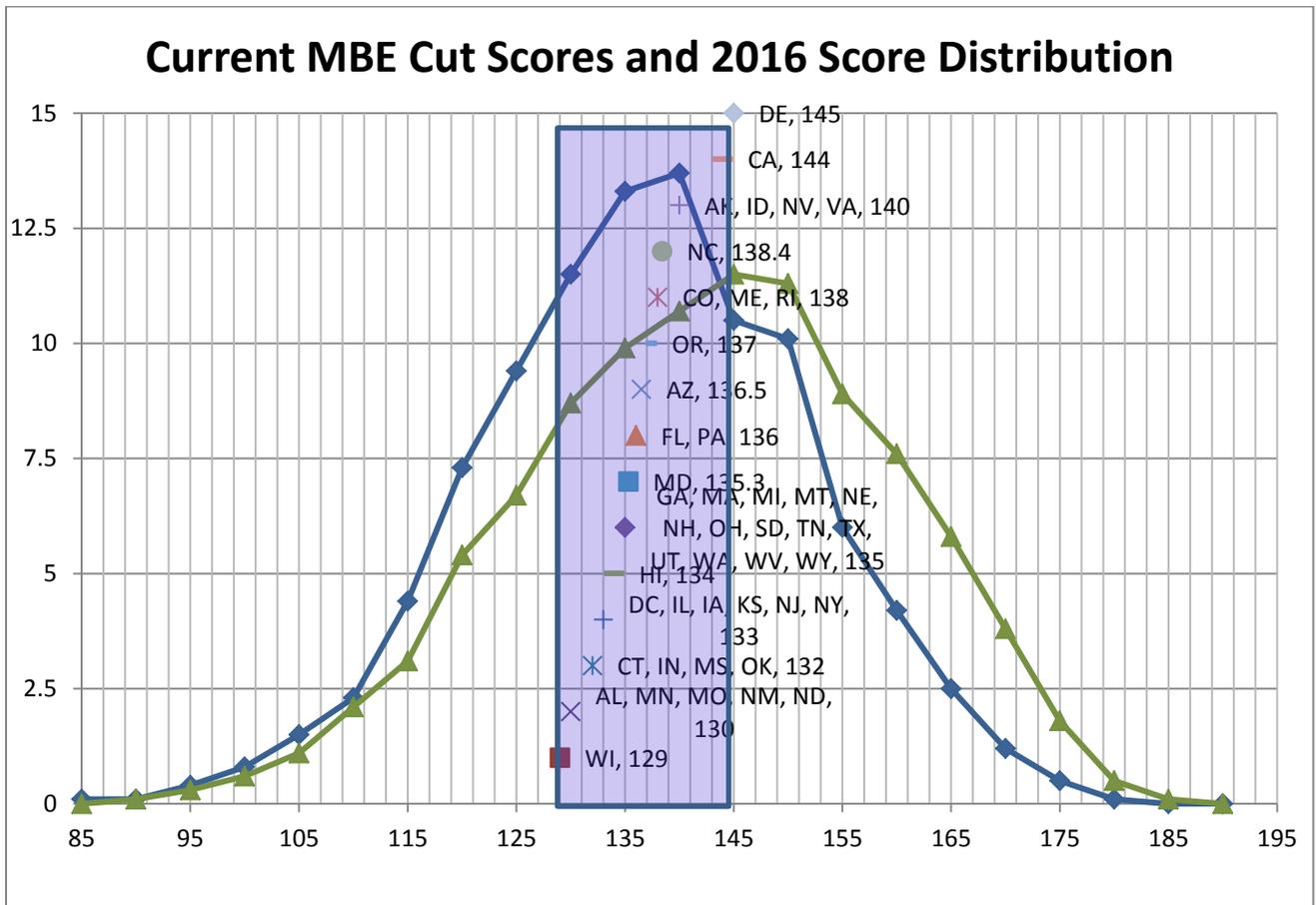
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¹ On a pass-fail test, the cut score, also known as the passing standard, is the score needed to pass the test. Gregory J. Cizek, *An Introduction to Contemporary Standard Setting: Concepts, Characteristics, and Contexts*, in *SETTING PERFORMANCE STANDARDS: FOUNDATIONS, METHODS, AND INNOVATIONS* 3, 4-5 (Gregory J. Cizek, ed., 2d ed. 2012) [hereinafter Cizek 2012]. In any test administration, raising the cut score lowers the pass rate, and vice versa. For earlier commentary criticizing MBE cut score disparities, see Alex M. Johnson, Jr., *Knots in the Pipeline for Prospective Lawyers of Color: The LSAT is Not the Problem and Affirmative Action is Not the Answer*, 24 *STAN. L. & POL'Y REV.* 379, 405-19 (2013) (urging adoption of a uniform cut score, 130, to diversify the profession); Gary S. Rosin, *Unpacking the Bar: Of Cut Scores and Competence*, 32 *J. LEGAL PROF.* 67, 69, 92-93 (2008) (suggesting that bar examiners need to achieve consensus on meaning of minimum competence).

² *2016 MBE Statistics*, NAT'L CONF. OF BAR EXAM'RS. (2016), <http://www.ncbex.org/publications/statistics/mbe-statistics/>; NAT'L CONF. OF BAR EXAM'RS. COMPREHENSIVE GUIDE TO BAR ADMISSIONS 2017, 29-30, Chart 9, <http://www.ncbex.org/pubs/bar-admissions-guide/2016/index.html#p=1>. [hereinafter NCBE Guide].

³ Of the 1,335,963 active attorneys in the United States in 2017, 177,035 are in New York and 168,746 are in California. Texas is a distant third, with 89,361. American Bar Association, *ABA National Lawyer Population Survey 2017*, https://www.americanbar.org/content/dam/aba/administrative/market_research/National%20Lawyer%20Population%20by%20State%202017.authcheckdam.pdf.

Figure 1



Sources: *2016 MBE Statistics*, NAT'L CONF. OF BAR EXAM'RS. (2016), <http://www.ncbex.org/publications/statistics/mbe-statistics/>; NAT'L CONF. OF BAR EXAM'RS. Comprehensive Guide to Bar Admissions 2016, 29-30, Chart 9, <http://www.ncbex.org/pubs/bar-admissions-guide/2016/index.html#p=1>.

These MBE cut score disparities undermine simple logic, psychometric validity, and optimal protection of the public. They constitute bad logic because every state is attempting to use the same test to predict exactly the same thing: minimum competence to practice law. They are bad science because setting a cut score is a “critical step”⁴ in assuring the validity⁵ of the use of the

⁴ AM. EDUC. RES. ASS'N, AM. PSYCH. ASS'N, & NAT'L COUNCIL ON MEAS. IN EDUC., STANDARDS. FOR EDUC. AND PSYCH. TESTING 53 (1999) [hereinafter STANDARDS 1999].

exam.⁶ MBE cut score disparities are also bad policy, which explains why professions other than law have moved to uniform multiple choice test cut scores in their licensing tests.

II. The Evolution of Professional Licensing Tests

Other professions have progressed through the same three stages of licensing, the first two of which are familiar in law.

A. Stage One: State Tests With No National Components.

Jurisdictions originally used oral tests for attorneys, from the first in Delaware in 1737⁷ to the beginning of the twentieth century when written tests became common.⁸ In 1915 the American Bar Association urged states to elevate their standards by requiring law school and passage of an examination for licensure.⁹ Licensing regimens for other professionals developed in similar ways.

B. Stage Two: State Licensing Tests Incorporate Some National Components

Gradually national, non-profit organizations were created to support and professionalize state licensing efforts. The National Conference of Bar Examiners (NCBE) was founded in 1931,¹⁰ sixteen years after the National Board of Medical Examiners¹¹ and twelve years after the National Council of Architectural Review Board,¹² for example. After many decades supporting

⁵ “Validity refers to the degree to which evidence and theory support the interpretations of test scores entailed by proposed uses of tests. Validity is, therefore, the most fundamental consideration in developing and evaluating tests.” STANDARDS 1999, *supra* note __, at 9.

⁶ “When test scores are used or interpreted in more than one way, each intended interpretation must be validated.” STANDARDS 1999, *supra* note __, at 9. “[I]n some situations the validity of test interpretations may hinge on the cut score.” *Id.* at 53.

⁷ State Bar of Cal., *Cal. Bar Examination: Information and History* (undated) at 3.

⁸ ROBERT STEVENS, *LAW SCHOOL: LEGAL ED. IN AMER. FROM THE 1850S TO THE 1980S* 25 (1983).

⁹ *The Standard Rules for Admission to the Bar: As Adopted by the Sect. on Leg. Educ. and Recommended to the Amer. Bar Ass’n*, 4 AMER. L. SCH. REV. 201 (1915-22).

¹⁰ Arthur Karcher, *The Continuing Role of the NCBE in the Bar Admissions Process*, B. EXAMINER, May 1996 at 14; STEVENS, *supra* note __, at 177 (giving date of 1930).

¹¹ The National Board of Medical Examiners (NBME) was founded in 1915 to “provide a single national exam,” that existed in parallel with state exams until the 1960s. Email from Donald Melnick, M.D., NBME President (2000-2017), to Michael Jodoin (Jun. 5, 2017, 10:01 a.m.) (on file with author) [hereinafter Melnick email]. The entity that is today the National Council of Architectural Review Board was founded in 1919. <https://www.ncarb.org/about/history-ncarb> .

¹² The entity that is today the National Council of Architectural Review Board was founded in 1919. <https://www.ncarb.org/about/history-ncarb> .

state licensing in other ways, these organizations developed psychometric expertise to create test components for use by states. The NCBE, for example, introduced the MBE in 1972.¹³

Multiple choice tests like the MBE are ubiquitous throughout professional licensing because psychometricians use them in their dominant strategy to enhance reliability, the degree to which a test's score always means the same thing.¹⁴ Multiple choice tests typically include some repeat questions, whose degree of difficulty is already known. Psychometricians compare how test takers do on the repeat and the new questions, using the scores on the repeat questions to determine the degree of difficulty of the new questions, and of the entire test. These statistical processes convert raw multiple choice scores to equated scores.¹⁵ This equating process is the first of two big psychometric steps focused on reliability.

The second statistical step, scaling, uses the greater reliability of the equated multiple choice score to improve the reliability of scores from less objective parts of the test, such as essays. Essay grades are notoriously unreliable because the questions change, and the grading is more subjective. To counter these potential inconsistencies in scores for written components, psychometricians use statistical scaling processes to match, in a way, the raw essay scores to the equated multiple choice scores.¹⁶ Currently, almost all jurisdictions scale their essay scores to the MBE.¹⁷

Bar examiners publish complex scoring formulae and include a variety of other test components, but scaling makes the MBE cut score a crucial decision concerning the degree of difficulty of the entire exam. For example, scaling means that the number of candidates who pass the MBE can determine the number who pass the essays. The MBE cut score also can be compared from state to state. The same equating and scaling practices used in law are used in other professions, with multiple choice scores anchoring other state-specific test components, such as essays or performance tests for doctors, engineers, nurses, and others.

C. Stage Three: State Licensing Using a National Component with a Uniform Cut Score

The third stage begins when states agree to use a uniform cut score for the national multiple choice component of their exams. Nurses and engineers adopted uniform cut scores in the

¹³ Karcher, *supra* note 10, at 18.

¹⁴ Susan M. Case, *Back to Basic Principles: Validity and Reliability*, B. EXAMINER 23, Aug. 2006.

¹⁵ For a detailed description of the MBE scaling and equating processes, see Deborah J. Merritt, Lowell L. Hargens & Barbara F. Reskin, *Raising the Bar: A Social Science Critique of Recent Increase to Passing Scores on the Bar Exam*, 69 U. CIN. L. REV. 929, 932-35 (2000-2001).

¹⁶ For explanations of bar exam scaling written for bar examiners, see Susan M. Case, *Frequently Asked Questions About Scaling Written Scores to the MBE*, B. EXAMINER 41 (Nov. 2006); and Susan M. Case, *Demystifying Scaling to the MBE: How'd You Do That?*, B. EXAMINER 45-46 (May 2005).

¹⁷ NCBE GUIDE, *supra* note 2, at 30-31.

1980s,¹⁸ leading a trend that gathered momentum over the next several decades. Today, doctors,¹⁹ nurses,²⁰ dentists,²¹ veterinarians,²² physical therapists,²³ engineers,²⁴ surveyors,²⁵ architects,²⁶ certified public accountants,²⁷ mortgage loan originators,²⁸ psychologists,²⁹

¹⁸ Nurses have used a uniform cut score since 1989. Email from Maureen Cahill, Senior Policy Advisor, National Council of State Boards of Nursing (NCSBN), to author (Apr. 26, 2017, 8:04 a.m.) (on file with author) [hereinafter Cahill email]. Engineers adopted a uniform cut score in the 1980s. Telephone Interview with Davy McDowell, Chief Operating Officer, Nat'l Council of Examiners for Engineering and Surveying (NCEES), Mar. 20, 2017 [hereinafter McDowell Conversation].

¹⁹ The United States Medical Licensing Examination (USMLE) is a three-step examination sponsored by the Federation of State Medical Boards (FSMB) and the NBME. The USMLE has used a uniform national cut score for each of its steps since 2004. Melnick *email*, *supra* note ___. See <http://www.usmle.org/>.

²⁰ See Cahill email, *supra* note 18, <https://www.ncsbn.org/nclex.htm>.

²¹ The Joint Commission on National Dental Examinations (JCNDE) creates and sets a uniform passing score for dental examinations used by states for licensure. See <http://www.ada.org/en/jcnde/examinations>

²² The International Commission on Veterinary Assessment (ICVA) creates the North American Veterinary Licensing Exam (NAVLE), and sets the passing score. <https://www.icva.net/navle-general-information/scroing-process/>.

²³ The National Physical Therapy Licensure Examinations (NPTE) are the uniform national test for state licensure as a physical therapist. The National Federation of State Boards of Physical Therapy provides information about their standard setting process for the PPTE, including that the cut score is regularly revisited every five years. <http://www.fsbpt.org/FreeResources/NPTEStandards.aspx>. A uniform national cut score for the NPTE was adopted in 1996. <http://history.fsbpt.org/>.

²⁴ The National Council of Examiners for Engineering and Surveying (NCEES) provides and scores tests used by states for licensing Engineers and Surveyors. See <http://ncees.org/licensure/>. They use a uniform passing score. The national examinations were adopted by all states in the 1960s and for comity purposes, adopted a national cut score in the 1980s. McDowell Conversation, *supra* note 18.

²⁵ See <http://ncees.org/licensure/>.

²⁶ The National Council of Architectural Regulation Boards creates standardized tests used by states for licensing architects, including the Architect Registration Examination, and set uniform passing scores. See <https://www.ncarb.org/get-licensed>.

²⁷ Certified public accountants take a Uniform CPA Exam produced by the American Institute of CPAs with a uniform cut score. See http://www.aicpa.org/BecomeACPA/CPAExam/ForCandidates/FAQ/Pages/computer_faqs_3.aspx#uniform.

²⁸ A national test for mortgage loan originators is administered by the National Multistate Licensing System and Registry (NMLS). Each state uses the same cut score, and some states add state components. <http://mortgage.nationwidelicensingsystem.org/profreq/testing/Documents/MLO%20Handbook.pdf>.

emergency medical technicians,³⁰ social workers,³¹ and real estate appraisers³² include a national multiple choice test *with a uniform cut score* as a requirement for state licensure. Law’s exceptionalism is remarkable.

Figure 2.

Professions with Uniform Cut Scores	
Architects	Nurses
CPAs	Pharmacists
Dentists	Physical Therapists
Doctors	Psychologists
Engineers	Real Estate Appraisers
EMTs	Social Workers
Lawyers	Surveyors
Mortgage Loan Originators	Veterinarians

III. Why Other Professions Have Moved to Uniform Cut Scores

Longstanding habits of state control are not easily set aside, but architects, social workers, dentists and other professions have overcome these impediments. Other professions have adopted uniform cut scores because of high-stakes testing standards, increasing professional mobility, and simple logic.

A. Cut Score Disparities Undermine Validity.

The cut score is aimed at the dividing line that separates minimal competence from *barely* below minimal competence. Therefore, not surprisingly, psychometric standards require that licensing tests “be precise in the vicinity of the passing, or cut, score.”³³ The “validity of test score interpretations may hinge on the cut scores.”³⁴ The “placement of the performance standards

²⁹ All states accept the recommended passing score on the test for licensed psychologists, although some states use a different score for supervised practice. EPPP Handbook at 10, available at http://c.ymcdn.com/sites/www.asppb.net/resource/resmgr/eppp_/EPPP_Cand-Handbook-May_23_2.pdf .

³⁰ Forty-six states require passage of certification tests offered by the National Registry of Emergency Medical Technicians for licensure. *See* <https://www.nremt.org/rwd/public/document/about> .

³¹ The Association of Social Work Boards (ASWB) creates standardized licensure tests used by all fifty states, which use uniform cut scores established by the ASWB. <https://www.aswb.org/exam-candidates/about-the-exams/exam-scoring/> .

³² Real estate appraisers are licensed by the states, but must pass a National Uniform exam for which each state uses the same cut score. *See* <http://history.fsbpt.org/> .

³³ STANDARDS 1999, *supra* note 4, at 157.

³⁴ AM. EDUC. RES. ASS’N, AM. PSYCH. ASS’N, & NAT’L COUNCIL ON MEAS. IN EDUC., STANDARDS. FOR EDUC. AND PSYCH. TESTING at 100 (2014) [hereinafter Standards 2014].

[cut scores] ... is an important aspect of the validity of inferences made from test results.”³⁵ And “[v]erifying the appropriateness of the cut score or scores on a test used for licensure or certification is a critical element of the validation process.”³⁶ By adopting uniform cut scores, other professions have taken seriously these fundamental psychometric principles meant to ensure that the test does what it purports to do.

B. Geographic Boundaries Are Less Relevant

No profession is immune from the increased mobility of twenty-first century lives, or the dramatic reach of technology-enhanced practice. An accountant or a lawyer might start her career in one state, take a different position in another, and use technology to serve clients in multiple states, all without leaving her hometown. Other professions have moved to uniform cut scores in part to facilitate this reality.

The Uniform Bar Exam (UBE) juggernaut reveals this trend in law. The now twenty-eight UBE jurisdictions have agreed to use the same test components and weigh those components the same way so that scores can be transferred. But UBE jurisdictions continue to use different cut scores.³⁷ UBE cooperation makes the foolishness of gaining or losing minimum competency by crossing state lines increasingly apparent. For example, ABA accreditors are now grappling with the complications of counting a law school’s graduate as either a pass or a fail depending on the order in which she seek admissions to multiple UBE jurisdictions. These impossible intricacies will worsen until the cut score is uniform.

C. Disparate Cut Scores Defy Logic

State-by-state cut score disparities are fundamentally illogical. In each profession that uses a national multiple choice test as a component of licensure, the purpose of the test is to establish minimal competence to practice the profession. Other professions have moved to a uniform cut score in part because of the flawed logic of attempting to use the same pass-fail test to measure the same thing (minimum competence) but setting the passing score at different points. Nurses, doctors, social workers do not gain or lose minimum competence by crossing state lines any more than lawyers. The difference is that the nurses, doctors, social workers, engineers, vets, dentists, accountants, and other professions have given up the illogical pretense that minimal competence -- *as measured by the same multiple choice test* -- changes from state-to-state.

D. Proper Standard Setting is Too Burdensome for States to Handle Well.

³⁵ John Mattar, Ronald K. Hambleton, Jenna M. Copella, and Michael S. Finger, *Reviewing or Revalidating Performance Standards on Credentialing Examinations*, in Cizek 2012, *supra* note 1, at 399, 400.

³⁶ STANDARDS 2014, *supra* note 34, at 176.

³⁷ See NCBE GUIDE, *supra* note 2, at 33.

The current practice of each state setting its own MBE cut score prevails only because states do not approach the task in the way that professional psychometric standards require.

1. Sound Cut Scores Are Set Through Transparent, Deliberate, Rational Processes.

Many bar examiners have no idea the basis on which their state's MBE cut score was established. These longstanding mysteries are directly contrary to professional norms for licensing tests. "Where the results of the standard-setting process have highly significant consequences, and especially where large numbers of examinees are involved, those responsible for establishing cut scores should be concerned that the process by which cut scores are determined be clearly documented and defensible."³⁸ Standard setting "should be based on data; and ... the data should be combined in a deliberate, considered, open, and reproducible manner; that is, using a defensible standard setting process."³⁹ Public engagement with cut score determinations "is a healthy manifestation of a truly democratic process."⁴⁰

Adherence to these professional standards regarding transparency is especially crucial to counter potential perceived or actual conflicts of interest or anti-competitive behavior when a profession is setting the bar for new entrants to the profession. "Passing a credentialing examination should signify that the candidate meets the knowledge and skill standards set by the credentialing body, independent of the availability of work."⁴¹ The actual purposes and values behind cut scores are impossible to ascertain without transparent processes. An opaque claimed rationale of public protection is no more credible coming from a jurisdiction attempting to justify a high MBE cut score than from dentists trying to prevent others from whitening teeth⁴² or optometrists trying to prevent opticians from making eyeglasses.⁴³

2. Setting a Cut Score is a Complex Policy Decision

State licensing decision makers in other professions relegate standard setting to national entities because the process is burdensome and difficult. Psychometric standards suggest that test-makers should not remove themselves from the crucial cut-score determinations.⁴⁴ Also, ideally, construction of a licensing test takes the cut score into account.⁴⁵

³⁸ STANDARDS 1999, *supra* note 4, at 54.

³⁹ William A. Mehrens & Gregory J. Cizek, *Standard Setting for Decision Making: Classification, Consequences, and the Common Good*, in Cizek 2012, *supra* note 1, at 36.

⁴⁰ *Id.* (Mehrens and Cizek) at 33.

⁴¹ STANDARDS 1999, *supra* note 4, at 158.

⁴² See *N.C. State Bd. of Dental Examiners v. FTC*, 574 U.S. ___ (2015).

⁴³ See *Williamson v. Lee Optical Co.*, [348 U.S. 483](#) (1955) (upholding rational basis for due process challenges to economic protectionist measures).

⁴⁴ "Standard 1.2. The test developer should set forth clearly how test scores are intended to be interpreted and used." STANDARDS 1999, *supra* note 4, at 17.

⁴⁵ STANDARDS 2014, *supra* note 34, at 107-08.

Standard setting studies are one potential aspect of arriving at a defensible cut score. National organizations charged with setting licensing cut scores routinely engage in these studies, as have some bar examiners.⁴⁶ Although dozens of methods have been designed, the process often involves asking trained panels of subject matter experts to evaluate whether actual test answers represent minimal competence or fall below. Unfortunately, however, these studies suffer reliability problems. Different methods are known to produce different results, and even the same method, when repeated with different panelists, is known to produce different results.⁴⁷ At best, complex and costly standard setting studies achieve results that add one additional factor for decision-makers to consider, among others.⁴⁸ Even a careful, successful standard setting study unmarred by procedural irregularities is just one aspect of setting a cut score.

3. Test Validity Requires that Cut Scores be Reviewed Periodically.

Professional norms require that cut scores of licensing tests be reviewed periodically – in conjunction with content validity studies -- to ensure that the test use is valid. Performance standards (cut scores) need to be reviewed when the test content or structure changes, if the profession changes, and simply because of the passage of time.⁴⁹ The usefulness of standard setting studies increases if they are done regularly. Nurses, for example, review their multiple choice cut score every three years, engineers and physical therapists every five years.⁵⁰ Yet no state publishes a schedule for routine, periodic review of its MBE cut score. With all the other fiscal and operational pressures on state courts and bar examiners, routinely re-evaluating cut scores is not a priority.

IV. The Path Forward

The MBE cut score disparity problem will be addressed by using transparent and detailed risk analysis to move to a consensus middle ground.

⁴⁶ See Merritt *et al*, *supra* note 15.

⁴⁷ Michael T. Kane, *The Future of Testing for Licensure and Certification Examinations*, in THE FUTURE OF TESTING, Barbara S. Plake & Joseph C. Witt, eds. (1986) at 171; cf. MICHAEL J. ZIEKY, MARIANNE PERIE, AND SAMUEL A. LIVINGSTON, CUTSCORES: A MANUAL FOR SETTING STANDARDS OF PERFORMANCE ON EDUCATIONAL AND OCCUPATIONAL TESTS (2008) at 3.

⁴⁸ A simple version of such a study would consist of administering an MBE test to a group of competent, licensed attorneys. Those results would be evaluated in light of psychometric expectations that experienced professionals will score higher than novices on valid licensing tests.

⁴⁹ Mattar *et al*, *supra* note 35, at 399.

⁵⁰ See Cahill email, *supra* note 18; McDowell conversation, *supra* note 18; & n. 23, *supra*.

A. Articulating a “Ratio of Regret”

A cut score represents a policy decision. “Cut scores embody value judgments as well as technical and empirical considerations.”⁵¹ Precision is lacking, so the cut score will be set too high or too low. Balancing those risks is largely a question of values. Therefore decision makers should undertake a careful consideration of the risks of error, similar to what standard setting experts Gregory Cizek and Michael Bunch have called a “ratio of regret.”⁵² The policymakers should carefully consider the costs of errors, identifying risks and values with specificity, and attempt to adopt cut score policies to minimize regret.

Protection of the public is the touchstone. In the professional licensure context, “the cut score represents an informed judgment that those scoring below it are likely to make serious errors for want of the knowledge or skills tested.”⁵³ But simply slapping the justification of public protection on a cut score decision is insufficient; errors in either direction hurt the public. Setting the bar too low risks licensing attorneys lacking in minimal competence; setting the bar too high risks depriving the public of competent attorneys and increasing the cost of representation.

The skills currently tested, doctrinal knowledge and analysis, are fundamental to attorney competence. In a “ratio of regret” deliberation, this clarity about the importance of doctrinal analysis could be balanced against any underlying validity questions regarding the exam. How strong is the evidence that the content – the competencies, the subjects, and the level of specificity – is valid?⁵⁴ A high degree of confidence in content validity is necessary to link minimum competency to any particular cut score.

⁵¹ “[T]he state of the art in both testing and public policy support the careful, comprehensive, and systematic processes that should be used to derive cut scores, and the informed deliberations that should characterize the adoption and continued monitoring of their use.” Mehrens & Cizek, *supra* note 39, at 33.

⁵² GREGORY J. CIZEK AND MICHAEL B. BUNCH, *STANDARD SETTING: A GUIDE TO ESTABLISHING AND EVALUATING PERFORMANCE STANDARDS ON TESTS* (2007) at 305-06.

⁵³ *STANDARDS* 1999, *supra* note 4, at 53.

⁵⁴ See Deborah Jones Merritt, *Validity, Competence, and the Bar Exam*, AALS NEWS, Spring 2017, <http://www.aals.org/about/publications/newsletters/aals-news-spring-2017/faculty-perspectives/>; Tracy A. Montez, *Observations of the Standard Setting Study for the California Bar Examination*, Calif. Dept. of Consumer Affairs, July 2017, at 10, <http://www.calbar.ca.gov/Portals/0/documents/admissions/Examinations/Tracy-Montez-ReviewBarExamstudy.pdf>. “Given that a state specific occupational analysis does not appear to have been conducted, it is critical to have this baseline for making high-stakes decisions.” *Ibid.*

Assuming content validity, the primary risk of an MBE cut score set too low is an increase in attorneys who are not equipped to remember and analyze legal doctrine for their clients. Decision makers charged with choosing a cut score should consider the extent of the problem of doctrinal error in the profession, and what mechanisms could exist to mitigate the impact of these errors, such as disbarment and malpractice. This inquiry might suggest the need for more resources to character and fitness inquiries, new requirements for training in law office management, or better addiction and mental health support services, in addition to clarifying the cut score determination.

Decision makers should also consider their possible regrets for the mistake of setting the cut score too high. The first level risk is that setting the cut score too high denies the public access to competent attorneys.⁵⁵ Values related to access to justice are implicated if competent attorneys are prevented from practicing, in part because fewer attorneys may mean increase costs for legal services. Decision makers could take into account the extent that these risks can be mitigated by policies permitting repeat testing. This, in turn, could lead to consideration of the benefits and costs of delayed admission for candidates who will eventually succeed.

Decision makers could use their “ratio of regret” analysis to consider the relationship of cut score mistakes on efforts for a diverse and inclusive profession, a specific aspect of public protection. For a jurisdiction strongly committed to a diverse and inclusive profession, regret from setting the cut score too high (and therefore keeping out competent attorneys of diverse racial and ethnic backgrounds) would be especially strong.⁵⁶ This concern is especially salient in light of the combination of persistent disparities in bar passage rates⁵⁷ and questions about content validity of the exam.⁵⁸ Thoughtful commentators have argued that “[a]rtificially high bar passage standards are of special concern because those standards can have a disproportionate impact on minority applicants to the bar.”⁵⁹

Decision makers could choose to consider the impact on legal education if the cut score is too high or too low. A cut score that is too low may enable law schools to give what bar examiners and courts might consider short shrift to doctrine and analysis.⁶⁰ A cut score that is too high may push law schools to emphasize bar subject doctrinal analysis and test taking skills at the expense

⁵⁵ “If the standards for the cognitive abilities are artificially high, the licensing examination is likely to exclude many who would make good practitioners.” Kane, *supra* note 47, at 170.

⁵⁶ See Johnson, *supra* note 1.

⁵⁷ See Stephen P. Klein & Roger Bolus, *The Size and Source of Differences in Bar Exam Passing Rates Among Racial and Ethnic Groups*, B. EXAMINER, Nov. 1997, at 8, discussed in Merritt, *et al*, *supra* note 15, at 966-67.

⁵⁸ See Merritt, *supra* note 54; Montez, *supra* note 54.

⁵⁹ Merritt, *et al*, *supra* note 15, at 965.

⁶⁰ Any defensible cut score would be too low to affect the curriculum at law schools whose students enter with the highest LSAT scores.

of experiential learning, lawyering skills, or focus on non-bar subjects, including federal statutes and regulations and specializations, such as bankruptcy or immigration .

Finally, the ratio of regret or risk of error analysis may take into consideration the need for special vigilance in guarding against protectionism. This is not a relevant concern for the risk of error in setting a cut score too low, but the legal profession needs to be concerned about perceived and actual economic protectionism in setting unusually high cut scores.⁶¹

B. Crowdsourcing to a Consensus Cut Score.

Using this type of serious risk analysis, decision makers should move to a uniform MBE cut score by arriving at a middle-ground consensus. States with very low cut scores should move up, and states with very high cut scores should move down. Typical standard setting studies attempt to produce a cut score recommendation by training perhaps dozens of lawyers and judges to try to recognize whether minimal competence is revealed in sample essay answers. Rather than these small and contrived studies of disappointing reliability, MBE cut score decision makers can consider the state of the profession in jurisdictions using the most prevalent cut scores. Two candidates for compromise are 135, the cut score currently adopted by the largest number of states, and 133, the cut score currently being used by jurisdictions with the largest total attorney population.

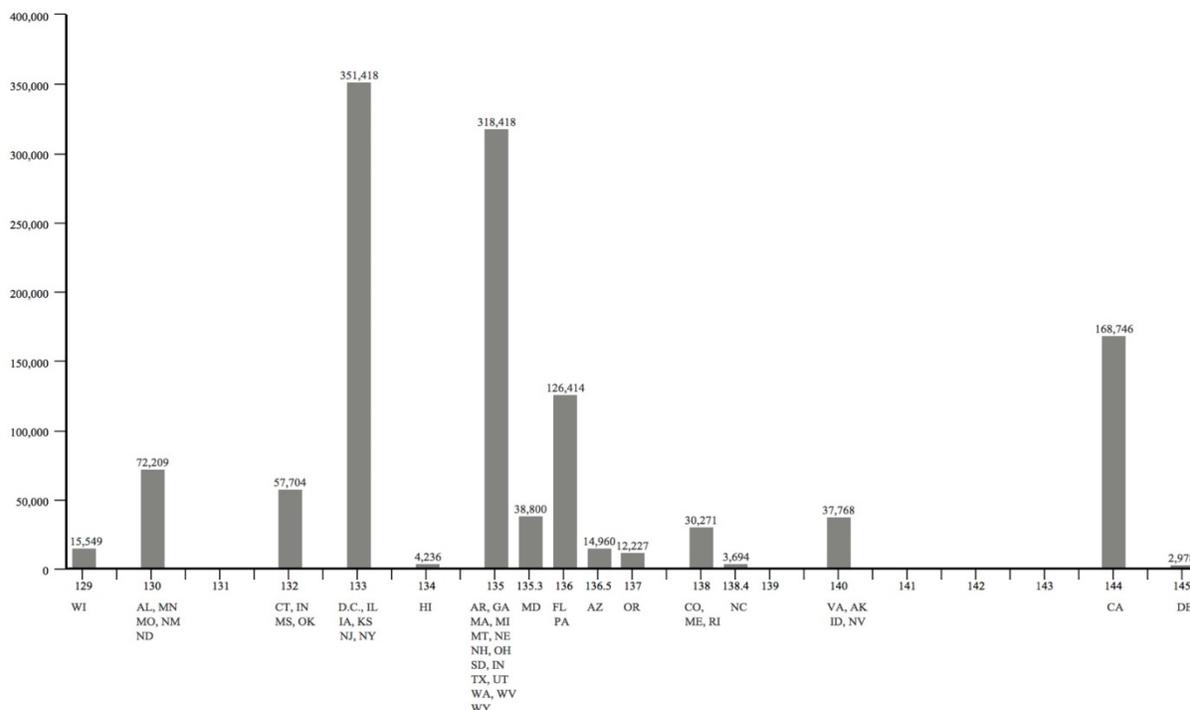
Usually licensing cut scores are difficult to evaluate in part because the professional performance of candidates with scores below the cut score – who do not receive the license -- cannot be assessed.⁶² But our current cut score variation creates a massive natural experiment. What problems exist, if any, in a state with a 130 or 133 cut score, that are different or on a different scale than competency problems in a state with a higher cut score? In the absence of data suggesting harms suffered from cut scores in those jurisdictions, states should follow the crowd. The sooner we reach that consensus uniform MBE cut score, the sooner we eliminate one of the significant validity problems with attorney licensing.

⁶¹ Michael Simkovik, *Is California's Bar Examination Minimum Passing Score Anti-Competitive?*, BRIAN LEITER'S LAW SCHOOL REPORTS (July 18, 2017), http://leiterlawschool.typepad.com/leiter/2017/07/is-californias-bar-examination-minimum-passing-score-anti-competitive.html?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+typepad%2FKiyu+%28Brian+Leiter%27s+Law+School+Reports%29 .

⁶² STANDARDS 1999, *supra* note 4, at 60.

Figure 3

MBE Cut Scores and Lawyer Populations



V. Conclusion

Justice Brandeis advised that “a courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”⁶³ States should cherish their authority over attorney licensing, including their opportunity to provide meaningful public protection in innovative ways. Attorney licensing is, indeed, ripe for innovation.⁶⁴ States should be asking, what is minimum competence to practice law? How do we best protect the public? New York has added pro bono and experiential experience requirements, and California recently considered imposing new experiential course requirements for licensing. But resting the case for state autonomy on setting a different cut score on the common, national portion of the exam is illogical, unfair, unambitious, and does harm other states. The public deserves valid licensing tests. Eliminating MBE cut score disparities would be an important step in that direction.

⁶³ *New State Ice Company v. Liebmann*, 285 U.S. 262, ___ (1935) (Brandeis, J., dissenting).

⁶⁴ See, e.g., Eileen Kaufman, Andi Curcio, & Carol Chomsky, *A Better Bar Exam – Look to Upper Canada?*, Law School Café (July 25, 2017), <https://www.lawschoolcafe.org/2017/07/25/a-better-bar-exam-look-to-upper-canada/>; Merritt, *supra* note 54.

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August 1, 2017

Committee of Bar Examiners
State Bar of California
180 Howard St.
San Francisco, CA 94105

Re: Bar Exam Passing Score

Dear Colleagues:

I urge you to lower the Bar Exam passing score to somewhere between 138 and 140. That is still higher than the national average passing score. There is something seriously wrong with the current scoring system. It cannot be possible that less than half of our law school graduates are qualified to be lawyers.

Very truly yours,



STEPHEN B. BEDRICK

SBB:SBM

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STATE BAR COURT
OF THE STATE OF CALIFORNIA
ANNUAL PUBLIC HEARING
pursuant to Business and Professions Code 6095(a)
August 14, 2017
10:02 a.m.

State Bar of California
Conference Room
845 South Figueroa Street
Los Angeles, California 90017

APPEARANCES:	<u>PAGE</u>
Karen Goodman, Chair, Committee of Bar Examiners	3
Gayle Murphy, State Bar Staff	--
Jeanne Vanderhoff, Vice-Chair, Committee of Bar Examiners	--
Erika Hiramatsu, Member, Committee of Bar Examiners	--
Lee Wallach, Member, Committee of Bar Examiners	--
Elizabeth Parker, State Bar	4
Ron Pi, State Bar	--
Robert Radulescu, Speaker	7
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1	APPEARANCE: (cont'd.)	
2	Bridget Gramme, Speaker	29
3	John Holtz, Speaker	36
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1 MS. GOODMAN: Okay. So good morning. This is the
2 first of our two opportunities for public comment. My name
3 is Karen Goodman. I'm Chair of the Committee of Bar
4 Examiners.

5 With me are some of my colleagues on the Committee
6 of Bar Examiners committee. To my immediate right is Jeanne
7 Vanderhoff, who is my vice-chair. To my immediate left is
8 Erika Hiramatsu, who will be the incoming chair in
9 September. The dapper gentleman to my right, in his Don
10 Draper hat, is Lee Wallach, who is the past chair of the
11 committee, and then our director of admissions is Gayle
12 Murphy. Elizabeth Parker is here, as well as Ron Pi, and
13 they both have just come in.

14 So this is an opportunity for public comment.
15 This is not your only opportunity. We have had an
16 overwhelming response on this really important issue
17 concerning the Bar exam, and we do appreciate everybody's
18 particular, as our web site has, frankly, been deluged with
19 commentary on that, and if you haven't had a chance to
20 comment on the web site, please do so.

21 Just so you have an understanding in terms of
22 perspective, we have a sign-in list of who wants to speak.
23 We'll go from 10:00 to 2:00 -- correct? -- or earlier if
24 we're done. Everything is being, as you can see, recorded,
25 so you can have an opportunity to review it, and this is not

1 an opportunity, really, for dialogue.

2 Just so the process is -- we're taking in the
3 information. We, as the Committee, we had participated in a
4 joint session with the Admissions and Education Committee,
5 with the Board of Trustees, on July 31st, and we will have
6 an opportunity to make a recommendation on August 31st at
7 our meeting, the issues, and, hopefully, everybody has read
8 the various standard-setting studies and the reports.

9 Really right now there's two alternatives for
10 consideration, and the Supreme Court will ultimately make
11 this decision. Number one is to keep the cut score where it
12 is, at least until different reports have been completed.
13 The second alternative that has also been proposed and for
14 consideration is to drop the cut score, the passing score,
15 for the Bar examination to 1414.

16 So those are the alternatives, and we obviously
17 invite your input today, as well as we invite your on-line
18 comments, and we very much appreciate, I think, the
19 enthusiastic particular we've seen this year as to the
20 examination of the Bar exam.

21 So, with those comments, does anyone else up here
22 want to say anything? Yes. Thank you, Elizabeth.

23 MS. PARKER: Well, thank you, Karen, for all the
24 work you and the Committee have done. I would like to offer
25 a few comments as we begin.

1 This is obviously a very important activity. It's
2 an opportunity to comment on one of four studies we are
3 hoping to be able to undertake. There has been some
4 confusion, however, about how these studies have been
5 developed, and so I thought it would be useful to put on the
6 record as we begin that, as we consider this pass line
7 study, which, of course, is going to provide important data
8 for the Supreme Court. It will be part of what the Court
9 reviews.

10 The process for designing and implementing the
11 study, I think, is important to be aware of, and there are
12 six considerations that I think are relevant here. First,
13 this pass line study was commissioned by the State Bar, and
14 it was undertaken by a nationally recognized and independent
15 expert consultant, Doctor Chad Buckendahl. Doctor
16 Buckendahl acted independently and according to standards
17 recognized by the National psychometric community.

18 Second, the design which Doctor Buckendahl used
19 for the pass line study, based on the analytic judgment
20 method, is a principal method recognized by the psychometric
21 expert community as appropriate for standard setting in
22 professional licensing exams.

23 Third, Doctor Buckendahl's implementation of the
24 study was conducted, critiqued, and validated by two
25 recognized national and state outside experts. Their

1 comments critiquing the implementation of the study will be
2 forwarded to the Court, but, in brief, notwithstanding some
3 differences in opinion about technical issues, they each
4 found that the study had been conducted in a way consistent
5 with accepted psychometric standards.

6 Fourth, the State Bar and Doctor Buckendahl went
7 to considerable effort to ensure that there was continuing
8 stakeholder involvement and consultation during the process.
9 The development of the study preceded them with complete
10 transparency and that type of interaction.

11 Fifth, neither the staff of the State Bar nor
12 members of the CBE, the A and E Committee, or the Board of
13 Trustees have been involved in the design of the study
14 itself. The role of staff has been to assist in the
15 implementation of the study under the direction of Doctor
16 Buckendahl.

17 Sixth and finally, the 20 subject-matter experts,
18 the so-called SMEs who participated in the pass line study,
19 who were charged with the responsibility of reviewing and
20 assessing answers to questions on the 2016 Bar exam, were
21 selected by the Supreme Court from nominations made by all
22 stakeholders, legislative oversight bodies, the Office of
23 the Governor, the Committee of Bar Examiners, and the law
24 school deans themselves. The resulting SMEs represent a
25 diverse and balanced group of practitioners and educators

1 drawn from all stakeholder groups and geographical regions
2 of the state, and they were, as I mentioned, selected by the
3 Supreme Court.

4 So I think the independence of the pass line study
5 ought not to be in doubt. Not all will welcome the results
6 of the study, but its validity should not be questioned. It
7 is, however, only one important data point as these
8 deliberations continue.

9 MS. GOODMAN: Okay. Good. Thank you. Thank you
10 very much, Elizabeth.

11 So, in terms of speakers, I've heard there's --
12 people have signed up, and if you haven't signed up yet to
13 speak, see Kim Wong, who is back there in the green.

14 Is Robert Radulescu -- are you here? And I may
15 have mangled your name. Can you come up and speak? I
16 understand you'd like to say a few words. Press into the
17 bottom, and then say your name, and then you can begin.

18 MR. RADULESCU: Hello?

19 MS. GOODMAN: Yes, we can hear you.

20 MR. RADULESCU: All right. My name is Robert
21 Radulescu. First of all, I want to say good morning,
22 citizens, concerned citizens, I should say, on the
23 Committee. I must mention that I flew all the way from
24 Seattle for this meeting, so I find it very important, and I
25 would like to share my comments and my personal experience

1 regarding the Bar exam.

2 To start off, I will say I took the Bar exam four
3 times, and I failed each time. Each of the four times,
4 including the first time I took it, I had a scaled score of
5 around 1420 or better.

6 Unfortunately, until the February 2017 Bar exam,
7 the State Bar would not send you your MBE percentile rank,
8 so a candidate would have no idea how they fared against any
9 other Bar takers on the MBE, which is the multiple choice
10 section. Luckily, the 2017 February Bar exam results came
11 with the MBE percentile rank information, and now I will
12 tell you something that should shock everyone in this entire
13 room.

14 On my February 2017 Bar exam, I scored in the top
15 seven percentile in the entire nation on the MBE. So I did
16 better than 92.4 percent of all Bar takers nationally, and I
17 still failed, and I have the Bar exam results here to prove
18 it. Granted, I failed by an extremely small margin. I
19 received a total scaled score of 1430.1, but, nonetheless, I
20 failed.

21 Now, in law school and in our profession, one of
22 the most repetitive concepts we learn about is the notion of
23 "unconscionable" or "reasonable and unreasonable." These
24 words are in every lawyer's vocabulary, like the phrase "How
25 are you" is in every new language that you learn.

1 There is no defined standard of what makes
2 something unreasonable. It's usually left to the
3 interpretation of every lawyer's good and rational judgment.
4 But I will tell you what. I am willing to bet -- and we can
5 take a hand of votes if you'd like -- that every single
6 reasonable lawyer would find that someone who scores in the
7 top seven percentile in the entire nation on the MBEs should
8 have passed the Bar exam, and should be admitted to practice
9 law, if the other good standing requirements are met.

10 Think about it. Bar takers, because of their
11 rigorous Bar exam study and preparation, should have some of
12 the highest level of general legal knowledge in the country,
13 even higher than the experienced and practicing attorneys
14 who oftentimes forget general legal knowledge and the
15 intricacies of the major legal subject.

16 If someone scored in the top seven percent in the
17 country on the Bar exam, I'm going to reasonably make the
18 argument that that someone knows the general legal concepts
19 and subjects better than 99 percent of all practicing
20 attorneys in the country, yet, in this case, that someone
21 was not admitted and failed the Bar exam. Now, that is
22 egregious. It is unconscionable. It is unreasonable by any
23 reasonable lawyer's standard.

24 By the way, I don't think it can be said that I'm
25 someone who cannot write well, legally. I've clerked for

1 both state and federal judges, I have clerked for the Public
2 Defender's Office, I have clerked for the Attorney General's
3 Office, and I have only received the highest marks from all
4 of my supervising judges or attorneys, and they've all loved
5 my written work, not to mention that, in some of the --
6 because, once again, to disclose scores there, there's a
7 re-read, and the Bar examiners have dropped some of my
8 written scores by 10 points on more than one question, I
9 believe, but that's beside the point of the argument that
10 I'm making here.

11 So I am very, very strongly in support of lowering
12 the cut score to 1414, and I think this example that I just
13 put forward as not a hypothetical, but a real-life example,
14 someone who scored in the top seven percentile in the
15 country, that failed the Bar exam -- that is unreasonable,
16 and that is something that has to be changed.

17 In the alternative, I think the scoring should not
18 be done in a vacuum. When I say that, I mean that when the
19 score on the MBE is high, let's say in the top 20th
20 percentile, and the written score is lower, but the total
21 scaled score is still above 1400, let's say, or, as one of
22 your proposed alternatives, 1414, I think there's
23 overwhelming reason to pass that candidate. By the same
24 token, if a candidate scores in the top 20th percentile on
25 the written portion, and gets above a 1414 scaled score, I

1 also think that there is reason to pass that candidate.

2 I think this practice of scoring in a vacuum can
3 be detrimental to really seeking out who is prepared to
4 practice law in the state of California or in the general --
5 in the country. I think, as long as someone demonstrates an
6 ability to reasonably write well, reasonably score decent
7 marks on the written portion, and gets so high in the MBEs,
8 they should be passed, or, as I said, by the same token,
9 someone who scores very, very high on the written portion
10 and does average on the MBEs should also pass.

11 As I said, I just cannot imagine that the system
12 is set up in such a way where something like this can
13 happen. I don't think you can point to any other exam,
14 whether it's in accounting or engineering or any other sort
15 of profession that is regulated by a state agency, where
16 someone scored in the top seven percentile of that country,
17 on a fundamental portion of that test, and failed that exam,
18 and is not admitted to practice, whatever that profession
19 is.

20 So thank you for your time. I would love to once
21 again strongly urge the lowering of the cut score to 1414,
22 and, in the alternative, if that's not granted, I think this
23 would be a very sensible solution, alternative, to not score
24 in a vacuum, and compare the MBE score to the written score,
25 and see -- if someone scores in the -- I'm not saying top

1 seven percent, but in the top 20 percent on that portion,
2 and reasonably still does well, and above a threshold like a
3 1414 -- they should be admitted to practice.

4 MS. GOODMAN: Thank you very much, Robert.

5 MR. RADULESCU: Thank you.

6 MS. PARKER: Thank you.

7 MS. GOODMAN: Okay. William Patton.

8 MR. PATTON: Good morning.

9 MS. GOODMAN: Good morning.

10 MR. PATTON: Thank you for holding these hearings.
11 There's no question we're all here to try and draw the same
12 conclusion. What we're trying to do is balance three public
13 policies. We're trying to determine how to protect the
14 public and consumers, while at the same time increasing
15 access to justice, while, as a result of the cut score, also
16 increasing diversity in the Bar. So we have three public
17 policies we're balancing. The question is, how do we best
18 do that?

19 I have submitted to the Committee seven empirical
20 studies now, so I'm not going to talk about the ones that I
21 sent to Ron Pi earlier, and thank you, Ron, for all your
22 help in doing my empirical studies. I've submitted this
23 morning a new empirical study, and that's one that analyzes
24 the methodology of Doctor Buckendahl's study. I strongly
25 disagree with the opening remarks, that we should not

1 question the validity of Doctor Buckendahl's study because
2 two other psychometricians have looked at that data and
3 concluded that it, as far as I'm concerned, using the
4 vernacular of the Bar exam, meets minimal competency in
5 terms of methodology.

6 I want to rehearse (sic) -- since there's an
7 attitude on the Committee that there's presumptive validity
8 now of Doctor Buckendahl's study, I want to rehearse (sic)
9 what one of your consultants said about Doctor Buckendahl's
10 study.

11 She said that in many areas, his study did not
12 meet best practices. She said that the evidence
13 demonstrated from her perspective, as well as from the
14 comments of the panelists, there was insufficient training
15 on how to grade. She stated that there was insufficient
16 time for the graders to evaluate the examinations.

17 She said that, not only in her own opinion, but in
18 the opinion of two other experts that she consulted with,
19 that the methodology was faulty, because it didn't provide
20 any kind of guidance, such as a grading rubric, or any
21 guidance on the weight of the four variables that are
22 inherent in the definition of "minimal competence" as set
23 out by the State Bar.

24 She also said that she thought that the evidence
25 demonstrated that many of the panelists did not have a

1 sufficient grasp on the criteria to be used to judge. She
2 also said that that could have led to misconceptions, and
3 that Doctor Buckendahl did not follow best practices by
4 trying to determine, prior to the evaluations, whether or
5 not the panelists had misconceptions about how they were to
6 grade, and the expectations of -- pragmatics of determining
7 whether or not an essay was not competent, minimally
8 competent, or highly competent.

9 Now, what I want to talk about today is the new
10 empirical study I've given you, you haven't had a chance
11 to read yet, and what Doctor Pitoniak, in her study of
12 Doctor Buckendahl's study, said is that there were no fatal
13 flaws. Well, in my analysis, there are several fatal flaws
14 that basically demonstrate that there's no validity to the
15 study.

16 The first is, and it's not one mentioned by either
17 of your consultants, is that Doctor Buckendahl misstated the
18 State Bar's definition of "minimal competence." This had
19 serious consequences in terms of the panelists deciding
20 which of the three categories the exams would fit into.

21 As you well know, the State Bar defined "minimal
22 competence" in terms of four categories. The first was
23 identifying facts. The second was identifying relevant law.
24 The third was application of law to facts. The fourth was
25 conclusions of law.

1 Unfortunately, in what he described as a "general
2 rubric" that he passed out to the panelists to help them in
3 their grading, he changed the four-part test of competence,
4 as defined by the State Bar, into a five-part test. Instead
5 of having conclusions as only one category, in other words,
6 25 percent of the deliberation, he changed conclusions into
7 two different kinds of conclusions, thus making it a
8 five-part test, in which he changed the weight for the
9 panelists of evaluating conclusions from 25 percent of the
10 overall evaluation to 40 percent of the evaluation.

11 Why is this so significant? It's significant
12 because I'm sure all of you have attended calibration
13 sessions, like I have. In a calibration session, or if you
14 look at the actual grading rubrics that are provided to the
15 graders of the California Bar exam, one of the sections that
16 gives the least amount of points in grading these exams is
17 the conclusions section. So not only did he inflate the
18 value of conclusions in the evaluations by the panelists, he
19 evaluated it on the one area of the exam that is not highly
20 evaluated by the graders on the July 2016 examination.

21 Therefore, because he misdefined the definition,
22 which was the centerpiece of these attempts to define
23 "minimally competent exams," we can have no assurance, and
24 nor is there any validity that we could generalize from the
25 examination selected as minimally competent by the panelists

1 would have any correlation with the actual examinations as
2 selected by the graders on the actual July 2016 exam.
3 Therefore, this study is not worth the paper it is written
4 on.

5 A further example of a serious methodological flaw
6 by Doctor Buckendahl is his failure to provide the panelists
7 with a weighting of the variables that they were to
8 determine in terms of minimal competence. I've given you in
9 my analysis a simple example, where every single one of the
10 20 panelists decides that an essay has one section that --
11 excuse me -- two sections that are highly competent, one
12 section that is minimally competent, one section that is not
13 competent. I've given you six ways that a reasonable
14 panelist, without guidance on the value or weight of each of
15 those four variables, could have made -- could have selected
16 that exam as not competent, as minimally competent, or as
17 highly competent.

18 The error value in trying to determine the
19 validity is quite great, because we know in the methodology
20 what actually occurred is that if an essay was selected as
21 highly competent, it was excluded from the later
22 determinations and discussions. So, if exams which, had
23 they been given information about weighting, might have been
24 not competent or minimally competent, we never had an
25 opportunity to find out that an individual grader graded

1 that highly competent, and, therefore, it was excluded from
2 discussion.

3 So, again, the failure to give a rubric, the
4 inadequate definition of "minimal competence," and the
5 failure to give a weighting of the procedures demonstrates
6 the invalidity of the study.

7 The other is -- and I basically take this from
8 Doctor -- I've read all of Doctor Buckendahl's studies. One
9 of the things that he indicates, which is basically best
10 practices, any time -- and Mr. Pi would agree with this --
11 any time your study has significant deviations in low and
12 high scores, any time you have significant deviations
13 between the median and the mean, you have serious questions
14 of validity. In this test, what we had is both among the
15 panelists, as well as individual panelists within the seven
16 essays that they graded, some of the greatest diversity I've
17 ever seen on an empirical study.

18 For instance, on one question, there was a -- this
19 is not just one essay, but the 30-essay medians as
20 established by two panelists. One had a median, of the 30
21 essays, of 45, a grade of 45. The other had a grade of 70.
22 So we had a 25-point distinction. How can anyone, if this
23 is a reliable study, have any confidence in Bar grading if
24 two individual graders using the same criteria come to such
25 radically different perspectives on a pile of 30 essays?

1 Again, what this demonstrates is they were
2 insufficiently guided on the criteria to use. In fact, if
3 we take a look at the individual panelist grading, the
4 patterns of each grader, not among graders but each grader,
5 what we find is the median deviation among the graders was
6 significant. One grader, for instance, had a median
7 deviation of only six percent among all of the 270 essays
8 that were graded. Another grader had a standard deviation
9 of 22.5 percent on the median.

10 Again, what this indicates -- and Mr. Pi would
11 know this -- that this is a variant of what we call the
12 "halo effect." The person who graded all exams almost
13 identically basically used a criteria in which the panelist
14 was unable to distinguish significantly among very poor
15 exams and very high exams. Again, when you have an
16 individual panelist with significant deviations of grading,
17 that raises questions of validity.

18 Finally, I question, and I actually, in my paper,
19 call it, a selection bias by Doctor Buckendahl. What he did
20 is, he chose not to provide the panelists with the actual
21 ratio of graded exams that occurred on the July 2016 exam.

22 For example, on the actual 2016 exam, the grade of
23 75 comprised 4.2 percent of the exams graded. The exam
24 score on his study was only 13.2 percent. The deviation is
25 significant because he did the same thing at the low end.

1 On the actual Bar exam, the grade of 55 occurred at a rate
2 of 27.3 percent, but, on the panelist essays, it appears at
3 only 13.2 percent.

4 Now, he didn't even discuss or justify why he
5 deviated so considerably, nor did he indicate how this might
6 affect the psychology of grading. I'll give you a very
7 simple example. I give you 10 exams to grade. Nine of them
8 are 75. One of them is a 55. In other words, they're very
9 low. You're going to see the 55s as significantly less
10 qualified as the 75 because it's such a distinction. It's
11 an outlier.

12 Unless you replicate the -- at least come close to
13 the percentage of exams as they actually existed on the July
14 2016 exam in terms of the selection you give to the graders,
15 you are going to have bias that's going to affect their
16 psychological perception of the value of the spread of the
17 exams.

18 Again, I do question the validity of Doctor
19 Buckendahl's study. I do question the validity of the State
20 Bar's proposal to only consider lowering the cut score to
21 141. I don't think you, based on Buckendahl's study, have
22 anything to justify what you're asking us to vote on, "Do
23 you want 144 or do you want 141?"

24 What I suggest is that you have another study, by
25 another independent psychometrician, that does a study

1 similar to Buckendahl, but take into account what your two
2 consultants and what I've said about the methodological
3 validity. Take into consideration what is required under
4 best practices. Let's see what a more methodologically
5 sound study would give before you vote on something that has
6 no empirical base. Thank you very much.

7 MS. GOODMAN: Thank you very much, William.

8 So our next speaker is Joan Howarth.

9 MS. HOWARTH: Good morning.

10 MS. GOODMAN: Good morning.

11 MS. HOWARTH: I've been a proud member of the
12 California Bar since 1980. I'm the dean emerita and
13 professor of law at Michigan State University College of
14 Law, currently serving as distinguished visiting professor
15 at the Boyd School of Law, UNLV, and I speak only for myself
16 this morning. So thank you for the opportunity to testify,
17 and thank you also for the scrutiny you're giving to the Bar
18 exam.

19 I have submitted for your consideration a paper,
20 "The Case for a Uniform Cut Score," which puts the current
21 MBE cut score discussions in the context of professional
22 licensing more generally. I looked at 16 professions that
23 use a national multiple choice licensing test as a component
24 of their state licensing exams, doctors, nurses, engineers,
25 dentists, CPAs, vets, social workers, physical therapists,

1 architects, and more.

2 Much to my surprise, I have to say, actually, to
3 my shock, I found that 15 out of 16, everybody else but law,
4 is currently using a uniform cut score for the multiple
5 choice component that anchors their state tests. Of course,
6 states may be individual in other ways.

7 For example, to be licensed as an engineer in
8 California, you have to pass an extra test on seismic
9 activity, a requirement for which we are all grateful, but,
10 for their common national multiple choice test, the
11 equivalent of our MBE, every jurisdiction of engineers,
12 dentists, architects, and the other professions I looked at,
13 nurses, doctors, vets, CPAs, they use now a uniform cut
14 score. We need a uniform cut score for the same reasons
15 that all those professions have adopted them.

16 First of all -- and I say this with the utmost
17 respect and seriousness -- proper standard setting is too
18 burdensome for states, individually, to handle well. We see
19 this in law. California, I would say -- I give you credit,
20 California, or us credit. We lead the country. You all
21 lead the country in the professionalism and resources
22 devoted to our licensing test. But California has not
23 revisited its cut score in decades.

24 Nurses routinely revisit their cut score every
25 three years, engineers every five years. That's because

1 they have -- their national testing organization has taken
2 that over, with the expertise and the resources to be able
3 to do that. Psychometric standards say that if the
4 profession changes, the tests change. Cut scores need to be
5 revisited every time there's a significant change in the
6 exams. States simply do not have the resources, expertise,
7 or the political will, really, to handle MBE cut scores
8 appropriately.

9 Secondly, handling the cut score well matters,
10 because the cut score is itself an aspect of the validity of
11 the uses of the exam. You all know validity means that the
12 test does what it says it does, and our national problem of
13 extreme cut score disparity on the MBE undermines validity.
14 Protection of the public starts with validity. Clearly,
15 geographic boundaries are mattering less and less.
16 Professional mobility is increasingly important.

17 Fourth, it is illogical to use the same pass/fail
18 test to measure the same thing, minimum competence to
19 practice law, but set the passing line at different places.
20 We've been using the MBE since 1972, 45 years. It's
21 possible it will take another 45 years for law to move to a
22 uniform cut score, but I doubt it, and I certainly hope not.
23 The same forces that caused the other professions to
24 overcome their habits of local control over cut score
25 determination will operate in law, and the reason that will

1 happen is because public protection really is what we're
2 talking about here.

3 What needs to happen, therefore, in law is that
4 the outlier jurisdictions, those with very low or very MBE
5 cut scores, need to move towards the middle. This is not
6 conformity for the sake of conformity. It's conformity for
7 the sake of validity.

8 Standard-setting studies can be a useful part of
9 the process when they are done routinely in the context of
10 content validity studies. Doctor Montez' comments about the
11 need for fundamental validity studies are, I think,
12 especially important on this point. We knew, you know,
13 standard setting is a contested and difficult field, but
14 even a flawlessly designed and executed standard-setting
15 study, standing alone, is not sufficient. It cannot be
16 undertaken once in a generation. That has an aspect of
17 randomness that's undeniable.

18 The magnitude of the effort that it took to pull
19 this one off should not cloud the limits in the usefulness
20 of the results. This goes to my earlier point. States by
21 themselves, even states with the size of resources of
22 California, do not have the capacity to handle this as well
23 as it would be handled nationally.

24 So, the question of what should be the recommended
25 cut score. One advantage of our current disparities, and

1 maybe the only one, but it's a significant one -- one
2 advantage of our current MBE cut score disparities is that,
3 instead of relying on the contested studies, outlier
4 jurisdictions can look to the mainstream, specifically, look
5 for evidence of problems from more moderate cut scores.

6 As your reporting knowledge is, there is no
7 evidence that states with mainstream cut scores are
8 suffering problems as a result. In the absence of such
9 evidence, California needs to justify why it is not choosing
10 a middle-ground cut score.

11 One thirty-five is the score used by the greatest
12 number of states. One thirty-three is the score used by
13 states with the largest attorney population. The record of
14 those jurisdictions is very significant evidence related to
15 proper cut score placement, and this I think I'm saying --
16 presenting its cut score, California should embrace
17 crowd-sourcing.

18 Finally, a word on the values that are implicated
19 in the cut score decision. As you know and we all agree,
20 protection of the public is the touchstone. An MBE cut
21 score that is set too low risks unleashing on the public new
22 attorneys with inadequate ability to memorize and analyze
23 legal doctrine, but no one is seriously suggesting that
24 California's cut score is too low. The question before you
25 is whether California's cut score is too high.

1 A cut score that is too high harms the public in
2 the following ways. First of all, access to justice is hurt
3 by limiting the number of attorneys, and reduced numbers
4 then lead to higher costs. Also, diversification in the
5 profession is hurt, because a cut score that is too high is
6 depriving under-served communities of attorneys who are
7 competent, but not licensed. Failure to license competent
8 attorneys disproportionately hurts under-served communities,
9 communities who do not have enough attorneys.

10 Diversification of the profession is also hurt,
11 and values of nondiscrimination and inclusion are
12 implicated, because an extreme cut score disparity
13 undermines validity of the test's use, and test validity
14 must be paramount when test results are persistently
15 racially disparate.

16 Legal education is hurt by a cut score that's too
17 high, because an unusually high cut score requires extreme
18 focus on doctrinal memorization, especially of first-year
19 subject, and test-taking skills, at the cost of more
20 advanced courses and skills courses that teach a broader
21 range of lawyering competencies.

22 Finally, a cut score that's too high creates the
23 appearance of protectionism, which, as you all understand,
24 is an improper value in standard setting and professional
25 licensing. Thank you very much for the opportunity to talk

1 with you today.

2 MS. GOODMAN: Thank you very much, Joan.

3 So our next speaker will be Sean Scott.

4 MS. SCOTT: Good morning.

5 MS. GOODMAN: Good morning.

6 MS. SCOTT: So I am here on behalf of SALT, the
7 Society of American Law Teachers. I have been a member of
8 the California Bar, a proud member, since 1987, and I'm a
9 tenured professor at Loyola, where I have taught for the
10 last 25 years or so. So thank you very much for the
11 opportunity to speak with you about this today, and, as
12 others have echoed, I commend the State Bar for its
13 willingness to examine the validity of the cut score.

14 SALT strongly supports the idea of lowering the
15 cut score. Consistent with Dean Howarth, we would even
16 recommend adopting a lower score. As she indicated,
17 adopting a score of either 133 or 135 would represent,
18 generally, what the median is across the nation.

19 Despite the support that we have for lowering the
20 score, we do have some concerns, both organizationally and,
21 for me, anecdotally, as a faculty member for the last 25
22 years, having graded thousands upon thousands of contracts
23 exams. So, first, we really would like to encourage the Bar
24 to take seriously the need to validate the Bar exam itself.
25 Right?

1 I'm not an empiricist, but, to my knowledge, there
2 has not been in recent history an attempt to assess what the
3 exam should measure, how it should measure it, and whether
4 the mechanism that we are currently using is an effective
5 tool. I think that's critically important, given the way in
6 which technology is radically changing what it is we do and
7 practice, and what it is we should be teaching in the
8 classroom, and I think that we are going to see a sea
9 change, and to have an exam reflect that, I think, is
10 critically important.

11 Second, I would say, concerning the validity of
12 the exam itself, underlying the discussion about the cut
13 score, there's an assumption that the lower pass scores will
14 create an increased risk of harm to the public, and it seems
15 to me that that is an assumption that needs to be explored,
16 and evidence provided that the lower cut score either
17 correlates to or causes an increase in attorney malfeasance.
18 It seems to me that currently no data has been provided that
19 supports that assumption.

20 Third concern, again one that has been shared. We
21 are concerned about the disparate impact that the exam may
22 have, and currently seems to have, on people of color. It's
23 a primary concern for SALT, but I would also add that the
24 potential invalidity of the exam has a negative impact on
25 everyone, right, and can have a negative impact on access to

1 legal services in California.

2 I do also have some concerns about the process
3 used to determine the appropriate cut score as reflected in
4 the materials that I have reviewed. Again, I am not an
5 empiricist, and so I'm speaking anecdotally. The conditions
6 under which you asked the panelists to grade the exams, to
7 me, seemed to be inconsistent about what we know about both
8 pedagogy and assessment, so to grade the number of essays
9 that the panelists were asked, in the period of time given,
10 was, I think, an extraordinary request.

11 I get to the point where I grade -- where I have
12 to say, "No more," because I begin to think unkind things
13 like "Well, did you come to class all semester?," at which
14 point I know it's time to put it away and have a glass of
15 wine, which I assume there was no alcohol provided. Well,
16 that, too, might have been a mistake.

17 The other things that I think are causes of
18 concern -- so, when I grade my exams, I draft my exam, I
19 take my exam, and then I come up with a rubric. It takes me
20 about four hours to come up with a good rubric, and I know
21 what I'm testing. I've been teaching for 25 years. I think
22 to not have any guidelines provided, no rubric, is
23 irresponsible, and makes me question the results. I think
24 that the comments from the essay graders themselves revealed
25 their concerns about the validity of the process.

1 It seemed to me that what you asked the panelists
2 to do would be akin to my saying to a torts faculty member,
3 "Here are my contracts exams. Tell me what you think.
4 Grade them, and whatever grades you come up with, those are
5 the ones that are going to determine whether these students
6 pass that contracts clause," and that's without giving my
7 torts colleague the benefit of having a grading rubric.

8 Bright people, intelligent people know torts
9 inside out. Should they be grading my contracts exam
10 without any guidance? Probably not. So I think I was
11 concerned about what it was you asked your panelists to do,
12 and whether, again, it reflects what we know about teaching
13 and what we know about assessment.

14 Having said that, I do want to reiterate that we
15 support a change in the cut score, given both the invalidity
16 of the exam itself and some concerns that we have about the
17 study. Thank you.

18 MS. PARKER: Thank you.

19 MS. GOODMAN: Thank you very much, Sean.

20 So our next speaker will be Bridget Gramme. Is
21 she here? There she is. Good morning.

22 MS. GRAMME: Good morning.

23 MS. GOODMAN: Good to see you again.

24 MS. GRAMME: Thank you. My name is Bridget
25 Gramme. I'm with the Center for Public Interest Law at

1 University of San Diego Law School. I just want to echo,
2 quickly, the prior two speakers. I totally agree with their
3 assessment of everything that's happening so far, and what
4 needs to happen. I'm also going to be providing my written
5 comments, but I'm just going to summarize them here for you.

6 On behalf of the Center for Public Interest Law, I
7 am pleased to submit this testimony, and I'm very grateful
8 for this opportunity, and I'm grateful to the Court for
9 their taking this really important issue on.

10 As the administrative director of the Center for
11 Public Interest Law, I have personally been monitoring the
12 State Bar, with a particular interest in the antitrust
13 implications involved in the Bar exam for the past three
14 years. I also served as the assembly judiciary committee's
15 nominee as a subject matter expert panelist on both the cut
16 score study and the content validation study for this
17 California Bar exam. So I come with some different
18 perspective than, I think, some of the other people that are
19 speaking today.

20 I believe there was a general consensus in the
21 room at the July 31 meeting of the Committee of Bar
22 Examiners and the Admissions and Education Committee that
23 this is really just a starting point here, that this is a
24 matter of great, great importance that is probably going to
25 take years to do right, and I really, really encourage you

1 to do it right.

2 As everyone has said before -- and I really liked
3 the comments of my predecessors here -- validity is public
4 protection, and if you do have such a disparate extreme of
5 cut scores across the country, that is not protecting
6 anyone, and I do agree -- and I already testified to this,
7 and will put it in my comments -- I do agree that there were
8 some flaws with the way that the standard-setting study
9 occurred.

10 A lot of those, I think, were just driven by the
11 impossibly short time frame that we had to conduct the
12 study, and I think most of the issues surrounded this
13 definition of "minimally competent attorney," but, for
14 purposes of today, I really believe -- and especially having
15 had two additional experts review the study and conclude
16 that, even though there were some flags, they were not fatal
17 enough -- I believe that -- I actually recommend that you
18 reduce the cut score to 139, which is the two standard
19 errors below, and that still has a 95-percent certainty
20 rate, according to the study.

21 The reason I say that is because I think it's
22 taking into considering the flags that people are pointing
23 out here today. What I believe myself as a panelist -- I
24 don't think everyone had the same understanding of a
25 "minimally competent attorney," what that really meant, and

1 we just didn't have the time to really go through that.

2 So, taking those into consideration, as well as
3 the policy issues that have been raised before you with
4 access to justice, and also diversity of the profession, I
5 think it makes sense, and you do have something
6 statistically sound, at least for the interim, right now, to
7 present to the Supreme Court, that is justified by this
8 study. It's better than what you have now in the status
9 quo, which I believe was totally arbitrarily set, and use
10 that right now as an interim, until you can do the study
11 correctly.

12 I want to briefly talk about, very quickly, the
13 Center for Public Interest Law and where we come from, has a
14 long history of studying the State Bar, but not just the
15 State Bar, all occupational licensing agencies in
16 California, and we've done this since 1980, and CPIL's
17 founder, Professor Robert Fellmeth, was appointed to be the
18 State Bar discipline monitor from 1987 to 1992.

19 So we come with a lot of background and
20 understanding about the way the Bar has functioned for a
21 long time, and he and CPIL staff put together 11 reports
22 during that time, and our work has resulted in significant
23 reform, including reform that's happening right now with the
24 de-unification of the Bar. And so, again, we come at this
25 with a unique perspective, and our mission is public

1 protection. So I would not be standing here before you
2 today recommending a low cut score if I thought that the
3 public would be harmed by this recommendation.

4 One thing that's a little different and has been
5 alluded to, but I want to talk about it more, and that is, I
6 need you to be aware of the difference between protecting
7 consumers and protecting the profession, and that really has
8 to do with the overall aspects of occupational licensing.

9 As you know, this cut rate, or the cut score that
10 was set 30 years ago, was set by the Committee of Bar
11 Examiners, or recommended by the Committee of Bar Examiners
12 and the Board of Trustees that were dominated by attorneys,
13 and this type of self-regulation is common in state
14 licensing boards. It's a delegation by the government to
15 professionals to regulate their own profession, but it is
16 increasingly coming under fire, for good reason, and that is
17 as most recently summarized by the U.S. Supreme Court's
18 decision in the North Carolina Dental Board case.

19 In that case, you may or may not be familiar with
20 it, but basically there was a board of dentists who were
21 dominated by dentists, and they made some policies that they
22 were going to prohibit teeth-whitening in North Carolina
23 unless you were a dentist. They did this in the name of
24 public protection. They were protecting the public from,
25 you know, bad teeth-whiteners, but really what they were

1 doing is protecting their market share as dentists.

2 I think this is a really important thing for you
3 to understand when you're thinking about this cut score, and
4 it's something that's not immediately apparent. I'm sure
5 none of the Committee of Bar Examiners are sitting around
6 talking about how you can deprive people from entering the
7 legal profession, and how you can be anti-competitive. I'm
8 sure that's not the point, and I know there are a lot of you
9 there that are -- a lot of public members that are really
10 dedicated to consumer protection.

11 I also think there's a real risk, and sometimes
12 these lines can be blurred, especially when this has been
13 just deeply ingrained in our system for such a long time. I
14 took the Bar exam. You know, all of us did, and I think,
15 you know, it's hard. It's hard to separate out and to take
16 a big view, a bird's-eye view, of this process, and to make
17 sure that this is actually accurate, but I have to say that
18 I echo many people today, that there is no evidence, none,
19 right now before you that shows that if you lower this cut
20 score, you're going to harm the public.

21 The biggest reason for that is that we haven't
22 undertaken a content validation study. We're in the process
23 of it now, and, as Doctor Montez recommended, I really
24 think you should take her recommendation and do a
25 California-specific occupational analysis. That's critical.

1 And so we can't tell. Right now there's just no correlation
2 between the existing Bar exam and minimum competence to
3 practice law, and so you can't say that the way that the
4 exam is formulated right now -- if you lower it, you're
5 going to correspondingly harm the public.

6 So those are my biggest things. The last thing I
7 just wanted to put out is that the Department of Consumer
8 Affairs here in California has been required for at least 20
9 years to establish its own occupational analysis and exam
10 validation process. So every regulated profession in
11 California under that umbrella, which includes doctors
12 and nurses and contractors and engineers, they have to
13 go through this re-validation process every five years, by
14 law.

15 This has to happen going forward, it has to, and
16 it's really inconceivable that it hasn't happened at this
17 Bar in 30 years, if ever. So that's one thing I recommend
18 that has to happen, and that this Bar, the State Bar, needs
19 to have resources and a staff dedicated to be able to do
20 that.

21 My final point is, I'm also very concerned about
22 the National Committee of Bar Examiners not giving you -- my
23 understanding is they didn't provide the data that we needed
24 as panelists to be able to assess the validity of that test,
25 and that is a big problem.

1 So I recommend, and I will be submitting with my
2 remarks, the Department of Consumer Affairs policy that
3 they've established pursuant to Business and Professions
4 Code Section 139. That has a very specific section about
5 validating national exams. As my predecessor talked about,
6 you know, these other licensing agencies, like the nurses,
7 they do use a national exam, but the Department of Consumer
8 Affairs has very specific requirements for national exams.
9 So I really recommend that you take a look at that as well.
10 Thank you very much.

11 MS. GOODMAN: Thank you very much, Bridget.

12 So our next speaker is John Holtz.

13 MR. HOLTZ: Good morning, Madame Chairman and
14 members of the Committee, dean, professors, director, and
15 concerned citizens. I would like to make a point of
16 information, or ask a point of information. I know that
17 that was not the dialog or the process that you wanted.

18 I just wanted to know two things. One is, the
19 survey that was sent out, I received it, my wife received
20 it, and I understand Bar applicants received it. Did all
21 registered law students receive it?

22 MS. PARKER: Ron would know.

23 UNIDENTIFIED SPEAKER: I think we did send it
24 to --

25 MR. HOLTZ: Well, I'm just curious, because --

1 okay. Gayle might know this. When will we get preliminary
2 results from the National Conference regarding this summer's
3 MBE scoring, or when will they make it known to those early
4 jurisdictions, and, therefore -- like, everybody kind of
5 knows the national trend is to go up.

6 UNIDENTIFIED SPEAKER: For July, October,
7 September, October.

8 MR. HOLTZ: Mid-September, they start to
9 release -- you know, some groups start to release their
10 scores, the smaller states. So I'm just curious, because it
11 seems like we're flying blind in one sense here. That's the
12 only thing I bring to that.

13 I don't want to fly under false flags. I put down
14 "Attorney" because I wasn't sure how I should indicate
15 myself. I do operate a writing course, preparation for the
16 Bar exam. However, what we're discussing today, in many
17 respects, is not in my line of the Bar. I always tell my
18 students I only help determine, or assist people in
19 determining, who will pass, not how many will pass. That is
20 the function of the MBE, and that's, of course, what we're
21 doing here, and I'll get to that in just a second.

22 I did want to make some comments about the people
23 that have spoken here. Robert, I applaud you for coming
24 down. I think that was fantastic. I can sympathize with
25 him. I guess, going back to who am I representing, as a

1 stakeholder, I would also -- I would like to represent Bar
2 applicants, because they seem to be left out of the mix. We
3 have the schools, we have citizens, we have individual Bar
4 applicants, but we don't have the group.

5 Over 25 years, going on 30, for just Bar review,
6 since I took the Bar, I've worked with a number of people
7 who, like Robert, I felt should have passed the Bar first
8 time or an earlier occasion, but, through misguidance or
9 luck or what have you, were not able to make it, and I think
10 that they're unfairly denigrated in our profession, if not
11 in the public, due to the fact of the Bar pass being such a
12 symbolic rite of passage, and I applaud the fact that you're
13 considering not only changing the Bar format, but also the
14 cut rate, because that will have an impact on some students.

15 In terms of Robert's situation, as I was
16 listening, I did write an amicus letter to the Court in
17 June, and four of them, in three proposals. I did touch
18 upon what affected him, without knowing his scores. I do
19 believe that someone in his situation -- as he indicated,
20 his last score was 1430. I think he should have passed, or
21 should be passed retroactively. You know, for him to have
22 to take another Bar when he's already demonstrated --
23 because my guess is your MBE score was above 1500.

24 MR. RADULESCU: That is correct. It was 1554.

25 MR. HOLTZ: See, he should be in.

1 As he mentioned about the high scores for the MBE,
2 I did make a proposal that we return to the days of
3 bifurcation, which is actually before my time, but
4 bifurcation would allow for -- bifurcation means that if you
5 score high enough on one part, the written section or the
6 MBE section, you don't have to retake that section. You
7 come back and sit for the part that you failed.

8 Since the MBE is most readily passed, and we want
9 focus on that, because that affects the pass rate, if we can
10 get more people to put in the energy on the MBE, our pass
11 rate will go up, and that's why we're all here today, is the
12 pass rate has been in a trough. What's not discussed is
13 that it's been in a trough since 1998, and there are reasons
14 for that.

15 Finally, he also would have qualified years ago,
16 but prior to his time, under reappraisal. He would have
17 been above the 1412 threshold, which would have allowed for
18 a third review, in which you would have had an individual
19 senior grader look at your paperwork and determine on a
20 whole whether this person evidences competency to be
21 admitted, without more, and, in fact, it's a de novo -- or
22 it was a de novo review, and I'm rather sad that the Bar
23 took that away. I think that, instead of going to the
24 current -- we'll look at all the scores that had variances
25 of over 10 points, which is the point that Mr. Patton brings

1 up, the discrepancies that are allowed under the Bar exam.

2 Finally, I think, in terms of both Mr. Patton and
3 Robert, the current way the Bar operates, with the study of
4 the cut score identified, Mr. Buckendahl -- the idea that
5 the Bar has a public policy to promote false positives by
6 allowing people -- once they pass the first time, if they're
7 above 1440, they allow them to pass without re-read,
8 whereas, prior to 2007, you had to pass 1465. You had to
9 get a 1466 to be allowed to pass after first read.
10 Otherwise, you were thrown back in the mix. In the world in
11 which I operate, we call that "double jeopardy." You could
12 then lose your score.

13 I trust that probably Robert, as he indicated, has
14 had these discrepancies, where, if you took one grader --
15 and that's called "cherry-picking," and I'm not here to
16 promote that, but, if you allowed to cherry-pick, you would
17 actually -- not just cherry-pick, but just pick one of the
18 slates, the first slate of graders or the second slate of
19 graders -- maybe the second late you would have passed.

20 I made that recommendation to the Committee in
21 summer of 2014, and since the fourth part of that
22 recommendation was that you publish it, that you rank-order
23 your graders between first and second read, and -- because
24 there is a difference between graders. Some graders are
25 easier and some graders are harder. It may that their paper

1 mixed. But why would you risk that for the perception --
2 you know, it just don't take much. But I will leave that
3 paper or send it further, send that paper on to you. I do
4 believe, in my letter to the Court, I did append that on.

5 So let me turn, then, to the survey. The reason I
6 asked about the survey was -- and I appreciate that you did
7 that, but the fact that you're doing it for the Bar
8 applicants, I think that's going to give you, maybe, a false
9 positive. I mean, I would certainly encourage, and will
10 encourage, all my students, you know, to do that, because
11 I'm a contingent fee-based course.

12 Unlike most of my fellows, I decided years ago,
13 prior to being a dean in a law school -- so I do have that
14 perspective as well -- but that, if I'm going to speak about
15 the Bar as a whole, not just my section, then I should not
16 have an interest in my section.

17 I saw too many MBE course that would downgrade,
18 denigrate, poo-poo the other sections of the Bar, and the
19 thing is, students would do MBE, which at the time was only
20 a third, more than 35 percent, and they'd fail the written
21 portion, because they'd put all their faith in that
22 instructor in that specialty course. And so I feel that
23 that has been a -- was a problem. So, actually, I applaud
24 the fact that you're going to lower the cut score. It means
25 that I will make more money, you know, this year alone, as

1 you just did.

2 The survey would have been nice for the two-day
3 Bar format. I think that would have addressed a lot of
4 concerns for the schools, as well as applicants, and I do
5 think it will have further efficacy in what seems to be an
6 underground or darkroom debate about whether we should join
7 the UBE, and if you do want to have that debate -- because
8 it seems like you've aligned your changes -- this cut rate
9 drop also would play into that -- with the uniform Bar exam.

10 That would be a debate that I, as an entrance
11 student or a current law student, would be really concerned
12 about, because, if we were to join the UBE uniform
13 licensing, that would mean that, instead of competing with
14 5,000 students for jobs two or three years down the road, I
15 might be competing with 30,000 students, and that would have
16 a bearing, because we have talked about the public and the
17 profession in terms of the cut score to those two.

18 We haven't talked about the lawsuits, and that's
19 an angle that has to be addressed, especially -- the L.A.
20 Times indicated a year ago in a article that there's a very
21 high attrition rate. I didn't come prepared for this
22 discussion on that point, but you might want to check it
23 out. They indicated 80 percent in California schools. I
24 think they meant accredited and not ABA, but a very high
25 attrition rate.

1 Those people are paying -- essentially, they're
2 buying cars, and then, you know, getting kicked out of
3 school, because schools are worried about not have a pass
4 rate. It's called balancing your budget on the back of your
5 entering class, your first-year class, and a California dean
6 years ago warned me of that, and I took it to heart, and I
7 see that played out all the time.

8 I think the move to 1440 -- or 1414, excuse me --
9 institutionally and politically, is already 90 percent.
10 You're on your last leg. You're going to go there. I think
11 you need cover for the two-day format. I think it hasn't
12 been debated. Maybe it has been within your circles, and
13 I'm just not aware, so please forgive me.

14 You said at the time that it would save money for
15 the -- you know, you wouldn't have to increase the rates,
16 the Bar could operate more efficiently, but it won't for
17 long, because, when you lower the cut score, or when we
18 increase the pass rate, which I've encouraged students to
19 pour more energy into the MBE -- when they do, and because
20 of the 50-percent weight now, they will, and once they do
21 that, you're going to get a higher score. You're also going
22 to get a boost on that, based on the cut score.

23 I'm not arguing against lowering the cut score.
24 I'm just saying that, to some way of thinking, in
25 retrospect, it will be cover for you, because, when the pass

1 rate jumps, people will go, "That's because they lowered the
2 cut score." No, it's because the new format, with the
3 50-percent weighting, drove more people to spend more time
4 on the MBE. Consequently, the pass rate goes up. How many
5 people pass goes up. Now, individually, it goes back to who
6 will pass, so that's a different matter.

7 You also mentioned, in your pros and cons that
8 were debated, it could lead to faster Bar results, but that
9 won't happen. It never could, because, to get to faster
10 results, even though you drop from eight items to six items,
11 it means it still takes time to grade all of those papers
12 for those six items. It means you have to increase the
13 number of graders, which, as Robert pointed out, alluded to,
14 that's just not feasible.

15 I mean, they all agree, you know, ideally, it's
16 one grader grades all, for a small state, but when you start
17 to increase your grading pool, then you have more
18 opportunity for outliers, which then gets into the balance
19 of graders, which then gets into a problematic where you
20 have outcomes which -- I haven't reviewed his papers, and
21 I've never spoken with Robert before, but I could well see,
22 you know, your 10-point variances, and I've seen 15-, 20-,
23 25-, and a 30-point variance.

24 So it's kind of like -- you know, that drives me
25 crazy, and I will not try to -- I have been an apologist for

1 the Bar for years, because one of my students years ago
2 ended up on the Committee, and I only asked her one
3 question, ever, when I saw her and she saw me. I was a
4 dean, and she was on the Committee on Examinations, and I
5 asked, "You said, when you got on the Bar" -- she actually
6 predicted she would do it because she was connected -- "that
7 you would find out if it was fair."

8 So I only asked her one question. I said, "Is it
9 fair?" And she said, "It's as fair as we can make it." And
10 I said, "Okay," and I took that away. 1995, I took that
11 away. For 20 years, that's what I've preached. For 10
12 years now, I've -- and before that, I heard it
13 intermittently, but I always poll every class I do, so up
14 and down the state, and I get students from every school. I
15 get them from every state. I get them from different
16 brackets, however you want. They're a diverse group.

17 I asked, as a public service announcement, "Have
18 you heard" -- not that "You believe," but "Have you heard
19 that the Bar is going to have a lower pass rate because we
20 have too many attorneys. And some of them raised their
21 hands, and many of them, you know, "Yes," they wave.

22 They've heard it. I mean, embarrassingly, it's
23 not as much down here. San Francisco seems to be the
24 hotbed. I don't know why. But they indicated that, and I
25 said, "You can't do that. You cannot go out there in the

1 field and let that canard persist. It is not true. The
2 Committee has no effect over the pass rate. The National
3 Conference with the MBE determines pass rate."

4 Our Committee has equated since '86, basically
5 right after my exam, which was the second-lowest in
6 history -- right after my exam, you went to an equation, so
7 the written part is equated to the MBE. So I tell students,
8 "Look. Don't freak out, because, if you get thrown an
9 oddball question, the Committee is not trying to depose you
10 or deny you entrance. It will all be put out in the wash,
11 because the MBE determines that."

12 At any rate, that continues to persist, and so I
13 feel that it's something that has to be and will be -- it
14 will come out now that this is being discussed, this
15 process.

16 As to the studies, I don't have enough information
17 for the second and third study regarding the competency and
18 the cut rate. I did read, and I noticed the comments that
19 people referred to. I did see those comments, and I think
20 that some of it is well taken.

21 Mine would be in the first study that was done
22 regarding the recent performance changes on the California
23 Bar exam, which was to look into the causes of declining
24 pass rate, but Doctor Bolus (phonetic) could only give a
25 well-documented, I would say, rough guess.

1 I think this is more a factor of the information
2 that the client gave him, because, as every attorney knows,
3 if your client doesn't give you good information, you can't
4 do your job, and I think -- that was an analysis/attorney
5 metaphor -- I think he wasn't given -- not that you
6 purposely withheld -- you don't have the information. You
7 couldn't give it to him. Now, he's anticipating that it's
8 going to come up in the next one, the fourth study, when
9 they go to the law schools, and I don't think that's going
10 to occur, either.

11 I did note -- it was interesting to read, because,
12 like Director Bridget, Ms. Gramme, I've been watching the
13 Bar exam, a student of it, for years and years and years,
14 albeit with a vested financial interest, but you learn to
15 like students when you get them for a few days, and you get
16 to know them, et cetera. The table that was given for the
17 Bar -- and I don't have extra copies. I didn't bring them
18 to pass around. But it was a chart that shows the
19 progression of the pass rate every summer from 2008 to
20 2016 -- I'm sorry, from 2000 to 2016.

21 Three things stand out in that. One is, you chose
22 for the start of the study -- or I don't know how it was
23 chosen -- 2008, which was a peak. The reason it was a peak
24 is because of Bar review. Bar review was starting, and the
25 National Conference had the same problem. In 2008, they

1 looked at "How did the pass rate jump?"

2 Doctor Case (phonetic), who was the
3 psychometrician for the National Conference at the time,
4 wrote in an article and said, "We can account for 20 percent
5 of the increase, but we really are lost as to what the rest
6 of it is due to." Well, I could have told her.

7 There was a change in Bar review provision across
8 the country, and there was free Bar review on the MBE, Bar
9 workshops on the MBE. People that would not have
10 necessarily ordinarily been able to afford it or access it
11 took it, and that accounted for it. It only lasted for one
12 year, because then the tides of commercialism and
13 competition -- the marketplace closed up, and that got shut
14 off, but for that one shining moment.

15 So you've chosen, you know, to march your
16 decline -- or mark your decline -- you've chosen abnormally
17 or atypically high, and nobody talks about it, because you
18 don't have that perspective.

19 Also, the early years in that study, from 2009 to
20 2012, you're basically looking at a plateau. Although it's
21 called a "decline," if you look at your own chart, you'll
22 see that there was a valley, from 2002 to basically 2005 or
23 '6, that's much lower, okay, statistically, significantly
24 lower, not by a great margin. Excuse me. I don't mean to
25 puff that up.

1 In the first part of the oughts, what we had is,
2 Bar review was dominated by one course, and that one course
3 did not have a large incentive. Consequently, training was
4 not at its peak, at its best -- I'll just say that --
5 whereas, in 2009 to '10, '11, you had competition. You had
6 more people coming in to the marketplace, and the way that
7 people have always entered the marketplace is through the
8 MBE. I'm an outlier. But they come in through the MBE, so
9 they focus on the MBE. When they focus on the MBE, boom,
10 there goes your pass rate. It goes up.

11 The drop, the third feature. The drop was in
12 2013, '14, '15, and he couldn't account for that, you know,
13 but I think I could. You got, in 2014, "Barmageddon." For
14 people in the audience who aren't aware, that was where
15 ExamSoft had a writing problem or a submission problem, and
16 across the country, people were not able to submit their
17 tests on time. Consequently, they were up until all hours
18 of the night.

19 The next day, they took the MBE on a few hours of
20 sleep, anxiety that they'd already failed the test, et
21 cetera. It occurred to some California students who had
22 tried to send in their first submissions, too, as well. It
23 was litigated, and, I think, poorly litigated. I would then
24 fault the National Conference. As the director mentioned
25 before, they were not forthcoming in the data that they

1 could have provided for the effect of that situation, in my
2 opinion.

3 Also, the next year, we had the introduction of
4 civ pro. Although it came on a winter Bar -- you always
5 introduce everything in the winter Bar. You all know that.
6 We always do those things, except for this one, because you
7 needed a big summer Bar to trot it out. But that summer,
8 2015, was the first time we had civ pro. The courses hadn't
9 gotten enough civ pro material for practice, and people were
10 afraid.

11 What I'm saying is that we could have a halo
12 effect. Mr. Patton alluded to that earlier. In this
13 instance, the halo effect would be, you take a civ pro
14 question and, you know, darn it, you're just not sure,
15 because you haven't had enough training. You haven't seen
16 enough of the patterns. And the next question is, say, a
17 contracts question, and it's a contracts question that you
18 should normally get right, you know, nine times out of 10,
19 but because you're still thinking about the civ pro
20 question, you're struggling now, and you get something
21 wrong.

22 I think that introduction of civ pro should not be
23 or cannot be downplayed. In fact, as Robert mentioned or
24 noted -- and it wasn't the Committee's fault -- the
25 Conference, National Conference, announced in March of 2016

1 that they would not -- fait accompli -- they would not be
2 releasing raw scores, raw subsets, raw scores. There will
3 just be a scaled total score. Boom, done deal. They were
4 afraid of the civ pro effect. They were afraid that civ pro
5 would come in as low raws, and students would look and just
6 go, "I failed because of civ pro," even though it couldn't
7 be equated.

8 I told students, "Don't worry about it when you
9 take the exam. It's going to be equated out. It's still
10 going to be high. Even if you guys all get nine points
11 right on the civ pro question, it's going to come out
12 right," which then leads me to the fact that this year, as
13 you pointed out, they suddenly announced percentiles.
14 What's with that?

15 I would suggest to the Committee that that's an
16 effort to allow for all students to be able to come to
17 California and say, "I scored 97 percentile. I should be
18 able to be admitted to your state without more." Otherwise,
19 you have to do too much work to get the percentile, but the
20 National Conference is splitting it. So I think there's an
21 agenda, and I don't know whose agenda it is, but there is an
22 agenda on that.

23 In light of all this, I would say that your next
24 study, the fourth study, is not going to have the right
25 data, because, again you're not going to have the totality

1 of Bar preparation. You're going to have a slice from law
2 school, and even though the law programs I am -- Loyola's is
3 to be lauded. USD has an MBE and a very strong "one and
4 done" program.

5 I've taught at both -- I held my workshop at both
6 schools. Excuse me. I know your people -- but most schools
7 don't. They don't spend all that time and that energy.
8 They leave it to Bar review, and, consequently, Bar review
9 is left with picking up -- everybody assumes that Bar review
10 is, you know, universal, ubiquitous, uniform. It is not.

11 Consequently, you have distinctions there, and I
12 kind of alluded to you about this in 2014. That was the
13 Professor Sander (phonetic) problem. He assumed that Bar
14 review -- and that was in his first writings -- that Bar
15 review has no effect on pass rate. Therefore, it's all the
16 schools. So you guys could abduct that lawsuit, but I don't
17 think I was clear enough at the time.

18 The bottom line on that scenario is, I would be
19 happy to consult with W.G. Vess (phonetic), if they want
20 information, a perspective that they're not, evidently,
21 including, and I appreciate it. There is kind of a
22 standoff, although, you know, I've had good relationships
23 with their directors of examinations, et cetera, through the
24 years, and, again, I'm not one who points fingers at the
25 Committee, and I don't think it's the Committee. I think

1 it's (indiscernible) Bar review. That's my opinion. There
2 are other factors, honestly, but, you know, it's the person
3 who had it last. That's the kind of thing I would go off
4 of.

5 Regarding the two options, I think either number
6 two has been mis-worded or you have a third option, and that
7 would be to reset and interim cut score of 1440, to be used
8 for the July 27, 2017, and February 2018 CBX only. In fact,
9 your Committee's recommendation or staff recommendation was
10 just as an interim, and for some reason, and I don't know
11 where in the process, it became July 27th only, and that
12 will have an adverse effect.

13 Subsequently, I think 1414 is a fine pick, but
14 you've got to go with February 2018 included in the mix as
15 well. Substantively, it was referred to early. The 1414 is
16 exactly one standard error, so it's well justified.
17 Historically, 1412 was the threshold for making reappraisal,
18 the third round, where a senior staff member could make a
19 decision, a senior grader could make that de novo decision,
20 and so I think that 1414 is probably, you know, an
21 appropriate mention there.

22 As a matter of -- well, similarly, it was
23 mentioned 1390, 1390 actually being the threshold for
24 re-read. So it's amazing that your studies actually have
25 vindicated, you know, your benchmarks along the way, and I

1 think the Bar has not been active in defending itself, but,
2 again, that's above my pay grade. I think that you've made
3 the decision, or the decision is being made, politically, to
4 go to a lower score. I'm fine with that. It's just that
5 other areas have to pick up the slack, and I do think that,
6 again, once the pass rate starts to rise, just through the
7 introduction of the two-day format and the further emphasis
8 on the MBE, I think we'll see pass rates return to what
9 people were happy with, which was 1996, '97, in that era,
10 where you had 62 percent-plus overall pass rate.

11 I also appreciate the fact that you're lowering
12 the cut rate, or that it would be lowered, because what
13 hasn't been mentioned, although Robert is an example, the
14 scarlet letter of the Bar is "Have you failed?" It seems
15 that people have a hard time handling that as they proceed
16 through life, through their career.

17 It seems to be something, a cudgel, that others
18 hold over their heads, which, since the Bar doesn't release
19 your score if you pass, it's rather a pernicious thing,
20 shouldn't be done, but, you know, since the difficulty of
21 the Bar exam is universally known in the public, people have
22 to sit for the Bar. You can't have a JD in California and
23 not get a license. That just doesn't work.

24 So, to the extent that this would take the monkey
25 off of people's back -- because, by changing to the new

1 format, what you've done, in essence, is everyone going
2 forward cannot say, "I passed the Bar the first time,"
3 because they don't know if they would have passed under the
4 old regime, and the old-timers don't know if they would have
5 passed under the new regime, with its emphasis on the MBE.

6 So I think just the change alone is something that
7 clears the baffles, and it's wonderful, and I think it
8 should be loudly promoted, and as a PSA, you know, in the
9 future. I always cut people short when they start to talk
10 about, you know, "I passed the first time." Doesn't matter.
11 There's too many factors in play that you don't know.

12 Procedurally, I think going to a 1418 -- or 14,
13 excuse me, 14, and extending it to the February 2018 CBX
14 would be good, because, without including February 2018, you
15 are affecting the ecosystem of the applicant pool, because,
16 when you take out that big chunk of "almost passes," then,
17 for winter 2018, they're not there, and that will disrupt
18 the pass rate for 2018. It will drop, because those are the
19 people most likely to excel or exceed, and so you're taking
20 away too many of the good people from that.

21 Psychologically, a lower cut for just the summer
22 would devastate a number of people. I'm sure that that was
23 part of the impetus, where he's going, "My God. I could
24 have just sat for this Bar and passed, easily," wherein the
25 people sitting for the winter, if it's not adjusted, would

1 be going, "My God. I missed that golden opportunity in the
2 summer, and now I'm still 26 points out," and all those
3 people -- you know, everybody is 26 points back, further
4 back, and, again, that cohort missing means that the MBE
5 will drop, so then it becomes even harder to get your
6 license.

7 I made that recommendation in my letter to the
8 Bar -- or to the Court, that you need to pump up the MBE in
9 the winter, and, therefore, you might want to introduce or
10 allow for a third year on same basis, lottery, what have
11 you.

12 Finally, if you don't push winter 2018, you're
13 going to end up coming back for it, because, what I've heard
14 today, if there is a division on the studies, the validity
15 of the studies that were done, and this drags out, you're
16 going to come back again to the Board, to the Court, and
17 make another recommendation to lower the pass rate for the
18 winter Bar only, and that's going to get you, because it's
19 going to look like you weren't aware of what you should be
20 doing, and, therefore, you weren't prepared. So I would do
21 that.

22 If you don't do it, I think, you know, other
23 people will. I think the Board will see it as a public
24 situation. The Court might even consider it as an equitable
25 matter that should be resolved, but, regardless of that, I

1 do applaud what you're doing. I do applaud that you're
2 taking the time, and I appreciate that you let me speak. I
3 was riffing on some of the earlier points that were made.
4 It's a problem as a teacher. Thank you very much, and I
5 would offer assistance in whatever way I can.

6 MS. GOODMAN: Thank you, John.

7 MR. HOLTZ: Sure.

8 MS. GOODMAN: So our next speaker is --

9 MR. HOLTZ: Sorry I took too much time.

10 MS. GOODMAN: Our next speaker is Ira Spiro.

11 MR. SPIRO: Thank you, but I'm going to pass.

12 MS. GOODMAN: Pardon?

13 MR. SPIRO: I will pass.

14 MS. GOODMAN: Okay. Great. So our next speaker
15 is Jennifer Mnookin.

16 MS. MNOOKIN: Good morning. Thank you for this
17 opportunity to speak today. I'm Jennifer Mnookin. I'm the
18 dean at the UCLA School of Law, and I strongly favor seeing
19 a reduction in the cut score to the California Bar. Of the
20 two proposals that you've put forward, I therefore prefer
21 the one that lowers the Bar score, though, frankly, I don't
22 think that goes far enough.

23 Now, I'm the dean at UCLA, which is one of the
24 strongest law schools in this state and in this country, and
25 our students are very strong by every measure, including

1 academically. Our media LSAT for last year's first-year
2 class was, in fact, the second-highest in the state, second
3 only to Stanford. Our Bar passage rate is also impressive.
4 If I look over the last decade, our rate has varied between
5 about 82 and 90 percent, depending on the year.

6 So I sit here as the dean of a law school whose
7 students are really quite successful in this space, and,
8 nonetheless, I sit here as somebody who believes that we
9 would be serving our state much, much better if we did, in
10 fact, move closer to the national average, and I'd like to
11 just spend a couple of minutes describing why.

12 First of all, I think it's important to say -- and
13 I realize that all of you certainly do already understand
14 this -- but our cut score currently isn't just a little bit
15 above the national average. It's a lot higher.
16 Interestingly, in fact, two of the other states with high
17 cut scores that were not quite as high, but close to ours,
18 Oregon and Nevada, have both this year made the decision to
19 lower theirs. Nevada has gone from -- it's gone to 138, and
20 Oregon has gone now down to a 137.

21 This does mean that, even at the 141 -- I'm using
22 the three-digit, rather than the four-digit, versions,
23 because that's more akin to how other states report it out.
24 Even at 141, California would actually still be the
25 second-highest in the country, and let's also note that

1 that's second to Delaware.

2 With all due respect to Delaware, Delaware is
3 basically irrelevant in this conversation, because do you
4 know how many people took the Delaware Bar in 2016, which
5 was the last public data I saw? It was 198. That's right,
6 200 people. So, if we bracket those 200 people, California
7 would still be the single highest cut score in the country,
8 even at the level that you are proposing.

9 Moreover, and I know you are all well aware of
10 this as well, but the evidence clearly shows that California
11 Bar takers currently perform better than the national
12 average on the multistate portion, which, at least until
13 now, has also been the driver of the overall scoring
14 structure here in California, and yet many more of them fail
15 the Bar, and that's after investing substantial amounts of
16 time, typically three years, and money, in their
17 professional education.

18 So, in a way, this hearkens back to Joan's point
19 earlier about crowd-sourcing, but it seems to me that if we
20 are going to retain a minimum competency level that is
21 unusually and atypically high, we need to have very good
22 evidence that we really get performance benefits from that
23 decision. If we had that evidence, if you could show me
24 that having this higher cut score really did help mean that
25 we had truly better lawyers in California, or that it

1 genuinely benefitted the public, I would want to know that,
2 and I would want to hear that, and I could come to
3 supporting that, but right now we do not have that evidence.

4 There is absolutely no evidence that California's
5 unusually high cut score actually produces better lawyers
6 than in states like New York, Pennsylvania, and Illinois,
7 none. There is no evidence that California's lawyers -- no
8 evidence that I know, anyway -- that California's lawyers
9 face less disciplinary actions, or do their jobs better, or
10 better meet the needs of their clients and their community.

11 My academic subject is evidence. I'm an evidence
12 scholar. In some ways, this feels like it's a question
13 about burdens of proof. There is no doubt that this has
14 been an understudied issue across the country, and I laud
15 you and this state for beginning to take steps to develop a
16 research basis, although I think we have a very long ways to
17 go.

18 I'll return to that in a moment, but, in the
19 absence of clear evidence that this higher cut score helps,
20 given that we have very clear evidence of its costs, I think
21 we should very concerned about retaining it. What are some
22 of those costs? Well, one of them -- and, again, I know you
23 are all very well aware of this -- is that this higher cut
24 score makes our state's lawyers meaningfully less diverse
25 than they would otherwise be.

1 This unusually high cut score has its particular
2 effects on minority test takers, in aggregate, and I think
3 this has very clear negative consequences, without any proof
4 that this high cut score actually produces better lawyers,
5 and this disparate impact concerns me greatly.

6 I spent a decent part of this past weekend both
7 watching the events in Charlottesville and then writing a
8 message to my own community about what happened there. It
9 was my former hometown. I used to be on the UVA faculty,
10 and so this hit pretty close to my heart.

11 Watching the continuation of overt bigotry and
12 racism in this country is absolutely heartbreaking. I know
13 we have none of that here, but we still do have significant
14 amounts of implicit bias and unfairness that hurts people
15 who are diverse, coming from communities of color and/or of
16 lower socioeconomic status, and so setting our Bar score/cut
17 score at a place that keeps more candidates like that from
18 being able to be lawyers, without strong evidence that that
19 high cut score is actually producing better lawyers, is
20 something that I think we should all be very, very worried
21 about.

22 Now, at UCLA, we're proud of our Bar passage rate,
23 but there's no question that it's still significantly lower
24 than it would be in almost any other state. One analysis
25 that was done, it's not my own analysis, but said that if we

1 were facing the New York Bar passage rate, we would have --
2 instead something like, this past year, in the low to
3 mid-80s, we'd be more like 97 percent of our students would
4 pass.

5 I see firsthand how, among the students that don't
6 pass the first time, they face significant and real costs,
7 and career consequences. Those who are still looking for
8 jobs, of course, find them significantly harder to get.
9 Some lose jobs that they had. Some are able to keep their
10 employment, but there's no doubt that they lose standing,
11 wherever they are, within their fledgling professional
12 positions, even if they are able to stay.

13 Now, from my school, the vast majority of
14 students who take the exam the second time do pass that
15 second time, but why is it that we are forcing them to go
16 through this ordeal twice, and has that second run-through
17 somehow actually made them better lawyers? Did they
18 really lack minimum professional competence the first time
19 around?

20 New York wouldn't have said so, but we did.
21 California said that. And yet they miraculously developed
22 it through this additional time, which wasn't spent
23 lawyering, but was, in fact, largely spent doing further Bar
24 preparation through a Bar prep course, whether it's BARBRI
25 or Themis or who knows who else.

1 Now, most of the students from UCLA who don't pass
2 are quite close to the pass level, and I believe that they
3 were, in fact, minimally competent in that first go-around.
4 I believe that it is our cut score that's getting it wrong,
5 not their capacities, and I will say to you again that, in
6 virtually every other state with identical performance, they
7 would have passed the first time.

8 In addition -- and this has been referenced by
9 other speakers as well -- our unusually high cut score has
10 meaningful and, in my view, deleterious effects on the law
11 school curriculum at a number of schools, and at the
12 margins, even including my own. Twenty-first-century
13 lawyers need to be broadly educated. Twenty-first-century
14 lawyers need to be agile problem solvers and impactful
15 leaders. Of course they need to be strong conventional
16 legal analysts, but what they need starts there, but does
17 not stop there.

18 I am enormously proud of our broad and deep
19 curriculum. I am proud of our significant experiential
20 program that gives students the change to develop
21 on-the-ground legal skills while still in law school. I'm
22 proud of the ways that we have courses that encourage
23 students to be interdisciplinary and to think about law as a
24 set of social problems, not merely as a question of
25 doctrine. But none of these broader skills are tested

1 directly on the Bar, and, to make the matter more acute,
2 over time, there's been an increase in the number of core
3 subjects that are tested and covered.

4 What this does, when combined with California's
5 unusually high cut score, is it pushes students into Bar
6 classes that may have absolutely nothing to do with their
7 professional goals, and sometimes that's in lieu of classes
8 that would, in fact, be far more beneficial to them over the
9 course of their careers.

10 At UCLA Law School, we believe that every single
11 student we accept clearly has the capacity to pass the Bar,
12 but I want to tell you that my fundamental goal as an
13 educator is to create extraordinary lawyers and leaders, not
14 extraordinary Bar takers, and a cut score closer to the
15 national average would help my school and others stay
16 focused on what's truly most important about legal education
17 for the long term, not just for this high-stakes test.

18 In addition, the current high cut score has
19 effects that some people don't really notice on the entire
20 California lawyer marketplace. I've seen the way it makes
21 many small firms and government agencies extremely reluctant
22 to make any hiring decision until after candidates have
23 passed, and, frankly, given the overall pass rates, that's a
24 pretty understandable response from employers, but what this
25 means is that, compared to other states, more of

1 California's law graduates will not have jobs by graduation,
2 even from top law schools.

3 It means that many are still hunting, and can't
4 fully get anything confirmed, and, given how late we tend to
5 get our results, and then the holidays, it's often not until
6 the New Year that they're able to continue their search in
7 full. This obviously creates additional financial pressures
8 for graduates. It also hurts California schools in the
9 national rankings, which look at both job placement at
10 graduation and job placement 10 months afterwards, and,
11 again, these consequences happen without any clear and
12 defined benefit from our higher cut score.

13 Now, I very much appreciate that the State Bar and
14 the Supreme Court are taking these issues seriously, and I
15 appreciate the efforts to begin to study this in a serious
16 way, including Doctor Buckendahl's study with his focus
17 group of 20 lawyers, which concluded that, while it might be
18 justifiable to reduce the cut score, that the current cut
19 score also appeared to be reasonable.

20 Unfortunately, in my opinion, that study was too
21 rushed and too hastily constructed to be worth giving very
22 much significant weight to. I will note that I've said that
23 all along, as several of you know, including well before I
24 had any idea what results the study would come to, and I
25 also appreciate that part of that speed was in response to

1 the Supreme Court's interest in having you begin to study
2 these questions, but I think it is a problem, and I think
3 that it means that that study can't simply be considered to
4 be valid, and can't, frankly, be considered to offer very
5 much substantive evidence in favor of or against any
6 particular cut score.

7 You've heard from several other speakers about
8 some of the flaws, and I'm not going to go over those again,
9 but I will mention, briefly, two additional concerns that I
10 didn't hear earlier, although one of them, at least, has
11 already been surfaced elsewhere. I think the presence of an
12 experienced Bar grader among that group was really a cause
13 for concern. I don't think that fits best practices of this
14 kind for a standard-setting study, and I've heard both in
15 the expert reports and from those who were present that that
16 person was extremely forceful, and I think that's a real
17 issue that we need to recognize in assessing what happened.

18 I also think there's an interesting double problem
19 with the combination of a lack of a rubric, and I understand
20 there were arguments why that might be better. That's a
21 hard question, but when you combine that with the
22 distribution of exams that the group saw, I think that's
23 really a very concerning issue.

24 The distribution that the focus group looked at
25 was not sampled in relationship to actual takers. It was

1 instead a sampling across -- a much more even sampling of
2 the different score relations. What this means is that
3 strong exams were over-sampled compared to the real
4 distribution. So those reading these exams saw many more
5 strong exams, as evaluated by their Bar exam score, than is
6 in the real distribution.

7 When you combine that with a lack of a rubric, and
8 when you combine that with the reality that those 20 people,
9 they're all qualified California lawyers, but they have
10 areas they know a lot about and areas they don't know a lot
11 about, the truth is, they were grading, in essence, on a
12 curve. Inevitably, that's what they were doing, and, having
13 talked to a couple of people who participated, they
14 confirmed that they were inevitably doing that.

15 So we had over-sampled strong exams, no rubric,
16 and an implicit curve, and, given that, it's hardly
17 surprising that, even though this group found a
18 significantly higher portion of the exams they saw to be
19 minimally competent or better than the overall pass rate, it
20 resulted in numbers that don't come out that way, and I
21 think that's an additional very significant flaw that we
22 need to assess.

23 While it's true that one of the expert reports
24 concluded, after detailing a set of concerns, that there
25 were no fatal flaws, I have to say, when I read that, it

1 reminded me of how I feel when I'm writing a tenure letter
2 for somebody, where I've got a bunch of concerns, but I
3 don't want to come out and say, "Gee. This person shouldn't
4 get tenure," and what I do is I describe all of the
5 concerns, and then I sort of say, "To be sure, there's
6 meaningful value in this scholarship," and it would be quite
7 understandable if this person were given tenure at their law
8 school, and what I mean to be saying is signaling that
9 there's very real weaknesses, but that I don't want to be
10 the one to say that this is too weak for them to continue
11 their position.

12 So I think it would be a real error to take that
13 "no fatal flaws" conclusion out of the broader context of
14 the set of flaws that that expert detailed, and which I
15 think, for reasons we've already heard earlier, is very
16 substantial, but, nonetheless, still incomplete.

17 From where I sit, and I have said this all along,
18 I think to do these kinds of studies well and right simply
19 will take longer. I think it's a good idea. I think it's
20 terrific that you're taking first steps toward doing that.
21 But I think we continue to have a kind of "in the meantime"
22 question, because academic research of this kind, done
23 carefully and thoroughly, with adequate time to vet the
24 "minimum competency" description that was not, in my
25 opinion, adequately vetted, with adequate time to look at

1 all of these challenging issues, it just can't be done on
2 this kind of time scale.

3 Now, I appreciate that the Court wanted concrete
4 information to support its decision making, but I think that
5 there are many other forms of concrete information that
6 suggest that it would be better for the moment to get
7 meaningfully closer to the state -- I mean, to the national
8 average, while we continue to learn more about the
9 validation of any particular cut score.

10 I also believe that, in one version of the
11 Buckendahl study, he did suggest 139 as a possible level,
12 and in the course of back and forths, perhaps with the other
13 experts and others, that possibility was removed. Of the
14 three numbers that I've heard today, that would seem to me
15 to be the most appropriate, though I will say that, from
16 where I sit, even a 139, I think, would be unjustifiably
17 high, and still be one of the very highest in the country.

18 I do appreciate that some critics of changing the
19 cut score suggest that the problem is that law students have
20 become weaker over time, and it is true that there has been
21 a significant decline in interest in law schools over the
22 whole nation in the past decade, and that that has had some
23 effects on what students law schools are taking, but I want
24 to be crystal clear that there is no evidence that this is
25 the entirety of the issue.

1 Furthermore, what these declining Bar pass rates
2 are showing, they're showing a problem that's existed for a
3 very long time, and they've just made it much more acute and
4 visible than it was before. It's not a new problem, and I
5 say this again as a school where our Bar pass rate has been
6 between 82 percent and 90 percent over this entire period,
7 and yet we see enormous negative consequences from the fact
8 that it's so much lower than it would be elsewhere.

9 I also appreciate that some people say we in
10 California, we are the greatest state in this nation, so we
11 should have the greatest lawyers, and so we should have the
12 toughest Bar exam. Some people think we should be proud
13 that, again, except for those 200 people in Delaware, our
14 Bar is the toughest one to pass.

15 I fully appreciate and agree that California is an
16 extraordinary state, and I'm enormously proud to be leading
17 one of the great law schools in our great state, but I
18 simply don't think that we serve the public, lawyers, law
19 schools, or law students by expressing that greatness by
20 making our graduates jump over an unusually high hurdle that
21 has clear costs and no clear benefits.

22 So, even if 141, California would be still the
23 second-highest in the country, and, again, for all practical
24 purposes, the very highest. At 139, it would still be one
25 of the highest in the country, and if we moved significantly

1 closer to the national average, I think we would be doing
2 even better for our state, though I realize that that's
3 probably not on the horizon currently.

4 I guess I just want to conclude by saying that,
5 from my perspective, a failure to shift at all would be an
6 extraordinary contrast with what I think are truly the core
7 values of our great and very diverse state. I want to see
8 us be forward-thinking, not hidebound. I don't want to see
9 us dig our heels in the ground in continued preservation of
10 a number that was created without any clear justification,
11 and which continues not to have any substantial
12 justification for it.

13 I think we have the opportunity to make decisions
14 here that will increase diversity, increase access to
15 justice, and serve our state, and I hope you decide to go
16 down that path. Thank you very much for the opportunity to
17 comment.

18 MS. GOODMAN: Thank you very much.

19 So our next speaker is Jackie Gardina.

20 MS. GARDINA: Good morning --

21 MS. GOODMAN: Good morning.

22 MS. GARDINA: -- and thank you. I will be brief.
23 There is a danger to being here at 11:50, keeping people
24 from lunch, and much of what I had to say has been said, but
25 I felt it was important to stand up as the dean of the Santa

1 Barbara and Ventura Colleges of Law, which is a California
2 accredited law school.

3 I think it was important to discuss the unique
4 circumstances that our students find themselves in, which is
5 that they are only eligible to sit for the California Bar.
6 They have chosen to live, learn, and work in the communities
7 in which they attend law school, and most, if not all of
8 them, stay in those communities. So, unlike graduates of
9 American Bar Association schools that may choose and have
10 the option to be mobile, our students do not.

11 Just to give a little bit more background for
12 those who aren't familiar with our school, we have been in
13 existence for almost 50 years. We have almost 2,000 alum
14 who have served or have served with distinction the
15 profession in this state.

16 Our students are unique in the demographics, and
17 I'll talk a little bit more about that as I go further with
18 my discussion today, but let me just start with, I'm urging
19 the Committee to recommend to the Supreme Court a 139 Bar
20 exam pass line.

21 Much has been said about why I think that's
22 important, so I will just be brief about why I think it's
23 important first. It's within the range identified within
24 the study. It is with a 95-percent confidence level that
25 the true cut score falls between 139 and 150.

1 Second, there is absolutely no evidence that
2 choosing a 139 Bar exam pass line will undermine public
3 protection. As others have said and pointed out, over 84
4 percent of all attorneys in the U.S. are licensed in
5 jurisdictions with a cut score 139 or below, and there's no
6 evidence, as the staff report pointed out, that discipline
7 cases or malpractice cases are fewer in California than in
8 those other jurisdictions.

9 Let me speak to the other two policy ideas at
10 play here. One is the commitment to bridging the
11 access-to-justice gap, and the commitment of the State Bar
12 to improving diversity. I think that California accredited
13 law schools, and my law school in particular, are well
14 situated in both cases.

15 The Colleges of Law is located in counties that
16 lack adequate access to legal services. They've chosen to
17 attend the school in part because they are rooted in their
18 communities and want to serve the communities in which they
19 live, and, unlike many ABA law school graduates, for whom
20 debt often serves as a substantial financial barrier to
21 rural or local legal practice, the total Colleges of Law JD
22 tuition is just over \$67,000.

23 Most of our graduates self-pay, although we do
24 have access to Title Four financial aid, so many leave with
25 little or no debt, because they're working adults, who

1 usually work full-time while they attend law school.

2 Finally, there's significant evidence that
3 adjusting the pass line will positively affect the diversity
4 of the profession. I know this is one of significant
5 importance to the State Bar. Many of the California
6 counties currently identifies as minority-majority
7 populations, and that's true for Santa Barbara and Ventura
8 Counties, which identifies 45 percent and 42 percent,
9 respectively, as Latino or Hispanic, yet, in the State Bar
10 of California, as far as I see, the statistics indicate that
11 4.2 percent of our attorneys identify as Hispanic.

12 Colleges of Law student demographic reflects the
13 demographics of the county in which we exist. We have over
14 40 percent of our students identify as Latino. Over 50
15 percent grew up in a home that speaks something other than
16 English.

17 So I think it speaks to the idea not only of
18 diversity, but with the California courts having an
19 increased focus on language access implementation plan, we
20 have a growing number of students who are bi- or
21 multilingual at our school, which obviously has an
22 implication for their performance on a standardized test,
23 but doesn't necessarily implicate their ability to be sound,
24 competent, practicing attorneys who can aid their
25 communities.

1 The staff report indicated that the Colleges of
2 Law -- or, I should say, the Cal-accredited law school Bar
3 pass -- would increase by 31 percent at the top end with a
4 141. It's not clear to me what the Bar pass rate would be
5 with 139, but I can say that the last time we received
6 statistics from the State Bar -- and, hopefully, will be
7 getting those again soon -- the Colleges of Law had a
8 70-percent cumulative Bar pass rate.

9 So, if that's accurate, that we have a 31-percent
10 increase, our students are going to be well situated to
11 serve the counties and the communities in which they live.
12 Then, if you look at the Bar pass rate for Hispanics,
13 according to the staff report, you're going to see a
14 10-percent increase at the top end, if not higher, for those
15 who identify as Hispanic who are taking the Bar.

16 So I think, based on the balancing of the policies
17 that you have before you, public protection, bridging the
18 access-to-justice gap, and the increasing diversity, it
19 favors lowering the Bar pass rate, and I urge you to
20 consider 139. Thank you.

21 MS. GOODMAN: Thank you very much, Jackie.

22 So, a couple other speakers that were on the list.
23 Darren Greitzer? Is Darren here? Must have left.

24 Okay. Stuart Webster?

25 MR. WEBSTER: Yes.

1 MS. GOODMAN: Okay. Thank you, Stuart.

2 MR. WEBSTER: Good morning, just. Thank you for
3 this opportunity to address the Committee. I've had the
4 benefit of reading the various reports, including Doctor
5 Buckendahl's report, the staff report, and also the
6 observers' reports. I've also had the benefit of viewing
7 the video session of the joint committees on the 31st of
8 July.

9 I want to address two issues, and the first is
10 really a challenge to the validity of the standard-setting
11 study. It seems that there's a disjunct between what an
12 exam candidate is required to do, according to the preamble
13 on the front page of the essay questions, and the definition
14 of the "minimally competent candidate" as modified and
15 adopted by the panel for their study purposes.

16 If I can refer to page 11 of Doctor Buckendahl's
17 report, the factors considered to be important in
18 determining whether a person is minimally competent include,
19 at paragraph two, and I'm quoting here:

20 "Ability to distinguish relevant from
21 irrelevant information when assessing a
22 particular situation in light of a given
23 legal role" -- and this is important --
24 "and identify what additional
25 information would be helpful in making

1 the assessment."

2 Point is that nowhere in the preamble to the
3 examination are the candidates asked to indicate what
4 further information might be important. How is it that you
5 can assess a minimally competent candidate on the basis of a
6 task that a candidate was not asked or required to do?

7 The second issue I wish to address is in relation
8 to foreign attorney takers. I accept that the current test
9 regime is the basis of a range of bad alternatives, and then
10 it goes (sic) what previous speakers have mentioned. The
11 other methods are subjective, heavy on resources, and
12 difficult logistically, and, quite frankly, expensive. So I
13 understand how the current methodology has been adopted and
14 used.

15 The essay part of the current test calls for an
16 unrealistic response, under enormous time pressure,
17 exclusively from recall, and without access to materials.
18 That is not reflective of real legal practice, except on
19 very rare occasion when one is required to think on their
20 feet. The MBE has no equivalence in practice. Life is not
21 a series of multiple choice questions.

22 Now, much emphasis has been placed on recent
23 graduates. Please spare a thought for attorney takers. The
24 difficult question of finding the answer to the decline in
25 pass numbers should not ignore what is also happening with

1 attorneys who are already qualified to practice elsewhere.

2 Attorney takers have presumably been unleashed on
3 the public in other states for years, and these candidates
4 are not distracted by the MBE, because they don't have to
5 sit that part of the test, yet the average pass rate is
6 traditionally very low, and can I just -- I'll refer to the
7 statistics over the last five to six years, and it's
8 published by the NCBE.

9 The low point for attorney takers was in
10 January -- sorry -- in July 2014, at 31 percent. The high
11 point was February 2014, at 54 percent. But if you take the
12 averages over the years, the lowest average was in 2011,
13 with 39 percent, and it's taking both February and July into
14 account. In February 2014, the average rate was 44 percent.
15 So there is, I think, still a difficulty, when you look at
16 those figures, at why is the California Bar failing people
17 who are competent notionally in other jurisdictions, in
18 large numbers?

19 So I should have been advocating for a special cut
20 rate for this category of candidate. When considering the
21 balance between access to justice, on the one hand, and
22 protection of the public on the other, and especially the
23 false negative side of the equation, please bear in mind
24 those whose approach to written expression is slow and
25 methodical, and the keyboard-challenged over-50s.

1 Does that make them any less competent, because
2 they have not recently been in a learning environment where
3 pressure tests are de rigeur? How many of the sample essays
4 reviewed by the panel were handwritten? Should the work of
5 a recent graduate who is touch-type proficient, and in 60
6 minutes able to cover more issues, develop more accurate
7 rule statements, and provide greater depth to the legal and
8 factual analysis represent greater competence over someone
9 with rudimentary typing skills?

10 I have been practicing law without censure in a
11 foreign jurisdiction for 30 years, at least 10 years of that
12 at senior partner level. I have just sat the California Bar
13 for the fifth time. Foreign attorneys are not exempted from
14 the MBE, as out-of-state attorneys are. My best score was
15 1419. My other scores have not been far behind. In
16 virtually every other state except Delaware, I would have
17 been licensed.

18 I am least able to judge whether I have the legal
19 competence required to practice in this jurisdiction, but
20 certainly the California Bar is truly difficult, and takes a
21 heavy toll financially and psychologically.

22 The exigencies of practice, client attrition,
23 common sense, peer supervision, and a robust and effective
24 discipline regime should mitigate against the worst impact
25 of the false positive. So it is not surprising that I favor

1 lowering the cut rate to 1414, or lower still. These
2 factors should feature in your thinking. Thank you.

3 MS. GOODMAN: Thank you very much, Stuart.

4 Our next speaker is Amy Breyer. Amy here? Great.

5 MS. BREYER: Thank you very much.

6 MS. GOODMAN: Thank you.

7 MS. BREYER: I graduated from Northwestern Law
8 School in 2000, which is, as you probably know, one of the
9 best-ranked schools in the country. It's about 12. During
10 my time in law school, I clerked for the State's Attorney's
11 Office. I clerked for the U.S. Attorney's Office, clerked
12 for a judge in the Northern District of Illinois.

13 I passed the Bar on the first time, ran my own
14 practice. I was very involved in both the Chicago Bar and
15 the Illinois State Bar. I was a principal founder of two
16 different sections, one of the Chicago Bar, one of the
17 Illinois Bar. I participated in other sections. I had
18 notable rulings in a number of cases of first impression in
19 my field.

20 I moved to California a few years ago, because my
21 fiancé had gotten a job here, and I tried to start a
22 nonprofit. I had done some nonprofit work for a few years.
23 But I wanted to speak here today because I am not qualified
24 to practice in California. I failed the February Bar, so I
25 was hoping, by outing myself, this is what the face of

1 failure looks like. This is what not being qualified to
2 practice looks like for an attorney taker, as the speaker
3 just previous to me had noted.

4 I understand the natural incentive for all of the
5 attorneys who practice here now who have already passed, who
6 have no interest in seeing the score lower, because it's a
7 point of pride, but, as many other people have already
8 observed, there is simply no empirical evidence that the
9 score where it stands now -- or lowering the score, I guess
10 I should say -- would have some sort of negative impact on
11 the people of the state of California.

12 I would add that whatever test it was that those
13 test takers in California took years ago, that they cling to
14 as such a badge of honor, is not the Bar exam that people
15 are taking today, and I'd like to offer a few observations
16 which I think tie in, actually, to a lot of the empirical
17 evidence we've heard, which I think has been some great
18 research, but just my own personal observations, having
19 studied now for this test.

20 If you look at what's on the State Bar web site as
21 sample strong answers from July 2006, it's a 70-page
22 document, and if you look at what's on the sample strong
23 answers from July 2016, just 10 years later, it's a 107-page
24 document, and the reality is that the examinees who pass
25 today aren't necessarily smarter, but they have learned the

1 secret sauce to beating this test, and I think, in a lot of
2 cases, the secret sauce is just length.

3 I would point to, for example, in July 2015, 13
4 pages on jurisdiction. I would challenge anybody to
5 handwrite 13 pages on jurisdiction in an hour, even if all
6 you were doing was copying over this essay. It goes back to
7 being a little bit computer-challenged. I handwrote the
8 first essay, the February test. I handwrote in Illinois,
9 and I passed.

10 I think that there is a certain amount of bias for
11 at least attorney takers who aren't averaging out the score
12 with the MBE. The entire score is just based on the written
13 exam, and, particularly for people who have been in practice
14 for a while, who have never used ExamSoft before, who didn't
15 want to risk a professional license on the nuances of
16 software that -- I don't need to go through the horror
17 stories. Even though ExamSoft is a lot better than it had
18 been, it's not perfect, and it seems like an awful lot to
19 ask somebody to risk getting a license on software they have
20 never used before.

21 So you talk about, you know, 13 pages on
22 jurisdiction. Well, this (indicating) is from the July 2016
23 essay. This was a real property:

24 "The problem, however, is that, in
25 closing, under the merger doctrine, the

1 land contract merges into the deed, and
2 cannot be used to provide relief to the
3 buyer. Under the merger doctrine, the
4 contract is said to merge into the deed,
5 and the buyer may not use the contract
6 to recover for defects on the property.
7 Here, closing the land-sale contract
8 that they entered into would be said to
9 merge into the deed. Thus, even though
10 the contract was breached at closing,
11 there could be no relief afforded under
12 the terms of the contract. As such,
13 plaintiff cannot make a breach of
14 contract claim here. So, in conclusion,
15 the contract claim would fail,
16 because the merger doctrine merged into
17 contract deed, and it can no longer
18 afford relief to the plaintiff."

19 They said one thing, but, because they're typing,
20 it took half a page, and this was considered a sample strong
21 answer. Sometimes what gets written is, for example, "The
22 facts indicate that, upon his death in 2004, Tim died." In
23 case you wanted to look at it, that was February 2006,
24 answer A to question two.

25 July 2015:

1 "Generally, tenants in common are not
2 entitled to contribution from other
3 co-tenants, because the cost expended to
4 repair -- because you can't recover for
5 cost expended to repair improved
6 property."

7 Flat-out wrong point of law, but the person passed
8 the test, and not only did they pass, it's a sample strong
9 answer.

10 This is from February 2016. This is a
11 professional responsibility question:

12 "Well, in this case, the lawyer also
13 breached her duty of care. A lawyer
14 must act in good faith and as a
15 reasonably prudent person, with the same
16 care, skills, and caution as would be
17 expended on her own matters."

18 There is no duty of -- this is a corporations
19 concept. You have a duty of care in a corporations context.
20 In law, we have duties of loyalty and confidentiality and a
21 whole host of others. This is flat-out wrong, but, because
22 they were able to type quickly, and type a lot of it, they
23 passed.

24 Here's personal favorite. Again, this was a
25 professional responsibility question. This is from July

1 2011:

2 "Under the ABA rules, an attorney may
3 threaten criminal or disciplinary action
4 as an attorney, so long as the charges
5 are sufficiently related to the civil
6 action."

7 No, but they passed. And I've got to say -- and
8 there's plenty more, but, you know, you guys get the idea.
9 As somebody who has practiced for the last 17 years, I am a
10 little offended by the notion that I am considered a greater
11 threat than somebody else who was under the impression that
12 it's okay to threaten disciplinary action as long as it's
13 related to the litigation.

14 As the gentleman behind me just pointed out, I do
15 think that there's a bias in this test against older
16 examinees, and it's implicit. I'm sure it's not like people
17 are sitting around thinking, "How can we do this?" For
18 example, once you get to be a certain age, maybe you just
19 don't type as quickly as you used to. Maybe you've never
20 used ExamSoft.

21 I think that the whole ExamSoft issue also goes
22 into some of the bias that other speakers have brought out
23 about other communities, for example, we call "communities
24 of color." Maybe they go to schools where they're not able
25 to invest in ExamSoft, as part of the reason why they come

1 to take this test and they're not scoring as well. There's
2 just layers of things that are going on that have nothing to
3 do with a person's competency to practice law.

4 I'm just a member of the public trying to get my
5 law license. I don't know the discussions that went on that
6 prompted this Committee to come up with "Well, there's only
7 two choices. We either keep things they way they are, or we
8 go to a 141.4."

9 It would seem to me that there's a whole universe
10 of choices out there, and I would certainly encourage, while
11 there's this review underway, not to exclude other possible
12 choices, and we've heard dozens of very valid reasons for
13 not excluding other possible choices already.

14 Had I taken the Bar just about any other state,
15 including New York, I would not be sitting here talking with
16 you right now, because I would be working.

17 As a final point, I would like to suggest -- I
18 don't have the exact numbers with me, but there were over
19 like a thousand test takers in February alone that were
20 transfer attorneys from other states. My understanding is
21 the annual Bar dues here is about \$400. Even, say, 1,000
22 people at 400 bucks, it's an extra \$400,000 a year of
23 revenue to the State Bar. There's some incentive right
24 there. Thank you very much.

25 MS. GOODMAN: Thank you very much.

1 So is there anybody else that would like to speak?
2 Okay. Come on up. I didn't get your name.

3 MS. MILANEZ: Patricia.

4 MS. GOODMAN: Okay. So, when you get up there,
5 say your first and last name, so we can get that.

6 MS. MILANEZ: Okay. Good afternoon. Patricia
7 Milanez. I'm from Brazil.

8 MS. GOODMAN: Can you spell your last name, just
9 because we don't have a list?

10 MS. MILANEZ: M-I-L-A-N-E-Z.

11 MS. GOODMAN: Okay. Thank you, Patricia.

12 MS. MILANEZ: Okay. So I'm licensed attorney in
13 Brazil, and I just took the Bar exam for the first time. So
14 I'm talking on my behalf and from my experience so far. I
15 don't have so much to share, but so far what I've seen, what
16 I've heard here (sic).

17 I've been immigration paralegal for many years now
18 here in the United States, and I took the Bar exam back in
19 2005 in Brazil, and I think the score should be lowered to
20 1414, because it give us a chance. I would love to become
21 an immigration lawyer here, and help people, because that's
22 what I do. That's what I love to do. I do not for the
23 money, but it's personally rewarding when I see -- when we
24 exercise the compassion, and when we can somehow improve the
25 law, come to this country to improve the law.

1 Of course, I'm going to only know if I passed or
2 not in November, but I would like to also thank you so much
3 for this opportunity, and thank you so much for the
4 opportunity for the foreign lawyers to be able to take the
5 California Bar, even without L and M (phonetic). So this
6 is great. So thank you so much, and thank you for the
7 opportunity to comment. Sorry. I just have to go little by
8 little.

9 One thing that bothered me the most is how people
10 deal with the Bar studies. I saw people saying outside --
11 because I saw those inserts the lady just said. I said,
12 "How come you're going to do all day one hour?" It's such a
13 rush, and so much to memorize. There's a language barrier,
14 and it's all that, and even hard for the people who study
15 here, went to law school here. And the answers were like
16 essays only, to be perfect. You just have to -- whatever
17 you remember, you just type. I don't think this is
18 effective.

19 For example, when I took the Bar in Brazil, one
20 difference is that here we have to know all subjects in
21 writing the essays. In Brazil, we can choose. We have the
22 multiple choices, and the essays we can choose whichever
23 we like better, whichever we would like to practice or
24 something, because sometimes you just throw information
25 there, and you're not ever going to see in your life again.

1 So that would be some suggestion, about, like, giving the
2 opportunity for the people to at least choose something that
3 they would like to write about. That would be something to
4 add. Yes.

5 I agree with Robert, who said that there should be
6 a balance between MBEs and essays. That was a good
7 suggestion, and I do agree with many people said about it
8 doesn't prove that you're going to be a good lawyer, because
9 there was even a some (sic) that California State Bar post,
10 over 15,000 misconduct for lawyers, ethical and -- yes. I
11 think it was regarding lawyers who don't return phone calls
12 to clients and all that.

13 So it's not only about practicing law. It's about
14 caring about your clients. So I think this is a big part of
15 being a good lawyer, is caring about, truly care about your
16 clients, not just throw things to the paralegals and they do
17 all the work. No. The lawyer should be hands-on.

18 I think this is really important, and something
19 that, if I were able to practice here, I would love to do,
20 because it's about compassion, about caring, and go an extra
21 mile to help your client, and to work with honesty,
22 because there's so many disciplined lawyers because of
23 business conduct, and that shows us that just knowing the
24 law is not enough. It's much more than that, and I agree
25 with the higher score limits, the number, the diversity of

1 the attorneys, because we can bring so much to the table,
2 and combine some things from our countries. Foreign lawyers
3 also can contribute with something to the American law, to
4 this country, and also the money that people spend.

5 From my experience, the people have took the Bar
6 review, so people go to crazy loans, and they've been taking
7 five times, three times. I don't know. It's endless. So
8 they go into debt, and that information also that the
9 applications dropped -- in (indiscernible), a lady told me
10 it was since 1970, it hasn't been lower like now, the law
11 school applications. So this might be a factor, because
12 people don't want to take the risk and say, "Okay. I'm
13 going to have a \$200,000 loan, and then how many times I'm
14 going to have to take the Bar?"

15 What I saw, it's people having fear. I don't
16 remember someone that was confident. They would be freaking
17 out. I would say, you know, there should be a sense of
18 community or something, but everybody there (indiscernible),
19 yes, because everyone is going crazy. Everyone has fear of
20 the test so much that there's anxiety, and then the
21 consequences. In my case, I didn't see anything, but we
22 hear the horror stories, and I don't think, out of
23 nervousness, you're going to take good, effective test.

24 Also, the typing, three hours. Sometimes we need
25 to think. We are not all like just a (indiscernible).

1 Everybody typing makes us nervous, makes a lot of us
2 nervous, because you feel like "They're typing so fast, and
3 I'm still here spotting the issues." And so this is
4 something that -- maybe be more flexible with the time.

5 Sorry. I just have to see the (indiscernible).
6 Yes. And it's a lot to memorize, at the end to say, "Okay.
7 The samples" -- you don't have to be perfect. As I said
8 before, like, you just write -- just throw information
9 there, and I don't think this is effective. We need to
10 apply the law consciously, not just in a crazy rush of
11 whatever that we remember, because we see the samples, like,
12 "Wow. I'll never be able to type like that." And people
13 would say, "Don't worry about it. You just need to show the
14 minimal competence," but I don't think that, in one hour for
15 each essay, it's possible to do all that.

16 I agree that lowering the score is not going to be
17 harm to the public, because, again, there's so many
18 misconducts from lawyers, and for ethical things, so it's
19 beyond the law, and it's a whole perspective that you
20 should -- I don't know if I expressed myself right, but I
21 don't think it's going to harm the public, because you can
22 do your research. I don't know this, but I can do some
23 research, and do the best of my ability to help my client.
24 So it's not because I don't know certain rule, I don't
25 remember at the time, that I cannot do some research later.

1 Another point is, I heard many things in my
2 lectures that -- some professors say -- they say, "This is
3 Bar exam. This is not real life. So you should do this,
4 this, and this." We should have more questions talking
5 about real life, real issues, not something that we have to
6 learn out of -- we have to get out of our way. It's already
7 hard to deal with clients every day, and deal with the real
8 questions, but we kept on learning, "You should answer
9 this." The Bar world is not the world I live in. It's
10 something else. So we have to learn somehow totally
11 different things than we see on a daily basis. So I think
12 the Bar exam should be more real, real life.

13 I agree with we should make extraordinary leaders,
14 not Bar takers. This was very good, too. Yes. And based
15 on my classmates -- I tried to remember everything, so I can
16 express. Yes. The main concern that I saw from my
17 experience with my classmates were the debt they're in.
18 They're Uber drivers now. One of our friends, he took three
19 times. He's driving Uber, so he can somehow help his family
20 to pay the loans, his student loans, and he got something
21 like 1420. So I'm talking on behalf of this man. I'm sure
22 that he would be very happy to know that I could talk about
23 it.

24 The passing rate, 34.5 percent is very low with
25 only two repeat that (sic), and out of 200 foreign

1 attorneys, who I'm sure they're very talented people, too, I
2 didn't find this number anywhere, but people told me. Out
3 of 200 foreign lawyers, 33 passed, so 14 percent, around
4 that. So we should be given this chance to show how we can
5 be -- how we can contribute to this society, how we can
6 provide the good work ethic, honesty, and compassion for our
7 clients, return the phone call, not leaving everything for
8 the paralegal to do. Just, I want to be a hands-on lawyer.

9 So thank you so much.

10 MS. GOODMAN: Okay. Thank you, Patricia.

11 MS. MILANEZ: Thank you.

12 MS. GOODMAN: Okay. Good. Anyone else that wants
13 to give a public comment?

14 MR. GIELEGHEM: Good morning.

15 MS. GOODMAN: Can you state your name, then?

16 MR. GIELEGHEM: My name is Neil Gieleghem, last
17 name G-I-E-L-E-G-H-E-M.

18 MS. GOODMAN: Thank you, Neil.

19 MR. GIELEGHEM: I will try and be brief, and I
20 will try not to repeat any of the comments that have been
21 made by some of the other speakers.

22 Let me give you, as briefly as I can, a little
23 context as to who I am, and I'm afraid I don't have prepared
24 remarks this morning, because I had not intended to speak.
25 I'm a graduate of what was then McGeorge Law School in

1 Sacramento in 1982. I took the California Bar in '82,
2 passed it the first time.

3 When I was in law school, I was a judicial extern
4 for Associate Justice Frank Newman, graduated Order of the
5 Coif. First year out of law school, I was the elbow clerk
6 for Chief Justice Gunderson of the Nevada Supreme Court,
7 took the Nevada State Bar while I was up in Nevada, or over
8 in Nevada, passed it the first time.

9 I was a grader for the California Bar exam in '83
10 through about '85, if memory serves. I was one of the
11 experiment takers for the PT, for the performance test, when
12 that came in, in '85, '86, and since about '86, moving
13 forward, I have been a pro bono coach, which is the way
14 I phrase it, for people who are taking the Bar exam.
15 Typically, they are what I call "repeaters," people who have
16 failed it at least once.

17 I did that for probably about four, five years,
18 until I met then-Dean Parker at our law school, and
19 ultimately taught a class at McGeorge in Bar preparation.
20 We called it something else, for various reasons, but that's
21 my experience in this area, and I continue to pro bono coach
22 to this day.

23 What I'm about to say are simply my opinions as a
24 practitioner. You know, certainly they're not attributable
25 to my law school, to Dean Parker, or to anyone else, but I'm

1 afraid I'm going to have to take, up to a point, a position
2 of the loyal opposition. I think that what's being
3 contemplated here is the wrong fix, for the wrong reason, to
4 the wrong problem, and, having said that, I agree with many
5 of the comments made by some of the other speakers.

6 It is a traumatic experience to fail. It has
7 consequences, both personal and professional, that are very
8 regrettable, and can people a long, long time to overcome.
9 The model answers on the State Bar web site, I agree, have
10 reached ludicrous proportions. There are sections in there
11 that are either inaccurate or flatly wrong. That's the
12 nature of the grading process. I also have to admit that
13 I'm not that familiar with, you know, how the grading
14 process works now, at least as to the essay questions and as
15 to the PT, but I don't think it's changed very much.

16 You know, can there be errors? Can graders go out
17 of calibration? Sure. Can you pull up exam answers where a
18 grader has mis-graded, at least in my opinion? Sure. But,
19 overall, in my tenure as a grader, I thought the process was
20 remarkably fair, and, in fact, that's one of the reasons why
21 I became a grader, to see behind the curtain, to see what
22 the Wizard of Oz was really doing back there, and I was
23 amazed how quickly 10 to 15 people on a grading panel, from
24 various practice areas, could quickly calibrate so that we
25 were all within the required five points. The system back

1 then was fair, and I have no reason to believe that it's not
2 fair now.

3 There's been a decline in the passage rate, yes.
4 We all know that. But, in my experience, it's largely that
5 the applicant seems to approach the exam in a way that I
6 find utterly inexplicable, given the amount of money, the
7 amount of time, the amount of effort that these people have
8 spent to get through law school and be in a position to take
9 the exam. Frankly, I don't understand it, because they need
10 to pass this test in order to make money.

11 You know, am I going to offer some, you know,
12 sociological explanation for it? No. I'm not competent to
13 do that, although I do resent, you know, the implication
14 that somehow anyone who talks about the facts is somehow
15 harboring some sort of racial animus or wants to hang on to
16 his exalted position as somebody who passed the Bar back in
17 1982. That's not where I'm coming from.

18 I would love to see the applicants that I have to
19 deal with -- I don't have to -- but that the applicants that
20 I work with, the repeaters, who I deal with every sitting of
21 the Bar -- I would love for them to pass the first time,
22 before they get to me, but that's not what's happening.

23 You know, again, with all respect to some of the
24 people who've spoken, and I'm sure they're very intelligent,
25 very competent people, my read would be they're probably

1 taking the exam the wrong way, which leads to my final area,
2 which is, the most interesting thing I heard raised here
3 today was the idea that there has never been any kind of a
4 real validation study as to whether the exam, in its current
5 format, really does test as to whether somebody will be a
6 good lawyer.

7 You know, I mean, it started out -- when I took
8 it, it was nine essay questions, an hour apiece, you know,
9 and one could make an argument that that really didn't test,
10 and then we went to the performance exam in about '86, and
11 it's very hard for an outsider at this point, and I am, to
12 get somebody to explain to me exactly why the performance
13 test was added.

14 You know, I think -- I'm actually pretty
15 confident -- it was added in an attempt to make the exam
16 fairer to older people, and I say that now as somebody who's
17 64, but, you know, older people who'd been out working in an
18 environment, and they weren't people who'd gone through life
19 on -- or hadn't gone through college and then law school on
20 what I call the "Mom and Dad plan." They'd actually had to
21 work, the way I did.

22 To the extent that the PT wanted to make the exam
23 fairer for that group of people, which may have included
24 some people of color, you know, which may have been intended
25 to broaden the demographic base, that was a great idea, and

1 I stand behind it 100 percent.

2 My problem, as former grader, and as a coach for
3 the last 15 years, I have never -- and I've looked at, you
4 know, thousands of Bar exam answers -- I have never seen a
5 correlation between life experience and a PT score that's
6 higher than the essay scores, or vice versa.

7 In my experience, the essay scores are always in
8 the same ball park, to use a lay term, the same ball park as
9 the PT scores, and if I understand the rationale for the PT
10 correctly, I should have -- at some point in my career, I
11 should have seen an applicant who's failed, who comes in,
12 and the essay scores are grossly out of sync with the PT
13 scores. I'll represent to this panel I have never seen
14 that, and I don't think I ever will.

15 Could this test -- could the exam process as a
16 whole, you know, warrant further review? Yes, absolutely.
17 Again, validation study. Show me why the current model
18 really does ensure a minimum level of competency, as opposed
19 to some other system, and that's the kicker for me, because,
20 other than simply lowering the cut score in a way that I --
21 first of all, it's contrary to the survey.

22 It's contrary to the research that you have before
23 you, and in a way that, to me, sounds very arbitrary, but
24 anybody who's advocating that, I think the burden is on
25 them. There was some discussion about burden of proof or

1 burden of persuasion. The burden is on them to come up with
2 an alternative.

3 I'm kind of left with a quote that's been
4 attributed to a number of people. I think Winston Churchill
5 is the one that I always remember. It was to the effect
6 that "Democracy is the worst system of government, except
7 for everything else."

8 What I've told my repeater applicants, what I've
9 told law school classes, is "If you can come up with a
10 better way to do this, a fairer way to do this, a way that
11 will ensure the minimal level of competency and include all
12 the professional and the demographic and the social factors
13 that are in play, I want to hear it. Tell me about it,
14 because I'll push for it." And so far, out of the last like
15 25 years, I haven't heard it, and I sure haven't come up
16 with it.

17 So, unless the panel has any questions, thank you.

18 MS. GOODMAN: Thank you, Neil.

19 MS. PARKER: Thank you.

20 MS. GOODMAN: Okay. Anybody else?

21 (No response.)

22 MS. GOODMAN: Okay. I think this concludes our
23 Los Angeles version of our public comments. We had some
24 great comments. We will resume tomorrow in San Francisco at
25 10:00 o'clock, for public comments there, and then we will

1 have further discussion with the Committee of Bar Examiners
2 on August 31st. So thank you, everybody that attended
3 today.

4 (Proceedings in the above-entitled matter were
5 concluded.)

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CERTIFICATION OF TRANSCRIBER

I, Holly Martens, do hereby certify that the foregoing 100-page transcript of proceedings, recorded by digital recording, represents a true and accurate transcript of the hearing in the matter of The State Bar Court of the State of California Annual Public Hearing, held on August 14, 2017

Date

Transcriber

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August 1, 2017

Committee of Bar Examiners
State Bar of California
180 Howard St.
San Francisco, CA 94105

Re: Bar Exam Passing Score

Dear Colleagues:

I urge you to lower the Bar Exam passing score to somewhere between 138 and 140. That is still higher than the national average passing score. There is something seriously wrong with the current scoring system. It cannot be possible that less than half of our law school graduates are qualified to be lawyers.

Very truly yours,



STEPHEN B. BEDRICK

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August 03, 2017

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The State Bar of California
180 Howard St.
San Francisco, CA 94105

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Executive Office
The State Bar of California

RE: Bar Exam Cut Score
Clarification Request to Dr.Chad W. Buckendahl

Dear Public Comments Manager:

The State Bar informs us that “all comments regarding Study methodology and possible cut score options beyond those specifically identified ...are welcome.”

This comment seeks a clarification to the Final Report dated July 28, 2017 titled “Conducting A Standard Setting Study For the California Bar Exam” by Dr. Chad W. Buckendahl. (“2017 Study”)

At the outset we commend Dr. Buckendahl for what is an informative and in-depth analysis of this complex issue.

As part of the “Introduction and Overview” of the 2017 Study, the following caveat is found:

“This examination purpose is distinguished from other types of exams in that licensure exams are not designed to evaluate training programs, evaluate mastery of content, predict success in professional practice, or ensure employability. Although other stakeholders may attempt to use scores from the examination for one or more of these purposes, it is important to clearly state what inferences the test scores are designed to support or not. Therefore, the standard setting process was designed in a way to focus expert judgments about the level of performance that aligns with minimal competence.”

The point of clarification goes to whether the paragraph cited above detracts in any way from a disclaimer made Dr. Buckendahl’s in an earlier study (I) and/or the Study by the American Bar Association (II) as reproduced below:

(I). In a Study by Dr. Chad Buckendahl, (referenced at p.2 of O-10 State Bar Attachment) dated July 15, 2013 (PR-13-02) titled: Key Factors To Consider When Engaging In A Development Or Redevelopment Process For Examinations—(California’s Two-Day Bar Examination Proposal), he writes:

“One of the primary purposes of a professional licensure examination is to provide independent evidence that candidates possess sufficient competency for entry-level practice. It would be inappropriate to confound that intent with the purposes of educational training programs or accreditation activities with that program...*Although often misused for such purposes, licensure testing program scores are not intended to serve as a comprehensive evaluation of a program’s curriculum and instruction.*” (p. 2-3) (emphasis added.)

(II) An ABA Task Force On The Future of Legal Education that addressed “Accreditation and Quality of J.D. Programs,” (2014) concluded:

“The pursuit of quality by law schools has unquestionably led to a strong system for training lawyers, and the ABA Standards have played a key role. But “quality of legal education” is an abstract notion as to which there is *no objective metric* for achievement. (emphasis added.)

(See: ABA Task Force on the Future of Legal Education Final Report.)

http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/report_and_recommendations_of_aba_task_force.authcheckdam.pdf

(p.12)

Is the “not designed to evaluate” text contained in the 2017 Study consistent with the references made in the two studies above?

Thank you.

Sincerely,


Stanislaus Pullé Ph.D.

Dean of Law and

Professor of Constitutional Law

TO: ABA COUNCIL ON LEGAL EDUCATION &
ADMISSION TO THE BAR
FROM: PROFESSOR WILLIAM WESLEY PATTON
RE: OPPOSITION TO PROPOSED CHANGES TO
STANDARD 316 (BAR PASSAGE)
DATE: MAY 7, 2016

This is the fourth analysis in opposition to the proposed changes to Standard 316 (bar passage) that I have filed with this Committee. My last analysis, an April 22, 2016 comparative empirical study of the disciplinary rates between Wisconsin bar members admitted pursuant to the “diploma privilege” versus a “bar examination” clearly demonstrated that there is no statistically significant correlation between having passed a bar examination and attorneys’ disciplinary records. This was the first empirical study to demonstrate that the main rationale for high state bar examination MBE cut scores and low bar passage rates, consumer protection, is not supported by empirical evidence.

This analysis provides a richer and deeper analysis of the **Wisconsin** comparative bar admission/ethical violation study presented in my April 22, 2016 study. This study also presents an analysis of 163 **California State Bar Court** disciplinary cases decided between January 1, 2016 and April 30, 2016 which demonstrates that the subjects tested on the California general bar examination are not correlated with actual attorney ethical violations or with consumer protection.

As the following empirical analysis demonstrates, the two most important data discoveries in these 140 published Wisconsin disciplinary cases as it relates to the proposed changes to Standard 316 (bar passage) are:

1. Only **4%** (7 out of 140) of the Wisconsin disciplinary cases involved violations of the primary skills tested on general bar examinations (spotting issues, determining relevant facts, determining relevant rules and standards per the applicable procedural nature of the case, identifying relevant law, applying relevant facts to relevant law, and discussing appropriate remedies).¹ This data provides further evidence that states’ consumer protection

¹ According to the National Conference of Bar Examiners the “ ‘obvious purpose’ of the bar examination is to determine what applicants should be admitted to the practice of law, by testing: (1) the applicant’s ability to make an analysis of legal problems; (2) his knowledge of the law, and (3) his ability to apply his legal knowledge in working out a rational solution in a lawyer-like fashion....(The bar examination) should require the applicant to demonstrate his ability to analyze the facts presented, to recognize legal points involved, to apply the proper legal principles, and to give well-reasoned answers.” Daniel R. Hansen, *Do We Need The Bar*

justification² for extremely high MBE cut scores and very low bar passage rates is unsupported by empirical data since 96% of ethical violations involve issues or rationale not covered or very rarely tested by general bar examinations.³ In fact, the most recent annual disciplinary report of the California State Bar Association states that **80%** of reports by others involved “**overdrafts from attorney trust accounts**”, a subject not even tested on the California general bar examination from February 2010 to July 2015.⁴ See, *infra*, at section III for a detailed empirical analysis of California State Bar Court disciplinary cases.

2. Overall, Wisconsin attorneys admitted after having passed a bar examination have more egregious histories of ethical violations than those admitted under the “diploma privilege”. As Tables 1 and 2 demonstrate, attorneys admitted after passing a bar examination had a substantially higher recidivist rate of ethical violations and had a greater percentage of cases involving dishonesty and practicing law while either suspended or while they had serious deficiencies with their bar admission license.

I. *Wisconsin Study Methodology.*

This study used the same methodology as the April 22, 2016 study already submitted to this Committee. The study concerns all published disciplinary cases of Wisconsin attorneys during a three-year period. During that period Wisconsin issued 140 published opinions that involved ethical violations by 131 Wisconsin attorneys. The current study involves a detailed analysis of those 140 published opinions by comparing the grounds for disciplinary action among the two groups of attorneys sanctioned (diploma privilege versus bar examination admittees). Table 1 summarizes the data regarding the 56 Wisconsin published disciplinary cases of those admitted pursuant to a bar examination. Table 2 summarizes the data regarding the 84 Wisconsin published disciplinary cases of those admitted pursuant to the diploma privilege.

Examination? A Critical Evaluation of the Justifications for the Bar Examination and Proposed Alternatives, 45 Case Western Reserve L. Rev. 1191, 1205 (1995).

² “The relative difficulty of the bar examination, in comparison to the paucity of actual skills that it guarantees, suggests that the exam is designed more to limit the number of lawyers than to guarantee any set level of competence, that is, the entry regulations are set to limit competition with existing lawyers rather than to protect the public.

³ As the following tables will demonstrate, most of the ethically sanctioned actions in Wisconsin involved issues covered on state bar ethics and/or professional responsibility examinations, not on the general bar examinations.

⁴ ANNUAL DISCIPLINE REPORT OF THE STATE BAR OF CALIFORNIA, at 41 (April 30, 2016). In 2015 there were 2763 disciplinary reports by others compared with only 242 self-reports by attorneys and by judges. *Id.*, at 34 and 42.

Finally, Table 3 compares the data listed in Tables 1 and 2 to demonstrate the comparisons between the two groups of Wisconsin attorneys regarding patterns of disciplinary violations.

II. *Discussing of the Wisconsin Disciplinary Data.*

Table 3 demonstrates many important comparative differences between the Wisconsin diploma privilege and bar examination admittees regarding their ethical violation histories:

Table 3
COMPARISON BETWEEN WISCONSIN ATTORNEYS'
DISCIPLINARY HISTORIES BASED UPON ADMMISSION BY
DIPLOMA PRIVILEGE VERSUS BAR EXAMINATION

<u>CATEGORY</u>	<u>DIPLOMA PRIVILEGE</u>	<u>BAR EXAMINATION</u>
Mean Prior Ethical Violations	0.99	1.52
Percentage with Prior Ethical Violations	49%	70%
Percentage with Dishonesty Violations	33%	43%
Percentage with Diligence Violations	45%	50%
Percentage with Monetary Violations	44%	46%
Percentage with License Practice Violations	14%	27%

Table 3 demonstrates the following important differences and similarities between these groups of attorneys:

A. *Mean Prior Ethical Violations.*

The bar examination group had a higher mean prior ethical violation history. The bar admittees in the 56 cases had 85 prior sustained ethical violations for a mean of **1.52** prior violations per published case.

In contrast, the diploma privilege group had a much lower mean prior ethical violation history. The diploma privilege group in the 84 cases had 83 prior sustained ethical violations for a mean of only **0.99** prior violations per published case.

B. Percentage of Attorneys with No Prior Ethical Violation.

70% of disciplined bar examination attorneys had one or more prior sustained ethical violations. However, only **49%** of diploma privilege attorneys had one or more prior sustained ethical violations. This data not only demonstrates a significantly higher recidivist ethical violation history among bar admitted attorneys, it also demonstrates a different pattern of ethical behavior within the two groups of attorneys. Since 51% of diploma privilege attorneys had no prior sustained ethical violations, it demonstrates that just a few of these diploma privilege attorneys accounted for a high percentage of the prior ethical violations.⁵ In contrast, 25% of bar admitted attorneys had three or more prior ethical violations.⁶ Recidivist ethical violations are substantially higher among bar examination admitted attorneys.

C. Percentage of Attorneys with Sustained Findings of Dishonesty.

Although knowledge of the attorney duties of candor and honesty are central to the professional responsibility bar examination (MPRE), they are rarely or very lightly tested on the general bar examination. Therefore, although the differences among diploma privilege and bar examination attorneys in the percentage of attorneys discipline for dishonesty is interesting, it does not support increasing MBE cut scores or in reducing bar examination pass rates in order to increase consumer protection. The survey results demonstrate that bar examination admittees had a 10% greater number of sustained disciplinary cases based upon dishonest conduct (43% bar admittees versus 33% diploma admittees). Therefore, even if the general bar examination tested the ethical duties of candor and honesty, the bar admittees had more violations than those admitted by diploma privilege.

D. Breadth of Ethical Violations.

Bar admitted attorneys had a higher percentage of ethical violations in each of the six categories charted in Table 3: (mean prior ethical violations; percentage with prior ethical violations; percentage with dishonesty ethical violations; percentage with diligence ethical

⁵ Table 2 demonstrates that of the diploma privilege attorneys had serious recidivism: four had 3 priors; three had 4 priors; two had 5 priors; one had 6 priors. Those ten diploma privilege attorneys accounted for 40 out of the total 83 prior sustained ethical violations or **48% of all prior sustained ethical violations.**

⁶ Table 2 demonstrates that 25% of bar admittee attorneys had three or more ethical violations (14 out of 56).

violations; percentage with monetary violations; and, percentage of violations based on license problems). This data demonstrates two critically important facts: (1) passing a bar examination had no correlation with reducing ethical violations or in increasing consumer safety; and (2) since **96%** of sustained ethical violations did not concern skills or subjects tested on the general bar examination, the bar examination is simply irrelevant or at best marginally relevant on the public policy of consumer protection.

III. *An Analysis of 2016 California State Bar Court Disciplinary Cases.*

As the following analysis demonstrates, the finding that Wisconsin disciplinary cases rarely involve violations of subjects frequently tested on the general bar examination, as opposed to the MPRE, is consistent with the pattern of disciplinary sanctions in California. This analysis studied the 163 disciplinary cases decided by the California State Bar Court in the Hearing and in the Review Departments from January 1, 2016 through April 29, 2016.⁷

A. **Summary of California State Bar Court Disciplinary Cases.**⁸

It is critical to note that **0 out of 163** state bar court disciplinary cases during the last six years involved an issue covered by the twelve non-professional responsibility substantive topics on the California general bar examination.⁹ Therefore, California's claim that it is essential to have a general bar examination with an extremely high cut score and very low bar passage rate in order to protect consumers is simply absurd and against the evidence.

Although the California general bar examination includes some professional responsibility topics¹⁰, during the last six years and twelve bar examinations (February 2010 to

⁷ The disciplinary case information was found at (<http://www.statebarcourt.ca.gov/HearingDepartmentDispositions.aspx>) and (<http://www.statebarcourt.ca.gov/ReviewDepartmentDispositions.aspx>) on May 8, 2016. Although 180 cases were decided during January through April 2016, thirteen of those cases resulted in dismissal of all charges and four cases involved bar members terminated due to death. In addition, eight cases were either dismissed or withdrawn. This analysis, therefore, only involves the 163 cases that resulted in determinations of ethical violations.

⁸ This data is included in Tables 4 through 4D.

⁹ The past 6 years of California state general bar examination questions are at (<http://admissions.calbar.ca.gov/Examinations/PastExams.aspx>). Those twelve substantive topics are: business associations, civil procedure, community property, constitutional law, contracts, criminal law and procedure, evidence, real property, remedies, torts, trusts, wills and succession. (http://admissions.calbar.ca.gov/Portals/4/documents/gbx/BXScope_R.pdf).

¹⁰ From February 2010 through July 2015 professional responsibility issues played a very limited role on the California bar examination. Out of those twelve bar examinations only six out of the twelve exams had a discrete professional responsibility question rather than including a limited professional responsibility issue as a small part in another substantive law question.

July 2105), not a single question addressed the number one California State Bar Court ethics violation – unethical client trust account management.¹¹ As Tables 4 through 4D demonstrate, 51% of the California disciplinary cases (83/163) involved violations of client trust account rules, and 14% of the cases (23/163) involved only allegations of trust fund violations. In addition, none of the twelve bar examinations from February 2010 through July 2015 had any questions regarding attorney substance abuse and alcoholism even though a substantial portion of the 18% of state bar court disciplinary cases involved criminal arrests for DUI or substance abuse or for failure by members to meet state bar court probation conditions.¹²

The State Bar of California has not published any empirical evidence to support its consumer protection rationale for dramatically increasing its MBE cut scores above the national median or to support the necessity of its very low bar passage rates.¹³ As my studies of the Wisconsin and California State Bar disciplinary systems demonstrate, there is no correlation between bar passage and attorney disciplinary rates or the types of disciplinary violations committed. Until the California bar examiners produce empirical evidence of the connection between its very high MBE cut score and low bar passage rates and consumer protection, the ABA Council should remain skeptical, especially since those aberrant bar examination standards have had and will continue to have an extremely negative impact on the minority law school and practicing bar pipelines.

CONCLUSION

My April 22 and May 7, 2016 empirical analyses of Wisconsin state bar published disciplinary opinions are the first studies to test state bar examiners' justification for raising MBE cut scores well above the national median and for lowering the bar passage rate substantially lower than the national median.

These analyses clearly demonstrate that there is no statistically valid correlation between passing a bar examination and higher levels of consumer protection demonstrated by lower state

¹¹ Although some bar examination topics involved economic issues, they did not address the common trust account violations proven in state bar court proceedings. For instance, the July 2010 test included issues of written fee agreements, the February 2012 test included an issue of expert witness fees, and the July 2012 test included issues of reasonable attorney fees and the prohibition of attorney interest in case outcome.

¹² See Tables 1 to 1D.

¹³ For instance, the California bar examiners could compare the disciplinary records of the different groups of attorneys who passed the bar examination under different California MBE cut scores during the last few decades of bar administration. Additionally, they could compare the disciplinary records of attorneys who passed the California general bar examination with those who passed the California attorney bar examination after having passed a bar examination in a different state that has a lower MBE cut score.

bar ethical disciplinary violations. In fact, the percentage of Wisconsin attorneys admitted after passing a bar examination who are recidivist ethical violators is substantially higher than Wisconsin attorneys admitted pursuant to the diploma privilege.

This data is critically important regarding the Council's consideration of the proposed changes to Standard 316 (bar passage) for several reasons:

- (1) The ABA can no longer take at face value claims by state bar associations that very high MBE cut scores and very low bar passage rates are a legitimate means of increasing consumer protection rather than a veiled effort at attorney monopoly;
- (2) The ABA should now shift the burden to state bar associations to produce verifiable evidence that rebuts my analyses and that proves that bar passage standards well above the national median lowers attorney ethical violations and increases consumer safety;
- (3) The ABA must reconfigure the cost/benefit analysis of its two competing public policies: consumer protection and increased minority bar membership representation. This requires a three-step analysis:

First, the ABA should discount the legitimacy of high MBE cut scores and low bar passage rates as means of consumer protection.

Second, the ABA needs to appropriately factor the negative effects of these illegitimate state consumer protection policies on the minority law school and bar admission pipelines.

Third, the ABA needs to determine the cumulative impact on the minority pipeline of the unproven state bar consumer protection policies when combined with the proposed radical increase in the ABA bar passage from 75% in 5 years to 75% in 2 years in Standard 316. As my studies demonstrate, there will be a significant cumulative impact on minorities if the proposed 75% within 2 year bar passage rate is applied to states with very high MBE cut scores and very low bar passage rates.

After carefully balancing the ABA policies of consumer protection and increased minority attorney representation, hopefully, the Council will either remand the proposed changes to Standard 316 back to the Standards Review Committee for reconsideration, or on its own shift from a most drastic alternative remedy of a 75% bar passage in 2 years to a reasonably balanced

alternative of modifying the bar passage standard to 75% in 4 years. This more reasonable and modest proposal will assure that the diversity pipeline is not needlessly narrowed while at the same time providing more consumer protection in bar passage standards, especially when coupled with the new ABA mandatory information transparency policies and rules. The 75% within 4 years standard will provide prospective law student consumers with sufficient information and protection without creating a rule that will substantially reduce California law schools' ability to provide minority law school applicants with a reasonable opportunity to study law without the serious threat of ABA dis-accreditation.

Table 1
ANALYSIS OF ETHICAL VIOLATIONS
OF WISCONSIN ATTORNEYS ADMITTED BY "BAR EXAMINATION"

CASE NUMBER	# Previous Violations	Dishonesty	Diligence/ Communication	Monetary Violations	No Active License
2014AP2918-D	2		Y	Y	Y
2012AP2322-D	1	Y			Y
2014AP482-D	3	Y		Y	
2013-OLR-14	5				Y
2013AP732-D	3		Y	Y	
2013AP312-D	2		Y	Y	
2012AP484-D	1		Y	Y	
2012AP2152-D	1		Y	Y	Y
2014AP2535-D	2	Y	Y		Y
2014AP569-D	2	Y	Y	Y	Y
2010AP1118-D	3				
2012AP2334-D	2	Y	Y	Y	Y
2012AP2487-D	4				Y
2014-OLR-4	1		Y	Y	
2011AP1400-D	1	Y		Y	
2013AP948-D	1	[Reinstatement	Petition	No New	Charges]
2014-OLR-3	0				
2013-AP1769-D	0	Y			
2014XX817-BA					
2010AP1348-D	2	Y		Y	
2014-OLR-8	0		Y	Y	
2012AP740-D	2	Y			
2015-OLR-5	3		Y		
2012SP967-D	8	Y			
2014AP495-D	1	Y			
2003AP2039-D	2	Y			
2014AP2578-D	0		Y	Y	
13-OLR-10	0		Y		
2014AP1523-D	0			Y	
2015AP1422-D	0		Y	Y	Y
2012AP486-D	3	Y	Y	Y	Y
2014AP2043	3		Y	Y	
2015-OLR-1	1	Y	Y		Y
2013AP2685-D	0	Y			
2013AP2300-D	0	Y		Y	
2013AP2088-D	0		Y	Y	
2012AP406-D	4		Y	Y	
2013-OLR-9	0	Y			Y

Table 1 (continued)
ANALYSIS OF ETHICAL VIOLATIONS
OF WISCONSIN ATTORNEYS ADMITTED BY “BAR EXAMINATION”

CASE NUMBER	# Previous Violations	Dishonesty	Diligence/ Communication	Monetary Violations	No Active License
2013AP2742-D	3	Y		Y	
2014AP337-D	0	Y			
2011AP2961-D	1	[Failed to	Report	Criminal	Conviction]
2013AP1770-D	1		Y		
2013AP1720-D	0			Y	
2012AP60-D	3			Y	
2013AP434-D	4				Y
2013AP2089-D	1	Y			
2015-OLR-4	2			Y	
2011AP387-D	0		Y		
2013AP1485-D	1		Y	Y	
2014AP515-D	1	Y	Y		Y
2013AP1619-D	2		Y	Y	
2015-OLR-1	1		Y		Y
2014AP1622-D	0	Y	Y		
2013AP490-D	0	[Medical	Incapacity]		
2013-OLR-11	0	Y	Y		
2012AP1845-D	2	Y	Y		

Table 2
ANALYSIS OF ETHICAL VIOLATIONS
OF WISCONSIN ATTORNEYS ADMITTED BY “DIPLOMA PRIVILEGE”

CASE NUMBER	# Previous Violations	Dishonesty	Diligence/ Communication	Monetary Violations	No Active License
2015AP2032	1			Y	
2013AP2702-D	0	Y			
2015AP1340-D	0		Y		
2015AP460-D	0		Y	Y	
2014AP41-D	0	[Failure to	Report	Criminal	Conviction]
2013AP2126-D	0	[Felony	Conviction]		
2012AP385-D	0		Y	Y	
2014-OLR-2	0			Y	
2013AP505-D*	0	Y	Y	Y	
2016AP217-D	1				Y
2011AP1767-D	2		Y	Y	
2012AP2423-D	3	Y	Y	Y	
2014AP1443-D*	0		Y		Y
2015AP1984-D	0		Y		
2014AP1242-D	0		Y	Y	
2011AP1820-D	3	Y	Y		
2015-OLR-7	4	Y	Y	Y	
2014AP2732-D*	2		Y	Y	
2012AP1827-D	0		Y	Y	
2012AP2321-D	1	Y	Y	Y	
2013AP1439-D	0		Y	Y	
2013AP2705-D	0			Y	
2013AP1137-D	1	Y	Y	Y	
2014AP340-D	2	Y	Y		
2012AP2338-D	1		Y	Y	
2012AP2695-D	0		Y	Y	
14-OLR-7	1	Y	Y		
2009AP284-D	5			Y	
2013AP314-D	1			Y	
2014AP2906-D	2	[Criminal	Conviction]		
2014AP517-D	0				Y
2012AP2727-D*	0	Y	Y		
2012AP2361-D	2	Y	Y	Y	Y
2012AP818-D	1		Y		Y
2014AP7-D	1		Y		Y
2014AP28-D	2		Y	Y	Y
2013AP1483-D	0	[Criminal	Conviction]		

Table 2 (continued)
ANALYSIS OF ETHICAL VIOLATIONS
OF WISCONSIN ATTORNEYS ADMITTED BY “DIPLOMA PRIVILEGE”

CASE NUMBER	# Previous Violations	Dishonesty	Diligence/ Communication	Monetary Violations	No Active License
2013AP360-D	4	Y			
2009AP941-D	1	[reinstatement	no new	charges]	
2011AP2760-D	0	[misconduct	petition	dismissed]	
2013AP2128-D	0	[criminal	conviction]		
2011AP2758-D	0	[harassment	and	inappropriate	sex]
2013AP2836-D	2			Y	
2015-OLR	1		Y		Y
2014AP974-D	0			Y	
2007AP2763-D	1	[DUI	and no	required	drug tests]
2013AP746-D	3		Y	Y	
13-OLR-12	2		Y		
2011AP584-D	6	Y		Y	Y
2013-OLR8	0	Y			
2013AP2362-D	2	Y			Y
2013AP2140-D	0	Y	Y		Y
2011AP3009-D	5	[misconduct	petition	dismissed]	
2013AP329-D	0		Y		
2015-OLR-2	0		Y	Y	
2002AP875-D	1	[no new	charges;	attorney	reinstated]
2014AP2476-D	0	Y	Y	Y	
2010AP1576-AP	1	[no new	charges	attorney	Reinstated]
2014AP2801-D	0	Y			
2015AP578-D	2	Y		Y	
2012AP2341-D	0	[improper	sexual	relationship]	
2015-OLR-3	0	[criminal	conviction]		
2012AP366-D	0	[criminal	convictions]		
2013AP2780-D	1	[criminal	conviction]		
2011AP259-D	1	[no new	charges;	attorney	reinstated]
2011AP2946-D*	1		Y	Y	
2014AP804-D	0		Y	Y	
2012AP1965-D	1	[offensive	statements	during an	election]
2013AP133-D	0	Y			
2012AP2350-D	0	Y		Y	
2012AP1826-D	0	Y		Y	

Table 2 (continued)
ANALYSIS OF ETHICAL VIOLATIONS
OF WISCONSIN ATTORNEYS ADMITTED BY “DIPLOMA PRIVILEGE”

CASE NUMBER	# Previous Violations	Dishonesty	Diligence/ Communication	Monetary Violations	No Active License
2013AP149-D	4	Y	[criminal	conduct]	
2014AP2125-D	0		Y		
2014AP175-D	0				Y
2015AP1732-D	0	[criminal	conviction]		
2015AP284-D*	1		Y		
2011AP2458-D	0	[misconduct	petition	dismissed]	
2013AP2230-D	0	Y	Y		
2012AP1949-D	2	Y			
2014AP2086-D	3	Y		Y	
2012AP931-D	2	Y		Y	
14-OLR-1	0			Y	
2015AR1649-D	0		Y	Y	
2013AP1362-D	0	Y		Y	

Table 4
ANALYSIS OF ETHICAL VIOLATIONS
OF CALIFORNIA ATTORNEYS JANUARY TO APRIL 2016

CASE NUMBER	# Previous Violations	Dishonesty	Diligence/ Communication	Monetary Violations	No Active License
15-N-14494	1	Y	Y		Y
15-O-10060	1	Y		Y	
13-O-16607	3		Y	Y	
14-O-05540	2	Y	Y	Y	
14-O-04341	0	Y		Y	
14-O-00910	0	Y		Y	
14-O-03864	0		Y	Y	Y
14-O-04095	0	Y	Y		
14-O-05372	0		Y		
15-O-11186	0	Y			
15-O-12440	0		Y	Y	
14-O-04072	0			Y	
14-O-04814	0	[CRIMINAL	CONVICTION]		
15-O-11763	0		Y	Y	
14-O-01807	0	Y	Y	Y	
15-O-11182	1	Y			
13-O-13951	0		Y	Y	Y
15-O-11924	0	Y			Y
15-O-11202	0	Y			Y
15-O-11212	0	Y			Y
15-J-12566	0			Y	
13-O-12373	0		Y	Y	
11-C-16691	1	[CRIMINAL	CONVICTION]		
13-O-17015	2			Y	
12-O-18141	1		Y	Y	
14-O-00577	1		Y	Y	
15-O-11121	1		Y	Y	
12-J-10617	0	Y			
15-J-10942	0				Y
12-O-17394	0		Y	Y	
15-O-11900	0	Y			Y
15-O-11209	0	Y			Y
15-O-11173	0	Y			Y
09-O-16405	3	Y			Y
12-O-13784	1	[CRIMINAL	CONVICTION]		
14-N-05747	1		Y	Y	Y
15-TB-15790	1			Y	

Table 4A
ANALYSIS OF ETHICAL VIOLATIONS
OF CALIFORNIA ATTORNEYS JAN. TO APRIL 2016

CASE NUMBER	# Previous Violations	Dishonesty	Diligence/ Communication	Monetary Violations	No Active License
15-O-10278	0	Y	Y	Y	
15-O-10045	1	Y		Y	
15-O-10023	1	Y		Y	
15-H-12443	1	[FAILURE TO MEET STATE	MEET STATE	BAR	PROBATION]
14-O-05168	1	[CRIMINAL CONVICTION]			
15-O-11331	3	[FAILURE TO MEET STATE	MEET STATE	BAR	PROBATION]
13-O-14986	1	Y			Y
14-O-00699	0		Y	Y	
15-O-10870*	0		Y		
15-O-11291	0			Y	
15-C-10697	0	[CRIMINAL CONVICTION]			
15-C-10916	0	[CRIMINAL CONVICTION]			
15-O-11175	1	Y			Y
15-C-11007	0	[CRIMINAL CONVICTION]			
14-O-06421	0	Y			Y
14-O-02844	0			Y	
15-O-11172	0	Y			Y
14-O-04421	0				Y
12-O-18036*	0	Y	Y	Y	
14-O-00483	0	Y	Y	Y	
15-O-12101	0			Y	
15-O-10030	0	Y		Y	
06-O-14925	0		Y	Y	
14-O-04007	1			Y	
13-O-14743	0		Y	Y	Y
14-J-05962	1	[VOLUNTARY RESIGNATION	RESIGNATION	BOTH	CASES]
14-O-06098					
15-O-11466	0		Y	Y	Y
15-O-11732	0		Y	Y	
13-C-15582	0	[CRIMINAL CONVICTION]			
14-C-00259	0	[CRIMINAL CONVICTION]			
14-O-04620	2		Y		
14-O-04902	0			Y	Y
15-N-12501	1	[FAILURE TO MEET STATE	MEET STATE	BAR	PROBATION]
12-O-15002	2		Y		Y
15-O-10380	0		Y	Y	
14-O-00897	0	Y		Y	
15-PM-15232	1	[FAILURE TO MEET STATE	MEET STATE	BAR	PROBATION]

Table 4B
ANALYSIS OF ETHICAL VIOLATIONS
OF CALIFORNIA ATTORNEYS JAN. TO APRIL 2016

CASE NUMBER	# Previous Violations	Dishonesty	Diligence/ Communication	Monetary Violations	No Active License
13-O-14406	0		Y		
14-O-01475	0		Y		
16-ZA-11030	0			Y	
16-ZA-11198	0			Y	
16-PM-10615	1	[FAILURE TO	COMPLETE	BAR	PROBATION]
16-PM-10320	1	[FAILURE TO	COMPLETE	BAR	PROBATION]
15-C-12992	0	[CRIMINAL	CONVICTION]		
14-N-04548	2	[FAILURE TO	COMPLETE	BAR	PROBATION]
15-O-10266	0	Y		Y	
14-O-00143	0		Y	Y	
15-O-11281	0		Y	Y	
15-J-10991	0		Y		
14-O-04265	0		Y	Y	
15-O-11722	1		Y	Y	
15-O-10512	0	Y	Y	Y	
15-O-12681	0	Y	Y	Y	
15-O-14375	0	Y			Y
15-O-14382	0	Y			Y
15-O-10504	0		Y	Y	
12-O-14411	0			Y	
15-O-11905	0	Y			Y
15-O-12082	0	Y			Y
13-C-10684	0	[CRIMINAL	CONVICTION]		
13-C-10790	0	[CRIMINAL	CONVICTION]		
13-O-16596	0		Y	Y	
14-O-02828		[RECORDS	NOT	PUBLICLY	AVAILABLE]
14-O-02998	0		Y	Y	
14-O-03594	0		Y	Y	
13-O-16121		[RECORDS	NOT	PUBLICLY	AVAILABLE]
15-O-10938	1	[FAILED TO	COMPLETE	BAR	PROBATION]
16-AE-10508	0			Y	
16-AE-10509	1			Y	
14-O-05187	1	Y	Y	Y	
15-H-11371	1	[FAILED TO	COMPLETE	BAR	PROBATION]
14-O-06274	0	Y	Y	Y	
14-O-06338	1			Y	
15-N-12582	3	[FAILED BAR	PROBATION]	Y	

Table 4C
ANALYSIS OF ETHICAL VIOLATIONS
OF CALIFORNIA ATTORNEYS JAN. TO APRIL 2016

CASE NUMBER	# Previous Violations	Dishonesty	Diligence/ Communication	Monetary Violations	No Active License
13-O-14121	0		Y	Y	
14-O-00208	0		Y	Y	
14-O-01755	0			Y	
14-O-04976	0			Y	
14-O-05337	0	Y		Y	
14-O-05439	0		Y	Y	
15-O-12589	0	Y	Y	Y	
15-N-11857	2	Y		Y	Y
14-O-06314	0		Y	Y	
14-O-02716	0	Y	Y	Y	
15-J-12016	0		Y	Y	
14-O-06419	0			Y	
15-C-13232	0	[CRIMINAL	CONVICTION]		
15-O-12835	0		Y	Y	
15-C-10630	0	[CRIMINAL	CONVICTION]		
15-V-12838	1		Y	Y	
16-ZA-12077	1	[PROBATION	COMPLETED	REENROLLED	ACTIVE]
16-PM-10389	1	[FAILED TO	MEET STATE	BAR	PROBATION]
14-O-04592	0	Y	Y	Y	
14-O-01968	0	Y			
14-O-05941	1		Y	Y	
15-O-13271	1		Y	Y	
15-O-13585	2	[FAILED TO	MEET STATE	BAR	PROBATION]
15-O-12479	1		Y		
16-O-10936	1		Y		
15-C-13689	2	[CRIMINAL	CONVICTION]		
15-C-13914	2	[CRIMINAL	CONVICTION]		
15-O-10522	0			Y	
16-O-11084	1	[FAILED TO	MEET STATE	BAR	PROBATION]
15-O-10337	0		Y	Y	
15-O-10784	0			Y	
15-O-14308	0	Y			Y
12-O-17631	0			Y	
15-O-12010	0			Y	
15-O-14471	0	Y			Y
15-O-12694	0	Y		Y	
15-O-12605	1			Y	

TO: ABA COUNCIL
FROM: WILLIAM WESLEY PATTON¹
RE: STANDARDS REVIEW COMMITTEE PROPOSED AMENDMENTS
TO STANDARD 316 (BAR PASSAGE)
DATE: APRIL 22, 2016

ANALYSIS IN OPPOSITION TO AMENDMENTS TO STANDARD 316

INTRODUCTION

*State bar associations for decades have justified increasing the rigorousness of their bar examinations as necessary measures for consumer protection. Thus, states like California have several times increased their state MBE passing cut scores well beyond national medians. No state has provided any empirical evidence that increasing the difficulty of a bar examination has any relationship with increasing consumer protection (decreasing attorney discipline based upon incompetency and/or ethical violations). This study of the Wisconsin State Bar disciplinary system demonstrates for the first time that **there is no statistical correlation between passing a bar examination and the percentage of attorneys disciplined**. This research is critical to the discussion of the proposed changes to Standard 316 (bar passage) because it demonstrates that many state bar associations have sacrificed the ABA's historical goal of increasing minority bar membership for an unproven method of consumer protection, needlessly increasing the difficulty of their bar examinations well beyond national norms. The ABA Council has a responsibility to assure that its own standards do not exacerbate the negative impact of these unproven and unjustified state bar examination standards on minority law school applicants and upon the percentage of minority representation in the bar.*

The Council has never publicly debated the current crisis in minority law school enrollment caused by **non-consumer based** bar examination passage rate manipulation by state bar associations seeking attorney monopolies by stemming the flow of new admittees. Inherent in Standard 316 (bar passage) is the assumption that state bar regulators will not promulgate bar passage standards that unreasonably restrict new and minority attorneys into the practice of law for unlawful or illegitimate public policy reasons.

¹ Professor Emeritus, Whittier Law School; Assistant Clinical Vol Professor, UCLA David Geffen School of Medicine, Department of Psychiatry. I am submitting these comments on my own behalf, and they are not submitted on behalf of Whittier Law School or the UCLA School of Medicine.

States with very low bar passage rates and very high MBE cut scores [MBECS]² have fended off allegations of attorney monopoly by the state bar association by justifying low bar passage rates as necessary for consumer protection. “[A]ccording to Oklahoma Supreme Court Justice Steven Taylor, ‘the purpose of the bar examination is to screen applicants in such a way to protect the public and to protect the reputation of the legal profession.’”³ No low bar passage rate or high MBECS state has presented any empirical evidence that substantially increasing cut scores provides more protection for the public.⁴ For example, California has not produced any empirical data to demonstrate that raising its cut score from the national median MBECS of

² MBE cut scores or "minimum passing scores" are decided by each state. "Using the MBE's 200-point scale, the Summer 2001 cut scores ranged from 118 (South Carolina) to 150 (Nevada) out of 200, with a median of 133." Gary S. Rosin, *Unpacking The Bar: Of Cut Scores and Competence*, 32 J. Legal Prof. (2008) (<http://ssrn.com/abstract=914224>), at p. 5.

³ *What Do Lower Bar Passage Rates For the Bar Exam Really Mean?*, April 8, 2016 (<https://openobvious.wordpress.com/2016/04/08/what-do-lower-pass-rates-for-the-bar-exam-really-mean/>). “Licensing processes, including most significantly the test instruments that are administered, should exist solely to meet the objectives of consumer protection.” Erica Moeser, *Rethinking Assessments and Alternatives to Assessments from the Perspective of a Bar Examiner*, 20 Ga. St. U. L. Rev. 1051 (2004). The State Bar of California prides itself on having one of the most difficult bar exams in the country: ‘To practice law in California, State Bar applicants must pass a rigorous three-day examination . . . considered one of the toughest in the nation, is administered by the Committee of Bar Examiners (CBE).’ (<http://www.calbar.ca.gov/AboutUs/StateBarOverview.aspx>).

⁴ “Although bar examiners have proffered . . . general arguments about attorney competence and the need for stricter bar admission standards, none has produced concrete evidence that existing standards are ineffective in preventing unqualified individuals from practicing law. Boards, for example, have not cited evidence that disciplinary complaints based on competence have been unacceptably high under current passing standards.” Deborah J. Merritt, Lowell L. Hargensa, and Barbara F. Reskin, *Raising the Bar: A Social Science Critique of Recent Increases to Passing Scores on the Bar Exam*, 69 U. Cin. L. Rcv. 929, 940 (2001).

135 to 144 provides consumers with any increased protection from incompetent and/or unethical attorneys.⁵

Unfortunately, the ABA has never challenged very high cut score states to demonstrate that high MBECS are reasonable or whether they constitute good public policy since those *out-of-the norm standards* lead to a system in which racial and ethnic minorities have not become a greater percentage of the practicing bar. However, since the Council is now considering radically increasing its bar passage standard (75% in 5 years to 75% in 2 years), it must now consider that proposal in light of the cumulative effect of that proposed standard on minorities in states with excessively high MBECS scores. Although the Council has no power to regulate state bar passage standards, it does have the power to assure that its own Standards do not exacerbate the effect of those state standards on the admission of minorities to the bar⁶.

⁵ The national median MBE scaled passage score was derived from Chart 9 in COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 2016, at 29-30 (National Conference of Bar Examiners and ABA Section of Legal Education and Admission to the Bar) by averaging the 48 states that reported “Minimum Passing Standards” for the “200 Point Scale. California’s desire to limit the licensing of new attorneys, although not relevant on the issue of consumer protection, is understandable since it has the second most active attorneys licensed to practice law. *Lawyers Per Capita By State* (<https://lawschooltuitionbubble.wordpress.com/original-research-updated/lawyers-per-capita-by-state/>).

⁶ In the debate about a proposal to substantially raise Florida’s cut score one study demonstrated that: “According to the data submitted by Lawrence, at the current 131 pass/fail line, all minority first-time test-takers had a 58-percent passage rate, raising the pass/file line to 133 dropped it to 48 percent, and raising it further to 136 showed only 42 percent would have passed.” Jan Pudlow, *Raising the Bar Passage Standard*, 28 The Florida Bar News (Aug. 1, 2001).

This is the first study to empirically demonstrate that passage of a bar examination is not correlated to the percentage of state attorney disciplinary actions. This empirical data is critically important to the ABA Council's consideration of the proposed amendments to Standard 316 (bar passage) because it places in context the ABA's critical need to balance consumer rights (the public and law students) with the ABA's historical role in attempting to increase minority attorney representation. In particular, the proposed Standard 316 "75% within 2 year" bar passage rule will have a devastating impact on the number of minority law students in states like California that have very low bar passage rates and very high MBECS (See my previous letters to the Council on March 19, 2016 and April 6, 2016).

I. ***There Is No Statistically Significant Correlation Between Wisconsin Attorney Discipline and the Method of Admitting Members Into the Bar (Diploma Privilege v. Bar Examination).***

This is the first study to empirically demonstrate that passage of a bar examination is not correlated to the percentage of state attorney disciplinary actions. This empirical data is critically important to the ABA Council's consideration of the proposed amendments to Standard 316 (bar passage) because it places in context the ABA's critical need to balance consumer rights (the public and law students) with the ABA's historical role in attempting to increase minority attorney representation. In particular, the proposed Standard 316 "75% within 2 year" bar passage rule will have a devastating impact on the number of minority law students in states like California that have very low bar passage rates and very high MBECS (See my previous letters to the Council on March 19, 2016 and April 6, 2016).

This study analyzes Wisconsin disciplined attorneys from January 2013 to March 2016 in relation to Wisconsin's four methods for admitting attorneys into the practice of law. Only two

states, New Hampshire and Wisconsin, provide students who attend those states' law schools a "Diploma Privilege" that automatically admits those law school graduates as members of the bar without the requirement of passing the state's bar examination.⁷ In addition, Wisconsin provides three other methods for admission to the Wisconsin bar: (1) passage of the Wisconsin bar examination; (2) admission of an attorney licensed and experienced from another jurisdiction; and (3) admission based on the applicant's Universal Bar Examination (UBE) score.⁸ Admission to the Wisconsin bar from 2013 to 2015 demonstrates: (1) 54.6% were admitted per the Diploma Privilege; (2) 22.9% were admitted by passing the Wisconsin bar examination; and (3) 22.5% were admitted through either Admission by Motion or UBE bar examination score from another state:

<u>METHOD OF ATTORNEY ENTRY</u> ⁹	<u>2013</u>	<u>2014</u>	<u>2015</u>	<u>Total</u>	<u>%</u>
Diploma Privilege	461	417	457	1335	54.6
Wisconsin Bar Examination	213	204	144	561	22.9
Motion and UBE	167	154	230	551	22.5

This study analyses whether the percentage of attorneys admitted to the Wisconsin bar through the Diploma Privilege versus all those admitted after taking a bar examination have

⁷ *2015 Statistics*, The Bar Examiner, March 2016, at 36.

⁸ *Id.*, at 35

⁹ This data is obtained from *2015 Statistics*, at 35.

higher or lower rates of attorney discipline.¹⁰ According to state bar examiners who justify the bar examination as necessary to protect consumers, the hypothesis is that attorneys who are admitted by passing a bar examination will have a much smaller percentage of disciplinary violations than a group of attorneys admitted through the diploma privilege without taking a bar examination. As this study demonstrates, empirical data does not support that hypothesis.

Wisconsin publishes an online list of attorneys who have been disciplined from January 2013 to March 2016.¹¹ A survey of that data demonstrates that:

- (1) During that approximate three-year period a total of 131 attorneys were publicly disciplined¹²;
- (2) 81 out of the 1335 attorneys admitted to the bar under the diploma privilege were disciplined;
- (3) 50 out of the 1112 attorneys admitted after the passage of a bar examination were disciplined.¹³

A statistical analysis of this comparative disciplinary data between those Wisconsin attorneys admitted pursuant to the diploma privilege and through passage of a state bar

¹⁰ The three categories of Wisconsin attorneys admitted after a bar examination are: (1) those who took the Wisconsin bar examination; (2) those who took another state bar examination who are admitted by motion; and, (3) those who were admitted by submitting their UBE scores.

¹¹ See, *Wisconsin Court System For the Public, Status of Lawyer Disciplinary Matters - List of Publicly Disciplined Lawyers* (<https://wicourts.gov/services/public/lawyerreg/status/public/lawyerreg>).

¹² Id.

¹³ All three groups for this category took and passed a bar examination and none were admitted through a diploma privilege. The method used to determine whether a disciplined attorney was admitted by the Diploma Privilege or through one of the other three methods of bar certification was by consulting the State Bar of Wisconsin Lawyer Search which lists the laws school from which each of the disciplined attorneys graduated. (<http://www.wisbar.org/directories/pages/lawyerprofile.aspx?>).

examination demonstrates **no statistical significance** between the disciplinary rates among those admitted by diploma privilege or those taking a bar examination. The bar examination admittees were thus from states that formed a cross-section of high, moderate and difficult bar examinations and MBECS standards.¹⁴

$$X^2 = \sum_{i=1}^r \sum_{j=1}^c \frac{(O_{i,j} - E_{i,j})^2}{E_{i,j}}$$

The statistical chi square analysis for this study is¹⁵:

	Not Disciplined		Disciplined		Marginal Row Totals		
Diploma Privilege	1254	(1263.53)	[0.07]	81	(71.47)	[1.27]	1335
Bar Exam	1062	(1052.47)	[0.09]	50	(59.53)	[1.53]	1112
Marginal Column Totals	2316			131			2447 (Grand Total)

The chi-square statistic is 2.9551. The *p*-value is .085608. This result is not significant at *p* < .05. The *p*-value, or statistical significance between the variables of methods of bar admission (diploma privilege versus bar examination) and attorney discipline, is 58% away from demonstrating a valid statistical relationship (<.05 demonstrates statistical significance versus the

¹⁴ The ten-year median bar passage rate in Wisconsin is 87.1% and the 10-year median bar passage rates among the fifty non-diploma admitted Wisconsin attorneys' states ranged from 89.9% (Iowa) to 65.3% (D.C.). The 10-year median state bar passage rates were derived from the data published in *2015 STATISTICS*, at 30-33 (The Bar Examiner, March 2016). This list of non-diploma admitted Wisconsin attorneys is based upon the information obtained on the Wisconsin Court System web page (<https://wicourts.gov/services/public/lawyer/statuspublic>) and the Wisconsin State Bar web pages (<http://www.wisbar.org/Pages/default.aspx>). The 50 out-of-state attorneys attended law schools in the following states (Arizona 1; Illinois 8; California 3; Vermont 1; Minnesota 10; Indiana 4; Georgia 1; Washington 2; Michigan 6; Oregon 1; Iowa 2; Texas 2; Oklahoma 3; Utah 1; Pennsylvania 1; Ohio 1; Colorado 2, and D.C. 1.

¹⁵ For the methodological calculation, see (<http://www.socscistatistics.com/tests/chisquare/Default2.aspx>)

test result of .0856 that shows no statistical significance in the variables).¹⁶ In other words, passing a bar examination had no statistical correlation with attorney disciplinary rates (unethical and/or incompetent representation) in Wisconsin.

States, like California, that have low bar passage rates and very high MBECS standards well above the national median justify those aberrant rates and standards on the unsupported claim that much higher than national bar examination standards protect consumers.¹⁷ However, not a single state with low bar passage rates and high MBECS has produced any empirical evidence to demonstrate an actual correlation between much more rigorous bar examination standards and the level of state disciplinary rates.

This study of Wisconsin disciplinary data is the first evidence to disprove the “low bar passage rate/better consumer protection” rationale.¹⁸ The burden has now shifted to state bar

¹⁶ “Most authors refer to statistically significant as $P < 0.05$ and statistically highly significant as $P < 0.001$ (less than one in a thousand chance of being wrong).”

(http://www.statsdirect.com/help/default.htm#basics/p_values.htm).

¹⁷ “[O]ne might be forgiven for wondering whether the efforts to increase the failure rates on bar examinations are motivated not by a desire to protect the public from incompetent lawyers, but by a desire to protect practicing lawyers from competition with bright, better-educated, new entrants into the legal profession.” Terence L. Blackburn, *Make Tests Relevant*, 85-JAN Mich. B.J. 54.

¹⁸ Theresa M. Gronkiewicz, Deputy Regulation Counsel, ABA Center for Professional Responsibility, said that she is “not aware of any studies tracking or linking law schools, LSAT scores or bar passage rates to lawyers who were subsequently disciplined for engaging in any misconduct, including incompetence.” Email response to Professor William Wesley Patton on March 12, 2016 at 2:48 p.m. The scope of this study was limited by the necessity to publish the results to the Council in time for consideration regarding the proposed changes to Standard 316. I intend to complete an expanded version of this study in the future regarding ten to fifteen years of Wisconsin state bar disciplinary records. That research is more difficult because those records are not electronically available.

associations to provide empirical rebuttal evidence to support their policy of severely limiting access to the bar with its concomitant effect of excluding minority candidates. Until states meet that burden the ABA Council should not simply presume good faith regarding these bar examination standards that substantially exceed national norms. In addition, the Council should be extremely cautious of promulgating its own standards that will exacerbate the anti-minority effects of these unreasonable state standards.

II. *Based Upon This Empirical Study of Wisconsin State Bar Disciplinary Data the Council Can No Longer Assume That Specific High MBECS State Bar Exam Standards Are Essential Or Even Reasonable Means of Protecting Consumer Safety, and Instead Those State Standards Represent An Unjustified Barrier to Minority Bar Representation.*

This study of Wisconsin disciplinary data is the first evidence to disprove the “low bar passage rate/better consumer protection” rationale.¹⁹ The burden has now shifted to state bar associations to provide empirical rebuttal evidence to support their policy of limited bar access and the concomitant effect of excluding minority candidates. Until states meet that burden the ABA Council should not simply presume good faith regarding these over-rigorous bar examination standards that substantially exceed national norms. In addition, the Council should

¹⁹ Theresa M. Gronkiewicz, Deputy Regulation Counsel, ABA Center for Professional Responsibility, said that she is “not aware of any studies tracking or linking law schools, LSAT scores or bar passage rates to lawyers who were subsequently disciplined for engaging in any misconduct, including incompetence.” Email response to Professor William Wesley Patton on March 12, 2016 at 2:48 p.m. The scope of this study was limited by the necessity to publish the results to the Council in time for consideration regarding the proposed changes to Standard 316. I intend to complete an expanded version of this study in the future regarding ten to fifteen years of Wisconsin state bar disciplinary records. That research is more difficult because those records are not electronically available.

be extremely cautious of promulgating its own standards that will exacerbate the anti-minority effects of these unreasonable state standards.

CONCLUSION

In light of California's aberrantly high and empirically unsupported bar passage rules, passage of the proposed ABA "75% within 2 year" bar passage standard will have a devastating impact on minority law school applicants and minority bar representation. I respectfully request that the Council send the proposed changes to Standard 316 (bar passage) back to the Standards Review Committee for reconsideration or that the Council amend the proposal to a "75% within 4 years" standard so that student consumers will be better protected without seriously damaging minority law school admission policies and future minority attorney bar representation.

Table 1
ANALYSIS OF ETHICAL VIOLATIONS
OF WISCONSIN ATTORNEYS ADMITTED BY "BAR EXAMINATION"

CASE NUMBER	# Previous Violations	Dishonesty	Diligence/ Communication	Monetary Violations	No Active License
2014AP2918-D	2		Y	Y	Y
2012AP2322-D	1	Y			Y
2014AP482-D	3	Y		Y	
2013-OLR-14	5				Y
2013AP732-D	3		Y	Y	
2013AP312-D	2		Y	Y	
2012AP484-D	1		Y	Y	
2012AP2152-D	1		Y	Y	Y
2014AP2535-D	2	Y	Y		Y
2014AP569-D	2	Y	Y	Y	Y
2010AP1118-D	3				
2012AP2334-D	2	Y	Y	Y	Y
2012AP2487-D	4				Y
2014-OLR-4	1		Y	Y	
2011AP1400-D	1	Y		Y	
2013AP948-D	1	[Reinstatement	Petition	No New	Charges]
2014-OLR-3	0				
2013-AP1769-D	0	Y			
2014XX817-BA					
2010AP1348-D	2	Y		Y	
2014-OLR-8	0		Y	Y	
2012AP740-D	2	Y			
2015-OLR-5	3		Y		
2012SP967-D	8	Y			
2014AP495-D	1	Y			
2003AP2039-D	2	Y			
2014AP2578-D	0		Y	Y	
13-OLR-10	0		Y		
2014AP1523-D	0			Y	
2015AP1422-D	0		Y	Y	Y
2012AP486-D	3	Y	Y	Y	Y
2014AP2043	3		Y	Y	
2015-OLR-1	1	Y	Y		Y
2013AP2685-D	0	Y			
2013AP2300-D	0	Y		Y	
2013AP2088-D	0		Y	Y	
2012AP406-D	4		Y	Y	
2013-OLR-9	0	Y			Y

Table 1 (continued)
ANALYSIS OF ETHICAL VIOLATIONS
OF WISCONSIN ATTORNEYS ADMITTED BY “BAR EXAMINATION”

CASE NUMBER	# Previous Violations	Dishonesty	Diligence/ Communication	Monetary Violations	No Active License
2013AP2742-D	3	Y		Y	
2014AP337-D	0	Y			
2011AP2961-D	1	[Failed to	Report	Criminal	Conviction]
2013AP1770-D	1		Y		
2013AP1720-D	0			Y	
2012AP60-D	3			Y	
2013AP434-D	4				Y
2013AP2089-D	1	Y			
2015-OLR-4	2			Y	
2011AP387-D	0		Y		
2013AP1485-D	1		Y	Y	
2014AP515-D	1	Y	Y		Y
2013AP1619-D	2		Y	Y	
2015-OLR-1	1		Y		Y
2014AP1622-D	0	Y	Y		
2013AP490-D	0	[Medical	Incapacity]		
2013-OLR-11	0	Y	Y		
2012AP1845-D	2	Y	Y		

Table 2 (continued)
ANALYSIS OF ETHICAL VIOLATIONS
OF WISCONSIN ATTORNEYS ADMITTED BY “DIPLOMA PRIVILEGE”

CASE NUMBER	# Previous Violations	Dishonesty	Diligence/ Communication	Monetary Violations	No Active License
2013AP360-D	4	Y			
2009AP941-D	1	[reinstatement	no new	charges]	
2011AP2760-D	0	[misconduct	petition	dismissed]	
2013AP2128-D	0	[criminal	conviction]		
2011AP2758-D	0	[harassment	and	inappropriate	sex]
2013AP2836-D	2			Y	
2015-OLR	1		Y		Y
2014AP974-D	0			Y	
2007AP2763-D	1	[DUI	and no	required	drug tests]
2013AP746-D	3		Y	Y	
13-OLR-12	2		Y		
2011AP584-D	6	Y		Y	Y
2013-OLR8	0	Y			
2013AP2362-D	2	Y			Y
2013AP2140-D	0	Y	Y		Y
2011AP3009-D	5	[misconduct	petition	dismissed]	
2013AP329-D	0		Y		
2015-OLR-2	0		Y	Y	
2002AP875-D	1	[no new	charges;	attorney	reinstated]
2014AP2476-D	0	Y	Y	Y	
2010AP1576-AP	1	[no new	charges	attorney	Reinstated]
2014AP2801-D	0	Y			
2015AP578-D	2	Y		Y	
2012AP2341-D	0	[improper	sexual	relationship]	
2015-OLR-3	0	[criminal	conviction]		
2012AP366-D	0	[criminal	convictions]		
2013AP2780-D	1	[criminal	conviction]		
2011AP259-D	1	[no new	charges;	attorney	reinstated]
2011AP2946-D*	1		Y	Y	
2014AP804-D	0		Y	Y	
2012AP1965-D	1	[offensive	statements	during an	election]
2013AP133-D	0	Y			
2012AP2350-D	0	Y		Y	
2012AP1826-D	0	Y		Y	

Table 2
ANALYSIS OF ETHICAL VIOLATIONS
OF WISCONSIN ATTORNEYS ADMITTED BY “DIPLOMA PRIVILEGE”

CASE NUMBER	# Previous Violations	Dishonesty	Diligence/ Communication	Monetary Violations	No Active License
2015AP2032	1			Y	
2013AP2702-D	0	Y			
2015AP1340-D	0		Y		
2015AP460-D	0		Y	Y	
2014AP41-D	0	[Failure to	Report	Criminal	Conviction]
2013AP2126-D	0	[Felony	Conviction]		
2012AP385-D	0		Y	Y	
2014-OLR-2	0			Y	
2013AP505-D*	0	Y	Y	Y	
2016AP217-D	1				Y
2011AP1767-D	2		Y	Y	
2012AP2423-D	3	Y	Y	Y	
2014AP1443-D*	0		Y		Y
2015AP1984-D	0		Y		
2014AP1242-D	0		Y	Y	
2011AP1820-D	3	Y	Y		
2015-OLR-7	4	Y	Y	Y	
2014AP2732-D*	2		Y	Y	
2012AP1827-D	0		Y	Y	
2012AP2321-D	1	Y	Y	Y	
2013AP1439-D	0		Y	Y	
2013AP2705-D	0			Y	
2013AP1137-D	1	Y	Y	Y	
2014AP340-D	2	Y	Y		
2012AP2338-D	1		Y	Y	
2012AP2695-D	0		Y	Y	
14-OLR-7	1	Y	Y		
2009AP284-D	5			Y	
2013AP314-D	1			Y	
2014AP2906-D	2	[Criminal	Conviction]		
2014AP517-D	0				Y
2012AP2727-D*	0	Y	Y		
2012AP2361-D	2	Y	Y	Y	Y
2012AP818-D	1		Y		Y
2014AP7-D	1		Y		Y
2014AP28-D	2		Y	Y	Y
2013AP1483-D	0	[Criminal	Conviction]		

Table 2 (continued)
ANALYSIS OF ETHICAL VIOLATIONS
OF WISCONSIN ATTORNEYS ADMITTED BY “DIPLOMA PRIVILEGE”

CASE NUMBER	# Previous Violations	Dishonesty	Diligence/ Communication	Monetary Violations	No Active License
2013AP149-D	4	Y	[criminal	conduct]	
2014AP2125-D	0		Y		
2014AP175-D	0				Y
2015AP1732-D	0	[criminal	conviction]		
2015AP284-D*	1		Y		
2011AP2458-D	0	[misconduct	petition	dismissed]	
2013AP2230-D	0	Y	Y		
2012AP1949-D	2	Y			
2014AP2086-D	3	Y		Y	
2012AP931-D	2	Y		Y	
14-OLR-1	0			Y	
2015AR1649-D	0		Y	Y	
2013AP1362-D	0	Y		Y	

TO: ABA COUNCIL CHAIR, THE HONORABLE REBECA WHITE BERCH
FROM: WILLIAM WESLEY PATTON¹
RE: STANDARDS REVIEW COMMITTEE PROPOSED AMENDMENTS
TO STANDARD 316 (BAR PASSAGE)
DATE: MARCH 19, 2016

ANALYSIS IN OPPOSITION TO AMENDMENTS TO STANDARD 316

The California State Bar Association is in crisis regarding the ratio of the California Hispanic population and the embarrassing and dangerously low percentage of California Hispanic attorneys.² According to the United States Census the percentage of Hispanics in California increased from 32.4% in 2000 to 37.6% in 2010³, and in 2014 comprised **38.6% of the California population.**⁴ However, according to the California State Bar Association, Hispanics comprised 3% of California's attorneys in 1999⁵, 3.7% in 2001, 3.8% in 2006⁶, and in 2011, the most recent survey, Hispanics comprised only **4.2% of California attorneys.**⁷ There are currently 186,600 attorneys licensed to practice law in California⁸, therefore, there are only

¹ Although I am currently a Professor at Whittier Law School, as of July 1, 2016, I am retiring and no longer will be affiliated with the law school. I will not teach there and will not receive a pension from the College. I disclose these facts to demonstrate that I no longer have a financial interest that might conflict with my opinion that the Council should deny the proposed amendment to Standard 316. This analysis is my own, does not necessarily represent the views of Whittier Law School, and I did not consult with any Whittier professors or administrators in drafting this analysis. I will continue in my position as an Assistant Clinical Vol Professor at the UCLA David Geffen School of Medicine, Department of Psychiatry after my retirement from the law school.

² This study focuses on the impact of the amendment to Standard 316 on California Hispanic law school applicants. Others will, I assume, present this Committee with the similar devastating impact on Black/African American law school applicants.

³ www.census.gov/prod/cen2010/doc/sfl.pdf, at Table 2.

⁴ U. S. Census Bureau (<http://www.census.gov/quickfacts/table/PST045215/06#headnote-js-b>).

⁵ *California State Bar Journal Survey, September 10, 2001, at 4* (<http://www.calbarjournal.com/Portals/1/documents/2001-CBJ-Survey-Summary.pdf>).

⁶ *Member Services Survey, Feb. 2006, at 12* <http://www.calbar.ca.gov/LinkClick.aspx?fileticket=AG4sVakYctc%3D&tabid=212>.

⁷ *Survey of Members, December 2011, at 8* (http://www.calbarjournal.com/Portals/1/documents/2011-12_SBCdemosurvey_sumandfacts.pdf).

⁸ (<http://www.calbar.ca.gov/AboutUs/BarNumbers.aspx>).

7, 837 (4.2%) Hispanic attorneys even though there are **14,013,719** Hispanics in California⁹. In addition, Hispanics (39%) are the largest group served by low income access to justice programs in California.¹⁰

Although there is also a national crisis in the number of Hispanics taking the LSAT, applying to law school [7,210 in 2010 v. 6,330 in 2014], matriculating, graduating, and passing the bar examination¹¹, nowhere is the scenario as precarious as in California where approximately 32.9% of all Mexican-American law school graduates took the bar examination according to one study.¹² However, we are on the brink of **two dramatic events** that will substantially reduce the number of Hispanics attending and graduating from California law schools and passing the California bar examination, thus dramatically reducing the number and percentage of Hispanic attorneys:

1. An amendment to ABA Standard 316 to change the bar passage standard to one of 75% of law school graduates in two years of graduation; and,
2. A change by the California State Bar Association increasing the percentage of the MBE portion of the California Bar Examination from 35% to 50%.

Although the Council does not control the nature of the California Bar Examination, that change should be considered by this Committee in determining whether to reject the Standards Review Committee's request for an over-aggressive amendment to Standard 316.

⁹ Supra., note 3.

¹⁰ *Equal Access Fund Partnership Grants...*, at 54 (<http://www.calbar.ca.gov/LinkClick.aspx?fileticket=yWNOa4EQF2o%3D&tabid=736>).

¹¹ In 2000 Hispanics consisted of 3.4% of attorneys, in 2010 3.7%, and in 2014 5.6% even though they represented 17.4% of the United States population. LSAC JD Minority Enrollment (<http://www.lsac.org/lisacresources/data>), at 1; ABA Lawyer Demographics, Number of Licensed Lawyers – 2010.

¹² Alex M. Johnson, *Knots in the Pipeline For Prospective Lawyers of Color: The LSAT Is Not The Problem And Affirmative Action Is Not The Answer*, XXIV:II *Stanford Law & Policy Rev.* 379, 409 (2013).

I. *The Council Should Reject the Amendment to Standard 316 Because It Will Have a Devastating Impact on the Percentage and Number of New California Hispanic Attorneys.*

The ABA is not only responsible for promulgating standards that will assure access to justice and competent and zealous advocacy, it is also carries the burden of assuring that minorities have fair access to law schools and admission to the bar. The Council at its March 2016 meeting stated that it will “continue consideration of proposed changes to Standard § 205 and 206 related to equal opportunity, non-discrimination, and diversity and inclusion” in law school admissions. It is irrational to consider Standards 205 and 206 without also considering the dramatic effect on minorities of accepting the Standards Review Committees proposed 75% within 2 year bar passage rate change in Standard 316. Of equal importance is the Council’s and ABA’s duty to treat minority law school candidates equally and not to promulgate standards that the ABA **knows** will substantially disadvantage minorities in some states such as California. The following analysis demonstrates that the 75% in 2 years proposed standard will single out California Hispanic law students unfairly.

California is unique in a variety of ways which have prohibited an increase in the number of Hispanics practicing law:

First, the California bar examination is one of the most difficult in the nation. For more than 3 decades it has had one of the lowest first-time bar passage rates in the nation. The average first-time bar passage rate in California from 2005 to 2014 was **65%**¹³ compared with many states whose bar passage rates are between **80-90%**¹⁴.

¹³ 2014 Statistics, at 24, The Bar Examiner, March 2015.

¹⁴ Id.

Second, for reason not explained by the California State Bar Association, the California scaled score on the MBE is one of the highest in the nation, thus reducing even further the chances that Hispanic and other minority attorney representation will ever increase. For instance, the California MBE scaled bar passage score is **144**, but in other states the scaled scores average in the mid **130's**. In fact, only five other states (Alaska, Delaware, Idaho, Nevada, and Virginia) have scaled MBE scores in the low 140's).¹⁵ In contrast to the California 144 scaled score, the national median scaled scores from 2005 to 2014 averaged just **141.7**.¹⁶

Third, the California State Bar Association has just increased the percentage the MBE counts on the bar examination from 35% to 50%.¹⁷ This change will further dramatically reduce the chances that Hispanic law school graduates will pass the California bar examination for several reasons:

1. There is a relationship between MBE cut (scaled) scores and bar passage.¹⁸

Therefore, in California as the extremely high MBE scaled score increases from 35% to 50%, the expected bar passage will decrease for certain law taker groups. Although a shifting of the percentage of the MBE on a bar examination will not change the state's bar passage rate, it will change which of those graduates taking the examination will fail.¹⁹ "Changing the weights of the components will affect **who passes**, but it will not affect the percentage of those who pass."²⁰

¹⁵ *Comprehensive Bar Admission Requirements 2016*, at 29-30 (Nat. Conf. of Bar Examiners & ABA).

¹⁶ *Supra.*, note 10, at 35.

¹⁷ *Modification to Format and Grading*, August 14, 2015, State Bar of California (http://admissions.calbar.ca.gov/Portals/4/documents/Examinations/NoticeTwoDay0815_R.pdf).

¹⁸ Mark A. Albanese, *The Testing Column: The July 2014 MBE: Rogue Wave or Storm Surge?*, *The Bar Examiner*, June 2015, at 35.

¹⁹ "[T]he efforts by many state bars to raise their cutoff scores for passage clearly have had a detrimental impact on minorities...." Alex M. Johnson, *Knots in the Pipeline For Prospective Lawyers of Color: The LSAT Is Not The Problem And Affirmative Action Is Not The Answer*, XXIV:II *Stanford Law & Policy Rev.* 379, 406 (2013).

²⁰ Susan M. Case, *The Testing Column: Things That Will Not Affect Bar Passage Rates- and Things That Will*, *The Bar Examiner*, June 2011, at 26.

2. If a state scales its bar exam essay scores to its MBE cut scores it will not affect the percentage of applicants who fail, but **“the particular examinees who fail will be different from those who fail strictly from the MBE alone.** The written score will have an impact on who passes proportionate to its weight.”²¹

This “triple effect” of California’s high MBE scaled score, scaling of the essay portion to the MBE, and reducing the weight of the essay portion of the exam will dramatically reduce the California Hispanic bar passage rate because Hispanic bar applicants historically score much higher on the essay portion of the exam than on the MBE portion. For instance, in one study when the essay portion was scaled to the MBE portion of the bar examination Hispanics’ bar examination scores were reduced more than any other racial minority.²² In July 2014 only 52% of Hispanics passed the California bar examination, and in July 2015 only 51.7% passed.²³ Therefore, we should expect Hispanics to fail the California bar examination at even higher rates in the future based upon the changes in bar examination grading procedures.

3. There is a very strong relationship between Hispanic LSAT scores and projected Hispanic MBE scores.²⁴ For decades Hispanics have been the second lowest scoring racial/ethnic subgroup on the LSAT and have substantially lagged the scores of White applicants (2000-2001 mean White LSAT score 153.9 vs. Hispanic score of 148.3, and 2009-2010 mean White LSAT score 155.3 v. Hispanic 149.5).²⁵ Therefore, we should expect that the increasing

²¹ Mark A Albanese, *The Testing Column: Scaling: Its Not Just For Fish or Mountains*, The Bar Examiner, December 2014, at 55.

²² Michael T. Kane, Andrew A. Mroch, Douglas R. Ripkey, and Susan M. Case, *Pass Rates and Persistence...*, The Bar Examiner, November 2007, at 9-10.

²³ *General Statistics Report July 2014 and 2015 California Bar Examination Overall Statistics*, at 2.

²⁴ Douglas R. Ripkey and Susan M. Case, *A National Look at MBE Performance Differences Among Ethnic Groups*, The Bar Examiner, August 2007, at 25-27; *Id.*, at 42-43; Erica Moeser, *President’s Page*, The Bar Examiner, June 2015, at 5;

²⁵ *Updated Wightman Race-Blind Admission Model Results: 2009-2010 Applicant Data*, at 3 (Law School Admission Council, August 2012).

reliance on the MBE in California to determine first-time bar passage rates will result in lower passage rates for Hispanic applicants.

II. *If the Council Approves the Standards Review Committee's Amendment to Standard 316, California Law Schools Will Substantially Reduce the Number of Hispanics Admitted to California ABA Law Schools.*

There is a constant pressure on ABA approved law schools to deny access to students who have LSAT scores below what many have identified as scores which provide students with an excellent chance to pass the bar examination. For instance, Law School Transparency has issued a report that states that law students with LSAT scores of between 147-149 are at “high risk” of failing the bar examination.²⁶ Obviously, in states like California with an extremely high percentage of Hispanic citizens, the decision not to admit students in this “high risk” category would mean that few Hispanics would be admitted into California ABA law schools since the Hispanic mean LSAT is only 149.5. In fact, if law schools use such an LSAT admission target, the California Hispanic bar will begin to wither.

If the Council adopts the amendment to Standard 316, California law schools will be under the threat of loss of accreditation if they seek to perform the important public policy objective of increasing Hispanic state bar representation. The loss of Hispanic matriculates is not merely theoretical. Those 5 ABA schools most at risk of violating proposed amended

²⁶ (<http://www.lawschooltransparency.com/reform/projects/investigations/2015/analysis/>).

Standard 316 (Golden Gate, Southwestern, Thomas Jefferson, LaVerne, and Whittier) currently enroll **29.8% of all Hispanics attending ABA approved law schools in California.**²⁷

The 5 California ABA accredited law schools listed above are at risk of failing the amended Standard 316 bar passage of 75% within two years if they continue their public policy objective of increasing minority representation in the California bar. For example, the 9-year first-time July bar passage average [2007-2015] of those schools is: Golden Gate 60.55%; Southwestern 62.8%; Thomas Jefferson 51.5%; LaVerne 55%; and Whittier 58.2%. Meeting the “75% within two years” standard will be difficult for these schools, and one way that they can assure a higher bar passage rate is to abandon their historical social policy objective of increasing minority bar representation. In addition, as demonstrated in Part I, supra, the chances of minority applicants passing the California bar examination will be substantially reduced as the exam shifts to a 50% allocation for the MBE and a reduction of the percentage of the essay exam upon which Hispanics perform at a higher level.

III. *The Standards Review Committee Relied on Two Empirically Flawed Studies to Conclude that Minorities Do Not Persist in Taking the Bar Examination Beyond Two Years.*

The Standards Review Committee relies heavily upon one of the least statistically reliable studies that I have ever read to justify its dramatic reduction from the current 5-year bar passage window to its proposed 2-year window. In that study, Susan M. Case, *The Testing Column: Persistence On The Bar Exam*, The Bar Examiner, December 2012, pp. 20-24, the author admits

²⁷ This data on Hispanic enrollment in California ABA approved law schools is derived from (<http://www.abarequireddisclosures.org/>). A total of 2132 Hispanic law students were enrolled in California ABA approved law schools in 2015, and 635 Hispanics were enrolled in 2015 in the above 5 ABA law schools that risk violation of the new 75% bar passage rate within 2 years

that its findings are preliminary and that the conclusions are based upon many guesses and assumptions, not hard evidence. The author admits that: (1) the study is based upon incomplete data because “neither candidates nor jurisdictions provide NCBE with information about the individuals’ bar admission status”; (2) the sample only includes “those examinees with appropriately coded Social Security numbers”; and (3) they are only guessing [“we must assume”] that those students who only took the bar examination once passed the examination. One need only examine the study’s conclusions about minority persisters to demonstrate that its simplistic assumptions and lack of complete data cast a broad shadow upon its conclusions. The study found that only 670 minority candidates in the study sample took the MBE examination at least twice over the “11 administrations” between July 2007 and July 2012. However, during that testing period in California alone, the following numbers of minority applicants repeated the California bar examination:

THE NUMBER OF MINORITIES **REPEATING** THE
CALIFORNIA BAR EXAMINATION²⁸

	<u>Black</u>	<u>Hispanic</u>	<u>Asian</u>
July 2007	250	119	142
Feb. 2008	304	393	482
July 2008	260	304	404
Feb. 2009	242	350	444
July 2009	258	354	413
Feb. 2010	249	376	433
July 2010	247	337	383
Feb. 2011	255	426	492
July 2011	241	339	366

This data regarding minority repeaters on the California bar examination explodes the conclusions of the Case study relied upon by the Standards Review Committee in determining

²⁸ This data is derived from the California State Bar Association web page compiled for each California bar examination under the title “General Statistics Report...California Bar Examination”. (<http://admissions.calbar.ca.gov/LinkClick.aspx?fileticket=PL6VLVgQEIM%3d&tabid=2269&mid=3159>).

that since few bar applicants persist in retaking the bar examination that a shorter bar window should be used in Standard 316. The Case study draws this very suspicious conclusion:

“Assuming that most of them [MBE takers] pass, we may conclude that most examinees pass the bar exam on their first attempt.” It is obvious that the Case study did not rely on data from those states, like California, that have consistently low bar passage rates and which have even lower bar passage rates among minority applicants. According to the Case study one would conclude that most of the **1945** Black, Hispanic, and Asian minority California bar test takers in June 2015 passed the exam. In fact, **937** of those minority applicants failed that bar exam. In addition, in contrast to the Case study, the chart above demonstrates that minority applicants that fail the California bar examination continue to retake that examination.

The second law student persistence study relied upon by the Standards Review Committee, Douglas Ripkey, *Explorations of MBE Attempt Patterns: July 2010 and July 2011 First-Taker Groups*, is equally flawed. The Ripkey study is based upon a biased sample of states that overall have very high first-time test taker passage rates, and does not include any states, such as California which have **low bar passage rates and high numbers of minority test takers**. The Case study and the Ripkey study are thus statistically designed in a manner to assure that a conclusion that minority test takers do not persist because most pass bar examination within a few administrations unlike in states with more difficult bar passage rates. Here is the sample used by Ripkey:

<u>STATE</u>	<u>FIRST-TIME BAR PASSAGE RATE JULY 2007²⁹</u>
Georgia	86%
Hawaii	77%
Kentucky	87%
Michigan	87%
New Hampshire	84%
New Mexico	83%
Oklahoma	91%
South Carolina	82%
Tennessee	80%
Texas	84%
Wyoming	70%
Vermont	76%

In contrast the California first-time passage rate on the July 2007 examination was **66%**.

Further, the Ripkey study included a total of 1107 Hispanic first-time takers, whereas in California alone, **497 Hispanics** took that July 2007 bar exam for the first-time and only **54.3% passed**.³⁰ Although the Ripkey study shows that only 26.9% of Hispanics repeated the test up to four times, in California 284 Hispanics retook the exam and the repeat passage rate was only 20.4%.³¹ Because the California bar passage rate is so low, and because the Hispanic bar passage rate is so low, in California Hispanics repeat and persist rates are much higher than those demonstrated by the Case and Ripkey studies. The Hispanic repeater rate has been consistently high in California:

²⁹ Douglas Ripkey, *Explorations of MBE Attempt Patterns: July 2010 and July 2011 First-Taker Groups* (2/25/2016), at 5. The July 2007 state first-time test taker passage rates are based upon 2014 Statistics, The Bar Examiner, March 2015, pp. 24-27.

³⁰ General Statistics Report July 2007 California Bar Examination Overall Statistics, at p. 2.

³¹ *Id.*

<u>EXAMINATION DATE</u>	<u>NUMBER & % PASS</u> <u>HISPANIC FIRST-TIME</u>		<u>NUMBER & % PASS</u> <u>HISPANIC REPEATERS³²</u>	
JULY 2007	497	54.3%	284	20.4%
FEB 2008	124	49.2%	393	29.8%
JULY 2008	511	64.4%	304	22.4%
FEB 2009	121	31.2%	350	23.4%
JULY 2009	493	59.0%	354	22.3%
FEB 2010	133	35.3%	376	24.2%
JULY 2010	539	56.2%	337	19.3%
FEB 2011	124	37.1%	426	32.6%
JULY 2011	588	55.3%	339	13.6%
FEB 2012	128	45.3%	431	35.5%
JULY 2012	601	57.4%	347	15.9%
FEB 2013	101	45.5%	416	30.3%
JULY 2013	631	58.5%	368	18.5%
FEB 2014	131	43.5%	437	33.6%
JULY 2014	650	52.0%	360	10.6%
FEB 2015	173	35.3%	495	33.7%
JULY 2015	718	51.7%	413	11.4%

This California bar examination data demonstrates that: (1) the first-time passage rate of Hispanics has been consistently very low; (2) the Hispanic repeater passage rate has been historically low; (3) the number of Hispanics who repeat the examination has been historically very high. This pattern of California low first-time and repeater Hispanic bar passage is obviously inconsistent with the Case and Ripkey studies that only looked at states with substantially higher bar passage rates. **It does not take a psychometrician to determine that the persistence of minority bar passage testers will be very low in states with high bar passage rates since students who pass the test are not eligible to repeat the exam.**

It is clear that the Standards Review Committee relied very heavily on the Case and the Ripkey studies for its decision to propose a drastic reduction in the bar passage window of the current 5 year standard to one of only two years. In fact, the Committee even included the

³² The data released by the California bar examiners does not specifically track the persistence patterns among Hispanic law students. The ABA and/or the NCBE should work with the California State Bar Association and the California Supreme Court in sharing the cost of producing that needed empirical data.

studies in its February 22, 2016 memo and attachments to this Council regarding its proposed amendment of Standard 316. Because the Standards Review Committee's conclusion is heavily based upon the flawed studies, I request that the Council return the proposed amendment to Standard 316 to the Standards Review Committee for reconsidering in light of data, such as that presented in the chart above, that demonstrates that minority applicants in states with very low bar passage rates do in fact persist in retaking the bar examination for multiple administrations. At the very least this Committee should either refuse to rely on such methodologically and empirically meager data presented on minority bar examination persistence, or it should seek a more sound analysis of a complete data set of minority repeaters within the 50 states and territories before radically changing the bar pass standard.

VI. *The Standards Review Committee's Earlier Decision Not to Count Non-Persisters Was Correct, and This Committee Should Modify the Proposed Amendment to Exclude Non-Persisters in Calculating Bar Passage Rates.*

The Standards Review Committee's proposed amendment that non-persistent bar examination test takers be counted against law school bar passage rates should be abrogated. Law schools cannot control law students who fail the bar examination once and decide not to retake the examination. The strongest argument against counting non-persistent test takers was ironically made by the Standards Review Committee itself on January 30, 2008:

[T]he Committee recommends in the Commentary [to former bar passage Standard 301-6]...that "non-persisters" (those graduates who take a bar examination once and fail, but do not take a bar exam again in any jurisdiction over the next two examination opportunities) *not* be counted

when calculating compliance with ultimate bar pass rates.³³

The Standards Review Committee was correct in 2008 in deleting non-persisters from compliance calculations, and the Committee has presented insufficient justification for taking a contrary and extremely unfair position in its current proposed amendment to Standard 316.

CONCLUSION

I am well aware of the consumer concerns that have been raised by many about the need to provide more transparency to prospective law students before they spend tens of thousands of dollars and incur a tremendous student debt in light of bar passage predictions and fewer job prospects. I fully support the U.S. Commission on Civil Rights call for law schools to disclose to the public and potential applicants data on “student academic performance, attrition, graduation, bar passage, student loan default, and future income disaggregated by academic credentials”, as well as any other material data that will assist in an intelligent cost/benefit analysis of whether to enroll in law school.³⁴ The American Bar Association has already mandated disclosure of much of that data. Even Brian Z. Tamanaha, one of the harshest critics of law school recruitment and admissions and author of *Failing Law Schools*, recently stated “[t]ransparency has substantially increased in the last few years. Students can now easily compare law school outcomes.”³⁵

However, I am strongly opposed to many of the recent calls for a national minimum LSAT score to attend an ABA accredited law school since such policy will exclude thousands of

³³ Letter from Dick Morgan, Chair, Standards Review Committee to Council Members, January 30, 2008 regarding amendments to ABA Standard 301-6 (Bar Passage). The January 30, 2008 recommendation changed the Standards Review Committee’s earlier decision that non-persisters should be counted for bar examination rate compliance. See December 3, 2007 letter from Hulett H. Askew, Consultant on Legal Education and Richard J. Morgan, Chair, Standards Review Committee to Deans of ABA-Approved Law Schools.

³⁴ U.S. Commission On Civil Rights Affirmative Action in American Law Schools, at 6 (April 2007).

³⁵ Elizabeth Olson, *Law Graduate Gets Her Day in Court, Suing Law School*, New York Times, March 6, 2016 (http://www.nytimes.com/2016/03/07/business/dealbook/court-to-hear-suit-accusing-law-school-of-inflating-job-data.html?smprod=nytcore-iphone&smid=nytcore-iphone-share&_r=0).

minorities who now have transparent information regarding law school attendance, performance, bar examination, and jobs prospects. Such proposals are not merely paternalistic, they are a form of “institutional racism” since although they appear neutral, they have a “disproportionately negative impact on members of a racial or ethnic minority group.”³⁶

The proposed amendment to Standard 316 will have a similarly institutional racist impact since it will, at least in California, provide an ABA sword that threatens dis-accreditation to schools that attempt to remedy over 100 years of exclusion of Hispanics as members of the California State Bar **even if** they provide sufficient information to prospective students regarding the risks of law school attendance.

The Council needs to determine which is more important – capitulating to the almost daily attacks by Law School Transparency and like-minded bloggers to radically alter law school admissions, or instead permitting ABA approved law schools, like those in California, to continue their effort at providing an more educational opportunity for Hispanics to become attorneys while at the same time requiring schools to provide sufficient consumer information to permit a reasoned cost/benefit analysis by prospective students.

I suggest the following amendment to the Standards Review Committee’s proposed amendment to Standard 316. Instead of a standard of achieving a 75% bar passage rate within 2 years, the standard should be modified to achieving a **75% bar passage within 4 years**. This less drastic alternative is more reasonable because at this time in which the California bar examination is being modified in a way that will substantially reduce minority bar passage, it will still permit law schools to admit minority candidates whose admission statistics (UGPA, LSAT, and relevant other characteristics) demonstrate a reasonable chance of graduating and of

³⁶ Vernellia R. Randall, *The Misuse Of The LSAT: Discrimination Against Blacks And Other Minorities in Law School Admission*, 80 St. John’s L. Rev. 107, 107 (2006).

passing the bar examination within the above time frame. However, at a minimum, this Committee in balancing the national disgrace regarding the paucity of Hispanic and other minority members of the bar should at the most approve a standard requiring a 75% bar passage within 3 years, not the current proposal of 2 years.

There is simply no current exigency supporting the dramatic and destructive standard proposed by the Standards Review Committee. The lesser drastic proposals that I proffer will permit the ABA to determine the effects of a moderate ratcheting up of the bar passage standard on minority law school enrollment, graduation, and bar passage without unnecessarily gutting law schools' attempts to bring minority law school applicants out of the pipeline and into the profession.

TO: ABA COUNCIL
FROM: WILLIAM WESLEY PATTON¹
RE: STANDARDS REVIEW COMMITTEE PROPOSED AMENDMENTS
TO STANDARD 316 (BAR PASSAGE)
DATE: APRIL 6, 2016

ANALYSIS IN OPPOSITION TO AMENDMENTS TO STANDARD 316

On March 19, 2016, I submitted to the Council an analysis demonstrating the devastating impact on prospective Hispanic law school applicants of the proposed amendment to Standard 316 (bar passage). This analysis focuses on the impact on California prospective Black law students of the proposed amendment to Standard 316.

I. *The Council Should Reject the Amendment to Standard 316 Because It Will Have a Devastating Impact on the Percentage and Number of New California Black Lawyers.*

On February 8, 2016 the ABA House of Delegates issued a critically important “RESOLUTION” warning states of the potentially devastating impact of adopting the Uniform Bar Examination (UBE) on minority law student bar passage.² The House of Delegates’ warning was based upon the following data³:

¹ Although I am currently a Professor at Whittier Law School, as of July 1, 2016, I am retiring and no longer will be affiliated with the law school. I will not teach there and will not receive a pension from the College. I disclose these facts to demonstrate that I no longer have a financial interest that might conflict with my opinion that the Council should deny the proposed amendment to Standard 316. This analysis is my own, does not necessarily represent the views of Whittier Law School, and I did not consult with any Whittier professors or administrators in drafting this analysis. I will continue in my position as an Assistant Clinical Vol Professor at the UCLA David Geffen School of Medicine, Department of Psychiatry after my retirement from the law school.

² The February 8, 2016 resolution states: “RESOLVED, That the American Bar Association urges state, territorial, and tribal bar admission authorities to consider the impact on minority applicants in deciding whether to adopt the Uniform Bar Examination (“UBE”) in their jurisdiction and to measure or otherwise track the performance of minority applicants on the UBE subsequent to its adoption....”

³ These variables are discussed in the RESOLUTION at pp. 1-3.

1. Racial and ethnic minorities have not gained proportional access to the practice of law (36% of U.S. population and 12% of practicing attorneys);
2. A large gap exists between minority and majority students' scores on standardized tests such as the LSAT, MBE, and UBE;
3. Bar passage rates for racially diverse law students are generally lower than for White bar admission applicants. Even Erica Moeser, the most zealous advocate for bar examination tests that have a high percentage of MBE scoring, admits that it is "a well-established fact" that minority groups do not perform as well as others on the bar examination⁴; and,
4. Adopting a test, such as the UBE which increases the reliance on the MBE objective portion of the bar exam, will likely have a disproportionately negative impact on minority bar passage rates.

Ironically, the House of Delegates used California as an example of the potential risk to minority bar passage rates of increasing the objective multiple-choice section of the bar examination per the UBE from California's current 35% MBE to a 50% MBE: "For example, if California were to adopt the UBE, students in California, a minority-majority state, would see significant increase in the importance of the MBE, as California weighs it as 35% of the total bar exam score." Even though the House of Delegates notes that increasing the MBE from 35% to 50%

⁴ Melissa Stanzone, *Jury Out on Uniform Bar Exam's Effect on Minorities*, The United States Law Week, March 24, 2016 (<http://uslw.bna.com/lwrc/display>).

will harm minority bar applicants, they failed to indicate that **California has already increased the weight of the MBE from 35% to 50% effective on the July 2017 bar examination.**⁵

Therefore, according to the House of Delegates, since California has raised its MBE percentage on the bar examination to 50% of the test, we will soon see an even wider gap between White and minority law student bar passage rates. The House of Delegates has historically taken a policy position that state bar examinations not discriminate against minority bar candidates:

“In 2006, the ABA adopted Resolution #113, urging bar association and bar examiners to ensure that the bar examination does not result in disparate impact on bar passage rates of minority candidates.”⁶

An obvious corollary is that the House of Delegates will not needlessly promulgate law school standards that will unnecessarily have a disparate negative impact on minority law school applicants and minority bar examiner test takers.

Because California has one of the lowest bar passage rates in the nation, one of the highest MBE “cut scores”, because the essay section is scaled to the MBE score, and because the MBE is being increased from 35% to 50%, is it easy to predict that as of July 2017 the California minority bar passage rate is likely to fall to historically low levels.

⁵ ⁵ *Modification to Format and Grading*, August 14, 2015, State Bar of California (http://admissions.calbar.ca.gov/Portals/4/documents/Examinations/NoticeTwoDay0815_R.pdf).

⁶ RESOLUTION, *supra.*, at 3.

II. *If the Council Approves the Standards Review Committee’s Amendment to Standard 316, California Law Schools Will Substantially Reduce the Number of Black Law Students Admitted to California ABA Law Schools.*

If the Council adopts the proposed ‘75% in 2 years’ amendment to Standard 316, California law schools will be under the threat of loss of accreditation if they seek to perform the important public policy objective of increasing Black attorney state bar representation. The loss of Black matriculates is not merely theoretical. The 5 California ABA schools most at risk of violating proposed amended Standard 316 (Golden Gate, Southwestern, Thomas Jefferson, LaVerne, and Whittier) currently enroll **33.4% of all Black law students attending ABA approved law schools in California.**⁷

The 5 California ABA accredited law schools listed above are at risk of failing the amended Standard 316 bar passage of 75% within two years if they continue their public policy objective of increasing minority representation in the California bar. For example, the 9-year first-time July bar passage average [2007-2015] of those schools is: Golden Gate 60.55%; Southwestern 62.8%; Thomas Jefferson 51.5%; LaVerne 55%; and Whittier 58.2%. Meeting the “75% within two years” standard will be difficult for these schools, and one way that they can assure a higher bar passage rate is to abandon their historical social policy objective of increasing minority bar representation.

⁷ This data on Black law school enrollment in California ABA approved law schools is derived from (<http://www.abarequireddisclosures.org/>). A total of 652 Black law students were enrolled in California ABA approved law schools in 2015, and 218 or 33.4% of those Black law students were enrolled in the above 5 ABA law schools that risk violation of the new 75% bar passage rate within 2 years.

III. *The Standards Review Committee Relied on Two Empirically Flawed Studies to Conclude that Minorities Do Not Persist in Taking the Bar Examination Beyond Two Years.*

I demonstrated in my March 19, 2016 analysis that the Standards Review Committee relied heavily upon two statistically unreliable studies regarding the persistence of law student bar examination test takers since those studies excluded states with very low bar passage percentages like California. As the following chart demonstrates the bar passage rate of Black test takers in California has historically been very low and the numbers of those Black law students who persist in re-taking the examination has been very high:

<u>EXAMINATION DATE</u>	<u>NUMBER & % PASS BLACK FIRST-TIME</u>		<u>NUMBER & % PASS BLACK REPEATERS⁸</u>	
JULY 2007	217	36.9%	250	9.6%
FEB 2008	62	32.3%	304	18.8%
JULY 2008	222	52.7%	269	18.1%
FEB 2009	70	20.0%	242	17.8%
JULY 2009	230	43.9%	258	12.8%
FEB 2010	68	26.5%	249	18.1%
JULY 2010	202	44.6%	247	7.3%
FEB 2011	69	29.0%	255	27.1%
JULY 2011	247	45.7%	241	8.7%
FEB 2012	69	36.2%	273	21.6%
JULY 2012	260	44.4%	250	10.4%
FEB 2013	82	34.1%	278	21.9%
JULY 2013	239	42.7%	240	11.3%
FEB 2014	76	27.6%	290	25.9%
JULY 2014	303	38.3%	252	8.7%
FEB 2015	98	30.6%	300	29.7%
JULY 2015	272	38.6%	252	13.1%

⁸ The data released by the California bar examiners does not specifically track the persistence patterns among Black law students. The ABA and/or the NCBE should work with the California State Bar Association and the California Supreme Court in sharing the cost of producing that needed empirical data.

This California bar examination data demonstrates that: (1) the first-time passage rate of Black law students has been consistently very low; (2) the Black repeater passage rate has been historically low; and (3) the number of Blacks who repeat the examination has been historically very high. This pattern of California low first-time and repeater Black bar passage is obviously inconsistent with the Case and Ripkey studies that only looked at states with substantially higher bar passage rates.

In order to provide California ABA law schools the possibility of attempting to achieve an increase in the number of Black California attorneys, the Council should reject the Standards Review Committee's proposal to dramatically reduce the bar passage standard from its current 5-year window to the proposed 2-year window. A more reasonable modification is to reduce the 5-year window to a 4-year window so that the ABA can study the effects of such a change on Black law student enrollment and bar passage rather than adopting the dramatically severe 2-year approach suggested by the Standards Review Committee. Further, in low bar passage states the proposed 2-year bar passage window will make it impossible for ABA law schools to implement the ABA's renewed emphasis on supplying minority students' access to the profession as demonstrated in the proposed *modifications to Standard 205* regarding equal opportunities for diversity law school admissions.

VI. *The Standards Review Committee's Earlier Decision Not to Count Non-Persisters Was Correct, and the Council Should Modify the Proposed Amendment to Exclude Non-Persisters in Calculating Bar Passage Rates.*

The Standards Review Committee's proposed amendment that non-persistent bar examination test takers be counted against law school bar passage rates should be abrogated. Law schools cannot control law students who fail the bar examination once and decide not to

retake the examination. The strongest argument against counting non-persistent test takers was ironically made by the Standards Review Committee itself on January 30, 2008:

[T]he Committee recommends in the Commentary [to former bar passage Standard 301-6]...that “non-persisters” (those graduates who take a bar examination once and fail, but do not take a bar exam again in any jurisdiction over the next two examination opportunities) *not* be counted when calculating compliance with ultimate bar pass rates.⁹

The Standards Review Committee was correct in 2008 in deleting non-persisters from compliance calculations, and the Committee has presented insufficient justification for taking a contrary and extremely unfair position in its current proposed amendment to Standard 316.

CONCLUSION

I am cognizant that the Council must balance the interests of future law school student consumers in having transparent law school data with the ABA’s historical mission of providing our diverse population an equal opportunity of attending law school and being admitted to the practice of the law. As this analysis demonstrates, the Standards Review Committee’s proposed changes to Standard 316 do not even attempt to balance these competing ABA interests. Instead, their proposal presents a radical modification from the current 5-year standard to a 2-year standard that will substantially decrease minority law school enrollment, especially in states like California which has a low bar percentage pass rate, a high MBE cut score, and an exam that in July 2017 will predictively result in lower minority bar passage by increasing the weight of the

⁹ Letter from Dick Morgan, Chair, Standards Review Committee to Council Members, January 30, 2008 regarding amendments to ABA Standard 301-6 (Bar Passage). The January 30, 2008 recommendation changed the Standards Review Committee’s earlier decision that non-persisters should be counted for bar examination rate compliance. See December 3, 2007 letter from Hulett H. Askew, Consultant on Legal Education and Richard J. Morgan, Chair, Standards Review Committee to Deans of ABA-Approved Law Schools.

MBE from 35% to 50%. The Council should reject the proposed changes to 316 and should adopt a modest approach of shortening the bar examination window from 5-years to 4-years until it can study the effects of that change on minority law school enrollment and bar passage, and until it can obtain methodologically sound and complete data on the persistence of minority test takers in low bar passage rate states like California.

**Impact of the Increase in the Passing Score
on the New York Bar Examination:
February 2006 Bar Administration**

Report Prepared for the New York Board of Law Examiners

by

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National Conference of Bar Examiners

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Executive Summary

Total scores on the New York Bar Examination (NY bar exam) are computed by combining three separate “scaled” and weighted scores from three separate components: the New York Essay Examination, which consists of five essay questions and an extended performance task and has a weight of 50%, the Multistate Bar Examination (MBE), which includes 190 multiple-choice questions and has a weight of 40%, and the New York Multiple-Choice Test, which includes 50 multiple-choice questions and has a weight of 10%. Scores on each of the three components and on the New York Bar Examination as a whole are reported on a scale with a range from 0 to 1,000.

On September 24, 2004, the New York State Board of Law Examiners (NYBLE) announced that the passing score on the New York Bar Examination would increase from 660 to 675 over a three-year period. The score was to increase five points a year from July 2005 to July 2007. The first of the three increases was implemented in July 2005. The second and third increases are currently on hold.

In Section 1, we describe the data collection process and the representativeness of the data. In Section 2, we describe the candidate population for the February 2006 administration of the NY bar exam in terms of candidates’ education (domestic or foreign), the number of times the candidates have taken the bar examination, and the age, gender and race/ethnicity of the candidates. In Sections 3 and 4, we present summaries of score distributions and pass rates in February 2006 for the candidate population as a whole and for various subgroups within the population.

Characteristics of the Candidates

Section 2 contains a description of the candidates who participated in the study, and by extension, the candidate population as a whole. We present this description in terms of a number of candidate characteristics, including the country in which each candidate graduated from law school, age at law school graduation, age when taking the February 2006 NY bar exam, the number of times the candidate had taken the bar examination in New York, and the candidate’s gender and race/ethnicity. To distinguish these characteristics from the performance measures (bar examination scores and pass rates), they are referred to as demographic variables.

Foreign-educated candidates made up about 36% of the respondents in February 2006, and as a group, they differed from the domestic-educated candidates in several respects. They had a smaller percentage of candidates who classified themselves as Caucasian/White and a larger percentage who classified themselves as Asian/Pacific Islander. They had a larger percentage of males and are slightly older than the domestic-educated candidates.

As discussed more fully later, the performance of the domestic-educated group, both in terms of scores on the bar examination and in terms of pass rates, was much better than that of the foreign-educated group.

Because of the substantial differences between the domestic-educated group and the foreign-educated group, most of the analyses of candidate performance are reported separately for these two groups.

Characteristics of Domestic-Educated Candidates

Of the candidates who completed law school in the United States, just over 42% were female, and just under 42% were male (16% did not indicate their gender). Almost 50% of the domestic-educated group was Caucasian/White, 9.6% were Asian/Pacific Islander, 14.4% were Black/African American, 4.1% were Hispanic/Latino, 1.4% were Puerto Rican, 0.4% were Chicano/Mexican American, 0.3% were American Indian/Alaskan Native, and 3.8% listed their race/ethnicity as "Other."

Among the domestic-educated candidates, the males were, on average, about half a year older than the females when they graduated from law school (29.7 vs. 29.1), and they were about a year older when they took the bar examination (32.0 vs. 30.9) in February 2006. Almost 37% of the domestic-educated candidates taking the New York bar exam in February 2006 were taking it for the first time, with the males a bit less likely to be repeating the examination than the females (60.2% versus 63.1%). However, as of February 2006, domestic-educated males had taken the bar examination an average of 2.3 times and domestic-educated females had taken it an average of 2.2 times. While less likely to repeat, males were slightly more likely to take the bar exam a larger number of times when they did repeat.

As a whole, the number of domestic-educated first-time takers did not differ substantially between females and males but the female/male ratios varied somewhat across racial/ethnic groups. Of the domestic-educated first-time takers over 74% of the males and about 63% of the females were Caucasian/White. Among the domestic-educated first-time takers, the females outnumbered the males in all of the other racial/ethnic groups except the "Other" group, and they outnumbered the males over two to one in the Black/African American group.

There were more domestic-educated repeat takers (1,447 or 63.2%) than first-time takers (843 or 36.8%) for the February 2006 NY bar exam. In addition, the domestic-educated repeat takers included slightly more females than males (about 42% to about 40%). About 43% of the repeat takers were Caucasian/White, about 17% were Black/African American, and 10% were Asian/Pacific Islander.

Characteristics of Foreign-Educated Candidates

Among the foreign-educated first-time takers, about 46% of candidates were Caucasian/White, about 23% were Asian/Pacific Islander, about 10% placed

themselves in the “Other”, just over 6% were Black/African American, and almost 6% were Hispanic/Latino.

The foreign-educated first-time takers had close to the same percentages of females and males (about 46%). But again, the female/male ratios varied somewhat across ethnic groups. About 5% of the males and 9% of the females were Black/African American, while about 52% of males and 49% of females were Caucasian/White.

The foreign-educated male candidates were older compared to the domestic-educated male candidates when they took the NY bar exam in February 2006. Among the foreign-educated candidates, the females had an average age of 30.5 years when taking the bar examination (compared to 30.9 for the domestic-educated females), and the males had an average age of 34.5 years when taking the bar examination (compared to 32.0 for the domestic-educated males).

The foreign-educated first-time takers tended to have relatively low scores on the bar examination and therefore relatively high failure rates. However, foreign-educated candidates were only slightly more likely than domestic-educated candidates to be repeating the bar examination. Almost 64% of the foreign-educated candidates were repeating the bar examination, compared to 63% of the domestic-educated candidates.

Performance on the New York Bar Examination

The performance of various groups on the New York Bar Examination is reported in Sections 3 and 4. In Section 3, we describe score distributions for various groups of candidates on the bar examination. In Section 4, we report expected pass rates as a function of passing score (from 660 to 675) for various groups.

Score Distributions

Section 3 of the report contains analysis of performance on the NY bar exam and on the three components of the examination (essay, MBE, and NYMC) separately for the domestic-educated candidates and the foreign-educated candidates, and within each of these groups provides breakdowns in terms of number of previous bar examination attempts, gender, race/ethnicity, and age at bar attempt. It also contains average scores as a function of age at law school graduation for domestic-educated candidates.

The variability in performance across groups (foreign-educated and domestic-educated, first-time takers and repeat takers, and the various racial/ethnic groups) is generally much larger than the differences across components of the examination within any particular group. That is, groups that do relatively well on one component (e.g., the essay portion) also tend to do well on the other two components (e.g., the MBE and the NYMC), and groups that don't do well on one component also don't do well on the other components.

The one noteworthy exception to this generalization is a consistent tendency for females to do better on the essay component and for males to do better on the MBE; this effect is not very large on average, but it is observed consistently across racial/ethnic groups, for the foreign and domestic-educated groups, and for first-time takers and repeat takers. These two tendencies (females doing better on the essay component and males doing better on the MBE) go in opposite directions, and thus tend to cancel out. As a result, in most analyses, females and males do not differ substantially in terms of their total scores on the bar examination or their pass rates.

The domestic-educated candidates do much better on the examination than the foreign-educated candidates, and, within both of these groups, the first-time takers do better than the repeat takers. Candidates who have already taken the examination a number of times tended to have very low pass rates. The average total score for domestic-educated first-time takers was about 710, and the average total score for domestic-educated repeat takers was about 656, a difference of about 54 points on the 1,000-point scale used in New York.

The average total score for domestic-educated repeat takers tends to decrease as the number of previous attempts increases, though scores may increase slightly in some cases. As noted above, domestic-educated first-time takers have an average total score of about 710. Domestic-educated second-time takers have an average of about 669, third-time takers have an average of about 638, and fourth-time takers have an average total score of about 640.

The average total score for foreign-educated first-time takers was about 632, which is almost 80 points lower than the average total score for domestic-educated first-time takers. The average total score for foreign-educated repeat takers was about 619, which is about thirteen points lower than that for foreign-educated first-time takers, and is over 90 points lower than that for the domestic-educated first-time takers.

The average total score for foreign-educated repeat takers also tends to decrease as the number of previous attempts increases. As noted above, the foreign-educated first-time takers had an average total score of about 632. Foreign-educated second-time takers had an average of about 626, third-time takers had an average of about 615, and fourth-time takers had an average of about 611.

The racial/ethnic groups exhibit large differences in their average bar examination scores within the domestic-educated first-time takers. The Caucasian/White group had an average total score of about 720, the Asian/Pacific Islander group had an average total score of about 703, the Hispanic/Latino group had an average total score of about 682, and the Black/African American group had an average total score of about 671. Note that the average total score of the Black/African American group was just above one of the four potential passing scores considered in this report (i.e., 670). The differences between racial/ethnic groups were less pronounced among the domestic-educated repeat takers, where the averages ranged from about 650 to about 665, than they were for the domestic-educated first-time takers.

As noted earlier, the difference in average total bar score between males and females was relatively small. For domestic-educated first-time takers, the average total bar examination score was about 714 for males and about 706 for females. The gender differences were small compared to the range of differences for the racial/ethnic groups (or the differences between the domestic- and foreign-educated groups).

The foreign-educated first-time takers exhibited a pattern of average scores as a function of race/ethnicity that is similar to that for domestic-educated first-time takers, with a range from about 656 to about 592.

The average total score of domestic-educated first-time takers declines systematically as age at graduation from law school increases, from about 719 for candidates who were younger than 27 at graduation to about 671 for candidates who were over 40 at graduation.

Expected Pass Rates at Various Passing Scores

In Section 4, we present analyses of the relationships between passing scores and pass rates for four possible passing scores (660, 665, 670, and 675) across a number of variables. As noted above, before July 2005, the passing score in New York was 660 (out of 1,000); and the passing score is now 665. The *passing score* is the total score on the New York Bar Examination (e.g., 665) that a candidate must achieve in order to pass. The *pass rate* associated with a passing score for a group of candidates is the percentage of candidates in that particular group that would pass if the passing score had the specified value. Because these analyses employ a fixed data set (i.e., data from the candidates who took the February 2006 New York Bar Examination), the pass rates of all groups will necessarily decrease (or remain the same) as the passing score increases. In practice, the pass rates could go up as the passing score increases (e.g., if the population of candidates changes or the candidates prepare more thoroughly).

As is true for several parts of this study, the analyses of pass rates were conducted separately for domestic-educated and foreign-educated candidates, and within each of these groups, analyses were conducted separately for first-time takers and repeat takers.

The analyses suggest two general conclusions about pass rates for domestic-educated first-time takers. First, the differences in pass rates between males and females are, at most, quite small. Second, the differences in pass rates among the different racial/ethnic groups are quite large, with the Caucasian/White group having the highest pass rates (about 80% for a passing score of 660 and about 76% for a passing score of 675), and the Black/African American group having the lowest passing rates (about 55% for a passing score of 660 and about 49% for a passing score of 675).

Among the domestic-educated candidates, the repeat takers, on the whole, had lower pass rates (about 46% for a passing score of 660 and about 39% for a passing score of 675), than the first-time takers (about 75% for a passing score of 660 and about 71% for a passing score of 675). The repeat takers' pass rates tended to decrease as the number of previous attempts increased. Those who were repeating for the first time had higher pass rates (about 58% for a passing score of 660 to about 50% for a passing score of 675) than those repeating for the second time (about 32% for a passing score of 660 to about 25% for a passing score of 675), who in turn had higher pass rates than those who were repeating for the third or more times.

The pass rates for the foreign-educated first-time takers are about half those of the domestic-educated first-time takers. The pass rates for the foreign-educated first-time takers go from just under 39% for a passing score of 660 to over 34% for a passing score of 675.

The foreign-educated repeat takers had low pass rates for all four passing scores (29% for a passing score of 660 to about 23% for a passing score of 675). The pass rates for the foreign-educated repeat takers are lower than the pass rates for the foreign-educated first-time takers and lower than the pass rates for domestic-educated repeat takers.

Introduction

This study was designed primarily to investigate the impact of proposed changes to the passing score on the New York Bar Examination (NY bar exam) on candidate pass rates. In September of 2004, the New York State Board of Law Examiners (NYBLE) announced its plan to raise the passing score on the NY bar exam from 660 to 675 (out of a maximum score of 1,000) over a three-year period. The score was to increase five points each year from July 2005 to July 2007.¹ The first of the three proposed increases (to a passing score of 665) was implemented in July 2005. The second and third increases (to passing scores of 670 and 675) are currently on hold.

The analyses described in this report are based on the results for candidates who took the NY bar exam in February 2006. As described in more detail below in Section 1, demographic data were supplied by candidates who completed an optional demographic survey when they applied to take the NY bar exam. Bar examination results were obtained from the NYBLE. Law School Admission Test (LSAT) scores, undergraduate grade-point averages (U-GPAs) and some demographic data were obtained from the Law School Admission Council (LSAC) for candidates who authorized release of these data. Law-school GPAs were obtained from law schools with the permission of the candidates. All of these data were combined into a single database for the candidates taking the February 2006 NY bar exam.

In this study, we examined the relationship between *passing score*² and *pass rate* by analyzing the data from the February 2006 candidates, assuming passing scores of 660, 665, 670, and 675 to reflect the proposed incremental changes to the passing score. The *passing score* is the score that must be achieved on the NY bar exam in order to pass. The *pass rate* is the percentage of candidates in a group who pass the examination (i.e., the percentage with a total score at or above the passing score). We examined the relationship between potential passing scores and pass rates for the candidate population as a whole and for various subgroups within the population (defined in terms of foreign or domestic legal education, gender, race/ethnicity, age at graduation from law school, and age when taking the bar examination).

Before examining the relationship between passing scores and pass rates, we analyzed the distributions of the available demographic variables (origin of legal education, repeat status, gender, race/ethnicity, age) and the relationships among these demographic variables. We also examined the relationships among the different components of the NY bar exam and the relationships between the demographic variables and performance on the bar exam.

The analyses in this study were designed to examine the impact of the previous, current and proposed passing scores on overall pass rates, and the impact of these passing scores on pass rates for subgroups defined in terms of country of education, gender, race/ethnicity, and age.

Impact of Changes in the Passing Score on Pass Rates

In this study, we examine the extent to which the changes in the passing score would lead to decreases in the bar examination score and pass rate for the candidate population as a whole and for various subgroups in the population (defined by origin of legal education, gender, race/ethnicity, and age). A simple way to examine the relationship between passing score and pass rate would involve a determination of the pass rates for the population as a whole and for various subgroups on the February 2006 bar examination administration, assuming different passing scores.³ The differences between the pass rates under the different passing scores provide an indication of the impact of the change in the passing score on pass rates, assuming that the change in passing score itself has no impact on the distribution of scores. This is a reasonable working assumption given that the three proposed changes in passing score are relatively small (5 points on a 1,000-point score scale). The results of these analyses constitute the bulk of this report. In Section 1, we provide an account of how the data were collected, checked, and combined into a single database. In Section 2, we describe the sample of candidates from the February 2006 administration in terms of various demographic variables (origin of legal education, repeat status, gender, race/ethnicity, and age) and combinations of these variables. In Section 3, we describe the performance of the total sample and of the subgroups defined by various combinations of these demographic variables in terms of their average scores on the bar examination and the three components included in NY bar exam scores. In Section 4, we summarize the pass rates for various subgroups at pass rates between 660 and 675, and therefore address the primary purpose of this study. But to fully understand the results in Section 4, it is necessary to understand the results in Sections 1, 2, and 3.

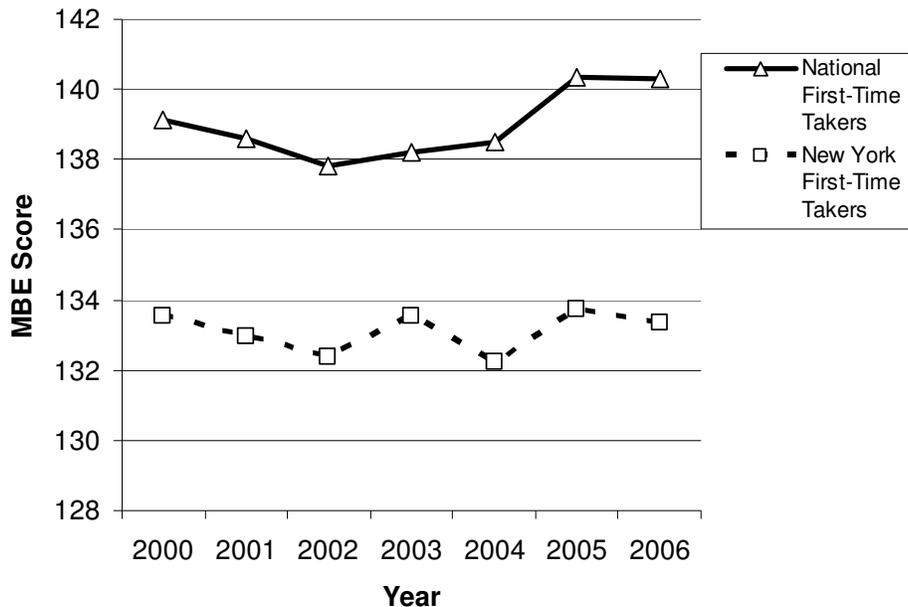
An analysis of pass rates using different passing scores within a single bar examination administration has advantages and disadvantages in evaluating the impact of changes in passing score (which were announced well in advance) on the pass rates.⁴ On the positive side, studying a single bar examination administration is straightforward and focuses exclusively on effects of the changes in passing score. Since the analysis makes use of data on the performance of a fixed group of candidates who took the bar examination on a particular occasion, the many factors (e.g., changes in the composition of the group, changes in patterns of law school curricula or test preparation) that can influence pass rates and produce variability in pass rates from one year to the next are controlled. By applying the different passing scores to the existing score distributions for various groups, the analysis focuses on the direct impact of changes in the passing scores, assuming that everything else is held constant.

However, it is important to keep in mind that legal education, test preparation activities, and the composition of the candidate population are likely to change over time (as everything changes), and as a result, the projections of what the pass rates would have been in February 2006 for different passing scores may not provide very accurate predictions of what would actually happen if the passing score were increased to 675 over the next two or three years. In particular, changes in the passing score may contribute to changes in how candidates prepare to take the bar exam, in the courses

they take in law school, in how law schools operate, and in the composition of the population of individuals who choose to take the NY bar exam. The results should be interpreted with caution, but they do provide a clear indication of the immediate impact of a change in passing score, and a reasonable projection of what would be likely to happen in the future if the passing score were changed in particular ways.

To check on the possible impact of an increase in the passing score on the level of candidate preparation and performance, we compared score trends of first-time New York candidates⁵ on the February MBE over the last seven years to score trends for first-time candidates nationally on the February MBE over the last seven years. If the New York pattern was similar to the national pattern through February 2006, it would suggest that the announced change in passing score in New York did not have any significant impact on performance of the New York candidates in February 2006. If the New York pattern was similar to the national pattern up to February 2005 but changed relative to the national data between February 2005 and February 2006, we would have an indication that something (e.g., the change in passing score) might have caused the change in New York candidates' performance between February 2005 and February 2006. Figure 0.1 displays the average MBE scores across February administrations for New York and National candidates.⁶ The pattern of scores appears to differ somewhat between 2003 and 2006. However, the pattern of scores between 2005 and 2006 do not differ substantially.

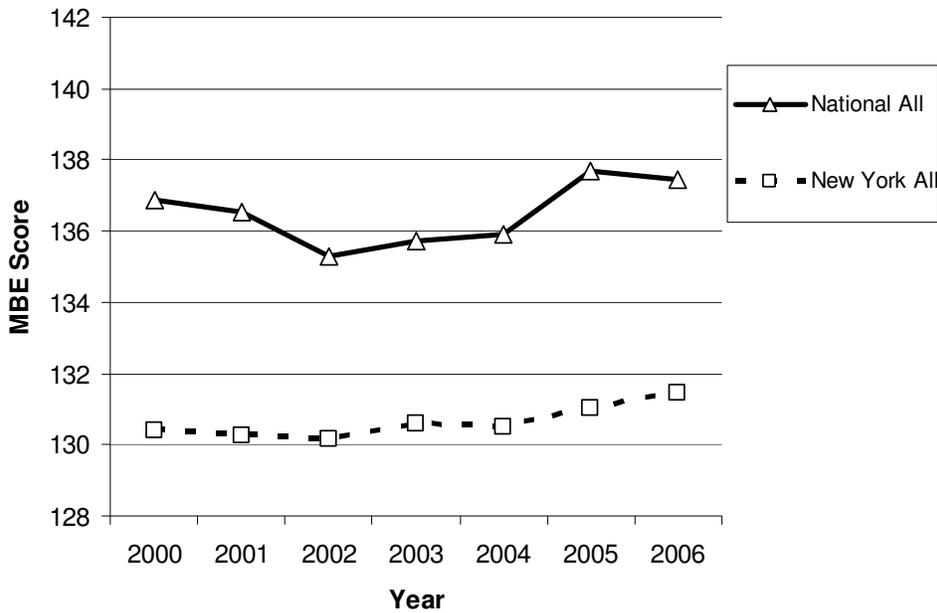
Figure 0.1
National and New York Average MBE Scores
February Administrations between 2000 and 2006
All First-time Takers



See note 6.

We also computed the national averages and the New York averages for all candidates (first-time takers and repeat takers) taking the February administrations of the MBE between 2000 and 2006. The results of this comparison are presented in Figure 0.2.⁷ The national averages show somewhat more variability from year to year, which is unexpected given that the sample size for the national sample is so much larger than for New York. The New York scores increased slowly from 2002 to 2006, but there is no indication of any unusually sharp change in the average MBE score for New York in February 2006.

Figure 0.2
National and New York Average MBE Scores
February Administrations between 2000 and 2006
All Candidates (First-time Takers and Repeat takers)



See note 7.

Notes

1. The NY bar exam includes four components, the Multistate Bar Examination (MBE), the New York Essay Examination (NY Essay), a Multistate Performance Test (MPT), and a multiple-choice test on New York law (NYMC). Scores on the NY bar exam are reported on a scale with a range from 0 to 1,000, and the 15-point change in passing score corresponds to a change of 3 points on the MBE scale, which has a range from 0 to 200. The first score increase, from 660 to 665, represented a one-point increase on the MBE scale.
2. This report includes a glossary that provides definitions of various technical terms included in the text. These terms are generally defined when first used, but the glossary may provide a useful reference.
3. Technically, this analysis is a cross-sectional analysis; it compares performance under different decision rules using data collected on a single occasion. However, the question being asked involves the changes in pass rates from one year to the next, with a change in the passing score between the two years; a study that evaluates changes from one year to the next is called a longitudinal study. It is not unusual to use cross-sectional data to address longitudinal questions, but there are potential problems in doing so, and we need to take these problems into consideration.
4. The increase in the passing score may have effects on candidate preparation, and therefore on bar examination performance. These effects may occur over an extended period as the candidates become better informed about the implications of a higher passing score.
5. Some candidates who are identified as first-time takers could have taken the bar examination in another jurisdiction. The numbers of such cross-jurisdictional repeat takers is presumably small.
6. Although the average MBE scores for the first-time takers in New York in Figure 0.1 are consistently lower than those for the first-time takers nationally, this difference is potentially misleading. As indicated later in this report, the population of candidates taking the NY bar exam includes a substantial number of candidates who were educated in foreign countries and who tend to get lower scores on the MBE than domestic-educated candidates. Foreign-educated candidates make up a much smaller percentage of the national population of candidates. If we focus on domestic-educated first-time takers. The New York average MBE score in February 2006 was 143, slightly higher than the national average for that test date.
7. As indicated in note 6 attached to Figure 0.1, the New York sample includes a relatively high percentage of foreign-educated candidates who tend to get relatively low scores. If only domestic-educated candidates are considered, the New York average MBE scores are similar to the national average.

1. Data Sources

Staff at the NYBLE and at NCBE planned and coordinated the transfer of several sources of data to NCBE for use in this study. In this section, we provide a brief description of the procedures for assembling the database that was used for the analyses presented in subsequent sections of this report.

1.1 Database Elements

The database used in this report contains information from five primary data sets. The different data sets each contain at least one of two indices that could be used to match data records belonging to the same individual. These two indices were (1) applicant identification number, which was the candidate's social security number (SSN) or (2) applicant seat number, which was a number coded by candidates that indicated the seat number they used when taking the NY bar exam.

The first data set was derived from a survey of NY bar exam respondents (i.e., from candidates who completed a survey) at the time of application for the February 2006 NY bar exam and consisted primarily of demographic information (e.g. self-reported age, gender, ethnicity, citizenship, and country of legal education). Candidates who supplied the information (or authorized its release) will be referred to as respondents in cases where it seems useful to remind the reader that some candidates are not included in the analyses. The second data set contained more detailed performance information on the February 2006 administration of the NY bar exam and included scores on the NY bar exam and on each of its components (i.e., New York Essay Examination (NY Essay), Multistate Performance Test (MPT), Multistate Bar Examination (MBE), and New York multiple-choice test (NYMC)). The third data set supplied by the NYBLE included birthdates and law school graduation dates of candidates. The fourth data source was from LSAC and included demographic information (e.g. birthdates, gender, ethnicity, undergraduate institution, and undergraduate major) and performance data (e.g., undergraduate GPA and average LSAT score from all attempts) for candidates who gave permission for LSAC to release these data. The fifth data set contained candidates' law school performance data (e.g., GPAs) obtained from their law schools for those candidates who authorized the release of this information and for those law schools that could and would release this information. There was some redundancy in these data sets, and as indicated below, this redundancy was used to check on the accuracy of the data where possible.

1.2 Database Construction

The database was assembled sequentially at NCBE as the data sets became available. As data were assembled, they were checked for accuracy using variables that were redundant across data sets (e.g., birthdates). First, the New York demographic data and bar examination scores were matched using applicant identification/seat number to identify corresponding records. Next, this combined information was matched by applicant seat number with the data set that contained their birthdates and law

school graduation dates. Then, the LSAC data were matched to the data set. Finally, the law school data were matched to the data set with New York demographic data, New York performance data, and LSAC data using SSNs. The resultant database contained a total of 3,564 records, one for each of the 3,564 candidates who took the NY bar exam in February 2006.

Because some data were not available, (e.g., LSAT records and law-school GPAs for foreign-educated candidates) and because some candidates and law schools chose not to release certain data, many of the candidate records had missing elements. Of the 3,564 candidates who took the NY bar exam in February 2006, 1,640 cases contained LSAC data and 427 cases contained law school data (for 118 U.S. law schools represented in the February 2006 NY bar exam administration).

1.3 Database Finalization

The data collection methods used in this study sometimes resulted in the availability of the same information from multiple sources. At several points in the database assembly, comparisons were made across data sets to verify accuracy using this redundant information. After data were matched, additional checks and analyses were implemented to identify and rectify potentially errant or conflicting data for the following variables: gender, racial/ethnic group, MBE score, and age/birthdate. In the few cases where data conflicted across data sources and couldn't be otherwise resolved, New York demographic data were used for a candidate's information.

1.4 Representativeness of the Database

In studies like this, in which information is provided voluntarily by participants, missing data are always a matter of some concern. To the extent that candidates who choose to participate are systematically different from those who do not participate, the results may be biased. As indicated below, participation in this study was generally good. Some information was not available for graduates of foreign law schools (e.g., age at graduation), but about 85% of the candidates supplied at least some of the demographic information requested of them.

Data were available for all 3,564 candidates on four variables included in the operational database for the NY bar exam: NY bar exam scores, number of NY bar exam attempts, age when taking the bar exam, and origin of legal education. Table 1.1 displays omitted response rates for the variables obtained from candidates and Table 1.2 displays omitted response rates by domestic- and foreign-educated candidates. For gender and race/ethnicity about 15% of the information was omitted. Age at law school graduation was omitted for about 36% of candidates overall, but for 0.5% of domestic-educated and 100.0% of foreign-educated candidates.

Undergraduate GPA, LSAT, and law-school GPA were omitted from the database for between 55% and 88% of the candidates. Larger percentages of these data were omitted for foreign-educated candidates because they generally did not have

LSAC records, and we made no attempt to obtain GPA from foreign law schools. However, substantial percentages of undergraduate GPA, LSAT, and law-school GPA were omitted for domestic-educated candidates, which cause concern about how representative these variables are of New York bar candidates. Because of this and because examining these variables was not our primary concern in this report, we did not analyze undergraduate GPAs, LSAT score, or law-school GPAs.

Table 1.1
Numbers and Percentages of Omitted Responses
February 2006 New York Bar Examination Database

Variable	Number of Omitted Responses	Percentage of Omitted Responses*
Gender	524	14.7%
Origin of Legal Education	0	0.0%
Race/Ethnicity	533	15.0%
Age at Law School Graduation	1,285	36.1%
Age at Bar Attempt	0	0.0%
Undergraduate GPA	2,018	56.6%
LSAT	1,983	55.6%
Law-School GPA	3,137	88.0%
NY Bar Exam	0	0.0%

Number of candidates in database (N) = 3,564

*Omitted responses include responses that were not released, not available, or not resolvable (e.g., because of contradictory information).

We obtained gender and race/ethnicity data for about 85% of candidates, but it is possible that the results would be slightly different if we had complete data for these variables. Most of the candidates (88%) who omitted their genders also omitted their races/ethnicities, so those who omitted these variables tended to omit both.

Table 1.2
Numbers and Percentages of Omitted Responses
Candidates Who Graduated from Domestic and Foreign Law Schools
February 2006 New York Bar Examination Database

Variable (Count of Omitted Responses*)	Type of Legal Education			
	Domestic (n = 2,290)		Foreign (n = 1,274)	
	n	%	n	%
Gender (524)	368	16.1%	156	12.2%
Race/Ethnicity (533)	374	16.3%	159	12.5%
Age at Law School Graduation (1,285)	11	0.5%	1,274	100.0%
Undergraduate GPA (2,018)	747	32.6%	1,271	99.8%
LSAT Scores (1,983)	743	32.4%	1,240	97.3%
Law-School GPA (3,137)	1,871	81.7%	1,266	99.4%

n = number of candidates

N = total number of candidates (3,564)

*Omitted responses include those that were not released, not available, or not resolvable (e.g., because of contradictory information).

1.5 Confidentiality of Data

The data sets described above were combined and analyzed by NCBE. NCBE was responsible for maintaining the confidentiality of the data. To ensure confidentiality, we collated the data from the NYBLE, participating law schools, and LSAC. We then linked the data from various sources for each candidate who agreed to provide data for the study.

Personal identifiers for candidates and identifiers for schools were necessary in order to link the data elements for each candidate into a single record. These identifiers were used only for constructing and finalizing the database.

2. Demographic Characteristics of the Candidates

The analyses included in this report are based on data collected from 3,564 candidates who took the New York Bar Examination (NY bar exam) in February 2006. In this section, the following characteristics of the candidates are analyzed: origin of legal education, gender, race/ethnicity, age at graduation, age when taking the NY bar exam in February 2006, and the number of attempts taking the NY bar exam. These variables are referred to as demographic variables to distinguish them from scores or pass rates on the NY bar exam. The latter variables are referred to as performance variables and are discussed in Sections 3 and 4, respectively.

2.1 General Demographics

Gender

Table 2.1 provides an analysis of the numbers and percentages¹ of females and males in the sample and indicates that 524 (or 14.7%) of the candidates did not record their genders, yielding a response rate of over 85%. Of the candidates who indicated their genders, 49.8% (or 1,515) were females and 50.2% (or 1,525) were males. Because 14.7% of the candidates omitted their genders, all analyses involving gender as a classification variable are subject to some uncertainty due to missing responses, but the percentages in Table 2.1 are based on information from over 85% of the February 2006 candidates and provide a good indication of what to expect for February administrations of the New York bar exam.

Table 2.1
Numbers and Percentages of Females and Males

Gender	Number	Percentage of Respondents
Female	1,515	49.8%
Male	1,525	50.2%
Omitted	524	--

Total number of candidates (N) = 3,564

Note: Percentages in this and subsequent tables may not add up to 100 due to rounding. Also, percentages are based on candidates with data on the relevant demographic variables (e.g., gender).

Domestic or Foreign Legal Education

Table 2.2 describes the sample in terms of whether the candidates obtained their legal education in the United States (domestic-educated) or in a foreign country (foreign-educated). In the sample, 64.3% (or 2,290) graduated from a domestic law school, and 35.7% (or 1,274) graduated from a foreign law school.

Table 2.2
Numbers and Percentages Who Graduated from Domestic and Foreign Law Schools

Origin of Legal Education	Frequency	Percentage of Respondents*
Domestic	2,290	64.3%
Foreign	1,274	35.7%

N = 3,564

Note: Domestic refers to candidates who graduated from a law school in the United States. Foreign refers to candidate who graduated from a law school outside of the United States.

*There were no data missing for this variable, so the percentage of respondents equals the percentage of candidates in the total sample.

Race/Ethnicity

Table 2.3 provides an analysis of the racial/ethnic composition of the sample, using the categories employed by the Law School Admission Council (LSAC) which were used in the candidate survey administered to the New York candidates in February 2006. As indicated in Table 2.3, 533 (or 15.0%) of the candidates omitted their race/ethnicity. Of those who indicated their race/ethnicity, 51.2% were Caucasian/White, 20.9% were Asian/Pacific Islander, 14.7% were Black/African American, 5.4% were Hispanic/Latino, 1.0% were Puerto Rican, 0.3% were Chicano/Mexican American, and 0.3% were American Indian/Alaskan Native. Of the respondents, 6.1% listed their race/ethnicity as "Other," which could refer to some other preferred designation or to a multi-racial/ethnic background, or it may reflect a simple reluctance to provide information on race/ethnicity.

Table 2.3
Numbers and Percentages in Different Racial/Ethnic Groups

Race/Ethnicity	Number	Percentage of Respondents*
Caucasian/White	1,553	51.2%
Asian/Pacific Islander	633	20.9%
Black/African American	445	14.7%
Hispanic/Latino	165	5.4%
Puerto Rican	31	1.0%
Chicano/Mexican American	10	0.3%
American Indian/Alaskan Native	8	0.3%
Other	186	6.1%
Omitted	533	--

N = 3,564

* Percentages based on 3,031 candidates with data on race/ethnicity.

Age at Law School Graduation, Age When Taking the Bar Examination, and Number of Bar Attempts

Table 2.4 describes the sample in terms of the candidates' ages at graduation from law school. This information was not available for 1,285 (or 36.1%) of the candidates. Most of the candidates for whom this information was not available completed law school outside of the United States. Of those who responded, 41.9% were under 27, and 20.3% were 27 or 28. About 73% of the candidates were under 31, and less than 3 percent were over 50 when they graduated from law school.

Table 2.4
Numbers and Percentages at Various Ages at Law School Graduation
(Using Age Ranges)

Age at Law School Graduation	Number	Percentage of Respondents
<27	955	41.9%
27-28	463	20.3%
29-30	246	10.8%
31-35	305	13.4%
36-40	127	5.6%
41-45	85	3.7%
46-50	50	2.2%
51-55	31	1.4%
56-60	10	0.4%
>60	7	0.3%
Omitted	1,285	--

N = 3,564

Table 2.5 describes the sample in terms of the candidates' ages when they took the bar examination in February 2006. 22.1%, were under 27, and 19.1% were 27 or 28. Just over 54% of the candidates were under 31, and almost 4% were over 50 when they took the NY bar exam in February 2006.

Table 2.5
Numbers and Percentages at Various Ages at February 2006 Bar Attempt
(Using Age Ranges)

Age at Bar Attempt	Number	Percentage of Respondents*
<27	788	22.1%
27-28	680	19.1%
29-30	461	12.9%
31-35	786	22.1%
36-40	357	10.0%
41-45	223	6.3%
46-50	132	3.7%
51-55	73	2.0%
56-60	36	1.0%
>60	28	0.8%

N = 3,564

*There were no data missing for this variable, so the percentage of respondents equals the percentage of candidates in the total sample.

Figure 2.1 plots age at February 2006 bar attempt with age at law school graduation. As indicated in this figure, age when taking the bar examination in February 2006 was always approximately equal to or greater than age at graduation. For most candidates, age at graduation and age when taking the bar examination in February were quite close. The candidates for whom age at February 2006 bar attempt is higher than age at graduation tend to be repeat takers.

Figure 2.1
Age at Bar Attempt as a Function of Age at Law School Graduation

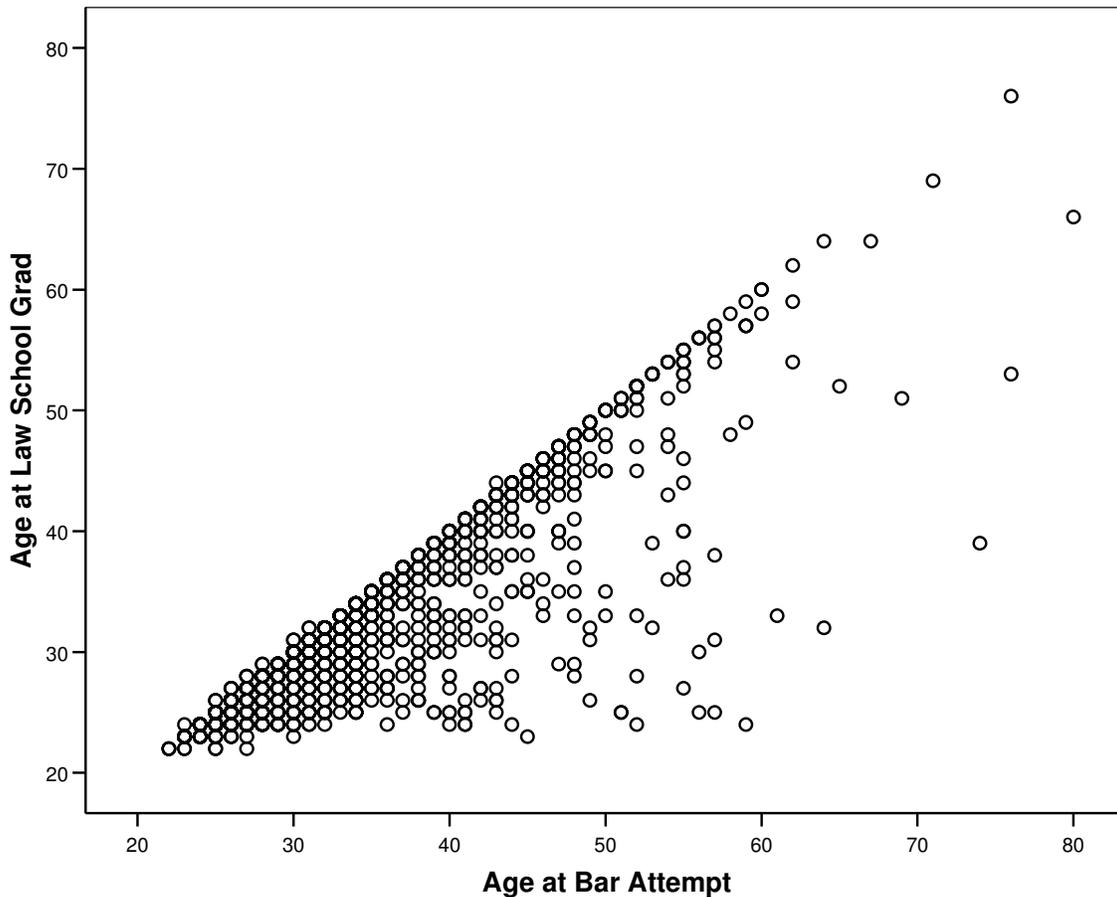


Table 2.6 indicates the number of times the candidates had taken the NY bar exam as of February 2006. 36.5% of the candidates were taking the examination for the first time (first-time takers). 38.4% were taking it for the second time, 7.3% for the third time, 6.7% for the fourth time, 3.6% for the fifth time, etc. The great majority of the candidates, 63.5%, were repeat takers. One candidate was taking it for the 60th time and one for the 56th time, but almost 97% were taking it for the eighth time or less.

Table 2.6
Numbers and Percentages for Number of Bar Attempts as of February 2006

Number of NY Bar Exam Attempts	Number	Percentage of Respondents*
1	1,302	36.5%
2	1,369	38.4%
3	261	7.3%
4	240	6.7%
5	130	3.6%
6	83	2.3%
7	38	1.1%
8	31	0.9%
9	19	0.5%
10	21	0.6%
11	11	0.3%
12	10	0.3%
13	7	0.2%
14	6	0.2%
15	4	0.1%
16	2	0.1%
17	4	0.1%
18	5	0.1%
19	2	0.1%
20	5	0.1%
22	1	0.0%
23	1	0.0%
25	1	0.0%
26	1	0.0%
27	1	0.0%
28	1	0.0%
29	2	0.1%
31	1	0.0%
32	1	0.0%
33	1	0.0%
42	1	0.0%
56	1	0.0%
60	1	0.0%

N = 3,564

*There were no omitted data for this variable, so the percentage of respondents equals the percentage of candidates in the total sample.

2.2 Domestic-Educated and Foreign-Educated Candidates

As indicated earlier, data were available for all candidates regarding whether their law-school education was domestic or foreign. This section provides comparisons between the domestic- and foreign-educated candidates on the other demographic variables.

Table 2.7 reports the percentages of females and males for the domestic- and foreign-educated groups in the sample. Of the 2,290 candidates who indicated that they completed law school in the United States, 42.4% were female, 41.6% were male, and 16.1% omitted their gender. Of the 1,274 candidates who indicated that they completed law school in a foreign country, 42.8% were female, 45.0% were male, and 12.2% omitted their gender. So, gender was very evenly balanced for the domestic-educated respondents, while the foreign-educated group had more males than females.

Table 2.7
Percentages of Females and Males
Domestic- and Foreign-Educated Candidates

Gender (N = 3,564)	Origin of Legal Education	
	Domestic (n = 2,290)	Foreign (n = 1,274)
Female (n = 1,515)	42.4%	42.8%
Male (n = 1,525)	41.6%	45.0%
Omitted (n = 524)	16.1%	12.2%

n = the number of candidates within a group

N = the total number of candidates

Table 2.8 provides a similar analysis of race/ethnicity as a function of the type of legal education (domestic or foreign). Of the 2,290 candidates who completed law school in the United States, 49.6% were Caucasian/White, 9.6% were Asian/Pacific Islander, 14.4% were Black/African American, 4.1% were Hispanic/Latino, 1.4% were Puerto Rican, 0.4% were Chicano/Mexican American, 0.3% were American Indian/Alaskan native, and 3.8% listed their race/ethnicity as "Other." Of the 1,274 respondents who completed law school in a foreign country, 32.8% were Caucasian/White, 32.5% were Asian/Pacific Islander, 9.0% were Black/African American, 5.5% were Hispanic/Latino, and 7.7% listed their race/ethnicity as "Other." None of the foreign-educated candidates listed their race/ethnicity as Puerto Rican, Chicano/Mexican American, or American Indian/Alaskan native. Of the domestic-educated candidates, 16.3% omitted their race/ethnicity, and of the foreign-educated candidates, 12.5% omitted their race/ethnicity.

Table 2.8
Percentages Choosing Various Race/Ethnicity Categories
Domestic- and Foreign-Educated Candidates

Race/Ethnicity (N = 3,564)	Origin of Legal Education	
	Domestic (n = 2,290)	Foreign (n = 1,274)
Caucasian/White (n = 1,553)	49.6%	32.8%
Asian/Pacific Islander (n = 633)	9.6%	32.5%
Black/African American (n = 445)	14.4%	9.0%
Hispanic/Latino (n = 165)	4.1%	5.5%
Puerto Rican (n = 31)	1.4%	--
Chicano/Mexican American (n = 10)	0.4%	--
American Indian/Alaskan Native (n = 8)	0.3%	--
Other (n = 186)	3.8%	7.7%
Omitted (n = 533)	16.3%	12.5%

The racial/ethnic categories chosen by the foreign-educated candidates were generally consistent with their reported countries of legal education. The foreign-educated respondents who classified themselves as Caucasian/White were mainly

educated in Europe, Canada, and Australia. The foreign-educated candidates who classified themselves as Asian/Pacific Islander were mainly educated in Asia (with most from China, India, Japan, Korea, Philippines, or Taiwan). The Black/African American graduates of foreign law schools were mainly educated in Africa or the United Kingdom. Most of the Hispanic/Latino foreign-educated candidates were educated in Central or South America (with most from Brazil, Colombia, Mexico, Peru, or Venezuela). Of the graduates of foreign law schools who listed their race/ethnicity as "Other," 39.8% were educated in the United Kingdom, 7.1% in Nigeria, 7.1% in Israel, 5.1% in France, 5.1% in Canada, and the remaining 35.8% were from a range of countries.

The most dramatic differences between the racial/ethnic composition of the domestic-educated group and that of the foreign-educated group were that over 49% of the domestic-educated group was Caucasian/White, while less than 33% of the foreign-educated group was Caucasian/White, and that over 32.5% of the foreign-educated group was Asian/Pacific Islander, while less than 10% of the domestic-educated candidates put themselves in this category. Note that 7.7% of the foreign-educated group classified themselves as "Other," while 3.8% of the domestic-educated group chose this category.

Table 2.9 provides an analysis of age at law school graduation as a function of type of law-school education (domestic or foreign) for all candidates. As noted earlier in the discussion of Table 2.4, age at law school graduation was not available for 36.1% (or 1,285) of the candidates, and most of those for whom this information was not available were foreign educated; age at law school graduation was not available for any of the foreign-educated candidates (100%). Of the domestic-educated candidates, over 60% were under 29 when they graduated from law school, and almost 86% were under 36. The average age of the domestic-educated candidates when they completed law school was 29.5 years (with a *standard deviation*, or SD, of 6.7 years).

Table 2.9
Percentages at Various Ages at Law School Graduation (Using Age Ranges)
Domestic- and Foreign-Educated Candidates

Age at Law School Grad. (N = 3,564)	Origin of Legal Education	
	Domestic (n = 2,290)	Foreign (n = 1,274)
<27 (n = 955)	41.7%	--
27-28 (n = 463)	20.2%	--
29-30 (n = 246)	10.7%	--
31-35 (n = 305)	13.3%	--
36-40 (n = 127)	5.5%	--
41-45 (n = 85)	3.7%	--
46-50 (n = 50)	2.2%	--
51-55 (n = 31)	1.4%	--
56-60 (n = 10)	0.4%	--
>60 (n = 7)	0.3%	--
Omitted (n = 1,285)	0.5%	100%

Table 2.10 provides an analysis of age at bar attempt in February 2006 as a function of law-school education (domestic or foreign). The foreign-educated candidates were generally older when they took the bar examination in February 2006 than the domestic-educated candidates, with smaller percentages in the under-27, 27-28, and 29-30 categories, and larger percentages in most of the other categories. The average age of the domestic-educated candidates taking the bar examination in February 2006 was 31.9, and that for the foreign-educated candidates was 32.9 (with SDs of 8.0 and 7.9, respectively), for an average difference of a year.

Table 2.10
Percentages at Various Ages at February 2006 Bar Attempt (Using Age Ranges)
Domestic- and Foreign-Educated Candidates

Age at Bar Attempt (N = 3,564)	Origin of Legal Education	
	Domestic (n = 2,290)	Foreign (n = 1,274)
<27 (n = 788)	23.1%	20.4%
27-28 (n = 680)	22.3%	13.3%
29-30 (n = 461)	13.4%	12.0%
31-35 (n = 786)	20.3%	25.2%
36-40 (n = 357)	8.0%	13.7%
41-45 (n = 223)	5.5%	7.7%
46-50 (n = 132)	3.4%	4.2%
51-55 (n = 73)	2.2%	1.7%
56-60 (n = 36)	1.0%	1.1%
>60 (n = 28)	0.8%	0.7%

Table 2.11 provides an analysis of the number of bar attempts as of February 2006 as a function of origin of legal education (domestic or foreign). The foreign-educated candidates and domestic-educated candidates were about equally likely to be repeating the examination. About 36.8% of the domestic-educated candidates and about 36.0% of the foreign-educated candidates were taking the NY bar exam for the first time. As of February 2006, the domestic-educated candidates had taken the NY bar exam an average of 2.5 times, and the foreign-educated candidates had taken it an average of 2.7 times (with SDs of 3.1 and 2.9 respectively).

Table 2.11
Percentages of Number of Bar Attempts for
Domestic- and Foreign-Educated Candidates

Number of Bar Attempts (N = 3,564)	Origin of Legal Education	
	Domestic (n = 2,290)	Foreign (n = 1,274)
1 (n = 1,302)	36.8%	36.0%
2 (n = 1,369)	41.0%	33.8%
3 (n = 261)	5.7%	10.2%
4 (n = 240)	6.4%	7.3%
5 (n = 130)	3.4%	4.0%
6 (n = 83)	2.2%	2.6%
7 (n = 38)	0.8%	1.5%
8 (n = 31)	0.9%	0.8%
9 (n = 19)	0.5%	0.6%
10 (n = 21)	0.6%	0.6%
>10 (n = 70)	1.7%	2.5%

2.3 Characteristics of Domestic-Educated Candidates

As indicated at several places in this report, the domestic-educated candidates differed from the foreign-educated candidates in a number of ways (e.g., in terms of demographic variables and performance on the bar examination), and therefore, most of our analyses were run separately for these two groups. In this section, we examine

some relationships among demographic variables for the domestic-educated candidates.

Tables 2.12 and 2.13 display the relationship between race/ethnicity and gender for domestic-educated first-time takers and repeat takers. Table 2.12 reports the percentages of females and males in each racial/ethnic group for the domestic-educated first-time takers, and Table 2.13 reports the percentages of females and males in each racial/ethnic group for the domestic-educated repeat takers. The general patterns are similar to those for all domestic-educated candidates (see Table 2.8) in that the Caucasian/White group had the largest percentages of candidates for all of the subgroups, but the percentage in different racial/ethnic groups vary across the subgroups (defined by first-time takers versus repeat takers and by gender).

Table 2.12
Percentages of Domestic-Educated Female and Male First-Time Takers
in Various Race/Ethnicity Categories

Race/Ethnicity	Gender		Total* (N = 843)
	Female (n = 358)	Male (n = 379)	
Caucasian/White (n = 507)	62.8%	74.4%	60.1%
Asian/Pacific Islander (n = 74)	10.3%	9.8%	8.8%
Black/African American (n = 78)	14.8%	6.6%	9.3%
Hispanic/Latino (n = 25)	4.5%	2.4%	3.0%
Puerto Rican (n = 12)	2.5%	0.8%	1.4%
Chicano/Mexican American (n = 4)	0.6%	0.5%	0.5%
American Indian/Alaskan Native (n = 3)	--	0.8%	0.4%
Other (n = 30)	3.9%	4.2%	3.6%
Omitted (n = 110)	0.6%	0.5%	13.0%

*Total includes 106 candidates who did not record their genders.

Table 2.12 reports the racial/ethnic distributions of the female and the male domestic-educated first-time takers. The male first-time takers included a larger percentage of Caucasian/White candidates than the female first-time takers and smaller percentages in most of the other racial/ethnic groups. Of the male domestic-educated

first-time takers, 74.4% were Caucasian/White, and of the females, 62.8% were Caucasian/White. Most of the other racial/ethnic groups constituted a higher percentage of females than they did of males, except for the American Indian/Alaskan Native and “Other” groups, which constituted larger percentages of males than they did of females.

Table 2.13 presents the percentages of females and males in each racial/ethnic group for the domestic-educated repeat takers. Note that about 43% of the repeat takers were Caucasian/White, while about 60% of the first-time takers were Caucasian/White, and that about 17% of the repeat takers were Black/African American, compared to about 9% of the first-time takers. The Caucasian/White group constituted a higher percentage of the males (56.7%) than of the females (about 49.3%).

Table 2.13
Percentages of Domestic-Educated Female and Male Repeat Takers
in Various Race/Ethnicity Categories

Race/Ethnicity	Gender		Total* (N = 1,447)
	Female (n = 612)	Male (n = 573)	
Caucasian/White (n = 628)	49.3%	56.7%	43.4%
Asian/Pacific Islander (n = 145)	11.4%	13.1%	10.0%
Black/African American (n = 252)	23.5%	18.8%	17.4%
Hispanic/Latino (n = 70)	6.7%	5.1%	4.8%
Puerto Rican (n = 19)	1.1%	1.9%	1.3%
Chicano/Mexican American (n = 6)	0.5%	0.5%	0.4%
American Indian/Alaskan Native (n = 5)	0.5%	0.3%	0.3%
Other (n = 58)	6.5%	3.1%	4.0%
Omitted (n = 264)	0.3%	0.3%	18.2%

*Total includes 262 candidates who did not record their genders.

As was the case for domestic-educated first-time takers, male repeat takers outnumbered females in the Caucasian/White group. Contrary to domestic-educated first-time takers, the domestic-educated repeat takers consisted of a larger percentage

of males than females in the Asian/Pacific Islander group and smaller percentages of males than females in the American Indian/Alaskan Native and “Other” groups.

Among the domestic-educated candidates, the females had an average age at graduation of 29.1 years, while the males had an average age at graduation of 29.7, years (with SDs of 6.8 and 6.6 respectively), for a difference of just over half a year. Table 2.14 presents a more detailed analysis of the relationship between gender and age at graduation for the domestic-educated candidates. Most of the graduates (about 66% of the females and about 60% of the males, see Table 2.14) were 28 or under when they graduated. An additional 10.8% of the females and 11.4% of the males were between 29 and 30 years old when they graduated.

Table 2.14
Percentages of Domestic-Educated Female and Male Candidates
Age at Law School Graduation (Using Age Ranges)

Age at Law School Graduation (N = 2,279)	Gender		
	Female (n = 967)	Male (n = 947)	Omitted (n = 365)
<27 (n = 955)	46.0%	39.9%	36.2%
27-28 (n = 463)	20.3%	20.1%	21.1%
29-30 (n = 246)	10.8%	11.4%	9.3%
31-35 (n = 305)	11.1%	14.9%	15.6%
36-40 (n = 127)	4.4%	5.5%	8.8%
41-45 (n = 85)	3.3%	3.8%	4.7%
46-50 (n = 50)	1.6%	2.7%	2.5%
51-55 (n = 31)	1.9%	0.8%	1.4%
56-60 (n = 10)	0.5%	0.4%	0.3%
>60 (n = 7)	0.2%	0.4%	0.3%

We also looked at the distributions of ages at graduation from law school for domestic-educated candidates across race/ethnicity and found some age differences. The range of average ages at graduation across race/ethnicity goes from 27.0 years for the Chicano/Mexican American group to 31.1 years for the American Indian/Alaskan

Native group. However, most of the other groups had average ages at graduation near 29 years.

Among the domestic-educated candidates, females had an average age of 30.9 years when they took the bar examination in February 2006, while males had an average age at bar attempt of 32.0 years at this point (with SDs of 7.3 and 7.7 respectively), for a difference of just over one year. Table 2.15 presents a more detailed breakdown of the relationship between gender and age at bar attempt for the domestic-educated candidates.

Table 2.15
Percentages of Domestic-Educated Female and Male Candidates
Age at Bar Attempt (Using Age Ranges)

Age at Bar Attempt (N = 2,290)	Gender		
	Female (n = 970)	Male (n = 952)	Omitted (n = 368)
<27 (n = 528)	27.1%	22.0%	15.2%
27-28 (n = 510)	24.4%	21.6%	18.2%
29-30 (n = 308)	13.4%	12.9%	14.9%
31-35 (n = 465)	18.5%	21.4%	22.3%
36-40 (n = 183)	6.6%	8.5%	10.3%
41-45 (n = 125)	3.6%	6.1%	8.7%
46-50 (n = 79)	2.7%	4.0%	4.1%
51-55 (n = 51)	2.3%	2.0%	2.7%
56-60 (n = 22)	0.8%	0.5%	2.4%
>60 (n = 19)	0.6%	0.9%	1.1%

Table 2.16 provides a breakdown of the number of bar attempts by the domestic-educated candidates as a function of gender as of February 2006. Most of the domestic-educated candidates taking the NY bar exam in February 2006 were taking it for the first or second time. Modest percentages were taking the examination for the third or more times, with 83.1% of females and 80.5% of males taking the NY bar exam for the second time or less. As of February 2006, the domestic-educated females had taken the bar examination an average of 2.2 times, while the domestic-educated males had taken it an average of 2.3 times (with SDs of 2.2 and 3.3 respectively).

Table 2.16
Percentages of Female and Male Domestic-Educated Candidates
Number of Bar Attempts

Number of Bar Attempts (N = 2,290)	Gender		
	Female (n = 970)	Male (n = 952)	Omitted (n = 368)
1 (n = 843)	36.9%	39.8%	28.8%
2 (n = 938)	46.2%	40.7%	28.0%
3 (n = 131)	4.1%	6.3%	8.4%
4 (n = 147)	5.4%	5.1%	12.5%
5 (n = 79)	2.4%	3.0%	7.3%
6 (n = 50)	1.2%	2.3%	4.3%
7 (n = 19)	0.8%	0.5%	1.6%
8 (n = 21)	1.2%	0.4%	1.4%
9 (n = 11)	0.4%	0.3%	1.1%
10 (n = 13)	0.4%	0.3%	1.6%
More than 10 (n = 38)	0.9%	1.2%	4.9%

2.4 Characteristics of Foreign-Educated Candidates

This section provides demographic characteristics for foreign-educated candidates. As we will see below, the demographic characteristics of the foreign-educated candidates are somewhat different from those of the domestic-educated candidates. Note that data on the age at graduation from law school were not available

for all of the foreign-educated candidates, and therefore, analyses involving this variable could not be conducted for the foreign-educated candidates.

Tables 2.17 and 2.18 analyze the relationship between gender and race/ethnicity for the foreign-educated candidates, first-time takers and repeat takers. Table 2.17 reports the racial/ethnic distributions of the female and the male foreign-educated first-time takers. The racial/ethnic category with the largest percentage of candidates was the Caucasian/White category, followed by the Asian/Pacific Islander category, "Other" category, Black/African American category and Hispanic/Latino category. None of the foreign-educated candidates chose the Puerto Rican, Chicano/Mexican American, or American Indian/Alaskan Native categories.

Foreign-educated first-time takers included larger percentages of non-Caucasian/White candidates compared to the domestic-educated first-time takers. Furthermore, foreign-educated first-time taking males were more likely than females to be Asian/Pacific Islander; 26.3% of the males and 23.2% of the females were Asian/Pacific Islander. Similar to domestic-educated first-time takers, females made up larger percentages of the Black/African American, and Hispanic/Latino categories for the foreign-educated first-time takers.

Table 2.17
Percentages of Foreign-Educated First-Time Takers
Female and Male Candidates in Various Race/Ethnicity Categories

Race/Ethnicity	Gender		Total* (N = 459)
	Female (n = 211)	Male (n = 209)	
Caucasian/White (n = 212)	48.8%	52.2%	46.2%
Asian/Pacific Islander (n = 104)	23.2%	26.3%	22.7%
Black/African American (n = 29)	8.5%	4.8%	6.3%
Hispanic/Latino (n = 26)	6.6%	5.7%	5.7%
Other (n = 44)	11.4%	9.6%	9.6%
Omitted (n = 44)	1.4%	1.4%	9.6%

*Total includes 39 candidates who did not record their genders.

Table 2.18 presents the percentages of females and males in each racial/ethnic group for the foreign-educated repeat takers. A slightly larger percentage of the females than of the males classified themselves as Caucasian/White (31.7% to about 26.9%). In the Asian/Pacific Islander group, males outnumbered females (47.8% to 39.5%). In the Black/African American group, males outnumbered females (14.6% to 9.3%). In the Hispanic/Latino group, females outnumbered males (7.8% to 4.1%).

Table 2.18
Percentages of Foreign-Educated Repeat Takers
Female and Male Candidates in Various Race/Ethnicity Categories

Race/Ethnicity	Gender		Total* (N = 815)
	Female (n = 334)	Male (n = 364)	
Caucasian/White (n = 206)	31.7%	26.9%	25.3%
Asian/Pacific Islander (n = 310)	39.5%	47.8%	38.0%
Black/African American (n = 86)	9.3%	14.6%	10.6%
Hispanic/Latino (n = 44)	7.8%	4.1%	5.4%
Other (n = 54)	10.2%	5.5%	6.6%
Omitted (n = 115)	1.5%	1.1%	14.1%

*Total includes 117 candidates who did not record their genders.

The results in Table 2.18 differ from those of the domestic-educated repeat takers (Table 2.13), where the Caucasian/White group constituted a smaller percentage of females than males and the Black/African American group constitutes a larger percentage of females than males. The pattern of results is similar for other groups.

The female foreign-educated candidates were generally younger than the domestic-educated female candidates when they took the NY bar exam in February 2006 and the foreign-educated males were generally older than the domestic-educated males. Among the foreign-educated candidates, females had an average age of 30.5 years when they took the bar examination (compared to 30.9 for the domestic-educated females), and males had an average age at bar attempt of 34.5 years at this point (compared to 32.0 for the domestic-educated males). Table 2.19 presents a detailed description of the relationship between gender and age at bar attempt for the foreign-educated candidates. Note that 28.6% of the foreign-educated females were under 27 and over 60% were 30 or under when they took the NY bar exam, but only 35.5% of the males were 30 or under when they took the bar examination.

Table 2.19
Percentages of Foreign-Educated Female and Male Candidates
Age at Bar Attempt (Using Age Ranges) in February 2006

Age at Bar Attempt (N = 1,274)	Gender		
	Female (n = 545)	Male (n = 573)	Omitted (n = 156)
<27 (n = 260)	28.6%	15.4%	10.3%
27-28 (n = 170)	16.9%	11.0%	9.6%
29-30 (n = 153)	14.9%	9.1%	12.8%
31-35 (n = 321)	22.0%	27.6%	27.6%
36-40 (n = 174)	9.0%	16.9%	17.9%
41-45 (n = 98)	4.8%	9.8%	10.3%
46-50 (n = 53)	2.9%	5.1%	5.1%
51-55 (n = 22)	0.7%	2.3%	3.2%
56-60 (n = 14)	--	2.1%	1.3%
>60 (n = 9)	0.2%	0.9%	1.9%

Similar percentages of foreign-educated candidates and domestic-educated candidates repeated the NY bar exam as of February 2006, with just over 63% of the domestic-educated candidates repeating and almost 64% of the foreign-educated candidates repeating. Table 2.20 provides an analysis of the number of bar attempts as of February 2006 as a function of gender for the foreign-educated candidates. Females were a bit less likely than males to be repeating the bar exam. 38.7% of the females and 36.5% of males were taking the bar examination for the first time. As of February 2006, the foreign-educated females had taken the examination an average of 2.3 times, and the foreign-educated males had taken it an average of 2.7 times (with SDs of 1.9 and 2.9 respectively). These averages are slightly higher than those of domestic-educated candidates.

Table 2.20
Percentages of Foreign-Educated Female and Male Candidates
Number of Bar Attempts

Number of Bar Attempts (N = 1,274)	Gender		
	Female (n = 545)	Male (n = 573)	Omitted (n = 156)
1 (n = 459)	38.7%	36.5%	25.0%
2 (n = 431)	36.1%	33.3%	27.6%
3 (n = 130)	9.5%	10.1%	12.8%
4 (n = 93)	7.9%	6.8%	7.1%
5 (n = 51)	3.5%	3.3%	8.3%
6 (n = 33)	1.8%	3.0%	3.8%
7 (n = 19)	0.7%	1.2%	5.1%
8 (n = 10)	0.6%	1.0%	0.6%
9 (n = 8)	0.2%	0.9%	1.3%
10 (n = 8)	0.2%	0.7%	1.9%
>10 (n = 32)	0.7%	3.1%	6.4%

Notes:

1. Adding the percentages listed in tables throughout this report may result in total percentages that differ slightly from 100% due to rounding (e.g., a total percentage of 100.1%), as percentages reported in the tables were rounded to the nearest tenth of a percent.

3. Analyses of Candidate Performance on the February 2006 New York Bar Examination

This section provides detailed descriptions of the performance of the domestic-educated candidates and the foreign-educated candidates on the February 2006 administration of the NY bar exam. It includes analyses of scores on the three different components of the NY bar exam and on the examination as a whole for various groups of candidates. The implications of these results in terms of percentages passing and failing the bar examination are examined in the next section.

The NY bar exam includes four sections, each with different kinds of questions or tasks; the Multistate Bar Examination (MBE), which includes 190 multiple-choice questions; the New York Essay Examination with five essay questions (NY Essay); one Multistate Performance Test task (MPT); and the New York multiple-choice test (NYMC) with 50 questions. In determining the scores on the NY bar exam, the five NY Essays and the MPT are combined to produce a total essay score (essay).

The scores on each component of the NY bar exam (the MBE, the essay, and the NYMC) are scaled to a 0-1,000-point scale. First, the MBE score, which is reported on a 0-200 scale, is multiplied by 5, putting it onto a 0-1,000 scale. The essay scores and the NYMC scores are then scaled to this MBEx5 scale. Scaling the essay and NYMC scores to the MBEx5 ensures that, for the total group of candidates taking the NY bar exam on a given test date, the *mean*, or average, and the SD (*standard deviation*), or spread, of the essay scores and of the NYMC scores will be the same as the mean and SD of the MBE scores on the MBEx5.

This scaling does not ensure that the means and SDs on the different components will be the same in the sample of candidates who agreed to participate in this study (the respondents), although we expect them to be similar because most of the candidates agreed to participate. Also, the scaling does not ensure that the means and SDs of the different tests will be the same in different sub-groups of respondents, and the means are not necessarily expected to be similar in these sub-groups. When reported below, scores for components of the NY bar exam will be reported on a 0-1,000 scale, unless otherwise noted.

In computing the total score for each candidate on the NY bar exam, the MBE gets a weight of 40%, and the NYMC gets a weight of 10%. The five New York essay questions together get a weight of 40%, and the MPT gets a weight of 10%, and therefore, the essay score, derived from the scores on the five essays and the MPT, is assigned a weight of 50%.

An important aspect of test scores is their *reliability*. Reliability refers to the consistency or repeatability in scores and reflects the extent to which the measurements are free of random variation (or random error). Reliability is typically reported as a correlation coefficient that varies from 0.0 to 1.0, where higher values reflect more precision and lower values indicate less precision. All measurements contain some

random (i.e., unexplained) variability; for example, if a person takes two tests covering the same content in more-or-less the same way, the two scores are not likely to be exactly the same. We expect the two scores to be similar, but we do not expect them to be identical. Such variability is typically attributed to *random errors* that have some impact on observed scores.

The reliabilities for the components of the NY bar exam are all fairly high.¹ MBE scores have a reliability of about .90. Multiple-choice tests typically have high reliabilities, and long multiple-choice tests (the MBE has 190 items) tend to have especially good reliability. The NYMC test is much shorter than the MBE, and mainly as a result of that has a somewhat lower reliability, about 0.78. The essay component (including the MPT) has a reliability of about .80. The total score on the NY bar exam that results when the three components are combined with the appropriate weights has a reliability of about .92.²

For purposes of this report, having the component scores of the NY bar exam on the same 0-1,000 scale facilitated comparisons of component scores across and within groups of candidates. In analyzing the patterns of performance on the NY bar exam, we will focus on the results for various groups of candidates defined in terms of the demographic variables discussed in Section 2 (e.g., domestic-educated male candidates) and then summarize the results in terms of the patterns of performance across groups. We will begin with the domestic-educated first-time takers and repeat takers, and then examine results for the foreign-educated first-time takers and repeat takers. Within each of these broadly defined groups, we will also look at performance in terms of gender, race/ethnicity, and age.

3.1 Technical Note on Standard Errors in Estimating Group Mean Scores

We have tried to make this report as non-technical and therefore as accessible as possible, but the accurate interpretation of many of the results in this section requires at least a general understanding of what is called the *standard error of the mean* (SEM). SEMs are intended to provide an indication of the uncertainty in an estimated mean or average score based on a sample from the population being analyzed. Standard errors provide an explicit caveat about the potential for over-interpreting small differences.

The sample analyzed in this report includes over 85% of the candidates who took the NY bar exam in February 2006, and therefore provides good estimates of group means for the total population of candidates who took that exam in February 2006, and for some subgroups in that population. However, in extending the interpretation to future administrations, the inference must be more tentative. The results from February 2006 are likely to be fairly representative of those for future February NY bar exam administrations, assuming that the tests remain the same, and the educational system and candidate population do not change too much.

However, even if everything stays the same, the results are likely to vary somewhat, just because the sample of specific individuals taking the examination will be

different. From one test to another, this sampling variability tends to have an especially large impact if the number of candidates in the group being examined, the *sample size*, is small (and the sample sizes get small for groups defined in terms of several demographic variables; e.g., foreign-educated, repeat takers in a particular racial/ethnic group). For example, if the sample size is 5, the addition of one candidate with an especially high or low score would have a major impact on the average score; if the sample size were 5,000, the addition of one candidate with an especially high or low score would have little impact on the group average. Results tend to be more variable from one sample to another if the sample size is small.

The formulas used to estimate standard errors are based on statistical sampling theory and reflect the random variability associated with the sampling of individuals from a larger population (on any given test date). They do not include any systematic errors due to changes in the population over time.

The statistical theory used to develop formulas for estimating the standard error is quite complicated, but the final result is fairly simple. The standard error in estimating the mean (or average) score for a group is equal to the observed SD (standard deviation) for the group over the square root of the sample size (i.e., the number of candidates in the group), and therefore, as the sample size gets larger, the standard error of the mean (SEM) gradually gets smaller. The decrease in the standard error as the sample size increases is gradual because the SEM is inversely proportional to the *square root* of the sample size. As a result, in order to cut the SEM in half, the sample size has to be made four times as large. So, if the SEM is based on a sample of 100, the sample size would have to be increased to 400 to cut the SEM in half and to 1,600 to cut it by three quarters. A law of diminishing returns operates for standard errors, and the standard error never reaches zero.

Thus, the standard error for a group mean depends on the SD within the group and the sample size for the group. The SDs for the various groups considered in this section vary somewhat (from about 50 to over 100), but the sample sizes vary much more (from a few individuals to sample sizes of over 2,000). Therefore, the sample size tends to be the dominant factor in determining the standard error.

Assuming a typical SD of about 70, a sample size of 100 would yield an SEM of about 7 ($70/\sqrt{100} = 7$), and a sample size of 49 would yield an SEM of about 10 ($70/\sqrt{49} = 10$). For a sample size of about 25, the SEM would be about 14. As a rule of thumb, we will not place much emphasis on group means based on fewer than 100 candidates and even less emphasis on group means based on fewer than 50 candidates. In this and subsequent sections, we will generally not report group means for groups with fewer than 20 candidates. As the sample size gets small (e.g., below 20), the group mean says more about the particular individuals in the sample than it does about the group as a whole or about what might be found in future February bar examination administrations. Note that we did, however, report group counts and percentages in Section 2 for groups with fewer than 20 candidates to provide information regarding the

characteristics (e.g., race/ethnicity) of the candidate sample from the February 2006 NY bar exam administration.

3.2 Note on Confidence Intervals

Confidence intervals are often used to indicate the uncertainty in a reported statistic. Assuming that the main source of uncertainty in a reported statistic is sampling variability, confidence intervals can be defined in terms of standard errors. In particular, a 68% confidence interval covers the range from one standard error below the mean, or average, to one standard error above the mean. It is called a “68% confidence interval” because such intervals are expected to include the true value of the mean about 68% of the time. Similarly, a 95% confidence interval includes the range from two standard errors below the mean to two standard errors above the mean and is expected to include the true value of the mean about 95% of the time.³

Standard errors are reported in many of the tables in this report and can be used to construct approximate confidence intervals if the reader wishes to do so. Alternately, they can be taken simply as cautionary notes not to over interpret relatively small differences (i.e., differences that are not much bigger than the standard errors involved in the comparison) in generalizing the result across future February administrations.⁴

3.3 Domestic-Educated First-Time Takers

As discussed in Section 2, the domestic-educated first-time takers include candidates who had graduated from a law school in the United States and were taking the bar examination for the first time in New York during the February administration. (It is possible that some of these candidates had taken a previous bar examination in a different jurisdiction). 60.1% of this group is Caucasian/White, but it also includes substantial percentages of other racial/ethnic groups. It has a slightly larger percentage of males (45.0%) than females (42.5%).

Table 3.1 reports the means and SDs on each part of the NY bar exam and the means and SDs on the total NY bar exam for domestic-educated first-time takers. Table 3.1 includes separate rows for females, males, and the total group. The mean bar examination score for the total group of just over 710 is well above the passing score of 665 in February 2007. Note that the standard errors (ranging from 2.7 to 3.9) are fairly small because of the large sample sizes, and that the SEMs for the total sample of respondents are smaller than those for the two subgroups.

Table 3.1
Score Means, Standard Deviations, and Standard Errors
Domestic-Educated First-Time Takers: Females and Males

Gender		MBE Scaled Score x 5	Essay Scaled Score	NYMC Scaled Score	Total NY Bar Score
Female (n = 358; SEM ≈ 3.9)	Mean (SD)	701.05 (73.37)	713.40 (76.43)	693.59 (80.78)	706.51 (67.70)
Male (n = 379; SEM ≈ 4.1)	Mean (SD)	727.01 (80.34)	705.81 (83.51)	703.37 (78.99)	714.03 (73.86)
Total* (N = 843; SEM ≈ 2.7)	Mean (SD)	714.42 (78.84)	709.50 (80.16)	697.94 (79.30)	710.32 (71.53)

*Total includes 106 candidates in the sample of domestic-educated first-time takers who did not record their genders.

Note: The standard error of the mean (SEM) is equal to the SD divided by the square root of the sample size, and is given in the table after the sample size (n or N).

The male candidates did better on average than the female candidates on the MBE and slightly better on the NYMC. The female candidates did better on average than the male candidates on the essay test, which includes both the NY Essay questions and the MPT task. The difference between males and females on the MBE is about 26 points (about 5 points on the MBE scale), while the difference on the essay test is about 7.6 points, and as a result the average score for males on the total NY bar exam is about 7.5 points higher than the average score for females. This difference of 7.5 points is equal to about a tenth of the SD (71.53) for the total group. A difference of a tenth of an SD would be considered a small difference in most contexts. Note also that the 7.5 point difference is not much bigger than the standard error of the difference between these two means (the SEM of the difference is about 6 points).

Table 3.2 presents similar results for the domestic-educated first-time takers, as a function of their race/ethnicity. Note that some of the sample sizes in this table are quite small (e.g., the Hispanic/Latino group had 25 candidates), and therefore, the corresponding standard errors are fairly large (15 points), and the mean scores would not be expected to be very stable for this group from one test date to another.⁵

Table 3.2
Score Means, Standard Deviations, and Standard Errors
Domestic-Educated First-Time Takers: Racial/Ethnic Groups

Race/Ethnicity		MBE Scaled Score x 5	Essay Scaled Score	NYMC Scaled Score	Total NY Bar Score
Caucasian/ White (n = 507; SEM ≈ 3.3)	Mean (SD)	725.46 (75.95)	719.07 (77.06)	707.02 (77.43)	720.43 (68.39)
Asian/ Pacific Islander (n = 74; SEM ≈ 9.3)	Mean (SD)	708.09 (82.77)	703.42 (83.09)	676.98 (82.31)	702.65 (73.23)
Black/ African American (n = 78; SEM ≈ 8.1)	Mean (SD)	669.01 (67.16)	671.29 (75.10)	676.17 (81.37)	670.83 (63.87)
Hispanic/ Latino (n = 25; SEM ≈ 15.1)	Mean (SD)	680.30 (69.59)	679.11 (84.36)	698.72 (76.89)	681.60 (71.16)
Other (n = 30; SEM ≈ 16.2)	Mean (SD)	721.58 (88.39)	707.08 (95.17)	701.50 (87.20)	712.30 (84.55)
Total* (N = 843; SEM ≈ 2.7)	Mean (SD)	714.42 (78.84)	709.50 (80.16)	697.94 (79.30)	710.32 (71.53)

*Total includes racial/ethnic groups with fewer than 20 candidates, which are not separately listed in the table.

Note: The SEM tends to be large for groups with small sample sizes. For example, for the Puerto Rican group (with 12 candidates) the SEM would be over 22 points.

There are two general characteristics of the data in Table 3.2 that are worthy of note. First, in general, the results do not differ substantially across test components within each racial/ethnic group; the difference between the highest average component score and the lowest average component score within each group is generally less than twenty points (over one fourth of an SD). The largest difference within racial/ethnic groups involves the NYMC scores, for which the Asian/Pacific Islander group has an unusually low average score and the Hispanic/Latino group has an unusually high average score. Second, the differences between racial/ethnic groups in Table 3.2 are large. The Caucasian/White group has the highest overall average score of the groups listed in Table 3.2, and the Black/African American group has the lowest overall average

score⁶. The difference between these two groups is almost 50 points, which is over three-quarters of a standard deviation (SD) for the total sample.

Combining these two observations, it is clear that the differences among the racial/ethnic groups are not associated with particularly high or low scores on one component of the bar examination. Rather, the differences among the group means are fairly consistent across all of the components and are considerably larger than those between test components.

Figure 3.1 displays the trends in scores for each part of the NY bar exam and for the total bar exam. In this figure, the scores within racial/ethnic groups tend to be similar across the components of the NY bar exam and total NY bar exam. In contrast, the racial/ethnic groups generally show larger differences in their average scores. That is, the lines for different racial/ethnic groups tend to be relatively flat, but they are widely separated, covering a range of nearly 50-points between the Caucasian/White group (highest scoring) and the Black/African American group (lowest scoring). There are two places where this finding does not hold. For the NYMC test, the Asian/Pacific Islander group scores relatively poorly compared to their other component scores and the Hispanic/Latino group scores relatively well compared to their other component scores.

Figure 3.1
Trends in Essay, NYMC, MBE, and Total NY Bar Exam Scores
Racial/Ethnic Groups

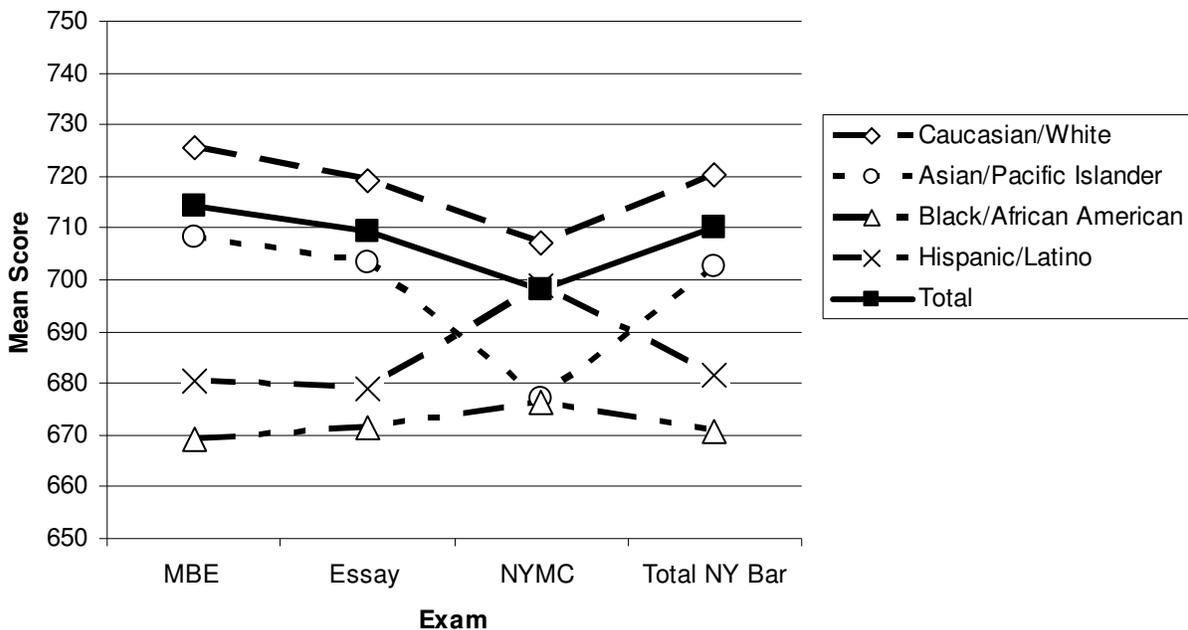


Table 3.3 examines the relationship between average test scores and age at graduation from law school for domestic-educated first-time takers. The average score for the total NY bar exam decreases systematically from the first age category (less than 27) to the sixth category (41 - 45). Age categories with fewer than 20 candidates are not included in Table 3.3 (note that the standard errors are increasing as age at graduation increases due to smaller and smaller sample sizes).

Table 3.3
Score Means, Standard Deviations, and Standard Errors
Domestic-Educated First-Time Takers: Age at Graduation

Age at Graduation		MBE Scaled Score x 5	Essay Scaled Score	NYMC Scaled Score	Total NY Bar Score
Less than 27 (n = 339; SEM ≈ 4.0)	Mean (SD)	722.72 (72.91)	719.78 (75.36)	701.59 (77.71)	719.15 (66.23)
27 - 28 (n = 193; SEM ≈ 5.7)	Mean (SD)	715.58 (81.04)	714.36 (83.83)	694.82 (75.41)	712.89 (74.40)
29 - 30 (n = 97; SEM ≈ 7.7)	Mean (SD)	713.48 (80.27)	703.56 (75.68)	700.49 (76.72)	707.23 (68.73)
31 - 35 (n = 116; SEM ≈ 8.1)	Mean (SD)	707.66 (90.52)	706.66 (86.94)	700.24 (90.69)	706.42 (80.75)
36 - 40 (n = 40; SEM ≈ 11.2)	Mean (SD)	711.68 (68.37)	688.55 (70.12)	698.59 (82.07)	698.83 (62.51)
41 - 45 (n = 24; SEM ≈ 14.7)	Mean (SD)	679.06 (74.46)	665.75 (62.27)	669.86 (89.79)	671.54 (61.51)
Total* (N = 843; SEM ≈ 2.7)	Mean (SD)	714.42 (78.84)	709.50 (80.16)	697.94 (79.30)	710.32 (71.53)

*Total includes age ranges with fewer than 20 candidates not separately listed in the table.

3.4 Domestic-Educated Repeat Takers

Table 3.4 reports the means and SDs on the three components of the bar examination and the means and SDs on the total NY bar exam for domestic-educated repeat takers. It reports results for females, males, and the total group of domestic-educated repeat takers.

The first thing to note in examining Table 3.4 in relation to Table 3.1 is that for both females and males and on all components of the test, the average scores for repeat takers are lower than they are for the first-time takers. For the total group of domestic-educated first-time takers, the average score on the NY bar exam is over 50 points higher than that for the repeat takers (710.32 vs. 656.37). The repeat takers have all failed the NY bar exam on at least one previous test date and generally have lower scores than the first-time takers on subsequent test dates. Past performance tends to be associated with future performance.

The female repeat takers do better on average than male repeat takers on the essay. The male repeat takers do better on average than females on the MBE and NYMC. The difference between males and females on the MBE is about 20 points on the 0-1,000-point scale, while the difference on the essay is about 11 points, and, as a result, the average scores for female repeat takers on the total NY bar exam is about 3 points lower than the average for male repeat takers. This difference of 3 points is less than one-tenth of an SD (and is less than the standard error for the difference between these two means).

Table 3.4
Score Means, Standard Deviations, and Standard Errors
Domestic-Educated Repeat takers: Females and Males

Gender		MBE Scaled Score x 5	Essay Scaled Score	NYMC Scaled Score	Total NY Bar Score
Female (n = 612; SEM ≈ 2.5)	Mean (SD)	644.42 (58.29)	669.45 (63.92)	655.93 (68.76)	658.10 (52.17)
Male (n = 573; SEM ≈ 2.5)	Mean (SD)	665.22 (59.77)	658.25 (61.48)	660.44 (64.68)	661.25 (51.53)
Total* (N = 1,447; SEM ≈ 1.6)	Mean (SD)	651.66 (60.95)	660.64 (63.74)	653.87 (68.77)	656.37 (52.87)

*Total includes 262 candidates in the sample of domestic-educated repeat takers who did not record their genders.

Table 3.5 presents results for the domestic-educated repeat takers as a function of their race/ethnicity. The results are fairly consistent across test components within each racial/ethnic group; the difference between the highest average component score and the lowest average component score in each group is generally less than 15 points.

The differences between racial/ethnic groups for domestic-educated repeat takers are much smaller than they are for the domestic-educated first-time takers. Among the repeat takers listed in Table 3.5, the “Other” group has the highest overall average total score, and the Black/African American group has the lowest average total score. The difference between these two groups is about 16 points, which is much smaller than the corresponding difference for first-time takers (more than 41 points).

Table 3.5
Score Means, Standard Deviations, and Standard Errors
Domestic-Educated Repeat Takers: Racial/Ethnic Groups

Race/Ethnicity		MBE Scaled Score x 5	Essay Scaled Score	NYMC Scaled Score	Total NY Bar Score
Caucasian/ White (n = 628; SEM ≈ 2.4)	Mean (SD)	659.07 (58.60)	670.21 (63.01)	664.18 (65.23)	665.16 (51.10)
Asian/ Pacific Islander (n = 145; SEM ≈ 4.8)	Mean (SD)	655.37 (60.82)	658.29 (58.09)	658.68 (66.46)	657.14 (48.22)
Black/ African American (n = 252; SEM ≈ 4.0)	Mean (SD)	644.33 (63.55)	654.63 (64.57)	648.00 (70.36)	649.84 (55.02)
Hispanic/ Latino (n = 70; SEM ≈ 7.6)	Mean (SD)	645.81 (59.17)	661.07 (67.77)	652.13 (70.83)	654.06 (55.54)
Other (n = 58; SEM ≈ 7.3)	Mean (SD)	664.45 (59.20)	669.51 (58.74)	657.97 (57.49)	666.43 (47.68)
Total* (N = 1,447; SEM ≈ 1.6)	Mean (SD)	651.66 (60.95)	660.64 (63.74)	653.87 (68.77)	656.37 (52.87)

*Total includes racial/ethnic groups with fewer than 20 candidates not separately listed in the table.

Table 3.6 examines the relationship between average test scores and age at graduation from law school for domestic-educated repeat takers. The relationship between average bar scores and age at graduation in Table 3.6 is not as regular and systematic as it is for the first-time takers, but the average score tends to decline from the first category (less than 27) to the sixth category (41-45).

Table 3.6
Score Means, Standard Deviations, and Standard Errors
Domestic-Educated Repeat Takers: Age at Graduation

Age at Graduation		MBE Scaled Score x 5	Essay Scaled Score	NYMC Scaled Score	Total NY Bar Score
Less than 27 (n = 616; SEM ≈ 2.4)	Mean	652.28	673.07	654.36	662.88
	(SD)	(58.70)	(60.71)	(68.16)	(50.10)
27 - 28 (n = 270; SEM ≈ 4.0)	Mean	656.96	663.59	651.67	659.77
	(SD)	(67.76)	(70.37)	(67.38)	(59.29)
29 - 30 (n = 149; SEM ≈ 4.9)	Mean	646.88	652.63	655.12	650.62
	(SD)	(56.97)	(62.19)	(67.55)	(51.83)
31 - 35 (n = 189; SEM ≈ 4.2)	Mean	655.84	653.30	655.55	654.55
	(SD)	(58.34)	(57.04)	(66.42)	(47.44)
36 - 40 (n = 87; SEM ≈ 6.9)	Mean	643.40	642.01	646.13	642.94
	(SD)	(66.65)	(64.28)	(69.68)	(56.21)
41 - 45 (n = 61; SEM ≈ 6.2)	Mean	643.19	628.70	653.42	636.98
	(SD)	(46.30)	(48.20)	(57.88)	(41.02)
46 - 50 (n = 33; SEM ≈ 10.0)	Mean	648.74	630.27	687.92	643.42
	(SD)	(58.88)	(51.94)	(72.39)	(45.69)
51 - 55 (n = 24; SEM ≈ 17.2)	Mean	643.40	646.20	639.55	644.42
	(SD)	(78.58)	(76.95)	(113.44)	(68.80)
Total* (N = 1,447; SEM ≈ 1.6)	Mean	651.66	660.64	653.87	656.37
	(SD)	(60.95)	(63.74)	(68.77)	(52.87)

*Total includes age ranges with fewer than 20 candidates not separately listed in the table.

Table 3.7 presents the averages and the SDs of the scores for each test component and for the total NY bar exam for domestic-educated first-time takers, second-time takers, third-time takers, etc. As noted earlier, the average score for the repeat takers, as a group, is lower than that of the first-time takers. The average score on the total NY bar exam declines as we move from the first-time takers to the second-time takers, and then show a mixed pattern of decline and increase for number of bar attempts greater than 3. This pattern is similar for the MBE, the essay, and the NYMC.

Table 3.7
Score Means, Standard Deviations, and Standard Errors
Domestic-Educated Takers: Number of Bar Attempts

Number of Bar Attempts		MBE Scaled Score x 5	Essay Scaled Score	NYMC Scaled Score	Total NY Bar Score
1	Mean	714.42	709.50	697.94	710.32
(n = 843; SEM ≈ 2.7)	(SD)	(78.84)	(80.16)	(79.30)	(71.53)
2	Mean	663.96	674.60	664.00	669.29
(n = 938; SEM ≈ 1.9)	(SD)	(59.47)	(61.60)	(65.58)	(50.59)
3	Mean	637.92	638.26	632.17	637.50
(n = 131; SEM ≈ 5.1)	(SD)	(59.77)	(56.63)	(69.56)	(49.64)
4	Mean	633.78	645.81	644.27	640.86
(n = 147; SEM ≈ 4.9)	(SD)	(53.71)	(63.57)	(73.10)	(49.15)
5	Mean	633.03	631.57	633.22	632.33
(n = 79; SEM ≈ 6.4)	(SD)	(54.88)	(55.11)	(72.49)	(45.66)
6	Mean	625.52	642.34	641.61	635.52
(n = 50; SEM ≈ 7.4)	(SD)	(46.39)	(55.10)	(70.88)	(38.19)
7 or more	Mean	609.18	613.81	624.37	613.04
(n = 102; SEM ≈ 5.8)	(SD)	(60.74)	(57.88)	(66.23)	(48.67)
Total	Mean	674.76	678.63	670.09	676.23
(N = 2,290; SEM ≈ 1.5)	(SD)	(74.50)	(74.06)	(75.85)	(65.77)

In general, and not surprisingly, the repeat takers get lower scores on average than the first-time takers, and the performance tends to be worse for candidates with larger numbers of previous attempts, at least for the first three attempts. In addition, we have the consistent finding that, for domestic-educated repeat takers, females do better than males on the essay, and males do better than females on the MBE.

3.5 Foreign-Educated First-Time Takers

Table 3.8 reports the means and SDs on each component of the NY bar exam and the means and SDs on the total NY bar exam for females, males, and the total group of foreign-educated first-time takers in the sample. Foreign-educated first-time takers score considerably lower on the NY bar exam on average compared to domestic-educated first-time takers (over 78 points lower). As is the case for the domestic-educated first-time takers, males do better on average than females on the MBE, and females do better than males on the essay. The difference between males and females on the MBE is over 10 points, while the difference on the essay is almost 17 points, and the average total score for males on the bar examination is about 4.5 points lower than the average total score for females. This difference of 4.5 points is small compared to the overall SD of almost 90 points and is less than the SEM (and therefore is not statistically significant).

Table 3.8
Score Means, Standard Deviations, and Standard Errors
Foreign-Educated First-Time Takers: Females and Males

Gender		MBE Scaled Score x 5	Essay Scaled Score	NYMC Scaled Score	Total NY Bar Score
Female (n = 211; SEM ≈ 6.1)	Mean (SD)	625.68 (93.84)	642.03 (84.62)	646.05 (91.76)	635.89 (82.79)
Male (n = 209; SEM ≈ 6.8)	Mean (SD)	636.41 (103.40)	625.09 (98.67)	642.40 (94.67)	631.36 (94.18)
Total* (N = 459; SEM ≈ 4.4)	Mean (SD)	629.38 (98.84)	631.54 (93.35)	642.85 (94.10)	631.81 (89.40)

*Total includes 39 candidates in the sample of foreign-educated first-time test takers who did not record their genders.

Table 3.9 presents average scores on each part of the NY bar exam and on the total NY bar exam for the foreign-educated first-time takers as a function of their race/ethnicity. The results are not as consistent across test components within each racial/ethnic group as they were for the domestic-educated first-time takers. In particular, the Hispanic/Latino group has a relatively large score difference (over 40 points) between the NYMC and the MBE. The other groups are more consistent in their mean scores across the three components, though the Asian/Pacific Islander group has a 25 point score difference between the NYMC and the MBE.

Compared to the differences among test components for each racial/ethnic group, the differences across groups are generally quite large. The largest difference between racial/ethnic groups (i.e., between Caucasian/White and Hispanic/Latino) is 64

points, or about seven-tenths of an SD. Scores for the Asian/Pacific Islander and Black/African American group are closer to scores for the Hispanic/Latino group than to scores for the Caucasian/White group.

Table 3.9
Score Means, Standard Deviations, and Standard Errors
Foreign-Educated First-Time Takers: Racial/Ethnic Groups

Race/Ethnicity		MBE Scaled Score x 5	Essay Scaled Score	NYMC Scaled Score	Total NY Bar Score
Caucasian/ White (n = 212; SEM ≈ 6.0)	Mean (SD)	652.88 (96.05)	656.82 (87.01)	661.89 (84.78)	655.78 (83.43)
Asian/ Pacific Islander (n = 104; SEM ≈ 9.8)	Mean (SD)	609.59 (103.29)	601.38 (97.63)	626.55 (104.01)	607.16 (94.75)
Black/ African American (n = 29; SEM ≈ 17.0)	Mean (SD)	601.45 (97.45)	609.39 (89.59)	593.64 (91.90)	604.69 (86.64)
Hispanic/ Latino (n = 26; SEM ≈ 14.3)	Mean (SD)	585.71 (69.84)	589.63 (73.87)	626.94 (80.48)	591.77 (67.29)
Other (n = 44; SEM ≈ 13.1)	Mean (SD)	622.52 (92.43)	636.85 (80.20)	642.20 (95.60)	631.61 (80.00)
Total* (N = 459; SEM ≈ 4.4)	Mean (SD)	629.38 (98.84)	631.54 (93.35)	642.85 (94.10)	631.81 (89.40)

*Total includes racial/ethnic groups with fewer than 20 candidates not separately listed in the table.

3.6 Foreign-Educated Repeat Takers

Table 3.10 reports the means and SDs on the three components of the bar examination and on the total NY bar exam for females, males, and the total group of foreign-educated repeat takers.

The average scores for both female and male foreign-educated repeat takers reported in Table 3.10 are lower than those for the foreign-educated first-time takers (see Table 3.8) on the total NY bar exam and on all components of the exam.

Table 3.10
Score Means, Standard Deviations, and Standard Errors
Foreign-Educated Repeat Takers: Females and Males

Gender		MBE Scaled Score x 5	Essay Scaled Score	NYMC Scaled Score	Total NY Bar Score
Female (n = 334; SEM ≈ 4.0)	Mean (SD)	616.05 (76.76)	620.74 (69.91)	624.32 (81.66)	619.22 (65.05)
Male (n = 364; SEM ≈ 3.8)	Mean (SD)	635.24 (77.67)	606.54 (70.45)	638.42 (77.94)	621.24 (66.34)
Total* (N = 815; SEM ≈ 2.6)	Mean (SD)	624.10 (77.41)	611.95 (70.62)	630.35 (80.24)	618.66 (65.74)

*Total includes 117 candidates in the sample of domestic-educated first-time test takers who did not record their genders.

Similar to foreign-educated first-time takers, foreign-educated female repeat takers have higher average essay scores compared to male repeat takers. Male candidates have higher average scores than females on the MBE and on the NYMC. The difference between males and females on the MBE is about 19 points, and the difference on the NYMC is about 14 points. The female candidates' essay scores are about 14 points larger than those of the males. Also, similar to the foreign-educated first-time takers, both female and male repeat takers have relatively higher average scores on the NYMC than on either of the other two components.

Table 3.11 presents results for the foreign-educated repeat takers as a function of their race/ethnicity. In general, scores for foreign-educated repeat takers are lower than those of foreign-educated first-time takers. The pattern of results across test components within each racial/ethnic group differs from that for the foreign-educated first-time takers. In particular, the Hispanic/Latino group has a lower average on the essay than on the MBE or the NYMC (the pattern is reversed for foreign-educated first-time takers).

Table 3.11
Score Means, Standard Deviations, and Standard Errors
Foreign-Educated Repeat Takers: Racial/Ethnic Groups

Race/Ethnicity		MBE Scaled Score x 5	Essay Scaled Score	NYMC Scaled Score	Total NY Bar Score
Caucasian/ White (n = 206; SEM ≈ 4.9)	Mean (SD)	638.15 (74.49)	636.00 (68.87)	635.74 (75.10)	636.81 (62.57)
Asian/ Pacific Islander (n = 310; SEM ≈ 4.2)	Mean (SD)	627.31 (79.40)	598.88 (69.02)	634.92 (81.79)	613.89 (66.57)
Black/ African American (n = 86; SEM ≈ 7.0)	Mean (SD)	609.35 (68.26)	610.58 (64.39)	623.37 (71.47)	611.40 (57.01)
Hispanic/ Latino (n = 44; SEM ≈ 11.6)	Mean (SD)	620.49 (82.65)	601.26 (73.07)	628.43 (81.54)	611.68 (71.29)
Other (n = 54; SEM ≈ 11.0)	Mean (SD)	603.64 (86.59)	622.87 (71.67)	613.86 (94.27)	614.30 (72.25)
Total* (N = 815; SEM ≈ 2.6)	Mean (SD)	624.10 (77.41)	611.95 (70.62)	630.35 (80.24)	618.66 (65.74)

*Total includes racial/ethnic groups with fewer than 20 candidates not separately listed in the table.

Table 3.12 presents the averages and the SDs of the scores for each test component and for the total NY bar exam for foreign-educated first-time takers, second time takers, third-time takers, etc. As noted earlier, the average score for the repeat takers, as a group, is lower than that of the first-time takers. The average score on the total NY bar exam decreases slightly as we go from the first-time takers to the second-time takers. After the second attempt, average scores tend to decrease more than they increase, but the pattern is not completely consistent. The pattern is also not very consistent for the MBE, essay, and NYMC.

Table 3.12
Score Means, Standard Deviations, and Standard Errors
Foreign-Educated Takers: Number of Bar Attempts

Number of Bar Attempts		MBE Scaled Score x 5	Essay Scaled Score	NYMC Scaled Score	Total NY Bar Score
1 (n = 459; SEM ≈ 4.4)	Mean (SD)	629.38 (98.84)	631.54 (93.35)	642.85 (94.10)	631.81 (89.40)
2 (n = 431; SEM ≈ 3.8)	Mean (SD)	631.96 (83.88)	620.11 (73.78)	632.21 (83.82)	626.07 (70.93)
3 (n = 130; SEM ≈ 6.3)	Mean (SD)	618.07 (73.40)	610.62 (69.14)	628.60 (79.97)	615.42 (64.13)
4 (n = 93; SEM ≈ 6.8)	Mean (SD)	618.91 (67.82)	600.70 (63.91)	632.96 (75.29)	611.20 (56.49)
5 (n = 51; SEM ≈ 9.3)	Mean (SD)	623.55 (60.73)	611.85 (68.45)	613.80 (80.31)	616.73 (55.45)
6 (n = 33; SEM ≈ 10.4)	Mean (SD)	614.91 (56.34)	605.44 (61.60)	633.23 (70.11)	612.06 (50.25)
7 or more (n = 77; SEM ≈ 7.2)	Mean (SD)	600.86 (69.72)	584.99 (59.86)	629.44 (70.34)	595.79 (54.28)
Total (N = 1,274; SEM ≈ 2.3)	Mean (SD)	626.00 (85.75)	619.01 (80.08)	634.85 (85.67)	623.40 (75.36)

3.7 Correlations among Scores

The previous sections provided a description of the component and total scores on the NY bar exam by domestic-educated and foreign-educated candidates, including first-time takers and repeat takers. In this section, we examine the *correlations* among component and total scores on the NY bar exam across all candidates to obtain a

general sense of the relationships among components of the NY bar exam. In addition, we examine the relationships among NY bar exam scores for several sub-groups.

Tables 3.13 through 3.20 present correlations among scores for the total sample and separately by gender and racial/ethnic group. The analyses for racial/ethnic groups were restructured to groups with 100 or more candidates, because smaller groups result in less stable correlation coefficients. A correlation coefficient between two variables indicates the degree of linear relationship between the two variables. Correlation coefficients have values between -1.0 and +1.0, with a correlation of +1.0 indicating a perfect direct linear relationship between the two variables, and a correlation of -1.0 indicating a perfect inverse linear relationship between the two variables. In either of these two extreme cases, either variable can be predicted perfectly from the other using a simple straight-line relationship. A correlation of 0.0 indicates the complete absence of any linear relationship between the two variables, and neither variable can be predicted from the other.

A correlation matrix, like Table 3.13, presents all of the correlations among a set of variables in a relatively compact format. For example, the second column includes the correlations of the MBE with each of the other variables. The 1 in the first row and the first column indicates that the MBE is perfectly correlated with itself, which is true for all variables. The second entry in the first column indicates that the correlation between the MBE and the essay is .71.

Table 3.13
Correlations Among Scores for the Total Sample

	MBE Scaled Score	Essay Scaled Score	NYMC Scaled Score	Total NY Bar Score
MBE Scaled Score	1			
Essay Scaled Score	.71	1		
NYMC Scaled Score	.68	.59	1	
Total NY Bar Score	.91	.93	.74	1

N = 3,564

The correlations in Table 3.13 are all quite large, indicating that scores on the different component tests have strong positive relationships with each other and with the total score. A strong positive correlation with the total score is expected in part because the component scores are included in the total score. The large positive correlations among the component tests reflect the fact that they measure related and partially overlapping competencies.

Table 3.14 presents the *disattenuated correlations* among components of the NY bar exam. Disattenuated correlations are estimates of what the correlations among scores would be if each was measured without error (i.e., each was perfectly reliable) and, because of this, these correlations are the same as or larger than ordinary correlation coefficients. For example, each of the correlations in Table 3.14 is larger than those in Table 3.13. Furthermore, disattenuated correlations of MBE and essay with NY bar exam are 1, indicating that if MBE and essay were perfectly reliable we would expect them to show a perfect linear relationship with the NY bar exam. This is not surprising given that 50% of the NY bar exam score is based on the essay component and 40% is based on the MBE. Of course, none of the bar exam components are perfectly reliable, but disattenuated correlations provide an idea of the extent to which component reliability affects the correlations among components.

Table 3.14
Disattenuated Correlations Among Scores for the Total Sample

	MBE Scaled Score	Essay Scaled Score	NYMC Scaled Score	Total NY Bar Score
MBE Scaled Score	1			
Essay Scaled Score	.84	1		
NYMC Scaled Score	.91	.75	1	
Total NY Bar Score	1	1	.87	1

N = 3,564

In Tables 3.13, and 3.15 to 3.20, the correlations are all positive, indicating that an increase in one score is associated with an increase in the other score. In all of these correlation matrices, the largest correlation is between essay scores and total NY bar exam scores, with a correlation between .91 and .94 (reflecting the fact that the essay score constitutes 50% of the total bar examination score).⁷ The second largest correlation in all cases is between MBE scores and NY bar exam scores, with a correlation between .88 and .92 (reflecting the fact that the MBE score constitutes 40% of the total bar examination score). These correlations are quite large because they involve relationships between the total bar examination score and major components of the total score. The correlation between the total score and the NYMC is also consistently large (between .70 and .76) because the NYMC also contributes to the total score (although its weight, 10%, is relatively small).

The correlations among the component scores and the total scores on the bar examination are similar in magnitude across females and males. These correlations range from .58 to .94 and differ at most by .04.

The correlations among components of and the total scores on the bar examination also have similar patterns across Caucasian/White, Asian/Pacific Islander, Black/African American, and Hispanic/Latino groups. However, the Black/African American group had slightly smaller correlations among all components of the bar examination compared to other groups.

Table 3.15
Correlations Among Scores for Females

	MBE Scaled Score	Essay Scaled Score	NYMC Scaled Score	Total NY Bar Score
MBE Scaled Score	1			
Essay Scaled Score	.71	1		
NYMC Scaled Score	.65	.58	1	
Total NY Bar Score	.91	.93	.72	1

N = 1,515

Table 3.16
Correlations Among Scores for Males

	MBE Scaled Score	Essay Scaled Score	NYMC Scaled Score	Total NY Bar Score
MBE Scaled Score	1			
Essay Scaled Score	.73	1		
NYMC Scaled Score	.71	.62	1	
Total NY Bar Score	.92	.94	.76	1

N = 1,525

Table 3.17
Correlations Among Component Scores for the Caucasian/White Group

	MBE Scaled Score	Essay Scaled Score	NYMC Scaled Score	Total NY Bar Score
MBE Scaled Score	1			
Essay Scaled Score	.69	1		
NYMC Scaled Score	.65	.57	1	
Total NY Bar Score	.90	.93	.72	1

N = 1,553

Table 3.18
Correlations Among Component Scores for the Asian/Pacific Islander Group

	MBE Scaled Score	Essay Scaled Score	NYMC Scaled Score	Total NY Bar Score
MBE Scaled Score	1			
Essay Scaled Score	.70	1		
NYMC Scaled Score	.71	.61	1	
Total NY Bar Score	.91	.93	.76	1

N = 663

Table 3.19
Correlations Among Scores for the Black/African American Group

	MBE Scaled Score	Essay Scaled Score	NYMC Scaled Score	Total NY Bar Score
MBE Scaled Score	1			
Essay Scaled Score	.63	1		
NYMC Scaled Score	.62	.52	1	
Total NY Bar Score	.88	.91	.70	1

N = 445

Table 3.20
Correlations Among Scores for the Hispanic/Latino Group

	MBE Scaled Score	Essay Scaled Score	NYMC Scaled Score	Total NY Bar Score
MBE Scaled Score	1			
Essay Scaled Score	.73	1		
NYMC Scaled Score	.68	.61	1	
Total NY Bar Score	.91	.94	.74	1

N = 165

Notes:

1. The reliabilities reported here are Cronbach's alpha coefficients. The reliabilities of .78 for the NYMC and of .80 for the essay component were estimated using candidates taking the NY bar exam in July 2005.
2. The reliability of the total NY bar exam was obtained by computing the composite reliability, which uses the variances in scores, component score reliabilities, and component score weights. High-stakes examinations are generally expected to have a reliability of 0.90 or above.
3. The standard error in the difference between the mean scores for two groups depends on the standard error in the two mean scores. If the standard error for the mean of one group is much larger than the standard error of the mean for the other group (usually because the first group is much smaller than the second), the standard error of the difference is essentially the same as the larger of the two standard errors. If the standard errors for the two groups are about the same size, the standard error of the difference will be about 1.4 times the average of the two standard errors.
4. Tests of statistical significance are often used in studies like this to decide whether an observed difference was due to sampling variation or represents a real difference between the populations being sampled. We have decided not to include such tests for three reasons:
 - First, in interpreting the results as an indication of what happened in February 2006, significance testing is not appropriate, because the database includes over 85% of the relevant population, making sampling error a minor concern.
 - Second, in extending the interpretation to future February administrations, sampling variability is a concern, but it is not the main concern. Except in cases where sample sizes are small, systematic changes over time are probably more serious threats to the validity of the inference.
 - Third, if a test of statistical significance of the difference between two mean scores is needed, it can be derived from the standard error of the difference between the mean scores. If the difference between the two mean scores is greater than two times the standard error of the difference, the observed difference is statistically significant.

The discussions in this section tend to focus on patterns in the data, rather than on differences between specific groups. Specific differences between groups are discussed mainly as a way of examining the more general patterns.
5. The group scores reported in this section are group averages (or mean scores), the sum of the scores for the group divided by the number of candidates in the group. An alternative statistic used to describe the "typical" score for a group is the median, or middle score. The median is determined by rank-ordering the scores for the group and taking the middle score (or the average of the two

middle scores) as the median. For test-score distributions involving large sample sizes, the mean and median tend to be close to each other, and the mean is generally preferred. For example, the median score for females is 706, that for males is 718, and the median for the total group is 713, all of which are larger than the corresponding means in Table 3.1. In Table 3.2, the sample sizes are smaller and the relationship between the means and medians for different groups are more complicated, but all of the medians are larger than their corresponding means. The medians for the first five groups in Table 3.2 are, respectively, 722, 706.5, 673, 691, and 732.5.

6. Other groups with fewer than 20 candidates had larger (Chicano/Mexican American) and smaller (Puerto Rican) means, but were not included in the table.

4. Analyses of Pass Rates on the February 2006 New York Bar Examination

The effect of changes in the passing score on pass rates was examined for the NY bar exam scores (scale 0 to 1,000) using data from the February 2006 bar examination administration. The original passing score for New York was 660 (out of 1,000), it was changed to 665 beginning with the July 2005 administration, and it was to go to 670 in July 2006 and to 675 in July 2007. The last two increases, to 670 and then to 675, are currently on hold. The analyses in this section examine what the pass rates would have been for the data from the February 2006 administration for passing scores of 660, 665, 670, and 675.

As discussed earlier, because these analyses employ a fixed data set, the pass rates of all groups necessarily decrease (or remain the same) as the passing score increases. Any candidate who fails when the passing score is 665, for example, would necessarily fail if the passing score were 670 or 675. However, some candidates who pass when the passing score is 665 (those with scores of 665 to just under 670) will fail if the passing score were 670. In practice, even if the passing score is increased from one test date to another, the pass rate can increase on the second test date if candidate performance improves between the first and second date. However, in the analyses reported here, the distributions of candidate scores are fixed and the pass rate necessarily decreases (or remains the same) as higher passing scores are considered.

Note, in these analyses, the *passing score* is the total score on the NY bar exam (e.g., 665) that a candidate has to achieve in order to pass. The *pass rate* for a group of candidates is the percentage of that group that would pass if the passing score had a particular value, given the fixed data set.

The pass rates vary substantially between first-time takers and repeat takers, and between domestic-educated and foreign-educated candidates, and therefore overall pass rates are less informative than pass rates for the four groups defined by these two dichotomies. These differences are predictable, at least in general terms, from the results on score distributions presented in Section 3, in which repeat takers had lower average scores than first-time takers, and foreign-educated candidates had lower average scores than domestic-educated candidates.

4.1 Note on Standard Errors in Pass Rates

As noted earlier, we have tried to make this report as non-technical and therefore as accessible as possible, but an appropriate interpretation of many of the results in this section requires at least a general understanding of *standard errors* (SEs) in estimating percentages (a special case of the standard errors of the mean discussed in Section 3). We have not cluttered the tables with large numbers of SEs, but have tried to provide an indication of the general level of the SE in the results for different groups.

Standard errors are designed to provide an indication of the uncertainty in an estimate based on a sample from the population (the total set of candidate scores in a particular group to which the estimate is generalized). We generalize or extrapolate from the sample to the population, and in doing so, our estimate is always somewhat uncertain. The data analyzed in this report include results for a large percentage (>85%) of the candidates who took the NY bar exam in February 2006, and therefore provides a very good indication of what would happen to the pass rates for most groups if different passing scores were applied to the February 2006 results. However, generalizations of the interpretation to future February test dates are subject to uncertainty due to sampling, and this uncertainty is reflected in the standard errors.

The formulas used to estimate standard errors are based on statistical sampling theory, and reflect the level of error due to sampling from a fixed population. They do not include any systematic errors due to changes in the population over time. Like the standard error in estimates of the mean (SEM), the standard error in the percentage passing (SE) within any group depends on the *sample size* (the total number of candidates in that group). The SE is inversely related to the square root of the sample size, and therefore, as the sample size gets larger, the standard error gradually gets smaller. Conversely, as sample sizes get smaller, the SE gets larger.

The standard error in estimating the passing rate for a group also depends on the numerical value of the passing rate in the group. It tends to be largest when the passing rate is around 50% and gets quite small as the passing rate approaches 0% or 100%. However, over a fairly wide range of passing rates, the standard error does not change much. Assuming a sample size of 100, and a passing rate of 50%, the SE would be 5 percentage points. As the passing rate went up to 80% or down to 20%, the SE would gradually drop to 4 percentage points. For passing rates of 90% or 10%, the SE would drop to about 3 percentage points.

In the analyses reported here, the passing rates are generally between 20% and 80%, and the sample sizes for the sub-groups considered vary widely, from under 10 to over 900. So, sample size is the dominant factor in determining the standard error. We have included information on the standard errors mainly as a caveat about the potential for over-interpreting modest differences, especially small differences for groups with small sample sizes and therefore large standard errors.

This issue arises mainly in connection with analyses broken down by race/ethnicity, and age categories, where there are a number of groups and small sample sizes in some groups. Similar to Section 3, results for groups with fewer than 20 candidates are generally excluded in the tables because pass rates for such groups are expected to be quite unstable. As mentioned previously, as the sample sizes get smaller, the standard errors get larger, and the uncertainty in the results increases. For example, for a group with a pass rate of 80% (or 20%), a sample size of 100 would yield an SE of 4 percentage points. For a sample size of 25, the SE would be about 8 percentage points. Similar to the SEMs described in Section 3, as a rule of thumb, the passing rates for groups with fewer than 100 candidates should be viewed as relatively

uncertain and those for groups with about 50 or fewer candidates should be considered even more uncertain.

4.2 Domestic-Educated First-time Takers

Table 4.1 analyzes the impact of changes in the passing score on pass rates for the total sample of domestic-educated first-time takers and separately for females and males as the passing score increases from 660 to 675.¹ If the passing score were 660, the overall pass rate would have been 74.9% for this sample. With the current passing score of 665, 73.7% of the sample passed. If the passing score was 670, the pass rate for domestic-educated first-time takers would have been 72.5%, and if the passing score was 675, the pass rate would have been 71.2%, for a total decrease of about 3.7 percentage points as the passing score increases from 660 to 675. Between 660 and 675, the pass rate drops about one and a quarter percentage points for each five-point increase in the passing score.

Table 4.1
Projected Pass Rates for Passing Scores of 660, 665, 670, 675
Domestic-Educated First-Time Takers: Females and Males

Gender		Pass 660	Pass 665	Pass 670	Pass 675
Female (n = 358; SE ≈ 2.4%)	Percentage (number passing)	74.6% (267)	72.4% (259)	71.2% (255)	69.3% (248)
Male (n = 379; SE ≈ 2.3%)	Percentage (number passing)	75.5% (286)	74.9% (284)	73.6% (279)	72.8% (276)
Total* (N = 843; SE ≈ 1.5%)	Percentage (number passing)	74.9% (631)	73.7% (621)	72.5% (611)	71.2% (600)

N = the total number of candidates in this analysis

n = the number of candidates in each group

*Total includes 106 candidates who did not record their genders.

Note: The standard error (SE) in the percentages provides an indication of the uncertainty (due to sampling) in the projections of percentage passing for other test dates.

Table 4.1 also shows the pass rate for female domestic-educated first-time takers decreasing from 74.6% to 69.3% as passing scores increase from 660 to 675, a decline of 5.3 percentage points. The pass rate for males decreases from 75.5% to 72.8%, a decline of 2.7 percentage points. Males have a slightly higher pass rate for all four passing scores, and the difference in pass rates between males and females

increases from 1.1 percentage points to 3.5 percentage points as the passing score increases from 660 to 675.

Table 4.2
Projected Pass Rates for Passing Scores of 660, 665, 670, 675
Domestic-Educated First-Time Takers: Racial/Ethnic Groups

Race/Ethnicity		Pass 660	Pass 665	Pass 670	Pass 675
Caucasian/ White (n = 507; SE ≈ 1.9%)	Percentage (number passing)	79.5% (403)	78.3% (397)	77.5% (393)	76.1% (386)
Asian/ Pacific Islander (n = 74; SE ≈ 5.4%)	Percentage (number passing)	71.6% (53)	71.6% (53)	68.9% (51)	67.6% (50)
Black/ African American (n = 78; SE ≈ 5.7%)	Percentage (number passing)	55.1% (43)	52.6% (41)	51.3% (40)	48.7% (38)
Hispanic/ Latino (n = 25; SE ≈ 9.8%)	Percentage (number passing)	68.0% (17)	64.0% (16)	60.0% (15)	60.0% (15)
Other (n = 30; SE ≈ 8.2%)	Percentage (number passing)	73.3% (22)	73.3% (22)	73.3% (22)	73.3% (22)
Total* (N = 843; SE ≈ 1.5%)	Percentage (number passing)	74.9% (631)	73.7% (621)	72.5% (611)	71.2% (600)

*Total includes racial/ethnic groups not separately listed in the table.

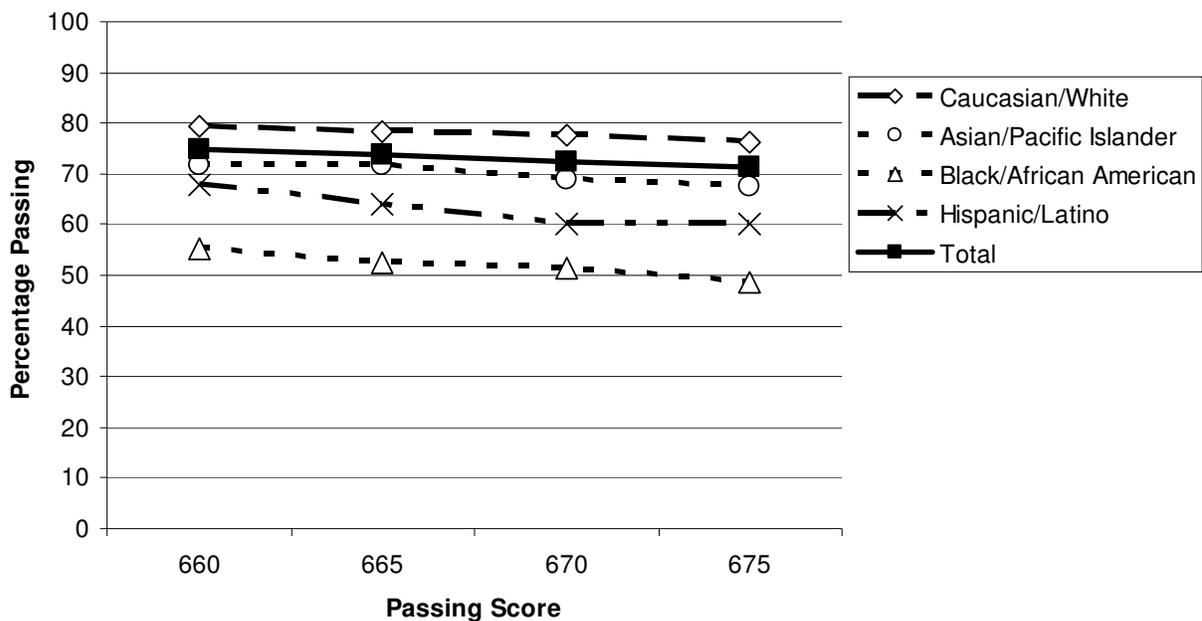
Note: The SEs tend to be large for groups with small sample sizes. For example, the SE for the Puerto Rican group, with only 12 candidates, is over 14 percentage points.

Table 4.2 examines the relationship between pass rate and passing score as the passing score increases from 660 to 675 for groups based on race/ethnicity. The overall pass rate for the total sample of domestic-educated first-time takers is included in the bottom row as a benchmark. It is clear that there are differences in pass rates across the racial/ethnic groups, and that the order of the four groups in terms of pass rates remains the same as the passing score is increased. The Caucasian/White group has the highest pass rates, the Asian/Pacific Islander group is second, the Hispanic/Latino group is third, and the Black/African American group is fourth. The order of these groups is consistent for all four passing scores. If the “Other” group is included in the comparison, it is in second place, with flat passing rates from scores of 660 to 675. The Puerto Rican, Chicano/Mexican American, and American Indian/Alaskan Native groups

have small sample sizes and are not included in Table 4.2, but their pass rates are flat because they have no candidates in the 660-675 range.

Figure 4.1 presents the relationship between pass rate and passing score at passing scores of 660, 665, 670, and 675 for groups based on race/ethnicity. It shows the differences in pass rates across the racial/ethnic groups, and it indicates that the order of the five groups in terms of pass rates remains the same as the passing score is increased.

Figure 4.1
Trends in Pass Rates at Passing Scores of 660, 665, 670, and 675
Domestic-Educated First-Time Takers: Racial/Ethnic Groups



Increasing the passing score tends to have the most impact on groups with average scores near the passing score, and therefore, pass rates near 50%. Most of the groups have score distributions that approximate what is called a *normal distribution*, with the scores concentrated around the average or mean score (see Figure 4.1). If the passing score is near the mean for a group, even a modest change in the passing score can change the pass/fail status for a relatively large number of candidates in the group. If the passing score is far from the group's mean score, a comparable change in the passing score will affect relatively few candidates, because there are few candidates in the tails of the distribution.

The vertical dashed lines in Figure 4.2 to 4.4 indicate the bar score range from 660 to 675, which includes the February 2006 passing score of 665. New York scores the essay and MPT responses of all candidates with total bar scores between 655 and 674 a second time in order to improve precision around the passing scores. This re-scoring can increase or decrease a candidate's total score and therefore can move the candidate (up or down) out of the 660-675 category. This tends to reduce the number of candidates in this score category.

Figure 4.2
Score Distribution of February 2006 NY Bar Exam Scores
Domestic-Educated First-Time Takers

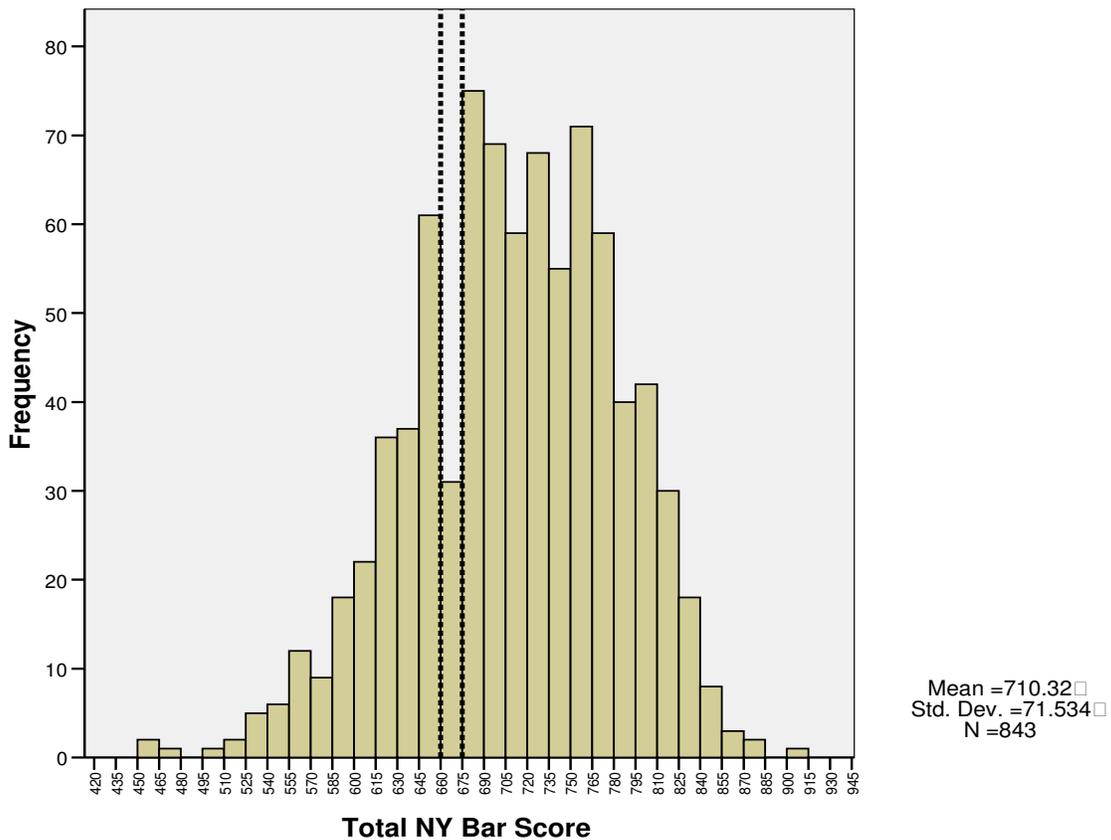
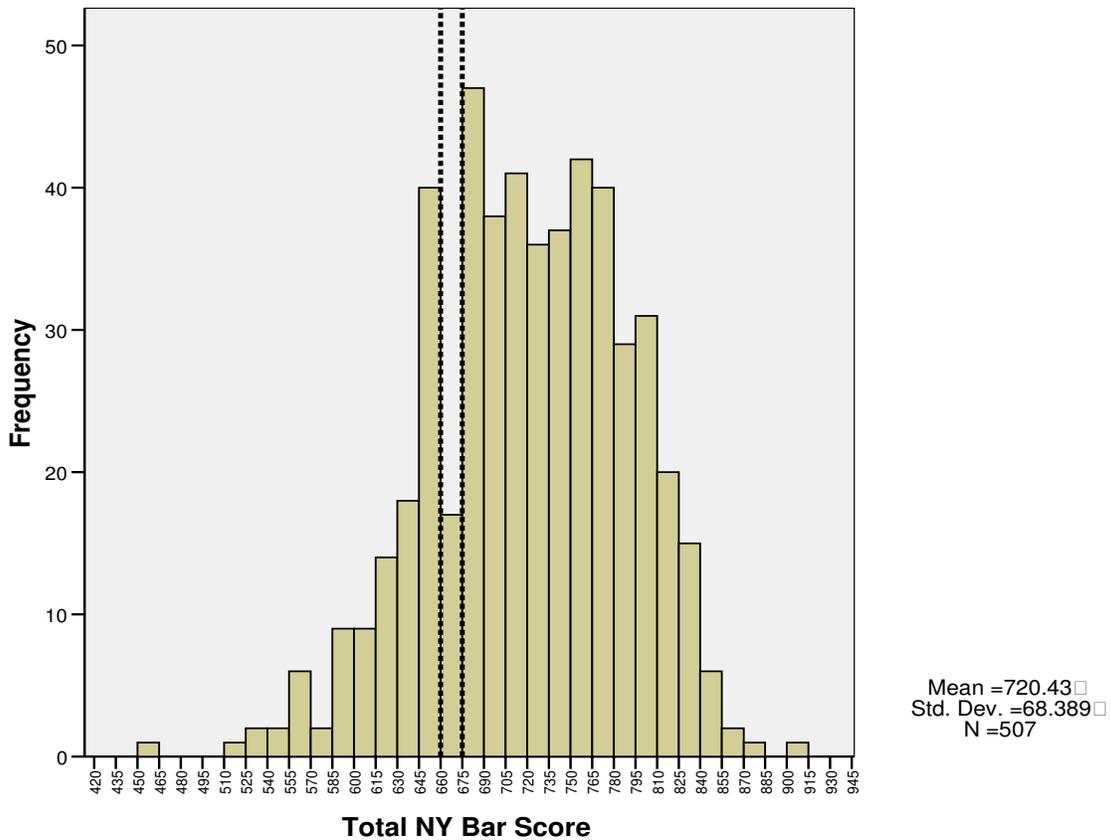


Figure 4.3 presents a graphical representation of the distribution of total scores on the NY bar exam for domestic-educated first-time takers in the Caucasian/White group. The mean for this group is 720.4, which is substantially above the current passing score of 665.² If the passing score were much lower to start, say around 600, the impact would be even smaller, because there are very few candidates in this group with scores around 600.

Figure 4.3
Score Distribution of February 2006 NY Bar Exam Scores
Caucasian/White Domestic-Educated First-Time Takers

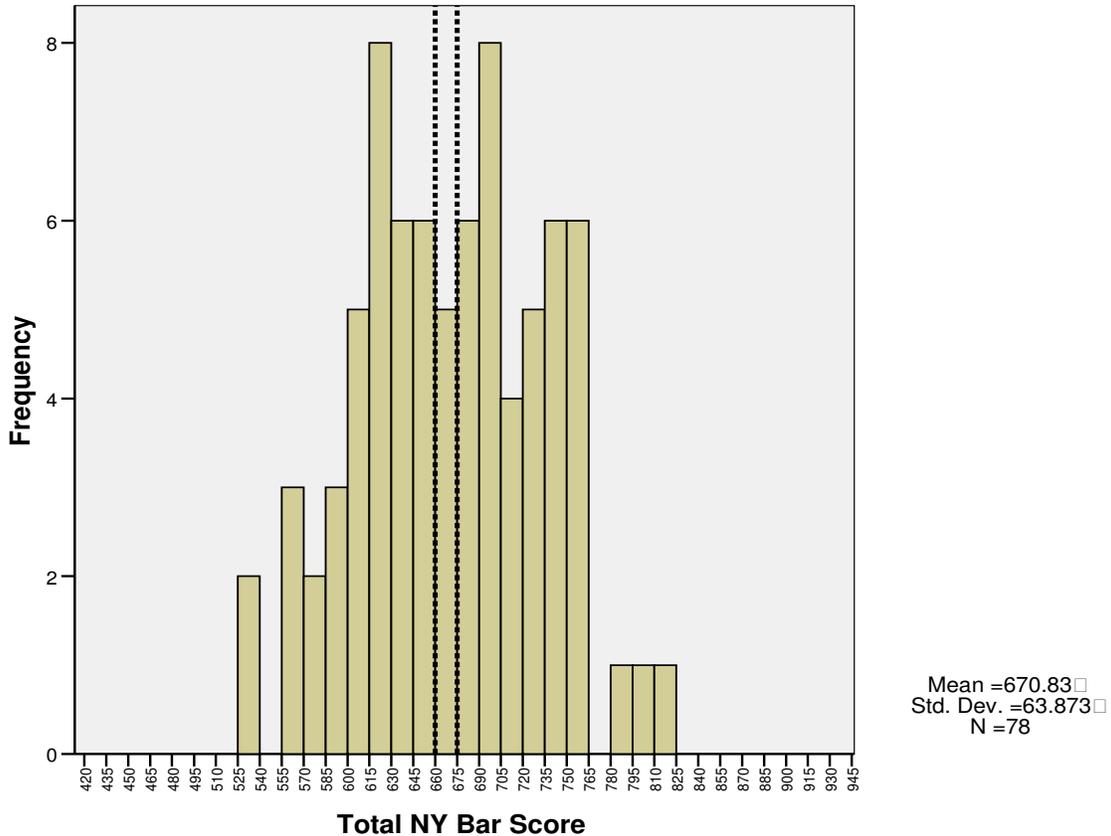


In contrast, Figure 4.4 presents a graphical representation of the distribution of scores on the February 2006 NY bar exam for Black/African American domestic-educated first time takers. The mean for this group is 670.8, which is only about six points above the current passing score of 665. Because the distribution is concentrated in this area of the score scale for the Black/African American group, any change in the passing score, either up or down tends to have a substantial impact on the proportion of Black/African American candidates passing.

In addition, a change of one percentage point in the pass rate has a larger relative impact on a group's pass rate if the initial pass rate is relatively low. A change in

pass rate of one percentage point from 90% to 89% represents a change of a little over one percent of the base rate of 90%. In contrast, a change of one percentage point in pass rate from 20% to 19% represents a change of one-twentieth, or five percent, of the base rate of 20%. The change from 20% to 19% is likely to be viewed as having more impact than a change from 90% to 89%.

Figure 4.4
Score Distribution of February 2006 NY Bar Exam Scores
Black/African American Domestic-Educated First-Time Takers



These two tendencies are relevant to the results in Table 4.2. The pass rate for the Caucasian/White group drops from 79.5% to 76.1% as the passing score increases from 660 to 675, a drop of just over 3 percentage points, or about 3.8% of the base rate of 79.5%. The pass rate for the Asian/Pacific Islander group drops from 71.6% to 67.6% as the passing score increases from 660 to 675, a drop of 4 percentage points, or about 5.6% of the base rate of 71.6%. The pass rate for the Hispanic/Latino group drops from 68.0% to 60.0% as the passing score increases, which is a drop of 8 percentage points, or about 11.8% on the base rate. The pass rate for the Black/African American group drops from 55.1% to 48.7% as the passing score increases from 660 to 675, a drop of 6.4 percentage points, or about 11.6% of the base rate.

Another way to look at the projected impact of a change in the passing score from 660 to 675 for the February 2006 sample is in terms of the candidates whose pass/fail status changes as the passing score is increased. Of the 631 candidates who would have passed if the passing score were 660, a total of 600 would pass if the passing score were 675, for a difference of 31. Of this group of 31 candidates, 17 (or 54.8%) would be Caucasian/White, 3 (or 9.7%) would be Asian/Pacific Islander, 5 (or 16.1%) would be Black/African American, and 2 (or 6.5%) would be Hispanic/Latino.

Table 4.3
Projected Pass Rates for Passing Scores of 660, 665, 670, 675
Domestic-Educated First-Time Takers: Age at Law School Graduation

Age at Law School Graduation		Pass 660	Pass 665	Pass 670	Pass 675
<27 (n = 339; SE ≈ 2.1%)	Percentage (number passing)	80.8% (274)	79.4% (269)	78.8% (267)	77.9% (264)
27 - 28 (n = 193; SE ≈ 3.2%)	Percentage (number passing)	75.7% (146)	74.1% (143)	72.0% (139)	70.5% (136)
29 - 30 (n = 97; SE ≈ 4.7%)	Percentage (number passing)	72.2% (70)	72.2% (70)	70.1% (68)	70.1% (68)
31 - 35 (n = 116; SE ≈ 4.3%)	Percentage (number passing)	72.4% (84)	70.7% (82)	69.0% (80)	66.4% (77)
36 - 40 (n = 40; SE ≈ 7.7%)	Percentage (number passing)	65.0% (26)	65.0% (26)	65.0% (26)	62.5% (25)
41 - 45 (n = 24; SE ≈ 10.0%)	Percentage (number passing)	54.2% (13)	54.2% (13)	54.2% (13)	54.2% (13)
Total* (N = 843; SE ≈ 1.5%)	Percentage (number passing)	74.9% (631)	73.7% (621)	72.5% (611)	71.2% (600)

*Total includes age groups not separately listed in the table.

Table 4.3 examines the relationship between pass rate and passing score as the passing score increases from 660 to 675 for groups based on age at law school graduation. The overall pass rate for the total sample of domestic-educated first-time takers is included in the bottom row as a benchmark. Pass rates decrease as passing score increases; the drop is typically 3 to 6 percentage points between 660 and 675. In

addition, pass rates decrease as age at law school graduation increases, and this pattern holds across passing scores of 660, 665, 670, and 675.

4.3 Domestic-Educated Repeat Takers

Candidates who fail the NY bar exam can repeat it on subsequent test dates. They can retake the NY bar exam as often as they wish. Table 4.4 indicates the impact of changes in the passing score from 660 to 675 for females, males, and the total sample of domestic-educated repeat takers. As indicated in the bottom row of the table, the overall pass rate for the repeat takers who took the February 2006 bar examination would decrease from 46.2% to 38.7% if the passing score were increased from 660 to 675. The pass rates for the repeat takers are clearly much lower than they are for domestic-educated first-time takers in Table 4.1. The pass rates for female repeat takers are lower than those for male repeat takers for each of the passing scores. As the passing score increases from 660 to 675, the pass rates decrease for both groups at nearly the same rate (by about 3 percentage points per 5 point increase in score). For a passing score of 660, the female pass rate is 3.7 percentage points lower than that of males. For a passing score of 675, the female pass rate is 3.1 percentage points lower than that of males.

Table 4.4
Projected Pass Rates for Passing Scores of 660, 665, 670, 675
Domestic-Educated Repeat Takers: Females and Males

Gender		Pass 660	Pass 665	Pass 670	Pass 675
Female (n = 612; SE ≈ 2.0%)	Percentage (number passing)	47.1% (288)	44.1% (270)	41.1% (252)	39.5% (242)
Male (n = 573; SE ≈ 2.1%)	Percentage (number passing)	50.8% (291)	47.5% (272)	44.7% (256)	42.6% (244)
Total* (N = 1,447; SE ≈ 1.3%)	Percentage (number passing)	46.2% (668)	43.2% (625)	40.5% (586)	38.7% (560)

*Total includes 262 candidates who did not record their genders.

Table 4.5 indicates the impact of a change in passing score on the pass rates for repeat takers as a function of race/ethnicity. The overall pass rate for the total sample of domestic-educated repeat takers is included in the bottom row as a benchmark. Focusing on the first four rows in Table 4.5, the order remains the same as the passing score is increased. The Caucasian/White group has the highest pass rates, the Asian/Pacific Islander group is second, the Hispanic/Latino group is third, and the Black/African American group is fourth. In general, the repeat taker pass rates are lower than first-time takers for all racial/ethnic groups, and they decrease gradually (6 to 10 percentage points) as the passing score increases from 660 to 675.

Table 4.5
Projected Pass Rates for Passing Scores of 660, 665, 670, 675
Domestic-Educated Repeat Takers: Racial/Ethnic Group

Race/Ethnicity		Pass 660	Pass 665	Pass 670	Pass 675
Caucasian/ White (n = 628; SE ≈ 2.0%)	Percentage (number passing)	52.4% (329)	49.5% (311)	45.7% (287)	44.1% (277)
Asian/ Pacific Islander (n = 145; SE ≈ 4.1%)	Percentage (number passing)	49.0% (71)	44.8% (65)	41.4% (60)	39.3% (57)
Black/ African American (n = 252; SE ≈ 3.1%)	Percentage (number passing)	42.5% (107)	40.0% (100)	39.3% (99)	36.9% (93)
Hispanic/ Latino (n = 70; SE ≈ 6.0%)	Percentage (number passing)	47.1% (33)	42.9% (30)	40.0% (28)	38.6% (27)
Other (n = 58; SE ≈ 6.6%)	Percentage (number passing)	53.5% (31)	50.0% (29)	46.6% (27)	43.1% (25)
Total* (N = 1,447; SE ≈ 1.3%)	Percentage (number passing)	46.2% (668)	43.2% (625)	40.5% (586)	38.7% (560)

*Total includes racial/ethnic groups not separately listed in the table.

Table 4.6 examines the relationship between pass rate and passing score as the passing score increases from 660 to 675 for groups based on number of bar attempts. The percentage of candidates passing decreases rather quickly as the number of bar attempts increases. 73.7% of candidates who are taking the NY bar exam for the first time pass at a score of 665 versus 8.8% taking the exam for the seventh time or more. At five attempts, the percentage passing at 665 drops below 25%. Similar patterns of passing percentages occur at passing scores of 660, 670, and 675.

Table 4.6
Projected Pass Rates for Passing Scores of 660, 665, 670, 675
Domestic-Educated Candidates: Number of Bar Attempts

Number of Bar Attempts		Pass 660	Pass 665	Pass 670	Pass 675
1 (n = 843; SE ≈ 1.5%)	Percentage (number passing)	74.9% (631)	73.7% (621)	72.5% (611)	71.2% (600)
2 (n = 938; SE ≈ 1.6%)	Percentage (number passing)	57.6% (540)	54.2% (508)	50.9% (477)	49.5% (464)
3 (n = 131; SE ≈ 4.0%)	Percentage (number passing)	32.1% (42)	29.8% (39)	28.2% (37)	25.2% (33)
4 (n = 147; SE ≈ 3.7%)	Percentage (number passing)	31.3% (46)	29.3% (43)	27.9% (41)	25.2% (37)
5 (n = 79; SE ≈ 4.6%)	Percentage (number passing)	25.3% (20)	21.5% (17)	20.3% (16)	16.5% (13)
6 (n = 50; SE ≈ 5.2%)	Percentage (number passing)	22.0% (11)	18.0% (9)	12.0% (6)	12.0% (6)
7 or more (n = 102; SE ≈ 2.7%)	Percentage (number passing)	8.8% (9)	8.8% (9)	8.8% (9)	6.9% (7)
Total (N = 2,290; SE ≈ 1.0%)	Percentage (number passing)	56.7% (1,299)	54.4% (1,246)	52.3% (1,197)	50.7% (1,160)

Table 4.7 examines the relationship between pass rate and passing score as the passing score increases from 660 to 675 for groups based on age at law school graduation. The overall pass rate for the total sample of domestic-educated repeat takers is included in the bottom row as a benchmark. Pass rates decrease as passing score increases; the drop is typically 5 to 10 percentage points between 660 and 675. In addition, pass rates decrease as age at law school graduation increases, and this pattern holds across passing scores of 660, 665, 670, and 675.

Table 4.7
Projected Pass Rates for Passing Scores of 660, 665, 670, 675
Domestic-Educated Repeat Takers: Age at Law School Graduation

Age at Law School Graduation		Pass 660	Pass 665	Pass 670	Pass 675
<27 (n = 616; SE ≈ 2.0%)	Percentage (number passing)	50.5% (311)	47.2% (291)	44.0% (271)	42.1% (259)
27 - 28 (n = 270; SE ≈ 3.0%)	Percentage (number passing)	47.0% (127)	45.6% (123)	43.7% (118)	41.9% (113)
29 - 30 (n = 149; SE ≈ 4.0%)	Percentage (number passing)	40.9% (61)	38.9% (58)	35.6% (53)	34.2% (51)
31 - 35 (n = 189; SE ≈ 3.6%)	Percentage (number passing)	46.6% (88)	42.3% (80)	40.7% (77)	39.7% (75)
36 - 40 (n = 87; SE ≈ 5.2%)	Percentage (number passing)	40.2% (35)	39.1% (34)	35.6% (31)	32.2% (28)
41 - 45 (n = 61; SE ≈ 5.5%)	Percentage (number passing)	31.2% (19)	23.0% (14)	21.3% (13)	21.3% (13)
46 - 50 (n = 33; SE ≈ 8.2%)	Percentage (number passing)	36.4% (12)	33.3% (11)	30.3% (10)	27.3% (9)
51 - 55 (n = 24; SE ≈ 9.8%)	Percentage (number passing)	41.7% (10)	37.5% (9)	33.3% (8)	29.2% (7)
Total* (N = 1,447; SE ≈ 1.3%)	Percentage (number passing)	46.2% (668)	43.2% (625)	40.5% (586)	38.7% (560)

*Total includes age groups not separately listed in the table.

In general, for the domestic-educated candidates, the repeat takers have much lower pass rates than the first-time takers for all of the passing scores under consideration. Repeat takers who are taking the bar examination for the second time generally do better than those taking it for the third time, who in turn have higher pass rates than those who have already taken the bar examination three or more times.

It is worth mentioning that the repeat takers include candidates who failed the NY bar exam under different passing scores; those who failed the NY bar exam two or more times before February 2006 (or did not take the July 2005 bar exam) likely failed when the passing score was 660. Therefore, the analyses presented here are based on some repeat takers (e.g., those repeating more than once) who had previous scores up to 659 and others (i.e., those repeating for the first time in July 2005) who had previous scores up to 664. As the passing score increases, the population of repeat takers will certainly change because the maximum previous scores of repeat takers will increase. As a result, the average previous score of the repeat takers is likely to increase.

4.4 Foreign-Educated First-Time Takers

The foreign-educated candidates generally have lower NY bar exam scores and lower pass rates than the domestic-educated candidates. Table 4.8 indicates the impact of changes in the passing score from 660 to 675 for females, males, and the total sample of foreign-educated first-time takers. As indicated in the bottom row of Table 4.8, the overall pass rate for foreign-educated first-time takers decreases from 38.8% to 34.4%, as the passing score increases from 660 to 675. These pass rates are lower than those of the domestic-educated first-time takers listed in Table 4.1, range from 74.9% to 71.2% as the passing score increases from 660 to 675. The female foreign-educated first-time takers have slightly higher pass rates than males at passing scores of 660, 665, and 670 (around a 1 percentage point difference), and the groups are about the same for passing scores of 675 (0.3 percentage point difference).

Table 4.8
Projected Pass Rates for Passing Scores of 660, 665, 670, 675
Foreign-Educated First-Time Takers: Females and Males

Gender		Pass 660	Pass 665	Pass 670	Pass 675
Female (n = 211; SE ≈ 3.4%)	Percentage (number passing)	40.3% (85)	38.9% (82)	37.4% (79)	35.1% (74)
Male (n = 209; SE ≈ 3.4%)	Percentage (number passing)	39.2% (82)	38.3% (80)	35.9% (75)	35.4% (74)
Total* (N = 459; SE ≈ 2.3%)	Percentage (number passing)	38.8% (178)	37.5% (172)	35.7% (164)	34.4% (158)

*Total includes 39 candidates who did not record their genders.

Table 4.9 indicates the impact of changes in passing scores from 660 to 675 on the pass rates for foreign-educated first-time takers as a function of race/ethnicity. The overall pass rate for the total group of foreign-educated first-time takers is included in the bottom row of the table for reference. Several of the sample sizes in Table 4.9 are fairly small and therefore the pass rates are likely to be too unstable to draw any strong conclusions about trends. The order of the groups in Table 4.9 remains the same as the passing score is increased from 660 to 675. The Caucasian/White candidates have the highest pass rates, the Asian/Pacific Islander group is second, the Black/African American group is third, and the Hispanic/Latino group is fourth. If the "Other" group is included, it has the second highest pass rates. None of the foreign-educated first-time takers indicated their race/ethnicity as Puerto Rican, Chicano/Mexican American, or American Indian/Alaskan Native.

Table 4.9
Projected Pass Rates for Passing Scores of 660, 665, 670, 675
Foreign-Educated First-Time Takers: Racial/Ethnic Groups

Race/Ethnicity		Pass 660	Pass 665	Pass 670	Pass 675
Caucasian/ White (n = 212; SE ≈ 3.4%)	Percentage (number passing)	49.5% (105)	48.1% (102)	45.8% (97)	44.8% (95)
Asian/ Pacific Islander (n = 104; SE ≈ 4.4%)	Percentage (number passing)	30.8% (32)	28.9% (30)	27.8% (29)	26.0% (27)
Black/ African American (n = 29; SE ≈ 7.4%)	Percentage (number passing)	20.7% (6)	20.7% (6)	17.2% (5)	17.2% (5)
Hispanic/ Latino (n = 26; SE ≈ 7.0%)	Percentage (number passing)	15.4% (4)	15.4% (4)	15.4% (4)	11.5% (3)
Other (n = 44; SE ≈ 7.5%)	Percentage (number passing)	40.9% (18)	40.9% (18)	40.9% (18)	38.6% (17)
Total* (N = 459; SE ≈ 2.3%)	Percentage (number passing)	38.8% (178)	37.5% (172)	35.7% (164)	34.4% (158)

*Total includes racial/ethnic groups not separately listed in the table.

As noted earlier, increasing the passing score tends to have a larger relative impact on a group if the initial pass rate is low. The pass rate for the foreign-educated first-time takers in the Caucasian/White group decreases from 49.5% to 44.8% as the passing score increases from 660 to 675, which is a drop of just under 5 percentage points, or about 9.5% of the base rate of 49.5%. The pass rate for the foreign-educated first-time takers in the Asian/Pacific Islander group decreases from 30.8% to 26.0%, a drop of just under 5 percentage points, or about 15.6% of the base rate of 30.8%. The pass rate for the “Other” group decreases from 40.9% to 38.6%, which is a drop of just over 2 percentage points, or about 5.6% of the base rate. The pass rate for the foreign-educated first-time takers in the Hispanic/Latino group decreases from 15.4% to 11.5%, a drop of 3.9 percentage points, or 25.3% of the base rate. The pass rates for the Black/African American group drops from 20.7% to 17.2% as the passing score increases, a drop of 3.5 percentage points, or 16.9% of the base rate.

4.5 Foreign-Educated Repeat Takers

Table 4.10 indicates the impact of changes in the passing score from 660 to 675 for females, males, and the total sample of foreign-educated repeat takers. As indicated in the bottom row of the table, the overall pass rate for the foreign-educated repeat takers decreases from 29.0% to 23.1% as the passing score increases from 660 to 675. The pass rates for foreign-educated repeat takers are lower than they are for foreign-educated first-time takers or for domestic-educated repeat takers. For all four potential passing scores between 660 and 675, male foreign-educated repeat takers have higher pass rates than females. As the passing score increases from 660 to 675, the pass rate decreases for both groups, and the difference between females and males decreases slightly from 3.5 percentage points to 2.2 percentage points.

Table 4.10
Projected Pass Rates for Passing Scores of 660, 665, 670, 675
Foreign-Educated Repeat Takers: Females and Males

Gender		Pass 660	Pass 665	Pass 670	Pass 675
Female (n = 334; SE ≈ 2.4%)	Percentage (number passing)	28.1% (94)	26.4% (88)	24.9% (83)	23.1% (77)
Male (n = 364; SE ≈ 2.4%)	Percentage (number passing)	31.6% (115)	29.1% (106)	27.2% (99)	25.3% (92)
Total* (N = 815; SE ≈ 1.5%)	Percentage (number passing)	29.0% (236)	26.6% (217)	24.7% (201)	23.1% (188)

*Total includes 117 candidates who did not record their genders.

Table 4.11 indicates the impact of a change in passing score on foreign-educated repeat takers as a function of race/ethnicity. Several of the sample sizes in Table 4.11 are fairly small and therefore the pass rates are likely to be too unstable to draw any strong conclusions about trends. The order of groups in Table 4.11 remains the same as the passing score is increased from 660 to 675. The Caucasian/White Candidates have the highest pass rates, the Asian/Pacific Islander group is second, the Hispanic/Latino group is third, and the Black/African American group is fourth. The clearest general conclusion that can be drawn from these data is that the pass rates for foreign-educated repeat takers are quite low for all passing scores and all racial/ethnic groups.

Table 4.11
Projected Pass Rates for Passing Scores of 660, 665, 670, 675
Foreign-Educated Repeat Takers: Racial/Ethnic Groups

Race/Ethnicity		Pass 660	Pass 665	Pass 670	Pass 675
Caucasian/ White (n = 206; SE ≈ 3.3%)	Percentage (number passing)	37.9% (78)	35.0% (72)	32.0% (66)	31.6% (65)
Asian/ Pacific Islander (n = 310; SE ≈ 2.5%)	Percentage (number passing)	28.1% (87)	26.5% (82)	25.5% (79)	22.9% (71)
Black/ African American (n = 86; SE ≈ 4.0%)	Percentage (number passing)	18.6% (16)	17.4% (15)	15.1% (13)	12.8% (11)
Hispanic/ Latino (n = 44; SE ≈ 6.3%)	Percentage (number passing)	27.3% (12)	22.7% (10)	20.5% (9)	18.2% (8)
Other (n = 54; SE ≈ 6.2%)	Percentage (number passing)	31.5% (17)	29.6% (16)	27.8% (15)	25.9% (14)
Total* (N = 815; SE ≈ 1.5%)	Percentage (number passing)	29.0% (236)	26.6% (217)	24.7% (201)	23.1% (188)

*Total includes racial/ethnic groups not separately listed in the table.

Table 4.12 examines the relationship between pass rate and passing score as the passing score increases from 660 to 675 for groups based on number of bar attempts. The percentage of candidates passing generally decreases as the number of bar attempts increases. 37.5% of candidates who are taking the NY bar exam for the first time pass at a score of 665 versus 10.4% taking the exam for seventh time or more. Similar patterns of passing percentages occur at passing scores of 660, 670, and 675.

Table 4.12
Projected Pass Rates for Passing Scores of 660, 665, 670, 675
Foreign-Educated Candidates: Number of Bar Attempts

Number of Bar Attempts		Pass 660	Pass 665	Pass 670	Pass 675
1 (n = 459; SE ≈ 2.3%)	Percentage (number passing)	38.8% (178)	37.5% (172)	35.7% (164)	34.4% (158)
2 (n = 431; SE ≈ 2.3%)	Percentage (number passing)	36.2% (156)	33.4% (144)	32.0% (138)	30.4% (131)
3 (n = 130; SE ≈ 3.8%)	Percentage (number passing)	29.2% (38)	26.2% (34)	22.3% (29)	20.8% (27)
4 (n = 93; SE ≈ 3.7%)	Percentage (number passing)	17.2% (16)	16.1% (15)	14.1% (13)	12.9% (12)
5 (n = 51; SE ≈ 5.3%)	Percentage (number passing)	19.6% (10)	17.7% (9)	15.7% (8)	13.7% (7)
6 (n = 33; SE ≈ 7.3%)	Percentage (number passing)	24.2% (8)	21.2% (7)	21.2% (7)	21.2% (7)
7 or more (n = 77; SE ≈ 3.2%)	Percentage (number passing)	10.4% (8)	10.4% (8)	7.8% (6)	5.2% (4)
Total (N = 1,274; SE ≈ 1.3%)	Percentage (number passing)	32.5% (414)	30.5% (389)	28.7% (365)	27.2% (346)

As indicated in Section 4.3, these passing rate projections apply to a group of repeat takers who had failed the NY bar exam when the passing score was either 660 or 665, depending on when they first attempted the New York bar exam. As the passing score increases, the maximum previous scores of repeat takers will also increase, and the average previous scores of the repeat takers are also likely to increase.

Notes:

1. As noted earlier, all of the results in this report are based on the sample of candidates who agreed to participate in this study, and therefore these results are not in perfect agreement with the actual pass rates for all domestic-educated first-time candidates in New York.
2. Because a score of 665 is in the lower region of the distribution for the Caucasian/White group, where there are fewer candidate scores, any change in the passing score, either up or down tends to have a modest impact on the percentage of candidates passing.

5. Conclusions

The analyses in this study were designed to examine the impact of the previous, current and proposed passing scores (i.e., 660, 665, 670, and 675) on overall pass rates, and the impact of these passing scores on pass rates for subgroups defined in terms of gender, race/ethnicity, and age using data from candidates taking the February 2006 administration of the New York Bar Examination (NY bar exam).

The database developed for this study is smaller than that previously analyzed for the July 2005 candidates, but it is still quite rich in a number of ways. It includes a large number of candidates and a wide range of data on each candidate, and therefore, makes it possible to examine the impact of passing scores and demographic variables on pass rates in some detail.

5.1 Characteristics of the Candidates

Relationships among the demographic variables (gender, race/ethnicity, age, and origin of legal education) were examined in Section 2.

Most of the candidates in New York are graduates of domestic law schools, but a substantial number (over 35%) are graduates of foreign law schools. The graduates of foreign law schools are quite different from the graduates of domestic law schools in a number of ways. The foreign-educated group has relatively large percentages of Asian/Pacific Islander candidates and relatively small percentages of Caucasian/White candidates. The foreign-educated group includes a slightly larger proportion of males (about 51%) than the domestic-educated group (about 49%). Foreign-educated candidates also tend to be a little older than domestic-educated candidates when they take the bar exam. The scores of the foreign-educated candidates are much lower than those of the domestic-educated candidates on all three parts of the NY bar exam, and their pass rates are also much lower. Given these differences, we have reported results separately for domestic-educated candidates and foreign-educated candidates.

The majority of candidates (63.5%) taking the February 2006 NY bar exam had taken it at least once before. However, candidates taking the bar examination for the first time tended to do much better on the NY bar exam than candidates who were repeating the exam. In addition, candidates who were repeating the examination for the first or second time tended to do better than candidates who had already taken the examination a number of times. Because of the differences in performance between first-time takers and repeat takers, we also analyzed the results for these two groups separately. So, results are reported separately for domestic-educated candidates and foreign-educated candidates, and within each of these major groups, for first-time takers and repeat takers.

5.2 Impact of Changes in the Passing Score on Pass Rates

The central issues examined in this study are addressed in some detail in Sections 3 and 4. Section 3 describes the performance of various groups of candidates on the different components of the NY bar exam and on the examination as a whole. Section 4 reports pass rates as a function of passing score (from 660 to 675) for various groups.

The analyses in Section 3 indicate that the results for different groups tended to be consistent across the different components of the exam. That is, groups that did well on one component (e.g., the essay) also did well on the other two components (e.g., MBE and NYMC), and groups that didn't do as well on one component also didn't do as well on the other components.

The one noteworthy exception to this result is a consistent tendency for females to do better on the essay component and for males to do better on the MBE; this effect is not very large on average, but it is consistent across racial/ethnic groups, the foreign- and domestic-educated groups, and first-time takers and repeat takers. These two tendencies (females doing better on the essay component and males doing better on the MBE) go in opposite directions, and they tend to cancel out. As a result, in most analyses, females and males did not differ substantially in terms of their total bar examination scores and pass rates.

The domestic-educated candidates did much better on the examination than the foreign-educated candidates, and, within both of these groups, the first-time takers did better than the repeat takers. Candidates who had already failed the examination a number of times had very low pass rates.

An increase in the passing score produces decreases in the pass rates. Given that these analyses were all applied to a fixed data set, this is necessarily the case. The results reported here do not necessarily represent the passing rate that would be associated with a particular passing score on any future test date, but they provide a general indication of what to expect.

The current and proposed increases in the passing score tend to have the largest impact on groups with average scores in or near the range over which the passing score is projected to vary (660 to 675). Among the domestic-educated first-time takers, the Black/African American group and other minority groups tend to suffer sharper declines in pass rates than the Caucasian/White group as the passing score increases (see Table 4.2). In addition, because the racial/ethnic minority groups have lower pass rates to begin, a decrease of a few percentage points in the pass rate has a larger proportional impact on the pass rates for these groups than it would if the initial pass rates were higher.

The domestic-educated repeat takers tend to have pass rates of about 46% for a passing score of 660. The pass rates decline to about 39% as the passing score

increases to 675. Because an increase in the passing score will yield a different population of repeat takers (one with higher scores on their previous attempts), the actual pass rates for repeat takers are likely to be somewhat higher than those reported in Section 4, especially for passing scores of 670 and 675.

As noted above, the foreign-educated first-time takers had relatively low scores on the bar examination and relatively low pass rates, and these pass rates decline from about 39% to about 34% as the projected passing score increases from 660 to 675. The foreign-educated repeat takers had low pass rates, which decline from about 29% to about 23% as the projected passing score increases from 660 to 675.

Notes:

1. Kane, M., Mroch, A., Ripkey, D., & Case, S. (2006). *Impact of the Increase in the Passing Score on the New York Bar Examination*. Madison, WI: National Conference of Bar Examiners. See <http://www.nybarexam.org/NCBEREP.htm>

Glossary

Confidence Intervals: A range of values around a statistic (e.g., a mean) used to indicate the uncertainty in a reported statistic. Assuming that the main source of uncertainty in a reported statistic is sampling variability, confidence intervals can be defined in terms of standard errors (defined below). For example, a 95% confidence interval covers the range from two standard errors below the mean to two standard errors above the mean and is expected to include the true value of the mean about 95% of the time.

Correlation: An indicator of the strength of the linear relationship between two variables. Correlations range from -1 to +1. The closer the correlation is to -1 and +1, the stronger the linear relationship. Positive correlations indicate that an increase in one variable is associated with an increase in the other. Negative correlations indicate that an increase in one variable is associated with a decrease in the other.

Dissattenuated Correlation: The strength of the linear relationship (see *correlation*) between two variables after taking into account measurement error. Measurement error tends to reduce the correlations between variables, but this “attenuation” of the correlation can be corrected to get an estimate of what the correlation would be if there was no random error in either of the variables being correlated.

Mean: A measure of the central tendency of a set of scores. Technically, the mean is defined as the sum of the scores divided by the number of scores. The mean may also be referred to as the average.

Normal Distribution: A bell shaped curve that is commonly used in statistics. Technically, it is a score distribution defined by a specific equation and has a shape defined by location (mean) and scale (standard deviation) parameters.

Pass rate: The percentage of a group of candidates that would pass at a particular passing score.

Passing score: The total numerical score on an examination that a candidate has to achieve in order to pass the exam.

Reliability: The consistency or repeatability of the scores produced by a measurement procedure; the precision in the scores yielded by a measurement instrument. Reliability is defined as the variance in “true” scores divided by the variance in observed scores. The observed score for an individual is assumed to consist of the true score plus an error component, and the variance in observed scores is equal to the variance in the true scores plus the error variance. So the reliability is always between 0.0 and 1.0. Reliability can also be interpreted as a correlation coefficient, with values between 0.0 and 1.0. Higher values for reliability reflect greater precision and less random error, and low values for reliability reflect a higher proportion of random error and therefore less precision.

Sample size: The number of observations in a data set. A sample is assumed to be drawn from a larger population of possible observations.

Standard deviation (SD): A measure of the spread in a set of scores. Technically, the standard deviation is defined as the square root of the average squared deviation from the mean. About 68% of the scores in a normal distribution will be within one standard deviation of the mean.

Standard error of the mean (SEM): An indication of the uncertainty in the estimate of the mean over repeated samples from the same population. Technically, it is the standard deviation divided by the square root of the sample size.

Standard error (SE) of percentages: An indication of the uncertainty in the estimate of a percentage over repeated samples from the same population. Technically, it is the standard deviation of the percentage divided by the square root of the sample size used to calculate the percentage (i.e., the denominator used to calculate the percentage).

**Impact of the Increase in the Passing Score
on the New York Bar Examination**

Report Prepared for the New York Board of Law Examiners

by

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National Conference of Bar Examiners

October 4, 2006

Executive Summary

Total scores on the New York Bar Examination are computed by combining three separate “scaled” and weighted scores from three separate components: the New York Essay Examination, which consists of five essay questions and an extended performance task and has a weight of 50%, the Multistate Bar Examination (MBE), which includes 200 multiple-choice questions and has a weight of 40%, and the New York Multiple-Choice Test, which includes 50 multiple-choice questions and has a weight of 10%. Scores on each of the three components and on the New York Bar Examination as a whole are reported on a scale with a range from 0 to 1,000.

On September 24, 2004, the New York State Board of Law Examiners (NYBLE) announced that the passing score on the New York Bar Examination would increase from 660 to 675 over a three-year period. The score was to increase five points a year from July 2005 to July 2007. The first of the three increases was implemented in July 2005. The second and third increases are currently on hold, pending an evaluation of the consequences of the first increase.

At the request of the NYBLE and with the cooperation of the Law School Admission Council (LSAC) and many law schools from which the candidates had graduated, we have assessed the impact of the recently implemented change in the passing score from 660 to 665 and the expected impact of the planned increases from 665 to 675. The NYBLE supplied the bulk of the data, which was collected from respondents who took the July 2005 New York Bar Examination.¹ Other supporting data were provided through the cooperation of LSAC and the law schools. Using these data, this report examines the likely impact of current and planned changes in the New York passing score on candidate pass rates.

Section 1 describes the data collection process and analyzes the representativeness of the data. In Section 2, the report describes the candidate population in terms of each candidate’s education (domestic or foreign), the number of times the candidate has taken the bar examination, and the age, gender and race/ethnicity of the candidate. Sections 3 and 4 present summaries of score distributions and pass rates for the candidate population as a whole and for various subgroups within the population.

Section 5 explores the relationships among bar examination scores, undergraduate grade-point averages, Law School Admission Test (LSAT) scores, and law school grade-point averages for a subset of respondents for whom these data were available. These analyses indicate how the performances are related over time (from entry to law school, to graduation from law school, to the bar examination) for the respondents overall and for various groups of respondents.

Characteristics of the Candidates

Section 2 describes the candidates who participated in the study, and by extension, the candidate population as a whole, in terms of a number of candidate characteristics, including the country in which each candidate graduated from law school, age at law school graduation, age when taking the July 2005 bar examination, the number of times the candidate had taken the bar examination in New York, and the candidate's gender and race/ethnicity. To distinguish these characteristics from the performance measures (bar examination scores and pass rates), they are referred to as *demographic variables*.

Foreign-educated candidates make up about 21% of the respondents, and as a group, they differ from the domestic-educated candidates in several respects. They have a much lower percentage of candidates who classified themselves as Caucasian/White and a much higher percentage who classified themselves as Asian/Pacific Islander. They have a higher percentage of males than the domestic-educated group, and they are slightly older than the domestic-educated candidates.

As discussed more fully later, the performance of the domestic-educated group, both in terms of scores on the bar examination and in terms of pass rates, is much better than that of the foreign-educated group. The foreign-educated group is much more likely to be repeating the bar examination (about 30%) than the domestic-educated group (about 10%).

Because of the substantial differences between the domestic-educated group and the foreign-educated group, most of the analyses of candidate performance are reported separately for these two groups.

Characteristics of Domestic-Educated Candidates

Of the candidates who completed law school in the United States, just under 50% are female, and just over 50% are male. The great majority (over 70%) of the domestic-educated group are Caucasian/White, 11.7% are Asian/Pacific Islander, 8.1% are Black/African American, 3.5% are Hispanic/Latino, 1.2% are Puerto Rican, 0.4% are Chicano/Mexican American, 0.2% are American Indian/Alaskan Native, and 4.1% listed their race/ethnicity as "Other."

Among the domestic-educated candidates, the males were, on average, about half a year older than the females when they graduated from law school (27.9 vs. 27.4), and they were a little more than half a year older when they took the bar examination (28.6 vs. 27.9) in July 2005. Over 90% of the domestic-educated candidates taking the New York Bar Examination in July 2005 were taking it for the first time, with the males a bit more likely to be repeating the examination than the females. As of July 2005, the domestic-educated females had taken the bar examination an average of 1.25 times,

while the domestic-educated males had taken it an average of 1.34 times.

As a whole, the domestic-educated, first-time takers were evenly split between females and males but the female/male ratios varied considerably across racial/ethnic groups. Of the domestic-educated, first-time takers, just over 73% were Caucasian/White, but over 77% of the males and only 69% of the females were Caucasian/White. Among the domestic-educated, first-time takers, the females outnumbered the males in all of the other racial/ethnic groups, and they outnumbered the males almost two to one in the Black/African American group.

The domestic-educated repeat takers included more males than females (about 54% to 46%). About 45% of the repeat takers were Caucasian/White, about 23% were Black/African American, and about 17% were Asian/Pacific Islander.

Characteristics of Foreign-Educated Candidates

Among the foreign-educated first-time takers, the race/ethnic category with the highest percentage of candidates was the Asian/Pacific Islander category (about 43%), followed by the Caucasian/White category (about 40%), the Black/African American category (just under 5%), the “Other” category (about 7%), and the Hispanic/Latino category (just over 5%).

In this same group, the foreign-educated first-time takers, males outnumbered females (54% to 46%). But again, the female/male ratios varied across ethnic groups. About 46% of the males and 39% of the females were Asian/Pacific Islander, while about 38% of males and 43% of females were Caucasian/White.

The foreign-educated candidates were generally a bit older than the domestic-educated candidates when they took the New York Bar Examination. Among the foreign-educated candidates, the females have an average age of 29.6 years when taking the bar examination (compared to 27.9 for the domestic-educated females), and the males have an average age of 32.7 years when taking the bar examination (compared to 28.6 for the domestic-educated males).

The foreign-educated first-time takers tend to have relatively low scores on the bar examination and therefore relatively high failure rates, and as a result, foreign-educated candidates were much more likely than domestic-educated candidates to be repeating the bar examination. Just under 10% of the domestic-educated candidates were repeating the bar examination, but almost 30% of the foreign-educated candidates were repeating the examination.

Performance on the New York Bar Examination

The performance of various groups on the New York Bar Examination is reported in Sections 3 and 4. Section 3 describes score distributions for various groups of

candidates on the bar examination. Section 4 reports expected pass rates as a function of passing score (from 660 to 675) for various groups.

Score Distributions

Section 3 of the report analyzes performance on the bar examination and on the three components of the examination (the essay, MBE, and NYMC) separately for the domestic-educated candidates and the foreign-educated candidates, and within each of these groups provides breakdowns in terms of number of previous bar examination attempts, and of gender, race/ethnicity, and age at bar attempt. It also reports average scores as a function of age at law school graduation for domestic-educated candidates.

The variability in performance across groups (foreign-educated and domestic-educated, first-time takers and repeat takers, and the various racial/ethnic groups) is generally much larger than the differences across components of the examination within any particular group. That is, groups that do relatively well on one component (e.g., the essay portion) also tend to do well on the other two components (e.g., the MBE and the NYMC), and groups that don't do well on one component also don't do well on the other components.

The one noteworthy exception to this generalization is a consistent tendency for females to do better on the essay component and for males to do better on the MBE; this effect is not very large on average, but it is observed consistently across racial/ethnic groups, for the foreign and domestic-educated groups, and for first-time takers and repeat takers. These two tendencies (females doing better on the essay component and males doing better on the MBE) go in opposite directions, and thus tend to cancel out. As a result, in most analyses, females and males do about equally well in terms of their total scores on the bar examination and their pass rates.

The domestic-educated candidates do much better on the examination than the foreign-educated candidates, and, within both of these groups, the first-time takers do better than the repeat takers. Candidates who have already taken the examination a number of times tend to have very low pass rates. The average total score for domestic-educated first-time takers was about 727, and the average total score for domestic-educated repeat takers was about 624, a difference of over one hundred points on the 1,000-point scale used in New York.

The average total score for domestic-educated repeat takers decreases systematically as the number of previous attempts increases. As noted above, domestic-educated first-time takers have an average total score of about 727. Domestic-educated second-time takers have an average of about 635, third-time takers have an average of about 627, and fourth-time takers have an average total score of about 620.

The average total score for foreign-educated first-time takers is about 647, which

is almost 80 points lower than the average total score for domestic-educated first-time takers. The average total score for foreign-educated repeat takers is about 599, which is almost fifty points lower than that for foreign-educated first-time takers, and is almost 130 points lower than that for the domestic-educated first-time takers.

The average total score for foreign-educated repeat takers also tends to decrease as the number of previous attempts increases, but the pattern is less consistent than it is for the domestic-educated candidates. As noted above, the foreign-educated first-time takers have an average total score of about 647. Foreign-educated second-time takers have an average of about 601, third-time takers have an average of about 609, and fourth-time takers have an average of about 593.

The racial/ethnic groups exhibit large differences in their average bar examination scores within the domestic-educated first-time takers. The Caucasian/White group has an average total score of about 736, the Asian/Pacific Islander group has an average total score of about 716, the Hispanic/Latino group has an average total score of about 703, and the Black/African American group has an average total score of about 676. Note that the average total score of the Black/African American group is just above the highest of the four potential passing scores considered in this report (i.e., 675). The differences between racial/ethnic groups are much less pronounced among the domestic-educated repeat takers, where the averages range from about 631 to about 613, than they are for the domestic-educated first-time takers.

As noted earlier, the difference in average total bar score between males and females is relatively small. For domestic-educated first-time takers, the average total bar examination score is about 731 for males and about 724 for females. The gender differences are small compared to the range of differences for the racial/ethnic groups (or the differences between the domestic- and foreign-educated groups), and they do not hold up across the racial/ethnic groups; in the Asian/Pacific Islander, Black/African American, and Puerto Rican groups, the females have higher average total bar scores than the males.

The foreign-educated first-time takers exhibit a pattern of average scores as a function of race/ethnicity that is similar to that for domestic-educated first-time takers, with a range from about 675 to about 588.

The average total score of domestic-educated first-time takers declines systematically as age at graduation from law school increases, from about 735 for candidates who are younger than 27 at graduation to less than 700 for candidates who are over 40 at graduation.

Expected Pass Rates at Various Passing Scores

Section 4 presents analyses of the relationships between passing scores and

pass rates for four possible passing scores (660, 665, 670, and 675) as functions of a number of variables. As noted above, before July 2005, the passing score in New York was 660 (out of 1,000); the passing score is now 665, and increases to 670 or 675 are planned. The *passing score* is the total score on the New York Bar Examination (e.g., 665) that a candidate must achieve in order to pass. The *pass rate* associated with a passing score for a group of candidates is the percentage of candidates in that particular group that would pass if the passing score had the specified value. Because these analyses employ a fixed data set (i.e., data from the candidates who took the July 2005 New York Bar Examination), the pass rates of all groups will necessarily decrease (or remain the same) as the passing score increases. In practice, the pass rates could go up as the passing score increases (e.g., if the population of candidates changes or the candidates prepare more thoroughly).

As is true for several parts of this study, the analyses of pass rates were conducted separately for domestic-educated and foreign-educated candidates, and within each of these groups, analyses were conducted separately for first-time takers and repeat takers.

The analyses suggest two general conclusions about pass rates for domestic-educated first-time takers. First, the differences in pass rates between males and females are, at most, quite small. Second, the differences in pass rates among the different racial/ethnic groups are quite large, with the Caucasian/White group having the highest pass rates (about 88% for a passing score of 660 and about 85% for a passing score of 675), and the Black/African American group having the lowest passing rates (about 58% for a passing score of 660 and about 50% for a passing score of 675).

Among the domestic-educated candidates, the repeat takers, as a whole, have much lower pass rates (about 23% for a passing score of 660 and about 16% for a passing score of 675), than the first-time takers. The repeat takers' pass rates tend to get lower as the number of previous attempts increases. Those who are repeating for the first time have higher pass rates (about 32% for a passing score of 660 to about 24% for a passing score of 675) than those repeating for the second time (about 26% for a passing score of 660 to about 19% for a passing score of 675), who in turn have higher pass rates than those who are repeating for the third or more times.

The pass rates for the foreign-educated first-time takers are about half of those of the domestic-educated first-time takers. The pass rates for the foreign-educated first-time takers go from just over 46% for a passing score of 660 to just over 40% for a passing score of 675.

The foreign-educated repeat takers have low pass rates for all four passing scores (just over 15% for a passing score of 660 to just about 11% for a passing score of 675). The pass rates for the foreign-educated repeat takers are much lower than the pass rates for the foreign-educated first-time takers and lower than the pass rates for domestic-educated repeat takers.

Performance Before Law School, in Law School and on the Bar Examination

The analyses in Section 5 examine the relationships among variables describing academic achievement before law school (undergraduate GPA and LSAT scores), performance in law school (law school GPAs), and performance on the New York Bar Examination (total scores on the bar examination). For a large sub-sample of the candidates, information on all of these variables was available, and the results for these candidates were used to develop and evaluate hypotheses about relationships among readiness for law school (as measured by undergraduate GPA and LSAT score), subsequent performance in law school (as measured by law school GPA), and later performance on the bar examination.

In general, performance in law school, as measured by law school GPA, is the best predictor of performance on the bar examination. Law school GPA was found to have the largest impact on New York Bar Examination scores, accounting for about 40% to 47% of the variance (or variability) in bar examination scores (depending on how the law school GPAs were scaled). Adding information about undergraduate GPA and LSAT scores to the prediction equations (in addition to law school GPAs) improved the accuracy of the prediction to cover about 56% of the variance in bar examination scores.

In general, performance in law school is the best predictor of performance on the NY bar exam. The measures of readiness for law school (undergraduate GPA and LSAT scores) are indirectly related to performance on the bar examination through their relationships to performance in law school but also seem to have some direct relationship to performance on the bar examination.

Candidates and groups with high undergraduate GPAs and LSAT scores generally do well in law school and then tend to do well on the bar examination. Candidates and groups with lower undergraduate GPAs and LSAT scores tend to do less well in law school and less well on the bar examination, but almost half the variability in bar examination scores is not accounted for by the simple models examined in this report.

Notes:

1. Because most of the demographic data included in this report could only be collected for those candidates who responded to the survey questions, it seems correct to refer to the groups as *respondents*; however, because generalizations can be made about the candidates based on the responses received, this report uses both *respondents* and *candidates* when discussing the data.

Introduction

This study was designed primarily to investigate the impact of proposed changes to the passing score on the New York Bar Examination (NY bar exam) on candidate pass rates. In September of 2004, the New York State Board of Law Examiners (NYBLE) announced its plan to raise the passing score on the NY bar exam from 660 to 675 over a three-year period. The score was to increase five points each year from July 2005 to July 2007.¹ The first of the three proposed increases was implemented in July 2005. The second and third increases are currently on hold, pending an evaluation of the consequences of the first increase.

The analyses described in this report are based on the results for candidates who took the NY bar exam in July 2005. As described in more detail in Section 1, demographic data were supplied by candidates who completed an optional demographic survey when they applied to take the NY bar exam. Bar examination results were obtained from the NYBLE. Law School Admission Test (LSAT) scores, undergraduate grade-point averages (GPAs) and some demographic data were obtained from the Law School Admission Council (LSAC) for candidates who authorized release of these data (see Appendix A). Law-school GPAs were obtained from law schools with the permission of the candidates (see Appendix B). All of these data were combined into a single database for the candidates taking the July 2005 NY bar exam.

In this study, the relationship between passing score and pass rates was examined by analyzing the data from the July 2005 candidates, assuming passing scores of 660, 665, 670, and 675 to reflect the proposed incremental changes to the passing score. The relationship between potential passing scores and pass rates was examined for the candidate population as a whole and for various subgroups within the population (defined in terms of foreign or domestic legal education, gender, race/ethnicity, age at graduation from law school, and age when taking the bar examination).

Before examining the relationship between passing scores and pass rates, we analyzed the distributions of the available demographic variables (origin of legal education, repeat status, gender, race/ethnicity, age) and the relationships among these demographic variables. We also examined the relationships among the different components of the NY bar exam and the relationships between the demographic variables and performance on the bar exam.

In order to put the relationship between passing score and pass rates into context and to make optimal use of this large and unique data set, the relationships among performance on the NY bar exam, performance in law school (as indicated by law-school GPA), prior educational achievement (as indicated by undergraduate GPA), and scores on the LSAT were also studied.

Questions

The analyses in this study were designed to answer four main questions, plus a number of ancillary questions:

1. What impact will the current and proposed changes in the passing score have on overall pass rates?
2. What impact will the current and proposed changes in passing score have on pass rates for subgroups defined in terms of gender, race/ethnicity, and age?
3. To what extent does performance in law school predict performance on the New York Bar Examination?
4. To what extent do undergraduate GPA and LSAT scores predict performance in law school and performance on the New York Bar Examination?

In the remainder of this section, these questions are described in more detail, and in the following sections, the analyses implemented to answer them and the results of these analyses are presented.

This report includes a glossary that provides definitions of various technical terms included in the text. These terms are generally defined when first used, but the glossary may provide a useful reference.

Impact of Changes in the Passing Score on Pass Rates

The first two questions to be addressed by this study examine the extent to which the changes in the passing score would lead to decreases in the pass rate for the candidate population as a whole and for various subgroups in the population (defined by origin of legal education, gender, race/ethnicity, and age). A simple way to address this question would involve a determination of the pass rates for the population as a whole and for various subgroups on the July 2005 bar examination administration, assuming different passing scores.² The differences between the pass rates under the different passing scores provide an indication of the impact of the change in the passing score on pass rates, assuming that the change in passing score itself had no impact on the distribution of scores. This is a reasonable working assumption given that the three proposed changes in passing score are relatively small (5 points on a 1,000-point score scale).

The results of these analyses constitute the bulk of this report. Section 1 provides an account of how the data were collected, checked, and combined into a single database. Section 2 describes the sample in terms of various demographic variables (origin of legal education, repeat status, gender, race/ethnicity, and age) and

combinations of these variables. Section 3 describes the performance of the total sample and of the subgroups defined by various combinations of these demographic variables in terms of their average scores on the bar examination and the three components included in NY bar scores. In Section 4, the pass rates for various subgroups are analyzed. Section 4 provides the most direct answers to the central questions of this study, but to fully understand the results in Section 4, it is necessary to understand the results in Sections 1, 2, and 3.

An analysis of pass rates using different passing scores within a single bar examination administration has advantages and disadvantages in evaluating the impact of the increases in passing score (which were announced well in advance) on the candidate population.³ On the positive side, studying a single bar examination administration is straightforward and focuses exclusively on effects of the increase in passing score. Since the analysis makes use of data on the performance of a fixed group of candidates who took the bar examination on a particular occasion, the many factors (e.g., changes in the composition of the group, changes in patterns of law school curricula or test preparation) that can influence pass rates and produce variability in pass rates from one year to the next are controlled. By applying the different passing scores to the existing score distributions for various groups, the analysis focuses on the direct impact of changes in the passing scores, assuming that everything else is held constant.

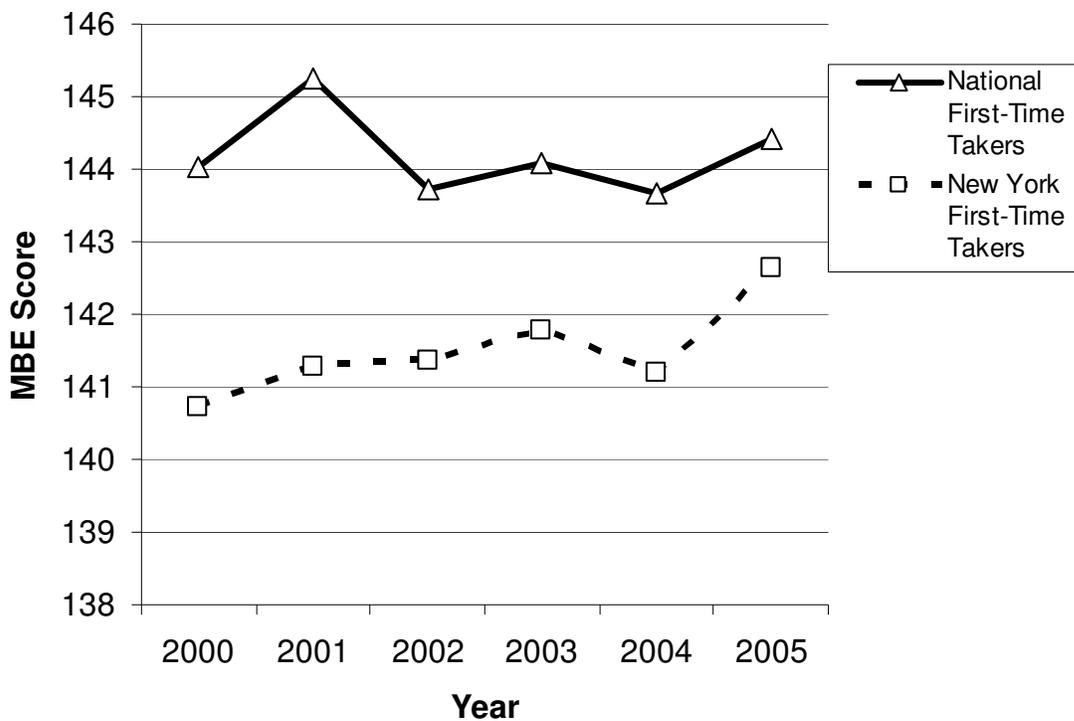
However, it is important to keep in mind that legal education, test preparation activities, and the composition of the candidate population are likely to change over time (as everything changes), and as a result, the projections of what the pass rates would have been in July 2005 for different passing scores may not provide very accurate predictions of what would actually happen if the passing score were increased to 675 over the next two or three years. In particular, changes in the passing score may contribute to changes in how candidates prepare to take the bar exam, in the courses they take in law school, in how law schools operate, and in the composition of the population of individuals who choose to take the NY bar exam. The results should be interpreted with caution, but they do provide a clear indication of the immediate impact of a change in passing score, and a reasonable projection of what would be likely to happen in the future as the passing score is changed.

To check on the possible impact of an increase in the passing score on the level of candidate preparation and thereby on candidate performance, we compared score trends of first-time New York candidates on the July MBE over the last six years to score trends for first-time candidates nationally on the July MBE over the last six years. If the New York pattern were similar to the national pattern through July 2005, it would suggest that the announced change in passing score in New York did not have any significant impact on performance of the New York candidates in July 2005. If the New York pattern was similar to the national pattern up to July 2004 but changed relative to the national data between July 2004 and July 2005, we would have an indication that

something (e.g., the change in passing score) might have caused the change in New York candidates' performance between July 2004 and July 2005.

To examine this issue, we conducted two comparisons using MBE databases at the National Conference of Bar Examiners (NCBE). First, we computed the national averages and the New York averages for all first-time candidates taking the MBE in July of each year between 2000 and 2005.⁴ The results of this comparison are presented in Figure 0.1.⁵ The national average for the first-time candidates was fairly flat (at about 144) between 2000 and 2005, with a slight bump in 2001. The New York averages for first-time candidates in July show a gradual increasing trend from 2000 to 2005, with a slight dip in 2004. The 2005 average is consistent with the trend from 2000 to 2003. The New York trend for first-time candidates differs from the national pattern mainly in the indication of an upward trend in New York, but there is no indication of a particularly sharp increase or decrease in the New York average in July 2005.

Figure 0.1
National and New York Average MBE Scores for All First-time Takers
for the Six July Administrations between 2000 and 2005

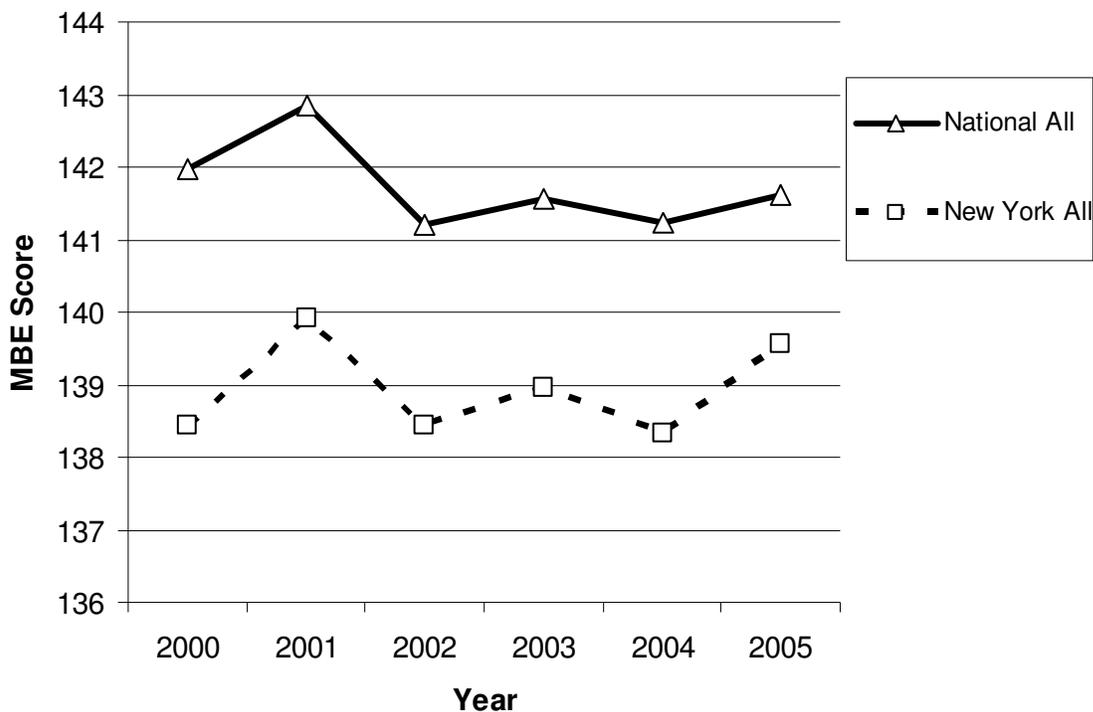


See note 5.

Second, we computed the national averages and the New York averages for all candidates taking the MBE for July administrations between 2000 and 2005. The results of this comparison are presented in Figure 0.2.⁶ The trend in the national average of all

candidates was quite similar to that for first-time candidates; in both cases, it was fairly flat between 2000 and 2005, with a slight bump in 2001. The New York pattern for all candidates is very similar to that of the national sample, including a similar bump in 2001. The New York averages show somewhat more variability from year to year, but this is expected because the number of candidates in New York is much smaller than the number of candidates in the whole country, including New York. Again, there is no indication of any sharp increase or decrease in the average MBE score for New York in July 2005.

Figure 0.2
National and New York Average MBE Scores for All Candidates (First-time Takers and Repeaters) for the Six July Administrations between 2000 and 2005



See note 6.

Relationship between Undergraduate GPA, LSAT Scores, Law-School GPA, and Bar Examination Scores

In order to develop an understanding of the variability in passing rates across different possible passing scores and different subgroups, the relationship between performance on the bar examination and performance in law school was examined. These analyses address the third and fourth questions listed earlier.

One problem inherent in analyzing the relationship between measures of law school performance (GPA, rank in class) and performance on the bar examination is the lack of standardization in grading practices across law schools. Another problem is that law schools vary in the scales they use (e.g., the traditional 0 to 4 GPA scale, a 0 to 100 GPA scale).

For this study, the law-school GPA was scaled in two ways. First, the GPA for all law schools was put on a four-point GPA scale by rescaling the GPA for all law schools to a standard four-point grading scale. This transformation did not attempt to correct for differences in course difficulty or grading standards across law schools, but it did put all law-school GPAs onto a common four-point scale, and therefore made it reasonable to conduct statistical analyses based on law-school GPA.

Second, the *means*, or averages, and *standard deviations* (SDs), or spread, of the GPAs in each law school were set equal to the means and SDs for the same individuals on an index, defined as a weighted average of LSAT score (60%) and undergraduate GPA (40%). Scaling law-school GPA to this index does not ensure that the index, LSAT score, or the undergraduate GPA will be closely related to the law-school GPA, but it does reflect the differences in the meaning of law-school GPA associated with differences in the selectivity of different law schools.

A candidate's performance on the NY bar exam and in law school would be expected to be positively related to the candidate's score on the LSAT and to undergraduate GPA, and performance in law school would be expected to be related to performance on the bar examination. The relationships among NY bar exam score, law-school GPA, LSAT score, and undergraduate GPA were examined in several ways (path analysis, linear regression, and logistic regression). The results of these analyses are reported in Section 5.

Notes

1. The NY bar exam includes four components, the Multistate Bar Examination (MBE), the New York Essay Examination (NY Essay), a Multistate Performance Test (MPT), and a multiple-choice test on New York law (NYMC). Scores on the NY bar exam are reported on a scale with a range from 0 to 1,000, and the 15-point change in passing score corresponds to a change of 3 points on the MBE scale, which has a range from 0 to 200. The first score increase, from 660 to 665, represented a one-point increase on the MBE scale.
2. Technically, this analysis is a cross-sectional analysis; it compares performance under different decision rules using data collected on a single occasion. However, the question being asked involves the changes in pass rates from one year to the next, with a change in the passing score between the two years; a study that evaluates changes from one year to the next is called a longitudinal study. It is not unusual to use cross-sectional data to address longitudinal questions, but there are potential problems in doing so, and we need to take these problems into consideration.
3. The increase in the passing score may have effects on candidate preparation, and therefore on bar examination performance. These effects may occur over an extended period as the candidates become better informed about the implications of a higher passing score.
4. Some candidates who are identified as first-time takers could have taken the bar examination in another jurisdiction. The numbers of such cross-jurisdictional repeaters is presumably small.
5. Although the average MBE scores for the first-time takers in NY in Figure 0.1 are consistently lower than those for the first-time takers nationally, this difference is potentially misleading. As indicated later in this report, the population of candidates taking the NY bar exam includes a substantial number of candidates who were educated in foreign countries and who tend to get lower scores on the MBE than domestic-educated candidates. Foreign-educated candidates make up a much smaller percentage of the national population of candidates. If we focus on domestic-educated first-time takers. The New York average MBE score in July 2005 was 145.4, slightly higher than the national average for that test date.
6. As indicated in note 5 attached to Figure 0.1, the New York sample includes a relatively high percentage of foreign-educated candidates who tend to get relatively low scores. If only domestic-educated candidates are considered, the New York average MBE scores are similar to the national average.

1. Data Sources

Staff at the NYBLE and at NCBE planned and coordinated the transfer of several sources of data to NCBE for use in this study. In this section, we provide a brief description of the procedures for assembling the database that was used for the analyses presented in subsequent sections of this report. Appendix C (at the end of this report) provides a more detailed description of the process used for assembling the database.

1.1 Database Elements

The database used in this report contains information from five primary data sets. The different data sets each contain at least one of two indices that could be used to match data records belonging to the same individual. These two indices were (1) applicant identification number, which was the candidate's social security number (SSN) or (2) applicant seat number, which was a number coded by candidates that indicated the seat number they used when taking the NY bar exam.

The first data set was derived from a survey of NY bar exam respondents (i.e., candidates who completed the survey) at the time of application for the NY bar exam and consisted primarily of demographic information (e.g. self-reported age, gender, ethnicity, citizenship, and country of legal education). Candidates who supplied the information needed in an analysis (or authorized its release) will be referred to as *respondents* in cases where it seems useful to remind the reader that some candidates are not included in the analyses. The second data set contained more detailed performance information on the July 2005 administration of the NY bar exam and included scores on the NY bar exam and on each of its components [i.e., New York Essay Examination (NY Essay), Multistate Performance Test (MPT), Multistate Bar Examination (MBE), and New York multiple-choice test (NYMC)]. The third data set supplied by the NYBLE included birthdates and law school graduation dates of candidates. The fourth data source was from LSAC and included demographic information (e.g. birthdates, gender, ethnicity, name, social security number, undergraduate institution, and undergraduate major) and performance data (e.g., undergraduate GPA and average LSAT score from all attempts) for candidates who gave permission for LSAC to release these data. The fifth data set contained candidates' law school performance data (e.g., GPAs) obtained from their law schools. There was some redundancy in these data sets, and as indicated below, this redundancy was used to check on the accuracy of the data where possible.

1.2 Database Construction

The database was assembled sequentially at NCBE as the data sets became available. As data were assembled, they were checked for accuracy using available data (see Appendix C for details). First, the New York demographic data and bar examination scores were matched using applicant identification/seat number to identify

corresponding records. Next, this combined information was matched by applicant seat number with the data set that contained their birthdates and law school graduation dates. Then, the LSAC data were matched to the data set. Finally, the law school data were matched to the data set with New York demographic data, New York performance data, and LSAC data using SSNs. The resultant database contained a total of 10,175 records, one for each of the 10,175 candidates who took the NY bar exam in July 2005.

Because some data were not available, (e.g., LSAT records and law-school GPAs for foreign-educated candidates) and because some candidates and law schools chose not to release certain data, many of the candidate records had missing elements. Of the 10,175 candidates who took the NY bar exam in July 2005, 7,093 cases contained LSAC data and 7,055 cases contained law school data (for 125 U.S. law schools represented in the July 2005 NY bar exam administration).

1.3 Database Finalization

The data collection methods used in this study sometimes resulted in the availability of the same information from multiple sources. As discussed in more detail in Appendix C, at several points in the matching process, comparisons were made across data sets to verify accuracy using this redundant information. As a final step in the database preparation process, additional checks and analyses were implemented to identify and rectify potentially errant or conflicting data for the following variables: gender, racial/ethnic group, MBE score, and age/birthdate.

As a final step in the data processing, a generic identification number (ID) was created to eliminate the need to carry any specific identifying information (e.g., candidate name, SSN, or seat number) forward into the database used for purposes of analysis.

1.4 Representativeness of the Database

In studies like this, in which information is provided voluntarily by participants, missing data are always a matter of some concern. To the extent that candidates who choose to participate are systematically different from those who do not participate, the results may be biased. As indicated below, participation in this study was excellent. Some information was not available for some groups (particularly for graduates of foreign law schools), but over 90% of the candidates supplied the information requested of them.

Data were available for all 10,175 candidates on three variables included in the operational database for the NY bar exam: NY bar exam scores, number of bar examination attempts, and age when taking the bar exam. Table 1.1 displays response rates for the variables obtained from candidates. For gender, origin of legal education, and race/ethnicity, less than 10% of the information was omitted. Age at law school graduation, undergraduate GPA, LSAT scores, and law-school GPA are missing from

the database for about 21% to 35% of the candidates. For the variables with large percentages of omitted data, the omissions are mostly in the records of the foreign-educated candidates for whom such information is simply unavailable. The foreign-educated candidates generally did not have LSAC records, and we made no attempt to obtain GPAs from foreign law schools. The lack of some kinds of information for graduates of foreign law schools did not cause a problem, because most of our analyses were performed separately for foreign-educated and domestic-educated candidates; the analyses involving variables that were not available for the foreign-educated candidates were simply not conducted for this group.

Table 1.1
The Numbers and Percentages of Omitted Responses
for Variables in the Database

Variable	Number of Omitted Responses	Percentage of Omitted Responses*
Gender	847	8.3%
Origin of Legal Education	961	9.4%
Race/Ethnicity	855	8.4%
Age at Law School Graduation	2,184	21.5%
Undergraduate GPA	3,402	33.4%
LSAT Score	3,332	32.7%
Law-School GPA	3,573	35.1%

Number of candidates in database (N) = 10,175

*Omitted responses include responses that were not released, not available, or not resolvable (e.g., because of contradictory information).

Table 1.2 displays the percentages of candidates not responding to the main variables in this study as a function of whether the candidates' legal education was domestic or foreign. Note that 961 (or about 9.4%) of the candidates did not provide information on the country where they obtained their legal education and did not provide information on most of the other variables. Of the candidates who indicated that they had graduated from a U.S. law school, the data for the six variables in Table 1.2 is quite complete. The variable with the most omitted data for this group is the law-school GPA (with 21.3% omitted). A substantial number of these candidates with omitted data on law-school GPA graduated from two New York law schools for which the relevant data were either not available or not available in usable form at the time of this report.

Table 1.2
Numbers and Percentages of Omitted Responses
for Candidates Who Graduated from Domestic and Foreign Law Schools

Variable (Count of Omitted Responses)	Type of Legal Education					
	Domestic (n = 7,252)		Foreign (n = 1,962)		Unknown* (n = 961)	
	n	%	n	%	n	%
Gender (847)	4	0.0%	17	0.9%	826	86.0%
Race/Ethnicity (855)	14	0.2%	11	0.6%	830	86.4%
Age at Law School Graduation (2,184)	81	1.1%	1,949	99.3%	154	16.0%
Undergraduate GPA (3,402)	625	8.6%	1,948	99.3%	829	86.3%
LSAT Scores (3,332)	619	8.5%	1,883	96.0%	830	86.4%
Law-School GPA (3,573)	1,548	21.3%	1,178	60.0%	847	88.1%

n = number of candidates

N = total number of candidates (10,175)

*Unknown responses include those that were not released, not available, or not resolvable (e.g., because of contradictory information).

The omitted data in this study causes less of a problem than it might in some cases, because most of the analyses focus on subgroups (domestic- vs. foreign-educated candidates), and the omitted data tends to occur in predictable places. About 8 percent of the candidates chose not to provide data and are omitted from most of the analyses, and certain kinds of data are not available for foreign-educated candidates.

The column for foreign-educated candidates indicates that the majority of omitted responses in age at law school graduation, undergraduate GPA, LSAT scores, and law-school GPA are from foreign-educated candidates. Again, this is because these data are not available for most foreign-educated candidates.

1.5 Confidentiality of data

The data sets were combined and analyzed by NCBE. NCBE was responsible for maintaining the confidentiality of the data. To ensure confidentiality, we collated the data from the NYBLE, participating law schools, and LSAC. We then linked the data from various sources for each candidate who agreed to provide data for the study.

Personal identifiers for candidates and identifiers for schools were necessary in order to link all of the separate data elements for each candidate into a single record. After these records were assembled and checked for accuracy, all personal identifiers (name, SSN) were deleted from the main database and kept in separate data sets. School identifiers that indicate the students who attended each school were retained in each candidate's record, but the association with any specific school was not included in the database.

2. Demographic Characteristics of the Candidates

The analyses included in this report are based on data collected from 10,175 candidates who took the New York Bar Examination (NY bar exam) in July 2005. In this section, the following characteristics of the candidates are analyzed: origin of legal education, gender, race/ethnicity, age at graduation, age when taking the NY bar exam in July 2005, and the number of attempts taking the NY bar exam. These variables are referred to as *demographic variables* to distinguish them from scores or pass rates on the NY bar exam. The latter variables are referred to as *performance variables* and are discussed in Sections 3 and 4, respectively.

2.1 General Demographics

Gender

Table 2.1 provides an analysis of the numbers and percentages¹ of females and males in the sample and indicates that 847 (or 8.3%) of the candidates did not record their genders, yielding a response rate of over 91%. Of the candidates who indicated their gender, 48.9% (or 4,557) are female and 51.1% (or 4,771) are male. Because 8.3% of the candidates omitted their gender, all analyses involving gender as a classification variable are subject to some uncertainty, but the percentages in Table 2.1 are based on information from over 91% of the July 2005 candidates and provide a good indication of what to expect for July administrations of the New York Bar examination.

Table 2.1
Numbers and Percentages of Females and Males in the Sample

Gender	Number	Percentage of Respondents
Female	4,557	48.9%
Male	4,771	51.1%
Omitted	847	--

Number of Candidates in Database (N) = 10,175

Domestic or Foreign Legal Education

Table 2.2 describes the sample in terms of whether the candidates obtained their legal education in the United States (domestic-educated) or in a foreign country (foreign-educated). In the sample, 961 (or 9.4%) of the candidates did not indicate whether their law school was domestic or foreign. Of the candidates who indicated their law-school type, 78.7% (or 7,252) graduated from a domestic law school, and 21.3% (or 1,962) graduated from a foreign law school.

Table 2.2
Numbers and Percentages in the Sample Who Graduated from Domestic and Foreign Law Schools

Origin of Legal Education	Frequency	Percentage of Respondents
Domestic	7,252	78.7%
Foreign	1,962	21.3%
Omitted	961	--

N = 10,175

Note: Domestic refers to candidates who graduated from a law school in the United States. Foreign refers to candidate who graduated from a law school outside of the United States.

The foreign-educated respondents make up just over a fifth of the respondents, and as a group, they are quite different from the domestic-educated respondents in several respects. As we shall see, the foreign-educated respondents tend to have lower scores on the NY bar exam, and therefore, tend to have higher failure rates than the domestic-educated respondents. On average, the foreign-educated respondents are older than the domestic-educated respondents, and they have a somewhat different distribution across racial/ethnic groups. In addition, the foreign-educated respondents do not take the LSAT, and therefore some of the data available for most of the domestic-educated respondents is not available for the foreign-educated respondents (e.g., LSAT). Because of these differences, most of the analyses in this report are presented separately for the domestic-educated respondents and the foreign-educated respondents.

Race/Ethnicity

Table 2.3 provides an analysis of the racial/ethnic composition of the sample, using the categories employed by the Law School Admission Council (LSAC) which were used in the candidate survey administered to the New York candidates in July

2005. As indicated in Table 2.3, 855 (or 8.4%) of the candidates omitted their race/ethnicity. Of those who indicated their race/ethnicity, 63.2% were Caucasian/White, 18.2% were Asian/Pacific Islander, 8.3% were Black/African American, 4.0% were Hispanic/Latino, 1.0% were Puerto Rican, 0.3% were Chicano/Mexican American, and 0.1% were American Indian/Alaskan Native. Of the respondents, 4.9% listed their race/ethnicity as “Other,” which could refer to some other preferred designation or to a multi-racial/ethnic background, or it may reflect a simple reluctance to provide information on race/ethnicity.

Table 2.3
Numbers and Percentages in Different Racial/Ethnic Groups

Race/Ethnicity	Number	Percentage of Respondents
Caucasian/White	5,888	63.2%
Asian/Pacific Islander	1,697	18.2%
Black/African American	773	8.3%
Hispanic/Latino	371	4.0%
Puerto Rican	91	1.0%
Chicano/Mexican American	28	0.3%
American Indian/Alaskan Native	11	0.1%
Other	461	4.9%
Omitted	855	--

N = 10,175

Age at Law School Graduation, Age When Taking the Bar Examination, and Number of Bar Attempts

Table 2.4 describes the sample in terms of the candidates' ages at graduation from law school. This information was not available for 2,184 (or 21.5%) of the candidates. Most of the candidates for whom this information was not available completed law school outside of the United States. Of those who responded, 54.5% were under 27, and 20.2% were 27 or 28. Almost 84% of the candidates were under 31, and less than one percent were over 50 when they graduated from law school.

Table 2.4
Numbers and Percentages at Various Ages at Law School Graduation
(Using Age Ranges)

Age at Law School Graduation	Number	Percentage of Respondents
<27	4,358	54.5%
27-28	1,618	20.2%
29-30	738	9.2%
31-35	725	9.1%
36-40	272	3.4%
41-45	140	1.8%
46-50	73	0.9%
51-55	43	0.5%
56-60	18	0.2%
>60	6	0.1%
Omitted	2,184	--

N = 10,175

Table 2.5
Numbers and Percentages at Various Ages at July 2005 Bar Attempt
(Using Age Ranges)

Age at Bar Attempt	Number	Percentage of Respondents*
<27	4,493	44.2%
27-28	2,015	19.8%
29-30	1,127	11.1%
31-35	1,332	13.1%
36-40	574	5.6%
41-45	314	3.1%
46-50	172	1.7%
51-55	83	.8%
56-60	43	.4%
>60	22	.2%

N = 10,175

*There was no data missing for this variable, so the percentage of respondents equals the percentage of candidates in the total sample.

Table 2.5 describes the sample in terms of the candidates' ages when they took the bar examination in July 2005. Almost half, 44.2%, were under 27, and 19.8% were 27 or 28. Just over 75% of the candidates were under 31, and about one and a half percent were over 50 when they took the NY bar exam in July 2005.

Figure 2.1 plots age at the July 2005 bar attempt with age at law school graduation. As indicated in this figure, age when taking the bar examination in July 2005 was always approximately equal to or greater than age at graduation. For most candidates, age at graduation and age when taking the bar examination in July 2005 was quite close. The candidates for whom age in July 2005 is substantially higher than age at graduation are generally repeat takers.

Figure 2.1
Age at Bar Attempt as a Function of Age at Law School Graduation

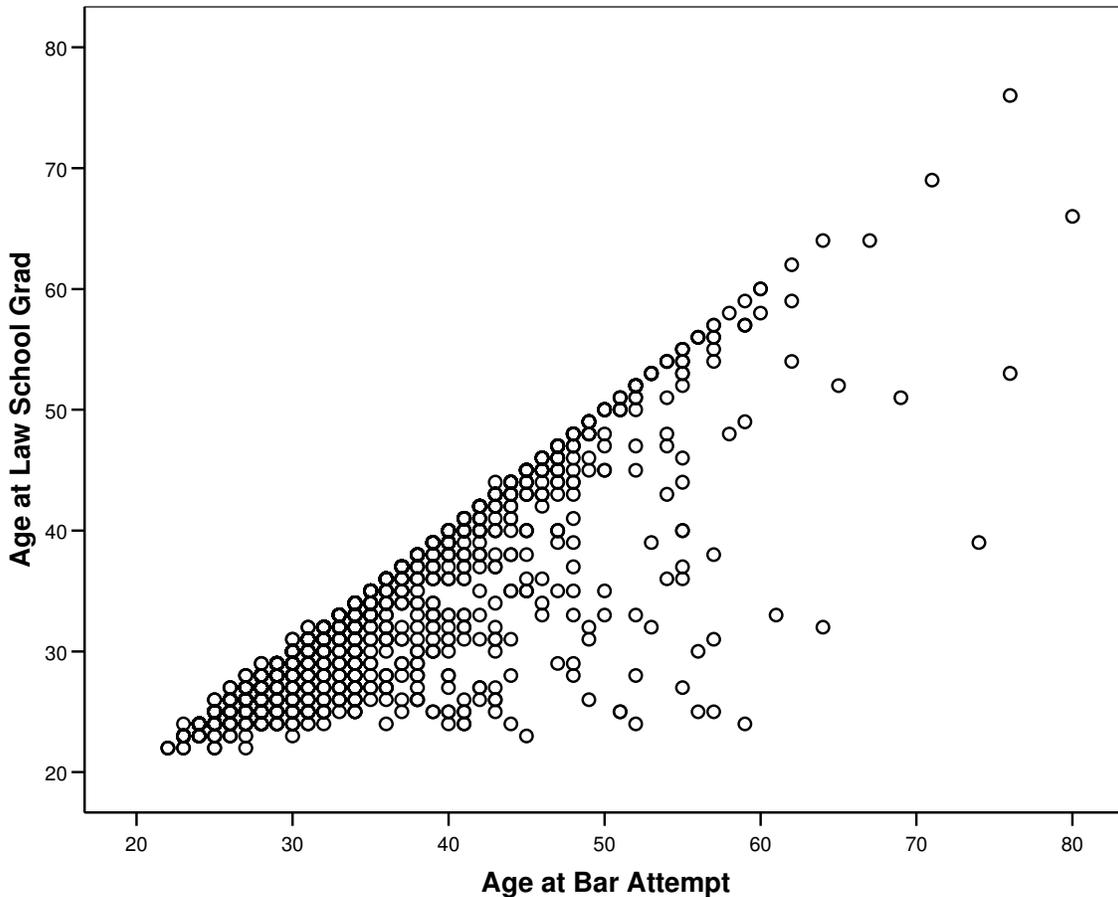


Table 2.6
Numbers and Percentages for Number of Bar Attempts as of July 2005

Number of NY Bar Exam Attempts	Number	Percentage of Respondents*
1	8,613	84.6%
2	506	5.0%
3	433	4.3%
4	211	2.1%
5	138	1.4%
6	68	0.7%
7	48	0.5%
8	27	0.3%
9	30	0.3%
10	19	0.2%
11	13	0.1%
12	9	0.1%
13	10	0.1%
14	7	0.1%
15	3	0.0%
16	6	0.1%
17	5	0.0%
18	3	0.0%
19	6	0.1%
21	1	0.0%
22	1	0.0%
23	1	0.0%
24	1	0.0%
25	2	0.0%
26	2	0.0%
27	2	0.0%
28	2	0.0%
30	1	0.0%
31	1	0.0%
32	1	0.0%
35	1	0.0%
41	1	0.0%
48	1	0.0%
55	1	0.0%
59	1	0.0%

N = 10,175

*There was no omitted data for this variable, so the percentage of respondents equals the percentage of candidates in the total sample.

Table 2.6 indicates the number of times the candidates had taken the NY bar exam as of July 2005. 84.6% of the candidates were taking the examination for the first time (first-time takers). 5.0% were taking it for the second time, 4.3% for the third time, 2.1% for the fourth time, 1.4% for the fifth time, etc. The great majority of the candidates were taking the examination for the first time, but 15.4% were repeat takers. One candidate was taking it for the 59th time and one for the 55th time, but over 97% were taking it for the fifth time or less.

2.2 Domestic-Educated and Foreign-Educated Candidates

As indicated earlier, 9,214 of the candidates indicated whether their law-school education was domestic or foreign and 961 (9.4%) of the candidates did not indicate whether they were domestic or foreign educated. This section provides comparisons between the domestic- and foreign-educated candidates on the other demographic variables.

Table 2.7 reports the percentages of females and males for the domestic- and foreign-educated groups in the sample. Of the 7,252 candidates who indicated that they completed law school in the United States, 49.5% were female, 50.4% were male, and 0.1% omitted their gender. Of the 1,962 candidates who indicated that they completed law school in a foreign country, 45.9% were female, 53.2% were male, and 0.9% omitted their gender. So, gender was very evenly balanced for the domestic-educated respondents, while the foreign-educated group had more males than females.

Table 2.7
Percentages of Females and Males for Domestic- and Foreign-Educated Candidates

Gender (N = 10,175)	Origin of Legal Education		
	Domestic (n = 7,252)	Foreign (n = 1,962)	Omitted (n = 961)
Female (n = 4,557)	49.5%	45.9%	6.7%
Male (n = 4,771)	50.4%	53.2%	7.4%
Omitted (n = 847)	0.1%	0.9%	86.0%

n = the number of candidates within a group

N = the total number of candidates

Table 2.8 provides a similar analysis of race/ethnicity as a function of the type of legal education (domestic or foreign) for the candidates who indicated the country of their law-school education. Of the 7,252 candidates who indicated that they completed law school in the United States, 70.6% were Caucasian/White, 11.7% were

Asian/Pacific Islander, 8.1% were Black/African American, 3.5% were Hispanic/Latino, 1.2% were Puerto Rican, 0.4% were Chicano/Mexican American, 0.2% were American Indian/Alaskan native, and 4.1% listed their race/ethnicity as "Other." Of the 1,962 respondents who indicated that they completed law school in a foreign country, 34.4% were Caucasian/White, 42.5% were Asian/Pacific Islander, 9.2% were Black/African American, 5.6% were Hispanic/Latino, and 7.8% listed their race/ethnicity as "Other." None of the foreign-educated candidates listed their race/ethnicity as Puerto Rican, Chicano/Mexican American, or American Indian/Alaskan native. Of the domestic-educated candidates, 0.2% omitted their race/ethnicity, and of the foreign-educated candidates, 0.6% omitted their race/ethnicity.

Table 2.8
Percentages Choosing Various Race/Ethnicity Categories for Domestic- and Foreign-Educated Candidates

Race/Ethnicity (N = 10,175)	Origin of Legal Education		
	Domestic (n = 7,252)	Foreign (n = 1,962)	Omitted (n = 961)
Caucasian/White (n = 5,888)	70.6%	34.4%	9.7%
Asian/Pacific Islander (n = 1,697)	11.7%	42.5%	1.4%
Black/African American (n = 773)	8.1%	9.2%	0.9%
Hispanic/Latino (n = 371)	3.5%	5.6%	0.6%
Puerto Rican (n = 91)	1.2%	0.0%	0.1%
Chicano/Mexican American (n = 28)	0.4%	0.0%	0.1%
American Indian/Alaskan Native (n = 11)	0.2%	0.0%	0.0%
Other (n = 461)	4.1%	7.8%	0.8%
Omitted (n = 855)	0.2%	0.6%	86.4%

The racial/ethnic categories chosen by the foreign-educated candidates are generally consistent with their reported countries of legal education. The foreign-educated respondents who classified themselves as Caucasian/White were mainly educated in Europe, Canada, and Australia. Of the Caucasian/White foreign-educated candidates, 14.5% were educated in France, 10.7% in the United Kingdom, 8.1% in

Germany, 8.0% in Canada, 6.5% in Israel, 5.2% in Italy, 4.4% in Ireland, 4.0% in Australia, and most of the remainder were educated in other countries in Europe. The foreign-educated candidates who classified themselves as Asian/Pacific Islander were mainly educated in Asia. Over one-fourth, 26.4%, were educated in Japan, 17.0% in Korea, 16.6% in China, 13.6% in Taiwan, 7.6% in India, 5.3% in the Philippines, and 4.7% in the United Kingdom. Of the Black/African American graduates of foreign law schools, 47.8% were educated in Nigeria, 18.3% in the United Kingdom, 6.7% in Cameroon, and 3.9% in Ghana; Barbados, France, Jamaica, and Liberia each contributed 2.2% and most of the others were educated in other countries in Africa. Most of the Hispanic/Latino foreign-educated candidates were educated in Latin America; 20.2% were educated in Colombia, 12.8% in Brazil, 11.9% in Mexico, 11.0% in Peru, and 9.2% in Venezuela. Panama and Spain each contributed 3.7%, and most of the rest were educated in other countries in Central and South America. Of the graduates of foreign law schools who listed their race/ethnicity as "Other," 35.0% were educated in the United Kingdom, 7.8% in France, 7.1% in Nigeria, 5.2% in Israel; Canada, China, and India each contributed 3.2%.

The most dramatic differences between the racial/ethnic composition of the domestic-educated group and that of the foreign-educated group were that over 70% of the domestic-educated group was Caucasian/White, while less than 35% of the foreign-educated group was Caucasian/White, and that over 42% of the foreign-educated group was Asian/Pacific Islander, while less than 12% of the domestic-educated candidates put themselves in this category. Note that 8% of the foreign-educated group classified themselves as "Other," while about 4% of the domestic-educated group chose this category.

Table 2.9 provides an analysis of age at law school graduation as a function of type of law-school education (domestic or foreign) for the candidates who indicated the country of their law-school education. As noted earlier in the discussion of Table 2.4, age at law school graduation was not available for 21.5% (or 2,184) of the candidates, and most of those for whom this information was not available were foreign educated (99.3%). Of the domestic-educated candidates, over 75% were under 29 when they graduated from law school, and over 90% were under 36. The average age of the domestic-educated candidates when they completed law school was 27.65 years (with an SD of 4.86 years).

Table 2.9
Percentages at Various Ages at Law School Graduation (Using Age Ranges) for Domestic- and Foreign-Educated Candidates

Age at Law School Grad. (N = 10,175)	Origin of Legal Education		
	Domestic (n = 7,252)	Foreign (n = 1,962)	Omitted (n = 961)
<27 (n = 4,358)	54.9%	0.1%	38.8%
27-28 (n = 1,618)	19.9%	0.3%	17.7%
29-30 (n = 738)	8.9%	0.1%	9.4%
31-35 (n = 725)	8.8%	0.2%	8.8%
36-40 (n = 272)	3.2%	0.1%	4.4%
41-45 (n = 140)	1.6%	0.0%	2.6%
46-50 (n = 73)	0.9%	0.0%	1.1%
51-55 (n = 43)	0.5%	0.0%	0.6%
56-60 (n = 18)	0.2%	0.0%	0.3%
>60 (n = 6)	0.1%	0.0%	0.2%
Omitted (n = 2,184)	1.1%	99.3%	16.0%

Table 2.10 provides an analysis of age at bar attempt in July 2005 as a function of law-school education (domestic or foreign) for the candidates who indicated the country of their law-school education. For the foreign-educated candidates, these data were much more complete than they were for the age at graduation. The foreign-educated candidates were generally older when they took the bar in July 2005 than the domestic-educated candidates, with smaller percentages in the under-27 and the 27-28 categories, and larger percentages in all of the other categories. The average age of the domestic-educated candidates taking the bar examination in July 2005 was 28.26, and that for the foreign-educated candidates was 31.34 (with SDs of 5.52 and 6.85 respectively), for a difference of about three years.

Table 2.10
Percentages at Various Ages at July 2005 Bar Attempt (Using Age Ranges) for Domestic- and Foreign-Educated Candidates

Age at Bar Attempt	Origin of Legal Education		
	Domestic (n = 7,252)	Foreign (n = 1,962)	Omitted (n = 961)
<27 (n = 4,493)	50.6%	25.0%	34.8%
27-28 (n = 2,015)	21.0%	15.3%	20.0%
29-30 (n = 1,127)	9.9%	14.7%	12.9%
31-35 (n = 1,332)	10.1%	23.5%	14.5%
36-40 (n = 574)	3.7%	12.0%	7.2%
41-45 (n = 314)	2.3%	5.0%	4.9%
46-50 (n = 172)	1.2%	2.8%	2.8%
51-55 (n = 83)	0.7%	0.8%	1.6%
56-60 (n = 43)	0.3%	0.7%	1.1%
>60 (n = 22)	0.2%	0.4%	0.3%

Table 2.11 provides an analysis of the number of bar attempts as of July 2005 as a function of origin of legal education (domestic or foreign) for the candidates who indicated the country of their law-school education. The foreign-educated candidates were more likely than the domestic-educated candidates to be repeating the examination. About 90% of the domestic-educated candidates and about 70% of the foreign-educated candidates were taking the NY bar exam for the first time. As of July 2005, the domestic-educated candidates had taken the NY bar exam an average of 1.30 times, and the foreign-educated candidates had taken it an average of 1.88 times (with SDs of 1.66 and 2.51 respectively).

As noted earlier, the foreign-educated candidates tended to have lower scores on the NY bar exam than the domestic-educated candidates and to have correspondingly higher failure rates. As a result, they were more likely to repeat the examination than the domestic-educated candidates.

Table 2.11
Percentages of Number of Bar Attempts for Domestic- and Foreign-Educated Candidates

Number of Bar Attempts (N = 10175)	Origin of Legal Education		
	Domestic (n = 7252)	Foreign (n = 1962)	Omitted (n = 961)
1 (n = 8,613)	90.8%	70.6%	66.8%
2 (n = 506)	3.0%	11.2%	7.2%
3 (n = 433)	2.6%	8.1%	8.7%
4 (n = 211)	1.2%	3.6%	5.3%
5 (n = 138)	0.8%	2.1%	3.6%
6 (n = 68)	0.4%	1.0%	2.1%
7 (n = 48)	0.3%	0.8%	1.0%
8 (n = 27)	0.1%	0.5%	1.0%
9 (n = 30)	0.2%	0.4%	1.0%
10 (n = 19)	0.1%	0.4%	0.3%
>10 (n = 82)	0.4%	1.2%	2.8%

2.3 Characteristics of Domestic-Educated Candidates

As noted earlier, the domestic-educated candidates differed substantially from the foreign-educated candidates in a number of ways, and therefore, most of our analyses were run separately for these two groups. In this section, we examine some relationships among demographic variables for the domestic-educated candidates.

Tables 2.12 and 2.13 display the relationship between race/ethnicity and gender for first-time takers and repeaters. Table 2.12 reports the percentages of females and males in each racial/ethnic group for the domestic-educated first-time takers, and Table 2.13 reports the percentages of females and males in each of the racial/ethnic group for the domestic-educated repeaters.

Table 2.12
Percentages of Domestic-Educated First-Time Taking Female and Male
Candidates in Various Race/Ethnicity Categories

Race/Ethnicity	Gender		Total* (N = 6,585)
	Female (n = 3,284)	Male (n = 3,299)	
Caucasian/White (n = 4,818)	69.0%	77.4%	73.2%
Asian/Pacific Islander (n = 740)	12.9%	9.6%	11.2%
Black/African American (n = 430)	8.5%	4.6%	6.5%
Hispanic/Latino (n = 214)	3.3%	3.2%	3.2%
Puerto Rican (n = 73)	1.3%	0.9%	1.1%
Chicano/Mexican American (n = 23)	0.5%	0.2%	0.3%
American Indian/Alaskan Native (n = 9)	0.2%	0.1%	0.1%
Other (n = 268)	4.3%	3.8%	4.1%
Omitted (n = 10)	0.1%	0.2%	0.2%

*Total includes two candidates who did not record their genders.

Table 2.12 reports the racial/ethnic distributions of the female and the male domestic-educated first-time takers. Similar to all domestic-educated candidates (see Table 2.8) the male group included a higher percentage of Caucasian/White candidates than the female group and lower percentages in all of the other racial/ethnic groups. Of the male domestic-educated first-time takers, 77.4% were Caucasian/White, and of the females, 69.0% were Caucasian/White. Each of the other racial/ethnic groups constituted a higher percentage of females than they did of males.

Table 2.13
Percentages of Domestic-Educated Repeat Taking Female and Male Candidates
in Various Race/Ethnicity Categories

Race/Ethnicity	Gender		Total* (N = 667)
	Female (n = 308)	Male (n = 357)	
Caucasian/White (n = 302)	43.2%	47.3%	45.3%
Asian/Pacific Islander (n = 111)	15.3%	17.6%	16.6%
Black/African American (n = 154)	25.3%	21.3%	23.1%
Hispanic/Latino (n = 42)	8.4%	4.5%	6.3%
Puerto Rican (n = 17)	2.3%	2.8%	2.5%
Chicano/Mexican American (n = 4)	0.6%	0.6%	0.6%
American Indian/Alaskan Native (n = 2)	0.3%	0.3%	0.3%
Other (n = 31)	4.2%	4.8%	4.6%
Omitted (n = 4)	0.3%	0.8%	0.6%

*Total includes two candidates who did not record their genders.

Table 2.13 presents the percentages of females and males in each racial/ethnic group for the domestic-educated repeaters. Note that about 45% of the repeat takers were Caucasian/White, while about 73% of the first-time takers were Caucasian/White, and that about 23% of the repeaters were Black/African American, compared to 6.5% of the first-time takers. The Caucasian/White group constituted a higher percentage of the males (about 47.3%) than of the females (about 43.2%).

As was the case for domestic-educated first-time takers, males outnumbered females in the Caucasian/White group, and females tended outnumber males in several other groups.

Among the domestic-educated candidates, the females had an average age at graduation of 27.42 years, while the males had an average age at graduation of 27.87, years (with SDs of 4.90 and 4.83 respectively), for a difference of less than half a year. Table 2.14 presents a more detailed analysis of the relationship between gender and age at graduation for the domestic-educated candidates. Most of the graduates (about 59% of the females and about 52% of the males) were under 27 when they graduated. An additional 31% of the males and over 27% of the females were between 27 and 30 years old when they graduated.

Table 2.14
Percentages of Domestic-Educated Female and Male Candidates at Various Ages at Law School Graduation (Using Age Ranges)

Age at Law School Graduation	Gender		
	Female (n = 3,556)	Male (n = 3,612)	Omitted (n = 3)
<27 (n = 3,983)	58.9%	52.2%	66.7%
27-28 (n = 1,443)	19.5%	20.8%	0.0%
29-30 (n = 647)	7.9%	10.2%	0.0%
31-35 (n = 636)	7.8%	9.9%	33.3%
36-40 (n = 229)	2.7%	3.7%	0.0%
41-45 (n = 115)	1.7%	1.6%	0.0%
46-50 (n = 62)	0.7%	1.0%	0.0%
51-55 (n = 37)	0.6%	0.4%	0.0%
56-60 (n = 15)	0.3%	0.1%	0.0%
>60 (n = 4)	0.1%	0.1%	0.0%

We also looked at the distributions of ages at graduation from law school for domestic-educated candidates across race/ethnicity and did not find any large differences. The range of average ages at graduation across race/ethnicity goes from 27.2 years for the “Other” group to 29.3 years for the American Indian/Alaskan Native group.

Among the domestic-educated candidates, females had an average age of 27.93

years when they took the bar examination in July 2005, while males had an average age at bar attempt of 28.57 years at this point (with SDs of 5.41 and 5.60 respectively), for a difference of a little over half a year. Table 2.15 presents a more detailed breakdown of the relationship between gender and age at bar attempt for the domestic-educated candidates.

Table 2.15
Percentages of Domestic-Educated Female and Male Candidates at Various Ages at Bar Attempt (Using Age Ranges)

Age at Bar Attempt (N = 7,252)	Gender		
	Female (n = 3,592)	Male (n = 3,656)	Omitted (n = 4)
<27 (n = 3,669)	54.1%	47.1%	25.0%
27-28 (n = 1,523)	20.6%	21.4%	25.0%
29-30 (n = 715)	8.8%	10.9%	0.0%
31-35 (n = 732)	9.0%	11.2%	0.0%
36-40 (n = 270)	3.1%	4.3%	0.0%
41-45 (n = 169)	2.0%	2.6%	25.0%
46-50 (n = 90)	1.1%	1.4%	25.0%
51-55 (n = 53)	0.7%	0.8%	0.0%
56-60 (n = 19)	0.3%	0.2%	0.0%
>60 (n = 12)	0.2%	0.2%	0.0%

Table 2.16 provides a breakdown of the number of bar attempts by the domestic-educated candidates as a function of gender as of July 2005. Most of the domestic-educated candidates taking the NY bar exam in July 2005 were taking it for the first time, with males a bit more likely to be repeating the examination than females. Modest percentages were taking the examination for the second or third times, with 96.8% of females and 96.0% of males taking the NY bar exam for the third time or less. As of July 2005, the domestic-educated females had taken the bar examination an average of 1.25 times, while the domestic-educated males had taken it an average of 1.34 times (with SDs of 1.24 and 1.98, respectively).

Table 2.16
Percentages of Female and Male Domestic-Educated Candidates
for Number of Bar Attempts

Number of Bar Attempts (N = 7,252)	Gender		
	Female (n = 3,592)	Male (n = 3,656)	Omitted (n = 4)
1 (n = 6,585)	91.4%	90.2%	50.0%
2 (n = 217)	2.6%	3.4%	0.0%
3 (n = 190)	2.8%	2.4%	25.0%
4 (n = 89)	1.1%	1.3%	0.0%
5 (n = 61)	0.7%	1.0%	25.0%
6 (n = 29)	0.4%	0.4%	0.0%
7 or more (n = 81)	1.0%	1.3%	0.0%

2.4 Characteristics of Foreign-Educated Candidates

The demographic characteristics of the foreign-educated candidates are quite different from those of the domestic-educated candidates.

Tables 2.17 and 2.18 analyze the relationship between gender and race/ethnicity for the foreign-educated candidates, first-time takers and repeaters. Table 2.17 reports the racial/ethnic distributions of the female and the male foreign-educated first-time takers. The race/ethnic category with the highest percentage of candidates is the Asian/Pacific Islander category, followed by the Caucasian/White category, "Other" category, Hispanic/Latino category, and Black/African American category. None of the foreign-educated candidates chose the Puerto Rican, Chicano/Mexican American, or American Indian/Alaskan Native categories.

Table 2.17
Percentages of Foreign-Educated First-Time Takers in Various Race/Ethnicity Categories for Female and Male Candidates

Race/Ethnicity	Gender		Total* (N = 1386)
	Female (n = 633)	Male (n = 748)	
Caucasian/White (n = 554)	42.5%	38.1%	40.0%
Asian/Pacific Islander (n = 590)	38.7%	45.9%	42.6%
Black/African American (n = 67)	5.4%	4.3%	4.8%
Hispanic/Latino (n = 73)	6.0%	4.7%	5.3%
Other (n = 92)	6.6%	6.7%	6.6%
Omitted (n = 10)	0.8%	0.4%	0.7%

*Total includes five candidates who did not record their genders.

In contrast with the domestic-educated first-time takers, for the foreign-educated first-time takers, females were more likely than males to be Caucasian/White. Among the foreign-educated first-time takers, the female category had a higher percentage of Caucasian/Whites and a lower percentage of Asian/Pacific Islanders than the male category; 42.5% of the female foreign-educated first-time takers were Caucasian/White, and 38.1% of the male foreign-educated first-time takers were Caucasian/White, while 38.7% of the female foreign-educated first-time takers were Asian/Pacific Islander, and 45.9% of the male foreign-educated first-time takers were Asian/Pacific Islander. The foreign-educated first-time takers who categorized themselves as Black/African American constituted a higher percentage of the females than of the males (5.4% to about 4.3%) as did those categorizing themselves as Hispanic/Latino (6.0% to about 4.7%).

Table 2.18
Percentages of Foreign-Educated Repeaters in Various Race/Ethnicity Categories for Female and Male Candidates

Race/Ethnicity	Gender		Total* (N = 576)
	Female (n = 268)	Male (n = 296)	
Caucasian/White (n = 121)	21.3%	20.6%	21.0%
Asian/Pacific Islander (n = 243)	44.0%	40.5%	42.2%
Black/African American (n = 113)	15.7%	23.6%	19.6%
Hispanic/Latino (n = 36)	7.1%	5.4%	6.3%
Other (n = 62)	11.6%	9.8%	10.8%
Omitted (n = 1)	0.4%	0.0%	0.2%

*Total includes 12 candidates who did not record their genders.

For the foreign-educated repeaters, Table 2.18 presents the percentages of the females and of the males in each racial/ethnic group. A slightly higher percentage of the females than of the males classified themselves as Caucasian/White (21.3% to about 20.6%) and as Asian/Pacific Islander (44.0% to 40.5%). In the Black/African American group, males outnumbered females. In the Hispanic/Latino group, females outnumbered males.

The results in Table 2.18 differ from those of the domestic-educated repeat takers (Table 2.13), where the Caucasian/White and Asian/Pacific Islander groups constituted lower percentages of females than males and the Black/African American group constituted higher percentages of females than males. The results are comparable for the Hispanic/Latino group, where females outnumber males for the domestic- and foreign-educated repeaters.

Data on the ages at graduation from law school was not available for essentially all of the foreign-educated candidates, and therefore, analyses involving this variable could not be conducted for the foreign-educated candidates.

The foreign-educated candidates were generally a bit older than the domestic-educated candidates when they took the NY bar exam in July 2005. Among the foreign-educated candidates, females had an average age of 29.61 years when they took the

bar examination (compared to 27.93 for the domestic-educated females), and males had an average age at bar attempt of 32.74 years at this point (compared to 28.57 for the domestic-educated males). Table 2.19 presents a detailed description of the relationship between gender and age at bar attempt for the foreign-educated candidates. Note that a third of the foreign-educated females were under 27 and over two-thirds were under 30 when they took the NY bar exam, but just over 45% of the males were under 30 when they took the bar examination.

Table 2.19
Percentages of Foreign-Educated Female and Male Candidates at Various Ages at Bar Attempt (Using Age Ranges) in July 2005

Age at Bar Attempt (N = 1,962)	Gender		
	Female (n = 901)	Male (n = 1,044)	Omitted (n = 17)
<27 (n = 490)	33.6%	17.8%	5.9%
27-28 (n = 300)	18.0%	13.1%	5.9%
29-30 (n = 288)	15.2%	14.4%	5.9%
31-35 (n = 461)	19.6%	26.6%	35.3%
36-40 (n = 235)	8.1%	15.0%	29.4%
41-45 (n = 98)	2.7%	7.0%	5.9%
46-50 (n = 55)	2.2%	3.3%	5.9%
51-55 (n = 15)	0.3%	1.1%	0.0%
56-60 (n = 13)	0.1%	1.1%	0.0%
>60 (n = 7)	0.1%	0.5%	5.9%

The foreign-educated candidates were much more likely than the domestic-educated candidates to be repeating the NY bar exam, with just under 10% of the domestic-educated candidates repeating, compared to almost 30% of the foreign-educated candidates repeating. Table 2.20 provides an analysis of the number of bar attempts as of July 2005 as a function of gender for the foreign-educated candidates. Females were a bit more likely than males to be repeating the bar exam, but were more likely to be taking it for the second, third, or fourth time, rather than the fifth time or higher. 70.3% of the females and 71.6% of males were taking the bar examination for

the first time. As of July 2005, the foreign-educated females had taken the examination an average of 1.72 times, and the foreign-educated males had taken it an average of 1.96 times (with SDs of 1.72 and 2.83 respectively).

Table 2.20
Percentages of Foreign-Educated Female and Male Candidates for Number of Bar Attempts

Number of Bar Attempts (N = 1,962)	Gender		
	Female (n = 901)	Male (n = 1,044)	Omitted (n = 17)
1 (n = 1,386)	70.3%	71.6%	29.4%
2 (n = 220)	12.5%	10.1%	11.8%
3 (n = 159)	8.7%	7.4%	23.5%
4 (n = 71)	4.2%	3.2%	0.0%
5 (n = 42)	1.6%	2.7%	0.0%
6 (n = 19)	0.7%	1.0%	17.6%
7 (n = 16)	0.8%	0.8%	5.9%
8 (n = 10)	0.2%	0.8%	0.0%
9 (n = 7)	0.3%	0.4%	0.0%
10 (n = 8)	0.0%	0.8%	0.0%
>10 (n = 24)	0.8%	1.4%	11.8%

Notes:

1. Adding the percentages listed in tables throughout this report may result in total percentages that differ slightly from 100% due to rounding (e.g., a total percentage of 100.1%), as percentages reported in the tables were rounded to the nearest tenth of a percent.

3. Analyses of Candidate Performance on the July 2005 New York Bar Examination

This section provides detailed descriptions of the performance of the domestic-educated candidates and the foreign-educated candidates on the July 2005 administration of the NY bar exam. It includes analyses of scores on the three different components of the NY bar exam and on the examination as a whole for various groups of candidates. The implications of these results in terms of percentages passing and failing the bar examination are examined in the next section.

The NY bar exam includes four sections, each with different kinds of questions or tasks; the Multistate Bar Examination (MBE), which includes 200 multiple-choice questions; the New York Essay Examination with five essay questions (NY Essay); one Multistate Performance Test task (MPT); and the New York multiple-choice test (NYMC) with 50 questions. In determining the scores on the New York bar exam, the five New York Essays and the MPT are combined to produce a total essay score (essay).

The scores on each component of the NY bar exam (the MBE, the essay, and the NYMC) are scaled to a 0-1,000-point scale. First, the MBE score, which is reported on a 0-200 scale, is multiplied by 5, putting it onto a 0-1,000 scale. The essay scores and the NYMC scores are then scaled to this MBEx5 scale. Scaling the essay and NYMC scores to the MBEx5 ensures that, for the total group of candidates taking the NY bar exam on a given test date, the mean, or average, and the SD (standard deviation), or spread, of the essay scores and of the NYMC scores will be the same as the mean and SD of the MBE scores on the MBEx5.

This scaling does not ensure that the means and SDs on the different components will be the same in the sample of candidates who agreed to participate in the study (the respondents), although we expect them to be similar because most of the candidates agreed to participate. Also, the scaling does not ensure that the means and SDs of the different tests will be the same in different sub-groups of respondents, and the means are not necessarily expected to be similar in these sub-groups. When reported below, scores for components of the NY bar exam will be reported on a 0-1,000 scale, unless otherwise noted.

In computing the total score for each candidate on the NY bar exam, the MBE gets a weight of 40%, and the NYMC gets a weight of 10%. The five New York essay questions together get a weight of 40%, and the MPT gets a weight of 10%, and therefore, the essay score, derived from the scores on the five essays and the MPT, is assigned a weight of 50%.

An important aspect of test scores is their *reliability*. Reliability refers to the consistency or repeatability in scores and reflects the extent to which the measurements are free of random variation or random error. Reliability is typically reported as a

correlation coefficient that varies from 0.0 to 1.0, where higher values reflect more precision and lower values indicate less precision. All measurement contains some random (i.e., unexplained) variability; for example, if a person takes two tests covering the same content in more-or-less the same way, the two scores are not likely to be exactly the same. We expect the two scores to be similar, but we do not expect them to be identical. Such variability is typically attributed to *random errors* that have some impact on observed scores.

The reliabilities for the components of the NY bar exam are all fairly high.¹ MBE scores have a reliability of about .90. Multiple-choice tests typically have high reliabilities, and long multiple-choice tests (the MBE has 200 items) tend to have especially good reliability. The New York Multiple-Choice test (NYMC) is much shorter than the MBE, and mainly as a result of that has a somewhat lower reliability, about 0.78. The essay component (including the MPT) has a reliability of about .80. The total score on the NY bar exam that results when the three components are combined with the appropriate weights has a reliability of about .92.²

For purposes of this report, having the component scores of the NY bar exam on the same 0-1,000 scale facilitated comparisons of component scores across and within groups of candidates. In analyzing the patterns of performance on the NY bar exam, we will focus on the results for various groups of candidates defined in terms of the demographic variables discussed in Section 2 (e.g., domestic-educated male candidates) and then summarize the results in terms of the patterns of performance across groups. We will begin with the domestic-educated first-time takers and repeat takers, and then examine results for the foreign-educated first-time takers and repeaters. Within each of these broadly defined groups, we will also look at performance in terms of gender, race/ethnicity, and age.

3.1 Technical Note on Standard Errors in Estimating Group Mean Scores

We have tried to make this report as non-technical and therefore as accessible as possible, but the accurate interpretation of many of the results in this section requires at least a general understanding of what is called the *standard error of the mean* (SEM). SEMs are intended to provide an indication of the uncertainty in an estimated mean or average score based on a sample from the population being analyzed. Standard errors provide an explicit caveat about the potential for over-interpreting small differences.

The sample analyzed in this report includes over 90% of the candidates who took the NY bar exam in July 2005, and therefore provides good estimates of group means for the total population of candidates who took that exam in July 2005, and for various subgroups in that population. However, in extending the interpretation to future July administrations, the inference must be more tentative. The results from July 2005 are likely to be fairly representative of those that will result from future July NY bar exam administrations, assuming that the tests remain the same, and the educational system and candidate population do not change too much.

However, even if everything stays the same, the results are likely to vary somewhat, just because the sample of specific individuals taking the examination will be different. This sampling variability tends to have an especially big impact if the number of candidates in the group being examined, the *sample size*, is small. For example, if the sample size is 5, the addition of one candidate with an especially high or low score would have a major impact on the average score; if the sample size were 5,000, the addition of one candidate with an especially high or low score would have little impact on the group average. Results tend to be more variable from one sample to another if the sample size is small.

The formulas used to estimate standard errors are based on statistical sampling theory, and reflect the random variability associated with the sampling of individuals on any given test date. They do not include any systematic errors due to changes in the population over time.

The theory used to develop formulas for estimating the standard error is quite complicated, but the final result is fairly simple. The standard error in estimating the mean (or average) score for a group is equal to the SD (standard deviation) for the group over the square root of the sample size (i.e., the number of candidates), and therefore, as the sample size gets larger, the standard error of the mean (SEM) gradually gets smaller. The decrease in the standard error as the sample size increases is gradual because the SEM is inversely proportional to the *square root* of the sample size. As a result, in order to cut the SEM in half, the sample size has to be made four times as large. So, if the SEM is based on a sample of 100, the sample size would have to be increased to 400 to cut the SEM in half and to 1,600 to cut it by three quarters. A law of diminishing returns operates for standard errors, and the standard error never reaches zero.

Thus, the standard error for a group mean depends on the SD within the group and the sample size for the group. The SDs for the various groups considered in this section vary somewhat (from about 50 to about 90), but the sample sizes vary much more (from a few individuals to sample sizes of over 5,000). Therefore, the sample size tends to be the dominant factor in determining the standard error.

Assuming a typical SD of about 70, a sample size of 100 would yield a SEM of about 7 ($70/\sqrt{100} = 7$), and a sample size of 49 would yield a SEM of about 10 ($70/\sqrt{49} = 10$). For a sample size of about 25, the SEM would be about 14. As a rule of thumb, we will not place much emphasis on group means based on fewer than 100 candidates and even less emphasis on group means based on fewer than 50 candidates. In this and subsequent sections, we will generally not report group means for groups with fewer than 20 candidates. As the sample size gets small (e.g., below 20), the group mean says more about the particular individuals in the sample than it does about the group as a whole or about what might be found in future July bar examination administrations. Note that we did, however, report group counts and percentages in

Section 2 for groups with fewer than 20 candidates to provide information regarding the characteristics (e.g., race/ethnicity) of the candidate sample from the July 2005 NY bar exam administration.

3.2 Note on Confidence Intervals

Confidence intervals are often used to indicate the uncertainty in a reported statistic. Assuming that the main source of uncertainty in a reported statistic is sampling variability, confidence intervals can be defined in terms of standard errors. In particular, a 68% confidence interval covers the range from one standard error below the mean, or average, to one standard error above the mean. It is called a “68% confidence interval” because such intervals are expected to include the true value of the mean about 68% of the time. Similarly, a 95% confidence interval includes the range from two standard errors below the mean to two standard errors above the mean and is expected to include the true value of the mean about 95% of the time.³

Standard errors are reported in many of the tables in this report and can be used to construct approximate confidence intervals if the reader wishes to do so. Alternately, they can be taken simply as cautionary notes not to over interpret relatively small differences (i.e., differences that are not much bigger than the standard errors involved in the comparison) in generalizing the result across future July administrations.⁴

3.3 Domestic-Educated First-Time Takers

As discussed in Section 2, the domestic-educated first-time takers include candidates who had graduated from a law school in the United States and were taking the bar examination for the first time in New York during the July 2005 administration. (It is possible that some of these candidates had taken a previous bar examination in a different jurisdiction). Most of these candidates were recent graduates of law school. This group is 73.2% Caucasian/White, but also includes substantial numbers of other racial/ethnic groups. It has approximately the same number of males (50.1%) and females (49.9%).

Table 3.1 reports the means and SDs on each part of the NY bar exam and the means and SDs on the total NY bar exam for domestic-educated first-time takers. Table 3.1 includes separate rows for females, males, and the total group. The mean bar examination score for the total group of just over 727 is well above the current passing score. Note that the standard errors (ranging from 0.9 to 1.3) are quite small because the sample sizes are quite large.

Table 3.1
Score Means, Standard Deviations, and Standard Errors
Domestic-Educated First-Time Takers: Females and Males

Gender		MBE Scaled Score x 5	Essay Scaled Score	NYMC Scaled Score	Total NY Bar Score
Female (n = 3,284; SEM ≈ 1.2)	Mean (SD)	713.28 (72.53)	734.08 (69.21)	719.75 (76.85)	724.34 (63.74)
Male (n = 3,299; SEM ≈ 1.3)	Mean (SD)	740.04 (72.97)	724.12 (71.98)	724.62 (78.77)	730.54 (65.05)
Total* (N = 6,585; SEM ≈ 0.9)	Mean (SD)	726.69 (73.96)	729.07 (70.80)	722.20 (77.84)	727.44 (64.47)

*Total includes two candidates in the sample of domestic-educated first-time test takers who did not record their genders.

Note: The standard error of the mean (SEM) is equal to the SD divided by the square root of the sample size, and is given in the table after the sample size (n or N).

The male candidates did better on average than the females on the MBE and slightly better on the NYMC. The female candidates did better on average than males on the essay, which includes both the essay questions and the MPT task. The difference between males and females on the MBE is about 27 points (about 5 points on the MBE scale), while the difference on the essay is 10 points, and as a result the average score for males on the total NY bar exam is about six points higher than the average score for females. This difference of 6 points is equal to about a tenth of the SD (64.47) for the total group. A difference of less than a tenth of an SD would be considered a small difference in most contexts.

Table 3.2 presents similar results for the domestic-educated first-time takers, as a function of their race/ethnicity. Note that some of the sample sizes in this table are quite small (e.g., the Chicano/Mexican American group had 23 candidates), and therefore, the corresponding standard errors are fairly large (over 15 points), and these mean scores would not be expected to be very stable for this group from one test date to another.⁵

There are two general characteristics of the data in Table 3.2 that are worthy of note. First, in general, the results are fairly consistent across test components within each racial/ethnic group; the difference between the highest average component score and the lowest average component score within each group is generally less than ten points (about one seventh of an SD). An exception to this generalization is the difference between the average MBE score and the average NYMC score for Chicano/Mexican American candidates, but note that this group has a small sample size

and therefore, large standard errors for the different mean scores.

Table 3.2
Score Means, Standard Deviations, and Standard Errors
Domestic-Educated First-Time Takers: Racial/Ethnic Groups

Race/Ethnicity		MBE Scaled Score x 5	Essay Scaled Score	NYMC Scaled Score	Total NY Bar Score
Caucasian/ White (n = 4,818; SEM ≈ 1.0)	Mean	735.63	737.03	730.21	735.79
	(SD)	(71.73)	(68.26)	(75.34)	(61.79)
Asian/ Pacific Islander (n = 740; SEM ≈ 2.7)	Mean	712.70	719.09	711.90	715.82
	(SD)	(73.54)	(72.89)	(77.57)	(65.37)
Black/ African American (n = 430; SEM ≈ 3.3)	Mean	673.21	678.97	671.39	675.90
	(SD)	(66.53)	(67.39)	(81.71)	(59.28)
Hispanic/ Latino (n = 214; SEM ≈ 5.1)	Mean	699.59	706.52	702.10	703.31
	(SD)	(82.47)	(68.49)	(77.95)	(67.20)
Puerto Rican (n = 73; SEM ≈ 8.5)	Mean	710.46	707.86	712.24	709.37
	(SD)	(71.93)	(73.60)	(77.84)	(65.55)
Chicano/ Mexican American (n = 23; SEM ≈ 15.2)	Mean	720.91	710.25	698.85	713.39
	(SD)	(70.49)	(81.25)	(74.28)	(65.76)
Other (n = 268; SEM ≈ 4.3)	Mean	718.20	719.32	708.45	717.81
	(SD)	(69.61)	(72.19)	(76.54)	(63.25)
Total* (N = 6,585; SEM ≈ 0.9)	Mean	726.69	729.07	722.20	727.44
	(SD)	(73.96)	(70.80)	(77.84)	(64.47)

*Total includes racial/ethnic groups with fewer than 20 candidates, which are not separately listed in the table.

Note: The SEM tends to be large for groups with small sample sizes. For example, for the Chicano/Mexican American group (with 23 candidates) the SEM is over 15 points.

Second, the differences between racial/ethnic groups in Table 3.2 are quite large. The Caucasian/White group has the highest overall average score, and the Black/African American group has the lowest overall average score on the examination as a whole. The difference between these two groups is almost 60 points, which is close to one standard deviation (SD) for the total sample. The American Indian/Alaskan Native group (not reported in Table 3.2 because this group included only 9 candidates) has the second highest overall mean, followed by “Other,” Asian/Pacific Islander,

Chicano/Mexican American, Puerto Rican, and Hispanic/Latino groups.

Combining these two observations, it is clear that the differences among the racial/ethnic groups are not associated with particularly high or low scores on one component of the bar examination. Rather, the differences are fairly consistent across all of the components.

Table 3.3
Score Means, Standard Deviations, and Standard Errors
Female Domestic-Educated First-Time Takers: Racial/Ethnic Groups

Race/Ethnicity		MBE Scaled Score x 5	Essay Scaled Score	NYMC Scaled Score	Total NY Bar Score
Caucasian/ White (n = 2,265; SEM ≈ 1.4)	Mean (SD)	722.57 (70.42)	743.52 (66.48)	728.50 (73.59)	733.65 (61.02)
Asian/ Pacific Islander (n = 424; SEM ≈ 3.4)	Mean (SD)	706.47 (70.11)	726.98 (69.05)	715.30 (76.19)	717.63 (62.40)
Black/ African American (n = 279; SEM ≈ 4.1)	Mean (SD)	666.93 (68.48)	687.87 (66.32)	673.75 (81.50)	678.08 (59.94)
Hispanic/ Latino (n = 108; SEM ≈ 7.2)	Mean (SD)	686.44 (79.36)	708.84 (70.93)	702.68 (81.69)	699.25 (68.56)
Puerto Rican (n = 42; SEM ≈ 11.0)	Mean (SD)	712.01 (74.81)	730.79 (69.33)	715.62 (75.46)	721.74 (64.59)
Other (n = 142; SEM ≈ 5.9)	Mean (SD)	698.35 (70.58)	717.93 (67.19)	700.97 (78.36)	708.43 (62.72)
Total* (N = 3,284; SEM ≈ 1.2)	Mean (SD)	713.28 (72.53)	734.08 (69.21)	719.75 (76.85)	724.34 (63.74)

*Total includes racial/ethnic groups with fewer than 20 candidates, which are not separately listed in the table.

Tables 3.3 and 3.4 provide a more detailed analysis of test scores, and make it possible to identify some interactions between gender and race/ethnicity. Table 3.3 reports the means and SDs on each component of the NY bar exam and the means and SDs on the total NY bar exam for female candidates as a function of race/ethnicity. Table 3.4 reports the corresponding results for male candidates as a function of race/ethnicity. For some of the racial/ethnic groups (particularly American Indian/Alaskan Native and Chicano/Mexican American) the sample sizes are too small to draw any firm conclusions and are not included.

Table 3.4
Score Means, Standard Deviations, and Standard Errors
Male Domestic-Educated First-Time Takers: Racial/Ethnic Groups

Race/Ethnicity		MBE Scaled Score x 5	Essay Scaled Score	NYMC Scaled Score	Total NY Bar Score
Caucasian/ White (n = 2,552; SEM ≈ 1.4)	Mean (SD)	747.22 (70.91)	731.34 (69.25)	731.72 (76.84)	737.73 (62.41)
Asian/ Pacific Islander (n = 316; SEM ≈ 4.3)	Mean (SD)	721.05 (77.25)	708.51 (76.59)	707.33 (79.27)	713.41 (69.18)
Black/ African American (n = 151; SEM ≈ 5.5)	Mean (SD)	684.81 (61.29)	662.52 (66.46)	667.02 (82.19)	671.88 (58.02)
Hispanic/ Latino (n = 106; SEM ≈ 7.1)	Mean (SD)	712.98 (83.79)	704.15 (66.16)	701.52 (74.34)	707.44 (65.84)
Puerto Rican (n = 31; SEM ≈ 12.7)	Mean (SD)	708.35 (68.99)	676.79 (68.55)	707.67 (81.99)	692.61 (64.09)
Other (n = 126; SEM ≈ 6.1)	Mean (SD)	740.58 (61.48)	720.89 (77.68)	716.89 (73.84)	728.37 (62.41)
Total* (N = 3,299; SEM ≈ 1.3)	Mean (SD)	740.04 (72.97)	724.12 (71.98)	724.62 (78.77)	730.54 (65.05)

*Total includes racial/ethnic groups with fewer than 20 candidates, which are not separately listed in the table.

For the remaining groups in Tables 3.3 and 3.4 and for both females and males, the differences across racial/ethnic groups are larger than the differences across test components within groups. The differences across test components within groups generally cover a range of about 20 points or less, while the difference between the highest and lowest group averages is about 55 points for females and over 65 points for males. In both cases, the Caucasian/White group has the highest mean and the Black/African American group has the lowest mean. For females, the second, third, fourth, and fifth averages are for Puerto Rican, Asian/Pacific Islander, "Other," and Hispanic/Latino, respectively. For males, the second through fifth averages are for "Other," Asian/Pacific Islander, Hispanic/Latino, and Puerto Rican, respectively.

The finding that females tend to do relatively well on the essay and males do relatively well on the MBE holds up across racial/ethnic groups. The females have a

higher average score on the essay than they do on the MBE for every racial/ethnic group other than the Chicano/Mexican American group, and in this one group, the sample size is relatively small, resulting in relatively large standard errors. The male candidates have a higher average score on the MBE than they do on the essay for every racial/ethnic group. The finding that females do better than males on the essay and males do better than females on the MBE is quite consistent across analyses.

Comparing results for different groups across Tables 3.3 and 3.4, we see that the differences between females and males in their average total scores are inconsistent in magnitude and direction. For the Caucasian/White group the average total score for females is about 4 points lower than that for males, and for the Hispanic/Latino group, the average for females is about 8 points lower than that for males. For the Asian/Pacific Islander, Black/African American, and Puerto Rican groups, females have higher average total scores than males. The “Other” group has a 20-point difference favoring males.

As indicated earlier there is a substantial interaction between gender and race/ethnicity among the candidates taking the NY bar exam. Within the Caucasian/White group, there were more males than females, but in all other racial/ethnic groups, females outnumbered males. Therefore, in comparing the performance of females to that of males, we are comparing two groups that differ not just in gender, but in their racial/ethnic composition.

In order to check on the impact of this interaction, we created an artificial sample in which percentages of males and females would be the same for each racial/ethnic group, and then computed the overall means for males and females in this artificial sample. More specifically, we multiplied the percentage of candidates in each racial/ethnic group by the mean for males in that racial/ethnic group to get a population-weighted mean for males. Separately, we multiplied the percentage of the sample in each racial/ethnic group by the mean for females in that racial/ethnic group to get a population-weighted mean for females. The resulting mean total score for males was 728.74 and the mean total score for females was 725.88 for a difference of about 3 points, which is about half the difference reported in Table 3.1 for the actual sample of candidates. So, about half of the observed difference in mean scores between females and males can be attributed to the fact that racial/ethnic groups with relatively low scores on the bar examination are more heavily represented among the females than the males.

Figure 3.1 displays the trends in scores for each part of the NY bar exam and for the total bar exam. In this figure, the scores within racial/ethnic groups are fairly similar across the components of the NY bar exam and total NY bar exam. In contrast, racial/ethnic groups show larger differences in their average scores. That is, the lines for different racial/ethnic groups are relatively flat, but they are widely separated, covering a range of nearly 60-points between the Caucasian/White group (highest scoring) and the Black/African American group (lowest scoring).

Figure 3.1
Trends in Essay, NYMC, MBE, and Total NY Bar Exam Scores
Racial/Ethnic Groups

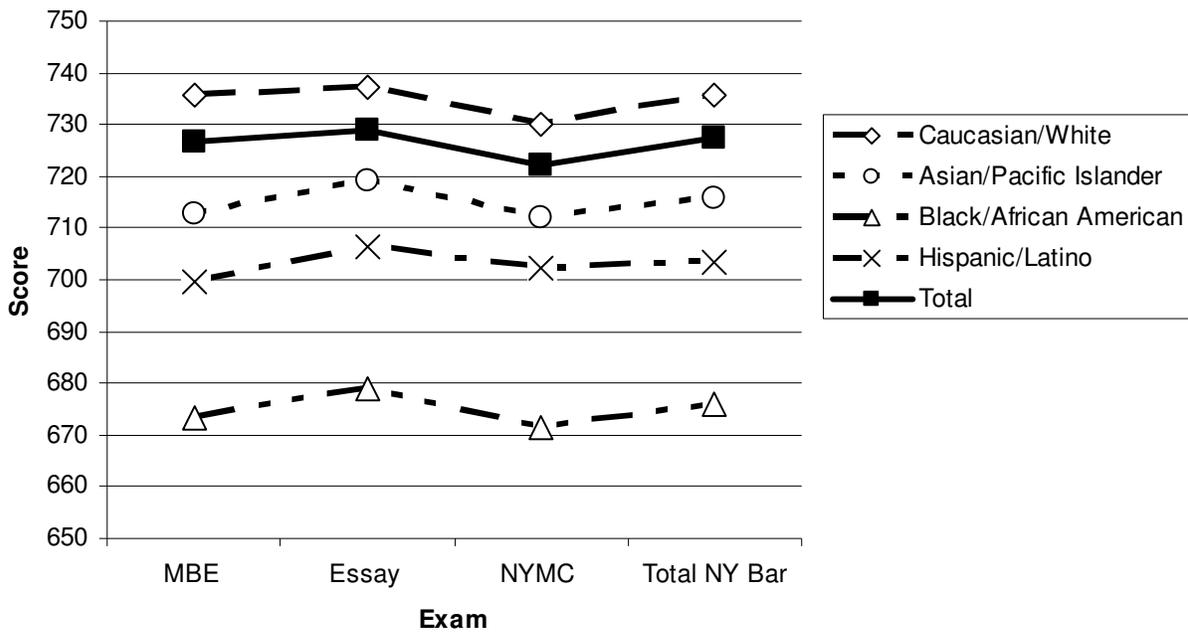


Table 3.5 examines the relationship between average test scores and age at graduation from law school for domestic-educated first-time takers. The average score for the total NY bar exam decreases systematically from the first age category (less than 27) until the seventh category (46 - 50) and then increases for the last category included in the table. The trends for the three test components are similar, with a systematic decrease in the early categories, and then a slight upturn for the last category (Note that the last few categories have large standard errors, and as a result, the increases for the last categories are not statistically significant).

Table 3.5
Score Means, Standard Deviations, and Standard Errors
Domestic-Educated First-Time Takers: Age at Graduation

Age at Graduation		MBE Scaled Score x 5	Essay Scaled Score	NYMC Scaled Score	Total NY Bar Score
Less than 27 (n = 3,768; SEM ≈ 1.1)	Mean (SD)	730.80 (71.94)	739.53 (68.01)	727.62 (76.72)	734.86 (62.06)
27 - 28 (n = 1,343; SEM ≈ 1.9)	Mean (SD)	728.75 (74.16)	725.96 (68.86)	721.79 (76.63)	726.66 (63.80)
29 - 30 (n = 585; SEM ≈ 3.0)	Mean (SD)	724.37 (73.83)	720.35 (69.74)	713.29 (80.47)	721.25 (63.95)
31 - 35 (n = 537; SEM ≈ 3.1)	Mean (SD)	715.80 (73.38)	706.27 (68.01)	712.11 (79.31)	710.67 (62.56)
36 - 40 (n = 160; SEM ≈ 6.1)	Mean (SD)	704.86 (82.09)	688.36 (77.02)	701.17 (76.32)	696.28 (71.45)
41 - 45 (n = 78; SEM ≈ 9.1)	Mean (SD)	694.44 (87.08)	676.82 (80.08)	701.32 (78.97)	686.35 (76.04)
46 - 50 (n = 47; SEM ≈ 10.9)	Mean (SD)	697.16 (75.87)	670.63 (74.40)	688.11 (81.94)	682.91 (66.25)
51 - 55 (n = 26; SEM ≈ 14.6)	Mean (SD)	714.04 (68.14)	669.65 (79.06)	710.51 (84.81)	691.58 (65.85)
Total* (N = 6,556; SEM ≈ 0.9)	Mean (SD)	727.15 (73.47)	729.49 (70.40)	722.57 (77.63)	727.87 (64.02)

*Total includes age ranges with fewer than 20 candidates not separately listed in the table.

3.4 Domestic-Educated Repeaters

Table 3.6 reports the means and SDs on the three components of the bar examination and the means and SDs on the total NY bar exam for domestic-educated repeaters. It reports results for females, males, and the total group of domestic-educated repeaters.

The first thing to note in examining Table 3.6 in relation to Table 3.1 is that for both females and males and on all components of the test, the average scores for repeat takers are much lower than they are for the first-time takers. For the total group of domestic-educated first-time takers, the average score on the NY bar exam is over 100 points higher than that for the repeat takers (727.44 vs. 623.77). The repeat takers have all failed the NY bar exam on at least one previous test date and generally have lower scores than the first-time takers on subsequent test dates. Past performance tends to be correlated with future performance.

The female repeat takers do better on average than male repeat takers on the essay and on the NYMC. The male repeat takers do better on average than females on the MBE. The difference between males and females on the MBE is about 13 points on the 0-1,000-point scale, while the difference on the essay is about 17 points, and, as a result, the average scores for female repeat takers on the total NY bar exam is about 4 points higher than the average for male repeat takers. This difference of 4 points is less than one-tenth of an SD (and is less than the standard error for the difference between these two means).

Table 3.6
Score Means, Standard Deviations, and Standard Errors
Domestic-Educated Repeaters: Females and Males

Gender		MBE Scaled Score x 5	Essay Scaled Score	NYMC Scaled Score	Total NY Bar Score
Female (n = 308; SEM ≈ 3.4)	Mean (SD)	615.65 (57.17)	633.84 (63.54)	626.14 (68.09)	625.78 (51.95)
Male (n = 357; SEM ≈ 3.2)	Mean (SD)	628.51 (58.28)	617.14 (63.80)	620.64 (71.59)	622.03 (50.29)
Total* (N = 667; SEM ≈ 2.4)	Mean (SD)	622.52 (58.01)	624.88 (64.26)	623.33 (69.94)	623.77 (51.06)

*Total includes two candidates in the sample of domestic-educated repeaters who did not record their genders.

Table 3.7 presents results for the domestic-educated repeaters as a function of their race/ethnicity. Note that some of the sample sizes in this table are quite small, and therefore the standard errors are large. The results are fairly consistent across test components within each racial/ethnic group; the difference between the highest average component score and the lowest average component score in each group is generally less than fifteen points (about a fourth of an SD), though the difference is 20 points for the “Other” group.

The differences between racial/ethnic groups for domestic-educated repeaters

are much smaller than they are for the domestic-educated first-time takers. Among the repeat takers, the Caucasian/White group has the highest overall average total score, and the Black/African American group has the lowest average total score. The difference between these two groups is about 18 points, which is much smaller than the corresponding difference for first-time takers.

Table 3.7
Score Means, Standard Deviations, and Standard Errors
Domestic-Educated Repeaters: Racial/Ethnic Groups

Race/Ethnicity		MBE Scaled Score x 5	Essay Scaled Score	NYMC Scaled Score	Total NY Bar Score
Caucasian/ White (n = 302; SEM ≈ 3.5)	Mean (SD)	626.85 (55.68)	633.83 (66.40)	628.92 (68.87)	630.53 (50.75)
Asian/ Pacific Islander (n = 111; SEM ≈ 6.0)	Mean (SD)	626.23 (61.22)	616.38 (66.21)	629.85 (70.44)	621.67 (54.82)
Black/ African American (n = 154; SEM ≈ 5.0)	Mean (SD)	613.98 (61.57)	613.15 (60.77)	604.98 (74.89)	612.67 (52.15)
Hispanic/ Latino (n = 42; SEM ≈ 8.4)	Mean (SD)	618.89 (57.00)	614.09 (56.19)	631.68 (60.73)	617.74 (43.86)
Other (n = 31; SEM ≈ 9.9)	Mean (SD)	615.21 (60.14)	635.10 (57.21)	615.33 (59.67)	625.06 (44.45)
Total* (N = 667; SEM ≈ 2.4)	Mean (SD)	622.52 (58.01)	624.88 (64.26)	623.33 (69.94)	623.77 (51.06)

*Total includes racial/ethnic groups with fewer than 20 candidates not separately listed in the table.

Tables 3.8 and 3.9 provide an analysis of domestic-educated repeater performance as a function of gender and race/ethnicity. Table 3.8 reports the means and SDs on each component of the NY bar exam and the mean and SD on the total NY bar exam for female candidates as a function of race/ethnicity. Table 3.9 reports the corresponding results for male candidates as a function of race/ethnicity. For some of the racial/ethnic groups (particularly Puerto Rican, American Indian/Alaskan Native, Chicano/Mexican American, and the “Other” group), the sample sizes are too small to draw any firm conclusions and are not included in the tables.

For the remaining groups and for both females and males, the differences across racial/ethnic groups are smaller than they are for the first-time takers, covering a range

of about 20 points. The differences across test components within groups are comparable to what they were for the first-time takers. In both cases the Caucasian/White group has the highest mean and the Black/African American group has the lowest mean. In general, across racial/ethnic groups, female repeat takers tend to do relatively well on the essay and males do relatively well on the MBE.

Table 3.8
Score Means, Standard Deviations, and Standard Errors
Female Domestic-Educated Repeaters: Racial/Ethnic Groups

Race/Ethnicity		MBE Scaled Score x 5	Essay Scaled Score	NYMC Scaled Score	Total NY Bar Score
Caucasian/ White (n = 133; SEM ≈ 5.2)	Mean (SD)	619.79 (55.24)	640.27 (66.66)	630.50 (65.94)	631.07 (52.57)
Asian/ Pacific Islander (n = 47; SEM ≈ 9.0)	Mean (SD)	628.07 (58.29)	642.12 (65.18)	636.79 (69.17)	635.96 (55.15)
Black/ African American (n = 78; SEM ≈ 7.1)	Mean (SD)	605.47 (62.11)	624.90 (60.19)	606.51 (74.90)	615.31 (54.68)
Hispanic/ Latino (n = 26; SEM ≈ 9.9)	Mean (SD)	605.19 (51.11)	616.05 (55.52)	638.63 (54.10)	613.96 (40.44)
Total* (N = 308; SEM ≈ 3.4)	Mean (SD)	615.65 (57.17)	633.84 (63.54)	626.14 (68.08)	625.78 (51.95)

*Total includes racial/ethnic groups with fewer than 20 candidates not separately listed in the table.

Table 3.9
Score Means, Standard Deviations, and Standard Errors
Male Domestic-Educated Repeaters: Racial/Ethnic Groups

Race/Ethnicity		MBE Scaled Score x 5	Essay Scaled Score	NYMC Scaled Score	Total NY Bar Score
Caucasian/ White (n = 169; SEM ≈ 4.7)	Mean (SD)	632.40 (55.56)	628.76 (65.96)	627.69 (71.26)	630.11 (49.42)
Asian/ Pacific Islander (n = 63; SEM ≈ 7.8)	Mean (SD)	625.47 (64.05)	598.42 (60.79)	623.80 (71.63)	611.78 (52.74)
Black/ African American (n = 76; SEM ≈ 7.0)	Mean (SD)	622.71 (60.17)	601.09 (59.36)	603.40 (75.35)	609.96 (49.64)
Total* (N = 357; SEM ≈ 3.2)	Mean (SD)	628.51 (58.28)	617.14 (63.80)	620.64 (71.59)	622.03 (50.29)

*Total includes racial/ethnic groups with fewer than 20 candidates not separately listed in the table.

Table 3.10 examines the relationship between average test scores and age at graduation from law school for domestic-educated repeaters. The relationship between average bar scores and age at graduation in Table 3.10 is not as regular and systematic as it is for the first-time takers. This is, no doubt, due in part to the relatively small sample sizes for repeat takers and to the restriction in range of their scores, which have lower averages and smaller SDs than those of the first-time takers.

Table 3.10
Score Means, Standard Deviations, and Standard Errors
Domestic-Educated Repeaters: Age at Graduation

Age at Graduation		MBE Scaled Score x 5	Essay Scaled Score	NYMC Scaled Score	Total NY Bar Score
Less than 27 (n = 215; SEM ≈ 3.9)	Mean (SD)	627.85 (54.79)	638.62 (62.53)	617.57 (65.01)	632.20 (48.14)
27 - 28 (n = 100; SEM ≈ 6.1)	Mean (SD)	632.11 (60.61)	641.61 (59.06)	623.78 (71.68)	636.04 (50.96)
29 - 30 (n = 62; SEM ≈ 7.5)	Mean (SD)	620.61 (54.01)	628.02 (64.41)	623.02 (69.05)	624.48 (48.18)
31 - 35 (n = 99; SEM ≈ 6.2)	Mean (SD)	615.14 (59.68)	608.62 (59.36)	622.63 (79.66)	612.66 (49.26)
36 - 40 (n = 69; SEM ≈ 7.4)	Mean (SD)	621.09 (60.03)	612.60 (63.64)	631.23 (69.12)	617.86 (53.26)
41 - 45 (n = 37; SEM ≈ 9.0)	Mean (SD)	615.46 (47.89)	615.80 (57.60)	629.13 (70.63)	616.92 (42.65)
Total* (N = 615; SEM ≈ 2.4)	Mean (SD)	623.93 (56.72)	628.21 (62.16)	623.16 (69.71)	625.98 (49.26)

*Total includes age ranges with fewer than 20 candidates not separately listed in the table.

Table 3.11
Score Means, Standard Deviations, and Standard Errors
Domestic-Educated Takers: Number of Bar Attempts

Number of Bar Attempts		MBE Scaled Score x 5	Essay Scaled Score	NYMC Scaled Score	Total NY Bar Score
1 (n = 6,585; SEM ≈ 0.9)	Mean (SD)	726.69 (73.96)	729.07 (70.80)	722.20 (77.84)	727.44 (64.47)
2 (n = 217; SEM ≈ 4.2)	Mean (SD)	638.10 (60.90)	633.83 (62.36)	626.74 (74.29)	634.82 (51.99)
3 (n = 190; SEM ≈ 4.4)	Mean (SD)	621.69 (54.57)	630.40 (66.10)	635.42 (71.74)	627.38 (50.59)
4 (n = 89; SEM ≈ 6.0)	Mean (SD)	617.49 (56.65)	622.00 (62.04)	615.77 (62.26)	619.55 (47.16)
5 (n = 61; SEM ≈ 7.4)	Mean (SD)	608.78 (52.94)	623.41 (66.49)	608.97 (61.11)	616.15 (50.09)
6 (n = 29; SEM ≈ 10.9)	Mean (SD)	621.24 (56.19)	616.60 (56.47)	610.52 (78.60)	617.90 (43.96)
7 or more (n = 81; SEM ≈ 6.1)	Mean (SD)	599.05 (53.27)	595.15 (60.55)	609.59 (59.89)	598.15 (47.41)
Total (N = 7,252; SEM ≈ 0.9)	Mean (SD)	717.11 (78.63)	719.48 (76.40)	713.11 (82.27)	717.90 (70.08)

Table 3.11 presents the averages and the SDs of the scores for each test component and for the total NY bar exam for domestic-educated first-time takers, second-time takers, third-time takers, etc. As noted earlier, the average score for the repeat takers, as a group, is substantially lower than that of the first-time takers. The average score on the total NY bar exam declines sharply as we move from the first-time takers to the second-time takers, and then declines more gradually as the number of attempts increases. The only exception to this steady decline is a slight increase in the average score between the groups with five and six attempts (for which, the standard errors are fairly large). This pattern also generally holds for the MBE and the essay, and with less consistency for the NYMC.

As indicated in Tables 3.12 and 3.13, this pattern is consistent across males and females. Table 3.12 indicates that females do better on the essay than they do on the MBE, regardless of their repeat status. As indicated in Table 3.13, males do better on the MBE than they do on the essay regardless of their repeat status.

Table 3.12
Score Means, Standard Deviations, and Standard Errors
Female Domestic-Educated Takers: Number of Bar Attempts

Number of Bar Attempts		MBE Scaled Score x 5	Essay Scaled Score	NYMC Scaled Score	Total NY Bar Score
1 (n = 3,284; SEM ≈ 1.2)	Mean (SD)	713.28 (72.53)	734.08 (69.21)	719.75 (76.85)	724.34 (63.74)
2 (n = 94; SEM ≈ 6.6)	Mean (SD)	629.36 (62.05)	647.36 (66.24)	633.26 (71.34)	638.73 (57.23)
3 (n = 101; SEM ≈ 5.8)	Mean (SD)	616.70 (53.03)	636.41 (62.77)	634.88 (67.13)	628.37 (48.24)
4 (n = 40; SEM ≈ 7.4)	Mean (SD)	608.31 (46.41)	631.91 (61.17)	609.13 (62.03)	620.18 (43.24)
5 (n = 24; SEM ≈ 11.0)	Mean (SD)	606.75 (59.08)	629.72 (54.13)	630.35 (56.27)	620.54 (45.92)
6 (n = 14; SEM ≈ 14.6)	Mean (SD)	607.64 (52.73)	621.29 (49.87)	597.93 (71.41)	613.43 (44.54)
7 or more (n = 35; SEM ≈ 10.4)	Mean (SD)	593.47 (60.32)	600.17 (62.20)	609.66 (69.67)	598.46 (53.48)
Total (N = 3,592; SEM ≈ 1.3)	Mean (SD)	704.91 (76.40)	725.49 (74.25)	711.73 (80.52)	715.89 (68.60)

Table 3.13
Score Means, Standard Deviations, and Standard Errors
Male Domestic-Educated Takers: Number of Bar Attempts

Number of Bar Attempts		MBE Scaled Score x 5	Essay Scaled Score	NYMC Scaled Score	Total NY Bar Score
1 (n = 3,299; SEM ≈ 1.3)	Mean (SD)	740.04 (72.97)	724.12 (71.98)	724.62 (78.77)	730.54 (65.05)
2 (n = 123; SEM ≈ 5.4)	Mean (SD)	644.78 (59.40)	623.50 (57.37)	621.76 (76.38)	631.82 (47.62)
3 (n = 88; SEM ≈ 6.8)	Mean (SD)	627.26 (56.35)	622.58 (69.17)	635.76 (77.42)	625.72 (53.44)
4 (n = 49; SEM ≈ 8.5)	Mean (SD)	624.98 (63.30)	613.91 (62.20)	621.19 (62.56)	619.04 (50.58)
5 (n = 36; SEM ≈ 9.9)	Mean (SD)	610.71 (49.91)	621.59 (73.56)	592.61 (59.73)	614.42 (53.34)
6 (n = 15; SEM ≈ 16.2)	Mean (SD)	633.93 (58.10)	612.21 (63.45)	622.28 (85.52)	622.07 (44.56)
7 or more (n = 46; SEM ≈ 7.4)	Mean (SD)	603.29 (47.47)	591.34 (59.66)	609.53 (52.05)	597.91 (42.84)
Total (N = 3,656; SEM ≈ 1.3)	Mean (SD)	729.15 (78.94)	713.67 (77.98)	714.47 (83.97)	719.94 (71.43)

In general, and not surprisingly, the repeat takers get lower scores on average than the first-time takers, and the performance tends to be worse for candidates with larger number of previous attempts. In addition, we have the consistent finding that, for domestic-educated repeaters, females do better than males on the essay, and males do better than females on the MBE.

3.5 Foreign-Educated First-Time Takers

Table 3.14 reports the means and SDs on each component of the NY bar exam and the means and SDs on the total NY bar exam for females, males, and the total group of foreign-educated first-time takers in the sample. As is the case for the domestic-educated first-time takers, males do better on average than females on the MBE and on the NYMC, and females do better than males on the essay. The difference between males and females on the MBE is about 26 points, while the difference on the essay is about 20 points, and the average total score for males on the bar examination

is about 2 points higher than the average total score for female candidates. This difference of two points is very small compared to the overall SD of almost 90 points and is less than the standard error (and therefore not statistically significant).

Table 3.14
Score Means, Standard Deviations, and Standard Errors
Foreign-Educated First-Time Takers: Females and Males

Gender		MBE Scaled Score x 5	Essay Scaled Score	NYMC Scaled Score	Total NY Bar Score
Female (n = 633; SEM ≈ 3.8)	Mean (SD)	637.38 (96.90)	651.10 (94.63)	653.44 (98.85)	645.87 (89.54)
Male (n = 748; SEM ≈ 3.4)	Mean (SD)	663.33 (97.60)	631.06 (96.74)	670.25 (92.77)	647.89 (90.07)
Total* (N = 1,386; SEM ≈ 2.6)	Mean (SD)	651.36 (98.10)	640.22 (96.21)	662.54 (96.12)	646.92 (89.79)

*Total includes five candidates in the sample of foreign-educated first-time test takers who did not record their genders.

Table 3.15 presents average scores on each part of the NY bar exam and on the total NY bar exam for the foreign-educated first-time takers, as a function of their race/ethnicity. The results are not as consistent across test components within each racial/ethnic group as they were for the domestic-educated first-time takers. In particular, the Asian/Pacific Islander group has a substantially lower average on the essay than on the MBE or the NYMC. The other groups are relatively consistent in their mean scores across the three components.

The differences across groups are quite large. The largest difference between racial/ethnic groups (i.e., between Caucasian/White and Black/African American) is almost 90 points, or one SD. The Asian/Pacific Islander group, the “Other” group, and the Hispanic/Latino group fall about halfway between these two groups.

Table 3.15
Score Means, Standard Deviations, and Standard Errors
Foreign-Educated First-Time Takers: Racial/Ethnic Group

Race/Ethnicity		MBE Scaled Score x 5	Essay Scaled Score	NYMC Scaled Score	Total NY Bar Score
Caucasian/ White (n = 554; SEM ≈ 3.8)	Mean (SD)	674.49 (90.87)	675.48 (88.01)	678.82 (93.01)	675.43 (82.05)
Asian/ Pacific Islander (n = 590; SEM ≈ 4.0)	Mean (SD)	646.09 (102.04)	616.15 (98.16)	660.42 (97.03)	632.56 (93.11)
Black/ African American (n = 67; SEM ≈ 10.5)	Mean (SD)	576.66 (81.91)	594.14 (85.55)	600.75 (98.26)	587.85 (77.36)
Hispanic/ Latino (n = 73; SEM ≈ 9.5)	Mean (SD)	617.42 (79.74)	623.53 (82.79)	642.90 (85.62)	623.03 (75.32)
Other (n = 92; SEM ≈ 9.1)	Mean (SD)	627.44 (96.95)	629.18 (82.44)	639.49 (89.23)	629.53 (82.29)
Total* (N = 1,386; SEM ≈ 2.6)	Mean (SD)	651.36 (98.10)	640.22 (96.21)	662.54 (96.12)	646.92 (89.79)

*Total includes racial/ethnic groups with fewer than 20 candidates not separately listed in the table.

Tables 3.16 and 3.17 provide more detailed analyses of these relationships, which make it possible to identify some interactions between gender and race/ethnicity. Table 3.16 reports the means and SDs on each part of the NY bar exam and on the total NY bar exam for female candidates as a function of race/ethnicity. Table 3.17 reports the corresponding results for male candidates as a function of race/ethnicity. The females generally have higher means on the essay than they do on the other components, but this result is not entirely consistent. For the Asian/Pacific Islander females, the mean on the essay is lower than the means for the MBE and the NYMC, and for the Hispanic/Latino females, the mean on the NYMC is slightly higher than that on the essay. For the foreign-educated males, the essay mean is consistently lower than the MBE and NYMC means.

Table 3.16
Score Means, Standard Deviations, and Standard Errors
Female Foreign-Educated First-Time Takers: Racial/Ethnic Group

Race/Ethnicity		MBE Scaled Score x 5	Essay Scaled Score	NYMC Scaled Score	Total NY Bar Score
Caucasian/ White (n = 269; SEM ≈ 5.3)	Mean (SD)	658.55 (89.82)	684.36 (84.27)	671.02 (94.62)	672.72 (81.25)
Asian/ Pacific Islander (n = 245; SEM ≈ 6.4)	Mean (SD)	635.19 (102.55)	627.88 (101.94)	652.01 (100.01)	633.25 (96.16)
Black/ African American (n = 34; SEM ≈ 16.0)	Mean (SD)	587.41 (91.83)	629.41 (87.38)	617.58 (108.83)	611.41 (84.59)
Hispanic/ Latino (n = 38; SEM ≈ 11.8)	Mean (SD)	603.72 (72.46)	630.15 (67.60)	632.01 (86.66)	619.76 (63.57)
Other (n = 42; SEM ≈ 13.3)	Mean (SD)	585.70 (92.51)	608.14 (76.38)	603.92 (97.35)	598.79 (77.41)
Total* (N = 633; SEM ≈ 3.8)	Mean (SD)	637.38 (96.90)	651.10 (94.63)	653.44 (98.85)	645.87 (89.54)

*Total includes racial/ethnic groups with fewer than 20 candidates not separately listed in the table.

For the Caucasian/White and Hispanic/Latino groups males have higher average scores than females, with differences of about five points and seven points, respectively. For the “Other” category, males have an average score that is about 57 points higher than that of females. In the Asian/Pacific Islander group, females have an average score less than two points higher than that of males, and in the Black/African American group, the female average is about 47 points higher than that of the males.

Table 3.17
Score Means, Standard Deviations, and Standard Errors
Male Foreign-Educated First-Time Takers: Racial/Ethnic Group

Race/Ethnicity		MBE Scaled Score x 5	Essay Scaled Score	NYMC Scaled Score	Total NY Bar Score
Caucasian/ White (n = 285; SEM ≈ 5.2)	Mean (SD)	689.54 (89.42)	667.10 (90.76)	686.17 (91.03)	677.98 (82.86)
Asian/ Pacific Islander (n = 343; SEM ≈ 5.1)	Mean (SD)	653.93 (101.27)	607.52 (94.46)	666.50 (94.14)	631.97 (90.98)
Black/ African American (n = 32; SEM ≈ 12.6)	Mean (SD)	566.98 (70.60)	557.68 (68.42)	585.21 (84.90)	564.25 (62.24)
Hispanic/ Latino (n = 35; SEM ≈ 15.0)	Mean (SD)	632.29 (85.53)	616.34 (97.15)	654.72 (84.11)	626.57 (87.12)
Other (n = 50; SEM ≈ 11.3)	Mean (SD)	662.50 (86.88)	646.85 (83.93)	669.37 (69.71)	655.36 (77.91)
Total* (N = 748; SEM ≈ 3.4)	Mean (SD)	663.33 (97.60)	631.06 (96.74)	670.25 (92.77)	647.89 (90.07)

*Total includes racial/ethnic groups with fewer than 20 candidates not separately listed in the table.

3.6 Foreign-educated repeaters

Table 3.18 reports the means and SDs on the three components of the bar examination and on the total NY bar exam for females, males, and the total group of foreign-educated repeaters.

The average scores for both female and male foreign-educated repeaters reported in Table 3.18 are lower than those for the foreign-educated first-time takers (see Table 3.14) on the total NY bar exam and on all components of the exam.

Table 3.18
Score Means, Standard Deviations, and Standard Errors
Foreign-Educated Repeaters: Females and Males

Gender		MBE Scaled Score x 5	Essay Scaled Score	NYMC Scaled Score	Total NY Bar Score
Female (n = 268; SEM ≈ 4.3)	Mean (SD)	594.47 (66.94)	605.56 (75.22)	616.43 (79.32)	602.21 (61.75)
Male (n = 296; SEM ≈ 4.1)	Mean (SD)	606.99 (73.75)	580.60 (70.07)	622.51 (75.76)	595.37 (62.33)
Total* (N = 576; SEM ≈ 3.0)	Mean (SD)	601.46 (71.14)	592.44 (73.31)	620.27 (77.46)	598.85 (62.15)

*Total includes twelve candidates in the sample of domestic-educated first-time test takers who did not record their genders.

As was the case for foreign-educated first-time takers, foreign-educated female repeat takers do better on average than male repeat takers on the essay. The male candidates have higher average scores than females on the MBE and on the NYMC. The difference between males and females on the MBE is about 13 points, and the difference on the NYMC is about 6 points. The difference on the essay favors female candidates by about 25 points. Also, similar to the foreign-educated first-time takers, both female and male repeat takers have relatively higher average scores on the NYMC than on either of the other two components. Unlike the parallel groups in the foreign-educated first-time takers, the average score for foreign-educated female repeat takers on the total NY bar exam was higher than the average for the foreign-educated male repeat takers (by about seven points).

Table 3.19 presents results for the foreign-educated repeaters, as a function of their race/ethnicity. The results are not as consistent across test components within each racial/ethnic group as they were for the domestic-educated first-time takers. In particular, the Asian/Pacific Islander group has a substantially lower average on the essay than they do on the MBE or the NYMC, and the Black/African American and Hispanic/Latino groups have higher averages on the NYMC than they do on the two other components.

Table 3.19
Score Means, Standard Deviations, and Standard Errors
Foreign-Educated Repeaters: Racial/Ethnic Group

Race/Ethnicity		MBE Scaled Score x 5	Essay Scaled Score	NYMC Scaled Score	Total NY Bar Score
Caucasian/ White (n = 121; SEM ≈ 5.9)	Mean (SD)	621.94 (63.15)	624.72 (66.53)	624.55 (76.44)	623.60 (53.69)
Asian/ Pacific Islander (n = 243; SEM ≈ 4.6)	Mean (SD)	604.93 (74.26)	579.65 (69.94)	624.75 (80.18)	594.28 (62.80)
Black/ African American (n = 113; SEM ≈ 6.4)	Mean (SD)	580.82 (66.04)	577.55 (73.63)	609.01 (70.00)	582.03 (60.36)
Hispanic/ Latino (n = 36; SEM ≈ 13.2)	Mean (SD)	580.42 (72.53)	579.91 (80.38)	614.71 (94.45)	583.64 (69.08)
Other (n = 62; SEM ≈ 8.7)	Mean (SD)	598.59 (70.48)	613.15 (71.96)	617.68 (71.12)	607.79 (60.15)
Total* (N = 576; SEM ≈ 3.0)	Mean (SD)	601.46 (71.14)	592.44 (73.31)	620.27 (77.46)	598.85 62.15

*Total includes racial/ethnic groups with fewer than 20 candidates not separately listed in the table.

The differences between racial/ethnic groups within the foreign-educated repeaters are smaller than they are for the corresponding first-time takers (see Table 3.15). Among the repeat takers, the Caucasian/White group has the highest overall average on the NY bar exam, followed by the “Other” group, Asian/Pacific Islander, Hispanic/Latino, and Black/African American groups. The range of average scores across these groups is about 42 points, from about 582 for the Black/African American group to about 624 for the Caucasian/White group. For all groups except the Caucasian/White group, the NYMC yields a higher average score than the MBE or the essay.

Tables 3.20 and 3.21 provide an analysis of foreign-educated repeater performance as a function of gender and race/ethnicity. Table 3.20 provides average scores and SDs for female candidates as a function of race/ethnicity. Table 3.21 reports the corresponding results for male candidates. Females generally do better on the essay than on the MBE with the exception of the Asian/Pacific Islander group, in which females did better on the MBE than they did on the essay. Males do better on the MBE

than on the essay for all racial/ethnic groups except the “Other” group. In general, the foreign-educated repeaters (like the foreign-educated first-time takers) do relatively well on the NYMC compared to both the MBE and the essay.

Table 3.20
Score Means, Standard Deviations, and Standard Errors
Female Foreign-Educated Repeaters: Racial/Ethnic Group

Race/Ethnicity		MBE Scaled Score x 5	Essay Scaled Score	NYMC Scaled Score	Total NY Bar Score
Caucasian/ White (n = 57; SEM ≈ 8.8)	Mean (SD)	602.81 (59.92)	635.31 (68.88)	611.54 (81.28)	619.93 (56.54)
Asian/ Pacific Islander (n = 118; SEM ≈ 6.5)	Mean (SD)	598.40 (69.27)	589.97 (71.25)	622.34 (79.54)	596.58 (61.79)
Black/ African American (n = 42; SEM ≈ 10.9)	Mean (SD)	575.69 (66.06)	598.28 (80.84)	615.59 (71.57)	590.95 (64.45)
Other (n = 31; SEM ≈ 11.3)	Mean (SD)	603.56 (63.57)	629.03 (67.02)	617.47 (68.22)	617.71 (53.30)
Total* (N = 268; SEM ≈ 4.3)	Mean (SD)	594.47 (66.94)	605.56 (75.22)	616.43 (79.32)	602.21 (61.75)

*Total includes racial/ethnic groups with fewer than 20 candidates not separately listed in the table.

Table 3.21
Score Means, Standard Deviations, and Standard Errors
Male Foreign-Educated Repeaters: Racial/Ethnic Groups

Race/Ethnicity		MBE Scaled Score x 5	Essay Scaled Score	NYMC Scaled Score	Total NY Bar Score
Caucasian/ White (n = 61; SEM ≈ 7.9)	Mean (SD)	638.93 (62.11)	615.35 (64.56)	634.39 (69.61)	626.70 (51.83)
Asian/ Pacific Islander (n = 120; SEM ≈ 6.7)	Mean (SD)	610.93 (78.53)	570.05 (67.81)	625.48 (81.56)	591.97 (64.11)
Black/ African American (n = 70; SEM ≈ 7.8)	Mean (SD)	582.85 (66.25)	565.04 (67.05)	603.98 (69.09)	576.10 (57.78)
Other (n = 29; SEM ≈ 13.0)	Mean (SD)	595.24 (71.24)	596.61 (73.12)	620.57 (73.94)	598.45 (61.68)
Total* (N = 296; SEM ≈ 4.1)	Mean (SD)	606.99 (73.75)	580.60 (70.07)	622.51 (75.75)	595.37 (62.33)

*Total includes racial/ethnic groups with fewer than 20 candidates not separately listed in the table.

Table 3.22 presents the averages and the SDs of the scores for each test component and for the total NY bar exam for foreign-educated first-time takers, second time takers, third-time takers, etc. As noted earlier, the average score for the repeat takers, as a group, is substantially lower than that of the first-time takers. The average score on the total NY bar exam declines sharply as we go from the first-time takers to the second-time takers, and then declines more gradually as the number of attempts increases. Two exceptions to this steady decline are a slight increase in the average score between the groups with 2 and 3 attempts and between those with 4 and 5 attempts. Note that the increase from the fourth to the fifth attempt is quite small compared to the standard error for the difference between the means for four and five attempts, which indicates that the increase is not statistically significant. This pattern also generally holds for the MBE, but with less consistency for the essay and NYMC.

Table 3.22
Score Means, Standard Deviations, and Standard Errors
Foreign-Educated Repeaters: Number of Bar Attempts

Number of Bar Attempts		MBE Scaled Score x 5	Essay Scaled Score	NYMC Scaled Score	Total NY Bar Score
1 (n = 1,386; SEM ≈ 2.6)	Mean (SD)	651.36 (98.10)	640.22 (96.21)	662.54 (96.12)	646.92 (89.79)
2 (n = 220; SEM ≈ 5.1)	Mean (SD)	602.86 (75.35)	594.88 (78.97)	619.35 (79.07)	600.53 (67.52)
3 (n = 159; SEM ≈ 5.7)	Mean (SD)	611.03 (71.19)	604.50 (72.71)	625.75 (79.07)	609.25 (62.24)
4 (n = 71; SEM ≈ 7.8)	Mean (SD)	592.53 (61.96)	589.07 (73.77)	618.19 (71.18)	593.39 (55.39)
5 (n = 42; SEM ≈ 8.6)	Mean (SD)	603.30 (61.13)	584.48 (48.30)	620.64 (70.59)	595.64 (44.19)
6 (n = 19; SEM ≈ 17.8)	Mean (SD)	583.18 (79.46)	580.11 (69.34)	625.04 (95.30)	585.95 (65.54)
7 or more (n = 65; SEM ≈ 8.1)	Mean (SD)	587.16 (67.31)	567.11 (62.92)	610.59 (74.89)	579.52 (54.52)
Total (N = 1,962; SEM ≈ 2.1)	Mean (SD)	636.71 (93.79)	626.19 (92.67)	650.13 (93.04)	632.80 (85.48)

As indicated in Tables 3.23 and 3.24, this pattern is consistent across females and males. Table 3.23 indicates that females do better on the essay than on the MBE or the NYMC regardless of the number of bar attempts. As indicated in Table 3.24, males do better on the MBE than they do on the essay regardless of their number of bar attempts.

In general, among foreign-educated repeaters, females do better than males on the essay, and to a lesser extent, on the NYMC, and males do better than females on the MBE. Finally, foreign-educated candidates generally do relatively well on the NYMC, compared to their performance on the other two components.

Table 3.23
Score Means, Standard Deviations, and Standard Errors
Female Foreign-Educated Repeaters: Number of Bar Attempts

Number of Bar Attempts		MBE Scaled Score x 5	Essay Scaled Score	NYMC Scaled Score	Total NY Bar Score
1 (n = 633; SEM ≈ 3.8)	Mean (SD)	637.38 (96.90)	651.10 (94.63)	653.44 (98.85)	645.87 (89.54)
2 (n = 113; SEM ≈ 7.1)	Mean (SD)	589.49 (74.03)	599.10 (80.81)	615.70 (81.28)	596.88 (67.58)
3 (n = 78; SEM ≈ 7.7)	Mean (SD)	605.72 (62.12)	621.64 (70.81)	624.69 (80.40)	615.59 (58.87)
4 (n = 38; SEM ≈ 10.9)	Mean (SD)	582.47 (60.05)	601.89 (79.28)	594.34 (69.36)	593.39 (60.04)
5 (n = 14; SEM ≈ 16.8)	Mean (SD)	605.21 (56.87)	595.42 (57.05)	634.84 (83.53)	603.21 (53.92)
6 (n = 6; SEM ≈ 24.8)	Mean (SD)	565.25 (54.08)	617.07 (63.83)	632.00 (71.63)	598.00 (53.73)
7 or more (n = 19; SEM ≈ 14.1)	Mean (SD)	603.21 (62.02)	589.18 (60.24)	612.47 (80.79)	597.21 (43.15)
Total (N = 901; SEM ≈ 3.0)	Mean (SD)	624.62 (91.15)	637.56 (91.66)	642.43 (94.95)	632.88 (84.62)

Table 3.24
Score Means, Standard Deviations, and Standard Errors
Male Foreign-Educated Repeaters: Number of Bar Attempts

Number of Bar Attempts		MBE Scaled Score x 5	Essay Scaled Score	NYMC Scaled Score	Total NY Bar Score
1 (n = 748; SEM ≈ 3.4)	Mean (SD)	663.33 (97.60)	631.06 (96.74)	670.25 (92.77)	647.89 (90.07)
2 (n = 105; SEM ≈ 7.2)	Mean (SD)	615.94 (74.64)	589.25 (77.14)	621.40 (76.00)	603.18 (67.53)
3 (n = 77; SEM ≈ 8.5)	Mean (SD)	615.23 (80.38)	587.36 (71.53)	625.46 (79.48)	602.31 (65.84)
4 (n = 33; SEM ≈ 10.5)	Mean (SD)	604.11 (63.01)	574.32 (64.94)	645.66 (63.77)	593.39 (50.42)
5 (n = 28; SEM ≈ 9.9)	Mean (SD)	602.34 (64.14)	579.01 (43.40)	613.54 (63.64)	591.86 (38.99)
6 (n = 10; SEM ≈ 25.2)	Mean (SD)	584.30 (70.34)	557.09 (69.26)	624.06 (113.52)	574.70 (66.24)
7 or more (n = 43; SEM ≈ 10.1)	Mean (SD)	580.92 (69.45)	558.69 (64.12)	607.64 (73.45)	572.49 (58.34)
Total (N = 1,044; SEM ≈ 2.8)	Mean (SD)	647.35 (94.90)	616.76 (92.79)	656.72 (90.83)	633.00 (86.43)

3.7 Correlations among Scores

The previous sections provided a description of the component and total scores on the NY bar exam by domestic-educated and foreign-educated candidates, including first-time takers and repeat takers. In this section, we examine the *correlations* among component and total scores on the NY bar exam across all candidates to obtain a general sense of the relationships among components of the NY bar exam. In addition, we examine the relationships among NY bar exam scores for several sub-groups.

Tables 3.25 through 3.31 present correlations among scores for the total sample and separately by gender, and by race/ethnicity. Racial/ethnic groups with 100 or more candidates were used in this analysis because smaller groups result in less stable correlation coefficients. A correlation coefficient between two variables indicates the degree of linear relationship between the two variables. Correlation coefficients have values between -1.0 and +1.0, with a correlation of +1.0 indicating a perfect direct linear relationship between the two variables, and a correlation of -1.0 indicating a perfect inverse linear relationship between the two variables. In either of these two extreme cases, either variable can be predicted perfectly from the other using a simple straight-line relationship. A correlation of 0.0 indicates the complete absence of any linear relationship between the two variables.

A correlation matrix, like Table 3.25, presents all of the correlations among a set of variables in a relatively compact format. For example, the first column includes the correlations of the MBE with each of the other variables. The 1 in the first entry in the first column indicates that the MBE is perfectly correlated with itself, which is true for all variables. The second entry in the first column indicates that the correlation between the MBE and the essay is .74.

Table 3.25
Correlations Among Scores for the Total Sample

	MBE Scaled Score	Essay Scaled Score	NYMC Scaled Score	Total NY Bar Score
MBE Scaled Score	1			
Essay Scaled Score	.74	1		
NYMC Scaled Score	.73	.68	1	
Total NY Bar Score	.92	.94	.79	1

N = 10,175

In Tables 3.25 to 3.31, the correlations are all positive, indicating that an increase in one score is associated with an increase in the other score. In all of these correlation matrices, the largest correlation is between essay scores and total NY bar exam scores, with a correlation between .92 and .95 (reflecting the fact that the essay score constitutes 50% of the total bar examination score). The second largest correlation in all cases is between MBE scores and NY bar exam scores, with a correlation between .90 and .93 (reflecting the fact that the MBE score constitutes 40% of the total bar examination score). These correlations are quite large because they involve relationships between the total bar examination score and major components of the total score. The correlation between the total score and the NYMC is also consistently large because the NYMC also contributes to the total score (although its weight, 0.10, is relatively small). The remaining correlations also tend to be large (ranging from .59 to .87).

Table 3.26
Correlations Among Scores for Females

	MBE Scaled Score	Essay Scaled Score	NYMC Scaled Score	Total NY Bar Score
MBE Scaled Score	1			
Essay Scaled Score	.77	1		
NYMC Scaled Score	.72	.68	1	
Total NY Bar Score	.93	.95	.79	1

N = 4,557

Table 3.27
Correlations Among Scores for Males

	MBE Scaled Score	Essay Scaled Score	NYMC Scaled Score	Total NY Bar Score
MBE Scaled Score	1			
Essay Scaled Score	.76	1		
NYMC Scaled Score	.74	.68	1	
Total NY Bar Score	.93	.95	.80	1

N = 4,771

The correlations among components of and the total scores on the bar examination are similar in magnitude across females and males. These correlations range from .68 to .95 and differ at most by .02.

Tables 3.28 to 3.31 report similar correlation matrices among scores for four racial/ethnic groups. In some cases, correlations appear to differ across the racial/ethnic groups. These correlations range from .59 to .95 and differ at most by .12. In part, these correlations appear to differ because of sampling variation (with relatively small sample sizes) and because of a phenomenon referred to as *restriction of range*. This occurs when a particular sample or group of interest has scores that represent a more limited range of scores than another sample or group of interest. This difference in score range results in correlation coefficients that are smaller (attenuated) for the group with a limited range of scores on one or both of the variables being correlated.

Table 3.28
Correlations Among Component Scores for the Caucasian/White Group

	MBE Scaled Score	Essay Scaled Score	NYMC Scaled Score	Total NY Bar Score
MBE Scaled Score	1			
Essay Scaled Score	.68	1		
NYMC Scaled Score	.71	.64	1	
Total NY Bar Score	.90	.92	.79	1

N = 5,888

Table 3.29
Correlations Among Component Scores for the Asian/Pacific Islander Group

	MBE Scaled Score	Essay Scaled Score	NYMC Scaled Score	Total NY Bar Score
MBE Scaled Score	1			
Essay Scaled Score	.87	1		
NYMC Scaled Score	.73	.68	1	
Total NY Bar Score	.93	.95	.79	1

N = 1,697

Table 3.30
Correlations Among Scores for the Black/African American Group

	MBE Scaled Score	Essay Scaled Score	NYMC Scaled Score	Total NY Bar Score
MBE Scaled Score	1			
Essay Scaled Score	.70	1		
NYMC Scaled Score	.59	.60	1	
Total NY Bar Score	.90	.94	.71	1

N = 773

Table 3.31
Correlations Among Scores for the Hispanic/Latino Group

	MBE Scaled Score	Essay Scaled Score	NYMC Scaled Score	Total NY Bar Score
MBE Scaled Score	1			
Essay Scaled Score	.76	1		
NYMC Scaled Score	.69	.67	1	
Total NY Bar Score	.93	.95	.77	1

N = 371

These consistently large correlations among the three components of the bar examination across correlation matrices (Tables 3.25 to 3.31) suggest that performance is fairly consistent across these components for the sample as a whole and for various groups within the sample. Combined with the results in Table 3.1 (i.e., large differences across racial/ethnic groups and relatively small differences across components) these results suggest that there is considerable overlap in the competencies measured by the different components or that the competencies measured by the different components are strongly related.

Notes:

1. The reliabilities reported here are Cronbach's alpha coefficients. The reliabilities of .78 for the NYMC and of .80 for the essay component were estimated using candidates taking the NY bar exam in July 2005.
2. The reliability of the total NY bar exam was obtained by computing the composite reliability, which uses the variances in scores, component score reliabilities, and component score weights. High-stakes examinations are generally expected to have a reliability of 0.90 or above.
3. The standard error in the difference between the mean scores for two groups depends on the standard error in the two mean scores. If the standard error for the mean of one group is much larger than the standard error of the mean for the other group (usually because the first group is much smaller than the second), the standard error of the difference is essentially the same as the larger of the two standard errors. If the standard errors for the two groups are about the same size, the standard error of the difference will be about 1.4 times the average of the two standard errors.
4. Tests of statistical significance are often used in studies like this to decide whether an observed difference was due to sampling variation or represents a real difference between the populations being sampled. We have decided not to include such tests for three reasons:
 - First, in interpreting the results as an indication of what happened in July, 2005, significance testing is not appropriate, because the database includes over 90% of the relevant population, making sampling error a minor concern.
 - Second, in extending the interpretation to future July administrations, sampling variability is a concern, but it is not the main concern. Except in cases where sample sizes are small, systematic changes over time are probably more serious threats to the validity of the inference.
 - Third, if a test of statistical significance of the difference between two mean scores is needed, it can be derived from the standard error of the difference between the mean scores. If the difference between the two mean scores is greater than two times the standard error of the difference, the observed difference is statistically significant.

The discussions in this section tend to focus on patterns in the data, rather than on differences between specific groups. Specific differences between groups are discussed mainly as a way of examining the more general patterns.

5. The group scores reported in this section are group averages (or mean scores), the sum of the scores for the group divided by the number of candidates in the group. An alternative statistic used to describe the "typical" score for a group is the median, or middle score. The median is determined by rank-ordering the

scores for the group and taking the middle score (or the average of the two middle scores) as the median. For test-score distributions involving large sample sizes, the mean and median tend to be close to each other, and the mean is generally preferred. For example, the median score for females is 729, that for males is 736, and the median for the total group is 733, all of which are about 5 points higher than the corresponding means in Table 3.1. In Table 3.2, the sample sizes are smaller and the relationship between the means and medians for different groups are more complicated. The medians for the first five groups in Table 3.2 are, respectively, 741.0, 723.0, 673.5, 696.5, and 715.0.

4. Analyses of Pass Rates on the July 2005 New York Bar Examination

The effect of changes in the passing score on pass rates was examined for the NY bar exam scores (scale 0 to 1,000) using data from the July 2005 bar examination administration. The original passing score for New York was 660 (out of 1,000), it was changed to 665 beginning with the July 2005 administration, and it was to go to 670 in July 2006 and to 675 in July 2007. The last two increases, to 670 and then to 675, are currently on hold. The analyses in this section examine what the pass rates would have been for the data from the July 2005 administration for passing scores of 660, 665, 670, and 675.

As discussed earlier, because these analyses employ a fixed data set, the pass rates of all groups necessarily decrease (or remain the same) as the passing score increases. Any candidate who fails when the passing score is 665, for example, would necessarily fail if the passing score were 670 or 675. However, some candidates who pass when the passing score is 665 (those with scores of 665 to just under 670) will fail if the passing score were 670. In practice, even if the passing score is increased from one test date to another, the pass rate can increase on the second test date if candidate performance improves between the first and second date. However, in these analyses the distributions of candidate scores are fixed and the pass rate necessarily decreases (or remains the same) as higher passing scores are considered.

Note, in these analyses, the *passing score* is the total score on the NY bar exam (e.g., 665) that a candidate has to achieve in order to pass. The *pass rate* for a group of candidates is the percentage of that group that would pass if the passing score had a particular value, given the fixed data in the data set.

The pass rates vary substantially between first-time takers and repeat takers, and between domestic-educated and foreign-educated candidates, and therefore overall pass rates are less informative than pass rates for the four groups defined by these two dichotomies. These differences are predictable, at least in general terms, from the results on score distributions presented in Section 3, in which repeat takers had lower average scores than first-time takers, and foreign-educated candidates had lower average scores than domestic-educated candidates.

4.1 Note on Standard Errors in Pass Rates

As noted earlier, we have tried to make this report as non-technical and therefore as accessible as possible, but an appropriate interpretation of many of the results in this section requires at least a general understanding of standard errors (SEs) in estimating percentages (a special case of the standard errors of the mean discussed in Section 3). We have not cluttered the tables with large numbers of SEs, but have tried to provide an indication of the general level of the SE in the results for different groups.

As noted earlier, standard errors are designed to provide an indication of the uncertainty in an estimate based on a sample from the population being analyzed. We generalize or extrapolate from the sample to the population, and in doing so, our estimate is always somewhat uncertain. The data analyzed in this report include results for a large percentage (>90%) of the candidates who took the NY bar exam in July 2005, and therefore provides a very good indication of what would happen to the pass rates for most groups if different passing scores were applied to the July 2005 results. However, generalizations of the interpretation to future July test dates are subject to uncertainty due to sampling, and this uncertainty is reflected in the standard errors.

The formulas used to estimate standard errors are based on statistical sampling theory, and reflect the level of error due to sampling from a fixed population. They do not include any systematic errors due to changes in the population over time. Like the standard error in estimates of the mean (SEM), the standard error in the percentage passing (SE) within any group depends on the *sample size* (the total number of candidates in that group). The SE is inversely related to the square root of the sample size, and therefore, as the sample size gets larger, the standard error gradually gets smaller.

The standard error in estimating the passing rate for a group also depends on the numerical value of the passing rate in the group. It tends to be largest when the passing rate is around 50% and gets quite small as the passing rate approaches 0% or 100%. However, over a fairly wide range of passing rates, the standard error does not change much. Assuming a sample size of 100, and a passing rate of 50%, the SE would be 5 percentage points. As the passing rate went up to 80% or down to 20%, the SE would gradually drop to 4 percentage points. For passing rates of 90% or 10%, the SE would drop to about 3 percentage points.

In the analyses reported here, the passing rates are generally between 20% and 80%, but the sample sizes for the sub-groups considered vary widely, from under ten to several thousand. So, the sample size is the dominant factor in determining the standard error. We have included information on the standard errors mainly as a caveat about the potential for over-interpreting small differences, especially small differences for groups with small sample sizes and therefore large standard errors.

This issue arises mainly in connection with analyses broken down by race/ethnicity, both gender and race/ethnicity, and age categories, where there are a number of groups and small sample sizes in some groups. Similar to Section 3, generally excluded in the tables are results for groups with fewer than 20 candidates, because pass rates for such groups are expected to be quite unstable. As mentioned previously, as the sample sizes get smaller, the standard errors get larger, and the uncertainty in the results increases. For example, for a group with a pass rate of 80% (or 20%), a sample size of 100 would yield an SE of 4 percentage points. For a sample size of 25, the SE would be about 8 percentage points. Similar to the SEMs described in Section 3, as a rule of thumb, the passing rates for groups with fewer than 100

candidates should be viewed as relatively uncertain and those for groups with about 50 or fewer candidates should be considered even more uncertain.

4.2 Domestic-Educated First-time Takers

Table 4.1 analyzes the impact of changes in the passing score on pass rates for the total sample of domestic-educated first-time takers and separately for females and males as the passing score increases from 660 to 675.¹ If the passing score was 660, the overall pass rate would have been 84.4% for this sample. With the current passing score of 665, 83.0% of the sample passed. If the passing score was 670, the pass rate for domestic-educated first-time takers would have been 81.7%, and if the passing score was 675, the pass rate would have been 80.5%, for a total decrease of about 4 percentage points as the passing score increases from 660 to 675. Between 660 and 675, the pass rate drops about one and a third percentage points for each five-point increase in the passing score.

Table 4.1
Projected Pass Rates for Passing Scores of 660, 665, 670, 675
Domestic-Educated First-Time Takers: Females and Males

Gender		Pass 660	Pass 665	Pass 670	Pass 675
Female (n = 3,284; SE ≈ 0.7%)	Percentage (n)	83.5% (2,742)	81.9% (2,691)	80.4% (2,639)	79.0% (2,593)
Male (n = 3,299; SE ≈ 0.7%)	Percentage (n)	85.3% (2,814)	84.0% (2,772)	83.0% (2,739)	82.1% (2,707)
Total* (N = 6,585; SE ≈ 0.5%)	Percentage (n)	84.4% (5,557)	83.0% (5,464)	81.7% (5,379)	80.5% (5,301)

N = the total number of candidates in this analysis

n = the number of candidates in each group

*Total includes two candidates who did not record their genders.

Note: The standard error (SE) in the percentages provides an indication of the uncertainty (due to sampling) in the projections of percentage passing to other test dates.

Table 4.1 also shows the pass rate for female domestic-educated first-time takers decreasing from 83.5% to 79.0% as passing scores increase from 660 to 675, a decline of 4.5 percentage points. The pass rate for males decreases from 85.3% to 82.1%, a decline of 3.2 percentage points. Males have a slightly higher pass rate for all four passing scores, and the difference in pass rates between males and females increases from 1.8 percentage points to 3.1 percentage points as the passing score increases from 660 to 675.

Table 4.2
Projected Pass Rates for Passing Scores of 660, 665, 670, 675
Domestic-Educated First-Time Takers: Racial/Ethnic Groups

Race/Ethnicity		Pass 660	Pass 665	Pass 670	Pass 675
Caucasian/ White (n = 4,818; SE ≈ 0.5%)	Percentage (n)	87.9% (4235)	86.8% (4184)	85.8% (4136)	84.8% (4087)
Asian/ Pacific Islander (n = 740; SE ≈ 1.5%)	Percentage (n)	82.6% (611)	80.1% (593)	78.2% (579)	76.6% (567)
Black/ African American (n = 430; SE ≈ 2.4%)	Percentage (n)	57.9% (249)	54.0% (232)	51.6% (222)	49.8% (214)
Hispanic/ Latino (n = 214; SE ≈ 3.2%)	Percentage (n)	70.1% (150)	69.6% (149)	67.3% (144)	65.4% (140)
Puerto Rican (n = 73; SE ≈ 5.0%)	Percentage (n)	80.8% (59)	76.7% (56)	72.6% (53)	71.2% (52)
Chicano/ Mexican American (n = 23; SE ≈ 8.8%)	Percentage (n)	82.6% (19)	78.3% (18)	78.3% (18)	78.3% (18)
Other (n = 268; SE ≈ 2.5%)	Percentage (n)	81.3% (218)	80.6% (216)	78.7% (211)	77.2% (207)
Total* (N = 6,585; SE ≈ 0.5%)	Percentage (n)	84.4% (5557)	83.0% (5464)	81.7% (5379)	80.5% (5301)

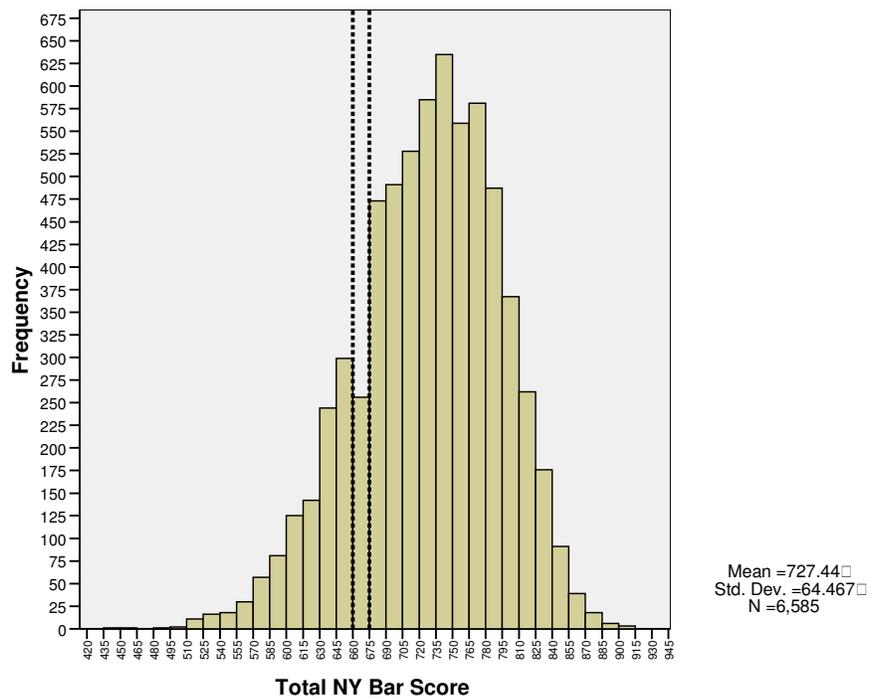
*Total includes racial/ethnic groups not separately listed in the table.

Note: The SEs tend to be large for groups with small sample sizes. For example, the SE for the Chicano/Mexican American group, with only 23 candidates, is almost 9 percentage points.

Table 4.2 examines the relationship between pass rate and passing score as the passing score increases from 660 to 675 for groups based on race/ethnicity. The overall pass rate for the total sample of domestic-educated first-time takers is included in the bottom row as a benchmark. Focusing on the first five rows in Table 4.2 (groups with close to 100 candidates or more), it is clear that there are large differences in pass rates across the racial/ethnic groups, and that the order of the five groups in terms of pass rates remains the same as the passing score is increased. The Caucasian/White group has the highest pass rates, the Asian/Pacific Islander group is second, the Puerto Rican group is third, the Hispanic/Latino group is fourth, and the Black/African American group

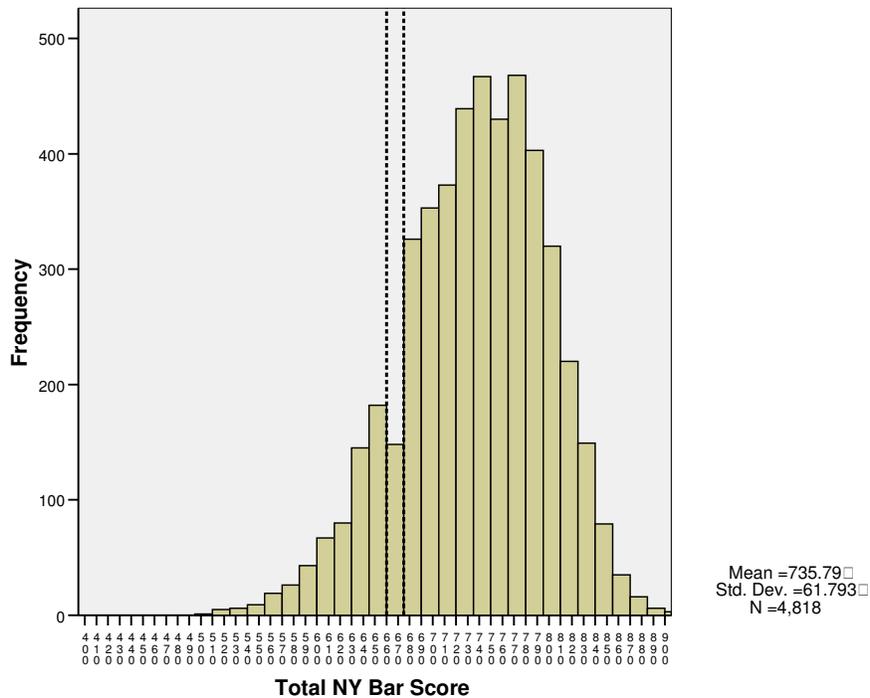
is fifth. The order of these groups is consistent for all four passing scores. If the “Other” group is included in the comparison, it tends to be in second or third place, alternating with the Asian/Pacific Islander group as the passing score increases. The Chicano/Mexican American and American Indian/Alaskan Native groups have small sample sizes and are not included in Table 4.2, but their pass rates are relatively flat (with about 80% passing) because they have essentially no candidates in the 660-675 range.

Figure 4.1
Score Distribution of July 2005 NY Bar Exam Scores
Domestic-Educated First-Time Takers



Increasing the passing score tends to have the most impact on groups with average scores near the passing score, and therefore, pass rates near 50%. Most of the groups have score distributions that approximate what is called a *normal distribution*, with the scores concentrated around the average or mean score (see Figure 4.1). If the passing score is near the mean for a group, even a modest change in the passing score can change the pass/fail status for a relatively large number of candidates in the group. If the passing score is far from the group’s mean score, a comparable change in the passing score will affect relatively few candidates, because there are few candidates in the tails of the distribution.

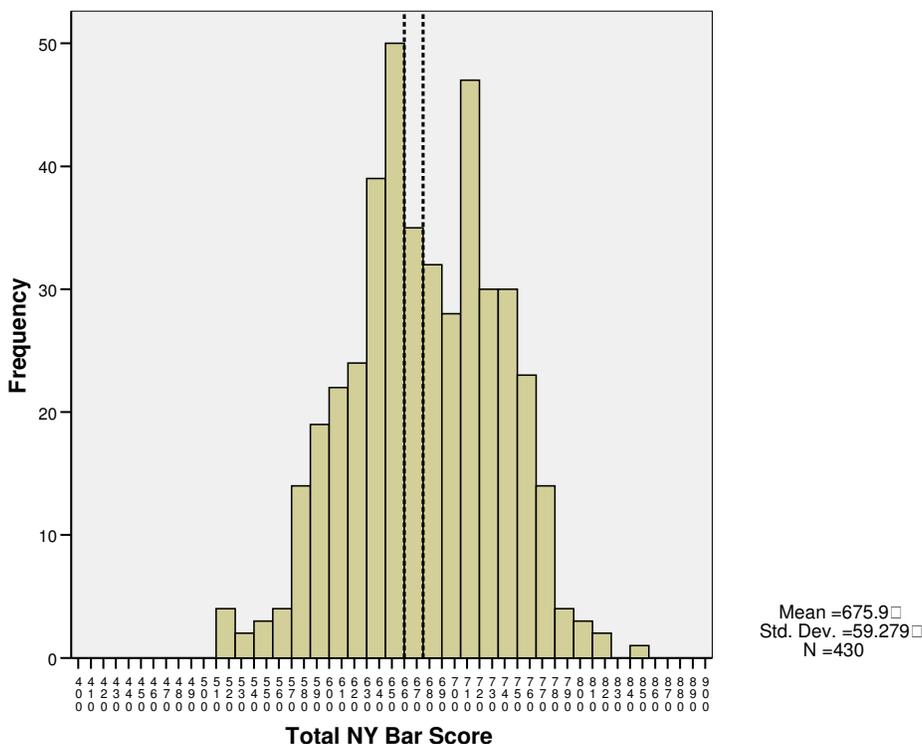
Figure 4.2
Score Distribution of July 2005 NY Bar Exam Scores
Caucasian/White Domestic-Educated First-Time Takers



For example, Figure 4.2 presents a graphical representation of the distribution of total scores on the NY bar exam for domestic-educated first-time takers in the Caucasian/White group. The mean for this group is 735.8, which is substantially above the current passing score of 665.² If the passing score were much lower to start, say around 600, the impact would be even smaller, because there are very few candidates in this group with scores around 600.

In contrast, Figure 4.3 presents a graphical representation of the distribution of scores on the July 2005 NY bar exam for Black/African American domestic-educated first time takers. The mean for this group is 675.9, which is only about eleven points above the current passing score of 665. Because the distribution is concentrated in this area of the score scale for the Black/African American group, any change in the passing score, either up or down tends to have a substantial impact on the proportion of Black/African American candidates passing.

Figure 4.3
Score Distribution of July 2005 NY Bar Exam Scores
Black/African American Domestic-Educated First-Time Takers



In addition, a change of one percentage point in the pass rate has a larger relative impact on a group’s pass rate if the initial pass rate is relatively low. A change in pass rate of one percentage point from 90% to 89% represents a change of a little over one percent of the base rate of 90%. In contrast, a change of one percentage point in pass rate from 20% to 19% represents a change of one-twentieth, or five percent, of the base rate of 20%. The change from 20% to 19% is likely to be viewed as having more impact than a change from 90% to 89%.

These two tendencies are relevant to the results in Table 4.2. The pass rate for the Caucasian/White group drops from 87.9% to 84.8% as the passing score increases from 660 to 675, a drop of just over three percentage points, or about 3.5% on the base rate of 87.9%. The pass rate for the Asian/Pacific Islander group drops from 82.6% to 76.6% as the passing score increases from 660 to 675, a drop of six percentage points, or about 7.3% of the base rate of 82.6%. The pass rate for the Puerto Rican group drops from 80.8% to 71.2% as the passing score increases from 660 to 675, a drop of 9.6 percentage points, or about 11.9% of the base rate of 80.8%. The pass rate for the Hispanic/Latino group drops from 70.1% to 65.4% as the passing score increases, a drop of 4.7 percentage points, or about 6.7% on the base rate. The pass rate for the

Black/African American group drops from 57.9% to 49.8% as the passing score increases from 660 to 675, a drop of 8.1 percentage points, or about 14.0% of the base rate.

Another way to look at the projected impact of a change in the passing score from 660 to 675 for the July 2005 sample is in terms of the candidates whose pass/fail status changes as the passing score is increased. Of the 5,557 candidates who would have passed if the passing score were 660, a total of 5,301 would pass if the passing score were 675, for a difference of 256. Of this group of 256 candidates, 148 (or 57.8%) would be Caucasian/White, 44 (or 17.1%) would be Asian/Pacific Islander, 35 (or 13.6%) would be Black/African American, and 10 (or 3.9%) would be Hispanic/Latino.

Tables 4.3 and 4.4 present pass rates for females and males by race/ethnicity. The general patterns of decreasing pass rates as the passing score increases are similar to those in Table 4.2, and the pattern across the racial/ethnic groups is similar for females and males, at least for the first five groups, which have the largest sample sizes.

The results in Tables 4.3 and 4.4 reflect the interaction between gender and race/ethnicity in the data. Although Table 4.1 indicates that males have higher pass rates than females for all four passing scores (660 to 675), Tables 4.3 and 4.4 paint a more complicated picture. In the Caucasian/White group, males do have higher pass rates than females for all four passing scores, but the differences are smaller than they are in Table 4.1, increasing from about 1 percentage point to about 2 percentage points as the passing score increases from 660 to 675.

However, for the Asian/Pacific Islander, Black/African American, and Puerto Rican groups, females have consistently better pass rates than males for all four passing scores. In the Hispanic/Latino group, females had higher pass rates for passing scores of 660, 665, and 670, but a lower pass rate than males for a passing score of 675. Given that the female/male differential for the Caucasian/White group is only about half that in the total group of domestic-educated first-time takers, and that the differential is in the opposite direction for four other groups with substantial sample sizes, the results in Table 4.1 may be considered surprising. Note that the "Other" group has a large differential in favor of males, but this group is not large enough, in itself, to produce the result in Table 4.1.

The difference in pass rates between females and males in Table 4.1 is not large to begin with, but about half of it can be attributed to a statistical artifact (similar to that discussed in conjunction with Tables 3.3 and 3.4). As noted earlier, there are large differences in pass rates across the different racial/ethnic groups. The pass rates for the Caucasian/White group are about 85% or higher for both males and females and across the four passing scores. In contrast, the pass rates for the Black/African American group tend to be around or below 55% for both males and females and across the four passing scores. The differences between groups are much larger than those between

females and males within the racial/ethnic groups. As reported in Table 2.12, over 77% of the males are Caucasian/White, while about 69% of the females are Caucasian/White. The female group includes higher percentages of all other racial/ethnic categories than the male group does. For example, the male group is 4.6% Black/African American, while the female group is 8.5% Black/African American.

Table 4.3
Projected Pass Rates for Passing Scores of 660, 665, 670, 675
Female Domestic-Educated First-Time Takers: Racial/Ethnic Groups

Race/Ethnicity		Pass 660	Pass 665	Pass 670	Pass 675
Caucasian/ White (n = 2,265; SE ≈ 0.7%)	Percentage (n)	87.4% (1,979)	86.1% (1,950)	84.9% (1,924)	83.8% (1,898)
Asian/ Pacific Islander (n = 424; SE ≈ 1.9%)	Percentage (n)	84.4% (358)	82.1% (348)	79.7% (338)	78.3% (332)
Black/ African American (n = 279; SE ≈ 3.0%)	Percentage (n)	59.5% (166)	56.3% (157)	53.4% (149)	50.9% (142)
Hispanic/ Latino (n = 108; SE ≈ 4.5%)	Percentage (n)	70.4% (76)	70.4% (76)	67.6% (73)	63.9% (69)
Puerto Rican (n = 42; SE ≈ 6.5%)	Percentage (n)	81.0% (34)	78.6% (33)	76.2% (32)	76.2% (32)
Other (n = 142; SE ≈ 3.6%)	Percentage (n)	77.5% (110)	76.8% (109)	73.9% (105)	71.8% (102)
Total* (N = 3,284; SE ≈ 0.7%)	Percentage (n)	83.5% (2,742)	81.9% (2,691)	80.4% (2,639)	79.0% (2,593)

*Total includes racial/ethnic groups not separately listed in the table.

Table 4.4
Projected Pass Rates for Passing Scores of 660, 665, 670, 675
Male Domestic-Educated First-Time Takers: Racial/Ethnic Groups

Race/Ethnicity		Pass 660	Pass 665	Pass 670	Pass 675
Caucasian/ White (n = 2,552; SE ≈ 0.7%)	Percentage (n)	88.4% (2,256)	87.5% (2,234)	86.7% (2,212)	85.8% (2,189)
Asian/ Pacific Islander (n = 316; SE ≈ 2.4%)	Percentage (n)	80.1% (253)	77.5% (245)	76.3% (241)	74.4% (235)
Black/ African American (n = 151; SE ≈ 4.1%)	Percentage (n)	55.0% (83)	49.7% (75)	48.3% (73)	47.7% (72)
Hispanic/ Latino (n = 106; SE ≈ 4.5%)	Percentage (n)	69.8% (74)	68.9% (73)	67.0% (71)	67.0% (71)
Puerto Rican (n = 31; SE ≈ 8.3%)	Percentage (n)	80.7% (25)	74.2% (23)	67.7% (21)	64.5% (20)
Other (n = 126; SE ≈ 3.2%)	Percentage (n)	85.7% (108)	84.9% (107)	84.1% (106)	83.3% (105)
Total* (N = 3,299; SE ≈ 0.6%)	Percentage (n)	85.3% (2,814)	84.0% (2,772)	83.0% (2,739)	82.1% (2,707)

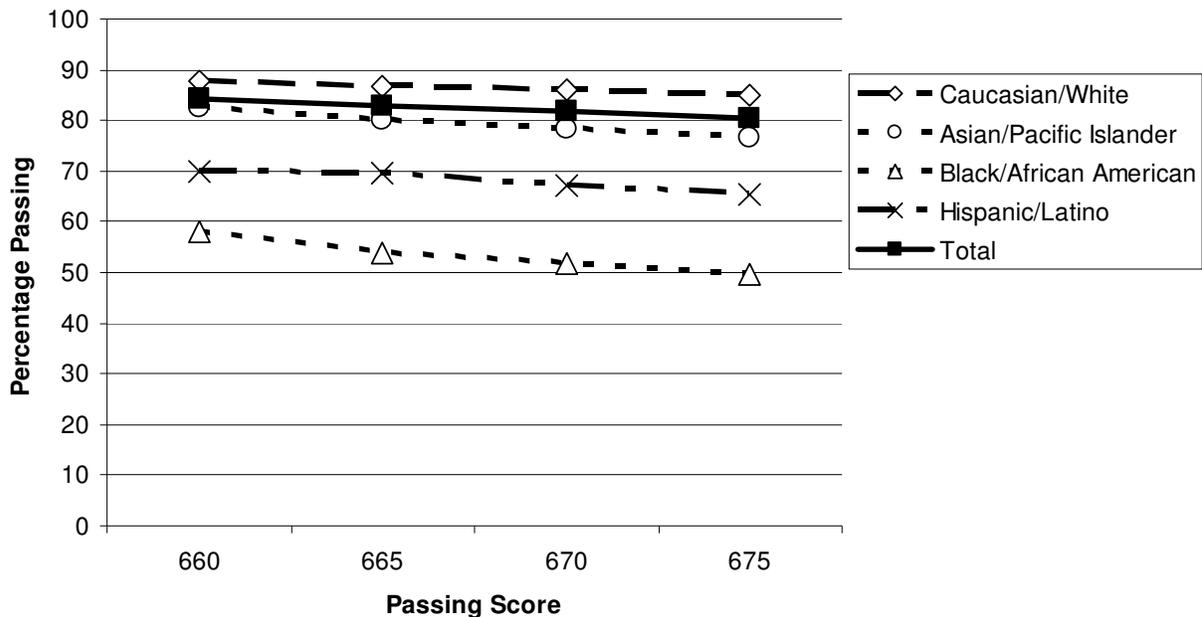
*Total includes racial/ethnic groups not separately listed in the table.

In order to check on the impact of this interaction, we created an artificial sample in which percentages of males and females would be the same across racial/ethnic groups, and then computed the overall pass rates for males and females in this artificial sample. More specifically, we multiplied the percentage in each racial/ethnic group by the pass rate for males in that racial/ethnic group to get a population-weighted pass rate for males. Separately, we multiplied the percentage of the sample in each racial/ethnic group by the pass rate for females in that racial/ethnic group to get a population-weighted pass rate for females. This population-weighted pass rate was 83.1% for males, and 82.7% for females, for a difference of 0.4%. This residual difference, after adjusting for the interaction between gender and race/ethnicity, is quite small and is less than the standard error in the difference between the pass rates for females and males. That is, among the domestic-educated first-time takers, there is no substantial difference in pass rates that is attributable to gender.

The analyses suggest three general conclusions about pass rates for domestic-

educated first-time takers. First, the differences in pass rates between males and females are, at most, quite small. Second, the differences in pass rates among the different racial/ethnic groups are quite large, particularly between Caucasian/White and Black/African American candidates (see Figure 4.4). Third, the interaction between gender and race/ethnicity tends to inflate the apparent differences in pass rates between females and males.

Figure 4.4
Trends in Pass Rates at Passing Scores of 660, 665, 670, and 675
Domestic-Educated First-Time Takers: Racial/Ethnic Groups



4.3 Domestic-Educated Repeaters

Candidates who fail the NY bar exam can repeat it on subsequent test dates. They can retake the NY bar exam as often as they wish. Table 4.5 indicates the impact of changes in the passing score from 660 to 675 for females, males, and the total sample of domestic-educated repeaters. As indicated in the bottom row of the table, the overall pass rate for the repeat takers who took the July 2005 bar examination would decrease from 23.4% to 15.9% if the passing score were increased from 660 to 675. The pass rates for the repeat takers are clearly much lower than they are for domestic-educated first-time takers in Table 4.1. The pass rates for female repeat takers are higher than those for male repeat takers for each of the passing scores. As the passing score increases from 660 to 675, the pass rates decrease for both groups, but they decrease faster for males than for females. For a passing score of 660, the female pass rate is two percentage points higher than that of males. For a passing score of 675, the female pass rate is almost four percentage points higher than that of males.

Table 4.5
Projected Pass Rates for Passing Scores of 660, 665, 670, 675
Domestic-Educated Repeaters: Females and Males

Gender		Pass 660	Pass 665	Pass 670	Pass 675
Female (n = 308; SE ≈ 2.4%)	Percentage (n)	24.4% (75)	22.7% (70)	20.5% (63)	17.9% (55)
Male (n = 357; SE ≈ 2.0%)	Percentage (n)	22.4% (80)	19.6% (70)	16.0% (57)	14.0% (50)
Total* (N = 667; SE ≈ 1.8%)	Percentage (n)	23.4% (156)	21.1% (141)	18.1% (121)	15.9% (106)

*Total includes two candidates who did not record their genders.

Table 4.6
Projected Pass Rates for Passing Scores of 660, 665, 670, 675
Domestic-Educated Second-Time Takers: Females and Males

Gender		Pass 660	Pass 665	Pass 670	Pass 675
Female (n = 94; SE ≈ 4.9%)	Percentage (n)	35.1% (33)	34.0% (32)	33.0% (31)	29.8% (28)
Male (n = 123; SE ≈ 3.9%)	Percentage (n)	30.1% (37)	26.8% (33)	23.6% (29)	20.3% (25)
Total (N = 217; SE ≈ 3.1%)	Percentage (n)	32.3% (70)	30.0% (65)	27.7% (60)	24.4% (53)

Table 4.6 indicates the impact of changes in the passing score from 660 to 675 on the pass rates for domestic-educated, second-time takers. Those taking the bar examination for the second time did well relative to other repeat takers. As indicated in the bottom row of the table, the overall pass rate for the second-time takers decreases from 32.3% to 24.4% as the passing score increases from 660 to 675. These pass rates are low compared to those of the domestic-educated first-time takers, but are higher than those for all repeat takers. The pass rates are higher for female second-time takers than they are for male second-time takers (but the differences are a bit smaller than the standard errors in these differences). As the passing score increases from 660 to 675, the pass rates decrease for both groups, but they decrease faster for males. For a passing score of 660, the female pass rate is five percentage points higher than that of males. For a passing score of 675, the female pass rate is 9.5 percentage points higher than that of males.

Table 4.7
Projected Pass Rates for Passing Scores of 660, 665, 670, 675
Domestic-Educated Third-Time Takers: Females and Males

Gender		Pass 660	Pass 665	Pass 670	Pass 675
Female (n = 101; SE ≈ 4.1%)	Percentage (n)	24.8% (25)	21.8% (22)	20.8% (21)	17.8% (18)
Male (n = 88; SE ≈ 4.4%)	Percentage (n)	27.3% (24)	23.9% (21)	20.5% (18)	19.3% (17)
Total* (N = 190; SE ≈ 3.0%)	Percentage (n)	26.3% (50)	23.2% (44)	21.1% (40)	19.0% (36)

*Total includes one candidate who did not record his or her gender.

Table 4.7 indicates the impact of changes in the passing score on the pass rates of domestic-educated, third-time bar takers. The overall pass rate for the third-time bar takers decreases from 26.3% to 19.0%, as the passing score increases from 660 to 675. These pass rates are lower than those for first-time or second-time candidates, but are higher than those of candidates taking the examination for the fourth time. For the third-time takers, the pass rates tend to be higher for male candidates than they are for female candidates. As the passing score increases from 660 to 675, the pass rates decrease for both groups, but they decrease faster for males. For a passing score of 660, the pass rate for males is 2.5 percentage points higher than that of females. For a passing score of 675, the pass rate for males is only 1.5 percentage points higher than that for females.

Table 4.8 indicates the impact of a change in passing score on the pass rates for repeat takers as a function of race/ethnicity. The overall pass rate for the total sample of domestic-educated repeaters is included in the bottom row as a benchmark. Focusing on the first four rows in Table 4.8, the order remains the same as the passing score is increased. The Caucasian/White group has the highest pass rates, the Asian/Pacific Islander group is second, the Hispanic/Latino group is third, and the Black/African American group is fourth. Most of these groups have relatively small sample sizes; therefore, the standard errors are likely to be fairly large. In general, however, it is clear that the repeat taker pass rates are low for all racial/ethnic groups, decreasing fairly sharply as the passing score increases from 660 to 675. This sharp decline is due in part to the fact that the repeat takers who would pass at 660 or 665 tend to have scores near the passing score.

Table 4.8
Projected Pass Rates for Passing Scores of 660, 665, 670, 675
Domestic-Educated Repeaters: Racial/Ethnic Group

Race/Ethnicity		Pass 660	Pass 665	Pass 670	Pass 675
Caucasian/ White (n = 302; SE ≈ 2.4%)	Percentage (n)	26.8% (81)	24.8% (75)	21.9% (66)	19.5% (59)
Asian/ Pacific Islander (n = 111; SE ≈ 3.9%)	Percentage (n)	25.2% (28)	22.5% (25)	19.8% (22)	16.2% (18)
Black/ African American (n = 154; SE ≈ 2.8%)	Percentage (n)	17.5% (27)	14.9% (23)	13.0% (20)	11.7% (18)
Hispanic/ Latino (n = 42; SE ≈ 5.5%)	Percentage (n)	19.1% (8)	16.7% (7)	11.9% (5)	11.9% (5)
Other (n = 31; SE ≈ 6.0%)	Percentage (n)	19.4% (6)	19.4% (6)	12.9% (4)	9.7% (3)
Total* (N = 667; SE ≈ 1.5%)	Percentage (n)	23.4% (156)	21.1% (141)	18.1% (121)	15.9% (106)

*Total includes racial/ethnic groups not separately listed in the table.

Table 4.9 presents pass rates as a function of passing score for the second-time candidates in the three groups with reasonably large sample sizes for this analysis. For all three groups and for all four potential passing scores, the pass rates are higher for the second-time takers than they are for all repeat takers. For the Caucasian/White and Asian/Pacific Islander groups, the pass rates for the second-time takers are about ten percentage points higher than they are for all repeat takers in that group. For the Black/African American group, the pass rates for the second-time takers are about 2 to 3 percentage points higher than they are for all Black/African American repeat takers. For all groups, however, the pass rates for second-time takers and for all repeat takers are much lower than they are for the first-time takers.

Table 4.9
Projected Pass Rates for Passing Scores of 660, 665, 670, 675
Domestic-Educated Second-Time Bar Takers: Racial/Ethnic Groups

Race/Ethnicity		Pass 660	Pass 665	Pass 670	Pass 675
Caucasian/ White (n = 114; SE ≈ 4.5%)	Percentage (n)	37.7% (43)	36.0% (41)	33.3% (38)	29.8% (34)
Asian/ Pacific Islander (n = 33; SE ≈ 8.0%)	Percentage (n)	33.3% (11)	30.3% (10)	27.3% (9)	27.3% (9)
Black/ African American (n = 44; SE ≈ 5.6%)	Percentage (n)	20.5% (9)	18.2% (8)	15.9% (7)	13.6% (6)
Total* (N = 217; SE ≈ 3.1%)	Percentage (n)	32.3% (70)	30.0% (65)	27.7% (60)	24.4% (53)

*Total includes racial/ethnic groups not separately listed in the table.

Table 4.10 presents pass rates as a function of passing score for the third-time takers in the three groups with reasonably large sample sizes. The pass rates are generally higher for the third-time takers than they are for all repeat takers but lower than those for the second-time takers. For the Caucasian/White and Asian/Pacific Islander groups, the pass rates for the third-time takers are lower than they are for the second-time takers.

For the Black/African American group, the pattern is somewhat different. The pass rates for the third-time takers are close to (and sometimes higher than) those for the Black/African American second-time takers. One factor contributing to this difference in pattern is the relationship between the passing scores and the score distribution for the Black/African American group. Because the passing scores under consideration are near the center of the score distribution for Black/African American candidates rather than in the tails of the distribution, a relatively high proportion of the Black/African American candidates who fail the bar examination on their first attempt have scores that are close to the passing score, and therefore have a relatively good chance of passing on their second or third attempt.

Table 4.10
Projected Pass Rates for Passing Scores of 660, 665, 670, 675
Domestic-Educated Third-Time Bar Takers: Racial/Ethnic Groups

Race/Ethnicity		Pass 660	Pass 665	Pass 670	Pass 675
Caucasian/ White (n = 78; SE ≈ 4.8%)	Percentage (n)	28.2% (22)	24.4% (19)	23.1% (18)	21.8% (17)
Asian/ Pacific Islander (n = 44; SE ≈ 6.4%)	Percentage (n)	27.3% (12)	25.0% (11)	20.5% (9)	13.6% (6)
Black/ African American (n = 38; SE ≈ 6.0%)	Percentage (n)	21.1% (8)	15.8% (6)	15.8% (6)	15.8% (6)
Total* (N = 190; SE ≈ 3.0%)	Percentage (n)	26.3% (50)	23.2% (44)	21.1% (40)	19.0% (36)

*Total includes racial/ethnic groups not separately listed in the table.

In general, for the domestic-educated candidates, the repeat takers have much lower pass rates than the first-time takers for all of the passing scores under consideration. Repeat takers who are taking the bar examination for the second time generally do better than those taking it for the third time, who in turn have higher pass rates than those who have already taken the bar examination three or more times.

The analyses provided above of the potential pass rates for repeat takers are subject to several limitations that do not apply to the corresponding analyses for first-time takers or do not apply with equal force. First, the standard errors for most of the projected pass rates are fairly large, because the sample sizes are small. Second, the repeat takers in all of these analyses had failed the NY bar exam when the passing score was 660, and so a score of 660 would be an improvement over these candidates' previous performance. In July 2006, the repeat takers will probably include candidates who got scores between 660 and 665 in July 2005 or February 2006, and if the passing score had been 675 over the last few years, there would be repeat takers who had gotten scores up to 674 on previous administrations.

The analyses presented here are based on repeat takers who had previous scores up to 659. As the passing score increases, the population of repeat takers will certainly change because the maximum previous scores of repeat takers will increase, and as a result, the average previous score of the repeat takers is likely to increase.

4.4 Foreign-Educated First-Time Takers

The foreign-educated candidates generally have lower NY bar exam scores and lower pass rates than the domestic-educated candidates. Table 4.11 indicates the impact of changes in the passing score from 660 to 675 for females, males, and the total sample of foreign-educated first-time takers. As indicated in the bottom row of Table 4.11, the overall pass rate for foreign-educated first-time takers decreases from 46.3% to 40.3%, as the passing score increases from 660 to 675. As indicated earlier in Table 4.1, the domestic-educated first-time takers' pass rates decrease from 84.4% to 80.5% as the passing score increases from 660 to 675. The male foreign-educated first-time takers have slightly higher pass rates than females for all four passing scores, but for the foreign-educated first-time takers, the difference in pass rates between males and females decreases from 1.5% to 0.3% as the passing score increases from 660 to 675.

Table 4.11
Projected Pass Rates for Passing Scores of 660, 665, 670, 675
Foreign-Educated First-Time Takers: Females and Males

Gender		Pass 660	Pass 665	Pass 670	Pass 675
Female (n = 633; SE ≈ 2.0%)	Percentage (n)	45.5% (288)	43.1% (273)	41.4% (262)	40.1% (254)
Male (n = 748; SE ≈ 1.8%)	Percentage (n)	47.0% (351)	44.5% (333)	42.4% (317)	40.4% (302)
Total* (N = 1386; SE ≈ 1.3%)	Percentage (n)	46.3% (641)	43.9% (608)	41.9% (581)	40.3% (558)

*Total includes five candidates who did not record their genders.

Table 4.12
Projected Pass Rates for Passing Scores of 660, 665, 670, 675
Foreign-Educated First-Time Takers: Racial/Ethnic Groups

Race/Ethnicity		Pass 660	Pass 665	Pass 670	Pass 675
Caucasian/ White (n = 554; SE ≈ 2.1%)	Percentage (n)	58.5% (324)	55.6% (308)	53.1% (294)	51.4% (285)
Asian/ Pacific Islander (n = 590; SE ≈ 2.0%)	Percentage (n)	42.0% (248)	40.0% (236)	38.3% (226)	36.8% (217)
Black/ African American (n = 67; SE ≈ 4.0%)	Percentage (n)	16.4% (11)	13.4% (9)	11.9% (8)	10.5% (7)
Hispanic/ Latino (n = 73; SE ≈ 5.0%)	Percentage (n)	27.4% (20)	24.7% (18)	23.3% (17)	21.9% (16)
Other (n = 92; SE ≈ 5.0%)	Percentage (n)	38.0% (35)	37.0% (34)	35.9% (33)	32.6% (30)
Total* (N = 1,386; SE ≈ 1.3%)	Percentage (n)	46.3% (641)	43.9% (608)	41.9% (581)	40.3% (558)

*Total includes racial/ethnic groups not separately listed in the table.

Table 4.12 indicates the impact of changes in passing scores from 660 to 675 on the pass rates for foreign-educated first-time takers as a function of race/ethnicity. The overall pass rate for the total group of foreign-educated first-time takers is included in the bottom row of the table for reference. The order of the groups in Table 4.12 remains the same as the passing score is increased from 660 to 675. The Caucasian/White candidates have the highest pass rates, the Asian/Pacific Islander group is second, the Hispanic/Latino group is third, and the Black/African American group is fourth. None of the foreign-educated first-time takers indicated their race/ethnicity as Puerto Rican, Chicano/Mexican American, or American Indian/Alaskan Native.

As noted earlier, increasing the passing score tends to have a larger relative impact if the initial pass rate is low. The pass rate for the foreign-educated first-time takers in the Caucasian/White group decreases from 58.5% to 51.4% as the passing score increases from 660 to 675, a drop of just over seven percentage points, or about 12% of the base rate of 58.5%. The pass rate for the foreign-educated first-time takers in the Asian/Pacific Islander group decreases from 42.0% to 36.8%, a drop of 5.2 percentage points, or about 12.4% of the base rate of 42.0%. The pass rate for the "Other" group decreases from 38.0% to 32.6%, a drop of 5.4 percentage points, or

about 14.2% of the base rate. The pass rate for the foreign-educated first-time takers in the Hispanic/Latino group decreases from 27.4% to 21.9%, a drop of 5.5 percentage points, or about 20% of the base rate. The pass rates for the Black/African American group drops from 16.4% to 10.5% as the passing score increases, a drop of 5.9 percentage points, or almost 36% of the base rate.

4.5 Foreign-Educated Repeaters

Table 4.13 indicates the impact of changes in the passing score from 660 to 675 for females, males, and the total sample of foreign-educated repeaters. As indicated in the bottom row of the table, the overall pass rate for the foreign-educated repeaters decreases from 15.1% to 10.9% as the passing score increases from 660 to 675. The pass rates for foreign-educated repeaters are much lower than they are for foreign-educated first-time takers or for domestic-educated repeaters. For all four potential passing scores between 660 and 675, female foreign-educated repeaters have higher pass rates than males. As the passing score increases from 660 to 675, the pass rate decreases for both groups, and the difference between females and males decreases from 7.8 percentage points to 4.3 percentage points.

Table 4.14 indicates the impact of a change in passing score on foreign-educated repeaters as a function of race/ethnicity. The sample sizes in Table 4.14 are all fairly small and therefore the pass rates are likely to be too unstable to draw any strong conclusions about trends. The numbers and percentages are presented in Table 4.14 for the sake of completeness. The clearest general conclusion that can be drawn from these data is that the pass rates for foreign-educated repeaters are quite low for all passing scores and all racial/ethnic groups.

As indicated in Section 4.3, these projections apply to a group of repeat takers who had failed the NY bar exam when the passing score was 660. As the passing score increases, the maximum previous scores of repeat takers will also increase, and the average previous score of the repeat takers is also likely to increase.

Table 4.13
Projected Pass Rates for Passing Scores of 660, 665, 670, 675
Foreign-Educated Repeat Takers: Females and Males

Gender		Pass 660	Pass 665	Pass 670	Pass 675
Female (n = 268; SE ≈ 2.2%)	Percentage (n)	19.0% (51)	16.4% (44)	13.8% (37)	13.1% (35)
Male (n = 296; SE ≈ 1.7%)	Percentage (n)	11.2% (33)	10.5% (31)	9.5% (28)	8.8% (26)
Total* (N = 576; SE ≈ 1.4%)	Percentage (n)	15.1% (87)	13.5% (78)	11.8% (68)	10.9% (63)

*Total includes twelve candidates who did not record their genders.

Table 4.14
Projected Pass Rates for Passing Scores of 660, 665, 670, 675
Foreign-Educated Repeaters: Racial/Ethnic Groups

Race/Ethnicity		Pass 660	Pass 665	Pass 670	Pass 675
Caucasian/ White (n = 121; SE ≈ 3.8%)	Percentage (n)	24.8% (30)	23.1% (28)	20.7% (25)	18.2% (22)
Asian/ Pacific Islander (n = 243; SE ≈ 2.0%)	Percentage (n)	13.6% (33)	11.1% (27)	9.9% (24)	9.5% (23)
Black/ African American (n = 113; SE ≈ 2.3%)	Percentage (n)	7.1% (8)	7.1% (8)	5.3% (6)	4.4% (5)
Hispanic/ Latino (n = 36; SE ≈ 5.8%)	Percentage (n)	13.9% (5)	13.9% (5)	13.9% (5)	13.9% (5)
Other (n = 62; SE ≈ 4.5%)	Percentage (n)	17.7% (11)	16.1% (10)	12.9% (8)	12.9% (8)
Total* (N = 576; SE ≈ 1.4%)	Percentage (n)	15.1% (87)	13.5% (78)	11.8% (68)	10.9% (63)

*Total includes racial/ethnic groups not separately listed in the table.

Notes:

1. As noted earlier, all of the results in this report are based on the sample of candidates who agreed to participate in this study, and therefore these results are not in perfect agreement with the actual pass rates for all domestic-educated first-time candidates in New York.
2. Because a score of 665 is in the lower tail of the distribution for the Caucasian/White group, where there are few candidate scores, any change in the passing score, either up or down tends to have a modest impact on the percentage of candidates passing.

5. Performance before Law School, in Law School, and on the July 2005 New York Bar Examination

The primary purpose of this study was to examine the impact of recent (July 2005) and proposed changes in the passing score on pass rates for the NY bar exam, and the analyses most directly relevant to this issue have been discussed in Section 4. This section digs a little deeper. It examines the relationships among variables describing academic achievement before law school (undergraduate GPA and LSAT scores), performance in law school (law-school GPAs), and performance on the NY bar exam (total scores on the bar exam).

For a large sub-sample of the candidates in this study, undergraduate GPA, LSAT scores, law-school GPA, and NY bar exam scores were all available. The results for this sub-sample were used to develop and evaluate hypotheses about relationships between readiness for law school (as measured by undergraduate GPA and LSAT score), subsequent performance in law school (as measured by law-school GPA), and later performance on the bar exam.

5.1 The School-Based Sample

For the analyses described in this section, it was necessary to construct a sub-sample of the candidates for whom data on undergraduate GPA (U-GPA), LSAT scores, law-school GPA (L-GPA), and NY bar exam scores were all available. The data on foreign-educated candidates did not include information on U-GPAs, LSAT scores, or L-GPAs; therefore, the foreign-educated candidates are not included in these analyses. In addition, any domestic-educated candidate for whom one or more of the four relevant variables was not available is not included in the sample. Since this sample is defined, to a large extent, in terms of the availability of L-GPAs and law-school admissions measures, it will be referred to as the *school-based sample*.

In order to simplify the interpretation of the results of these analyses, we also excluded candidates who were taking the NY bar exam for the second or subsequent time. The experience of having taken the bar examination on previous administrations and the associated passage of time would be likely to have an impact on the relationships among the variables, and explicitly incorporating the number of previous bar examination attempts into the models would have made them quite cumbersome. Therefore, the school-based sample was limited to domestic-educated first-time takers with complete data on the variables employed in these analyses.

The school-based sample was further limited to candidates from law schools with twenty-five or more graduates who met all of the other requirements for inclusion. As discussed later, it was necessary to rescale the L-GPAs for some of the analyses, and this rescaling required within-law-school analyses for which it was necessary to have a reasonable number of candidates from the particular law school. All but two of the fifteen law schools in New York are represented in the school-based sample; the two

New York law schools not included in the school-based sample were not able to supply GPAs for their graduates. Nineteen additional schools from across the country were also represented in this sample, but the number of candidates from each of these schools is generally smaller than the number from the New York schools. Therefore, although many out-of-state schools are included in the sample, most of the candidates in the school-based sample are from law schools in New York. The school-based sample contains 4,388 candidates from 32 schools.

5.2 Description of the Sample

The characteristics of the 4,388 candidates in the school-based sample are described in Tables 5.1 to 5.6. These tables also include the corresponding results for the larger *reference group* of all domestic-educated first-time candidates from the full sample of candidates taking the July 2005 NY bar exam (6,585 of a total of 10,175 candidates) to determine the extent to which the sample was representative of this reference group.

Table 5.1 presents the frequencies and percentages of females and males in the school-based sample. The female-male split is almost even with a slightly larger number of males than females. The percentages of females and males in the school-based sample are quite close to the corresponding percentages in the reference group of domestic-educated first-time test takers.

Table 5.1
Numbers and Percentages of Males and Females in the School-Based Sample and the Reference Group of Domestic-Educated First-Time Takers

Gender	Number in School-Based Sample*	Percent in School-Based Sample*	Percent in Reference Group**
Female	2,187	49.8%	49.5%
Male	2,201	50.2%	50.4%

*N = 4,388

**Domestic-educated first-time takers only; N = 6,585

Table 5.2 displays the numbers and percentages of candidates in the school-based sample in each racial/ethnic category and the corresponding percentages in the reference group as a function of race/ethnicity. The distributions are generally similar for the school-based sample and the reference group, with the Caucasian/White group constituting about 75% of both samples and with the different groups in the same order in terms of their percentages in the two samples. The school-based sample has a larger percentage of Caucasian/White takers than the sample of all domestic-educated first-

time takers (75.1% versus 73.2%) and a smaller percentage of Asian/Pacific Islander candidates than the sample of all domestic-educated first-time takers (9.5% versus 11.2%), but, overall, the school-based sample matches the reference group pretty closely.

Table 5.2
Numbers and Percentages by Race/Ethnicity for the School-Based Sample and the Reference Group of Domestic-Educated First-Time Takers

Race/Ethnicity	Number in School-Based Sample*	Percent in School-Based Sample*	Percent in Reference Group**
Caucasian/White	3,294	75.1%	73.2%
Asian/Pacific Islander	416	9.5%	11.2%
Black/African American	284	6.5%	6.5%
Hispanic/Latino	151	3.4%	3.2%
Puerto Rican	54	1.2%	1.1%
Chicano/Mexican American	14	0.3%	0.3%
American Indian/Alaskan Native	7	0.2%	0.1%
Other	167	3.8%	4.1%
Omitted	1	0.0%	0.2%

*N = 4,388

**Domestic-educated first-time takers only; N = 6,585

Table 5.3 presents the percentages of candidates in the school-based sample as a function of gender and race/ethnicity, and Table 5.4 displays these percentages for the reference group. Overall, the school-based sample appears comparable to the reference group, but as seen in Table 5.2, the school-based sample contains a slightly larger percentage of Caucasian/White takers and a smaller percentage of Asian/Pacific Islander takers. In both the school-based sample and the reference group, the Caucasian/White group includes a higher percentage of males than females, while all other groups have more females than males (see Tables 5.3 and 5.4).

Table 5.3
Percentages of Race/Ethnicity by Gender for the School-Based Sample

Race/Ethnicity	Gender	
	Female (n = 2,187)	Male (n = 2,201)
Caucasian/White (n = 3,294)	70.6%	79.5%
Asian/Pacific Islander (n = 416)	10.9%	8.0%
Black/African American (n = 284)	8.5%	4.5%
Hispanic/Latino (n = 151)	3.5%	3.4%
Puerto Rican (n = 54)	1.4%	1.0%
Chicano/Mexican American (n = 14)	0.4%	0.3%
American Indian/Alaskan Native (n = 7)	0.2%	0.1%
Other (n = 167)	4.4%	3.2%
Omitted (n = 1)	0.0%	0.0%

N = 4,388

Table 5.4
Percentages of Race/Ethnicity by Gender for the Reference Group of Domestic-Educated First-Time Takers

Race/Ethnicity	Gender		
	Female (n = 3,284)	Male (n = 3,299)	Omitted (n = 2)
Caucasian/White (n = 4,818)	69.0%	77.4%	50.0%
Asian/Pacific Islander (n = 740)	12.9%	9.6%	0.0%
Black/African American (n = 430)	8.5%	4.6%	0.0%
Hispanic/Latino (n = 214)	3.3%	3.2%	0.0%
Puerto Rican (n = 73)	1.3%	0.9%	0.0%
Chicano/Mexican American (n = 23)	0.5%	0.2%	0.0%
American Indian/Alaskan Native (n = 9)	0.2%	0.1%	0.0%
Other (n = 268)	4.3%	3.8%	0.0%
Omitted (n = 10)	0.1%	0.2%	50.0%

N = 6,585

Table 5.5 reports the distribution of candidate ages when they took the NY bar exam for the school-based sample and the reference sample. The percentages are similar across age groups for the school-based sample and reference group; they differ at most by two percentage points.

Table 5.5
Frequencies and Percentages of Age at Bar Attempt for the School-Based Sample and the Reference Group of Domestic-Educated First-Time Takers

Age at Bar Attempt	Frequency in School-Based Sample*	Percent in School-Based Sample*	Percent in Reference Group**
< 27	2,478	56.5%	54.5%
27 - 28	925	21.1%	21.5%
29 – 30	387	8.8%	9.6%
31 – 35	360	8.2%	8.8%
36 – 40	113	2.6%	2.7%
41 – 45	63	1.4%	1.5%
46 – 50	31	0.7%	0.8%
51 – 55	22	0.5%	0.5%
56 – 60	8	0.2%	0.2%
> 60	1	0.0%	0.0%

*N = 4,388

**Domestic-educated first-time takers only; N = 6,585

Table 5.6 reports the distribution of candidates' ages at law school graduation in the school-based sample and in the reference group. The percentages in the various age groups are similar for the school-based sample and reference group; they differ at most by about one percentage point.

While some differences are observed in the percentages of Caucasian/White, Asian/Pacific Islander, and Black/African American takers between the school-based sample and the reference group of all domestic-educated first-time takers, the school-based sample appears to be representative of the reference group.

Table 5.6
Frequencies and Percentages of Age at Law School Graduation for the School-Based Sample and the Reference Group of Domestic-Educated First-Time Takers

Age at Law School Graduation	Frequency in School-Based Sample*	Percent in School-Based Sample*	Percent in Reference Group**
< 27	2,561	58.4 %	57.2%
27 - 28	887	20.2%	20.4%
29 – 30	367	8.4%	8.9%
31 – 35	335	7.6%	8.2%
36 – 40	110	2.5%	2.4%
41 – 45	63	1.4%	1.2%
46 – 50	30	0.7%	0.7%
51 – 55	21	0.5%	0.4%
56 – 60	8	0.2%	0.2%
> 60	1	0.0%	0.0%

*N = 4,383 (age at law school graduation was not available for five candidates).

**Domestic-educated first time takers only; N = 6,556 (age at law school graduation was not available for 29 candidates).

5.3 Scaling Law-School GPAs

The use of GPAs from different schools is always somewhat problematic, because the meaning of GPAs is likely to vary across schools as a result of differences in admissions policies, course requirements, grading standards, and the specific methods used to compute GPAs. There is no reason to think that law-school GPAs are immune to these factors, and in fact, our analyses of the relationships between law-school GPA (L-GPA) and other variables (e.g., U-GPAs, LSAT scores, and bar examination scores) indicates some variability in the meaning of GPAs across law schools.

In addition to the general problem associated with the use of GPAs from different schools in the same analysis, L-GPAs introduce some special problems. Although most of the law schools represented in the sample seem to use a traditional four-point definition of GPA, several reported GPAs on a 0-100 scale, and a few used other scales. The use of such widely different scales for the same variable within a single statistical analysis would make any results impossible to interpret in a sensible way. Some rescaling of the GPAs was essential.

The U-GPAs are subject to some of the same difficulties as L-GPAs, particularly the likelihood that GPAs from different undergraduate institutions and from different majors within institutions can reflect different kinds of performance and different levels of performance. However, the U-GPAs are from such a great variety of institutions and majors that any effects associated with institutions and majors can be effectively treated as sources of random error (or noise). The variability introduced by differences among undergraduate schools in grading standards tends to diminish the power of the U-GPA as a predictor of future performance, but it probably does not introduce any substantial systematic errors into the analyses. The problem with L-GPAs is not so easily resolved, largely because a substantial proportion of the sample of domestic-educated first-time takers graduated from a relatively small number of law schools in the same year.

We examined a number of ways of standardizing L-GPAs, and decided to use two approaches. In the first approach, we adjusted for the selectivity of the law school in terms of U-GPAs and LSAT scores. In particular, for each candidate in the sample, we computed an index based on his or her LSAT score and U-GPA. The U-GPAs and LSAT scores in the school-based sample were scaled¹ to have a mean of 0.0 and an SD (standard deviation) of 1.0. The two sets of scores were then combined into an index, with the LSAT score given a weight of 60% and the U-GPA given a weight of 40%. An arbitrary value of 10.0 was then added to the index to ensure that all values were positive. Each candidate in the school-based sample had a score on the index.

The mean and SD for the index was computed for each law school in the school-based sample using the candidates in the school-based sample who had graduated from that law school, and the L-GPAs for the candidates from that school were scaled to have the same mean and SD as the index for the law school. The resulting *Index-Based L-GPA* depends on the candidate's actual GPA and the distribution of the index for candidates from his or her law school. Using this scaling of the GPA to the index implies that if two candidates from different law schools have the same L-GPA, the candidate from the more selective school (i.e., with a higher average for the index) will generally have the higher Index-Based L-GPA.

In the second approach, we transformed L-GPAs within each law school to a common four-point scale, the *4-pt L-GPA*, by scaling the mean and SD within each school to the average GPA mean and SD for all of the schools that used a traditional four-point GPA scale. Under this definition, all of the law schools in the school-based sample have the same mean and SD for their GPAs. This approach makes no attempt

to adjust the L-GPAs to take account of differences across law schools, and in fact, any differences in means and SDs of L-GPAs that might have existed across schools are eliminated. The 4-pt L-GPA reflects each candidate's relative standing on GPA within their law school.

5.4 Distributions and summaries of scores

The results reported in this section summarize the means and SDs of the U-GPA, LSAT, 4-pt L-GPA, Index-Based L-GPA, and total NY bar exam scores for the school-based sample and for various subgroups within that sample. Figure 5.1 to 5.5 provide plots of score distributions using *histograms* for each of these five variables in the school-based sample. Each of the distributions approximates a normal distribution with a central peak and a gradual falloff at each end.

Figure 5.1 displays a distribution of the U-GPAs. The GPAs tend to be clustered around 3.3, with most of the GPAs between 3 and 4. The distribution falls off quickly at the high end and more slowly at the low end. Such distributions are said to be negatively skewed. The mean of the U-GPA is 3.33 (SD = 0.40).

Figure 5.2 displays a distribution of LSAT scores in the school-based sample. The LSAT scores tend to be centered on 160, with most of the scores between 150 and 170. The mean of the LSAT is 158.02 (SD = 7.61).

Figure 5.3 displays a distribution of 4-pt L-GPAs in the school-based sample. The 4-pt L-GPAs tend to be centered on 3.15, with most of the scores between 2.75 and 3.75. The mean of the 4-point L-GPA is 3.19 (SD = 0.36).

Figure 5.4 displays a distribution of Index-Based L-GPAs in the school-based sample. The Index-Based L-GPAs tend to be centered on 10, with most of the scores between 9 and 11.5. The mean of the Index-Based L-GPA is 10.16 (SD = 0.95).

Figure 5.5 displays the distribution of bar examination scores in the school-based sample. The scores tend to be clustered around 728.5, with most of them between 625 and 825. The mean bar examination score for the school-based sample is 728.45 (SD = 63.15).

Figure 5.1
Score Distribution for Undergraduate Grade-Point Average in the School-Based Sample

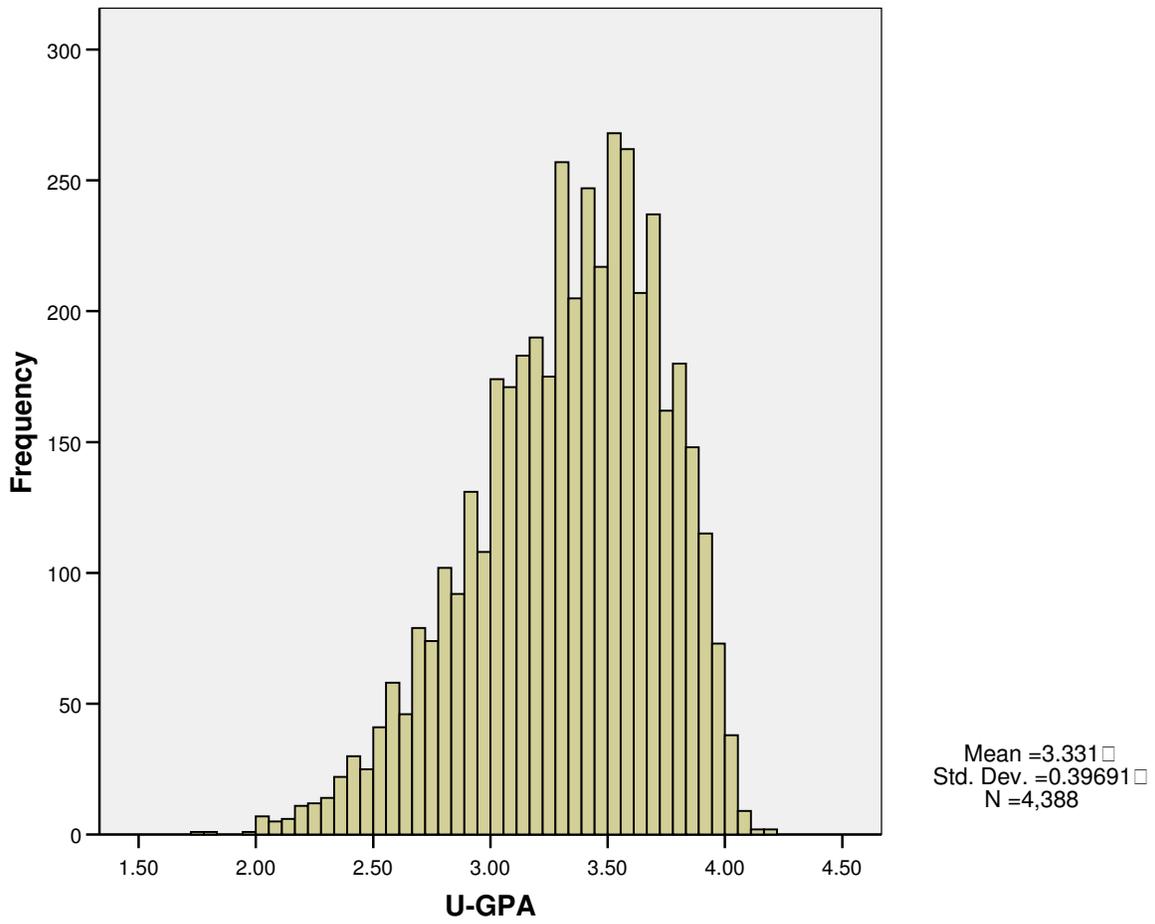


Figure 5.2
Score Distribution for LSAT Scores in the School-Based Sample

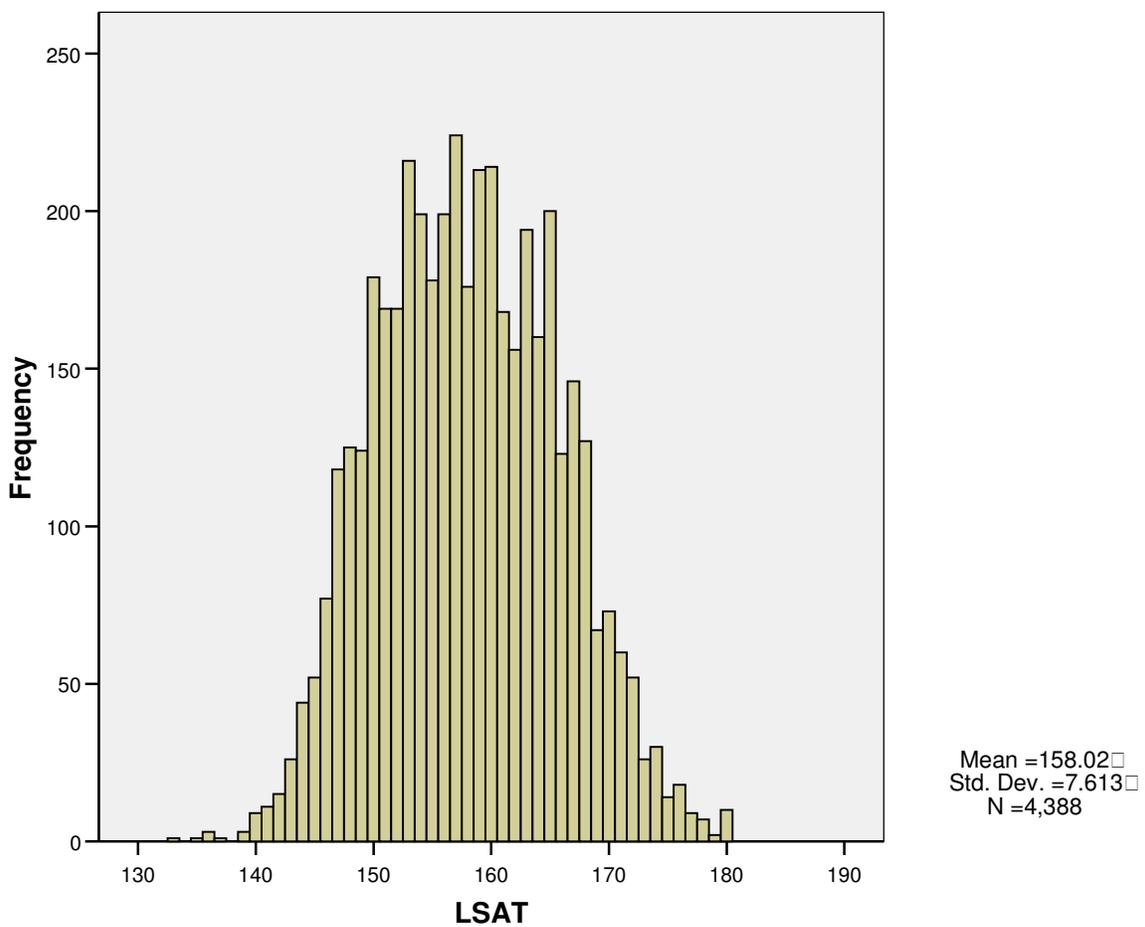


Figure 5.3
Score Distribution for 4-pt Law-School Grade-Point Average in the School-Based Sample

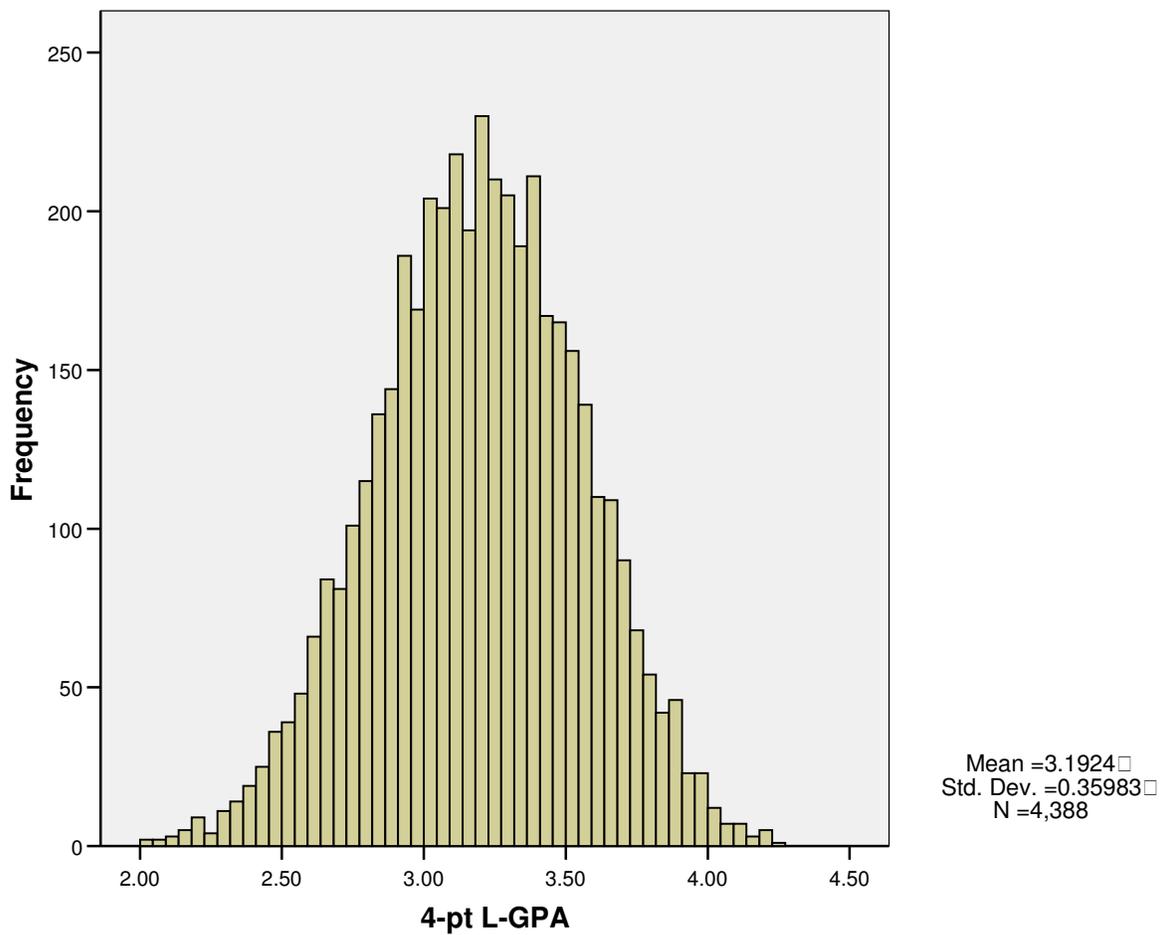


Figure 5.4
Score Distribution for Index-Based Law-School Grade-Point Average in the School-Based Sample

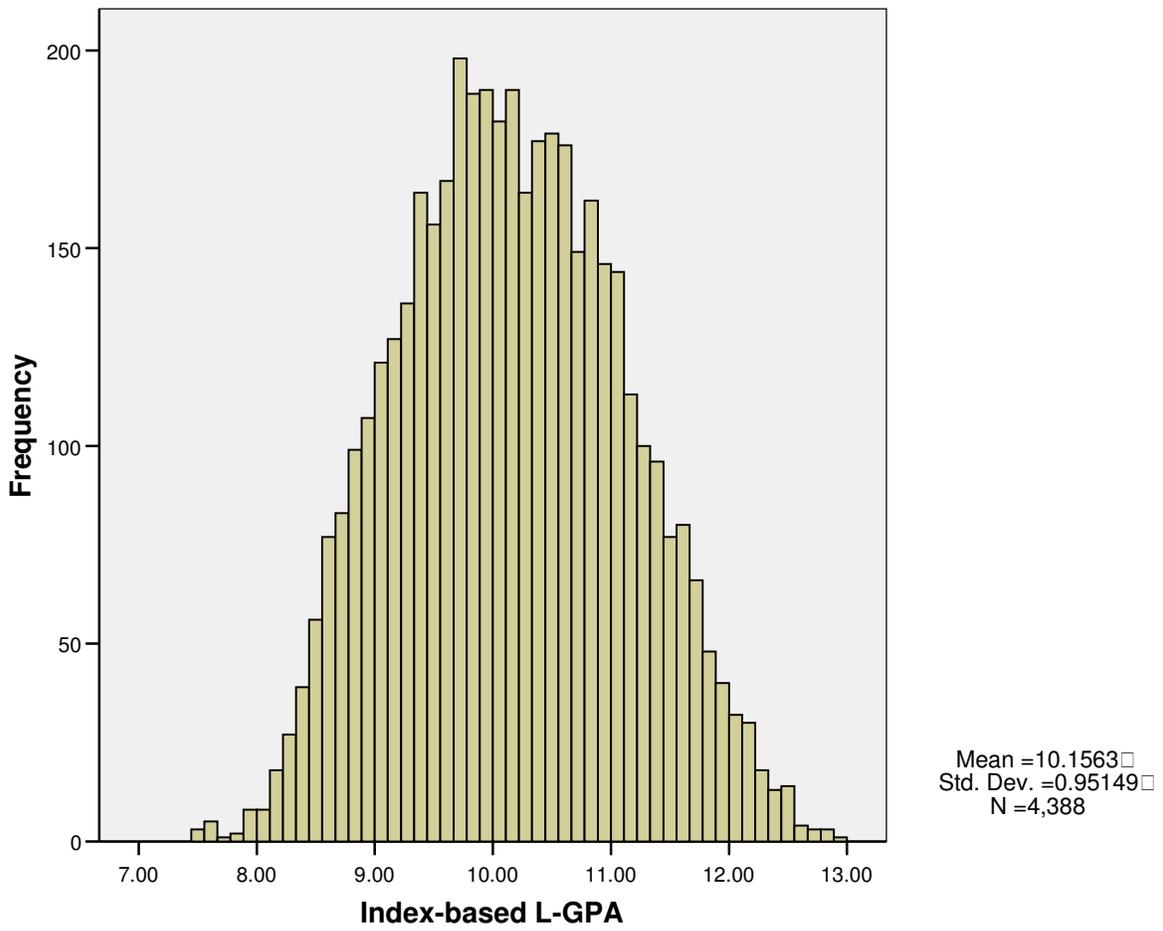


Figure 5.5
Score Distribution for NY Bar Scores in the School-Based Sample

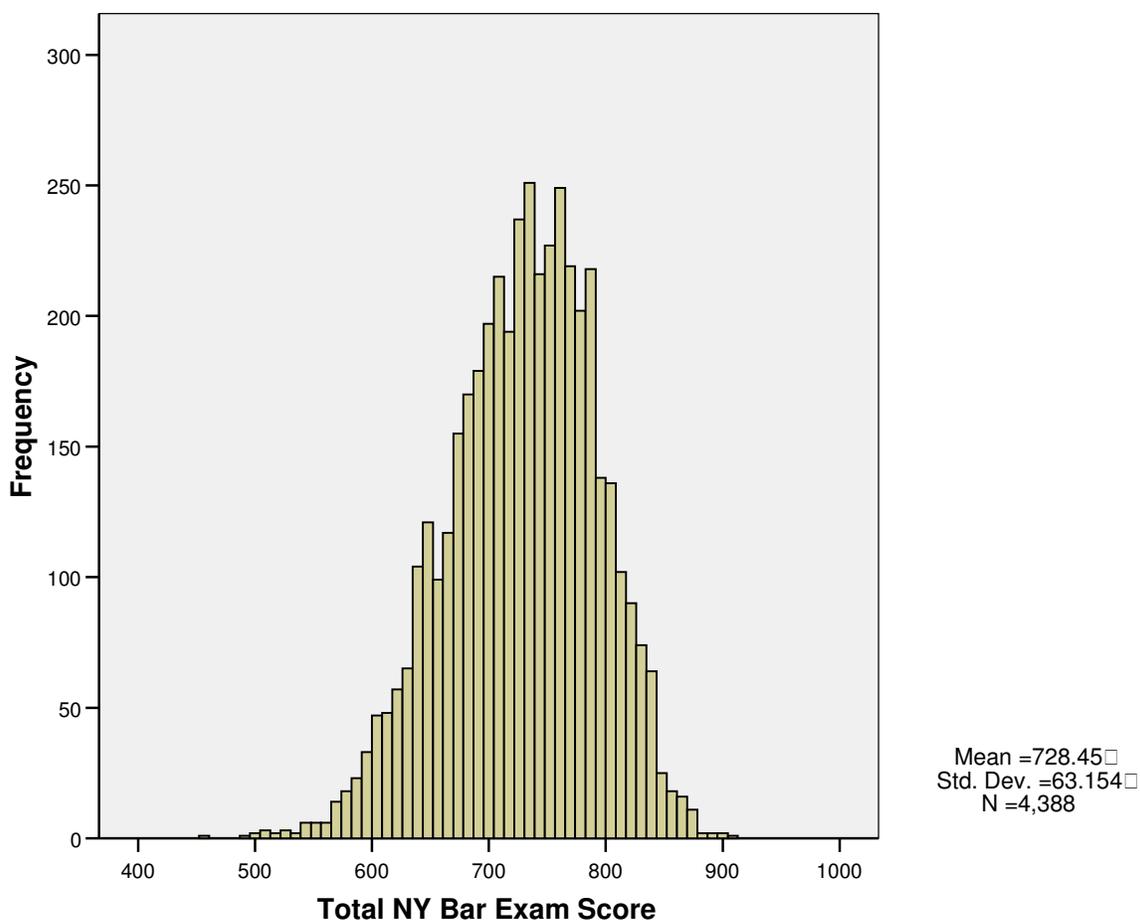


Table 5.7 presents the means and SDs for U-GPAs, LSAT scores, 4-pt L-GPAs, Index-Based L-GPAs, and NY bar exam scores by gender for the school-based sample. The first and second rows of Table 5.7 present the means and SDs for females and males, and the bottom row presents the means and SDs for the total school-based sample. The females have a slightly higher average U-GPA, and males have a slightly higher average LSAT score, L-GPAs, and bar examination score.

Note that the means and SDs of the total bar exam scores for females and males and for the total group in the school-based sample are very similar to those for the domestic-educated first-time takers (see Table 3.1). The school-based sample is quite representative of the total group of domestic-educated first-time takers.

Table 5.7
Means and Standard Deviations of Undergraduate Grade-Point Average, LSAT Scores, Law-School Grade-Point Average, and Total New York Bar Scores by Gender for the School-Based Sample

Gender		U-GPA	LSAT Score	4-pt L-GPA	Index-Based L-GPA*	Total NY Bar Score
Female (n = 2,187)	Mean (SD)	3.37 (0.37)	157.29 (7.52)	3.18 (0.36)	10.10 (0.93)	725.12 (62.77)
Male (n = 2,201)	Mean (SD)	3.29 (0.42)	158.74 (7.64)	3.20 (0.36)	10.21 (0.97)	731.76 (63.37)
Total (N = 4,388)	Mean (SD)	3.33 (0.40)	158.02 (7.61)	3.19 (0.36)	10.16 (0.95)	728.45 (63.15)

*Index is weighted average of 60% LSAT and 40% Undergraduate GPA

Table 5.8 presents the means and SDs of the five performance variables for racial/ethnic groups with more than 20 candidates (Appendix D.1 presents the standard errors for this table). Performance on the bar examination mirrors that found in the reference sample of domestic-educated first-time takers as described in Table 3.2. The Caucasian/White group has the highest mean, followed by the Asian/Pacific Islander, Puerto Rican, Hispanic/Latino, and Black/African American groups. The same ordering also occurs for U-GPA and the 4-pt L-GPA. The Asian/Pacific Islander group has the highest average on the LSAT and on the Index-Based GPA, followed by the Caucasian/White, Hispanic/Latino, Puerto Rican, and Black/African American groups. Since the Index-Based L-GPA depends in part on LSAT scores, it is not surprising that the ordering of groups on these two variables is related.

Table 5.8
Means and Standard Deviations of Undergraduate Grade-Point Average, LSAT Scores, Law-School Grade-Point Average, and Total New York Bar Scores by Race/Ethnicity for the School-Based Sample

Race/Ethnicity		U-GPA	LSAT Score	4-pt L-GPA	Index-Based L-GPA	Total NY Bar Score
Caucasian/ White (n = 3,294)	Mean (SD)	3.36 (0.39)	158.56 (7.47)	3.24 (0.35)	10.21 (0.95)	735.85 (60.92)
Asian/ Pacific Islander (n = 416)	Mean (SD)	3.31 (0.39)	159.50 (7.61)	3.10 (0.32)	10.23 (0.97)	720.09 (61.53)
Black/ African American (n = 284)	Mean (SD)	3.13 (0.40)	152.19 (6.42)	2.90 (0.34)	9.66 (0.89)	680.33 (59.71)
Hispanic/ Latino (n = 151)	Mean (SD)	3.23 (0.41)	154.28 (6.71)	3.03 (0.37)	9.86 (0.89)	702.98 (66.92)
Puerto Rican (n = 54)	Mean (SD)	3.28 (0.37)	153.48 (7.56)	3.06 (0.36)	9.85 (0.93)	710.15 (68.12)
Other (n = 167)	Mean (SD)	3.34 (0.40)	158.37 (7.26)	3.14 (0.33)	10.12 (0.89)	715.76 (63.72)
Total* (N = 4,388)	Mean (SD)	3.33 (0.40)	158.02 (7.61)	3.19 (0.36)	10.16 (0.95)	728.45 (63.15)

*Total includes racial/ethnic groups not separately listed in the table.

Table 5.9
Means and Standard Deviations of Undergraduate Grade-Point Average, LSAT Scores, Law-School Grade-Point Average, and Total New York Bar Scores for Females by Race/Ethnicity for the School-Based Sample

Race/Ethnicity		U-GPA	LSAT Score	4-pt L-GPA	Index-Based L-GPA	Total NY Bar Score
Caucasian/ White (n = 1,545)	Mean	3.42	158.03	3.24	10.16	733.94
	(SD)	(0.36)	(7.25)	(0.35)	(0.92)	(60.24)
Asian/ Pacific Islander (n = 239)	Mean	3.34	159.00	3.08	10.15	717.61
	(SD)	(0.36)	(7.51)	(0.30)	(0.92)	(59.10)
Black/ African American (n = 186)	Mean	3.15	151.17	2.92	9.62	681.74
	(SD)	(0.39)	(6.38)	(0.33)	(0.90)	(61.31)
Hispanic/ Latino (n = 77)	Mean	3.26	153.47	3.03	9.81	701.88
	(SD)	(0.42)	(6.52)	(0.36)	(0.92)	(68.07)
Other (n = 96)	Mean	3.37	157.30	3.12	10.08	706.41
	(SD)	(0.41)	(7.80)	(0.32)	(0.88)	(64.25)
Total* (N = 2,187)	Mean	3.37	157.29	3.18	10.10	725.12
	(SD)	(0.37)	(7.52)	(0.36)	(0.93)	(62.77)

*Total includes racial/ethnic groups not separately listed in the table.

Tables 5.9 and 5.10 present the corresponding breakdown of the data separately for females and males (Appendix D.2 and D.3 present the standard errors for these tables). For each of the racial/ethnic groups represented in these tables, females have higher average U-GPAs and males have higher average LSAT scores. For each of the racial/ethnic groups, except the Black/African American group, males have a higher average bar examination score than females. For the Black/African American group, females have a higher average bar examination score than the males. Note that, although the overall numbers of males and females are approximately equal, there are almost twice as many females as males in the Black/African American group.

Table 5.10
Means and Standard Deviations of Undergraduate Grade-Point Average, LSAT Scores, Law-School Grade-Point Average, and Total New York Bar Scores for Males by Race/Ethnicity for the School-Based Sample

Race/Ethnicity		U-GPA	LSAT Score	4-pt L-GPA	Index-Based L-GPA	Total NY Bar Score
Caucasian/ White (n = 1,749)	Mean	3.30	159.03	3.24	10.25	737.54
	(SD)	(0.42)	(7.64)	(0.35)	(0.97)	(61.48)
Asian/ Pacific Islander (n = 177)	Mean	3.27	160.18	3.14	10.32	723.44
	(SD)	(0.42)	(7.72)	(0.35)	(1.02)	(64.67)
Black/ African American (n = 98)	Mean	3.08	154.13	2.86	9.73	677.64
	(SD)	(0.41)	(6.09)	(0.36)	(0.87)	(56.78)
Hispanic/ Latino (n = 74)	Mean	3.21	155.14	3.02	9.91	704.12
	(SD)	(0.40)	(6.85)	(0.39)	(0.87)	(66.15)
Other (n = 71)	Mean	3.29	159.82	3.16	10.17	728.41
	(SD)	(0.38)	(6.23)	(0.34)	(0.90)	(61.19)
Total* (N = 2,201)	Mean	3.29	158.74	3.20	10.21	731.76
	(SD)	(0.42)	(7.64)	(0.36)	(0.97)	(63.37)

*Total includes racial/ethnic groups not separately listed in the table.

5.5 Distributions of Z-Scores

In examining changes in group means and SDs across time from the pre-law-school measures to L-GPAs to bar examination scores, it is convenient to have all of the different measures on the same scale. One way to make variables defined in terms of different units or on different scales comparable is to rescale all of the measures to have the same means and SDs in some reference population, and this is commonly done by rescaling all of the variables to what is called a *z-score* scale.

Z-scores are scores that have been rescaled to have a mean of 0.0 and a standard deviation of 1.0 in some reference population. The reference population used here consisted of the school-based sample. The z-scores considered in this section all have a mean of 0.0 and a SD of 1.0 for the school-based sample.²

Thus, the mean, or average, z-score for any variable is 0.0 in the reference population (i.e., the school-based sample), and the SD of the z-scores on any of the five

variables under consideration in the reference population is 1.0. So, on any variable, about half the z-scores in the school-based sample will be positive and about half will be negative. Because almost all of the scores in a typical distribution fall between three SDs below the mean and three SDs above the mean, almost all z-scores for any variable fall between -3.0 and 3.0 (with the mean at 0.0). These properties make z-scores easy to interpret. If a z-score is positive, it is above the mean for the reference population. If it is above 1.0 it is moderately high. If it is above 2.0, it is quite high, and if it is above 3.0 it is one of the highest scores on that variable in the reference population. If a z-score is negative, it is below the mean. If it is below -1.0 it is moderately low. If it is below -2.0, it is quite low, and if it is near -3.0 it is one of the lowest scores on that variable in the reference population.

To examine the relative differences between groups of candidates on U-GPA, LSAT, L-GPA, and the NY bar exam scores, z-scores were computed for each candidate, and the group averages were computed by taking the average of these z-scores over all candidates in the group. For particular groups of examinees (e.g., males and females), deviation of the average z-score for the group from zero is an indication of the extent to which groups tend to be below the mean (less than zero) or above the mean (greater than zero) on the variable.

Table 5.11 displays z-scores for U-GPA, LSAT, the two L-GPAs, and NY bar exam by gender for the school-based sample. Note that the average z-scores for the total school-based sample (i.e., the reference population) are necessarily equal to 0.0 for all five variables, because of the definition of z-scores. Because there are only two groups in Table 5.11, and the numbers of candidates in the two groups are approximately equal, the average z-scores for females and males are very close to being mirror images of each other; if one is a certain distance above the mean, the other is the same distance below the mean. Since the overall average is necessarily 0.0, if the average for one of the two groups is positive, the average for the other has to be negative (except possibly as a result of rounding).

In Table 5.11, the average z-scores on the LSAT, the two L-GPAs, and NY bar exam are below zero for females and above zero for males. For U-GPA, however, the average z-score for females is positive, and the average z-score for males is negative. None of these differences are large. The difference (-0.05 to +0.05) between the average scores on the bar examination for males and females is about a tenth of an SD (i.e., about 0.10 on the z-score scale). The larger mean z-scores in Table 5.11 involve about a tenth of an SD favoring females on U-GPA and a tenth of an SD on the LSAT scores favoring males.

As discussed in Sections 3 and 4, the average scores for females and males are influenced by the fact that the different racial/ethnic groups include different numbers of females and males, with the Caucasian/White group including more males than females and all other groups including more females than males. If we adjust for these differences by weighting the average scores for females and males in each racial/ethnic

group (from Tables 5.13 and 5.14) equally, the average scores for females increase relative to those of males on all of the variables in Table 5.11. The 4-pt L-GPA z-scores go from -.03 and .03 to -.01 and .01, the average Index-Based L-GPAs become -.04 and .04, the average bar examination z-scores become -.02 and .02, and the average LSAT scores become -.07 and .08. The gap between the average U-GPAs, which favors females, gets a little bigger (.12 to -.12) when we adjust for the percentages of females in the different racial/ethnic groups.

Table 5.11
Standardized Score Means and Standard Deviations of Undergraduate Grade-Point Average, LSAT, Law-School Grade-Point Average, and Total New York Bar Scores for Males and Females in the School-Based Sample

Gender		U-GPA	LSAT Score	4-pt L-GPA	Index-Based L-GPA	Total NY Bar Score
Female (n = 2,187)	Mean (SD)	0.11 (0.94)	-0.10 (0.99)	-0.03 (0.99)	-0.06 (0.98)	-0.05 (0.99)
Male (n = 2,201)	Mean (SD)	-0.11 (1.05)	0.09 (1.00)	0.03 (1.01)	0.06 (1.02)	0.05 (1.00)
Total (N = 4,388)	Mean (SD)	0.00 (1.00)	0.00 (1.00)	0.00 (1.00)	0.00 (1.00)	0.00 (1.00)

Table 5.12 displays average z-scores on the U-GPA, LSAT, the two L-GPAs, and NY bar exam by race/ethnicity. The average z-scores for the Caucasian/White group are above zero for all five variables, indicating that the average score for this group is above the average for the school-based sample as a whole on all five of these variables. Average z-scores for the Black/African American group and the Hispanic/Latino group are below zero, and therefore below the overall average for the school-based sample as a whole on all five variables. Basically, this result can be interpreted as saying that the groups with relatively low average scores on U-GPA and LSAT (i.e., measures of previous academic success) also have relatively low average scores on L-GPA and relatively low average scores on the NY bar exam.

Table 5.12
Standardized Score Means and Standard Deviations of Undergraduate Grade-Point Average, LSAT, Law-School Grade-Point Average, and Total New York Bar Scores by Race/Ethnicity for the School-Based Sample

Race/Ethnicity		U-GPA	LSAT Score	4-pt L-GPA	Index-Based L-GPA	Total NY Bar Score
Caucasian/ White (n = 3,294)	Mean	0.06	0.07	0.14	0.06	0.12
	(SD)	(0.99)	(0.98)	(0.97)	(0.99)	(0.96)
Asian/ Pacific Islander (n = 416)	Mean	-0.04	0.19	-0.25	0.07	-0.13
	(SD)	(0.98)	(1.00)	(0.89)	(1.02)	(0.97)
Black/ African American (n = 284)	Mean	-0.52	-0.77	-0.82	-0.52	-0.76
	(SD)	(1.00)	(0.84)	(0.95)	(0.93)	(0.95)
Hispanic/ Latino (n = 151)	Mean	-0.24	-0.49	-0.46	-0.31	-0.40
	(SD)	(1.03)	(0.88)	(1.04)	(0.94)	(1.06)
Other (n = 167)	Mean	0.02	0.05	-0.16	-0.04	-0.20
	(SD)	(1.01)	(0.95)	(0.91)	(0.93)	(1.01)
Total* (N = 4,388)	Mean	0.00	0.00	0.00	0.00	0.00
	(SD)	(1.00)	(1.00)	(1.00)	(1.00)	(1.00)

*Total includes racial/ethnic groups not separately listed in the table.

The results for Black/African American candidates reported in the third row of Table 5.12 indicate that the average value of their U-GPAs is about half an SD below the mean, and that their average LSAT score is over three quarters of an SD below the mean. To the extent that these two measures reflect readiness for law school, this group starts out at an academic disadvantage. The average 4-pt L-GPA for the Black/African American group is quite low (-0.82), indicating that on average, this group has relatively low GPAs in their law schools (about four-fifths of a standard deviation below the average GPA in the law school). Their average Index-Based L-GPA is about half an SD below the mean, which is still relatively low, but not as low as their average for the 4-pt L-GPA. This difference reflects the fact that the Index-Based L-GPA is adjusted for the selectivity of the law school attended and that the Black/African American candidates tend to graduate from law schools that are more selective than the typical law school in the school-based sample. The results are roughly stable across the three points in time, at entry to law school, in law school, and on the bar examination, with the Black/African American group having average scores on each of these variables of half or more of an SD below the corresponding average scores for the

school-based sample.

The results for Hispanic/Latino candidates reported in the fourth row of Table 5.12 are similar to those for the Black/African American group, but smaller in magnitude. The results for the Hispanic/Latino group are also roughly stable across entry to law school, law school, and the bar exam, with the Hispanic/Latino group having average scores of a quarter to half an SD below the overall mean for the school-based sample.

The Asian/Pacific Islander group has the highest average score on the LSAT and an average U-GPA that is slightly below that of the school-based sample as a whole. Their 4-pt L-GPA is a quarter of an SD below the average for the reference population, but their Index-Based L-GPA is above the mean, indicating that they are graduating from law schools that are more selective than average.

The results for the “Other” group are unusual in that this group scores above average on U-GPA and LSAT, but scores below average on the L-GPAs and on the bar examination.

Tables 5.13 and 5.14 display standardized scores of U-GPA, LSAT, L-GPA, and NY bar exam for females and males by race/ethnicity in the school-based sample. These tables reveal a more complex pattern in the variables.

Table 5.13
Standardized Score Means and Standard Deviations of Undergraduate Grade-Point Average, LSAT, Law-School Grade-Point Average, and Total New York Bar Scores for Females by Race/Ethnicity for the School-Based Sample

Race/Ethnicity		U-GPA	LSAT Score	4-pt L-GPA	Index-Based L-GPA	Total NY Bar Score
Caucasian/ White (n = 1,545)	Mean	0.21	0.00	0.14	0.01	0.09
	(SD)	(0.90)	(0.95)	(0.96)	(0.97)	(0.95)
Asian/ Pacific Islander (n = 239)	Mean	0.03	0.13	-0.32	-0.00	-0.17
	(SD)	(0.91)	(0.99)	(0.83)	(0.96)	(0.94)
Black/ African American (n = 186)	Mean	-0.46	-0.90	-0.76	-0.56	-0.74
	(SD)	(0.98)	(0.84)	(0.91)	(0.95)	(0.97)
Hispanic/ Latino (n = 77)	Mean	-0.17	-0.60	-0.45	-0.36	-0.42
	(SD)	(1.05)	(0.86)	(1.01)	(0.96)	(1.08)
Other (n = 96)	Mean	0.10	-0.09	-0.20	-0.08	-0.35
	(SD)	(1.04)	(1.02)	(0.88)	(0.92)	(1.02)
Total* (N = 2,187)	Mean	0.11	-0.10	-0.03	-0.06	-0.05
	(SD)	(0.94)	(0.99)	(0.99)	(0.98)	(0.99)

*Total includes racial/ethnic groups not separately listed in the table.

Table 5.11 indicates that females have higher average U-GPAs than males, and a comparison of the first columns in Tables 5.13 and 5.14 indicates that this difference is consistent across all five of the racial/ethnic groups included in these tables. Females have lower average LSAT scores than males, and a comparison of the second columns in Tables 5.13 and 5.14 indicates that this difference is consistent across all five of the racial/ethnic groups included in these tables.

Table 5.11 indicates that females have slightly lower average 4-pt L-GPAs than males, but a comparison of the third column in Table 5.13 to the third column in Table 5.14 indicates that this difference is not consistent across the racial/ethnic groups included in these tables. Within the White/Caucasian group, males and females have the same 4-pt L-GPAs. For the Asian/Pacific Islander group, the average 4-pt L-GPA is higher for males than for females, but for the Black/African American and Hispanic/Latino groups, the average 4-pt L-GPA is higher for females than for males.

Table 5.14
Standardized Score Means and Standard Deviations of Undergraduate Grade-Point Average, LSAT, Law-School Grade-Point Average, and Total New York Bar Scores for Males by Race/Ethnicity for the School-Based Sample

Race/Ethnicity		U-GPA	LSAT Score	4-pt L-GPA	Index-Based L-GPA	Total NY Bar Score
Caucasian/ White (n = 1,749)	Mean (SD)	-0.07 (1.05)	0.13 (1.00)	0.14 (0.97)	0.10 (1.01)	0.14 (0.97)
Asian/ Pacific Islander (n = 177)	Mean (SD)	-0.15 (1.05)	0.28 (1.01)	-0.14 (0.96)	0.18 (1.08)	-0.08 (1.02)
Black/ African American (n = 98)	Mean (SD)	-0.62 (1.02)	-0.51 (0.80)	-0.93 (1.00)	-0.45 (0.91)	-0.80 (0.90)
Hispanic/ Latino (n = 74)	Mean (SD)	-0.32 (1.00)	-0.38 (0.90)	-0.47 (1.08)	-0.26 (0.92)	-0.39 (1.05)
Other (n = 71)	Mean (SD)	-0.09 (0.96)	0.24 (0.82)	-0.10 (0.96)	0.02 (0.95)	-0.00 (0.97)
Total* (N = 2,201)	Mean (SD)	-0.11 (1.05)	0.09 (1.00)	0.03 (1.01)	0.06 (1.02)	0.05 (1.00)

*Total includes racial/ethnic groups not separately listed in the table.

Table 5.11 indicates that females have lower average Index-Based L-GPAs than males, and a comparison of the fourth column in Table 5.13 to the fourth column in Table 5.14 indicates that this difference is consistent across all five of the racial/ethnic groups included in these tables. Females have lower average bar examination scores than males, and a comparison of the last columns in Tables 5.13 and 5.14 indicates that this difference is consistent across the racial/ethnic groups, with the exception of the Black/African American group for which females have a higher average bar examination score than males.

Overall, the results summarized in this section suggest a complex pattern with a few major trends. First, there are major differences between the racial/ethnic groups, which tend to be fairly consistent across all of the measures. Second, the differences between females and males are much smaller in magnitude and not so consistent.

5.6 Correlations

Table 5.15 presents a correlation matrix for the five variables being considered in this section for the school-based sample. As noted earlier, a correlation coefficient between two variables indicates the degree of linear relationship between the two variables. Correlation coefficients have values between -1.0 and +1.0, with a correlation of +1.0 indicating a perfect direct linear relationship between the two variables, and a correlation of -1.0 indicating a perfect inverse linear relationship between the two variables. In either of these two extreme cases, either variable can be predicted perfectly from the other using a simple straight-line relationship. A correlation of 0.0 indicates the complete absence of linear relationship between the two variables.

A correlation matrix, like Table 5.15, presents all of the correlations among a set of variables in a compact format. For example, the first column includes the correlations of the U-GPA with each of the other variables. The 1 in the first entry in the first column indicates that U-GPA is perfectly correlated with itself, which is true for all variables. The second entry in the first column indicates that the correlation between U-GPAs and LSAT scores in the school-based sample is .34, a moderate positive correlation.

Table 5.15
Correlations Among Undergraduate Grade-Point Average, LSAT Scores, Law-School Grade-Point Average, and Total New York Bar Scores for the School-Based Sample

	U-GPA	LSAT Scores	4-pt L-GPA	Index-Based L-GPA	Total NY Bar Score
U-GPA	1				
LSAT Scores	.34	1			
4-pt L-GPA	.23	.19	1		
Index-Based L-GPA	.52	.75	.57	1	
Total NY Bar Score	.36	.49	.63	.68	1

N = 4,388

The correlations in Table 5.15 are all positive, indicating that as scores increase on one variable, they tend to increase on the other variables as well. This is to be expected for a set of variables which measure different kinds of cognitive achievement in related areas. The main conclusions drawn from a correlation matrix like that in Table 5.15 are those implied by the pattern of correlations in the table.

The largest correlation in Table 5.15 (.75) is between the Index-Based L-GPAs and LSAT scores. It is to be expected that this correlation would be fairly high, because the Index-Based L-GPA is based in part on the distribution of LSAT scores at the law school attended by each candidate. The high correlation between the Index-Based L-GPA and the LSAT scores reflects the fact that the law schools included in the school-based sample exhibit substantial variability in their mean values for the index (i.e., their selectivity), and therefore, adjusting L-GPAs to match the distribution of the index in each school has a substantial impact on the Index-Based L-GPAs.

The Index-Based L-GPA also has fairly high correlations with the 4-pt L-GPA (.57) and with the U-GPA (0.52), both of which also contribute to its definition. U-GPA is part of the index, and the 4-pt L-GPA is a within-law school measure on which the Index-Based GPA is ultimately based.

The 4-pt L-GPAs were scaled to have the same mean and SD for each school, thereby diminishing the relationship of 4-pt L-GPA to any factors (e.g., difference in grading standards, selectivity of schools) that vary across law schools. The 4-pt L-GPA is essentially a measure of each candidate's relative standing, in terms of GPA, within the law school they attended. Note that the 4-pt L-GPA has a relatively low correlation (.19) with the LSAT scores and a somewhat higher correlation with U-GPA (.23).

In summary, these two L-GPAs are quite different in their interpretations and in the patterns of their correlations. The Index-Based L-GPA uses information about the school distributions of U-GPAs and LSAT scores to adjust the L-GPAs of candidates from that school. These Index-Based L-GPAs, therefore, build information about a law school's average LSAT score and average U-GPA into the computation of Index-Based L-GPAs for the candidates from that school. The 4-pt L-GPA focuses on the candidate's standing within his or her school, and is independent of the law school's selectivity. Each candidate's 4-pt L-GPA (i.e., relative standing within his or her school) may still be related to the candidate's U-GPA and LSAT score, but these relationships are expected to be much weaker than those for the Index-Based L-GPA.

The high correlations between the two versions of the L-GPA and bar examination scores indicate that there is substantial overlap in what is being evaluated on the bar examination and what is being evaluated in law schools. The strong positive correlation (.63) between the 4-pt L-GPA and bar examination scores indicate that relative performance in law school (independent of the selectivity of the law school) is an important determiner of performance on the bar exam; the 4-pt L-GPA accounts for almost 40% of the variance in bar examination scores. The Index-Based L-GPA has a

somewhat higher correlation with bar examination scores (.68) indicating that the strength of the relationship between grades in law school and performance on the bar examination can be enhanced by taking the selectivity of the law school into account; the Index-Based L-GPA accounts for about 47% of the variance in bar examination scores

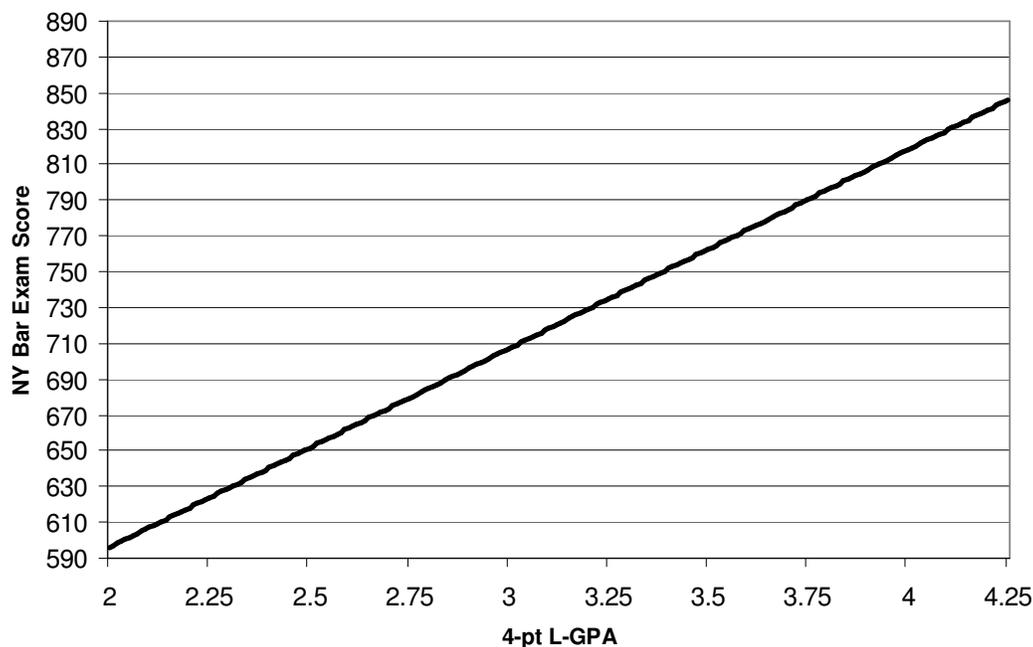
The bar examination scores have their highest correlation with the Index-Based L-GPA and their second-highest correlation with the 4-pt L-GPA. So it is clear that performance on the bar examination is strongly related to performance in law school. The correlation of bar examination scores with LSAT scores is fairly high, and the correlation with U-GPA, which has the lowest value of the four correlations, is also reasonably high. Note that U-GPA has a higher correlation with bar examination scores than it has with the LSAT scores. This is somewhat surprising, because the bar examination is taken three or more years after graduation from college, while the LSAT is generally taken closer to the completion of undergraduate education.

5.7 Linear Regression

Multiple linear regression is a technique used to predict values of one variable using one or more other variables.³ Linear regression analyses can be used to examine the relationship between measures of achievement before law school, achievement in law school, and performance on the bar examination.

As a first step, we can examine how well L-GPA predicts performance on the bar exam. As indicated above, both the 4-pt L-GPA and the Index-Based L-GPA have high correlations (i.e., strong linear relationships) with bar examination scores; therefore, both do a good job of predicting scores on the bar exam. Figure 5.6 displays the linear regression equation resulting from using 4-pt L-GPA to predict NY bar exam score.

Figure 5.6
Example Linear Regression Line Plotting NY Bar Exam Score with Law-School GPA



A commonly used measure of the strength of the association (or prediction accuracy) between the dependent variable (the variable to be predicted; e.g., NY bar exam scores) and the independent variables (those used to make the prediction; e.g., L-GPA), is the percentage of variance in the dependent variable accounted for (or predicted) by the independent variable. This measure is equal to the squared correlation between the dependent variable and the predicted value of the dependent variable based on the regression equation. It is generally designated as R^2 , and will be used in reporting the results for linear regression, logistic regression, and path models reported in this section.⁴

As indicated earlier, the 4-pt L-GPA accounts for about 40% of the variance in the bar examination scores. So, this one variable does a fairly good job of predicting performance on the bar examination. The Index-Based L-GPA does an even better job of predicting performance on the bar examination, accounting for about 47% of the variance in the bar examination scores.

In general, the accuracy of prediction of the dependent variable can be improved (i.e., R^2 can be increased) by using additional variables to predict the dependent variable. Regression analyses can be used to determine a weighted combination of several variables that provides the best prediction of the dependent variable. If the 4-pt

L-GPA, the U-GPA, and the LSAT score are all used to predict the bar examination score, rather than just the 4-pt L-GPA, the percentage of variance accounted for by the regression equation increases from about 40% to about 56%. That is, adding each candidate's U-GPA and LSAT score to the regression equation produces a substantial improvement in the predictive accuracy over what can be achieved with the 4-pt L-GPA alone.

If the Index-Based L-GPA, the U-GPA, and the LSAT score are all used to predict bar examination scores, rather than just the Index-Based L-GPA, the percentage of variance accounted for by the regression equation increases by a very small amount over what can be achieved with the Index-Based L-GPA alone, and the overall variance accounted for by the regression equation is essentially the same, about 47%. That is, adding each candidate's U-GPA and LSAT score to the regression equation based on the Index-Based L-GPA does not significantly improve the prediction based on the Index-Based L-GPA alone. The Index-Based L-GPA already includes information about U-GPAs and LSAT scores (for the law school), and adding the individual values of these variables to the regression equation did not add much to the overall accuracy of the prediction.

5.8 Logistic Regression

Similar to linear regression, logistic regression is used to examine and/or predict values of one variable using one or more other variables. However, in logistic regression the variable being predicted is a binary variable (taking two values; e.g., one or zero, pass or fail) and logistic regression finds a nonlinear equation (a logistic equation) that fits the observed pattern of scores. For example, in this case we are interested in examining the effectiveness of L-GPA, U-GPA, and LSAT scores in predicting whether or not a candidate passes the bar.

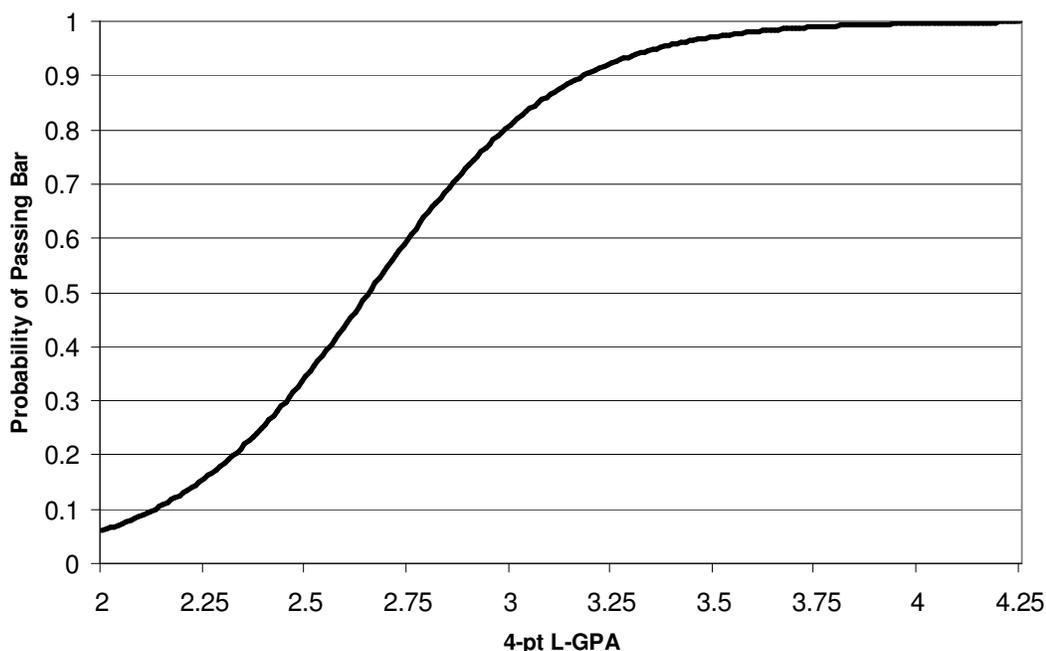
Logistic functions have a characteristic shape, like that of Figure 5.7. They start out near zero for very low values of the independent variable, increase gradually and then more rapidly as the independent variable increases, and then flatten out as they approach a value of one. In this application, the logistic function represents the probability of passing the bar exam, which is necessarily between 0.0 and 1.0.

Using the 4-pt L-GPA to predict the probability of passing the bar examination accounts for about 34% of the variance in the pass/fail outcome. Again, this one variable does a fairly good job of predicting performance on the bar exam. The Index-Based L-GPA does an even better job of predicting pass/fail outcomes on the bar exam, accounting for about 42% of the variance.

Using the 4-pt L-GPA, U-GPA, and LSAT score to predict the probability of passing the NY bar exam, the percentage of variance accounted for increases from about 34% of the variance to about 44% of the variance, a substantial increase. When using the Index-Based L-GPA, U-GPA, and LSAT score to predict the probability of

passing the bar exam, the percentage of variance accounted for is about the same as it is for the Index-Based L-GPA alone. Again, adding the U-GPA and LSAT score to the Index-Based L-GPA does not improve its predictive ability to any significant extent. The best prediction occurs when the 4-pt L-GPA is used in conjunction with LSAT scores and U-GPA.

Figure 5.7
Example Logistic Regression Curve Plotting the Probability of Passing the NY Bar Exam with Law-School GPA



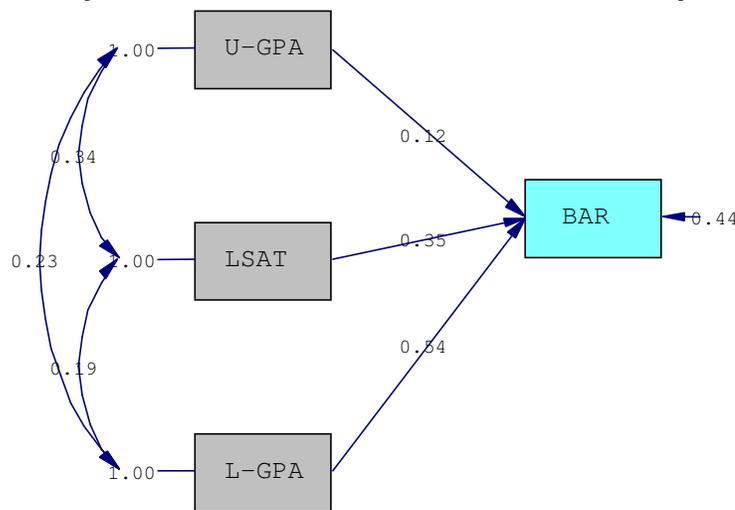
5.9 Path Analysis

Path analysis is an approach to modeling relationships among a set of variables, which aims for an understanding of the direct and indirect effects of certain variables on certain other variables. Path analysis models require explicit specification of the patterns of relationships among variables and incorporate a graphical representation of these relationships in what is called a *path diagram*. The results of a path analysis include estimates of the strength of the relationships between variables and the proportion of variance in specific variable(s) explained by the model. The relationships among variables and the proportion of variance explained are interpreted in ways that are similar to those employed in linear regression models.

For the school-based sample, we are interested in the effects that L-GPA (here,

4-pt L-GPA⁵), LSAT score, and U-GPA have on NY bar exam score. Figure 5.8 displays the path diagram for a simple path analysis model, in which it is assumed that the 4-pt L-GPA, LSAT score, and U-GPA all have direct effects on the bar examination score. In this path diagram, the boxes represent variables in the model. For example, the box labeled “Bar” represents the NY bar exam score. The two-way arrows on the left represent the correlations among variables that are expected to be related, but for which no directional influence (e.g., one of the variables has an effect on the other) is specified. For example, the correlation between U-GPA and LSAT is .34, reflecting a moderate positive correlation. The one-way arrows going from one box to another represent the effects of one variable on another.⁶ For example, the arrow from U-GPA to “Bar” is associated with a value of 0.12, reflecting a small effect. The number, “0.44”, to the right of the box labeled “Bar” in Figure 5.8 represents the proportion of variance *not* explained by the path model, or the error variance.⁷ If we multiply the error variance by 100, we get the percentage of variance not explained in a variable. For example, about 44% of the variance in NY bar exam scores is not explained by the model in Figure 5.8. Since about 44% of the variance is not explained, about 56% is explained by the model as a whole.

Figure 5.8
Path Analysis Model 1 for the School-Based Sample



Note: 55.7% of the variance in NY bar exam scores is explained by the model.

The model in Figure 5.8 is similar to a multiple linear regression model, and the results are the same whether the path analysis or linear regression models are employed. The percentage of variance in bar scores explained by the three variables in this model is about 56% (or 100% - 44%).

However, path analysis is more flexible than linear regression models and allows us to incorporate plausible hypotheses into the specifications of the model and thereby

draw stronger conclusions from the results. In particular, we can examine path models that allow for different patterns of direct and indirect effects of 4-pt L-GPA, LSAT score, and U-GPA on bar examination scores. For example, it seems reasonable to assume that a student's degree of readiness for law school, as measured by U-GPA and LSAT scores, might influence performance on the bar examination directly, but might also have an influence on a candidate's performance in law school and thereby have an indirect effect on bar examination scores. This kind of indirect effect (i.e., from U-GPA and LSAT to 4-pt L-GPA and then from the 4-pt L-GPA to bar examination performance) is not easily examined using simple regression models.

The bar examination does not test candidates on content learned in college, nor does it focus on the kinds of cognitive skills (e.g. critical reading and thinking, writing, analytic skills) developed in college and assessed to varying degrees by U-GPA and LSAT score. These fundamental skills would certainly be needed on a bar exam, but they are not explicitly tested on the bar exam. Rather, both the objective components (the MBE and the NYMC) and the essay component (including the MPT and the essay test) of the NY bar exam evaluate a candidate's skill in applying basic legal principles to various fact situations, a skill that is presumably developed in law school. It seems reasonable therefore to assume that at least some of the effects that the competencies measured by U-GPA and LSAT have on bar examination performance occurs indirectly through their effects on performance in law school.

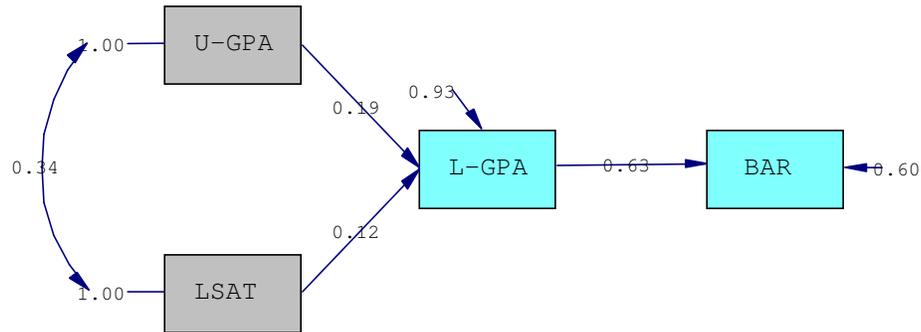
In addition, given that U-GPA and LSAT scores are obtained three to four years before a candidate takes the bar examination and that law school is generally completed a few months before the first-time takers sit for the bar examination in July, it seems likely that performance in law school might have a stronger and more direct effect on bar examination performance than LSAT scores or U-GPA.

Figures 5.9 and 5.10 display two simple path analysis models that incorporate indirect effects of U-GPA and LSAT scores on bar examination scores by modeling the effects of U-GPA and LSAT score on 4-pt L-GPAs. The model in Figure 5.9 removes the hypothesized direct effects of U-GPA and LSAT scores on bar examination scores and specifies that U-GPA and LSAT score operate indirectly through 4-pt L-GPA. That is, the U-GPA and LSAT score are assumed to have an effect on 4-pt L-GPA, which in turn has an effect on bar examination scores. This model accounts for about 40% of the variance in bar examination scores, which is less than that accounted for by the linear regression model with 4-pt L-GPA, U-GPA, and LSAT used to predict bar examination scores.

The third model, which is presented in Figure 5.10, adds the direct effects of U-GPA and LSAT scores on NY bar exam scores to the model in Figure 5.9, such that U-GPA and LSAT scores have direct and indirect effects on NY bar exam scores. In the model in Figure 5.10, it is assumed that performance in law school (as measured by the 4-pt L-GPA) has a direct effect on bar examination scores, and that readiness for law school (as measured by U-GPA and LSAT scores) has both an indirect effect, through

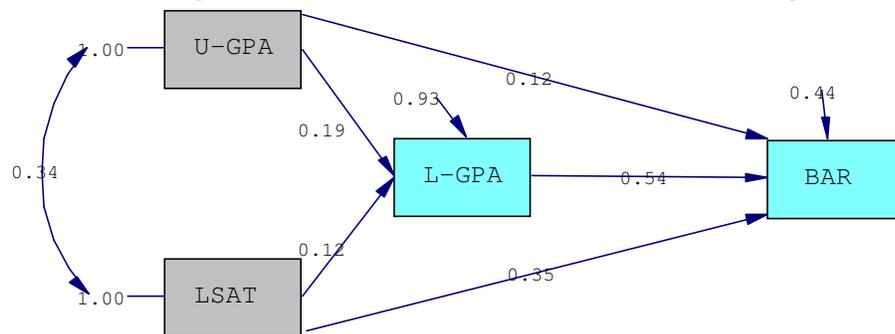
performance in law school, and in addition, a direct effect on performance on the bar exam. This model explains about 56% of the variance in bar examination scores. Of the three variables used to explain performance on the bar exam in this model, the 4-pt L-GPA has the largest effect.

Figure 5.9
Path Analysis Model 2 for the School-Based Sample



Note: 6.7% of the variance in L-GPA scores is explained in the model. 40.1% of the variance in NY bar exam scores is explained in the model.

Figure 5.10
Path Analysis Model 3 for the School-Based Sample



Note: 6.7% of the variance in L-GPA scores is explained in the model. 55.7% of the variance in NY bar exam scores is explained in the model.

Several aspects of the path modeling results are worth mentioning here. First, as was the case for the regression analyses, performance in law school has the largest effect on bar examination scores. This makes sense because we would expect that bar examination performance would be closely related to performance in law school, rather than to earlier measures of aptitude and general academic achievement, such as U-GPA and LSAT score.

Second, while 4-pt L-GPA has the largest effect on NY bar exam score, the effects of U-GPA and LSAT score on bar examination score add some explanatory power to the models. They add about 15% to the percentage of variance in bar examination scores explained by the model.

Third, Models 1 and 3 are statistically equivalent. This means that from a statistical point of view, the models are interchangeable in terms of how well they predict bar examination scores (the percentage of variance explained by these two models is identical). However, from a substantive point of view, the third model is more interesting than the first model, because it exhibits the effects of U-GPA and LSAT scores on 4-pt L-GPA, as well as the direct effects of U-GPA and LSAT scores on bar examination scores.

Note that, although the models explain a substantial part of the variance in bar examination scores, they leave about 44% of the variance in the bar examination scores unexplained. Some of this residual variance is due to a basic difference between the models (which are all very simple) and life (which is very complicated) and to errors of measurement (none of the measures is perfectly reliable), but some of it is also no doubt due to factors not included in the models (e.g., motivation, physical and psychological well-being, ability to spend time preparing to take the bar exam, etc.).

Notes

1. Scaling here means subtracting the group mean from each score and dividing by the group standard deviation.
2. In computing z-scores for a particular variable, the mean and SD of the variable are computed for the reference population. The z-score for a particular candidate on a particular variable is then calculated by subtracting the mean score on that variable in the reference population from the candidate's score on the variable and dividing the result by the SD of the variable in the reference population.
3. Linear regression develops a linear equation (one that corresponds to a straight line) that gives one variable (the dependent variable) as a function of the other variables (the independent variables).
4. Higher values of R^2 mean a stronger association (or better prediction), with the maximum R^2 being 1.0, which corresponds to 100% of the variance in the dependent variable being accounted for (or predicted) by the independent variable.
5. Index-Based L-GPA was not included in the path analysis model results because this variable incorporates much of the U-GPA and LSAT effects. Because of this, path models that include U-GPA, LSAT scores, and Index-Based L-GPA lead to greatly reduced effects of U-GPA and LSAT on bar exam scores.
6. These effects are referred to as *path coefficients*. The path diagrams in this report contain *standardized path coefficients*, which provide an easier interpretation of the relative sizes of the effects in the model.
7. Error variance is also referred to as the *disturbance* and can be thought of as $1 -$ the proportion of variance in a variable that is explained by the model.

6. Conclusions

The analyses in this study address four main questions and a number of subsidiary questions. The four main questions were:

1. What impact will the current and proposed changes in the passing score have on overall pass rates?
2. What impact will the current and proposed changes in passing score have on pass rates for subgroups defined in terms of gender, race, and age?
3. To what extent does performance in law school predict performance on the New York Bar Examination?
4. To what extent do undergraduate GPA and LSAT scores predict performance in law school and performance on the New York Bar Examination?

The database developed for this study is quite rich in a number of ways. It includes a large number of candidates and a wide range of data on each candidate, and therefore, makes it possible to examine these questions in some detail.

Characteristics of the Candidates

Relationships among the demographic variables (gender, race/ethnicity, age, and origin of legal education) were examined in Section 2.

Most of the candidates in New York are graduates of domestic law schools, but a substantial number of the candidates (over 20%) are graduates of foreign law schools. The graduates of foreign law schools are quite different from the graduates of domestic law schools in a number of ways. The foreign-educated group has relatively high percentages of Asian/Pacific Islanders and relatively low percentages of Caucasian/Whites. The foreign-educated group includes a slightly higher proportion of males (about 53%) than the domestic-educated group (about 50%). Foreign-educated candidates also tend to be a little older than domestic-educated candidates when they take the bar exam. The scores of the foreign-educated candidates are substantially lower than those of the domestic-educated candidates on all three parts of the NY bar exam, and their pass rates are also much lower. Given these differences, we have reported results separately for domestic-educated candidates and foreign-educated candidates.

Candidates taking the bar examination for the first time tend to do much better on the NY bar exam than candidates who are repeating the exam. In addition, candidates who are repeating the examination for the first or second time tend to do better than candidates who have already taken the examination a number of times. Because of the

substantial differences in performance between first-time takers and repeat takers, we also analyzed the results for these two groups separately. So, results are reported separately for domestic-educated candidates and foreign-educated candidates, and within each of these major groups, for first-time takers and repeat takers.

6.1 Impact of Change in Passing Score on Pass Rates

The first two questions posed for this study are addressed in some detail in Sections 3 and 4. Section 3 describes the performance of various groups of candidates on the different components of the NY bar exam and on the examination as a whole. Section 4 reports pass rates as a function of passing score (from 660 to 675) for various groups.

The analyses in Section 3 indicate that the results for different groups tended to be consistent across the different components of the exam. That is, groups that do well on one component (e.g., the essay) also do well on the other two components (e.g., MBE and NYMC), and groups that don't do as well on one component also don't do as well on the other components.

The one noteworthy exception to this result is a consistent tendency for females to do better on the essay component and for males to do better on the MBE; this effect was not very large on average, but it was consistent across racial/ethnic groups, the foreign and domestic-educated groups, and first-time takers and repeat takers. These two tendencies (females doing better on the essay component and males doing better on the MBE) go in opposite directions, and they tend to cancel out. As a result, in most analyses, females and males do about equally well in terms of their total bar examination scores and pass rates.

The domestic-educated candidates do much better on the examination than the foreign-educated candidates, and, within both of these groups, the first-time takers do better than the repeat takers. Candidates who had already failed the examination a number of times had very low pass rates.

Increases in the passing score produce decreases in the passing rates. Given that these analyses were all applied to a fixed data set, this is necessarily the case. The results reported here do not necessarily represent the passing scores that would be associated with a particular passing score on any future test date, but they provide a good general indication of what to expect.

The current and planned increases in the passing score tend to have the largest impact on groups with average scores in or near the range over which the passing score is projected to vary (660 to 675). Among the domestic-educated first-time takers, the Black/African American group and other minority groups tend to suffer sharper declines in pass rates than the Caucasian/White group as the passing score goes up (see Table 4.2). In addition, because the minority groups have lower pass rates to

begin, a decrease of a few percentage points in the pass rate has a larger proportional impact on the pass rates for these groups than it would if the initial pass rates were higher.

The domestic-educated repeat takers tend to have low pass rates (about 23%) for a passing score of 660. The pass rates decline to about 16%, as the passing score increases to 675 (a drop of almost a third). Because an increase in the passing score will yield a different population of repeat takers (one with higher scores on their previous attempts), the actual pass rates for repeat takers are likely to be somewhat higher than those reported in Section 4, especially for passing scores of 670 and 675.

As noted above, the foreign-educated first-time takers have relatively low scores on the bar examination and relatively low pass rates, and these pass rates decline from about 46% to about 40% as the projected passing score increases from 660 to 675. The foreign-educated repeaters have very low pass rates, which decline from about 15% to about 11% as the projected passing score increases from 660 to 675.

6.2 Impact of law-school GPA, undergraduate GPA, and LSAT scores on bar examination performance

Performance on the bar examination is strongly related to performance in law school, as measured by law-school GPA. A strong relationship between law-school GPA and bar examination scores was observed when the GPAs were standardized to have the same mean and standard deviation in all schools (the 4-pt L-GPA), and an even stronger relationship was observed when the law-school GPAs were scaled to reflect differences in selectivity among law schools (the Index-Based L-GPA).

Undergraduate GPA and LSAT scores are indirectly related to bar examination performance through law school performance and through the selectivity of the law school attended. Candidates with relatively high undergraduate GPAs and LSAT scores tend to have higher GPAs in their law schools, and they tend to attend law schools in which students generally had higher undergraduate GPAs and LSAT scores.

In general, law-school GPA is strongly related to performance on the bar examination. The best predictor of performance on the bar examination was achieved using the 4-pt L-GPA (which reflects a candidate's relative standing in terms of GPA within their law school), with the LSAT scores and undergraduate GPA as ancillary predictors.

Glossary

Correlation: An indicator of the strength of the linear relationship between two variables. Correlations range from -1 to +1. The closer the correlation is to -1 and +1, the stronger the linear relationship. Positive correlations mean that an increase in one variable is associated with an increase in the other. Negative correlations mean that an increase in one variable is associated with a decrease in the other.

Histogram: A bar graph containing a distribution of scores that is based on tabulated counts of scores.

Linear regression: A procedure used to predict values of one variable using one or more other variables. Technically, linear regression finds the best fitting linear equation (based on one or more scores) to predict another score.

Logistic regression: A procedure used to predict values of one categorical variable using one or more other variables. Technically, logistic regression finds the best fitting nonlinear equation (logistic equation) on one or more scores to predict a categorical variable (e.g., pass/fail on the bar exam).

Mean: A measure of the central tendency of a set of scores. Technically, the mean is defined as the sum of the scores divided by the number of scores. The mean may also be referred to as the average.

Normal Distribution: A bell shaped curve that is commonly used in statistics. Technically, it is a score distribution defined by a specific equation and has a shape defined by location (mean) and scale (standard deviation) parameters. A common form of the normal distribution is the *standard normal distribution* (see definition below).

Pass rate: The percentage of a group of candidates that would pass at a particular passing score.

Passing score: The total numerical score on an examination that a candidate has to achieve in order to pass the exam.

Path analysis: An approach to modeling relationships among a set of variables and in examining the direct and indirect effects of certain variables on certain other variables. Path analysis models require explicit specification of the patterns of effects among variables and incorporate a graphical representation of these effects. Technically, path analysis finds the best fitting set of equations implied by the specified model.

Path coefficients: A parameter that represents the direct effect of one variable on another in a path analysis.

Path diagram: A graphical representation of a path analysis model.

Reliability: The consistency or repeatability of the scores produced by a measurement procedure; the precision in the scores yielded by a measurement instrument. Reliability is defined as the variance in “true” scores divided by the variance in observed scores. The observed score for an individual is assumed to consist of the true score plus an error component, and therefore, the variance in observed scores is equal to the variance in the true scores plus the error variance. So the reliability is always between 0.0 and 1.0. Reliability can also be interpreted as a correlation coefficient, with values between 0.0 and 1.0. Higher values for reliability reflect greater precision and less random error, and low values for reliability reflect a higher proportion of random error and therefore less precision.

Restriction of range: A phenomenon that occurs when a particular sample or group of interest has scores that represent a more limited range of scores than another sample or group of interest. This difference in score range results in correlation coefficients that are smaller (attenuated), because the full range of scores is not represented by both samples/groups.

Sample size: The number of observations in a data set. A sample is assumed to be drawn from a larger population of possible observations.

Scaling: The process of transforming a set of scores on a test (or other measure) so that they have the same mean (or average) and same standard deviation (or spread) as scores on another test (or other measure). The intent of scaling is to make the scores comparable in the sense that an average or typical score on both tests would be about the same, the highest scores on both tests are about the same, and the lowest scores on both tests are about the same. Scaling is especially useful in cases where scores on very different scales (e.g., scores on a fifty-item test and on a hundred-item test) are to be compared or combined. Scaling does not change the relative values of scores; the highest score remains the highest score, the second highest score remains the second highest score, etc. The methods used to scale scores are the same as those used to change temperatures from one scale (e.g., Centigrade) to another (e.g., Fahrenheit).

Standard deviation (SD): A measure of the spread in a set of scores. Technically, the standard deviation is defined as the square root of the average squared deviation from the mean. About 68% of the scores in a distribution will be within one standard deviation of the mean.

Standard error of the mean (SEM): An indication of the uncertainty in the estimate of the mean over repeated samples from the same population. Technically, it is the standard deviation divided by the square root of the sample size.

Standard normal distribution: A normal distribution with a mean of zero and a standard deviation of one.

Standardized path coefficient: Path coefficients obtained when the original variables in a path model have been scaled to have a mean of zero and a standard deviation of one (see z-score below). Standardized path coefficients allow for examining the relative magnitudes of effects in a path model.

Z-score: A set of scores that have been scaled to have a mean of zero and a standard deviation of one. Technically, the z-score is defined as the original score minus the mean of the original scores divided by the standard deviation of the original scores. Also sometimes called standardized scores.

Appendix A

Authorization for Release of Law-School Information

New York State Board of Law Examiners
Corporate Plaza, Building 3
254 Washington Avenue Extension
Albany, NY 12203

AUTHORIZATION TO PERMIT LAW SCHOOLS
TO PROVIDE DATA TO THE NEW YORK STATE
BOARD OF LAW EXAMINERS FOR THE
BAR EXAMINATION RESEARCH PROJECT

I authorize my law school(s) _____ [fill in U.S. law school name(s)] to provide the New York State Board of Law Examiners (the Board) and its designated researchers, with my law school Grade-point average and class standing (by rank or quartile or however it is tracked by the law school), and a copy of my transcript, with the understanding that the Board will use the data for research in order to enhance the validity of bar examination scores. In so authorizing my law school(s) to provide this data to the Board for research purposes, I specifically waive any confidentiality afforded my educational records under the Family Educational Rights and Privacy Act, Title 20 USCA § 1232g or otherwise.

The Board will maintain the confidentiality of the data, and analyses will be reported only in the aggregate to maintain the anonymity of individuals. (Your consent to the release and use of this information to the Board is essential in ensuring that the data accurately represent the full population of candidates for the New York Bar. Your decision to grant or withhold consent will not affect your scores in any way.)

I hereby release, discharge, and agree to hold harmless my law school(s), its agents, representatives, or appointees from any and all liability arising out of this authorized release of my law school records.

Dated

Signature of Applicant

Print Name

U.S. Social Security Number

Date of Birth

Appendix B

Authorization for Release of Law School Admissions Council Information

New York State Board of Law Examiners
Corporate Plaza . Building 3
254 Washington Avenue Extension
Albany, NY 12203
AUTHORIZATION TO PERMIT THE
LAW SCHOOL ADMISSION COUNCIL (LSAC)
TO PROVIDE DATA TO THE
NEW YORK STATE BOARD OF LAW EXAMINERS FOR THE
BAR EXAMINATION RESEARCH PROJECT

I authorize the Law School Admission Council (LSAC) to provide the New York State Board of Law Examiners (the Board) and its designated researchers, data from my LSAC file, including but not limited to demographic, academic, and LSAT performance data, with the understanding that the Board will use the data for research in order to enhance the validity of bar examination scores. The Board will maintain the confidentiality of the data, and analyses will be reported only in the aggregate to maintain the anonymity of individuals. (Your consent to the release and use of this information to the Board is essential in ensuring that the data accurately represent the full population of candidates for the New York Bar. Your decision to grant or withhold consent will not affect your scores in any way.)

Dated

Signature of Applicant

Print Name

U.S. Social Security Number

Date of Birth

LSAC Registration Number (if available)

Appendix C

Expanded Description of Data Sources

Data Sources

Staff at the NYBLE planned and coordinated the transfer of several sources of data to staff at NCBE. These sources of data were catalogued, processed, and combined by NCBE staff to assemble a database to be used to examine several aspects of candidate performance on the NY bar exam. In this appendix, we provide a description of the procedures for assembling the database used for the analysis presented in this report.

Database Elements

The database used in this report was based on five primary data sets which are described briefly below. The descriptions of the data sets include the information contained in each data set and the data elements that were used to link the data sets to each other.

The first data set consisted primarily of demographic information (e.g. age, gender, race/ethnicity, citizenship, and country of legal education) collected by a survey of NY bar exam candidates at the time of application for the July 2005 administration of the NY bar exam. For purposes of matching data sources and quality control, the data also included raw and scaled scores on the July 2005 MBE and was indexed by the New York applicant identification number (i.e., SSN for domestic candidates or a pseudo SSN for international candidates). In total, this data set consisted of unique records for 9,218 of the candidates who tested in July 2005. Responding to this survey was voluntary, and not all of the candidates completed it.

The second data set contained detailed performance information for the full set of candidates who took the NY bar exam in July 2005. These records included raw and scaled scores on each component of the NY bar exam (i.e., individual essays, the Multistate Bar Examination, and New York Multiple Choice) along with the scaled overall essay score and the final reported score for the 10,175 candidates who completed the NY bar exam. This file also provided information regarding the total numbers of attempts for each candidate on the NY bar exam (including the July 2005 administration). The index for this set of files was applicant seat number, which is coded on an answer sheet by candidates who sat for the MBE in New York. Because the files with the demographic data and the bar examination performance data employed different keys for uniquely identifying candidates (seat number vs. applicant identification number), NCBE staff also requested and received a file from the NYBLE that mapped the applicant seat number to the applicant ID. After these two files were combined, the database included performance information on the 10,175 candidates who took the NY bar exam in July 2005 and demographic information on the 9,218 candidates who responded to the demographic survey.

The third data set included birthdates and law school graduation dates for July 2005 New York bar admission respondents (i.e., candidates that volunteered to participate). In a meeting with representatives of the NYBLE, NCBE, and New York law schools, the law-school representatives expressed an interest in the relationships between ages when candidates graduated law school and when they sat for the NY bar exam and the other variables in the study. Subsequently, the NYBLE supplied NCBE with data containing candidate birthdates and law school graduation date (if applicable) for the 10,175 July 2005 NY bar exam respondents. Based on the available information (birthdate information was missing for 5 candidates and law school graduation date was missing for 2,175 candidates), NCBE staff calculated several age-related variables including age at July 2005 bar examination administration, age at law school graduation, and time interval between law school graduation and the bar examination administration. As part of this process, internal consistency checks were implemented to flag potentially illogical or unlikely values (i.e., taking the bar examination before graduation from law school or age at law school graduation less than 20 or greater than 70) for further verification.

The fourth data set was obtained from LSAC and included demographic information (e.g. date of birth, gender, ethnicity, name, SSN, undergraduate institution, undergraduate major) and performance data (e.g., undergraduate grade-point average and average LSAT score from all attempts) for the July 2005 NY bar exam candidates who gave permission for the release of these data (see Appendix A). Candidates were asked for permission to obtain these data from LSAC when they applied to take the NY bar exam. From the list of authentic IDs for the 10,175 candidates who sat for the July 2005 administration of the NY bar exam, LSAC information was available for 7,644 individuals. Not surprisingly, very few of the candidates who had graduated from a foreign law school were included in the LSAC data files. As a result, the foreign-educated candidates did not generally have values for the variables supplied by LSAC (e.g., undergraduate GPA and LSAT scores).

The fifth data set contained candidates' law school performance. Over the course of several months, NYBLE staff collected information from individual law schools regarding the performance of their students who had given permission for the release of this information (see Appendix B). The following information was solicited from law schools for candidates who agreed to release their records: law-school GPA, class rank, and "standing." Law school grade-point average was the information most frequently provided by law schools, but the scale used to report GPA sometimes varied from school to school (e.g. GPA on a 4-point scale vs. GPA on 100-point scale), and sometimes varied even within school if candidates had graduated under different grading policies (which only happened in a few cases; these cases were not included in analyses of GPA). Two law schools did not compute GPAs for their graduates, but agreed to have GPAs computed from the transcripts supplied to the NYBLE. This was done for one school, but could not be completed for the second school in time for this report. Class rank was less frequently reported and tended to consist of a range of types of rank information (e.g., "10 out of 100" or "top 50%"). "Standing" was

infrequently reported in the data obtained from law schools and tended to include a variety of information ranging from a repetition of class rank data to notes about students.

Because the data formats varied by school (paper, ASCII, spreadsheet), the imported data were checked for upload errors and inconsistencies and then re-checked against the original data files from schools, if necessary. For candidates who appeared to have attended more than one school (i.e., same name and/or identification number appearing in data files from more than one school), performance information was used from the law school at which the student spent the most time. For students for whom the length of time or status at each school was unclear, the data for their first submitted record were used for analysis.

In general, no data were available on law-school GPAs for the foreign-educated candidates. Some of these candidates had taken courses at American law schools, but, in all cases, this coursework seemed to relate to supplementary legal education and was not included in the variables describing law-school GPA.

Ultimately, law school data were obtained for 7,055 candidates who had graduated from 125 schools. Of these, 6,602 had reported law-school GPAs.

Database Construction

The database was assembled sequentially as the data became available. First, the New York demographic and bar examination scores were matched using applicant ID/seat number to identify corresponding records. As a check on this matching process, the MBE raw and scaled scores (i.e., information that appeared in both data sets) were compared for discrepancies. All 9,218 records from the New York demographics file (based on responses to the voluntary survey) matched correctly with one of the 10,175 records from the New York bar performance data set.

Next, this combined information was matched by applicant seat number with the corresponding record in the data set that contained the birthdates and law school graduation dates. After resolving a missing data problem for one candidate, comparisons were made between the only additional common information derivable in both data sets, candidate age, to check the integrity of the match. The age (in years) was identical for 8,364 of 10,175 candidates (82.2%). Most of the non-identical cases were only one year apart and the differences seemed explainable by candidates having a birthday between the time they completed the demographic information and sat for the July 2005 administration of the bar exam. Therefore, the match on applicant seat number appeared successful.

As a further quality control step, NCBE records from the July 2005 administration were compared to the file with the consolidated New York demographic and performance information. This process was complicated by the fact that some

candidates (e.g., those applying in more than one state) take the MBE in another state and have their score transferred to New York, and it therefore required a two-stage matching process. First, the consolidated file was matched by the New York applicant seat number; this resulted in matches for 9,823 seat numbers. As a second step, the applicant ID (i.e., SSN) was used to attempt to match the remaining 352 records to candidates who had taken the MBE in another jurisdiction and intended to transfer their MBE score from that jurisdiction to New York. A total of 323 records matched based on applicant ID information. The remaining list of unmatched SSNs was reconciled using MBE scores and birthdate (a value listed in both data sets). In nearly all cases, the candidate incorrectly coded their identification number on the MBE answer sheet (e.g., one number in the nine-digit string was inaccurate). After the two-step process, all 10,175 candidate records had verified MBE scores.

The LSAT data set was matched to this data set, which contained New York demographic and bar examination performance information, including the confirmed MBE scores. By using applicant ID, 7,093 available LSAT records matched to the combined data set of 10,175 candidate records. Because of confidentiality and security concerns, name information was not released to NCBE by NYBLE, nor was it consistently coded on the MBE answer sheet; thus, the options for resolving the remaining unmatched cases were limited. Attempts to use an algorithm to identify “close,” but inexact, applicant identification number matches were unsuccessful. Similarly, neither the use of candidate name for the few records where it was available from the MBE answer sheet nor birthdate information yielded additional matches.

Consultation with NYBLE staff regarding the issue of unmatched LSAT data indicated that candidate consent for the release of LSAT information was gathered prior to test administration. The conclusion was that unmatched applicant IDs represented candidates who provided LSAT release at the time of application, but subsequently did not sit for the July 2005 administration of the NY bar exam. Analyses were also implemented for the candidates who sat for the NY bar exam but didn’t have a match with the LSAT data. The vast majority of these unmatched candidates provided demographic information indicating that their education was outside of the United States. Thus, it seems reasonable to conclude that most of these remaining candidates were foreign-educated students for whom the LSAT wasn’t required and a small percentage of domestic candidates who didn’t provide consent for the release of the LSAT data. The rate of candidates not agreeing to release their LSAT data is similar to other LSAT data collection efforts by NCBE.

As mentioned above, school data were received in individual data sets from each school for the graduates from that school who agreed to have the schools supply these data and were combined into a master school data set before matching school data with other data. School data for 7,055 candidates were matched to the database with New York demographic data, NY bar exam performance data, and LSAC data. For the remaining 3,120 candidates (out of 10,175) either the candidate did not give permission for the release of the data by the law school or the law schools could not supply the

data.

Database Finalization

The collection methods used in this study resulted in the availability of the same information from multiple sources for some of the variables (e.g., gender, ethnicity, MBE scores, birthdates, age at law school graduation, age at bar exam). As indicated above, at several points in the matching process, comparisons were made across data sets to verify accuracy using this redundant information. As a final step in the database preparation process, a few additional analyses were implemented to identify and rectify potentially errant or conflicting data.

Two potential sources of gender information were available for the 10,175 candidates who sat for the July 2005 administration, one from the demographic survey data set and one from the LSAC data set. For the majority of candidates, the final assignment of a code for gender was straightforward because the data in the two data sets was consistent ($n = 7,625$) or gender information was available from only one source (i.e., 2,544 candidates with missing gender information in one data set but not the other). Only six records had conflicting information (e.g., a person was listed as male in one data set and female in the other). For these six records, examination of candidate names provided clear guidance as to the likely gender. Implementing these decision rules yielded counts of 4,557 females, 4,771 males, and 847 candidates with a value of "Omitted."

A similar situation occurred with racial/ethnic information. The data reconciliation process was also aided by the NYBLE decision to use the same race/ethnicity categories as the LSAT in its demographic survey. Once again, the race/ethnicity of the vast majority of candidates ($n = 7,178$) was consistent in the two data sets (including candidates with "omitted" racial/ethnic information in both data sets) or had a specific racial/ethnic information coded in one data set and no racial/ethnic information in the other ($n = 2,915$). For the 82 candidates with conflicting specific racial/ethnic information, the race/ethnicity code in the New York survey-based demographic data set was used for the analyses.

The MBE scores appeared in several data sets. As mentioned above, these values were checked to verify the matching process. The only differences appeared as a result of score transfers. The information in data sets received from the NYBLE was all consistent. Because the data set with MBE scores had information reported to one decimal place for all candidates, these data differed slightly from NYBLE for those candidates who transferred scores from a jurisdiction that had a MBE score reporting rule different from New York. The MBE scores used for the analyses were the ones provided by the NYBLE.

Candidate birthdate was also available from several data sets (i.e., New York data set with date of birth, MBE score data set, and LSAC data set). For 10,029 of the

candidates, the birthdate was consistent across the three data sets (or missing in one data set and consistent across the other two). For 86 of the remaining 146 records where birthdate was inconsistently reported, the birthdate included in the database was the value that was consistent across two of the three sources. For the remaining 60 records, one date was missing (usually the LSAT birthdate) and the two existing dates were inconsistent. If one of the birthdates was illogical or unreasonable (e.g., was listed as 1/1/2005), the other date was the final coded value. If both birthdate values were reasonable and less than one year apart, the birthdate from the New York date data set was included in the database. If the birthdates were more than a year apart and an age was available from the New York demographic data set, the birthdate that provided the closest match to the candidate's reported age was used in the database. For any remaining mismatches, the New York date data set information was used as the final value.

The value that represented age at the time of the bar examination was calculated by taking the difference between date of the July 2005 administration and birthdate values as described above. This newly calculated age value was compared to self-reported age from the New York demographics data set to verify that the values were reasonable. As noted previously, nearly all of the candidates had a calculated age that was within a year of self-reported ages. The age value for the nine examinees where the difference was greater than one year was verified by checking that the calculated age was more reasonable than the self-reported value.

Age at law school graduation was calculated by taking the difference between graduation date and the birthdate. Once again, this calculated age was compared to self-reported ages to verify reasonableness. Seven unusual ages at law school graduation were identified – all of these calculated ages were less than 16 and four were negative. For these seven records, the law school graduation age was treated as missing because the birthdate information was not in question. In addition, two other ages at law school graduation were treated as missing data because the calculated values were more than one year greater than age at bar attempt.

As a final step in the data processing, a generic identification number was created to eliminate the need to carry any specific identifying information (e.g., candidate name, SSN, or seat number) forward into the database used for purposes of analysis.

Appendix D

Standard Errors of Measurement for Variables in the School-Based Sample

D.1
Standard Errors of the Mean of Undergraduate Grade-Point Average, LSAT Scores, Law-School Grade-Point Average, and Total New York Bar Scores by Race/Ethnicity for the School-Based Sample

Race/Ethnicity		U-GPA	LSAT Score	4-pt L-GPA	Index-Based L-GPA	Total NY Bar Score
Caucasian/ White (n = 3,294)	SEM	0.01	0.13	0.01	0.02	1.06
Asian/ Pacific Islander (n = 416)	SEM	0.02	0.37	0.02	0.05	3.02
Black/ African American (n = 284)	SEM	0.02	0.38	0.02	0.05	3.54
Hispanic/ Latino (n = 151)	SEM	0.03	0.54	0.03	0.07	5.45
Puerto Rican (n = 54)	SEM	0.05	1.03	0.05	0.13	9.27
Other (n = 167)	SEM	0.03	0.56	0.03	0.07	4.93
Total* (N = 4,388)	SEM	0.01	0.12	0.01	0.01	0.95

*Total includes racial/ethnic groups not separately listed in the table.

D.2

Standard Errors of the Mean of Undergraduate Grade-Point Average, LSAT Scores, Law-School Grade-Point Average, and Total New York Bar Scores for Females by Race/Ethnicity and Gender for the School-Based Sample

Race/Ethnicity		U-GPA	LSAT Score	4-pt L-GPA	Index-Based L-GPA	Total NY Bar Score
Caucasian/ White (n = 1,545)	SEM	0.01	0.18	0.01	0.02	1.53
Asian/ Pacific Islander (n = 239)	SEM	0.02	0.49	0.02	0.06	3.82
Black/ African American (n = 186)	SEM	0.03	0.47	0.02	0.07	4.50
Hispanic/ Latino (n = 77)	SEM	0.05	0.74	0.04	0.10	7.76
Other (n = 96)	SEM	0.04	0.80	0.03	0.09	6.56
Total* (N = 2,187)	SEM	0.01	0.16	0.01	0.02	1.34

*Total includes racial/ethnic groups not separately listed in the table.

D.3

Standard Errors of the Mean of Undergraduate Grade-Point Average, LSAT Scores, Law-School Grade-Point Average, and Total New York Bar Scores for Males by Race/Ethnicity and Gender for the School-Based Sample

Race/Ethnicity		U-GPA	LSAT Score	4-pt L-GPA	Index-Based L-GPA	Total NY Bar Score
Caucasian/ White (n = 1,749)	SEM	0.01	0.18	0.01	0.02	1.47
Asian/ Pacific Islander (n = 177)	SEM	0.03	0.58	0.03	0.08	4.86
Black/ African American (n = 98)	SEM	0.04	0.62	0.04	0.09	5.74
Hispanic/ Latino (n = 74)	SEM	0.05	0.80	0.05	0.11	7.69
Other (n = 71)	SEM	0.05	0.74	0.04	0.11	7.26
Total* (N = 2,201)	SEM	0.01	0.16	0.01	0.02	1.35

*Total includes racial/ethnic groups not separately listed in the table.



Supreme Court of California

350 McALLISTER STREET
SAN FRANCISCO, CA 94102-4797

TANI G. CANTIL-SAKAUYE
CHIEF JUSTICE OF CALIFORNIA

(415) 865-7060

March 27, 2017

Faith Bautista, CEO
Mark Whitlock, Chair
Jack Miranda, Vice Chair
Gilbert Vasquez, Treasurer
Robert Gnaizda, General Counsel
National Diversity Coalition
15 Southgate Avenue, Suite 200
Daly City, CA 94015

Re: California Bar Exam

Dear Officers:

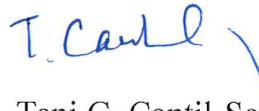
Thank you for your email of March 20, 2017, sharing the concerns of the National Diversity Coalition regarding the effect of the California bar exam on Black, Latino, and Asian American bar applicants. As you note, the deans of various California law schools recently asked the Supreme Court to temporarily lower the cut score of 144 that the State Bar of California applies to the Multistate Bar Exam portion of the exam. The court recognizes the impact of the low pass rate on all law school graduates is significant and deserves a thorough and expedited investigation. For your information, I attach my February 28, 2017, letter in which I directed the State Bar to undertake such an investigation.

The court currently lacks a fully developed analysis with supporting evidence from which to conclude that 144 or another cut score would be the most appropriate for admission to the bar in California. Because an informed and deliberative process will allow the court to engage in the best decision making, the court has declined to make adjustments in the absence of an investigation that examines all relevant data and factors.

My February 28 letter directs the State Bar to submit recommendations for any changes to the bar exam as soon as practicable, and in no event later than December 1, 2017. Under that directive, the State Bar will bring any recommended changes to the court as soon as they are ready. The court is aware the next bar exam is in July 2017 and will consider the application of any recommended changes to administration of that exam if those recommendations are timely and found appropriate.

Thank you again for advising the court of the National Diversity Coalition's concerns. Your input into the investigative process will be duly considered.

Sincerely,



Tani G. Cantil-Sakauye

Enclosure

cc: Mark Stone, Chair, Assembly Judiciary Committee
James Fox, President, State Bar
Elizabeth Parker, Executive Director, State Bar



Supreme Court of California

350 McALLISTER STREET
SAN FRANCISCO, CA 94102-4797

TANI G. CANTIL-SAKAUYE
CHIEF JUSTICE OF CALIFORNIA

(415) 865-7060

February 28, 2017

James Fox, President, Board of Trustees
Elizabeth Parker, Executive Director
State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: **California Bar Exam**

Dear Mr. Fox and Ms. Parker,

The Supreme Court of California received the attached February 1, 2017, letter from the Deans of 20 ABA-accredited law schools, in which the Deans request the court order the State Bar of California to lower the “cut score” of 144 that the State Bar applies to the Multistate Bar Exam (MBE) portion of the California bar exam. In support of their request, the Deans observe that California’s cut score of 144 is the second highest in the nation. They note California bar takers, on average, score higher on the MBE portion of the exam than the national average, yet fare significantly worse at bar admission — and they contend this is so because California uses an atypically high cut score.

Leaving aside the question of what has caused this situation, the Deans raise a significant concern, particularly given the high cost of attending law school and the reality that non-admission to the bar could mean the loss of employment opportunities while student loan debt continues to compound. It appears prudent to consider and address whether 144 is an appropriate score for evaluating the minimum competence necessary for entering attorneys to practice law in California.

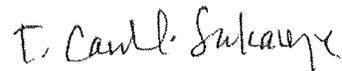
Of course, there may be reasons to question how much the cut score is contributing to the pass rate. For one, the cut score has remained consistent for three decades as overall bar pass rates have fluctuated. It is unclear, therefore, whether the July 2016 pass rate, a 30-year low, constitutes evidence that the cut score needs to be lowered.

James Fox
Elizabeth Parker
February 28, 2017
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Yet given the significant impact of the pass rate on law school graduates, the issue calls for a thorough and expedited study. The court is informed that the State Bar has begun investigating the potential causes of the declining California bar pass rates and is reviewing the bar exam and its grading system. The court agrees such an investigation is critically important, and directs the State Bar to ensure the investigation includes: (1) identification and exploration of all issues affecting California bar pass rates; (2) a meaningful analysis of the current pass rate and information sufficient to determine whether protection of potential clients and the public is served by maintaining the current cut score; and (3) participation of experts and stakeholders in the process, including psychometricians, law student representatives and law school faculty or deans.

The court directs that, once the investigation and all studies are concluded, the State Bar make a report to the court. The report must include a detailed summary of the investigation and findings, as well as recommendations for changes, if any, to the bar exam and/or its grading, and a timeline for implementation. The State Bar's report and recommendations should be submitted to the court as soon as practicable, and in no event later than December 1, 2017. The State Bar is further directed to submit bi-monthly letter reports to the court regarding the progress of its investigation, beginning March 1.

Sincerely



Tani G. Cantil-Sakauye

Attach.

cc: *Sent via email*

Erwin Chemerinsky, University of California, Irvine School of Law
Judith F. Daar, Whittier Law School
Allen Easley, Western State College of Law
David L. Faigman, University of California, Hastings College of Law
Stephen C. Ferruolo, University of San Diego School of Law
Thomas F. Guernsey, Thomas Jefferson School of Law
Andrew T. Guzman, University of Southern California Gould School of Law
Gilbert A. Holmes, University of La Verne College of Law
Lisa A. Kloppenberg, Santa Clara University School of Law
M. Elizabeth Magill, Stanford Law School
Jennifer L. Mnookin, UCLA School of Law
Francis J. Mootz, III, University of the Pacific, McGeorge School of Law
Melissa Murray, University of California Berkeley School of Law

James Fox
Elizabeth Parker
February 28, 2017
Page 3 of 3

cc: (con't)

Matthew J. Parlow, Dale E. Fowler School of Law at Chapman University
Susan Westerberg Prager, Southwestern Law School
Niels B. Schaumann, California Western School of Law
Deanell Reece Tacha, Pepperdine University School of Law
John Trasviña, University of San Francisco School of Law
Rachel Van Cleave, Golden Gate University, School of Law
Michael E. Waterstone, Loyola Law School

February 1, 2017

Supreme Court of California
350 McAllister Street
Room 1295
San Francisco, CA 94102

Re: The California Bar Exam

Dear Justices:

We, the Deans of 20 of California's ABA-accredited law schools, write collectively to request that the Court exercise its legal jurisdiction over the California State Bar to adjust its scoring methods to bring them in line with the nation's at large. California's current practice of setting an atypically high 'cut score' (the minimum passing score set by each state that is keyed to the Multistate Bar Exam (MBE) portion of the exam), has resulted in the nation's lowest bar pass rate as measured over the past couple of decades. This arbitrarily high cut score is not supported by any valid basis and we believe it causes multiple public harms both to our students and beyond.

This year, the pass rate of those who took the July 2016 California bar fell to historically low rates: 43 percent overall, and 62 percent for first-time takers from ABA-accredited law schools, the lowest overall pass rate in 32 years. Thirty-eight percent of the graduates of ABA-accredited law schools did not pass what is understood to be a minimum competency exam.

California consistently ranks near or at the very bottom of pass rates nationally. By contrast, in New York, the pass rate this year for all first-time takers from ABA-accredited schools was 83 percent, and Texas saw a similar 82-percent pass rate for its Texas ABA-accredited first-time takers. Pennsylvania: 75 percent for first time takers; Ohio, 76 percent. We are a distinct outlier.

Critically, California's lower pass rate is not due to those who take the California bar being less qualified, or poorer exam-takers, than those in other states. Rather, it is a result of California's atypically high cut score of 144 for the MBE portion of the exam. This cut score is higher than that of all other states in the country save one (Delaware) and directly generates the low pass rate in California.

In fact, California bar takers, as a whole, performed better than average on the MBE portion of the exam by national standards. The national average score on the MBE was 140.3. California's overall average was 143, and for those takers from California ABA-accredited schools, the average score was 145.7. (Unlike California, most states permit only graduates of ABA-accredited law schools to sit for the bar.) In other words, California bar takers from ABA law schools perform considerably better than the national average on the one part of the exam that is given nationally, and yet fared significantly worse in terms of passing the bar exam, simply because California uses an atypically high cut score on the MBE portion of the exam. While the content of the essay portion of the exam varies across states, it is statistically scaled to

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the MBE – meaning, in essence, that the aggregate MBE scores drive the scaled aggregate grades on the essays as well.

We recognize that there have been legitimate concerns, in California and across the country, about law school admissions in recent years, including whether law schools are admitting less qualified students than in the past. We certainly agree that this important issue deserves attention and assessment. But the discrepancy between California's pass rates and those of other states given the performance of California bar takers on the multistate portion of the exam cannot be explained away in these terms. Let us say it again: California graduates of ABA-accredited schools are performing better than average, and yet many of them – graduates of our law schools who would have passed the bar with similar performance in virtually any other state – are failing it in our great State, simply because of where California has decided to draw the line between passing and failing.

California's low pass rate would be regrettable but understandable if there were a valid justification for the State Bar's atypically high cut score. This high cut score was set 30 years ago, in 1986, but we are aware of no valid evidence showing that this unusually high cut score distinguishes accurately between those who should and those who should not be licensed to practice law in California, or produces better lawyers for the citizens of California than those permitted to practice in states like New York and elsewhere.

Given that we can find no justification for the present practice of scoring the bar exam, the costs of the high failure rate should be deeply concerning to us all. The most immediate and direct costs fall upon the students who do not pass the California bar, particularly those who would have passed in other states. Many will retake the exam, and most will ultimately succeed in passing on their second or subsequent attempts. However, as a consequence of their initial failure, many of these students lose jobs or employment opportunities and months of income. Each of these students will incur substantial costs, often including newly incurred debt, to pay for further administrations of the exam, to take additional bar preparation courses, and to pay their costs of living while focusing on test preparation. Those seeking jobs as lawyers find their efforts stymied while they focus on preparing for the exam. For many, failure causes psychological harms as well. Although the bar results are often described in statistical terms, the choice of the cut score profoundly impacts real lives.

Beyond our students, the negative consequences of California's high cut score also impact the people of our State more broadly. Although it is by now an urban legend that there are "too many lawyers," in many parts of the State and in many areas of the law there may well, in fact, be too few. Geographically, for example, the Central Valley is perennially short of practicing attorneys. And by subject area, many areas are short of legal counsel, including family law, and immigration, as well as for large areas of 'low-bono' practice on behalf of people of modest and middle class means. Moreover, the State's elevated cut score has a direct effect on minority populations. In particular, law schools seeking to improve their respective state pass rates are forced to take fewer chances on non-traditional students, and will seek to admit as many strong test takers as possible rather than making more holistic evaluations. This will ultimately have a dire impact on minority representation in law schools and, ultimately, in the legal profession.

Furthermore, California's high cut scores generate pressure for California law schools to design their educational programs with even more focus on the bar exam itself than is required in other states. This may, at the margins, drive schools and students to additional emphasis on memorization, multiple-choice exam skills and overt test preparation rather than the full range of skills necessary for effective lawyering.

We admittedly do not know precisely what cut score would be appropriate for determining who passes and who fails a state licensing exam. However, in the absence of valid support for California's atypically high cut score, we believe that it violates basic fairness, undermines the public interest, and inflicts considerable financial, emotional and psychological costs on prospective members of the Bar, for California to hold to its historical practice of a pass rate 1.5 standard deviations below the national average.

The California Bar has had thirty years to study whether its cut score is justified or truly produces more competent lawyers than those in New York, Texas, Pennsylvania, Massachusetts or virtually anywhere else. Given the lack of meaningful evidence to support the validity of this elevated cut score, and the significant costs to our students and the public of our current outlier approach, we strongly believe that while we wait for such evidence, the threshold should be shifted. Unless or until we have strong justification for the benefits of California's approach, we ought to bring our exam in line with the approach taken by other economically significant states, most of which use a cut score between 133 and 136.

We would welcome careful investigation and thoughtful study of the appropriate cut score, and we are prepared to support and collaborate with the California State Bar in such a study. But we strongly believe that our State cannot wait to act. We therefore propose that the California Supreme Court order the California State Bar, beginning with the July 2017 administration, to employ a cut score in line with other states. In the absence of information regarding what cut score is best, a cut score within the range we suggest (133-136) is likely the best approximation for what is fair. We believe that this standard should be maintained until the State can complete a full study of the bar exam, and we would like to re-emphasize that we are eager to participate in that study in any way that we can.

Should you have any questions we would be pleased to meet at any time to discuss both our proposal and our deep concerns on behalf of our students and schools.

Sincerely,

Erwin Chemerinsky
Dean and Distinguished Professor of Law
Raymond Pryke Professor of First Amendment Law
University of California Irvine School of Law

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SUPREME COURT OF CALIFORNIA

I, Katelyn N. Madar, declare:

I am a citizen of the United States and employed in the City and County of San Francisco, California in the office of a California law school at whose direction the following service was made. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 200 McAllister Street, San Francisco, California 94102.

On February 1, 2017, I served a copy of the within document(s):

- **LETTER FROM 20 DEANS OF CALIFORNIA ABA-ACCREDITED LAW SCHOOLS TO THE CALIFORNIA SUPREME COURT RE THE CALIFORNIA BAR EXAM SIGNED FEBRUARY 1, 2017**

- by **FACSIMILE TRANSMISSION**, by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.
- by **UNITED STATES MAIL**, by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California addressed as set forth below. I am readily familiar with this law school's practice of collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the U.S. Postal Service, in a sealed envelope(s) with postage fully prepaid.
- by **COURIER** placing the document(s) listed above in a sealed envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a Delivery Service agent for delivery.
- by **PERSONAL DELIVERY**, by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.
- by **E-MAIL VIA PDF FILE**, by transmitting via e-mail or electronic transmission the document(s) listed above to the person(s) at the e-mail address(es) set forth below.
- by **ELECTRONICALLY POSTING** to the ECF website of the [COURT AND VENUE]. The Court performed service electronically on all ECF-registered entities in this matter.

by **ELECTRONICALLY SERVING** the document via Lexis Nexis File & Serve as described above on the recipients designed on the Transaction Receipt located in the LexisNexis File & Serve website.

BY U.S. MAIL AND E-MAIL

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BY PERSONAL DELIVERY AND E-MAIL

Vanessa L. Holton
General Counsel, The State Bar of California
180 Howard Street
San Francisco, CA 94105
vanessa.holton@calbar.ca.gov

Executed on February 1, 2017 in San Francisco, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.


Katelyn N. Madar

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August 25, 2017

Committee of Bar Examiners
Senior Director, Admissions
The State Bar of California
180 Howard St.
San Francisco, CA 94105-1617

Re: Bar Passage Rate

Gentlepersons:

I have been a practicing lawyer in California since 1978. I support maintaining a high standard for the California Bar. In my practice I have met literally hundreds of lawyers and experienced a wide range of competence. I am convinced though, that lawyers who have matriculated from non-accredited law schools and lower tier law schools (both of which I understand are correlated with lower test scores) have been less skilled than their counterparts matriculating from the most distinguished law schools.

It is my belief that the legal profession needs to be vigilant in maintaining the highest possible technical standards. Reducing the bar passage rate to admit lawyers with objectively demonstrated more marginal skills is not the way to accomplish that goal. Accordingly, please accept this letter in support of maintained upper limit standards for bar passage rate.

Very truly yours,

DIEHL & RODEWALD

Joseph W. Diehl, Jr.

JWD:lde

May 20, 2016

From: James Dunworth
16 Gardenia St
Ladera Ranch, CA 92694
james.dunworth@pfizer.com
949.374.7684

To: State Bar of California
Committee of Bar Examiners/Office of Admissions

Subject: Request to have my February 2016 California Bar Examination re-graded

To the Committee of Bar Examiners,

This letter is written to request that the Committee of Bar Examiners re-grade my California Bar Exam taken in February 2016. I have included a letter from your office dated May 13, 2016 that summarizes my test scores. My Raw Written exam score after the 1st read was 610. After scaling my score using the formula provided by your Committee: $(\text{raw score} \times 3.5003) - 718.7867$, my Scaled Written score was 1416.40. If you add my Scaled MBE score of 1464.0 with the Scaled Written score of 1416.40 - after multiplying these scores by .35 and .65 respectively - this would result in a TOTAL SCALED SCORE of 1,433.06, which would have left me 7 points short of the 1,440 passing grade. This equates to my having missed the passing score of 1440 by .00486111%.

My understanding is that if an applicant such as myself falls short of the 1440 score after the 1st read, and scores above 1390, then the Committee will conduct a 2nd Read of the entire written exam. A 2nd Read apparently was conducted and some of my scores went up (essays #1 and #6), while some scores went down (Essay 3 and PT A), with some scores remaining unchanged (Essays #2, #4, #5 and PT B). Consequently after the 2nd Read my Raw Written score was reduced from 610 to 590.

My main concern simply stated is two-fold – (1) that Essay #3 was graded at 70% after the 1st Read, and then received a grade of 55% after the 2nd Read; and (2) that PT A received an initial score of 75 and then received a grade of 65% on the 2nd Read. This is a 15 point difference and 10 point difference respectively (Essay #3 and PT A). How could there be such a wide margin where one grader concluded Essay #3 to be a *clearly adequate* answer, with the second grader concluding that my answer was *inadequate*? Similarly a score of 75% on the performance test would indicate that the initial grader evaluated my answer as *clearly adequate*, with the second grader evaluating my answer as *barely adequate*. Further, per the letter I received from your committee regarding the grading criteria used, *“Applicants with grading discrepancies more than 10 raw points between the first and second read assigned grades on any answer, whose averaged total scaled score is less than 1440 will have those answers referred to the supervising member of the grading team for that particular question for resolution of the discrepancy. The supervising member will assign a resolution grade to the answer and*

that grade will replace the average of the first and second read assigned grades for that question. No such resolution grade was indicated within the letter the Committee of Bar Examiners sent me that listed all of my test scores. Essentially, the Operant Grade received for essay #3 was a 55, the same grade received on the 2nd Read, despite having received a grade of 70% on the 1st read.

The process used by the committee to evaluate my exam after the 1st read seems to be very unfair. Why the committee would further reduce a score on any given essay or performance test after the 1st read makes no sense. Further, the fact that my initial scores on essay #3 and PT A were significantly reduced after the 1st read does not say a whole lot as to the consistency of the bar exam grading process. Imagine if I had scored 1440 after the 1st read. If this were the case then the Committee would never have considered a 2nd read. However, had they done a 2nd read and used the Committee's methodology then I would have ultimately failed the exam despite receiving an initial passing grade.

It would seem to me, and I would assume the same for most fair-minded people, that the committee should consider only scores on the 2nd read that improve an applicant's 1st read score. The net result of a 2nd read should not be to penalize an applicant by lowering his or her initial score obtained after the 1st read, but rather should provide the applicant with the benefit of any doubt that may exist as to his or her competency. In other words, the score after the 1st read should only be increased or, in the very worst case scenario, the score would remain unchanged after the 2nd read. Further, the fact that my essay #3 received no stated resolution grade makes me question the process that was used in reevaluating my bar exam score. I respectfully ask the Committee of Bar Examiners to re-grade my bar exam taken in February of 2016.

Sincerely,

James Dunworth



CHAMBERS OF
The Superior Court

GLEN M. REISER, Judge

PROBATE COURT
4353 E. VINEYARD AVENUE
OXNARD CA 93036
(805) 289-8860

August 15, 2017

The State Bar of California
Re: California Bar Exam
180 Howard St.
San Francisco, CA 94105
Public.Comment@calbar.ca.gov

Dear State Bar of California:

Thank you for the opportunity to provide public comment regarding the 2017 Standard Setting Study Report and related options for the California Bar Exam pass line.

Prior to 1999, I worked for more than 20 years as a civil litigator in the California state and federal courts. By the end of this year, I will have worked an additional 19 years as a California Superior Court judge, in most case types, civil, criminal, family law and probate.

Over the course of that career, both as an attorney and judge, I have also encountered a meaningful number of out-of-state attorneys appearing in California courts *pro hac vice*. I can fairly say from those decades of experience, both in terms of courtroom presence and legal writing capability, I have seen no qualitative difference between California attorneys and those attorneys licensed to practice in other states.

The very minor fractional difference required of bar passage scores by California over the vast majority of other states, in my opinion, appears less relevant to actual performance/integrity as an attorney than what could be arguably characterized as a trade barrier to limit supply in an exclusive marketplace.

Without being critical of "margin of error" reports from social scientists, some of the actual debate appears to include an "if it was good enough for me" undertone that is simply not inclusive of many otherwise qualified applicants with disadvantaged backgrounds wishing to serve under-represented communities.

By way of example, a former court employee, after moving from Mexico, grew up in a single parent household in Oxnard. She did not speak a word of English until the third grade. Because the employee was interested in helping those who could not help themselves, she attended law school at night. While bright and dedicated, the applicant was unable to pass the California bar examination on her first three attempts. Though she passed the exam on her fourth attempt last year, her scores on the first three examinations appear to have been sufficient to admit her in a number of other states. Our former employee now competently and confidently represents California farm workers.

Forcing that attorney to wait an additional two years, put her aspirations and the needs of her prospective clients on hold, by taking the state bar examination on four separate occasions, does not appear in any way beneficial to that attorney, to the State of California, or to the farm workers she now represents.

Recognizing that a written examination is an imperfect way of gauging character, integrity, honesty and work ethic, one would expect California, because of its vast diversity, to be more inclusive than other states, rather than exclusionary. Worthy people deserve a fair opportunity. I stand in support of adjusting the examination passing score in favor of greater inclusiveness, but not outside the range authorized by other states.

Judge Glen M. Reiser

A handwritten signature in cursive script, appearing to read "Glen M. Reiser".

UNLV | WILLIAM S. BOYD SCHOOL OF LAW

UNIVERSITY OF NEVADA, LAS VEGAS

August 12, 2017

Dear Trustees and Committee of Bar Examiners, State Bar of California:

I attach for your consideration my recent paper, *The Case for a Uniform Cut Score*.

The paper began with my investigation of licensing practices in other professions. I discovered that our state-to-state MBE cut score disparities make law an extreme outlier in professional licensing. Fifteen of sixteen professions I reviewed have adopted a uniform cut score for the national multiple choice component of their state licensing tests. Law is the only exception. Doctors, dentists, engineers, nurses, architects, veterinarians, social workers, CPAs, and more use a uniform cut score.

As my paper delineates, states have adopted uniform cut scores for licensing in other professions for several compelling reasons:

- Disparate cut scores undermine the validity of each use of the exam;
- States do not have the expertise, resources, or political will to undertake the burdens of appropriate standard setting;
- Disparate cut scores are illogical, because each jurisdiction is using the same test to measure the same thing, minimum competence; and
- Increasing professional mobility is served by greater uniformity in licensing requirements.

In the absence of evidence of problems in jurisdictions with middle-ground cut scores, states at the high and low ends should follow the crowd. Consider moving to 135, the MBE cut score used by the most states, or 133, the cut score used by jurisdictions with the most attorneys. As supporting data, even a flawless standard setting study cannot match the record of tens of thousands of attorneys licensed in jurisdictions with those cut scores.

The paper also discusses appropriate risk analysis in setting cut scores. Jurisdictions choosing unusually high cut scores risk better access to justice, increased diversity in the profession, and more experiential learning in law schools. Unusually high cut scores may also suggest improper protectionism.

Thank you for undertaking this serious cut score review, and for consideration of *The Case for a Uniform Cut Score*. Please contact me if you have any questions.

Sincerely,



Joan W. Howarth

Distinguished Visiting Professor, Boyd School of Law

Dean Emerita and Professor of Law, Michigan State University College of Law

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AN ANALYSIS OF “CONDUCTING A STANDARD SETTING STUDY FOR THE CALIFORNIA BAR EXAM: FINAL REPORT”

William Wesley Patton *

INTRODUCTION

The methodology used in *Conducting A Standard Setting Study For The California Bar Exam: Final Report* is a form of minimally directed essay evaluation termed the Analytic Judgment Method. The study’s theory is that by providing participants a general definition of “minimal competence” without providing them a detailed grading rubric, like the one supplied to the actual graders on the California Bar Exam, panelists will be able through a process of essay selection to provide samples that demonstrate minimal competence that can then be used to set a reasonable bar passage “cut score.” The validity of the entire cut score study depends on the reliability of the panelists’ initial selection of essays as either “not competent”, “minimally competent”, or “highly competent”. Unfortunately, as demonstrated, *infra*, the study’s selection process was not only biased, it was also unreliable because: (1) the panelists were insufficiently provided with guidelines on the weight to be ascribed to the five variables to be judged in determining whether an essay demonstrated minimal competence; (2) the general evaluation rubric provided significantly overstated the importance of exam test takers’ ability to draw and justify legal conclusions; (3) the essays selected for panelist evaluation did not even approximate the percentage and variety of essays on the July 2016 bar exam; and (4) the extreme variations in panelists’ essay scores demonstrate that the study design and results lack validity . Therefore, the State Bar should not rely in any way on this study in determining the appropriate cut score for the California Bar Examination.

INTRODUCTION

On August 4, 2017 State Bar Consultant, Mary J. Pitoniak issued her analysis of Dr. Buckendahl’s cut score study and found that it:

* Professor Emeritus, Whittier Law School; Assistant Clinical Vol Professor, UCLA David Geffen School of Medicine, Department of Psychiatry; Lecturer in Law, USC Gould School of Law.

1. Violated “best practice[s]”¹;
2. Failed to sufficiently train the Participants on how to grade/evaluate the essays;²
3. Did not provide Panelists sufficient time to grade/evaluate the essays;³
4. Failed to follow best practices by supplying a detailed evaluation/grading rubric;⁴
5. Failure to provide a rubric could have led Panelists to use very different grading criteria which would affect the consistency and validity of the essay selection results;⁵
6. Dr. Buckendahl did “not evaluate panelists’ possible misconceptions about the level of knowledge and skill that the minimally competent candidate would display in each content area”;⁶ and,
7. Panelists’ comments supported her concerns that there was insufficient training, insufficient grading time, and potential use of different grading systems by the individual Panelists.⁷

Dr. Tracy A Montez, in her July 2017 report to the State Bar, *Observation of the Standard Setting Study for the California Bar Examination*, at 7, agreed with Pitoniak that Dr. Buckendahl’s study failed to sufficiently teach Panelists how to identify a minimally competent essay: “[I]t appeared panelists struggled with creating a common frame of reference from which to score the exam responses...[and] [a]dditional time should have been allocated to defining a MCC”

The following study begins where Pitoniak’s and Montez’s studies concluded. The instant analysis demonstrates several **fatal flaws** in Buckendahl’s study, such as providing a general rubric to the Panelists that **misstated the definition of “minimal competence”** as defined by the State Bar. As this analysis demonstrates, Buckendahl’s study is so seriously flawed that the State Bar and California citizens can have no confidence in its recommended cut scores.

¹ Mary J. Pitoniak, *Evaluation of Standard Setting Conducted for the State Bar of California* (August 4, 2017), at 13.

² *Id.*, at 3, 6.

³ *Id.*, at 3.

⁴ *Id.*, at 3, 6, 7.

⁵ *Id.*, at 6.

⁶ *Id.*, at 6.

⁷ *Id.*, at 6, 8, 9, 11.

I. *The Lack of Training on How to Evaluate “Minimal Competence” and Lack of a Grading Rubric Led to Unreliable Study Results.*

Assume that all graders in the *Standard Setting Study* came to the identical conclusion about an essay exam they were asked to categorize as either “not competent, minimally competent or highly competent”. Every grader found that the essay was:

1. Highly competent on issue spotting;
2. Highly competent on identifying the applicable law;
3. Minimally competent on application of law to facts;
4. Not competent on drawing conclusions; and,
5. Not competent on justifying conclusions.

The Study’s methodology did not provide the graders with any instructions on how to weigh the five categories of lawyer skills they were asked to consider in ranking the essay as “not competent, minimally competent, or highly competent.”⁸ This was a fatal methodological flaw. For instance, consider the following reasonable grading responses to the hypothetical, supra:

(1) Grader 1 thinks that “minimal competence” must be demonstrated on all 5 of the grading variables and therefore places the essay in the “not competent” pile.

(2) Grader 2 thinks that “minimal competence” means that the essay can have no more than 1 area determined to be “not competent” and therefore places the essay in the “not competent” pile.

(3) Grader 3 thinks that a “minimally competent” essay must average at least “minimally competent” in the 5 categories. Grader 3 determines that in his/her mind a “highly competent” section and a “not competent” section cancel each other and equal a “minimally competent score.” Since this essay had two “highly competent” and two “not competent” sections, the grader concluded that the product of those scores was equal to 2 “minimally competent” sections which he/she added to the

⁸ The *Standard Setting Study* did not provide any data regarding instructing the graders on the relative weight to be given to the five variables being evaluated. According to Ron Pi, Principal Program Analyst Office of Research & Institutional Accountability, The State Bar of California, “No weights were assigned to any specific area in the rubric. It was part of the study design, as the panelists were instructed to rate the performance of the papers from a global perspective – following the guidelines of the minimum competence definition - rather than scoring the papers, which had already been done.” (Email from Ron Pi to William Wesley Patton (August 4, 2017)).

single “minimally competent” fifth section and therefore placed the essay in the minimally competent pile.

(4) Grader 4, after reading dozens of essays in which no students scored a “highly competent” score in his/her mind, valued the essay’s two “highly competent” sections as determinative, and therefore places the essay in the “highly competent pile.” Unfortunately, under the study’s methodology all essays judged “highly competent” were excluded from the group discussions and from the study’s cut score determination.⁹

(5) Grader 5 determined that some of the 5 attorney skills being evaluated were more important than others in defining “minimal competence.” Nothing in the description of the Study’s training sessions informed the graders whether they should or should not weigh the 5 attorney skills being evaluated. Therefore, Grader 5 determined that since client counseling is one of the most important attorney functions in defining “minimal competence” that “not competent” scores on drawing conclusions and justifying conclusions merited placing the essay in the “not competent” pile.

(6) Grader 6 also weighs the 5 attorney skills and determines that issue spotting and applying law to facts are by far the most important skills. Therefore, Grader 6 places the essay in the “highly competent” pile, and that essay, like the one judged by Grader 4, is excluded from the Study’s cut score determination. Since the essays placed in the “highly competent” pile were not discussed or used to set the cut score, no one discovered “why” Grader 6 rated the essay “highly competent” and no one discovered that Grader 6 used the same rationale for grading all of the initial essays evaluated.

The number and variety of categorizations and individually self-defined grading options available to the study participants was almost unlimited because the study did not provide them with a detailed grading rubric or any description on the weight to be applied among the 5 lawyering skills being judged. The grading process used by the twenty participants was not standardized and the reliability of their selection results therefore is very suspect. In contrast, graders on the actual California bar examination are provided a detailed grading rubric that not only identifies the types of lawyering skills to be graded, the substantive basis for the analysis, but also a guide to the weights of each of those sections on the essay.¹⁰ Those

⁹ *Standard Setting Study*, at 13. The two participants were directed to choose for group discussion only the “two best not competent exemplars [essays] and the two worst competent exemplars from their initial classifications.” Id.

¹⁰ For an example of a weighted rubric examination evaluation form, see, Kenneth Wolf and Ellen Stevens, *The Role of Rubrics in Advancing and Assessing Student*

substantive rubrics and weight guides provide standardization to the grading of the actual bar examination and buttress the scoring consistency among the dozens of different bar essay graders.¹¹

2. *The General Grading Rubric Provided to Panelists Was Methodologically Flawed Because It Substantially Overvalued The Importance of Test Takers' Ability To Reach and Justify Conclusions.*

The greater the differences in the grading/judgment criteria used by the cut score study participants and the grading criteria used by graders on the actual California Bar Examination, the less confidence we can have that the panelists' conclusions will be consistent with and translate to the actual grading of the full bar examination.

According to the bar examination calibration sessions that I have attended, and according to the detailed grading rubrics provided to the actual graders of the California Bar Examination, the number of points allocated to applicants' ability to draw conclusions is weighted much less than other variables being graded such as issue spotting, identifying relevant law, and applying that relevant law to the germane facts.

According to the definition of "minimal competence" supplied by the State Bar to the cut score study participants, there are only 4 variables inherent in that definition regarding applicants' essays:

1. Legal rules and principles;
2. Identification of relevant facts and suggestions for further fact investigation;
3. Ability to apply applicable law to relevant facts; and
4. Formulating and communicating legal conclusions and recommendations.¹²

Unfortunately, the cut score study rubric provided more emphasis on the variable of "formulating and communicating" conclusions than exists in the State Bar's definition of "minimal competence" or on the actual grading rubrics for the California Bar Examination. Instead of providing panelists

Learning, 7 *Journal of Effective Teaching* 3, 8 (2007).

¹¹ According to Ron Pi, *supra*, note 1, the actual bar exam graders are given a detailed rubric that provides the weight given to each section of the essay being graded. (Email from Ron Pi to William Wesley Patton, August 4, 2017.)

¹² *Standard Setting Study*, at 11.

with the 4 Variables of minimal competence defined by the State Bar, the panelists received a “generic guide/rubric” that contained 5 Variables:

1. Issue spotting;
2. Identifying elements of applicable law;
3. Analysis and application of law to facts;
- 4. Formulating conclusions; and,**
- 5. Communicating conclusions.**¹³

Since the panelists were not provided with a guide on the weights of the 5 grading criteria, the methodological decision to separate the State Bar’s single variable on “conclusions” into two separate variables on “conclusions”, the study’s rubric/guide supplied to panelists suggested to them that the “conclusion” sections were far more important than warranted under the State Bar’s definition of “minimal competence.” Any reasonable panelist who saw that the skill of dealing with “conclusions” appeared in 2 out of 5 categories to be judged would conclude that the “conclusions” sections are much more important than the 1 in 4 listing of “conclusions” in the State Bar’s definition of minimal competence.

The problem, of course, is that the panelists were led to believe that one of the categories of minimal competence, “conclusions”, was more important than the percentage of grading allocated to “conclusions” on the grading rubric on the California Bar Exam. By listing “conclusions” as 2 out of 5 categories rather than correctly as 1 out of 4 categories, the rubric increased the importance of “conclusions” from 25% (1 of 4) of the evaluation variables to 40% (2 of 5). Because of the significantly greater attention to judging the quality of essay conclusions by the panelists in relation to the weight of grading conclusions on the actual bar exam, we cannot have confidence that the essays the panelists selected for the three categories of “not competent, minimally competent, or highly competent” correlate with how actual bar graders would categorize them. In addition, we cannot conclude that the panelists themselves would have categorized the essays they evaluated the same way if the rubric/guide provided to them correctly listed “conclusions” as only 1 of 4 variables rather than as 2 of 5 variables. Because we cannot have confidence that the panelists’ selection of cases, based on the methodologically flawed rubric/guide, would have been similar if they were provided a correctly constructed rubric/guide, we can have no confidence in the study’s use of those selected essays to formulate a minimal cut score.

¹³ Id.

3. *Several Panelists Found That The Time For Training on Grading Was Inadequate and That They Needed More Specific Guidance on How to Evaluate the Essays.*

Many of the comments from the 20 participants in the cut score study provide clear evidence that the lack of grading training, directions and a weighted rubric raises serious questions about the reliability of the study. First, the participants rated the time for training for graders as the weakest part of the study. On a scale of 1 to 3 four participants rated the training as a “1” and not a single panelist rated the training as a “3”.¹⁴ In addition, the panelists provided the following comments on training:

(1) Seven comments complained that there was insufficient information provided, such as a rubric/guide, to help them judge whether an essay was “minimally competent”.¹⁵ One panelist opined that the lack of instruction on evaluating essays would mean that there would be “no consistency among the group”¹⁶; and,

(2) Four panelists stated that the time provided for grading training was inadequate.¹⁷

The methodological weakness of not standardizing the essay evaluation process among the twenty participants by providing a rubric and a description of the weight to given to the five attorney skills being evaluated infected the later phases of the study since the initial essay selection was used to further refine the definition of “minimal competence” and to set a reasonable cut score. For instance, essays that some participants judged as “highly competent” based upon weighting the variables might have been judged as “minimally competent” or “incompetent” under other panelists’ self-defined grading criteria. Because the teaching session on grading left the evaluation criteria undefined, some participants may have used Justice Potter Stewart’s approach to obscenity, “I know it when I see it”¹⁸, i.e., they know when an essay demonstrates “minimal competence” without having to articulate the analytical steps or criteria used in forming that opinion. Although the Analytical Judgment Method used in the cut score study may permit such subjective, intuitive and gestalt assessments, such a method used by some study participants, but not others, reduces consistency and

¹⁴ *Standard Setting Study*, at 17.

¹⁵ *Standard Setting Study*, Appendix D.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ See *Jacobellis v. Ohio*, 378 U.S. 184 (1964).

reliability in determining the critical issue of defining a minimal bar examination passage score.

The methodological problems discussed, *supra*, were exacerbated by the decision to deviate from customary and suggested Analytical Judgement Method methodology. Arbitrariness can sometimes be ameliorated by the size of the sample being examined and by the number of those evaluating the data since outlier data will be less significant than in a small study sample. Unfortunately, Dr. Buckendahl decided to modify the Analytical Judgement Model by reducing the recommended number of essay exemplars for panelists to judge from the standard 50 to only 30. This reduction magnified the differences in the grading processes that might have been used by the twenty different panelists.¹⁹

The Study further failed to discuss another possible methodological flaw-- the selection process of the actual July 2016 essays to be judged by the study participants. Rather than providing panelists with a normal distribution of essays graded on the 2016 exam, the Study used a non-representative sample of those exams. For instance, on the July 2016 exam 4.2% were scored at 75, but the study included 13.2% of exams scored at 75.²⁰ In addition, on the July 2016 exam 27.1% of exams were scored a 55, but the study sample only included 13.2% of exams graded at 55.²¹ The Study does not even discuss how the decision to present the participants with a very different range of essays than those actually graded on the July 2016 bar exam might have affected participants' decisions on which essays demonstrated "minimal competence" and upon the decision of what cut score to recommend. It is critical to note that one of Dr. Buckendahl's previous studies found that the choice of which questions from an examination will be used for panelists to evaluate can affect the panelists' selection of an examination cut score.²² In that study a group of panelists that were provided a smaller sample of randomly selected questions from a standardized exam agreed on a cut score "one standard error of the median lower" than a second group of panelists who evaluated the entire examination."²³ Dr. Buckendahl has cautioned policymakers to be cautious in using data from cut score setting standards that do not use the actual, rather than a modified, form of the examination for panelists' to review: use

¹⁹ *Standard Setting Study*, at 10.

²⁰ *Id.*, at 12.

²¹ *Id.*

²² Chad W. Buckendahl, et. al., *Recommending Cut Scores with a subset of items: An Empirical Illustration*, 15 *Practical Assessment, Research & Evaluation* 1, 5 (2010).

²³ *Id.*

of a modified exam “may require policymakers to underweight the results of the experimental method.”²⁴ Since Dr. Buckendahl did not provide panelists with a comparable selection of essays that actual bar graders evaluated, he needs to provide the State Bar with evidence that his non-representative sample of essays did not affect the panelists’ judgments and the ultimate suggested cut scores articulated in his study.²⁵

4. *The Study Results Demonstrate The Arbitrariness and Lack of Consistency in Panelists’ Determinations of “Minimal Competence” and the Resultant Suggested Cut Scores.*

When a study is designed to produce group agreement on a benchmark standard such as a bar passage cut score, significant deviations in the scoring/judgments among the graders substantially undermines the reliability and credibility of the study. The Study claims that the results are reliable because the participants’ evaluations were consistent given the broad grading range: “the values calculated for the panelists were close...”²⁶ Nothing could be further than the truth. First, the Study admitted that the panelists’ scores included “extreme scores” which impact reliability in a very small study sample like the instant investigation.²⁷ Therefore, the Study results did not produce the expected convergence of the Study’s “mean or average score” and the “median/mid-point of all scores”. Because of the significant deviations in the participants’ essay scoring the Study concluded that it must abandon using the “mean” in calculating the recommended cut score.²⁸

Table 1 demonstrates the arbitrariness and lack of consistency and reliability of the panelists’ essay grading. Although the Study does not even attempt to analyze the reasons for the huge discrepancies in panelists’ essay grades, it is clear that the cause is the failure to supply the panelists with a detailed grading rubric and a weighting of each of the five lawyering

²⁴ Id., at 7.

²⁵ Although the empirical studies discussed, *supra*, found reliability errors based on the differences between the test questions evaluated by two groups, the question of how test items selection is accomplished is very relevant to Dr. Buckendahl’s cut score study. For instance, what psychological effect does the percentage of the range of selected essays have on panelists? If the selected essays for evaluation have a percentage of higher or lower scores than the overall pattern of the July 2016 bar exam essays that were actually graded, what impact does that experimental selection process have on the panelists’ views of the standard for minimal competence?

²⁶ Id. at 15.

²⁷ Id.

²⁸ Id.

skills being evaluated in order to assure consistency among graders.

The Study attempts to explain and justify the enormous discrepancy in panelists' essay grades by referring to the "theoretical scale that ranges from 0 to 700 (i.e., 100 points for each essay question, 200 points for the performance task). The problem, of course, is that it was impossible for any panelist to actually score at the extremes of the 700 point scale since the actual scale used in the study for each essay question was limited to scores between 45 and 90.²⁹ Therefore, the actual range of scores permitted the panelists to score from a low of 315 (5 essays times a minimum score of 45, plus 90 on the performance test) to a high of 630 (5 essays times a maximum score of 90, plus 180 for the performance test). Therefore, the true theoretical range of scores was only 315 to 630, not the stated 0 to 700. As Table 1 demonstrates, the range of essay grades among panelists raises the specter of arbitrariness. Dr. Buckendahl needs to explain why there was an average of more than a 20 points difference in the panelists' evaluations of the essay questions and how that discrepancy affects the validity and credibility of the study's recommended cut score.

*TABLE 1*³⁰
RANGE OF GRADES ON THE ESSAYS

	<u>Low Median</u>	<u>High Median</u>	<u>Median</u>
	<u>Score</u>	<u>Score</u>	<u>Deviation</u>

Question 1	52.5	72.5	20.0 Points
Question 2	55.0	75.0	20.0 Points
Question 3	47.5	72.5	25.0 Points
Question 4	50.0	72.5	22.5 Points
Question 5	45.0	70.0	25.0 Points
Performance Test (PT-B)	105.0	140.0	35.0 Points

²⁹ The Study states that the actual "score scale only ranges from approximately 45-90 and is limited to increments of 5 points." Id. at 10.

³⁰ The data included in Table 1 is derived from the panelist scoring charts included in Appendix C, *Performance Level Descriptor for Minimally Competent Entry-Level Attorneys for Bar Exams, Overall Calculations for Written Section*.

Equally troubling is individual Panelists' median differential grading among the five non-PT-B essay questions. Some panelists evaluated all essays with scores in an extremely narrow score range while other graders had median score deviations among the five essays that were very large. For instance, Panelist # 10 had a median differential among the five non-PT-B questions of only 6.3 points, while Panelist # 11 had a median differential of 22.5 points. (Appendix C, supra.). The median essay question differentials for all twenty panelists were: 16.3; 21.2; 18.7; 8.7; 10.0; 13.7; 18.3; 16.3; 16.2; 6.3; 22.5; 15.0; 11.2; 10.0; 20.0; 15.0; 13.7; 17.5; 13.8; and 13.7. (Appendix C, supra.). Although one would expect to find large differences among the scores that individual participants might give to the 30 essays within each of the five questions graded, the tremendous variation in the median differential among the graders is very troubling and raises questions about whether the panelists were using the same grading standards to judge the essays. In addition, there is no evidence that Buckendahl corrected for any "halo effect" aberrations among the Panelists' scores. One variant of the Halo Effect is illustrated by Panelist 10's very low 6.3 median score differential. "[I]f the standard-setting panelist does not distinguish between the performance level descriptors as intended, then the panelist may simply rate all the items in a comparable manner."³¹

This data on the degree of grading disparity among Panelists provides concrete statistical proof of Pitoniak's fear that the graders, without the help of a detailed grading rubric, might each have used a different standard to evaluate the essays. This issue of the inconsistency of panelists' grading patterns is consistent with many Panelists' comments that the training on grading was insufficient and that they were uncertain how to evaluate the essays without a detailed substantive rubric. The serious discrepancies in individual Panelist's essay grades and the deviations among the Panelists' median and mean grading scores raise very serious additional doubts about the reliability of Dr. Buckendahl's cut score study.

CONCLUSION

What effect did Dr. Buckendahl's erroneous definition of "minimal competence" in the general rubric provided to Panelists have on their essay evaluation? What is the significance of the dramatic differences among

³¹ George Engelhard, *Evaluating the Bookmark Judgments of Standard Setting Panelists*, 7 Educational and Psychological Measurement 909, 912 (2011).

panelists' scoring of identical essays? Were the panelists who complained that the training on grading the essays was inadequate correct? Was the panelist who predicted that the lack of an evaluation rubric would result in arbitrary judgments correct? What effect on the initial case selection did the failure to provide guidelines on the weight of the five variables have on panelists' categorization of essays as "not competent, minimally competent, or highly competent?" What effect did the methodology of selecting the specific essays for evaluation have on panelists' evaluations? Until we have answers to these critical methodological and statistical questions, Californians cannot have confidence in this study's suggested cut scores for the California Bar Examination.

The only way to assure that the significant methodological problems of the cut score study did not produce unreliable results and a seriously flawed suggested cut score is to have a different psychometrician conduct a new study in which the study better replicates the actual grading of the bar examination. The new cut score study should provide the panelists with more grading training and a correctly weighted rubric consistent with how the various lawyering skills are actually graded on the California Bar Examination. Until the results of the new study are received and reviewed, the State Bar should not use the Buckendahl study in determining a reasonable bar examination cut score.

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Dear Gayle,

I read the article in the Daily Journal RE: State Bar pass rate 3/27/17.

Sorry to see you caught in this strange bind where you are ~~in~~ having to explain the high passing score - it is ridiculous the commotion about this. I don't think there needs to be any explanation and I surely do NOT think the pass score should be lowered. Rather I think students should study more and study smarter. We have too many attorneys already. It is a slippery slope... first the exam went from 3 days to 2 days (which is a shame too), next we lower the pass score? Then what do they expect... get rid of the exam all together? you have my full support Gayle - please DONT lower the pass score. All the best, ☺
Sevan

- DRAFT -

A REBUTTAL TO ANDERSON'S AND MULLER'S STUDY
ON THE RELATIONSHIP BETWEEN BAR PASSAGE
SCORES AND ATTORNEY DISCIPLINE

William Wesley Patton *

Professors Anderson and Muller recently concluded that there is an unspecified connection¹ between bar passage scores and the probability of state bar discipline and that lowering the MBE cut score in California will result in an explosion of attorney disciplinary cases. Their article, *The High Cost of Lowering the Bar*², is built more on speculation than on actual empirical data, and their article has the most caveats of any empirical article that I have ever read. However, I applaud their admission that:

1. Their “analysis is limited due to the imperfect data available...”³;
2. They “do not have access to the bar exam scores of these attorneys. Accordingly, we use proxies...”⁴;
3. Their results require “numerous assumptions that...[they] believe are reasonable but may not ultimately reflect the true relationships”⁵ among LSAT, bar scores and attorney discipline; and

* Professor Emeritus, Whittier Law School; Assistant Clinical Vol Professor, UCLA David Geffen School of Medicine, Department of Psychiatry. Although Professor Anderson on his blog has called academics who have proposed recalculating the California MBE cut score as “in denial”, and that they are in a “blame shifting exercise”, I am retired, no longer teach law, and will not economically benefit from lowering the MBE cut score. However, I care very much whether the current 144 MBE cut score is needlessly keeping competent bar exam test takers, including minority candidates, from helping to advance justice in California. (<http://witnesseth.typepad.com/blog/2016/12/deans-denial-and-the-california-bar-exam.html>).

¹ Since the publication of their article the authors have each responded to criticism regarding the validity of their analysis, methodology and conclusions. In Section II, I discuss the significant criticism of their article and Professor Anderson's confusing responses.

² The article is published on SSRN at (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2977359).

³ Id., at 2.

⁴ Id., at 3.

⁵ Id., at 7.

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4. “[A]lthough...[their] model relies on aggregate (and *noisy*) data, it gives roughly accurate predictions of the individual data we do have.”⁶

But perhaps most perplexing is their failure to answer the most salient questions based upon their finding of a relationship between bar passage scores and attorney discipline: IF LOWERING THE MBE [MULTISTATE BAR EXAMINATION] BAR PASSAGE CUT SCORE SUBSTANTIALLY INCREASES ATTORNEY DISCIPLINE CASES, WHY HAVE THE 48 STATES THAT HAVE SUBSTANTIALLY LOWER MBE CUT SCORES THAN CALIFORNIA NOT EXPERIENCED THE EXPLOSION IN DISCIPLINE CASES PREDICTED BY ANDERSON AND MULLER? And why haven't the media and public in those states with 133 MBE cut scores zealously fought to increase the MBE cut score in order to protect the public from the onslaught of attorney malpractice?

- I. States With A 133 MBE Cut Score Have Not Experienced The Attorney Disciplinary Increase Predicted By Anderson and Muller.

Anderson and Muller predict that if California lowered its MBE cut score from 144 to 133 that there would be at least a 10% increase in the chances of an attorney with that bar exam score of being disciplined during a 35 year career (1330 pass score would predict a 19% chance of discipline versus a 9% chance for a passing score of 1440).⁷ If their data and predictions are accurate, the disciplinary rates in jurisdictions with a 1330 pass score should be at least 10% higher than those in California. Instead of testing their research and hypothesis in jurisdictions with a 133 MBE cut score (Connecticut, District of Columbia, Illinois, Iowa, Kansas, Montana, New Jersey, New York, and South Carolina)⁸, they took the easy way out by citing two law review articles that they say support their own conclusion that “[c]ross-state comparisons may have little value due to disparities in state bar disciplinary procedures, enforcement, and priorities.”⁹ The two

⁶ Id., at 10.

⁷ Id. at 6. Under State Bar grading the MBE cut score, for instance, 133, is scaled to a final score of 1330.

⁸ Comprehensive Guide to Bar Requirements 2017 (National Conference of Bar Examiners and American Bar Association Section of Legal Education and Admission to the Bar), at 30-31.

⁹ Id., at 13. See, Debra Moss Curtis, *Attorney Discipline Nationwide: A*

referenced articles do not support Anderson's and Muller conclusion that conducting cross-state comparisons of attorney disciplinary statistics has "little value."

For instance, Professor Curtis said in her article merely stated that "finding this information [bar exam disciplinary information] in one place to make comparisons among states and of lawyers licensed in multiple jurisdictions is difficult."¹⁰ Curtis then spent more than 100 pages providing comparative state attorney discipline statistics. Curtis would probably be surprised that Anderson and Muller, who rely on her data, find her study of "little value."

In addition, the other article cited by Anderson and Muller on the futility of comparing state disciplinary systems actually undercuts some of their rationale for even attempting to look at other states' disciplinary patterns. In that article, Professor Moulton, states that "[t]he point is that we should be careful not to exaggerate the extent to which the substance of lawyer-conduct standards varies among the states. Most states' rules are close to identical, in substance if not in precise language."¹¹ Therefore, disciplinary statistics among states are not significantly skewed by the substance of ethical precepts. Further, the thrust of the Moulton article is that lawyers engaged in multi-jurisdiction practices face uncertainty about how rules will be interpreted and enforced differently in multiple jurisdictions, not whether enforcement machinery has substantial disparities. Moulton even limits those potential multi-jurisdictional ethics conflicts and states that "where compliance with one state's rule would mean violation of another state's rule, and vice versa-is largely limited to the area of attorney-client confidentiality and exists only as a result of the rules in four states."¹² The Moulton article does not provide Anderson and Muller a safe harbor against the need to test their predictions of dramatically increased attorney disciplinary cases in other states with lower MBE cut scores. In addition, as demonstrated in Section III, *infra*, a cross-jurisdictional study of attorney discipline would be at least as methodologically sound as their own study.

Comparative Analysis of Process and Statistics, 35 J. Legal Prof. 209 (2011); H. Geoffrey Moulton, Jr., *Federalism and Choice of Law in the Regulation of Legal Ethics*, 82 Minn. L. Rev. 73 (1997).

¹⁰ See, Debra Moss Curtis, *Attorney Discipline Nationwide: A Comparative Analysis of Process and Statistics*, 35 J. Legal Prof. 209 (2011).

¹¹ H. Geoffrey Moulton, Jr., *Federalism and Choice of Law in the Regulation of Legal Ethics*, 82 Minn. L. Rev. 73, 95-96 (1997).

¹² "In terms of the states that have adopted the Model Rules, therefore, the level of disparity in adopted standards is not as great as advertised." *Id.*, at 91.

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The reality is that the articles that the authors cite actually provide comparative attorney disciplinary statistics that are very germane to their prediction of escalating disciplinary cases if California were to change its MBE cut score to 133 or some other number lower than 144. The following chart demonstrates that the percentage of attorneys with disciplinary charges and the mean ratio of disciplinary charges to actual disciplined attorneys in states with 133 MBE cut scores are not only similar to one another, but they are not dramatically different than those current statistics in California.¹³ Anderson's and Muller's prediction of a 10% increase in attorney disciplinary cases in California if the MBE cut score is changed to 133 is simply not supported by the comparative state attorney disciplinary evidence.

The following chart compares the percentage of attorneys charged with disciplinary violations and the rate of convictions to charges lodged in each state that uses a 133 MBE cut score with those rates in California that has a 144 cut score:

¹³ Although I agree that comparing different jurisdictions' disciplinary rates may not always be statistically accurate if those states have extremely different rates of enforcement and/or conviction rates. And the states in this comparison of 133 cut scores, other than Iowa, each have almost identical rates of prosecution and similar conviction rates.

STATE ATTORNEY DISCIPLINARY STATISTICS
FOR CALIFORNIA (MBE 144) & FOR STATES
WITH 133 MBE CUT SCORES¹⁴

<u>State</u>	<u>% of Attorneys Charged to Number of Active Attorneys</u>	<u>Mean % of Attorneys Charged to Those Actually Disciplined</u>
California ¹⁵	Approx. 1%	10%
Connecticut ¹⁶	Approx. 1%	15%
Illinois ¹⁷	<1%	5%
Iowa ¹⁸	Approx. 1%	25%
Kansas ¹⁹	Approx. 1%	13%
Montana ²⁰	Approx. 1%	17%
New Jersey ²¹	<1%	8%
New York ²²	<1%	8%
South Carolina ²³	1-3%	12%

This comparative state attorney disciplinary data demonstrates that the percentage of active attorneys with formal disciplinary complaints is almost identical in jurisdictions with MBE cut scores of 133 with the percentage of complaints against California attorneys where there is a 144 MBE cut score. In addition, unlike Anderson's and Muller's prediction that

¹⁴ This data is derived from Debra Moss Curtis, supra., note 9
(<http://www.ssrn.com/abstract=1718053>).

¹⁵ Id., at 20.

¹⁶ Id., at 24.

¹⁷ Id., at 39.

¹⁸ Id., at 43.

¹⁹ Id., at 47.

²⁰ Id., at 68.

²¹ Id., at 78.

²² Id., at 85.

²³ Id., at 102.

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changing the cut score from 144 to 133 will result in at least a 10% or greater increase in the California attorney disciplinary rate, the chart demonstrates that in only one state, Iowa, has a rate of 19% or higher been recorded. Further, in 3 states with a 133 MBE cut score the percentage of disciplined attorneys is lower than in California, and in 3 states the percentage is only slightly higher than in California. The comparative state data does not support their prediction of an explosion of California attorney disciplinary cases if the MBE cut score is lowered from 144.

II. Anderson and Muller Have Failed to Prove a Causal Link or Even A Critical Connection Between Bar Examination Scores and the Rate of Attorney Discipline.

Anderson and Muller state that they are “confident that the relationship between lower bar examination score and higher discipline is accurate.”²⁴ They do not clarify whether that statement asserts that the relationship is merely a correlation or whether they assert a causal link between low bar scores and attorney discipline. What is certain is that their data does not prove a causal relationship. After their paper was published and received significant criticism for their methodology and conclusions, they attempted to walk back what many readers thought was the authors’ claim of a causal link between bar scores and attorney discipline.²⁵ Professor Merritt concluded: “[D]espite some suggestive language in the paper, Anderson and Muller do not identify a direct correlation between bar exam scores and disciplinary actions.”²⁶ She stated that no proof of causation was proven because there is a 10-year gap between the bar exam and attorney discipline manifesting, and because they presented no proof of a connection between what the bar exam tests and the types of issues for which California attorneys are predominately disciplined.²⁷

The same day that Merritt’s critical review of their article was published, Anderson began backtracking. Anderson attempted to make it clear that their paper does not allege causation between bar exam scores and attorney state bar discipline. However, his attempt failed miserably. In his response he provided two antithetical explanations for their paper’s

²⁴ Anderson and Muller, supra., note 1, at 10.

²⁵ For an excellent analysis and criticism of the Anderson and Muller article, see Deborah J. Merritt, *Bar Exam Score and Lawyer Discipline*, June 3, 2017 (<http://www.lawschoolcafe.org/2017/06/03/baar-exm-scores-and-lawyer-discipline/>).

²⁶ Id.

²⁷ Id.

findings: (1) “low bar exam scores are not actually causing discipline, but rather [are] merely correlated with it”; and (2) their paper “argues that the current proposal to lower the required passing score for the California Bar Exam would **result** in an increased rate of discipline....”²⁸ The problem, of course, is that when one argues that X action on Y will result in Z effect, you are stating causation: “Causation indicates that one event is **the result** of the occurrence of the other event; i.e. there is a causal relationship between the two events. This is also referred to as cause and effect.”²⁹ It appears that Anderson is a bit uncertain about what he thinks that their study demonstrates.

All that Anderson and Muller have demonstrated is that their methodologically flawed study demonstrates that there is a greater chance that California attorneys who scored lower on the bar examination have a higher chance of being disciplined than those who scored higher. That does **not** prove that attorneys with lower bar scores commit more ethical violations, but rather, that under California’s attorney disciplinary system a greater percentage of lower scoring bar exam attorneys were identified and sanctioned by the disciplinary system. Anderson and Muller have not proven causation because the disparity in disciplinary filings may be caused by so many other variables that they did not build into a multi-variate analysis to determine relative causal weight or as Professor Anderson recently phrased the issue, “the exact magnitude” of the relationship.³⁰

The most absurd observations in their paper involve a discussion between graduates of “elite” law schools and graduates of lower ranked schools in terms of the types of jobs they accept and the levels of predictive ethical violations within each of those types of legal employment. The gist of their argument goes thus:

1. Elite law school students score much higher on the bar.
2. Elite law school students hire into elite legal jobs.³¹

²⁸ Id.

²⁹ (<http://www.abs.gov.au/websitedbs/a3121120.nsf/home/statistical+language+-+correlation+and+causation>). “Causation = cause and effect; talking about one thing will tend, other things equal, **to result** in another thing.” (<https://www.bing.com/search?q=is+a+statement+that+an+event+will+result+in++change+a+statement+of+causation&form=PRUSEN&mkt=en-us&httpsmsn=1&refig=85fde88dea584aa5a118468564ccb2f9&sp=-1&pq=is+a+statement+that+an+event+will+result+in+change+a+statement+of+causation&sc=0-75&qs=n&sk=&cvid=85fde88dea584aa5a118468564ccb2f9>).

³⁰ Anderson, supra, note 26.

³¹ Id., at 12.

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3. California disciplinary records indicate a much lower percentage of disciplinary cases against those from elite law schools who work in elite law jobs.
4. Therefore, those who attend elite law schools and score very high on the bar exam are a lower risk to consumers.

And their argument continues:

1. Students from non-elite or much lower ranked law schools score lower on the bar exam.
2. Students from lower ranked law schools and who perform lower on the bar exam get jobs that are different (solo/small firm).
3. California disciplinary records indicate a much higher percentage of disciplinary cases involves attorneys from lower ranked schools who work in solo/small firms.
4. Therefore, those who attend lower ranked schools and score lower on the bar exam are a greater risk to the public.³²

Sometimes an author's bias is demonstrated more by what he/she fails to discuss than by the actual narrative. Anderson has justified their study as necessary to protect "the most vulnerable, least sophisticated clients..."³³; however, they do not even discuss one of the most vulnerable client populations, criminal defendants, who are often at the mercy of prosecutors who graduated from elite law schools. Anderson and Muller do not even discuss the ethical crisis among the highest scoring bar examination test takers from the most elite law schools who work in the United States Attorney Office or in elite state/county prosecution units. According to the U.S. Attorney's Office, not only is hiring into that office "highly competitive", those with "a judicial clerkship" will be considered even if they do not have the expected years of lawyering experience.³⁴ Harvard Law School even informs its students that those who have a judicial clerkship have a serious leg up on the competition for becoming a U. S. Attorney.³⁵ In addition, attorney jobs in county and city district attorney offices in large cities have become exceedingly competitive and

³² Id., at 13.

³³ Anderson, supra, note 26.

³⁴ *Attorneys/Lawyers* (The United States Attorney's Office, Central District of California (<https://www.justice.gov/usao-cdca/employment/attorneyslawyers>)).

³⁵ *The Fast Track To The U. S. Attorney's Office* (Harvard), at 6.

graduates from elite law schools now represent a very large percentage of lawyers hired, and graduates from fourth-tier law schools are rarely hired.³⁶

Professor Muller has recently catalogued the relationship among elite law school students and judicial clerkships – they are essentially one and the same. His study indicates that from 2014-2016 a super-majority of federal clerks attended only a handful of elite law schools including: Yale (200), Stanford (153), Harvard (312), Univ. of Chicago (98), Univ. of Virginia (159), Duke (82), UCI (40), Berkeley (110), and the Univ. of Michigan (119). In contrast, students from fourth-tier California Law Schools simply did not receive federal clerkships: Golden Gate (none); Whittier (none); Western State (none); Southwestern (1).³⁷

Therefore, a review of ethical violations within the U. S. Attorney's Office and other large city elite District Attorney Offices puts the Anderson/Muller findings to its strictest test. Under their theory, we should find an ethically pristine legal environment in these offices staffed by high bar exam scoring elite law students. The data, however, tells a very different story since some of these prosecutors commit serious ethical violations that place citizens in jeopardy of losing their liberty.³⁸

³⁶ It is extremely difficult to engage in a comprehensive study of district attorneys' law schools because district attorney offices rarely even publish a list of their district attorneys. However, I offer the following example of hiring in the Santa Clara, California District Attorney Office as a small illustration of district attorney hiring patterns. The Santa Clara District Attorney Office announced the hiring of 15 new lawyers in *Replacing Retirees and Staffing Courtrooms, Santa Clara County District Attorney's Office Hires 15 New Lawyers*. (<https://www.sccgov.org/sites/da/newsroom/newsreleases/Pages/NRA2012/District-Attorney-Hires-15-New-Lawyers.aspx>). I took that list of attorneys' names and searched for the law school from which each graduated at (<http://members.calbar.ca.gov/fal/MemberSearch/QuickSearch?FreeText=>). One of the fifteen attorneys hired is deceased and those records are no longer maintained. Of the other fourteen attorneys hired none attended any of the bottom quartile schools referenced by Anderson and Mullen as likely to produce attorneys whose bar exam scores predict higher likelihood of bar discipline. And of those fourteen who were hired, 1 attended Harvard, 1 Stanford, 2 Berkeley, 1 UCLA, and 1 Univ. of Virginia. It is generally recognized in the legal hiring arena that graduates of elite law schools have a distinct advantage in D. A. hiring decisions: "You must also excel while you are attending law school and it always looks better if you attend one of the more prestigious schools in the country." Silas Reed, *How to Become a District Attorney* (<http://www.lawcrossing.com/article/5426/How-to-Become-a-District-Attorney/>).

³⁷ Derek T. Muller, *Visualizing Law School Federal Clerkship Placements, 2014-2016* (<http://excessofdemocracy.com/blog/2017/5/visualizing-law-school>).

³⁸ See, e.g., a chronicle of recent examples of serious prosecutorial misconduct in California courts that have been characterized as "epidemic" in Maura Dolan, *U. S. judges*

The Northern California Innocence Project published a study of the hundreds of cases of demonstrated prosecutorial misconduct in California, including those occurring in California federal courts in which prosecutors were almost never sanctioned.³⁹ The Innocence Project data demonstrates that Anderson and Muller are asking not only the wrong question, but an unfair question. The issue regarding consumer safety is not how many attorneys are actually disciplined, but rather how many and which attorneys are committing ethical violations even if the disciplinary system does not prosecute them. The Innocence study found that judges rarely refer prosecutorial malpractice cases to the California Bar Association, and even if those cases are referred, the Bar Association rarely proceeds with disciplinary action: “[c]ourts fail to report prosecutorial misconduct (despite having a statutory obligation to do so), prosecutors deny that it occurred, and the California State Bar almost never disciplines it.”⁴⁰ Even though the State Bar Disciplinary overall conviction rate is 10%⁴¹, it is only 1% when the State Bar investigates claims of prosecutorial misconduct: “the State Bar publicly disciplined only one percent of the prosecutors in the 600 cases in which the courts found prosecutorial misconduct and NCIP researchers identified the prosecutor.”⁴² And unlike those solo practitioners who Anderson and Muller accuse of committing the lion’s share of California’s ethical violations, U. S. Attorneys and District Attorneys have the political power of their office to attempt to shield themselves from public obloquy.⁴³

Perhaps the most famous denouncement of prosecutorial misconduct

see ‘epidemic’ of prosecutorial misconduct in state, L. A. Times, January 31, 2015 (<http://www.latimes.com/local/politics/la-me-lying-prosecutors-20150201-story.html>).

³⁹ Kathleen Ridolfi and Maurice Possley, *Preventable Error: A Report on Prosecutorial Misconduct in California 1997-2009* (<http://digitalcommons.law.scu.edu/ncippubs/2>).

⁴⁰ *Id.*, at 3. “In California, as in many states, prosecutors rarely face sanctions for their courtroom tactics. For that reason, the Field case – which could result in the prosecutor being suspended or even barred from the practice of law – is seen by some as a test of the system’s ability to police itself.” Leslie Griffy, *Prosecutor Faces Rare Disciplinary Hearing Today*, The Mercury News, May 20, 2008 and updated August 14, 2016 (<http://www.mercurynews.com/2008/05/20/prosecutor-faces-rare-disciplinary-hearing-today/>).

⁴¹ See Table, *supra*, page 3.

⁴² *Preventable Error, supra.*, note 28, at 3.

⁴³ See, e.g., *U. S. v. Lopez-Avilia* in which the U. S. Attorney’s Office unsuccessfully sought to have the federal court delete the U. S. Attorney’s name from a case in which prosecutorial misconduct played a significant role. (<http://cdn.ca9.uscourts.gov/datastore/opinions/2012/02/14/11-10013.pdf>).

was by Judge Alex Kozinski who said that violations “have reached epidemic proportions in recent years...”, and that “[p]rofessional discipline is rare...”⁴⁴ However, because, as Judge Kozinski states, “it is unlikely that [prosecutorial] wrongdoing will ever come to light...”, we may never have the ability to compare the extent of ethical violations among attorneys from elite law schools in elite prosecution offices with graduates of lower ranked law schools in solo/small firm practice.⁴⁵

The example of attorneys who attended elite law schools, who scored very well on the bar examination and who were hired into elite prosecution offices demonstrates some of Anderson's and Muller's methodologically flaws and conclusions. Their study simply did not account for system effects, such as political factors that affect the filing of state bar disciplinary actions or elite law firm “in-house” mechanisms for keeping ethical violations secret. In addition, elite law firm clients may be more willing not to report misconduct to the state bar rather than addressing their problems with the firm privately. As the data on the lack of state bar sanctions against prosecutorial misconduct demonstrates, state bar disciplinary statistics do not predict the amount of relative ethical violations among different groups of attorneys, but rather only predict the chances that those who violate ethics rules will be prosecuted.

All that Anderson and Muller have demonstrated is what the State Bar has known for more than a decade: (1) those from less elite law schools are more likely to work in solo or small firms where their ethical violations are more likely to be discovered, to be referred to the State Bar, and to be disciplined; and (2) those from elite law schools are more likely to work either in elite law firms or elite government positions where their ethical violations are either less likely to be discovered and/or reported, and if reported, are less likely to result in disciplinary sanctions.

For instance, in 2001 the California State Bar issued a report studying complaints about disparate treatment in the disciplinary system between big law firm attorneys and solo/small firm attorneys.⁴⁶ That study

⁴⁴ *United States v. Olson*, (United States Court of Appeals for the Ninth Circuit, Nos-10-36063 and 10-36064) (2013), Judge Kozinski dissent at 11, 14. Although *U. S. v. Olson* dealt with a failure of a U. S. Attorney to proffer alleged exculpatory information, Judge Kozinski also listed prosecutors' other forms of misconduct such as using unreliable experts (“some prosecutors turn a blind eye to such misconduct because they're more interested in gaining a conviction than achieving a just result....” *Id.*, at 15-16

⁴⁵ *Id.*, at 11.

⁴⁶ *Investigation and Prosecution of Disciplinary Complaints Against Attorneys in Solo Practice, Small Size Law Firms and Large Size Law Firms* (State Bar of California,

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found that the State Bar Disciplinary system: (1) “is a complaint driven system”; and (2) that those practitioners working in “personal injury law, family law, criminal law, workers’ compensation and building contract disputes” are most often referred to the State Bar’s disciplinary system.⁴⁷ But perhaps most important in analyzing the Anderson and Muller paper, the State Bar study found that the culture in elite or large firm practice makes it much less likely that elite law firm lawyers who commit ethical violations will be referred to the State Bar disciplinary system:

[S]olo and small firm attorneys can find themselves so overworked that they miss a statute of limitations, neglect to communicate a settlement offer or fail to return a client’s call. **In a large law firm, while these mistakes could result in a reprimand from the firm or even the loss of job, it would not usually result in a complaint to the Bar.**⁴⁸

Thus, a review of the differences between solo/small firm lawyers’ state bar disciplinary actions and those of elite law firm lawyers’ cannot support Anderson’s and Muller’s conclusion that solo/small firm lawyers pose a greater risk to consumers because we simply have no data on the comparative number and seriousness of ethical violations by elite firm lawyers that are just kept in-house and never reported. Anderson and Muller have not proven that attorneys from lower ranked schools that score lower on the bar and who frequently work in solo/small firms are: (1) more unethical; (2) a greater danger to consumers; or (3) not minimally competent to practice law.

Anderson and Muller may find my analysis of unethical conduct by graduates of elite law schools irrelevant because lowering the MBE cut score mostly affects graduates of bottom-tier law schools. Anderson and Muller see the bar exam as a means of protecting the public. But all legal

June 2001). The State Bar did not find a bias against solo/small firm practitioners, but rather that more complaints were filed against those attorneys than against large firm attorneys.

⁴⁷ Id., at 19. The State Bar report included several other variables that justified the greater percentage of solo/small firm attorney cases litigated in the State Bar disciplinary system that have nothing to do with the actual ethical violation being investigated: (1) solo/small firm attorneys often cannot afford to hire an attorney to defend them in the State Bar Proceeding; (2) solo/small firm attorneys’ records are often less cooperative. Id., at 2 and 13.

⁴⁸ Id., at 18.

clients, not just those without the funds to hire an elite law firm, are entitled to ethical and competent attorneys. If the State Bar is going to investigate whether any relationships between the bar exam and unethical conduct actually exist, it must also analyze why some attorneys from elite law schools engage in ethical misconduct which sometimes cost's innocent defendants their liberty. Perhaps Anderson's and Muller's cynical observation about students from elite law schools is correct: "[i]t may be the case that graduates of more elite law schools are more sophisticated in covering up their unethical behavior...."⁴⁹

III. The Methodological Flaws and Weakness of Their Study.

Anderson and Muller admit that a well-designed and highly predictive study of the relationship between bar passage and attorney discipline would be comprised of the following individualized data on each disciplined attorney, including:

1. Law school attended;
2. Date of Admission;
3. LSAT score;
4. Law school GPA;
5. Public disciplinary record.
6. Bar exam score, including MBE score.⁵⁰

However, their study did not have access to or use individualized LSAT scores, Law School GPA or Bar Exam scores. Instead, they use what they term "proxies" for this data. Their chain of proxies is very difficult to follow, but they attempted to explain how they linked their "proxies":

1. An individual disciplined attorney's LSAT score was obtained by **estimating** that score based on the attorney's law school 25th and 75th percentile LSAT scores.⁵¹ However, this calculation amounts to no more than a guess of where that student fit on the full range of LSAT scores within the law school. The probability of the accuracy of that prediction is very low and such an erroneous estimate could significantly affect any conclusions regarding that particular disciplined attorney's bar passage score.

2. They then predict the law school's average bar passage score by using the LSAT average by "**interpolating**" that score from data

⁴⁹ Anderson & Muller, at 13.

⁵⁰ Anderson & Muller, at 3-4, 7.

⁵¹ Id., at 4.

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published by the National Conference of Bar Examiners [NCBE].⁵² One problem is that Anderson and Muller do not describe their interpolation protocol. The NCBE does not publish individual law school students' or law schools' LSAT scores or MBE scores, and therefore, it is difficult to understand how this interpolation has any statistical validity regarding the analysis of any single disciplined attorney referred to the State Bar.

3. They then tested their model against a single set of data for the July 2016 California exam in which individual law schools', but not individual test takers', mean MBE scores were published.⁵³ The obvious problem is that the Anderson and Muller study analyzes bar exam data for graduates from 1975 to 2006, but their test instrument is based on a single administration of the California bar examination. They do not address the possibility that the school specific bar passage scores and mean MBE scores were aberrant for that July 2016 administration of the California bar examination. Based upon my inspection of California State Bar Examination records for tests from February 2007 to July 2015 for my own law school, Whittier, the first-time test taker MBE mean scores varied from a low of 133.6 to a high of 146.4. This significant MBE mean score variation demonstrates the fatal methodological flaw in the Anderson and Muller study that relied on a single mean MBE score to calculate a law school's bar passage score that was then used to calculate individual disciplined attorney's predicted disciplinary histories.

The Anderson and Muller study is so full of statistical caveats, proxies, incomplete data, interpolation, speculation and belief that it lacks statistical validity. No reasonable policy maker should provide this study with sufficient merit to construct a new California bar examination passage standard. However, I commiserate with their inability to gather sufficient specific data from the State Bar to conduct a more statistically reliable study, and I join their request that more State Bar data be released to the public.

But beyond the Anderson and Muller paper, I submitted an empirical study to the ABA Council that demonstrates that there is no correlation between passing a bar examination, not taking a bar exam and being admitted pursuant to a "diploma privilege", and patterns of attorney

⁵² Id.

⁵³ Id.. I commiserate with their inability to gather sufficient specific data from the State Bar to conduct a more statistically reliable study, and I join their request that more State Bar data to be released to the public.

discipline. In that study⁵⁴ I examined Wisconsin disciplined attorneys from January 2013 to March 2016 in relation to whether they had to pass a bar exam or whether they were admitted by diploma privilege. By employing a chi-square analysis the data demonstrated that there was no valid statistically relationship between rates and seriousness of attorney disciplinary violations of those who passed a bar exam versus those admitted under the diploma privilege.⁵⁵ The results disproved my hypothesis that diploma privilege admitted attorneys would have a greater number and more serious ethical violations than those who passed a bar exam. In a companion study of bar passers versus diploma admitted attorneys I conducted an analysis of the patterns and seriousness of those two groups' disciplinary violations.⁵⁶ The results demonstrated that the bar passage [BP] group had more sustained disciplinary cases and that those case were usually based upon more serious ethical violations than the diploma admitted [DA] attorneys: (1) recidivists: .99 DP; 1.52 BP; (2) violations involving dishonesty: 33% DP; 43% BP; (3) Monetary violations: 44% DP; 46% BP.⁵⁷

These studies of the differences between Wisconsin attorneys admitted by bar exam versus those admitted by the diploma privilege raise serious questions about the Anderson and Muller conclusions. The Wisconsin studies posit the possibility that the bar exam is either irrelevant or only marginally relevant in predicting attorney misconduct. Before the State Bar of California relies on the Anderson and Muller paper, it needs to conduct its own empirical analysis of attorney bar exam and disciplinary records to determine what variables, if any, actually predict not only attorney ethical violations, but also predict the most serious types of violations that will place the public at most risk.

IV. Anderson's and Muller's Claim That Lowering The California MBE Cut Score Will Increase Malpractice Cases Is Inconsistent With State Bar Disciplinary Statistics.

⁵⁴ William Wesley Patton, April 22, 2016 (https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/comments/201607_comment_s316_william_patton_3.authcheckdam.pdf).

⁵⁵ Id., at 7.

⁵⁶ William Wesley Patton, May 7, 2016 (https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/comments/201607_comment_s316_william_patton_4.authcheckdam.pdf).

⁵⁷ Id.

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Anderson and Muller predict that those with low California bar passage scores will have a greater chance of being disciplined than attorneys' with high passage scores.⁵⁸ They assume, without analysis, that those disciplined attorneys "increase the amount of malpractice, misconduct, and discipline among California attorneys" and that this will increase reduce consumer protection.

First, Anderson and Muller present no data to demonstrate that changing the California MBE cut score will increase malpractice rates. They simply make that prediction out of thin air. They do not present any qualitative analysis to prove that the types of misconduct that result in attorney discipline in California also would support the very different legal standard in malpractice cases. Many acts sanctioned by the State Bar have no correspondence with malpractice. In a study that I sent to the ABA Section on Legal Education and Admission to the Bar⁵⁹ I analyzed 163 California State Bar disciplinary opinions issued from January 1 to April 30, 2016. The analysis demonstrated that 51% of the 163 violations involved client trust fund violations. Many of those violations were not found to be seriously culpable and many only involved inappropriate comingling of funds.⁶⁰ Almost none of those cases would support legal malpractice filings because most of the violations either did not result in harm to the client versus potential harm to the client or they did not result in any prejudice to the client's legal cause of action. Another 18% of the cases involved drug and/or alcohol problems or failures to meet disciplinary probation conditions which were unrelated to any specific lawyer acts that would give rise to a malpractice action.⁶¹ Cases associated with the common claims for malpractice such as not meeting a statute of limitations, failure to call a critical witness, failure to reasonably engage in discovery, failure to inform a client of a proffered settlement offer, etc., were almost non-existent. Therefore, Anderson and Muller's prediction that lowering the California MBE score will result in a substantial increase in malpractice is simply unproven and empirically unsupported.

⁵⁸ Id., at 8.

⁵⁹ Letter to ABA from William Wesley Patton, May 7, 2016 (https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/comments/201607_comment_s316_william_patton_4.authcheckdam.pdf).

⁶⁰ Id., at 6.

⁶¹ Id., at 14-18.

CONCLUSION

I applaud Professors Anderson and Muller for investigating the ramifications of California changing its MBE cut score. The consequences of such a change are critically important in balancing the dual goals of the State Bar of California and the California Supreme Court of maintaining consumer safety while also increasing diversity in the bar. I also do not fault them for having insufficient evidence to provide a methodologically and statistically reliable study since the State Bar does not publicly share the critical data necessary to account for the myriad variables necessary to scientifically determine why certain attorney disciplinary patterns exist. What I fault them for is publishing a substantially flawed study that some who do not take the time to actually read and analyze it may rely upon as a justification for keeping the current 144 MBE score. As serious legal bloggers, they both should have known that their dramatic claims would inflame the current public policy debate well beyond what their limited evidence actually demonstrated.⁶² Of course, perhaps that was the intent.

What Anderson and Muller failed to prove is: (1) students from low rated California ABA Law Schools engage in significantly more actual unethical behavior rather than merely working in legal environments in which detection and reporting to the State Bar is much more likely; (2) that there is a causal relationship between students who attend low ranked schools, their bar exam scores, and their non-ethical behavior; and (3) that students from low ranked schools who scored lower on the bar exam are either not minimally competent to practice law or are a significantly greater danger to the public than students who attended elite law schools.

Neither Anderson and Muller, nor the California State Bar, has produced any empirical evidence that a MBE cut score of 144 is necessary to assure the public that all licensed attorneys are minimally competent. The dangers of setting an unreasonably high MBE cut score are considerable: (1) a loss of many attorney candidates, including diversity candidates, who could provide legal services to California residents; (2) an artificially unreasonable monopoly on the practice of law that has long-term impact on the availability and cost of legal services; and (3) great economic

⁶² See, e.g., (<http://witnesseth.typepad.com/blog/2017/06/responsibility-and-irresponsibility-in-the-california-bar-exam-debate.html>) and (<http://excessofdemocracy.com/blog/2017/6/draft-work-in-progress-the-high-cost-of-lowering-the-bar>).

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and psychological harm to the hundreds of attorney applicants whose MBE scores demonstrate that they would have been admitted to most other state bar associations in the United States⁶³, but who, because of the 144 MBE cut score failed the California bar examination. It is time to better balance consumer safety with increased diversity in the bar by setting an empirically justified California MBE cut score.

⁶³ Professor Anderson's earlier study demonstrated that California's fourth-tier law schools' mean MBE scores on the California Bar Examination would have resulted in those students passing the New York bar examination at rates between 57%-83%. Anderson, *California law school bar passage rates recalculated for the New York bar*, Dec. 19, 2016 (<http://witnesseth.typepad.com/blog/2016/12/california-law-school-bar-passage-rates-recalculated-for-the-new-york-bar.html>).

AHEAD OF THE CURVE

TURNING LAW STUDENTS INTO LAWYERS

*A Study of the Daniel Webster Scholar Honors Program
at the University of New Hampshire School of Law*





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Honors Program at the University of
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EDUCATING
TOMORROW'S
LAWYERS®

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INSTITUTE *for the* ADVANCEMENT
of the AMERICAN LEGAL SYSTEM



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Educating Tomorrow's Lawyers is an initiative of IAALS dedicated to aligning legal education with the needs of an evolving profession. Working with a Consortium of law schools and a network of leaders from both law schools and the legal profession, *Educating Tomorrow's Lawyers* develops solutions to support effective models of legal education.

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FOREWORD

BY LLOYD BOND, PH.D., AND WILLIAM M. SULLIVAN, PH.D.¹

Shortly after the publication of the Carnegie Foundation's *Educating Lawyers: Preparation for the Profession of Law* in 2007, John Garvey visited the foundation and spent an afternoon describing for us the newly established Daniel Webster Scholar Honors Program, which he directs at the University of New Hampshire School of Law. Professor Garvey stated that he believed the program comes close, both in its purpose and in its actual instantiation, to the vision we had of how legal education might be improved. We agree.

In *Educating Lawyers*, we called for a greater degree of intentional integration among what we designated the three “apprenticeships” or key components of legal education: the teaching of law as a mode of thinking, the development of practical competence, and the fostering of professional commitments and identity. We were immediately struck by the resonance between our recommendations and the enterprise on which John Garvey and his colleagues were embarked at New Hampshire. So, we were delighted when, several years later, the opportunity arose to study the program more rigorously and in depth.

In April 2013, we conducted a series of focus groups over two-and-a-half days at the University of New Hampshire to learn more about the program and its role in developing lawyers. The transcript and our resulting summary of events gave rise to this report, undertaken by IAALS and *Educating Tomorrow's Lawyers*, as part of its expressed mission to identify innovative models of legal education that ensure knowledgeable, ethical, and practice-ready professionals. In the paper, Gerkman and Harman make a powerful and convincing case that the program represents a landmark innovation in the preparation of lawyers. In it, they detail the instructional elements of the program, the intense exposure of students to the actual practice of law, the powerful innovations in formative and reflective assessment, the intimate involvement of the entire state of New Hampshire's legal community, and the acceleration of legal competence that the program fosters in students.

We eagerly endorse the conclusions herein that the Daniel Webster Scholar Honors Program “gives a glimpse of what is possible if we look beyond the limitations of today,” and “that any law schools and bar or bench initiatives taking a critical look at lawyer training should know about the establishment, structure, and success the program has had in positioning its scholars to be ahead of the curve.”

1 Lloyd Bond, Ph.D., was a Senior Scholar (Ret.) of the Carnegie Foundation for the Advancement of Teaching and Professor (Emeritus) at the University of North Carolina, Greensboro. He is a co-author of *Educating Lawyers: Preparation for the Profession of Law* (2007). William M. Sullivan, Ph.D., was a Senior Scholar (Ret.) of the Carnegie Foundation for the Advancement of Teaching. He was a co-founder of *Educating Tomorrow's Lawyers* and served as its first director. He is the lead author of *Educating Lawyers: Preparation for the Profession of Law* (2007).



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EXECUTIVE SUMMARY

In recent years, law schools have been the subject of great scrutiny—by media, by the profession, by law students, and even by legal educators within the schools—about the quality of legal education and training they offer students who will graduate to become tomorrow’s lawyers. There may be disagreement about the severity of the problem and the solutions to the problem, but there can hardly be disagreement that the increasing focus on the quality of legal education is creating more opportunities than ever for innovation in law schools and for building partnerships with the profession to develop improved models of legal education.

When New Hampshire’s law school teamed up with the New Hampshire Supreme Court and the New Hampshire Board of Bar Examiners over a decade ago, a unique program was born. The Daniel Webster Scholar Honors Program at the University of New Hampshire provides a combination of training and assessment over a two-year period that serves as a variant to the two-day bar examination—simply stated, students who participate in the program are evaluated for bar admission based on their performance over a two-year period and do not sit for the traditional bar examination.

But, the success of the program lies not in its relationship to the bar exam. Rather, the success of the program lies in the fact that, on some measures, the students are actually better prepared for the practice of law. The combination of formative and reflective assessment administered in a practice-based context appears to produce better outcomes for students, which ultimately translates to better prepared lawyers.

The two-year program, beginning in the second year of law school, works within a proscribed curriculum that immerses students in experience-based learning settings, and both provides and demands formative, reflective, and summative assessment. The ultimate assessment comes, of course, at the end of the program when student participants are reviewed for bar admission based on their performance over the course of two years.

From the outside, the program seems to have all the right elements for success, but is it actually doing a better job of preparing lawyers for practice and clients? To find out, IAALS worked with an evaluation consulting firm to conduct quantitative and qualitative analysis of existing research to evaluate outcomes of the Daniel Webster Scholar Honors Program. Notably, we learned:

- In focus groups, members of the profession and alumni said they believe that students who graduate from the program are a step ahead of new law school graduates;
- When evaluated based on standardized client interviews, students in the program outperformed lawyers who had been admitted to practice within the last two years; and
- The only significant predictor of standardized client interview performance was whether or not the interviewer participated in the Daniel Webster Scholar Honors Program. Neither LSAT scores nor class rank was significantly predictive of interview performance.

Based on our evaluation, we believe other schools, educators, and jurisdictions can learn from the success of the program. While aspects of the program may be difficult to replicate in larger jurisdictions, full-scale replication is not the only option for schools looking to build upon the success of the program. IAALS believes the program can be unbundled into the key elements—most notably, the combination of formative and reflective assessment in a practice-based context and a focus on collaboration between the academy and the profession. Part of the genius of the program was its collaborative roots. Together, practicing lawyers and law schools can innovate effectively.

The Daniel Webster Scholar Honors Program is ahead of the curve in graduating new lawyers ready to venture into the profession—and others can learn from its success.

INTRODUCTION

Law schools do not often find themselves on the front page of mainstream media sources, but in the last few years it has been happening with increasing regularity. New lawyers and their readiness—or lack of readiness—to move into practice were highlighted on the front page of the *New York Times* in November 2011.² The article claimed that recent graduates pay as much as \$150,000 for legal educations that do not prepare them to practice law. One recent graduate who went through a post-law school training program at his firm, Drinker Biddle, was quoted with, “What they taught us at this law firm is how to be a lawyer. What they taught us at law school is how to graduate from law school.” It was not the first article of its kind³ and it would not be the last, but it created a firestorm around the question: are law school graduates ready to enter the profession, engage in the practice of law, and serve clients?

It is a good question—and it is a question that many from both the profession and the academy have been asking for some time. In New Hampshire, just over a decade ago, a group of judges, lawyers, and law school administrators decided that the answer was increasingly looking like “no,” but they believed that they could change that—at least for a group of law students who would participate in a two-year program at the University of New Hampshire.

² David Segal, *What They Don't Teach Law Students: Lawyering*, N.Y. TIMES, Nov. 20, 2011, at A1, available at <http://www.nytimes.com/2011/11/20/business/after-law-school-associates-learn-to-be-lawyers.html?pagewanted=all&r=0>.

³ Clark D. Cunningham, *Should American Law Schools Continue to Graduate Lawyers Whom Clients Consider Worthless?* 70 MD. L. REV. 499 (2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1805936.

THE DANIEL WEBSTER SCHOLAR HONORS PROGRAM

AT THE UNIVERSITY OF NEW HAMPSHIRE SCHOOL OF LAW

The calls to improve legal education are hardly new. More than two decades ago, a task force of the American Bar Association sought to narrow the perceived gap between the legal profession and the law schools who educate future members of that profession. In its final report, the task force said:

It has long been apparent that American law schools cannot reasonably be expected to shoulder the task of converting even very able students into full-fledged lawyers licensed to handle legal matters. Thus, a gap develops between the expectation and the reality, resulting in complaints and recriminations from legal educators and practicing lawyers.⁴

Best known for its Statement of Skills and Values,⁵ this report, colloquially referred to as the MacCrate Report, “set off a wide-ranging discussion among academics, practitioners, bar examiners, and the judiciary in a variety of contexts.”⁶ Among its many recommendations, the MacCrate Report suggested “[l]icensing authorities, the law schools and the organized bar should engage in continuing dialogue to determine the optimum content, methods and mix of instruction in skills and values in law school, during the licensing process and after admission to practice.”⁷

In response to the publication and its recommendations, representatives from the highest courts in Maine, New Hampshire, and Vermont met with the deans of Vermont Law School, the Franklin Pierce Law Center,⁸ and the University of Maine School of Law, as well as the presidents of the three state bar associations, to discuss the implications of the report for improving legal education in their respective states.

The meeting resulted in the creation of a Tri-State Task Force on Bar Admissions, consisting of members of the judiciary, law school deans, bar presidents, bar examiners, and other community leaders. The Task Force considered a multi-week transitional comprehensive education program for all bar applicants, which eventually led to the formation of a committee that would create the Daniel Webster Scholar Honors Program (“DWS”).⁹

4 ABA SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT – AN EDUCATIONAL CONTINUUM (REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP) 4 (1992) [hereinafter MACCRATE REPORT].

5 *Id.* at 123.

6 Dean Mary Lu Bilek et al., *Twenty Years After the MacCrate Report: A Review of the Current State of the Legal Education Continuum and the Challenges Facing the Academy, Bar, and Judiciary*, A.B.A. SEC. LEGAL EDUC. ADMISSIONS B. 2 (2013), available at http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/june2013councilmeeting/2013_open_session_e_report_prof_educ_continuum_committee.authcheckdam.pdf.

7 MACCRATE REPORT, *supra* note 4, at 334.

8 Franklin Pierce Law Center affiliated with the University of New Hampshire in 2010 and has now fully merged with the University of New Hampshire School of Law.

9 John Burwell Garvey and Anne F. Zinkin, *Making Law Students Client-Ready: A New Model in Legal Education*, 1 DUKE F. LAW & SOC. CHANGE 101, 115-117 (2009), available at <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1004&context=dfisc> [hereinafter Garvey, *A New Model in Legal Education*].

ESTABLISHMENT, STRUCTURE, AND LEADERSHIP

The DWS program was championed by then-Senior Associate Justice Linda S. Dalianis of the New Hampshire Supreme Court. When discussing the inception of the program, she said she was disturbed by the ineptness and lack of preparation of the young lawyers arguing cases before her and was especially concerned that they were leaving law school without learning how to make legal arguments in court.¹⁰ Justice Dalianis led a two-year conversation with the New Hampshire Supreme Court, the New Hampshire Board of Bar Examiners, and the dean of the Franklin Pierce Law Center, the only law school in New Hampshire. Their discussions resulted in what is now the Daniel Webster Scholar Honors Program at the University of New Hampshire School of Law.

The DWS program began with an ambitious goal to shrink the gap between law school and legal practice—to produce lawyers who would be client-ready—and it sought to achieve that goal by focusing on the ten skills and four values set forth by the MacCrate Report (see sidebar).¹¹

The DWS program operates under the leadership of Director John Burwell Garvey, who joined the University of New Hampshire School of Law as a full-time faculty member in 2005, but had a long association with the school as an adjunct faculty member. He brings 35 years of practice experience, starting his career as a Lieutenant in the United States Navy Judge Advocate General's Corps, and continuing at a private New Hampshire law firm.

He is joined by two full-time law professors and six adjunct faculty members: Marcus Hurn, a Professor of Law who teaches Contracts, Property, Writing for Practice, and Contract Design and Drafting; Peter S. Wright, a Professor of Law and Director of Clinical Programs; Crystal M. Maldonado, an adjunct professor and DWS graduate who is a domestic relations lawyer at a New Hampshire law firm; Petar M. Leonard, an adjunct professor and DWS graduate who is a domestic relations lawyer at a New Hampshire law firm; Kirk Simoneau, an adjunct professor and DWS graduate who is a civil trial and appellate lawyer in a New Hampshire law firm; Emily Gray Rice, an adjunct professor who is a civil trial and

¹⁰ See Existing Qualitative Data, page 12.

¹¹ MACCRATE REPORT, *supra* note 4, at 138-141.

MACCRATE SKILLS AND VALUES

FUNDAMENTAL LAWYERING SKILLS

- Problem solving
- Legal analysis and reasoning
- Legal research
- Factual investigation
- Communication
- Counseling
- Negotiation
- Litigation and alternative dispute resolution
- Organization and management of legal work
- Recognition and resolution of ethical dilemmas

FUNDAMENTAL VALUES OF THE PROFESSION

- Providing competent representation
- Striving to promote justice, fairness, and morality
- Striving to improve the profession
- Engaging in professional self-development

appellate lawyer at a New Hampshire law firm; Donna J. Brown, an adjunct professor who is a criminal trial lawyer at the New Hampshire Public Defender's Office; and David Cleveland, an adjunct professor trained in theater who works with the standardized clients used in the DWS program.¹²

ADMISSIONS CRITERIA AND SELECTION

When it began in 2005, the DWS program was limited to 15 students in each graduating class. That number has since increased to 24 students, for a total of 48 students in the two-year program. In each of the last two years, more than 40% of the class has applied to participate in the program.¹³ Students apply in March of their first year and are selected in June.

It would be easy to assume that the DWS program accepts students with only the top academic credentials, especially given that it is called an "honors" program. In fact, in its first year, academic excellence was a significant factor in admission. That changed, however, in subsequent years. The committee, comprising faculty and alumni of DWS, that determines the composition of each class of students who participate in the DWS program ("DWS scholars") looks at a much broader set of criteria, including how students interact in professional relationships, how they approach professional development, and how they accept personal responsibility as students who will eventually enter the profession.

Selection is based upon a personal interview conducted by graduated Webster Scholars and a holistic assessment of each applicant, which includes evaluation of academic, professional, and interpersonal skills and the student's overall ability to succeed in the program. Because enrollment is limited, the committee identifies a balanced and diverse group from the pool of qualified applicants.¹⁴

12 The DWS program has also provided a list of other partners it works with to deliver the program. See Appendix C.

13 John Burwell Garvey, "Making Law Students Client-Ready" – *The Daniel Webster Scholar Honors Program: A Performance-Based Variant of the Bar Exam*, N.Y. ST. BAR ASS'N J., September 2013, at 44, 46, and n.21.

14 *Id.* at 46.

ADMISSIONS CRITERIA¹⁵

PROFESSIONAL RELATIONSHIPS	PROFESSIONAL DEVELOPMENT
<ul style="list-style-type: none"> • Have integrity and engage in honest discourse • Treat themselves and others with respect • Work well with others, acknowledging their own and others' strengths and weaknesses • Show empathy and kindness to others • Listen attentively—know when to listen and when to contribute • Have humility—admit to mistakes and make apologies 	<ul style="list-style-type: none"> • Are committed to working as part of a learning team • Are motivated to improve—engage in a continuous process to improve their own and their classmates' performance • Eagerness to learn new skills • Learn from mistakes and are willing to take risks • Seek—and learn from—feedback • Are open to new ideas, seeing things from others' perspectives, and sharing their views • Are committed to developing strong written and oral skills
PERSONAL RESPONSIBILITY	ACADEMIC COMPETENCY
<ul style="list-style-type: none"> • Have a strong work ethic—maintaining positive relationships, staying productive, and managing stress when faced with a demanding workload and multiple deadlines • Seek to serve and help others, through volunteer projects or extracurricular activities • Are committed to continual professional and personal development and a healthy life balance 	<ul style="list-style-type: none"> • Demonstrate academic skills sufficient to maintain a cumulative GPA of at least 3.0 upon graduation and to obtain at least a B- in any Daniel Webster Scholar course.

CURRICULUM AND ASSESSMENT

The DWS program subjects students to an intensive, two-year program that begins during the second year of law school. Building on the traditional first-year curriculum, students follow a strict list of course requirements in a specified sequence. When the program was conceived, the committee identified existing classes at the law school that would be required for DWS scholars and created “practice courses that would be small, emphasize the MacCrate skills and values, and be taught in the context of real life.”¹⁶

The DWS program weaves together a combination of formative, reflective, and summative assessment, which we discuss in more detail on page 10. “Formative, reflective, and summative assessment is an integral part of the program, both as a critical aspect of the learning environment and as a means of measuring outcomes.”¹⁷ Notably, DWS scholars are admitted to the New Hampshire Bar based on their performance over the full, two-year program.¹⁸

15 University of New Hampshire School of Law – Daniel Webster Scholars: Criteria for Applicants, available at <http://law.unh.edu/academics/jd-degree/daniel-webster-scholars/criteria> (last visited Dec. 2, 2014).

16 Garvey, *A New Model in Legal Education*, *supra* note 9, at 117.

17 *Id.* at 119.

18 Rules of the Supreme Court of New Hampshire: Administrative Rules 35 to 59: Rule 42. Admission to the Bar; Board of Examiners; Character and Fitness Committee, available at <http://www.courts.state.nh.us/rules/scr/scr-42.htm> (last visited Dec. 22, 2014).

DWS REQUIRED COURSES

This report will focus on the courses that were designed specifically for the DWS program. They are required courses that span the two-year program. DWS scholars are also required to take specific courses that are part of the regular law school curriculum.

PRETRIAL ADVOCACY

Taken in the fall semester of the scholar's second year of law school, this is a 4-credit course that divides the scholars into two law firms to litigate a mock case. In addition to the scholars, who act as junior associates, each team includes one experienced litigator and faculty member, who acts as a senior partner, and three third-year DWS scholars, who play the role of senior associates. Working together in small groups and working alone, junior associates interview clients and witnesses; prepare or answer a complaint; prepare and answer interrogatories; take and defend a deposition with a real court reporter (videotaped); prepare deposition reports; prepare a motion or an objection to a motion for summary judgment and argue it before a real judge in the judge's courtroom (videotaped); and track and submit time for all activities each week.

Throughout the experience, the scholars receive feedback from a variety of sources, including senior partners, senior associates, other junior associates, court reporters, judges, attorneys, standardized clients, and witnesses.

At the conclusion of the semester, bar examiners receive a portfolio with a table of contents, student work, a student reflective paper, video URLs for the deposition and oral arguments, and a copy of the student's transcript. They also receive benchmarks, completed by the students and senior partner after each exercise, and a final evaluation by the senior partner.

ADR/NEGOTIATIONS

Taken in the spring semester of the scholar's second year of law school, this is a 3-credit course that helps students develop negotiation, mediation, collaborative law, and arbitration skills. Scholars learn basic negotiation theory, strategy, and technique through a combination of simulation and class discussions. At the conclusion of the semester, bar examiners receive the problem information, along with problem and strategy outlines created by the scholars, a weekly skills journal, final personal reflections, and comments by the professor and teaching assistant.

MINISERIES

Taken in the spring semester of the scholar's second year of law school, this is a 2-credit survey course that covers six focus areas with four professors in fourteen weeks: Introduction to Client Counseling, two weeks; Family Law, three weeks; Domestic Violence Emergency (DOVE),¹⁹ three weeks; Conflicts of Laws, one week; Negotiable Instruments, two weeks; Secured Transactions, two weeks. Throughout the course and in each segment, students participate in a variety of exercises, including a mock trial on a domestic violence petition, and take tests to demonstrate a basic understanding of the materials. At the conclusion of the semester, bar examiners receive personal reflection papers written throughout the course.

¹⁹ The DOVE program is used to strengthen professional formation by introducing scholars to pro bono work and helping them understand the obligation lawyers have to serve society. Every scholar is trained as a DOVE attorney and many take DOVE cases when they enter practice.

TRIAL ADVOCACY

Taken in the spring semester of the scholar's second year of law school, this is a 3-credit course that builds on the Pretrial Advocacy course. During the course, the scholars work with witnesses in a trial setting, learn the importance of good interrogatory and deposition questions and answers, conduct a simulated civil trial based on the case they litigated in Pretrial Advocacy the previous semester, and conduct a simulated criminal trial. Throughout the course, students receive feedback from other scholars, professors, lawyers, judges, jurors, and witnesses. At the conclusion of the semester, bar examiners receive course materials, the student's weekly journal entries, a reflective paper written after observing a real court proceeding, and a final reflective paper for the course.

BUSINESS TRANSACTIONS

Taken in the fall semester of the scholar's third year of law school, this is a three-credit course focused on the formation, financing, operations, and selling of business organizations. The course uses hypotheticals, writing assignments, and negotiation exercises; students are evaluated on writing assignments, a personal reflective paper that considers the MacCrate Skills and Values,²⁰ and a capstone exercise that pulls together facts and information from previous class exercises. At the conclusion of the semester, bar examiners receive the assignments from class and the reflective paper.

CAPSTONE COURSE: ADVANCED PROBLEM SOLVING AND CLIENT COUNSELING

Taken in the spring semester of the scholar's third year of law school, this two-credit course integrates lessons learned throughout the DWS program. The syllabus from the Spring 2014 course, taught by John Garvey, sets forth the course objective:

In order to be client-ready, a lawyer needs to be able to integrate many skills and correctly apply many values. As you have progressed through the DWS Program, you have reflected upon the MacCrate Skills and Values, and how they have applied to your development as a lawyer. This course will include the further development and refinement of many of those skills and values, with particular emphasis on the skills and values involved in the lawyer's relationship with the client. In order to emphasize the appropriate focus of that dynamic, we will refer to it as the client-lawyer relationship, rather than [sic] vice-versa. The skills we will focus upon include: 1) fact investigation (§4); 2) client and witness interviewing (§4.3 & 5); 3) client counseling (§6); 4) problem solving (§1); 5) organization and management of legal work (§9), and; 6) recognizing and resolving ethical dilemmas (§10). The values include: 1) provision of competent representation (§1); 2) striving to promote justice, fairness and morality (§2); 3) striving to improve the profession (§3), and; 4) professional self-development (§4).²¹

The course includes lessons from litigation and transactional practices and relies on simulations and role-playing that place scholars in various roles, including lawyer and client. During the course, all scholars interview a standardized client three times.

The DWS program added the standardized client interview model to its curriculum in 2008. Through a collaboration with Clark Cunningham of Georgia State University College of Law and funding from the W. Lee Burge Endowment for Law & Ethics, the standardized clients used in the program were actually trained through repeated sessions led by Paul Maharg and Karen Barton, who previously validated this form of assessment at Glasgow Graduate School

20 MACCRATE REPORT, *supra* note 4, at 138-141.

21 John Garvey, DWS Capstone Course – Becoming Client-Ready: Advanced Interviewing, Counseling, and Problem Solving (Spring 2014) (unpublished syllabus, University of New Hampshire) (on file with author).

COURSE REQUIREMENTS²²

	Course	Credits
First Year Requirements: (Required for <i>all</i> UNH Law students):		31
Upper Level Courses: (Required for <i>all</i> UNH Law students):	Administrative Process	3
	Criminal Procedure	3
	Professional Responsibility	3
	Writing Requirement	3
	Subtotal	12
Additional Upper Level Courses: (Required for Webster Scholars)	Evidence	3
	Personal Income Tax	3
	Business Associations	3
	Wills, Trusts, & Estates	3
	Clinic/Externship	6
	Subtotal	18
DWS Required Courses:	DWS Pretrial Advocacy (satisfies writing requirement)	4
	DWS Miniseries	2
	DWS Negotiations & ADR Workshop	3
	DWS Trial Advocacy	3
	DWS Business Transactions	3
	DWS Capstone - Advanced Problem Solving and Client Counseling	2
	Subtotal	17
Total Required Credits:		78
Minimum Additional Electives to graduate:		7

REQUIRED SEQUENCING²³

Semester	DWS Courses	Other Courses
Second Year – Fall	Pretrial Advocacy (4 credits)	Personal Income Tax (3 credits)
Second Year – Spring	Trial Advocacy (3 credits) Miniseries (2 credits) Negotiations (3 credits)	
By End of Second Year (courses may be taken in either semester)		Business Associations (3 credits) Wills, Trusts, & Estates (3 credits) Evidence (3 credits)
Third Year – Fall	Business Transactions (3 credits)	
Third Year – Spring	Capstone Course: Advanced Problem Solving and Client Counseling (2 credits)	
By End of Third Year (courses may be taken in either semester)	Clinic/Externship (6 credits)	

of Law.²⁴ Students role-play as lawyers and interview the standardized clients—actors who are trained to evaluate scholars using standardized criteria—in videotaped sessions. Students are evaluated on eight effectiveness criteria on a scale of 1-5 and must receive a total of 24 to pass each interview (See Appendix B).

At the conclusion of the semester, bar examiners receive the course syllabus; course assignments; standardized client interview materials, including assessment criteria, fact pattern, memo to lawyer, memo to file, interviewing assessment, videos of interviews, and student benchmarks; weekly journal entries; a final reflective paper that considers the MacCrate Skills and Values;²⁵ and the professor's final assessment of the scholar's progress.

FORMATIVE, REFLECTIVE, AND SUMMATIVE ASSESSMENT

The DWS program uses three forms of assessment that work together to ensure that scholars progress satisfactorily through the program and leave law school prepared to enter the profession: formative, reflective, and summative.

FORMATIVE ASSESSMENT

Formative assessment is a central component of the DWS program's overall assessment plan. Scholars receive frequent and constructive feedback on their performance as they advance through the courses and the program. This feedback comes from professors, lawyers, judges, other scholars, and bar examiners. It is delivered before the scholar has completed the course or program, which allows the scholar to reflect on the feedback and self-correct by applying the feedback to future exercises. This report discusses formative assessment and program participant reactions more fully in later sections.

REFLECTIVE ASSESSMENT

Reflective assessment complements formative assessment in the DWS program. Through frequent reflection exercises, referenced in the DWS required courses described above, scholars consider formative feedback they have received, evaluate their own performance (See Appendix A), contemplate what they are learning about themselves, and develop a plan to address any weaknesses. Reflection allows them to understand better the lessons they are learning, how those lessons are intended to help them improve, and how those lessons are related to the practice of law and their roles as lawyers.

SUMMATIVE ASSESSMENT

Summative assessment is used in each DWS required course and in the DWS program. At the conclusion of each course, the professor evaluates the scholar's performance and progress throughout the course. As noted in the course descriptions, these evaluations are shared with the bar examiners, who also review the student's performance for the semester. While summative assessment is commonly used in law school courses, the DWS program is unique in its use of summative assessment to evaluate student performance in the full, two-year program. At the end of the program, which coincides with graduation, scholars are evaluated by bar examiners who determine, based on two years' performance in the DWS program, whether those students will be admitted to the New Hampshire bar without further testing.

22 University of New Hampshire School of Law – Daniel Webster Scholars: Curriculum, available at <http://law.unh.edu/academics/jd-degree/daniel-webster-scholars/curriculum> (last visited Dec. 2, 2014).

23 *Id.* Daniel Webster Scholar courses must be taken at the time indicated; timing of non-DWS courses may be subject to modification by individual request, primarily based upon scheduling conflicts.

24 The validity of this model as an assessment tool is evaluated by Karen Barton, Clark D. Cunningham, Gregory Todd Jones, and Paul Maharg, *Valuing What Clients Think: Standardized Clients and the Assessment of Communicative Competence*, 13 CLINICAL L. REV. 1 (2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1817764 [hereinafter Barton et al., *Valuing What Clients Think*].

25 MACCRATE REPORT, *supra* note 4, at 138-141.

A TWO-YEAR BAR EXAMINATION

While there are many elements of the DWS program that are of interest, perhaps the most discussed aspect is its conclusion: successful DWS scholars are admitted to the bar in New Hampshire without sitting for the traditional bar examination. DWS replaces a two-day bar examination with a two-year course path and assessment of each student. Formally, classroom performance is assessed by law school faculty and bar passage is approved by each student's assigned bar examiner.

This is facilitated by use of individual student portfolios:

Consistent with the recommendations in the Carnegie Report and Best Practices, scholars have portfolios of their work compiled throughout their participation in the program. The portfolio includes papers, legal documents the scholar has drafted, exams, self-reflective analysis based upon the MacCrate skills and values, peer evaluations, teacher evaluations, various videos of student performances in simulated settings, and the like. Every semester, each portfolio is evaluated by a bar examiner, who provides written comments to the student. In the spring semester of each year, every scholar meets with and is questioned by a bar examiner about the portfolio.²⁶

Bar examiners review student portfolios, including reflective papers and video, to evaluate each student and, in the end, determine whether the student should be admitted to practice. The five bar examiners interviewed by Lloyd Bond and William Sullivan in April 2013 generally agreed that these are students who are not likely to fail.

The bar examiners also explained that each DWS bar examiner commits to five DWS scholars per year and receives a stipend of \$800 per year for participation in the program. One bar examiner suggested that it would not be possible for a bar examiner to evaluate more than five students per year and that they would have to add one additional bar examiner for every five students added to the program.

THE STANDARDIZED CLIENT ASSESSMENT

As discussed earlier in the Capstone Course section, page 8, DWS began using “standardized client interviews” in 2008 to evaluate student performance. Based on the Glasgow Graduate School of Law model,²⁷ which was based on the “standardized patient” model used in medical education, actors are trained to act as new clients and to evaluate scholars using standardized criteria. All interviews are videotaped for later review and reflection. The actors are trained to evaluate students using two criteria: 1) the students' interpersonal and professional interaction with the client during the interview (Part A); and 2) the extent to which the students ascertain all relevant information necessary for a competent representation of the client (Part B). See page 17. Students are evaluated on eight effectiveness categories on a scale of 1-5 and must receive a total of 24 to pass each interview (See Appendix B). In *Analysis of Standardized Client Interviews by Current DWS Scholars and Non-DWS Lawyers*, page 17, we evaluate the performance of DWS scholars in these assessments.

26 Garvey, *A New Model in Legal Education*, *supra* note 9, at 121 (citations omitted).

27 The validity of this model as an assessment tool is evaluated in Barton et al., *Valuing What Clients Think*, *supra* note 24.

ACCELERATED COMPETENCE

GRADUATING AHEAD OF THE CURVE

When we first learned about the DWS program, it looked impressive from the outside. It placed students in highly experiential educational settings. It allowed them to succeed and fail with ongoing assessment and personal reflection. It utilized standardized client assessment to evaluate the scholars' ability to interview clients. It collaborated with the local legal community to do all of this effectively. And it resulted in admission to the state bar. The elements of the program were promising, but were they actually better preparing lawyers for practice and clients? To find out, IAALS and *Educating Tomorrow's Lawyers* worked with an evaluation consulting firm to conduct quantitative and qualitative analysis of existing research to evaluate outcomes of the DWS program.

EXISTING QUALITATIVE DATA

In April 2013, Lloyd Bond and William Sullivan conducted focus groups at the University of New Hampshire School of Law with various groups that participate in or interact with the DWS program. The participating individuals were placed in groups based on their roles: New Hampshire judges (four judges participated), lawyer supervisors and peers of DWS alumni (eight supervisors and two peers participated), DWS alumni (ten alumni participated), DWS scholars in second year of law school (ten scholars participated), DWS scholars in third year of law school (seven scholars participated), administrators from the University of New Hampshire School of Law (five administrators participated), law faculty from the University of New Hampshire School of Law (nine faculty members participated), and members of the New Hampshire Board of Bar Examiners (five bar examiners participated).²⁸ The focus groups were facilitated as discussions, rather than formal question and answer sessions. A non-verbatim transcript of the focus groups was prepared by Margaret Haskett, a court reporter who was present during all sessions. Our qualitative analysis of the DWS program is based on this transcript.

EXISTING QUANTITATIVE DATA

To evaluate how DWS scholars compare to new lawyers, the DWS program administered the standardized client interview assessment to 123 non-DWS lawyers who had completed law school within the last two years. The assessments were conducted in December 2009, 2010, and 2012, and June 2010, 2011, and 2012. We compared this data to the standardized client interview assessments of sixty-nine DWS scholars conducted in their final semesters of law school in April 2009, 2010, 2011, and 2012.

As discussed below, our analysis of this data suggests that DWS scholars are as competent, or more competent, than lawyers who have graduated from law school within the last two years. The focus groups we evaluated, described below, suggested that this may be attributable to a selection process that favors high-achieving students. To test this, we also obtained and analyzed data from the DWS program on the LSAT scores and class ranks of the DWS scholars and new lawyers who participated in the study.

28 To allow for open discussion, John Garvey, Director of the DWS program, and Krystal Johnson, Coordinator of the DWS program, did not participate in the focus groups.

FOCUS GROUPS

WHAT DWS IS ACHIEVING

All eight focus groups discussed the accelerated competence of DWS graduates. Participants expressed that DWS graduates are a step ahead of new law school graduates, with some claiming DWS graduates are up to two years ahead and others being less specific about the number of years the experience represents. Compared with new lawyers who spend their first few years learning to practice, DWS graduates are able to hit the ground running, working with clients and taking a lead role on cases immediately.

Both students and the professionals who interact with them value DWS graduates' accelerated competence. Students appreciate feeling competent and value the opportunities they are presented with as a result of this competence—even prior to leaving law school. For example, students discussed being given additional responsibilities (e.g., arguing at a hearing, taking a lead role on a research project) during internships. In addition, many students chose to attend the University of New Hampshire Law School because of the DWS program's reputation for producing client-ready graduates. Students participate in the program because they want to learn to practice law—not because they want to avoid the bar exam. Supervisors and peers of alumni perceive DWS graduates as a better investment than other new graduates because they require fewer training resources in their first years as associates.

For example, one supervisor of a DWS graduate stated that, “the selling point for her firm was they needed someone who could start practicing law immediately.” Furthermore, judges appreciated the competence of recent DWS graduates arguing cases in front of them. Judges expressed that DWS graduates “argue ably” and research and write at a level superior to other new lawyers.

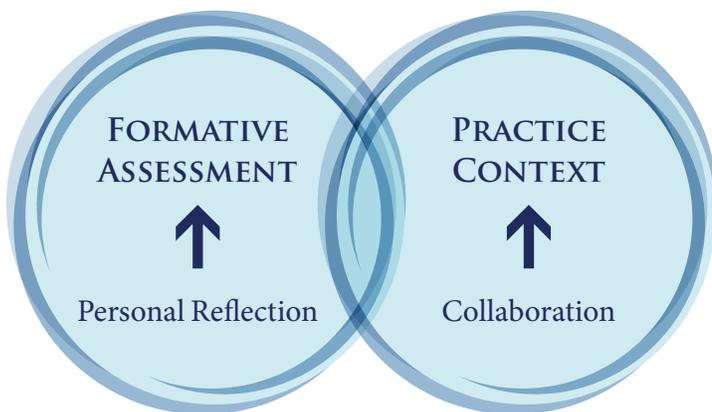
Overwhelmingly, focus group participants attributed DWS graduates' accelerated competence to their level of confidence in their skills. It is not sufficient for a lawyer to be competent—they must also know that they are competent. Supervisors and peers of alumni reported that because DWS graduates have real world experience, they are comfortable in practice settings and not easily flustered when things go differently than planned. The

“ Compared with new lawyers who spend their first few years learning to practice, DWS graduates are able to hit the ground running, working with clients and taking a lead role on cases immediately. ”

confidence of DWS graduates translates to clients feeling more confident with their representation. Judges agreed that a significant part of the success of DWS graduates is their confidence from having two years of practical exposure prior to beginning practice. Finally, students and faculty reflected on the development of DWS graduates' confidence throughout the program. They agreed that as DWS scholars have the opportunity to practice real world skills, their confidence in their abilities increases.

WHAT DRIVES ACCELERATED COMPETENCE

Focus group participants identify two factors driving the accelerated competence of DWS scholars: formative assessment and practice context. Although participants perceive that integrating aspects of formative assessment or practice context would be valuable for non-DWS courses, they are most effective in tandem. Furthermore, formative assessment in the DWS program is strengthened by opportunities for personal reflection, and practice context is strengthened by peer collaboration.



FORMATIVE ASSESSMENT

The focus groups with participants who had direct experience with the DWS program (alumni, students, bar examiners, and faculty) extensively discussed the formative assessment students receive. Participants identified this as a key factor that differentiates the DWS program from other law curricula. Students and alumni

“Supervisors and peers of alumni perceive DWS graduates as a better investment than other new graduates because they require fewer training resources in their first years as associates.”

expressed that the feedback was extremely constructive and the constant nature of the feedback encouraged reflection and improvement. Individualized attention over an extended period of time was particularly valuable. Because the same bar examiner repeatedly assesses students, improvement is commended and positive feedback is perceived as more credible because students have previously received criticism from the same source. Furthermore, students receive feedback from their peers, and the DWS program director keeps careful track of each student's progression. Focus group participants, especially the alumni, expressed that incorporating formative assessment into non-DWS courses could improve those courses even in the absence of altering the curriculum content. Specifically, alumni, judges, and supervisors and peers of alumni felt that formative assessment is crucial for a student to become a good legal writer—an important skill where many non-DWS lawyers remain weak. Instead of grading writing assignments as pass/fail, suggestions for improvement could be provided on all written assignments.

PRACTICE CONTEXT

However, the combination of formative assessment and a practice context provides a particularly strong foundation for DWS graduates. For example, alumni, bar examiners, faculty, and supervisors and peers of alumni discuss the benefits of DWS graduates having had the opportunity to “fail in a simulated setting.” Students participate in simulations and engage with live clients and real judges throughout the program, in addition to formal externships during their third year. The DWS simulations create fact-based settings embedded with ethical issues to help students learn to make decisions and solve problems while also developing ethical and moral judgment that can be applied in their real client experiences. By the time DWS scholars graduate, they have made—and corrected—numerous real world mistakes. As a result, they know where and how mistakes are made and how to avoid them as practicing lawyers. But learning from these experiences requires that the context reflects settings lawyers might encounter in practice (e.g., communicating with clients, writing briefs, trying a criminal or civil case, mediation) and that students are supported in understanding what went wrong and reflecting on how to improve next time. Though alumni believe that a “learn by doing,” “see one, do one, teach one” approach would be helpful in many courses, applying it appropriately requires formative assessment during and after each step. Formative assessment helps maximize the benefits of a practice-based curriculum.

Students and alumni expressed that being able to apply what they are learning and process the material in context facilitated a deeper level of understanding. But beyond altering the structure of courses, DWS scholars and alumni value the expertise of the faculty—many DWS professors were/are practicing lawyers. These professors are able to provide a practical perspective on the substantive law that students do not receive in non-DWS courses. Thus, some benefits of a practice context could be transferable to other law schools by recruiting faculty with practical experience and encouraging them to incorporate practical perspectives into their courses.

COLLABORATION

The collaborative interactions between DWS scholars were identified as another important aspect by groups with direct experience with the program (alumni, students, bar examiners, and faculty). Courses are designed to mirror the collaboration characteristic of real law firms. Participants reported that in these courses, DWS scholars do not compete with one another. Instead, they “support each other and push each other to do well.” The program facilitates a collaborative environment by having the same students working together over two years, in small courses, on projects that one could not complete alone. For example, students are split into two mock law firms and develop a case over the term, sometimes given three weeks to write 50-60 pages of briefs. This experience helps students realize “that you come up with a better product when you collaborate, which is better for the client.” And because students may work in many different groups over the two years, being a good team player is highly valued. There is an incentive not to “burn bridges” and students “learn to lean on each other and are encouraged to share cases and ideas,” which “teaches them how to interact with each other.”

PERSONAL REFLECTION

All eight focus groups discussed the importance of DWS scholars reflecting on their own performance. Initially, personal reflection is driven by formative assessment, because students are expected to improve based on the feedback they receive. However, students are also encouraged to critique their own work. As a result, they learn continuously to reflect on their performance, fostering self-awareness and contributing to professional practice once they graduate. DWS graduates are able to identify their own strengths and weaknesses—and seek help when needed—rather than relying on others to provide this feedback. Specifically, participants discussed the benefits of students’ opportunity to watch recorded videos of their performance in a practice context and to write reflective papers throughout the program, sometimes as frequently as weekly. Personal reflection magnifies formative assessment by sustaining its benefits once formal assessment is unavailable. This is particularly beneficial for DWS graduates practicing in small firms where the partners may have a limited capacity to provide ongoing feedback.

WHAT MAKES REPLICATION CHALLENGING

CAPACITY AND COMMUNITY SUPPORT

Participants identified various key elements of the DWS program that they believe account for its success and raised some questions about whether those elements are all replicable. For example, individualized formative assessment is resource intensive and, together with a collaborative environment, is hard to execute with a larger group of students. Bar examiners, judges, faculty, and administrators expressed that the maximum capacity for this type of program was one examiner for every five students and only 24 students in each course, sometimes taught by two professors (one for each side of a case). Students did not provide exact numbers, but agreed that small course size is critical to maintain. Expanding or replicating the program would require additional bar examiners and professors with practical experience.

The voluntary time commitment from the legal community, especially bar examiners, is substantial, and garnering buy-in to implement DWS-style components requires extensive relationship-building work and, perhaps, changes to accreditation/tuition structure. To expand/replicate the key ingredients of the program, a law school would need participation of local judges (to participate in simulations) and bar examiners (to provide feedback), school administration commitment to small course sizes (to facilitate collaboration and individualized feedback), and faculty with practical experience (to support a practice-based curriculum). Participants wondered whether this could be accomplished without a charismatic, credible, and persistent program leader with “political weight” (“a John Garvey person”). A related question raised by students and administrators is whether this degree of community participation is feasible in a community larger than New Hampshire, with fewer small law firms and more than one law school. For example, how much of the community engagement in the DWS program is driven by self-interest “because they know these lawyers are coming into the practice in the state, maybe even in their town?”

SELECTION PROCESS

Focus group participants disagreed about the degree to which a DWS-style program would succeed if the selection criteria were broader. DWS scholars are not selected randomly. As one administrator described, “the students need to be motivated, responsible and willing to work hard and cooperatively together.” Students, faculty, and judges felt that the program can and should be expanded to lower performing students without diluting the program’s success, but other groups disagreed. The bar examiners (and some administrators) were concerned that much of the DWS program’s success was attributable to taking “smart people who may not have the skills needed to succeed and mak[ing] them ready.” They felt that DWS graduates “are much better prepared because of the program, but they are people who probably would have been successful anyway.” Supervisors and peers of alumni expressed that the practice-based approach of the DWS program may not be suited to all learning styles, and administrators conceded that the program is best designed for a subset of students who want to practice in New Hampshire.

ANALYSIS OF STANDARDIZED CLIENT INTERVIEWS BY CURRENT DWS SCHOLARS AND NON-DWS LAWYERS

During focus groups with stakeholders of the DWS program (alumni, students, bar examiners, faculty, administrators, supervisors and peers of alumni, and judges) participants expressed that new DWS graduates perform at a level comparable to associates with a few years of experience. To test this theory, we compared performance on a standardized client interview by current DWS scholars to performance by lawyers admitted to practice within the last two years who did not participate in the DWS program. These lawyers volunteered for this study at the request of the Chief Justice of the New Hampshire Supreme Court and participated during the New Hampshire Bar Association's practical skills course. Participants represented a range of LSAT scores, law school class ranks, and past client interviewing experience. Performance was measured by two factors:

1

The actors specially trained to play the client in these interviews scored participants from 1-5 on eight items representing an overall assessment of their performance. The items assessed the lawyer/student's interactions with the client, and included:

- The greeting and introduction was appropriate
- I felt the lawyer listened to me
- The lawyer's approach to questioning was helpful
- The lawyer accurately summarized my situation
- I understood what the lawyer was saying
- I felt comfortable with the lawyer
- I would feel confident with the lawyer dealing with my situation
- If I had a new legal problem, I would come back to this lawyer

2

The percentage of relevant information points that the participant learned. On assessments prior to April 2011, there were eight items the lawyer/student was expected to have learned; beginning in April 2011, an additional two items were added. The items included:

- My brother died without a will
- My brother and I were never formally adopted
- The equity in my brother's house is \$60,000
- My brother had \$5,000 in a savings account
- My brother owned Coke stock worth \$40,000
- I receive \$50,000 from life insurance
- I paid funeral costs of \$5,000
- My brother died with \$10,000 of outstanding debts
- The "sister's" name is Elizabeth McVey (added April 2011)
- Elizabeth McVey is the only other known "sibling" (added April 2011)

One hundred and ninety-two total standardized client interviews were included in this study, 69 by DWS scholars and 123 by non-DWS lawyers. The DWS scholars were examined in April 2009, 2010, 2011, and 2012 and the non-DWS lawyers were examined in December 2009, 2010, and 2012 and June 2010, 2011, and 2012.

FINDINGS

The findings corroborate the focus group participants' impression that DWS scholars are as competent—or more competent—in client interactions than lawyers with up to two years of experience.²⁹ DWS scholars significantly outperform non-DWS lawyers on both the overall assessment and the percentage of relevant information learned.

OVERALL ASSESSMENT

DWS scholars' overall performance was rated an average of 3.76 out of 5, compared to non-DWS lawyers whose overall performance was rated an average of 3.11. This difference is large and statistically significant.³⁰ Figure 1 displays the distribution of overall assessment scores for the two groups: the DWS scholars tend to score higher than non-DWS lawyers. Only 3% of DWS scholars (two students) were rated below a three, compared to 40% of non-DWS lawyers (55 lawyers). Finally, looking at only the final item on the overall assessment, "If I had a new legal problem, I would come back to this lawyer," 56% of DWS scholars were rated a 4 or 5 compared to only 25% of non-DWS lawyers.

INFORMATION LEARNED

Similarly, DWS scholars on average learned 89% of relevant information points, compared to non-DWS lawyers who on average learned 69% of relevant information points. This difference is large and statistically significant.³¹ Figure 2 displays the distribution of the percentage of relevant

“DWS scholars significantly outperform non-DWS lawyers on both the overall assessment and the percentage of relevant information learned.”

29 Given the design of the study, we do not have data to test observations from the focus groups about performance levels beyond two years.

30 $t(190) = 6.187, p < .001$; effect size (d) = .90 (greater than .60 is considered a large effect in the social sciences).

31 $t(190) = 6.174, p < .001$; robust to non-normality of distribution, difference is also significant using a non-parametric Mann-Whitney U Test. Effect size (d) = .90 (greater than .60 is considered a large effect in the social sciences).

Overall Assessment

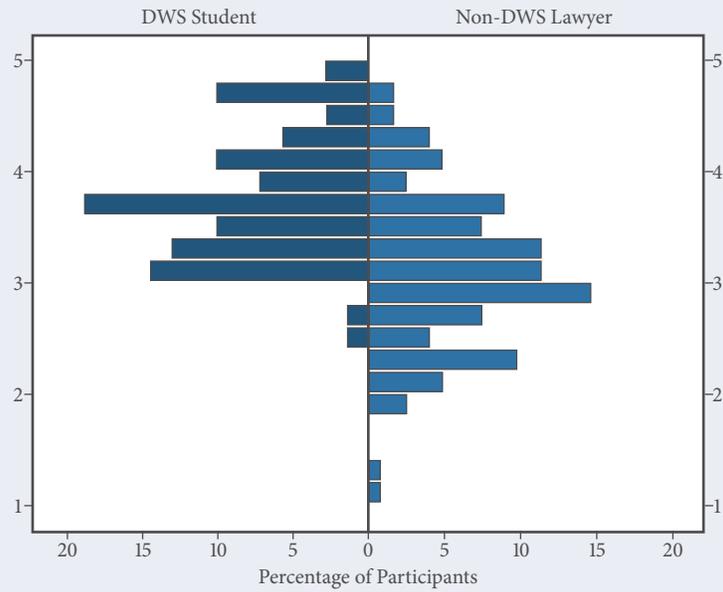


Figure 1. DWS Students Score Higher on the Overall Assessment than Non-DWS Lawyers

Percentage of Relevant Information Points Earned

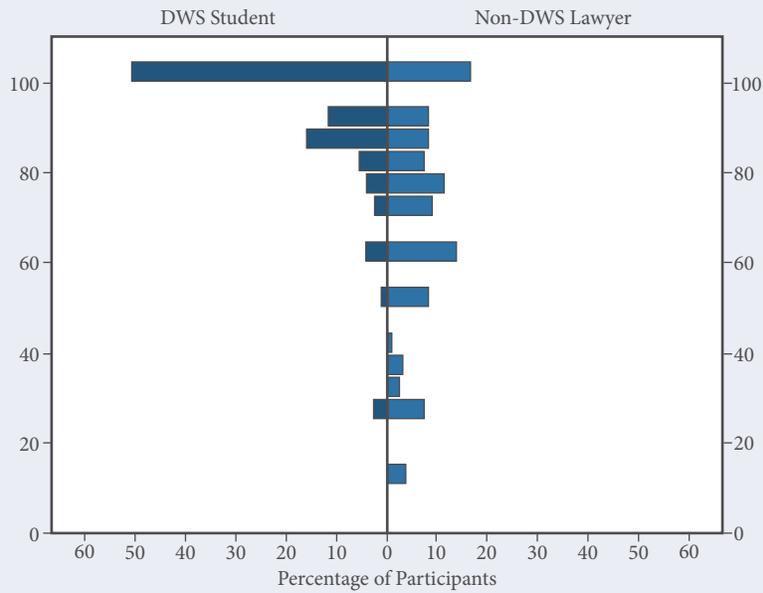


Figure 2. DWS Students Learned More Relevant Information Points than Non-DWS Lawyers

information points learned by the two groups: DWS scholars tend to learn more than non-DWS lawyers.³² Fifty-one percent of DWS scholars learned all relevant information points compared to only 16% of non-DWS lawyers.³³

ANALYSIS OF IMPACT OF LSAT SCORES AND CLASS RANK ON PERFORMANCE IN STANDARDIZED CLIENT INTERVIEWS

Initial evidence about the DWS program from qualitative and quantitative data sources suggests that DWS scholars are more prepared for practice than non-DWS students with up to two years of experience. However, focus group participants postulated that the success of the DWS program might be attributable to the selection process: Perhaps DWS takes already high performing students and gives them additional tools to be successful. Participants wondered if the success of the DWS program could be replicated with lower performing students. While data was not available on all factors used for program selection decisions (e.g. motivation, responsibility, cooperation), we were able to test whether performance on a standardized client interview by current DWS scholars and non-DWS lawyers was associated with LSAT scores and class rank. We know from the first quantitative analysis that DWS

“ [T]he only significant predictor of standardized client interview performance is whether or not the interviewer participated in the DWS program. ”

32 The analyst thought the switch from an eight-item assessment of relevant information learned to a ten-item assessment might be problematic for the validity of these results. Among both DWS scholars and non-DWS lawyers, participants learned a greater percentage of relevant information on the ten-item version (DWS scholars: 94% compared to 83%; non-DWS lawyers: 78% compared to 61%). And a greater percentage of DWS scholars were assessed using the ten-item version (55% of DWS scholars compared to 42% of non-DWS lawyers), thus biasing the results in favor of DWS scholars. However, when the analysis was conducted on the eight-item and ten-item versions separately, the result held: DWS scholars learn a greater percentage of relevant information than non-DWS lawyers on both the eight-item test ($t(101) = 4.053, p < .001$) and the ten-item test ($t(87) = 4.651, p < .001$). Thus, the analyst is confident in this finding despite the change in testing instrument.

33 While the results are quite positive for DWS, it is important to bear in mind that this is a secondary analysis of the data—the analyst had no role in designing the study, and thus caution must be employed when concluding that the differences between DWS scholars and non-DWS lawyers are attributable to the DWS program.

scholars significantly outperform non-DWS lawyers on both measures of standardized client interview performance. The present analysis addresses the following question: Do LSAT scores and class rank account for the remaining variation in performance on standardized client interviews? Performance was measured by two factors (See Analysis of Standardized Client Interviews by Current DWS Scholars and Non-DWS Lawyers, page 17).

One hundred and sixty total standardized client interviews were included in this analysis, sixty-seven by DWS scholars and ninety-three by non-DWS lawyers. Only cases reporting both LSAT score and class rank were included. The DWS scholars were examined in April 2009, 2010, 2011, and 2012 and the non-DWS lawyers were examined in December 2009, 2010, and 2012 and June 2010, 2011, and 2012.

FINDINGS

The findings provide no evidence to support the focus group participants' postulation that DWS scholars are only successful because they are initially high performing students. Neither LSAT score nor class rank is significantly predictive of overall assessment and the percentage of relevant information learned. Rather, the only significant predictor of standardized client interview performance is whether or not the interviewer participated in the DWS program. However, among DWS scholars, those with higher LSAT scores performed better on the overall assessment and the percentage of relevant information learned than DWS scholars with lower LSAT scores.

OVERALL ASSESSMENT

LSAT score³⁴ and class rank³⁵ are not significantly predictive of overall assessment scores when all 160 cases are analyzed. Together, these two variables account for only 2% of the variability in overall assessment scores. In contrast, whether or not the interviewer was a DWS student is a significant predictor of overall assessment scores, accounting for 18% of score variability.³⁶ A DWS student can be expected to score on average 0.626 points higher on the overall assessment (a 1 to 5 scale) than a non-DWS lawyer with the same LSAT score and class rank. However, when looking at only DWS scholars, LSAT score is significantly predictive of overall assessment scores, accounting for 14% of score variability.³⁷ A DWS student who scored between 150 and 159 on the LSAT can be expected to score on average 0.381 points higher on the overall assessment (a 1 to 5 scale) than a DWS student who scored between 140 and 149 on the LSAT. Class rank remains non-significant.³⁸ These results indicate that participation in DWS, not LSAT score or class rank, accounts for the increased competence of DWS scholars compared to non-DWS lawyers. However, among DWS scholars, those who scored higher on the LSAT scored higher on the overall assessment.

INFORMATION LEARNED

Similarly, LSAT score³⁹ and class rank⁴⁰ are not significantly predictive of relevant information points learned when all 160 cases are analyzed. Together, these two variables account for only 2% of the variability in relevant information points learned. In contrast, whether or not the interviewer was a DWS student is a significant predictor of relevant information points learned, accounting for 21% of score variability.⁴¹ A DWS student can be expected to learn on

34 $t(156) = 0.805, p = .422.$

35 $t(156) = -0.002, p = .998.$

36 $t(156) = -5.501, p < .001.$

37 $t(66) = 3.275, p < .01.$

38 $t(65) = -0.171, p = .153.$

39 $t(156) = 0.072, p = .943.$

40 $t(156) = 0.852, p = .395.$

41 $t(156) = -6.139, p < .001.$

average 23% more relevant information points than a non-DWS lawyer with the same LSAT score and class rank. However, when looking at only DWS scholars, LSAT score is significantly predictive of relevant information points learned, accounting for 7% of score variability.⁴² A DWS student who scored between 150 and 159 on the LSAT can be expected to learn on average 7.4% more relevant information points than a DWS student who scored between 140 and 149 on the LSAT. Class rank remains non-significant.⁴³ These results indicate that participation in DWS, not LSAT score or class rank, accounts for the increased competence of DWS scholars compared to non-DWS lawyers. However, among DWS scholars, those who scored higher on the LSAT learned more relevant information points.

OPPORTUNITIES FOR PROGRAM REPLICATION

In 2013, New Hampshire had 3,507 resident and active lawyers.⁴⁴ Only seven states have fewer lawyers.⁴⁵ University of New Hampshire School of Law is the state's only law school and more than a third of the lawyers in New Hampshire graduated from the school. That said, it still sends more graduates out of state than almost any other law school. In 2005, only 24 graduates from the school sat for the New Hampshire bar examination.⁴⁶ The school's entering class in 2013 had 77 students, while the entire school had only 305 students.⁴⁷

New Hampshire is not typical, nor is the University of New Hampshire School of Law. The DWS program is a small program in a small school in a small state with a bench and bar motivated to collaborate with the school and committed—on a long-term basis—to the program. Beyond that, its program director, John Garvey, is extraordinary. Across the Bond/Sullivan focus groups, Garvey's commitment to the program was cited as a key component of the program's success. One alumnus questioned whether the program could be replicated or scaled up without the drive of a Garvey-like director.

Can the full DWS program be scaled up to serve the needs of a larger jurisdiction in a different academic setting? The answer to that is unclear, but we encourage schools and jurisdictions with different circumstances to attempt to answer it. John Garvey and Anne Zinkin, permanent law clerk to Justice Dalianis, outlined suggestions for replication in 2009.⁴⁸ Full-scale replication is not, however, the only way to learn from the success of the DWS program. We believe the program can be unbundled into the key elements that foster success in the DWS curriculum—and that can foster success in courses, programs, and schools across the country.

42 $t(66) = 3.680, p < .05$.

43 $t(65) = 0.524, p = .602$.

44 American Bar Association National Lawyer Population by State, available at http://www.americanbar.org/content/dam/aba/administrative/market_research/2013_natl_lawyer_by_state.authcheckdam.pdf (last visited Dec. 2, 2014).

45 *Id.* Alaska (2,442), Delaware (2,888), Montana (3,046), North Dakota (1,560), South Dakota (1,905), Vermont (2,300), and Wyoming (1,681).

46 John D. Hutson, *Preparing Law Students to Become Better Lawyers, Quicker: Franklin Pierce's Webster Scholars Program*, 37 U. TOL. L. REV. 103, 103 (2005), available at http://heinonline.org/HOL/Page?handle=hein.journals/utol37&div=18&g_sent=1&collection=journals#115.

47 American Bar Association Section of Legal Education and Admissions to the Bar – ABA Required Disclosures, available at <http://www.abarequireddisclosures.org/> (drop down menu: select University of New Hampshire, 2013) (last visited Dec. 2, 2014).

48 Garvey, *A New Model in Legal Education*, *supra* note 9, at 127-129.

RECOMMENDATION

PROVIDE A LEARNING ENVIRONMENT WITH FORMATIVE AND REFLECTIVE ASSESSMENT IN A PRACTICE-BASED CONTEXT

- Identify learning outcomes and benchmarks
- Identify multiple sources of feedback (professors, lawyers, judges, other students, bar examiners)
- Create simulated practice environments and involve the student in real-life practice settings
- Build in ongoing feedback checkpoints
- Require students to gather feedback and capture personal reflections in portfolios
- Review personal reflections and provide feedback on student's development
- Use the full student portfolio for summative assessment

PROVIDE A LEARNING ENVIRONMENT WITH FORMATIVE AND REFLECTIVE ASSESSMENT IN A PRACTICE-BASED CONTEXT

As discussed above, the focus groups with participants who had direct experience with the DWS program identified formative assessment as a key factor that differentiates DWS from other law curricula. They discussed the benefits of receiving regular feedback by the same person over time, as well as the benefits of receiving feedback from multiple sources, including faculty, members of the profession, other students and, of course, bar examiners. The students perceive the quality of feedback as “high,” in large part because of the involvement of key people from the legal community. Examiners evaluating portfolios provide feedback not only on content, but also on the mannerisms and characteristics of students. Notably for those interested in replicating limited aspects of the DWS program, focus group participants expressed the belief that formative assessment would have a positive effect on non-DWS courses, as well.

Similarly, focus group participants spoke at length of the reflective papers. The level of personal reflection by DWS scholars contributes to the culture of feedback and improvement the program creates, and it leaves a mark on students. Everything is assessed by identifying strengths, weaknesses, and areas for improvement. Through the reflective papers, students track both what they are learning and what they still need to learn and, in doing so, they begin to drive their own professional development. Personal reflection institutionalizes an improvement-focused approach that allows students to continue to develop after leaving the structured formative assessments provided by the DWS program. Focus group participants believe that self-reflection and ongoing development give DWS graduates a head start when they encounter challenges they have not before faced. One law school administrator said the real value of the program was its ability to help students manage failure, identify what caused it, learn from it, and work through it. After all, new lawyers may never again sit for a final exam, but they most certainly will encounter lessons that test them throughout their careers. Understanding how to assess and correct themselves will be immeasurably valuable throughout the course of their careers.

Finally, students and alumni said that being able to apply what they are learning and process the material in context facilitated a deeper level of understanding. While they acknowledged that it is common for law students to observe a court case, it is less common, they believed, for them to participate in a simulated court case. They believe that observing a case provides students very little if they lack context. Similarly, students expressed that in traditional lectures it is not always clear how to apply what one has learned. The practical aspects of a case are, however, apparent when you are operating in a simulation. Those practical aspects are magnified when students interact with real judges, who bring significant experience to bear on the process.

These elements of the program—formative and reflective assessment in a practice-based context—were repeatedly identified by focus group participants as the keys to the success of the DWS program. The closer the formative assessment relates to tasks graduates will actually be undertaking, the more valuable the feedback. Feedback in a traditional classroom would likely improve the students' performance in that class, but may or may not be relevant in a practice setting. Similarly, a practice context may expose students to real-life setting, but without formative assessment, they may not learn to distinguish the right lessons from the wrong lessons, or to distinguish their strengths from their weaknesses.

We believe “Formative Assessment + Reflective Assessment + Practice Context” is a winning equation for courses and programs, big and small.

BUILD COLLABORATIONS BETWEEN THE ACADEMY AND THE PROFESSION

One of the most remarkable things about the DWS program might just be its origins: it was instigated by the profession and it was developed through a rich collaboration between the University of New Hampshire School of Law and the New Hampshire legal community—most notably, the New Hampshire Supreme Court and the New Hampshire Board of Bar Examiners. The DWS program would not exist in its current form without the initial and ongoing support and involvement of New Hampshire's legal community. Great innovation requires great collaboration. In some ways this is a challenge, but perhaps the time is right for more collaboration.

RECOMMENDATION

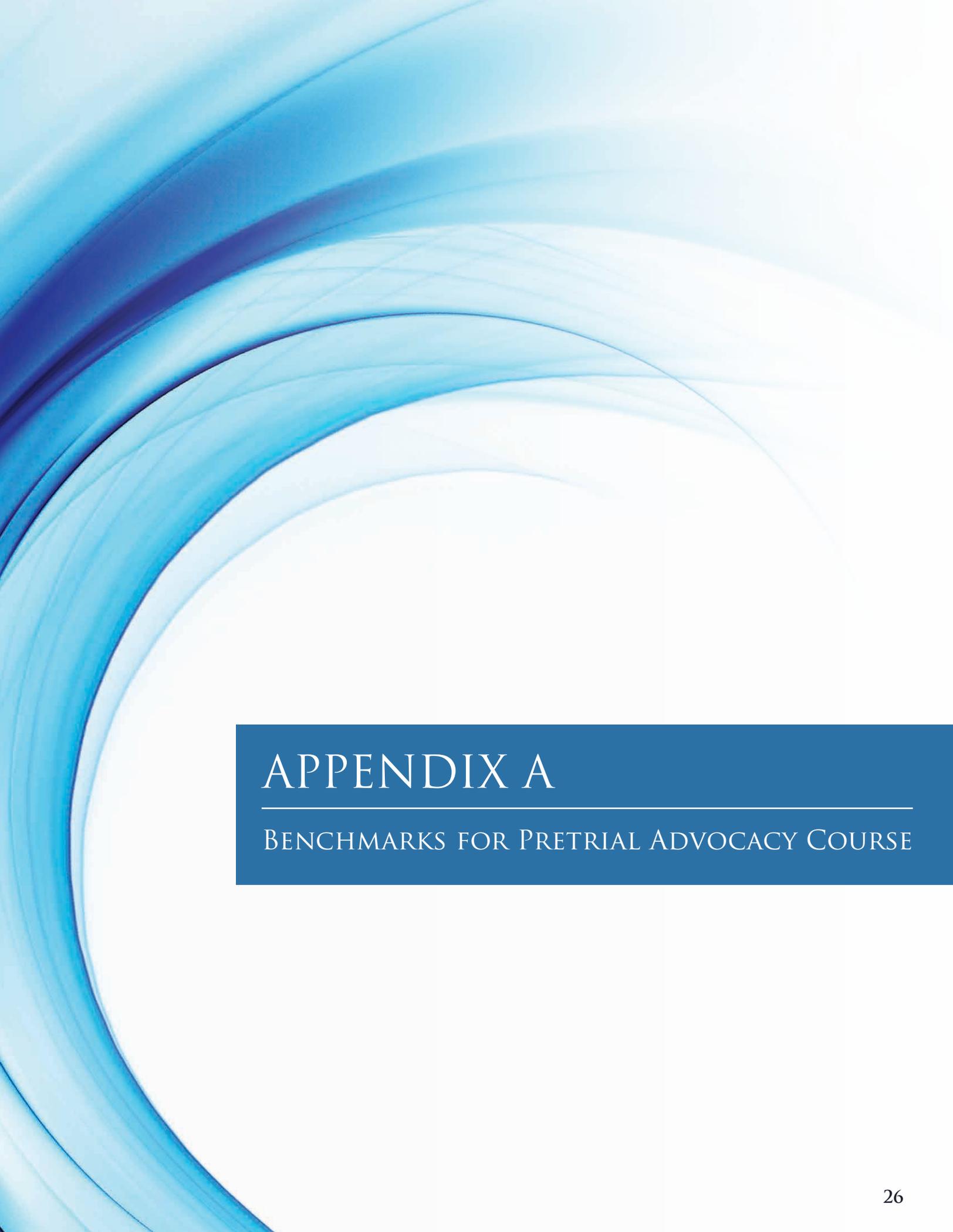
BUILD COLLABORATIONS BETWEEN THE ACADEMY AND THE PROFESSION

- Proactively seek out opportunities to collaborate
- Recognize and explicitly state common goals related to the development of new lawyers
- Work together to identify ways to meet these goals
- Commit to an ongoing relationship that lasts beyond recommendations and into implementation
- Be willing to look beyond what is currently possible to what *might be possible*

Across the country, the profession—through state bar organizations and the courts—is taking an active interest in the training and development of lawyers. Driven by concerns about whether law students are adequately prepared to find and excel in legal employment, lawyers and judges have established task forces and committees to evaluate solutions. These committees and task forces will be stronger with the active involvement of legal educators. Similarly, legal education will be stronger with the active involvement of the profession.

CONCLUSION

The DWS program gives us a glimpse into what is possible tomorrow if we are willing to look beyond the limitations of today. Through ongoing and extensive collaboration between the New Hampshire legal community and the University of New Hampshire School of Law, and through a commitment to thoughtful integration of formative and reflective assessment in a practice-based context, the DWS program gives us a guide to creating robust and effective law school courses, programs, and curricula that will better prepare lawyers for the realities of today's profession. We believe that any law schools and bar or bench initiatives taking a critical look at lawyer training should know about the establishment, structure, and success the program has had in positioning its scholars to be ahead of the curve.



APPENDIX A

BENCHMARKS FOR PRETRIAL ADVOCACY COURSE

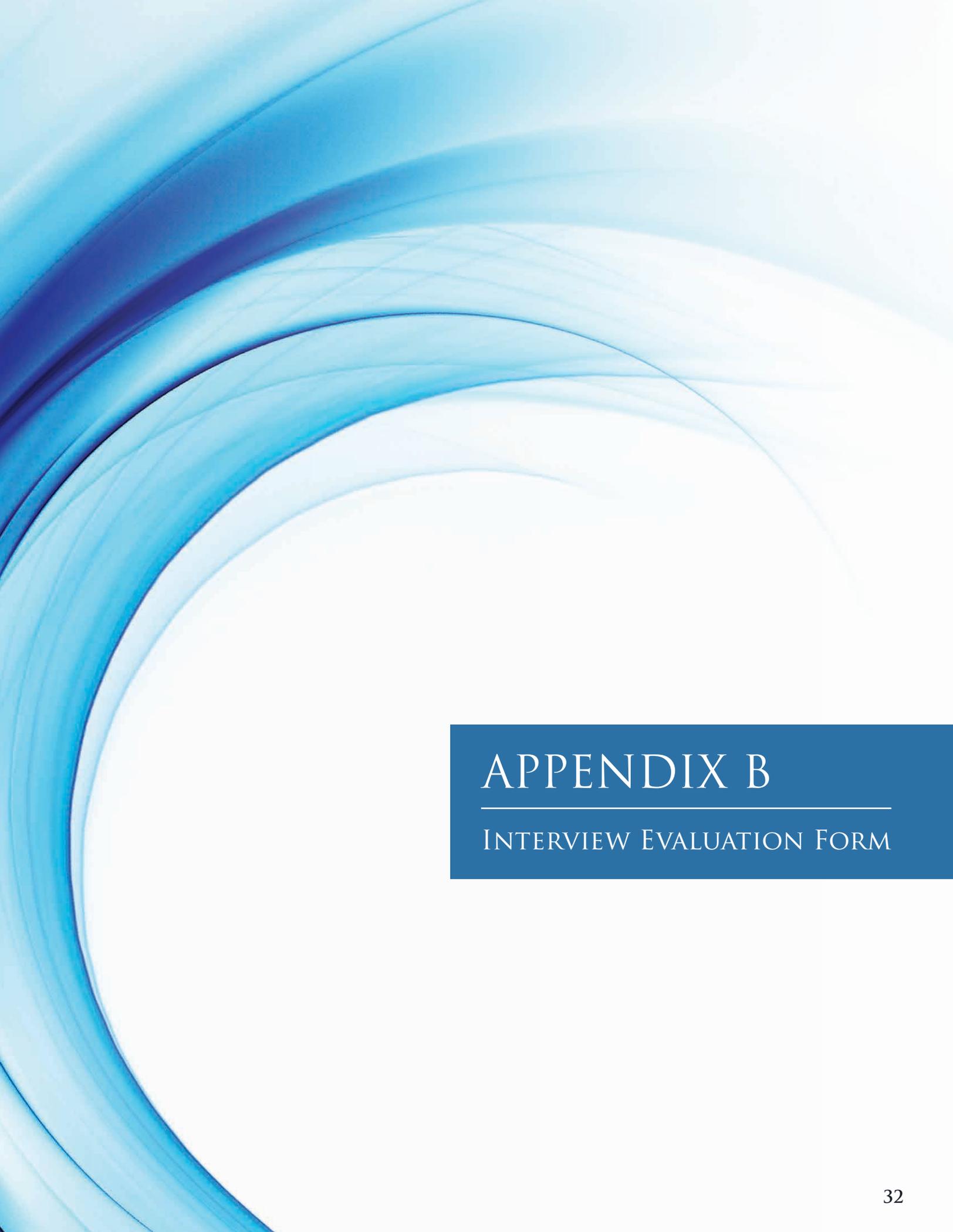
NATURE OF TASK AND PERFORMANCE GOAL	EXCEEDS	MEETS	APPROACHES
<p>Answers to Discovery Requests / Interrogatories</p> <p>Collaborative work of all P's or all D's</p> <p>Goal – exposure and demonstration of adequate evaluative and writing skills for first year associate</p> <p>MacCrate 1,2,3,4,5,6,8,9,10</p>	<p><i>Answers clearly comply with the rules; appropriately identify documents; identify privilege log if appropriate, and; are stated in such a way that would almost certainly avoid sanctions.</i></p>	<p><i>For the most part, answers comply with the rules; identify documents (although some clarification may be required); identify privilege log if appropriate, and; are stated in such a way that would likely avoid sanctions.</i></p>	<p><i>Answers often fail to comply with rules and are stated in such a way that could justify sanctions</i></p>
<p>Class Participation</p> <p>(Not every aspect implicated in every class)</p> <p>Individual Work</p> <p>Goal – instill importance of professionalism, timeliness, preparation, ability to work with others, oral communication skills</p> <p>MacCrate 1,2,3,4,5,7</p>	<p><i>Routinely arrives to class on time, is settled, has any books and accessories at hand and is fully ready to engage.</i></p> <p><i>Actively and respectfully listens to peers and professor.</i></p> <p><i>Comments are routinely relevant and reflect understanding of: a) assigned reading; b) previous remarks of other students, and c) insights about the topic under discussion.</i></p> <p><i>Comments routinely help move group conversation forward.</i></p> <p><i>Actively participates and is consistently engaged at appropriate times.</i></p> <p><i>Is routinely able to admit when he or she does not know something or is wrong and takes appropriate action.</i></p> <p><i>Is routinely a team player, able to work collaboratively with others, peers and supervisors included, and demonstrates appreciation for the contributions of others towards a common goal.</i></p>	<p><i>Routinely arrives to class on time.</i></p> <p><i>For the most part, actively and respectfully listens to peers and professor.</i></p> <p><i>For the most part, comments are relevant and reflect understanding of: a) assigned reading; b) previous remarks of other students, and c) insights about the topic under discussion.</i></p> <p><i>For the most part comments help move group conversation forward.</i></p> <p><i>For the most part, actively participates and is engaged at appropriate times.</i></p> <p><i>For the most part, is able to admit when he or she does not know something or is wrong and takes appropriate action.</i></p> <p><i>For the most part is a team player, able to work collaboratively with others, peers and supervisors included, and demonstrates appreciation for the contributions of others towards a common goal.</i></p>	<p><i>Repeatedly fails to arrive to class on time.</i></p> <p><i>Often fails to actively and respectfully listen to peers and professor.</i></p> <p><i>Comments often irrelevant, betray lack of preparation, or indicate lack of attention to previous remarks of other students.</i></p> <p><i>Comments often do little to advance conversation or are disruptive to it.</i></p> <p><i>Often fails to participate and is generally not engaged.</i></p> <p><i>Often fails to admit when he or she does not know something or is wrong and fails to take appropriate action.</i></p> <p><i>Fails to generally be a team player, to work collaboratively with others, peers and supervisors included, and demonstrate appreciation for the contributions of others towards a common goal.</i></p>

NATURE OF TASK AND PERFORMANCE GOAL	EXCEEDS	MEETS	APPROACHES
<p>Deposition – Conducting or Defending Day: Depo of: URL LOG and Transcripts Individual Work Goal – exposure and demonstration of adequate deposition skills for first year associate MacCrate 1,2,3,4,5,6,8,9,10</p>	<p>Questioner asks clear questions which are understandable to outside observer. Questioner covers significant subject matter. Questioner appears calm and in control and uses effective body language and eye contact.</p>	<p><i>For the most part,</i> questioner asks clear questions which are understandable to outside observer. <i>For the most part,</i> questioner covers significant subject matter. <i>For the most part,</i> questioner appears calm and in control and uses effective body language and eye contact.</p>	<p>Questioner <i>often fails</i> to ask clear questions which are understandable to outside observer. Questioner <i>fails</i> to cover significant subject matter. Questioner generally <i>fails</i> to appear calm and in control and to use effective body language and eye contact.</p>
<p>Deposition Summary Of: Name Individual Work Goal – exposure, first attempt at summarizing facts from deposition, and providing coherent and concise written analysis for partner and client MacCrate 1,2,3,4,5,6,9</p>	<p>Summary follows template, is well-organized, coherent, and concise. Summary clearly identifies the important facts from the deposition. Summary clearly explains how the important facts from the deposition impact the key issues of the case. Summary clearly identifies any follow-up needed based upon what transpired at the deposition.</p>	<p><i>For the most part,</i> summary follows template, is well-organized, coherent, and concise. <i>For the most part,</i> summary clearly identifies the important facts from the deposition <i>For the most part,</i> summary clearly explains how the important facts from the deposition impact the key issues of the case. <i>For the most part,</i> summary clearly identifies any follow-up needed based upon what transpired at the deposition.</p>	<p>Summary <i>generally fails</i> to follow template, and <i>generally lacks clear organization, coherence or conciseness.</i> Summary <i>generally fails</i> to clearly identify the important facts from the deposition Summary <i>generally fails</i> to clearly explain how the important facts from the deposition impact the key issues of the case. Summary <i>generally fails</i> to clearly identify any follow-up needed based upon what transpired at the deposition.</p>
<p>Discovery Requests/ Interrogatories Collaborative work of all P's or all D's Goal – exposure and demonstration of adequate evaluative and writing skills for first year associate MacCrate 1,2,3,4,8,9</p>	<p>Document requests/ interrogatories are written <i>with sufficient specificity so that a failure to produce could justify sanctions.</i></p>	<p><i>Most</i> document requests/ interrogatories are written <i>with sufficient specificity to require production.</i></p>	<p>Document requests/ interrogatories <i>lack sufficient specificity for response</i> without need for substantial clarification.</p>

NATURE OF TASK AND PERFORMANCE GOAL	EXCEEDS	MEETS	APPROACHES
<p>DRAFT Evaluation Memo to Partner</p> <p>Individual Work</p> <p>Goal – exposure, first attempt at receiving facts from client interview, researching law and providing coherent and concise written analysis for partner</p> <p>MacCrate 1,2,3,4,5,6,9</p>	<p>Memo includes facts and law and is well-organized, coherent, and concise. Supervising attorney would <i>be confident that writer understood and appropriately analyzed issues.</i></p>	<p>Memo includes facts and law and is <i>generally</i> well-organized, coherent, and concise. Supervising attorney would <i>require some additional clarification, reorganization, and/or analysis.</i></p>	<p>Memo <i>lacks clear organization, coherence or conciseness.</i> Supervising attorney would require significant clarification, reorganization, and/or analysis.</p>
<p>FINAL Evaluation Memo to Partner</p> <p>Review FINAL memo in conjunction with initial memo and comments</p> <p>Individual Work</p> <p>Goal – demonstration of adequate evaluative and writing skills for first year associate</p> <p>MacCrate 1,2,3,4,5,6,9</p>	<p>Memo includes facts and law and is well-organized, coherent, and concise. Supervising attorney would <i>be confident that writer understood and appropriately analyzed issues.</i></p> <p>Incorporates feedback from initial memo and improves quality.</p>	<p>Memo includes facts and law and is <i>generally</i> well-organized, coherent, and concise. Supervising attorney would <i>require some additional clarification, reorganization, and/or analysis.</i></p> <p><i>For the most part,</i> incorporates feedback from initial memo and improves quality.</p>	<p>Memo <i>lacks clear organization, coherence or conciseness.</i> Supervising attorney would require significant additional clarification, reorganization, and/or analysis.</p> <p><i>Fails to incorporate feedback from initial memo and improve quality.</i></p>
<p>Motion for Summary Judgment w/Memo (Defendants) OR Objection to Motion for Summary Judgment w/Memo (Plaintiffs)</p> <p>Individual Work</p> <p>Goal – exposure and demonstration of adequate evaluative and writing skills for first year associate and ability to comply with filing requirements</p> <p>MacCrate 1,2,3,5,8,9</p>	<p>Memo is well-organized, coherent, and concise. Supervising attorney would <i>be confident that writer understood and appropriately analyzed issues.</i></p> <p><i>Complies with Local Rules and FRCP and would be accepted by Clerk of Court.</i></p> <p>Supervising attorney would feel comfortable signing and submitting document to court <i>with only minor revisions.</i></p>	<p>Memo is <i>generally</i> well-organized, coherent, and concise. Supervising attorney would <i>require some additional clarification, reorganization, and/or analysis.</i></p> <p><i>Complies with Local Rules and FRCP and would be accepted by Clerk of Court.</i></p> <p>Supervising attorney would feel comfortable signing and submitting document to court <i>with some revisions.</i></p>	<p>Memo <i>lacks clear organization, coherence or conciseness.</i> Supervising attorney would <i>require significant additional clarification, reorganization, and/or analysis.</i></p> <p><i>Fails to comply with Local Rules or FRCP and would be rejected by Clerk of Court.</i></p> <p>Supervising attorney would <i>not</i> feel comfortable signing and submitting document to court <i>without significant revisions.</i></p>

NATURE OF TASK AND PERFORMANCE GOAL	EXCEEDS	MEETS	APPROACHES
<p>Oral Argument on Motion for Summary Judgment</p> <p>Day: Individual Work Goal – exposure, demonstration of basic advocacy skills, ability to distill brief and answer questions from the bench MacCrate 1,2,3,4,5,9</p>	<p>Organizes key arguments in <i>coherent and fluent</i> manner.</p> <p>Demonstrates <i>mastery</i> of facts in response to judge’s questions.</p> <p>Demonstrates <i>mastery</i> of law in response to judge’s questions.</p> <p><i>Consistently</i> provides responsive answers to judge’s questions.</p> <p><i>Consistently</i> appears calm and in control and uses effective body language and eye contact.</p>	<p>Organizes key arguments in <i>coherent</i> manner.</p> <p>Demonstrates <i>basic</i> grasp of facts in response to judge’s questions.</p> <p>Demonstrates <i>basic</i> grasp of law in response to judge’s questions.</p> <p><i>Usually</i> provides responsive answers to judge’s questions.</p> <p><i>For the most part,</i> appears calm and in control and uses effective body language and eye contact.</p>	<p><i>Fails</i> to organize key arguments in <i>coherent</i> manner.</p> <p><i>Fails</i> to demonstrate <i>basic</i> grasp of facts in response to judge’s questions.</p> <p><i>Fails</i> to demonstrate <i>basic</i> grasp of law in response to judge’s questions.</p> <p><i>Often Fails</i> to provide responsive answers to judge’s questions.</p> <p>Generally <i>fails</i> to appear calm and in control and to use effective body language and eye contact.</p>
<p>Reflective Paper Self-Assessment</p> <p>Individual Work Goal - using MacCrate analysis, demonstration of ability to reflect upon lessons learned in course as appropriate building blocks for ongoing development MacCrate 1,2,3,4,5,6,7,8,9,10</p>	<p>Shows <i>sophisticated insights</i> about areas of strength and areas in need of continued development; formulates concrete appropriate action plan to build strengths and address weaknesses.</p> <p><i>Consistently</i> correlates insights with appropriate MacCrate Skills and Values.</p>	<p><i>Identifies</i> areas of strength; identifies areas in need of continued development; formulates appropriate action plan to build strengths and address weaknesses.</p> <p><i>For the most part,</i> correlates insights with appropriate MacCrate Skills and Values.</p>	<p><i>Fails</i> to adequately identify areas of strength or areas in need of continued development or <i>fails</i> to formulate plan to build strengths and address weaknesses.</p> <p>Generally <i>fails</i> to correlate insights with appropriate MacCrate Skills and Values.</p>

NATURE OF TASK AND PERFORMANCE GOAL	EXCEEDS	MEETS	APPROACHES
<p>Revised Motion for Summary Judgment Memo w/track changes (Defendants) OR Revised Objection to Motion for Summary Judgment Memo w/tract changes (Plaintiffs)</p> <p>Review revised memo in conjunction with original memo and comments</p> <p>Individual Work</p> <p>Goal – exposure and demonstration of adequate evaluative and writing skills for first year associate and ability to comply with filing requirements</p> <p>MacCrate 1,2,3,4,5,8,9</p>	<p>Memo is well-organized, coherent, and concise. Supervising attorney would <i>be confident that writer understood and appropriately analyzed issues.</i></p> <p><i>Incorporates</i> feedback from initial memo and improves quality.</p> <p>Supervising attorney would feel comfortable signing and submitting document to court <i>with only minor revisions.</i></p> <p><i>Complies</i> with Local Rules and FRCP and would be accepted by Clerk of Court.</p>	<p>Memo is <i>generally</i> well-organized, coherent, and concise. Supervising attorney would <i>require some additional clarification, reorganization, and/ or analysis.</i></p> <p><i>Incorporates</i> feedback from initial memo and improves quality.</p> <p>Supervising attorney would feel comfortable signing and submitting document to court <i>with some revisions.</i></p> <p><i>Generally complies</i> with Local Rules and FRCP and would be accepted by Clerk of Court.</p>	<p>Memo <i>lacks clear organization, coherence or conciseness.</i> Supervising attorney would <i>require significant additional clarification, reorganization, and/ or analysis.</i></p> <p><i>Fails</i> to incorporate feedback from initial memo and improve quality.</p> <p>Supervising attorney would <i>not</i> feel comfortable signing and submitting document to court <i>without significant revisions.</i></p> <p><i>Fails</i> to comply with Local Rules or FRCP and would be rejected by Clerk of Court.</p>
<p>Timesheets - 1st Review</p> <p>Individual Work</p> <p>Goal – exposure, and demonstration of basic understanding</p> <p>MacCrate 5,9</p>	<p>Weekly records of time spent <i>sufficiently documented to generate a bill</i> without much editing.</p> <p>Submissions <i>always</i> made and are <i>timely.</i></p>	<p>Weekly records of time spent demonstrate <i>basic understanding</i> of requirements of time keeping (may lack sufficient details to generate a bill without editing).</p> <p>Submissions <i>always</i> made. <i>Not late more than 3 times nor by more than 3 days</i> without prior permission.</p>	<p>Weekly records <i>fail to demonstrate basic understanding</i> – could not be used as the basic information necessary to generate a bill.</p> <p><i>Failure</i> to submit one or more weekly time sheet(s), or <i>failure</i> to submit on a timely basis <i>more than 3 times or by more than 3 days</i> without prior permission.</p>
<p>Timesheets - 2nd Review</p> <p>Individual Work</p> <p>Goal – exposure, and demonstration of basic understanding</p> <p>MacCrate 5,9</p>	<p>Weekly records of time spent <i>sufficiently documented to generate a bill</i> without much editing.</p> <p>Submissions <i>always</i> made and are <i>timely.</i></p>	<p>Weekly records of time spent demonstrate <i>basic understanding</i> of requirements of time keeping (may lack sufficient details to generate a bill without editing).</p> <p>Submissions <i>always</i> made. <i>Not late more than 3 times or by more than 3 days</i> without prior permission.</p>	<p>Weekly records <i>fail to demonstrate basic understanding</i> – could not be used as the basic information necessary to generate a bill.</p> <p><i>Failure</i> to submit one or more weekly time sheet(s), or <i>failure</i> to submit on a timely basis <i>more than 3 times or by more than 3 days</i> without prior permission.</p>



APPENDIX B

INTERVIEW EVALUATION FORM

DWS PROGRAM: INTERVIEW EVALUATION FORM

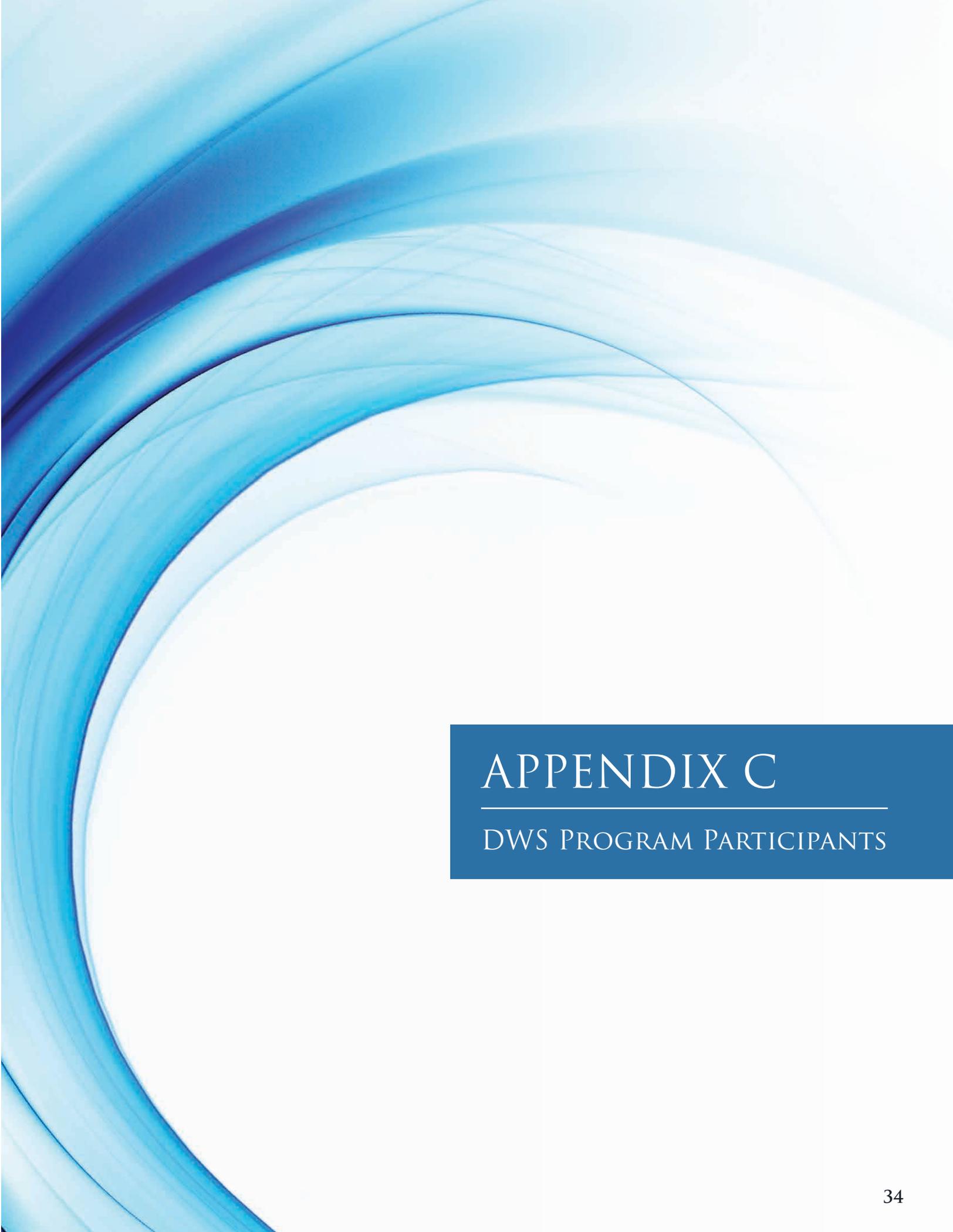
Part A (Circle the appropriate # from “1” — strongly disagree to “5” — strongly agree)

- | | | | | | |
|---|---|---|---|---|---|
| 1. The greeting and introduction were appropriate.
<i>Comment:</i> | 1 | 2 | 3 | 4 | 5 |
| 2. I felt the lawyer listened to me.
<i>Comment:</i> | 1 | 2 | 3 | 4 | 5 |
| 3. The lawyer’s approach to questioning was helpful.
<i>Comment:</i> | 1 | 2 | 3 | 4 | 5 |
| 4. The lawyer accurately summarized my situation.
<i>Comment:</i> | 1 | 2 | 3 | 4 | 5 |
| 5. I understood what the lawyer was saying.
<i>Comment:</i> | 1 | 2 | 3 | 4 | 5 |
| 6. I felt comfortable with the lawyer.
<i>Comment:</i> | 1 | 2 | 3 | 4 | 5 |
| 7. I would feel confident with the lawyer dealing with my situation.
<i>Comment:</i> | 1 | 2 | 3 | 4 | 5 |
| 8. If I had a new legal problem, I would come back to this lawyer.
<i>Comment:</i> | 1 | 2 | 3 | 4 | 5 |

Part B

The lawyer learned that If “yes”, enter 1. If “no”, enter 0

- | | |
|--|-------|
| 1. My brother died without a will. | _____ |
| 2. My brother and I were never formally adopted. | _____ |
| 3. The equity in my brother’s house is \$60,000, | _____ |
| 4. My brother has \$5000 in a savings account | _____ |
| 5. My brother owned Coke stock worth \$40,000. | _____ |
| 6. I receive \$50,000 from life insurance. | _____ |
| 7. I paid funeral cost of \$5,000. | _____ |
| 8. My brother died with \$10,000 of outstanding debts. | _____ |
| 9. The “sister’s” name is Elizabeth McVey. | _____ |
| 10. Elizabeth McVey is the only other known sibling. | _____ |



APPENDIX C

DWS PROGRAM PARTICIPANTS

DWS PROGRAM PARTICIPANTS

BAR EXAMINERS (PAST AND PRESENT)

William (Bill) Ardinger

Rath, Young & Pignatelli, PC

Fred Coolbroth

Devine Millimet & Branch (Retired)

Bruce Felmly

McLane, Graf, Raulerson & Middleton

Melinda Gehris

Hess Gehris Solutions

Andrea Johnstone (now Magistrate Judge)

United States District Court

Willard (Bud) Martin

Martin, Lord & Osman, P.A.

Jennifer Shea Moeckel

Cook, Little, Rosenblatt & Manson

Evan J. Mulholland

Legal Counsel

Office of the Executive Director

New Hampshire Fish and Game Department

Matt Serge

Upton & Hatfield, LLP

Martha Van Oot

Jackson Lewis

Larry Vogelman

Nixon, Vogelman, Barry, Slawsky & Simoneau, P.A.

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The Honorable Gillian L. Abramson

New Hampshire Superior Court

The Honorable Paul J. Barbadoro

United States District Court

The Honorable Thomas T. Barry

New Hampshire Circuit Court

The Honorable Kenneth Brown

New Hampshire Superior Court

The Honorable Carol Ann Conboy

Associate Justice

New Hampshire Supreme Court

Chief Justice Linda Dalianis

New Hampshire Supreme Court

The Honorable Joseph A. DiClerico, Jr.

United States District Court

The Honorable James Duggan

Associate Justice (retired)

New Hampshire Supreme Court

Eileen Fox

Clerk of Courts

New Hampshire Supreme Court

The Honorable Gary E. Hicks

Senior Associate Justice

New Hampshire Supreme Court

The Honorable Andrea K. Johnston

Magistrate Judge

United States District Court

The Honorable Joseph N. LaPlante

United States District Court

Daniel F. Lynch

Clerk of Court

United States District Court

The Honorable Steven J. McAuliffe

United States District Court

The Honorable Landya McCafferty

United States District Court

William McGraw

Clerk of Court

Merrimack County Superior Court

The Honorable Kathleen A. McGuire

New Hampshire Superior Court

The Honorable James R. Muirhead (retired)

United States District Court

Anne F. Zinkin

Permanent Law Clerk to Chief Justice Dalianis

New Hampshire Supreme Court

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David William Plant

Alan L. Reische

Sheehan, Phinney, Bass & Green, PA

Arpiar G. Saunders

Shaheen & Gordon, PA (retired)

William P. Wall

Counsel and Director
Abrams Capital

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Lucy J. Karl, Esquire

Shaheen & Gordon, PA

Jay & Linda Lambert

The Computer Tutors

Petar Leonard (DWS Graduate)

R. Stein and Associates

Peter Meyer

Sulloway & Hollis, PLLC

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McLane, Graf, Raulerson & Middleton

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Lucy J. Karl, Esquire

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Michael M. Lonergan, Esq.

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DOVE Project Coordinator

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(PAST AND PRESENT)

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Avicore Reporting & Videoconferencing

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Georgetown University Law Center	University of Pittsburgh School of Law
Georgia State University College of Law	Regent University School of Law
Golden Gate University School of Law	Seattle University School of Law
Hamline University School of Law	University of Southern California Gould School of Law
Hofstra University Maurice A. Deane School of Law	Southwestern Law School
Indiana University Maurer School of Law	University of St. Thomas School of Law
Loyola University Chicago School of Law	Stanford Law School
Loyola University New Orleans College of Law	Suffolk University Law School
Mercer University Walter F. George School of Law	Texas Southern University Thurgood Marshall School of Law
University of Miami School of Law	Touro College Jacob D. Fuchsberg Law Center
University of New Hampshire School of Law	Washington and Lee University School of Law
University of New Mexico School of Law	







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August 24, 2017

Ms. Elizabeth Rindskopf Parker
Executive Director
State Bar of California
180 Howard Street
San Francisco, CA 94105

Dear Ms. Parker,

My name is Dennis Stewart and I have been a practicing member of the California bar since 1981. I have worked in private and public practice and supervised many attorneys with diverse levels of experience in my over 35-year career. I offer these comments in support of the proposals to reduce the cut score of the California bar exam pending further study and to perform both a rigorous study of the content and cut scores for the exam. Inherent in that would be a fulsome discussion and definition of the standard of competency targeted by the exam, the policies underlying that standard and the manner in which that standard could best be achieved through examination. The principal reasons are summarized below.

It is an indisputable given that reasonable measures to protect the public from incompetent practitioners are vital to the integrity of the profession. This appropriately includes, among other things, an examination designed to provide a measure of preliminary assurance and predictability that the candidate for a license to practice meets a minimum standard of competence.

This, however, is only the starting point. For it is also (or should be) an indisputable given that it is fundamentally unfair to deny one who has invested years of study and six figures of investment into a profession and has attained a level of minimal competence a license to practice that profession. As lawyers and judges, we are in the business of fairness. For

those who exercise the direct gatekeeping role of determining licensure, there is a solemn responsibility to exercise that power intelligently, diligently, responsibly and free from intentional or accidental bias. The evidence is compelling that this has not occurred to any significant extent in the past.

Against these, I believe, indisputable tenets, the historically nearly complete absence of support for the California bar exam cut score is nothing short of shocking. For decades, it appears, the exam has utilized a cut score which was almost completely unstudied and unvalidated; in plainer terms, arbitrary. That, combined with the fact that California's low pass rate has long been an outlier compared to the pass rates of almost all other states, raises serious questions about the basic fairness of the cut score.

Thus, I applaud and support the Bar's and the Court's recent determination to put more intense focus on the exam and to study the exam itself and the cut score. However, the job must be done right. The study must be unbiased by personal and institutional preconceptions, and it must be scientifically rigorous. I urge each person who has a role in this determination to challenge himself or herself to assure that there be no methodologies employed or evidence relied upon which will consciously or unconsciously tend to reach pre-determined findings.

Of particular note and concern is the recent attorney survey on whether to alter the cut score. The opinions of entrenched practitioners, many likely suffering from an inherent bias founded, perhaps among other things, on their own self-satisfaction for having passed the exam and with minimal to probably no relevant factual basis or context upon which to base a judgment on the appropriate cut score are particularly meaningless. Worse, it has the flavor of evidence marshaling, rather than fact-finding. Likewise of little to no help are the subjective editorial views of judges frustrated with what they may accurately perceive as a lack of competence among some practitioners who appear before them. Such uninformed, anecdotally-based and often unconsciously biased opinions would be of no more value to the question before the Bar than a survey of unsuccessful bar takers or their mothers.

The recent Buckendahl study was a step in the right direction. But it was not without its flaws, both in its design and execution per the evaluation of an independent consultant. Although deemed "credible evidence" the study was also noted to have fallen short of best practices. When it comes to a matter of such great societal and personal weight, we should rely on more than the mere presence of some "credible" evidence drawn from a seemingly

Ms. Elizabeth Rindskopf Parker

August 24, 2017

Page 3

rushed study which in the opinion of the evaluator fell short in certain respects of best practices. In a court of law, we would demand at least a preponderance of evidence and given the interests at stake the Bar should support its cut rate with evidence that is clear and convincing. Even giving the study some weight, one must note its conclusion that the correct cut score could, within a level of acceptable statistical validity, fall below the current cut score. That, combined with California's anomalously low and declining pass rate compared to other states, despite the higher than median scores achieved on the LSAT and the MBE of its takers, provides persuasive, if preliminary, evidence that the current cut rate may well be keeping competent and invested individuals out of California's underserved legal market. There are other more direct and effective ways to police competence in actual practice than by over-limiting admission such as tightening CLE requirements and post admission standards testing in specialty fields of particular impact to the society at large such as immigration, domestic relations and criminal defense.

The cut score and the standard of minimum competency it achieves, as noted, is very much policy driven. So viewed, the evidence suggests that the California bar is currently pursuing a policy in which a high number of students who attend some of the finest law schools inside and outside the state, many of whom would serve the legally underserved, cannot get licensed. Even putting aside the personal impact on those candidates, that seems like a policy that disserves California. Thus, for these reasons, I support immediately lowering the current cut rate to 139 based on the evidence now before the Bar and conducting a more rigorous regular study of the exam and the cut rate.

Sincerely,

/s

DENNIS STEWART, ESQ

DS/av



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August 23, 2017

The State Bar of California
Re: California Bar Exam
180 Howard Street
San Francisco, CA 94105

Re: Support to Reduce the Cut Score for the July 2017 CBX

Dear Members of the Committee of Bar Examiners and State Bar Board of Trustees,

On behalf of the California Registered Law Schools here named, we write to support the proposed option to reduce the California Bar Examination (CBX) pass line for the July 2017 CBX. We urge, though, that the interim MBE cut score be set at 139 rather than 141.

It makes sense to set the pass line on an interim basis with an MBE cut score at 139 for the July 2017 CBX while consideration is given to the idea of eventually having the CBX pass line be on par with pass lines established in other states.

There is justification to place it on an interim basis at 139. The State Bar's recent standard setting study determined that an MBE score of 139 would provide 95% accuracy in predicting minimum competency on the CBX. Further, it determined that there is no evidence that setting the cut score at that number would result in less competent lawyers and greater disciplinary rates.

When comparing the complexity of the law and the practice of law in California to the complexity of the law and the practice of law in New York and Florida, there is no significant difference. Yet, the MBE cut score in New York is 133. In Florida, it is 136.

A higher cut score in California negatively impacts deserving citizens who, as bar applicants, would qualify and be licensed as lawyers elsewhere. Such a disparity should not exist. We, therefore, submit that the MBE cut score in California should be placed in the range of 133 to 136, and that the interim cut score for the July 2017 CBX be set at 139.

Thank you for your consideration of the above-stated comments.

Respectfully Submitted,

Michael P. Clancey, Dean

FOUNDED IN 1982

Re: Support to Reduce the Cut Score for the July 2017 CBX

Additional Signatures



Hyung Park, Dean
Abraham Lincoln University School of Law



Ronda Baldwin-Kennedy, Dean
American Heritage University School of Law



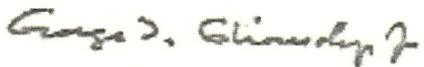
Andy J. Szeto, Interim Dean
American International School of Law



Bernadette M. Agaton, Dean
California Southern University School of Law



Martin Pritikin, Dean
Concord Law School



George J. Gliaudys, Jr., Dean
Irvine University College of Law



Richard O. Fanning, Dean
Lady Justice School of Law



Ira Spiro, Dean
Peoples College of Law

Page 3 of 3

Re: Support to Reduce the Cut Score for the July 2017 CBX



Robert Strouse, Dean
Taft Law School



Karen Travis, Interim Dean
St. Francis School of Law



Michael Herrin, Dean
Western Sierra Law School

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August 26, 2017

The State Bar of California
180 Howard Street
San Francisco, California 94108

RE: Comments on California Bar Exam & Buckendahl/ACS Study

Dear Sir or Madam:

1. The Buckendahl/ACS study looks flawed.

Most of my comments relate to the California Bar's recently commissioned study, Chad W. Buckendahl, Ph.D., ACS Ventures, *Conducting a Standard Setting Study for California Bar Exam: Final Report* (Jul. 28, 2017) [henceforth Study]. Many aspects of the Study look odd.

A. The Study is the California Bar's commissioned self-serving political statement, not a serious scientific inquiry into possible problems with the California Bar.

First, the Study's purpose is to self-servingly bolster the California Bar's current scoring practices.¹ This purpose is political rather than scientific. The study presents little critical thinking about possible problems with the current scoring system.

B. The Study looks gamed through "exemplar," i.e. answer, group labelling and inclusion of far more high-scoring answers for review than in the actual test results.

The Study looks prone to gaming by selecting exam answers for the twenty panelists to review. The Study used twenty panelists to review exam answers.² Figure 1 shows the "[d]istribution of observed scores and selected exemplars [answers] for written section of the California Bar Examination from July 2016."³ The blue "Actual" bar graph matches the "Actual" percentage distribution in the table in Figure 1. Likewise, the red "Selected" bar graph matches the "Selected" percent-

¹ 6 para. 3

² 7 para. 4 *l.* 1 ("Panelists and Observers").

³ Study 12.

age distribution in the table. “Selected” means the “exemplars,” i.e. exam answers, reviewed by the panel.⁴

The Study starts with at least two doubtful procedures. First, without explanation, “30 exemplars for each question were selected to approximate a uniform distribution, (i.e., *about the same number of exemplars across the range of observed scores*).”⁵ Second, “these exemplars were then randomly ordered and only *identified with a code that represented the score that the exemplar received during the grading process in 2016*.”⁶ The panelist then ranked the “exemplars,” i.e. answers.⁷

But, regarding the first procedure, as Figure 1 shows, including equal numbers of answers across the range put a far higher percentage of high-scoring answers before the panelists than in the actual test July 2016 results. The panelist would then not make as many fine distinctions between lower-scoring answers. By seeing so many higher-scoring answers, the lower-scoring answers would seem less-competent than they might seem in isolation or in a group of more lower-scoring answers as in the actual test results. In other words, *the Study’s “verification” procedure itself persuaded the panelists to shift the competence curve upward and away from the mean and median of answers.*

Further, regarding the second procedure, labelling the answers with a code destroyed the panelists’ *independent* ranking by strongly suggesting groupings and rankings.

C. The Study fails to address the charge that its exam is a trade-group barrier.

The Study fails to address underlying biases. The University of California Hastings College of Law Dean Faigman has criticized the California Bar “a trade group that masquerades as a state agency.”⁸ Nothing in the study or the Bar’s publication’s squarely answers the charge that the scoring seems to be more of trade group. “The panelists were licensed attorneys”⁹ Thus, all the panelists had an innate interest in preventing more competition from more licensed lawyers in California. The Study fully fails to address this underlying bias.

⁴

⁵ Study 12 para. 3 (“Operational Standard Setting Judgments”) (stress added).

⁶ *Id.* at 11 para. 1 *II.* 1–2.

⁷ *Id.* at 11 para. 1.

⁸

⁹ Study 7 par. 4 *I.* 1.

D. Much of the review process and exam grading remains opaque.

The comment process remains opaque. None of the “public” comments seem to have been posted online.

The Study leaves the exam grading opaque.

The California Bar maintains that its standard is the same as decades ago, but the older exams are not online for the public to compare them with the latest exams.

The study notes observers. Did the observers have any comments?

2. The California Bar fails to address the exam’s unrealistic time pressures.

Due to time pressure, typing speed can become a significant factor. Former California Governor Pete Wilson famously said he could not have passed the California Bar exam until he took a typing class.

At random, I looked at the California Bar’s example answers for the first essay question in July 2012. The first example answer has 2086 words. Without stopping to think whatsoever, this translates into 35 words per minute for a 60-minute essay. With 15 minutes for planning, thinking, etc., the typing speed rises to 46 words per minute.

Rather than having panelists rank the papers, a more interesting study of the lawyering skills for real-world practice would be to randomly select licensed lawyers without warning to answer three California Bar essays in three hours without a transcriptionist. The Bar would then grade their answers and compare them to the latest exam results.

I hope the California Supreme Court finds these comments helpful.

Though I am in Detroit, I am filing these comments before midnight Pacific Time.

Sincerely,

/Mark R. Carter/

LAW OFFICE OF WILLIAM HANSULT

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HansultLaw@aol

August 22, 2017

Colantuono, Highsmith & Whatley, PC
420 Sierra College Dr Ste 140
Grass Valley, CA 95945
Attn: Board of Trustee President, Michael Colantuono

Dear Mr. Michael Colantuono,

Congratulations on your recent election as President of the State Bar Board of Trustees. I am confident you will find the position very rewarding. As you know, the Board has recently adopted a new Mission Statement which reads as follows:

The State Bar of California's mission is to protect the public and includes the primary functions of licensing, regulation and discipline of attorneys; the advancement of the ethical and competent practice of law; and support of efforts for greater access to, and inclusion in, the legal system.

In your new position as President, you will be faced with a challenge which is difficult to reconcile with the new Mission Statement. That challenge is the proposed lowering of the Bar Exam pass cut line.

I have been practicing consumer protection law on the Central Coast for eighteen years, and nothing the State Bar Board had done during that time, caused a general public concern as this particular subject. I am hearing from friends, family, clients and other attorneys. The issue has created quite a "buzz."

And the "buzz" among the general public and attorneys alike is strongly against the lowering of the cut line. As you know, in today's fast paced society, people usually do not stop and take the time to get involved or fill out a survey form on a particular issue. From what I am hearing, they are with this particular issue.

Thus, I hope that you and the other Board members will request staff to provide you with copies of the survey forms submitted and you will read their comments. I truly believe they will be very important in your deliberations and decision process.

The reasons the public and attorneys alike are against the lowering of the cut line are as numerous as the variations in the colors of the rainbow. However, two general themes emerge. From the public's perspective there are not enough competent attorneys to perform the work they need. From the attorneys' perspective, the market is already so flooded with attorneys that it is difficult to make ends meet, which then leads to attorneys cutting ethical boundaries with clients money, requiring disciplinary action, but also clouding the profession with a bad reputation.

Obviously, lowering the Bar Exam pass cut line will only exacerbate both of these problems.

I understand the State Bar has concerns that the Bar pass rate has been steadily declining and that those who do not pass the exam, and thus are not able to secure employment, are straddled with debt. Yes, we can agree that these are problems. However, neither of these problems are issues addressed in the State Bar Mission Statement.

On the other hand serving the public to increase the per capita of competent attorneys, protecting the reputation of the profession and preventing unethical behavior concerning the misuse of client money are all within the Mission Statement.

There is a way forward for the State Bar to resolve all of these problems (including those not within the Mission Statement). First, do not lower the pass cut line. In fact, the Bar might want to consider raising the cut pass line.

With regards to the lower pass rates and the student loan problems; the Bar Exam has remained of equal difficulty for decades. That has been a constant. The only thing which has changed and which would cause the lower pass rates and the fall-out because of it is the relaxing of academic standards and the rigors of law school.

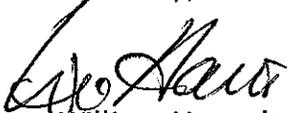
As you know, law schools have been experiencing declining enrollment over the last decade. In response, and to keep the tuition flowing in, law schools have been relaxing both their entrance requirements (e.g. lowering LSAT requirements) and relaxing academic standards of the students to retain the student population (traditionally first year has a high drop-out rate).

These lowered standards are the direct cause of the lower Bar pass rates. However it became a double edged sword for the schools, because now the particular school Bar pass rate goes down and that doesn't look good for them. The schools' solution is to lobby for State Bars to lower the pass cut lines.

But that is not the solution to the larger problem of the State Bar's Mission. In fact it goes counter to the State Bar's Mission. The only solution is to keep an academically difficult Bar Exam to pass, forcing the schools to raise their academic standards again so the Bar pass rate rises again and leaving the schools to their own devices to figure out their declining enrollment issue.

I do not see that the State Bar should be the solution of the law schools' problems to the detriment of the general public and attorneys alike. Thank you for your consideration.

Sincerely,



William Hansult

August 25, 2017

The State Bar of California
Re: California Bar Exam
180 Howard St.
San Francisco, CA 94105

Public.Comment@calbar.ca.gov

We write as deans of 19 ABA-accredited California law schools to provide comment on the 2017 Standard Setting Study and related options for the California Bar Examination cut score.¹

We first note that these comments are preliminary. We recognize that the Bar has been operating under tight time constraints. Those time constraints, however, have meant that we have not had sufficient time fully to evaluate the materials the Bar released in late July. Many of us have sought independent outside reviews of the Buckendahl study, and some of us requested further data from Dr. Buckendahl. We received that data 10 days ago, and continue to await some of the reviews we have sought. In light of this, please consider these comments preliminary. We appreciate the opportunity to share our views at the public hearings and at the Law School Council meeting happening next week. In addition, it is our intention to submit a full set of comments and recommendations to the Supreme Court in September, after the State Bar has made its recommendations to the Court.

We will start with our conclusion. Having reviewed the Standard Setting Study, several critical evaluations of that Study, and having heard testimony at the public hearing, we continue to believe that our earlier view, expressed by 20 deans of ABA-accredited California law schools in February of this year, remains correct. California's atypically high cut score is not justifiable and it has very high costs. We appreciate the Bar's efforts to begin to study this set of issues, but

¹ Signatories to this letter include the Deans of all but two ABA-accredited California law schools (Davis and Whittier).

unfortunately, given its serious flaws, the Standard Setting Study simply cannot provide a sound basis for setting a cut score. We believe that sound studies **should** be conducted to set a cut score, but properly doing those studies will take time—not merely a couple of months, which forces important decisions to be made in a somewhat scattershot and insufficiently careful way, but likely a year or more. The fact that this area is understudied in general makes the need for studies significant but also elevates the difficulty level of pursuing such studies in a methodologically sound manner.

In the interim, we believe that the California cut score should be set somewhere within the national average – the national average would be between 133 and 136 and, even if the Supreme Court wanted to choose a cut score on the higher end of the national range, that would be 137 to 139. We reach this conclusion for a variety of reasons.

First, the Standard Setting Study has serious flaws in both design and execution. To our knowledge, every independent expert who has reviewed the Standard Setting Study, including the two retained by the State Bar, has pointed out serious methodological flaws in the design and conduct of the study and in the presentation and analysis of the data. We know that other independent reviews are now being conducted, and we will be summarizing the issues raised by them in our more detailed letter to the Supreme Court. In particular, we would ask the State Bar of California to closely consider and take account of the powerful criticisms provided by Professor Deborah Merritt in her Public Comment. Professor Merritt, one of the nation’s premiere scholars on state bar exams and their respective cut scores, and who is a trained social scientist, calls into question whether the Standard Setting Study has any value whatsoever to the present inquiry. For a wide variety of reasons, she concludes that it does not. Indeed, she finds the study to be fatally flawed and useless to answer the question presented. As Professor Merritt concludes, “Using the [Standard Setting Study] to set even an interim cut score would diminish the professional reputation of both the State Bar of California and the Supreme Court of California.”

We want to reiterate that we laud the state bar for taking a serious interest in studying these questions. But at the same time, from the beginning of the plans for this study, we expressed multiple concerns to the leadership of the state bar and the study’s project director that notwithstanding the Bar’s good intentions, the timeline was simply too rushed to permit the pursuit of appropriately careful social science.

Several well-done studies – rather than one deeply flawed one -- should properly inform the setting of the cut score, but the simple reality is that those studies will take considerable time to do well.² We believe that there should be a California-specific occupational analysis as called

² The State Bar of California, it should be noted, plans to complete two additional studies prior to the Supreme Court’s December deadline, but we do not believe either of them are relevant to the setting of a cut score. One is the “content validity study,” which is designed to determine which subjects are properly

for by several of the experts (and legally mandated for many other professional licensing bodies in California) to be designed and conducted independent of the State Bar. Second, there should be a validity study that would examine how bar performance is predictive of legal practice performance. Although this study would be challenging to design and carry out, it is possible to construct once a thorough occupational analysis is conducted setting forth the knowledge, skills, and abilities expected of entry-level lawyers in California. Finally, a study should closely examine the policy consequences attending to both false positives and false negatives, the ratio of which are obviously a product of what cut score is selected. As the Standard Setting Study sets out, the higher the cut score the more false negatives will occur – i.e., those who are competent to practice law will be deemed not competent. There are significant social costs associated with these errors, including, among many, access to the legal profession among historically underrepresented groups. At the same time, too low a cut score creates the likelihood of increasing the number of false positives – i.e., those that are not competent to practice law are deemed competent. There are significant costs associated with these errors as well, many described as within the State’s interest in protecting the public from unqualified lawyers. There are very sophisticated ways to evaluate the balance that must be struck between these two kinds of errors, and we would recommend a formal study of this issue. While we strongly advocate careful study, it is also worth emphasizing that even once a more robust set of studies exist, determining the cut score will still fundamentally be a policy decision, one that can be valuably informed by, but not wholly determined by, appropriate social science.

At the same time, we recognize that determining an appropriate cut score uninformed by any valid social science poses challenges. We appreciate that if, as we believe, the current standard setting study does not provide any genuinely legitimate basis for determining a cut score, one might therefore argue that there is no evidentiary basis for making an interim change, and the right answer would therefore be simply to wait several more years for additional, appropriately careful studies before taking any step toward change. However, we vehemently disagree with this position. Compared to bar-takers in every other state in the country (with the exception of Delaware, which has a total of just a few hundred bar takers per year) there is no question that a series of significant harms flow from California’s current atypically high cut score. These harms include the additional costs and fees borne by repeat-exam takers; the significant reduction in the

included on the State’s bar exam. What subjects are tested, of course, is an issue independent of the cut score question. The second proposed study, the “Bar Performance Study,” seeks to identify the factors that might have contributed to the recent decline in bar passage rates in California, given that the cut score has remained the same over that time. This study too is not relevant to the cut score. The cut score is intended to set a line dividing qualified from not-qualified attorneys. Knowing what factors might be correlated with a drop in passage rates cannot inform policy makers as to what is the proper line to draw for professional licensure. To believe that it does, in fact, is to assume that the status quo was somehow valid, but that is the very question sought to be answered in the present inquiry. (It is also worth noting that it is hard to see how either of these studies could be completed by December. Both are complex, and the latter is awaiting state legislation that would authorize it.)

racial and socioeconomic diversity of California’s lawyers; and the challenges faced by experienced lawyers who wish to relocate to California and – notwithstanding successful multi-year practice experience that strongly suggests that they meet a minimum competence standard– are more likely to fail than to pass the California Bar Exam.

Given our positions as deans, we wish to point out that the current cut score also hurts California ABA-accredited law schools in significant ways that we would hope would be relevant to the Bar and to the Court. As a consequence of the atypically high cut score, more students at California’s ABA-accredited law schools fail the bar the first time than similarly situated students elsewhere. In addition to the significant hardships for the students themselves, this means that fewer of our students can be employed as lawyers at graduation or at 10 months afterwards. In addition, if California maintains its current cut score and the ABA pursues the accreditation standard it currently has under consideration,³ several California schools will be disproportionately affected relative to comparable schools elsewhere. Moreover, every one of us – even those of us who come from schools viewed as among the best in the nation – sees, firsthand, the way that false negatives are not simply statistics. We witness the painful phenomenon of students we know to be competent to practice law being told otherwise simply because of California’s exceptionally high cut score. Finally, we know how many skills that go well beyond those tested on the bar exam assist students in achieving true professional competence.

We also want to highlight particularly critical consequences of setting the cut score too high: the effects on access to justice and the pass rates of under-represented minority populations. This is shown in Table 5 of the memo circulated by the Bar. That table indicates that a reduction of the cut score on the July 2016 exam from 1440 to the Bar’s recommended alternative of the interim cut score of 1414 would have resulted in increased passage rates of 12.5% for Blacks, 10.6% for Hispanics, and 8.6% for Asians, compared to 7.2% for Whites. In response to a request made to the State Bar, we understand that data will be made available next week on how these groups would have performed had the cut rate been set at 139 (as recommended by some commentators), 135 (the most common cut score) and 133 (New York’s cut score). We also refer to the information presented at the State Bar’s public hearing in San Francisco on August 15 by Dean Anthony Niedwiecki of Golden Gate University School of Law, and subsequently

³ In 2016, the ABA Council recommended a 75 percent (over two years) minimum bar passage rate as a requirement for ABA accreditation. The full ABA House of Delegates in February 2017, voted to return the measure to the Council for further consideration. In the course of these engagements, a letter from 90 ABA law school deans from across the country requested that the Council postpone enactment of the provision for one year, in part because of how California’s high cut score was producing extremely low bar passage rates. That letter reads, in part: “The California bar results, if they become the ‘new normal’ for graduates of ABA-accredited law schools in California, could potentially imperil the accreditation of a very large number of law schools – law schools whose history and profile have demonstrated over many decades an ability to educate and graduate successful law students by any reasonable measure.”

submitted as written public comment to the State Bar, about the decisions made both in New York and Illinois rejecting recommendations to set higher cut scores based on studies showing the adverse impact on minority applicants. We believe that the evident harm done to minority applicants by high cut scores should weigh heavily in the State Bar and Supreme Court's policy decision, especially given the Study's acknowledgement that there is no empirical evidence that the California's high cut score has made our state's attorneys more competent or resulted in fewer discipline cases than in other states.

The decision to employ a 1440 cut score in California back in 1985 simply did not have a careful, empirically grounded basis to support it. We readily acknowledge that even now, we do not yet have a careful, empirically grounded basis to support *any* given cut score – not 1330, not 1360, not 1390, not 1410, and not 1440. It would be a significant conceptual mistake to believe that in the absence of appropriate validity data, doing nothing is somehow more justified than a change. Rather, given that standard setting is a policy decision, we believe the right approach is to look at the known benefits and costs of the various possible cut scores, while also recognizing that we do not have all the information we would wish for to inform a choice.

Given this state of affairs – that the current cut score is not justifiable and causes harm and that the flawed Standard Setting Study does not provide a valid basis for setting the cut score – we continue to believe that the best option is to set an interim cut score that is selected from the range of scores that are closer to the national average. That average would be between 133 and 136 or, if the Bar is concerned to set the cut score on the high end, it could choose between 137 and 139. Ultimately setting the cut score is a policy judgment and, while awaiting the results of validly conducted studies that can inform that judgment, choosing a cut score more consistent with the wisdom of general practice is entirely defensible. It is perhaps worth noting that several other states – indeed two of California's neighbors – have recently come to a similar conclusion. In Oregon, the only state apart from Delaware and California to have a cut score above 140, the Supreme Court adopted the recommendation of its Board of Bar Examiners and reduced that state's cut score from 142 to 137. Nevada, one of four states at 140 (currently the highest cut score outside of California and Delaware), reduced its cut score to 138 as a result of a regular re-examination of the exam by its Board of Bar Examiners and the Supreme Court.

As Professor Merritt notes in her comment, the cut score adopted by the states do, especially in aggregate, represent a sort of wisdom:

“The cut scores adopted by states . . . incorporate a different sort of wisdom: they have evolved over time in response to conditions within the profession. When practicing lawyers see incompetent new lawyers, they complain about ‘low standards’ in the profession and push for higher cut scores. When members of the public suffer incompetence, similarly, they file disciplinary complaints or malpractice actions. State supreme courts respond to these pressures by adjusting cut scores on the bar exam.”

... “Overall ... market forces produce cut scores that have some rational bases. A passing score based on a well-designed standard-setting study is the best choice for a licensing test. A score drawn from the experiential wisdom of other states, however, is better than one based on no study or a flawed one.”

Thank you for your consideration of these preliminary comments.

Sincerely,

Joan R. M. Bullock
President and Dean
Thomas Jefferson School of Law

Paul Caron
Duane and Kelly Roberts Dean and Professor of Law
Pepperdine University School of Law

Erwin Chemerinsky
Dean and Jesse H. Choper Distinguished Professor of Law
University of California Berkeley School of Law

Allen K Easley
Dean & Professor of Law
Western State College of Law

David L. Faigman
Chancellor and Dean
John F. Digardi Distinguished Professor of Law
University of California Hastings College of Law

Stephen C. Ferruolo
Dean and Professor of Law
University of San Diego School of Law

Andrew T. Guzman
Dean and Carl Mason Franklin Chair in Law and Professor of Law and Political Science
University of Southern California Gould School of Law

Gilbert Holmes
Dean & Professor of Law
University of La Verne College of Law

Lisa Kloppenberg
Dean & Professor of Law
Santa Clara University School of Law

M. Elizabeth Magill
Richard E. Lang Professor of Law and Dean
Stanford Law School

Jennifer L. Mnookin
Dean and David G. Price & Dallas P. Price Professor of Law
UCLA School of Law

Anthony Niedwiecki
Dean & Professor of Law
Golden Gate University School of Law

Matt Parlow
Dean and Donald P. Kennedy Chair in Law
Chapman University Dale E. Fowler School of Law

Susan Westerberg Prager
Dean and Chief Executive Officer
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L. Song Richardson
Interim Dean and Professor of Law
University of California Irvine School of Law

Niels Schaumann
President and Dean
California Western School of Law

Michael Hunter Schwartz
Dean and Professor of Law
University of the Pacific, McGeorge School of Law

John Trasviña
Dean & Professor of Law
University of San Francisco School of Law

Michael E. Waterstone
Fritz B. Burns Dean and Professor of Law
Loyola Law School

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August 17, 2017

The State Bar of California
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San Francisco, CA 94105

Kimberly West-Faulcon
Professor of Law
James E. Bradley Chair in Constitutional Law
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Re: Comment on 2017 California Bar Examination Standard Setting Report

To Whom It May Concern:

Based on my expertise in the legal implications of psychometrics and industrial organizational psychology, I offer three comments to support my view that the State Bar of California has not employed best practices in identifying a cut score appropriate for determining its stated goal of identifying “entry level attorneys who are minimally competent” (2017 ACS Ventures Report at 2).

First, the State Bar fell short of best practices by hiring a company lacking expertise in occupational and employment testing. Instead, the State Bar of California has presented a report by a firm with expertise in educational testing without any effort to demonstrate why it failed to hire experts with credentials and professional experience in advising institutions as to how to properly set cut scores for professional credentialing and licensing. Expertise in validating a test cut score to identify “minimally competent” entry level attorneys differs substantially from expertise in validating a test cut score for identifying applicants for admission to educational institutions or progression to higher levels of education. Accordingly, it is my view that the cut score for the California State Bar Examination should be evaluated by experts with nationally-recognized credentials and professional experience in Industrial Organizational Psychology, such as current and recent past leaders of the Society of Industrial Organizational Psychologists (SIOP) <http://www.siop.org/Presidents/PastPres.aspx>.

Second, the two evaluations of the 2017 ACS Ventures Standard Setting Report (ACS Ventures Report) authored by Mary J. Pitoniak (Senior Strategic Advisor at Educational Testing Service (ETS)) and Tracey A. Montez (Chief, Division of Programs & Policy Review, California Department of Consumer Affairs) should be read to call the best practices of the ACS Ventures, LLC workshop described in the ACS Ventures Report into question because both evaluations point to serious flaws that warrant evaluation by a nationally-recognized expert in Industrial Organization Psychology (IO Psychology).

While Pitoniak and Montez conclude that the ACS Ventures methods “appear to adhere to professional guidelines and technical standards” (Montez at Executive Summary) and lack “fatal flaws” (Pitoniak at p. 13), both experts point to significant problems in ACS Ventures’ methodology that fall short of best practices throughout both the Pitoniak and Montez evaluations. Pitoniak states explicitly that “in some ways the

design and execution fell short of what I would view as best practice” (Pitoniak at 13). Montez points out that the State Bar of California has fallen short of Standard 11.13 of the *Standards for Educational and Psychological Testing (Standards)* when she observes:

Although a national job analysis and a CBE Content Validation have been conducted, *it is highly recommended that the State Bar conduct a comprehensive occupational analysis of California practice.* Given that a state-specific occupational analysis does not appear to have been conducted, *it is critical to have this baseline for making high-stakes decisions.* (Montez at p. 10 (emphasis added))

Montez also concluded that “[a]dditional time should have been allocated to defining a MCC [minimally competent candidate]” in order to comply with Standard 11.2 of the *Standards* (Montez at p. 8).

My third and summary comment is that (1) the absence of industrial organization psychology expertise in the design and implementation of the ACS Ventures-run cut score assignment workshop, (2) the conclusion by Dr. Pitoniak that the ACS Ventures approach fell short of best practice, and (3) the conclusion of Dr. Montez that best practice for setting the cut score for the California State Bar Examination would require additional time to “define” a “minimally competent candidate” to the State Bar of California and a “comprehensive analysis of California practice” (a state-specific occupational analysis of the job of attorney in the State of California) warrant rejection of the cut score recommendations currently proposed by the State Bar of California. It is my view that a cut score comparable to that of another state with similar practice settings to California should be adopted until a carefully identified, nationally-recognized industrial organization psychologist can conduct analysis of the California Bar Examination cut score in a manner consistent with Standard 11.2 and Standard 11.13 relating to occupational analyses as applied to credentialing or licensing examinations as well as all other appropriate provisions of the *Standards* and, if appropriate, the fourth edition of the *Principles for the Validation and Use of Personnel Selection*.

Sincerely,



Kimberly West-Faulcon

Professor of Law

Loyola Law School, Los Angeles

Comments on California's Standard-Setting Study

Deborah Jones Merritt¹
John Deaver Drinko/Baker & Hostetler Chair in Law
Moritz College of Law, The Ohio State University

The State Bar of California set an important example for other states by commissioning a standard-setting study for the state's bar exam. The State Bar also attempted to accelerate that study, hoping that the results could inform pass/fail decisions for the July 2017 bar exam. The study conducted by ACS Ventures, however, suffers from several irreparable flaws. The study provides a starting point for future research, but it does not offer a valid foundation for choosing California's passing score.

As I explain below, the ACS study deviates in several ways from best practices in standard setting; those departures alone impair the study's validity. Three distinctive features of the bar exam, moreover, compound the impact of those flaws:

- (1) The bar exam tests an unusually broad knowledge domain; candidates must memorize hundreds of detailed rules or formulas.
- (2) The exam integrates testing of legal reasoning skills with examination of this large knowledge domain. Except on one question (the performance test), examinees cannot demonstrate their reasoning skills without first recalling the correct legal rules and formulas.
- (3) The legal profession tests an unusual type of knowledge on the bar exam. Most practicing lawyers do not retain memory of this broad knowledge domain after finishing the exam; very few could pass the exam again without weeks of intensive study. Instead, practitioners focus their knowledge in more specialized fields, often ones that do not appear on the bar exam. Practicing lawyers also depend heavily on written sources, rather than memorized rules, to inform their knowledge in practice.

These factors, which ACS may not have fully understood, aggravated the irregularities in its study. The flaws in ACS's method, when combined with the distinctive features of the bar exam, produced a study that was fatally flawed: it does not provide a valid basis for recommending a passing score.

¹ My scholarly interest in the bar exam started in 2001, when I coauthored an article noting flaws in a method that several states had used to establish a cut score for the exam. *Raising the Bar: A Social Science Critique of Recent Increases to Passing Scores on the Bar Exam*, 69 U. CIN. L. REV. 929 (2001) (with Lowell Hargens & Barbara Reskin, both social scientists). That article influenced deliberations in several states and has been cited approvingly by other scholars. The NCBE invited me to contribute a shortened version of the article to a symposium on standard setting. *Raising the Bar: Limiting Entry to the Legal Profession*, BAR EXAMINER, Nov. 2001, at 9. I have followed the standard-setting literature since that time and am quite familiar with that literature. I have also published numerous articles related to other aspects of legal education and the legal profession.

I explain those flaws in the first section of these comments. I then suggest how the State Bar could use the lessons learned in this study to inform future research. In the final section of the comments, I offer two suggestions for recommending an appropriate cut score for the July 2017 exam. I hope these suggestions will be helpful.

I. Flaws in the Standard-Setting Process

The ACS study and report reflect at least five serious flaws. Each of the deficiencies raises considerable doubt about the ACS results; in combination, the defects render the study far too flawed to support a reasoned recommendation.

A. Lack of an Adequate Performance Level Descriptor

Setting a valid passing score requires a coherent vision of the performance expected from a minimally competent candidate. To develop that vision, examiners must first create a “performance level descriptor” or “PLD.”² For this study, the State Bar drafted a PLD after consulting with law school deans and other stakeholders.

That description, attached as Appendix C to the ACS report,³ does an excellent job identifying the legal reasoning skills tested on the bar exam. The PLD, for example, points to the ability “to distinguish relevant from irrelevant information,” “identify what additional information would be helpful,” “explain the application of a legal rule or rules to a particular set of facts,” and “communicate basic legal conclusions and recommendations.” The PLD also offers some suggestions about how a minimally competent candidate might fall short on some of these reasoning abilities while still qualifying for a license.

The PLD, however, devotes very little attention to the *knowledge* tested on the bar. The statement refers to “[r]udimentary knowledge of a range of legal rules and principles in a number of fields in which many practitioners come into contact,” but it does not attempt to identify those fields, the breadth of rules and principles a candidate should know within each of the fields, or the depth of knowledge that would qualify as “rudimentary.” Nor did the State Bar supplement the PLD with a more detailed outline of the rules tested on the bar exam.

The facilitator attempted to fill this gap during the standard-setting session by asking panelists to identify the knowledge that a minimally competent candidate would possess within several fields tested on the bar exam. The responses generated by the panelists, however, were extremely general. For Constitutional Law, for example, the panelists indicated that a minimally competent candidate should know:

- Standing
- Levels of judicial scrutiny

² Mary J. Pitoniak & Gregory J. Cizek, *Standard Setting*, in *EDUCATIONAL MEASUREMENT: FROM FOUNDATIONS TO FUTURE* 38, 41 (Craig S. Wells & Molly Faulkner-Bond eds. 2016).

³ ACS VENTURES, *CONDUCTING A STANDARD SETTING STUDY FOR THE CALIFORNIA BAR EXAM* (2017).

- First Amendment (e.g., unprotected speech, establishment, free exercise)
- Procedural and Substantive Due Process
- Separation of powers
- Commerce Clause
- State vs. Federal
- Equal Protection (5th and 14th Amendments)
- Takings Clause
- 11th Amendment
- Immunity (e.g., absolute, qualified)
- Justiciability (e.g., mootness, ripeness, political question doctrine)⁴

These are remarkably broad categories; most law schools teach an entire 3-credit course on the First Amendment alone. The list of topics was far too general to adequately supplement the PLD. Neither the PLD nor the workshop discussion helped the panelists conceptualize *how much* a minimally competent candidate should know about the First Amendment, separation of powers, or any of the other topics that candidates might address on the essay portion of the bar exam.

Perhaps most important, the PLD and accompanying discussion failed to make clear how many distinctive rules an examinee must know in order to succeed on the bar exam. Each essay question focuses on just a few legal rules within a single field, but the examinees do not know in advance which rules will be tested. To prepare for the exam, candidates must memorize rules across the entire knowledge domain.

Understanding that context is essential in setting a cut score on the bar exam. Panelists should not ask, “Does this candidate display minimum competence with respect to the rules tested in this question?” Instead, the proper question is: “Does the candidate display minimum competence with respect to the rules tested in this question, given the large number of legal rules that the candidate was required to memorize?” Without information about the broad knowledge domain tested on the exam, panelists could not ask the latter question.

Experts agree that the PLD is a “key component of the standard-setting process”⁵ and that it is “central for both effective standard setting and communicating results.”⁶ Indeed, “PLDs are the heart of the standard setting process.”⁷ In this case, the PLD itself was critically flawed, providing insufficient guidance for panelists.

B. Lack of Rubrics, Adequate Discussion, Revision, or Self-Testing

The standard-setting workshop might have partially compensated for the incomplete PLD by incorporating one or more of these best practices: (1) use of scoring rubrics; (2) regular panelist

⁴ *Id.* app. C.

⁵ Pitoniak & Cizek, *supra* note 2, at 53.

⁶ Ronald K. Hambleton & Mary J. Pitoniak, *Setting Performance Standards*, in EDUCATIONAL MEASUREMENT 433, 453 (Robert L. Brennan ed., 4th ed. 2006).

⁷ Karla L. Egan, et al., *Performance Level Descriptors: History, Practice, and a Proposed Framework*, in SETTING PERFORMANCE STANDARDS: FOUNDATIONS, METHODS, AND INNOVATIONS 79, 80 (Gregory J. Cizek ed. 2011).

discussion; (3) opportunities for panelists to revise their answers; or (4) self-testing by panelists. Unfortunately, however, the ACS workshop included none of these components. The absence of each component is troubling in itself; combined with the insufficient PLD, these omissions were fatal to the process.

1. *Scoring Rubrics.* Scoring rubrics play a key role in most standard-setting approaches,⁸ including the Analytic Judgment method used by ACS. The psychometricians who developed the latter method utilized a scoring rubric;⁹ more recently, they “strongly affirmed” that “familiarization with . . . rubrics would be advisable in an implementation of the Analytic Judgment method.”¹⁰ Without that information, they noted, “panelists . . . have no context for the kind of information that a strong response would contain.”¹¹

The lack of scoring rubrics was particularly acute in this exercise because of the distinctive features of the bar exam described above: (a) The exam tests a very broad knowledge domain, and (b) most panelists lack detailed knowledge of that domain. In most standard-setting exercises, panelists are “subject matter experts” who are quite familiar with the content tested on the exam. A high school mathematics teacher, for example, knows pre-algebra, algebra, geometry, and trigonometry. Those teachers may be able to assess performance on a mathematics competency exam without referring to scoring rubrics.

Expertise in the legal profession, however, is quite different. Accomplished practitioners know their specialty well, but they are not subject matter experts with respect to knowledge tested on the bar exam. Without rubrics, they cannot reliably assess the accuracy of exam answers.

The lack of rubrics also undermined the panelists’ attempts to evaluate candidates’ legal reasoning. The reasoning skills described in the PLD do not occur in a vacuum; they take shape only in the context of particular legal rules. A candidate, for example, cannot “distinguish relevant from irrelevant information” without knowing the content of the applicable legal rule. Panelists who attempted to judge a candidate’s exercise of that skill, without themselves knowing the applicable legal rule, were navigating dark terrain without either lights or a map.

2. *Panelist Discussion.* Most standard-setting exercises incorporate significant discussion among panelists.¹² Panelists have an opportunity to compare their ratings on each question and to discuss their decisions. These exchanges allow panelists to check their understanding of minimum competence, revise those views, and move toward a consensus concept.¹³

The discussion in the ACS workshop, in contrast, was remarkably limited. The panelists discussed the PLD, the results of a practice exercise, and their ratings on the first essay question.

⁸ Hambleton & Pitoniak, *supra* note 6, at 437 (“Effective training includes . . . showing the scoring keys and/or scoring rubrics and ensuring they are understood . . .”).

⁹ Barbara S. Plake & Ronald K. Hambleton, *The Analytic Judgment Method for Setting Standards on Complex Performance Assessments*, in *SETTING PERFORMANCE STANDARDS: CONCEPTS, METHODS, AND PERSPECTIVES* 283 (Gregory J. Cizek ed. 2001).

¹⁰ Memorandum from Mary J. Pitoniak to Ron Pi 8 (Aug. 4, 2017) [hereinafter Pitoniak Memorandum].

¹¹ *Id.*

¹² Pitoniak & Cizek, *supra* note 2, at 46.

¹³ Hambleton & Pitoniak, *supra* note 5, at 456.

They did not, however, discuss their ratings on the other four essay questions or the performance test.

The panelists, in other words, worked in relative isolation—without a fully defined PLD, scoring rubrics, or colleague discussion to guide them. This combination prevented the panelists from developing an adequate concept of minimum competence. Instead, the panelists appear to have pursued highly idiosyncratic views without sufficient information to guide their decisions.

One panelist comment highlights the extent of this problem. That panelist reported that on the one graded essay they discussed, “[e]ach of the 30 essays was marked as the best no-pass or worst pass by at least one person.”¹⁴ If that account is even close to true, it should have raised a vibrant red flag. ACS deliberately chose a range of essays that would include “about the same number of exemplars across the range of observed scores.”¹⁵ The fact that some panelists identified the lowest scoring essays as borderline, while others chose the highest scoring essays, reflects such a high level of disagreement that it suggests lack of a coherent standard.

3. *Score Revision.* Many standard-setting workshops allow panelists to revise their scores after discussion or other feedback.¹⁶ These opportunities for revision recognize that panelists begin the process as novices; they must develop their capacity for identifying minimum competence. As Dr. Pitoniak and another leading expert have explained:

A two- or three-stage rating process is typically used, whereby panelists provide their first ratings (independent of other panelists or performance data of any kind), discussion follows, and then panelists complete a second set of ratings. It is not required that panelists change their initial ratings, but they are given the opportunity to do so.¹⁷

Given the lack of a comprehensive PLD or scoring rubrics, opportunities for revision were especially important in this workshop. It appears, however, that panelists had no chance to revise their scores—even for the one question they discussed. This omission further compounded the other flaws in the process.

4. *Self-Testing.* Many standard-setting exercises require panelists to take part of the underlying exam themselves. Dr. Pitoniak and others have recognized this step as a best practice: “In addition to familiarizing the panelists with the general content covered by the test, the facilitator should have them take all or part of the test on which they will set standards under conditions that are as close as possible to the actual operational testing conditions.”¹⁸ The

¹⁴ ACS VENTURES, *supra* note 3, app. D.

¹⁵ *Id.* at 12.

¹⁶ See Hambleton & Pitoniak, *supra* note 5, at 456 (“It is routine in many standard-setting studies to use two or three rounds of ratings.”); Pitoniak & Cizek, *supra* note 2, at 41-42; *id.* at 45-46 (“At least two rounds are generally recommended, with three rounds often being optimal.”).

¹⁷ Hambleton & Pitoniak, *supra* note 5, at 437.

¹⁸ Pitoniak & Cizek, *supra* note 2, at 44-45.

panelists do not have to share their scores with others but their “private self-scoring . . . helps them gain an appreciation of the level of challenge presented by the test.”¹⁹

Self-testing was absolutely critical in this study, given the flawed PLD, the lack of scoring rubrics, and the mismatch between exam content and panelist knowledge. Asking the panelists to begin the session by writing an answer to a selected essay question would have offered essential context for the standard-setting process. It almost certainly, in fact, would have revealed the need for a better PLD, scoring rubrics, panelist discussion, and opportunities for revision.

C. Participation of an Unduly Influential Panelist

As Dr. Pitoniak observed in her review, the panel included a member who had significant experience developing and grading the California bar exam.²⁰ Indeed, he was a former Chair of the Examination Development and Grading Team. This experience gave him a personal stake in defending California’s current cut score. He was also outspoken in attempting to influence other panelists. As Dr. Pitoniak reports, he rebuked the facilitator at one point with the words: “You shouldn’t even ask if anyone thought the response was competent—don’t embarrass them, it can’t be competent.”²¹

The comments of this panelist would have been troubling in any standard-setting session, but they were especially problematic here. A more effective PDL, scoring rubrics, discussion sessions, opportunities for revision, or self-testing might have offset the comments of this panelist. Absent those safeguards, however, the remarks of this panelist unduly biased the process.²²

D. Lack of Clarity in the ACS Report

For the reasons outlined above, the panelists in this study struggled to develop a coherent concept of minimum competence. The scores they generated confirm that lack of coherence; panelist scores vary widely. The ACS report, unfortunately, fails to reveal this disagreement to the State Bar and Supreme Court. The report, in fact, confuses the concepts of “standard error” and “standard deviation,” producing statements that greatly overstate the degree of panelist consensus.

¹⁹ *Id.* at 45. *See also* Hambleton & Pitoniak, *supra* note 6, at 437 (“Effective training includes . . . taking the test under standard or near-standard conditions.”).

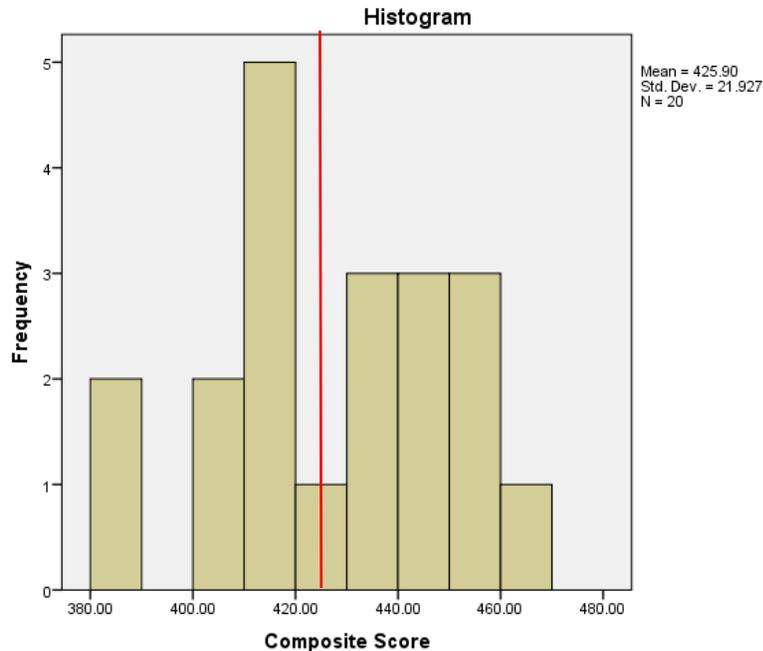
²⁰ Pitoniak Memorandum, *supra* note 10, at 5.

²¹ *Id.*

²² The other outsider reviewer, Dr. Tracy Montez, agreed that this panelist “may have unduly influenced the group with his extensive experience and strong presence in the exam process.” Tracy A. Montez, Observation of the Standard Setting Study for the California Bar Exam 7 (July 2017). Dr. Montez also noted that several educators participated in the study, and that California’s Department of Consumer Affairs “attempts to avoid using educators/faculty in standard setting workshops because of potential conflict of interest.” *Id.* It is quite common, however, to use faculty when setting standards for a professional licensing exam; those panelists are essential to provide subject matter expertise. In professions like law and medicine, moreover, practitioners are as likely to suffer a conflict of interest (due to fears from increased competition) as educators are.

The report, for example, states that panelists’ raw scores “were close.”²³ It also claims that “most panelists’ individual recommendations were within about six raw score points of the median recommended value.”²⁴ In fact, however, the twenty panelists generated composite cut scores that were not at all close: they ranged from 385.00 to 460.00. Only four of these scores, moreover, fell “within about six raw score points” of the median (425.00) reported by ACS. The other sixteen scores were further away; indeed, eight of the panelist scores were twenty or more points away from that median.²⁵

Here is a histogram showing the distribution of panelists’ composite raw scores. The vertical red line represents the median raw score calculated by ACS:



As the graph shows, the panelist scores are not particularly close; nor do they cluster at the median. Instead, the graph reveals considerable disagreement among the panelists.

It is possible to base a cut score on divergent panelist scores, but the policy making body should understand that it is doing so. The ACS report obscures this notable disagreement among the panelists. Before endorsing any cut score based on that report, the State Bar and Supreme Court

²³ ACS VENTURES, *supra* note 3, at 15.

²⁴ *Id.* at 18.

²⁵ This is the point at which ACS seems to have confused standard error with standard deviation. The standard error for the cut score was, in fact, 5.6. That statistic, however, relates to the replicability of the ACS study: it suggests that, if ACS repeated this study many times, using all of the same procedures, about two-thirds of those studies would generate a cut score within 5.6 points of the one produced by this study. That is far different from saying that most of the panelists in this study generated cut scores “within about six raw score points of the median recommended value.”

should review the extent of disagreement and consider the flaws contributing to that lack of consensus.

E. Improper Calculation of a Recommended Final Score

The final flaw in the ACS standard-setting process stems from the translation of a minimally competent score on the written portion of the exam to a minimally competent score on the full exam. As the ACS report details, the panelists were not allowed to assess the multiple-choice (MBE) questions used in the bar exam. Performance on the MBE, however, now constitutes half of a candidate's final score on the California bar exam. The ACS experts, therefore, had to estimate a passing score for the full exam based on recommendations related to just one half of the exam.

ACS did this by using “an equipercentile linking approach to find the score that yielded the same percent passing [for the full exam] as was determined on just the written component of the examination.”²⁶ The psychometricians, in other words, (1) calculated that the panelists' recommended cut score for the written portion of the exam was 423.75; (2) rounded that to the closest observable score of 425; and (3) determined that 46% of the exam takers met that score. They then identified a cut score for the full exam that would yield a 46% pass rate.

As the ACS report acknowledges, this technique assumes that scores on the written and multiple-choice portions of the exam “are sufficiently correlated to support” the transformation. This, however, is emphatically not the case with respect to the California Bar Exam. The Bolus report, prepared for the State Bar earlier this year, indicates that the MBE (multiple-choice) and written portions of the bar exam showed a correlation of .73 on the July 2016 exam (which was the one used in the standard-setting exercise. Correlations on some other exams were even lower (.66 and .68).²⁷

A correlation of .73 is large in some contexts, but it is not large enough to support the translation made by ACS. California grades its bar exam on a compensatory basis: candidates who score weakly on one part of the exam can demonstrate minimum competence by scoring more strongly on the other part. A correlation of .73 suggests that this happens with some frequency; a significant number of exam takers score better on one part of the exam than the other.

The Bolus report, moreover, shows that subgroups perform differently on the written and multiple-choice portions of the bar exam. Women outperform men on the written portion of the exam, while men outscore women on the multiple-choice questions.²⁸ This “pattern has existed for many years.”²⁹ It is not appropriate to equate performance on one part of the exam to overall

²⁶ ACS VENTURES, *supra* note 3, at 14.

²⁷ ROGER BOLUS, RECENT PERFORMANCE CHANGES ON THE CALIFORNIA BAR EXAMINATION (CBE): INSIGHTS FROM CBE ELECTRONIC DATABASES 26 (2017). ACS cites a different figure, a .97 correlation between written scores and total scores on the July 2016 bar exam. ACS VENTURES, *supra* note 3, at 14. That very high correlation likely results from the scoring rule used in July 2016: at that time, the score earned on the written portion of the exam constituted 65% of the total grade. Now that California affords equal weight to the written and multiple-choice portions of the exam, the .97 correlation has little importance. Instead, the .73 correlation between written and multiple-choice scores is the dispositive one.

²⁸ BOLUS, *supra* note 27, at 16-17.

²⁹ *Id.* at 16 n.12.

exam performance when an exam uses compensatory scoring and subgroups differ in their performance on exam components.

ACS's calculation of a total passing score, in other words, is unreliable—even without considering the numerous flaws that undercut the panelists' recommendations for a cut score on the written part of the exam. It is doubtful that one *can* compute a total score from recommendations based on just one part of the exam, given the compensatory nature of grading on the exam and performance differences on those subparts. Any attempt to make that calculation from the existing data needs careful scrutiny.

II. Building for the Future

For the reasons outlined above, the ACS study does not provide a valid basis for determining California's cut score. No standard-setting process is perfect, but the ACS study suffers from multiple, compounding flaws. Using the ACS study to set even an interim cut score would diminish the professional reputation of both the State Bar of California and the Supreme Court of California.

The study does teach some important lessons that could guide California and other states in setting cut scores and assessing the validity of the underlying bar exam. For example:

- The current exam requires extensive knowledge that practicing lawyers do not retain in memorized form. Subject matter experts in law, in other words, differ from subject matter experts in many other fields. This reality must inform the processes used to set cut scores for the bar exam.
- This disconnect between knowledge tested on the bar and knowledge possessed by practitioners raises questions about the exam's validity.
- The legal profession appears to lack a consensus view of minimum competence. That concept is difficult to define in any field, but the variations among the panelists in this standard-setting study suggest that it is particularly amorphous in our profession. How can we better define the knowledge and skills that a minimally competent lawyer should possess?

The State Bar of California took an important step in commissioning this standard-setting study. I encourage the State Bar to continue that leadership by exploring some of the questions raised by the study.

III. Setting an Interim Passing Score

The State Bar, meanwhile, faces the difficult task of recommending an interim passing score to the Supreme Court. The current score, based on tradition rather than research, is difficult to

defend. A score based on the flawed ACS study, unfortunately, seems equally indefensible. I suggest two options to consider.

First, the State Bar could recommend a passing score based solely on the ACS panelists' evaluation of the performance test. That portion of the bar exam does not require memorization of legal rules; it constitutes a purer test of legal reasoning as defined in the State Bar's PLD. The PLD is sufficient as applied to that portion of the exam, and the absence of a scoring rubric is less troubling. All twenty of the panelists scored answers to the performance test, and they did so near the end of the workshop—when they had accumulated the most expertise from scoring other questions.

It would be highly unusual, however, to base a passing score on evaluation of a single question. In addition, a score based on the performance test would still suffer from the other flaws identified above: lack of discussion among panelists, absence of an opportunity to revise scores, presence of an unduly influential panelist, and difficulty in translating a cut score drawn from one portion of the exam to an overall score. This option is plausible, but far from optimal.

The second option is to base an interim cut score on the scores applied in other states. This option seems unsatisfactory at first because it appears to “follow the crowd” rather than an approved standard-setting method. Many of those other states, moreover, set their cut scores without employing any psychometric process.

The cut scores adopted by multiple states, however, incorporate a different sort of wisdom: those scores have evolved over time in response to conditions within the profession. When practicing lawyers see incompetent new lawyers, they complain about “low standards” in the profession and push for higher cut scores on the bar exam. When members of the public suffer incompetence, similarly, they file disciplinary complaints or malpractice actions. State supreme courts respond to these pressures by adjusting cut scores on the bar exam.

Neither of these forces offers a perfect indicator of the right cut score. Indeed, practitioners may push for unduly high cut scores because they want to reduce competition rather than eliminate incompetence. Clients, conversely, may fail to recognize incompetent services—or may not want to suffer the burden of pursuing a complaint.

Overall, however, market forces produce cut scores that have some rational basis. A passing score based on a well-designed standard-setting study is the best choice for a licensing test. A score drawn from the experiential wisdom of other states, however, is better than one based on no study or a flawed one.

As the Bolus report shows, the most common bar exam cut score in the United States is 135; thirty-three states (65%) have a cut score of 135 or below.³⁰ In a recent article, Professor Howarth offers another useful reference point: states with a cut score of 133 maintain the largest combined number of practitioners in the country.³¹

³⁰ BOLUS, *supra* note 27, at 2.

³¹ Joan W. Howarth, *The Case for a Uniform Cut Score* (2017), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3010168.

California is an extreme outlier with its cut score of 144. That high score suggests protectionism; it also excludes a disproportionate number of minority test-takers from the profession.³² Both protectionism and lack of diversity harm the public: the Supreme Court of California would serve its citizens well by licensing more lawyers and increasing diversity within the legal profession. Practices in other states suggest that California can obtain those goals without compromising competence in the profession.

Given the limited evidence available to the State Bar, the most supportable cut score ranges from 133 to 135. California should draw upon the market wisdom of other states by adopting an interim score within that range. Then it can work, perhaps with other states, to develop a professionally validated bar exam and passing score.

³² In 2016, 52% of white test-takers passed California's July bar exam, compared to 38% of Asian test-takers, 34% of Hispanic test-takers, and 21% of Black test-takers. BOLUS, *supra* note 27, at 16. California's current cut score thus excludes a startling percentage of nonwhite test-takers.

Comments on “Conducting a Standard Setting Study for the California Bar Exam”

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Executive Summary

While the State Bar of California is to be commended for attempting to conduct rigorous research regarding the appropriateness of the current cut score for the California Bar Exam, I would advise the State Bar and Supreme Court to not rely on the median and standard error of the cut scores reported in the ACS report as a basis for determining an appropriate cut score for the California Bar Exam. Simply put, despite the efforts of the facilitators and experts involved in this exercise, there was insufficient cohesion in the assessments of the experts for one to draw reliable inferences about what cut score is justified.

In my expert opinion, there are also significant concerns about the validity of the measurement strategy undertaken in the ACS study. However, my comments here focus on the measurement reliability of the reported median cut score and the standard error of that median from the ACS report. Reanalysis of the ACS study’s anonymized raw data suggests that the ACS report is unjustified in suggesting that the experts’ scores showed sufficiently coherent conceptions of how a minimally competent lawyer should perform on the Bar Exam. 40% of the experts effectively recommended cut scores greater than 1500. 40% recommended cut scores below 1390. The wide divergence in scores results in the median cut score and the standard error of the median reported in the ACS report to be statistically unreliable. In this circumstance, relying on any average of such highly disparate results is not scientifically legitimate.

While I am encouraged by the efforts of the State Bar to provide solid empirical evidence that may be used to better justify an appropriate cut point, good empirically-grounded policy making needs to be honest about the strengths and weaknesses of the studies used. In this case, the weaknesses are simply too significant to justify meaningful reliance.

Background

I write this comment as an expert in research design and statistics. I became aware of this study because Dean Jennifer Mnookin suggested that the Empirical Research Group at UCLA, which I direct, evaluate the ACS study and report. While Dean Mnookin has her own perspective on the appropriate cut score, the analysis discussed in these comments is entirely my own and results from independent assessment and study of the statistical reliability of this study.

Since receiving my PhD in 2004, my research has focused on the applied use of statistical analysis in the social sciences and public policy, with a particular interest in the measurement and empirical analysis of concepts that are hard to measure, such as corruption. For more than 15

¹ UCLA’s Empirical Research Group strives to enhance the quality of empirical legal research at UCLA and within the legal academy and community more broadly. Dr. Nyblade joined the UCLA School of Law as Director of the Empirical Research Group in 2016.

years I have taught courses on statistics and research methods at the graduate and undergraduate levels, most recently teaching graduate courses on “Measurement for Government Analytics” at Johns Hopkins University. At UCLA I teach empirical legal research methods. My vita and more on my background and qualifications can be found at <http://www.bnyblade.com/>.

Measurement Reliability and the ACS Study

There are numerous concerns that can be raised about the ACS study with regards to measurement validity, concerns that may be sufficient for many to suggest that any reliance on the study to justify overall cut scores is inappropriate. Some of the concerns may arise from constraints that ACS researchers may have had no control over, but nonetheless are serious limitations to the study. Perhaps the most crucial validity concern is the fact that the study could only examine the written exam, which is particularly problematic given how the essay scores are normalized based on MBE scores and the fact that the scores of the two sections are intended to be compensatory. Other validity concerns relating to this study include the adequacy of the training and guidance of the expert panel, the disjuncture between the distribution of scores of the essays evaluated by the expert panel when compared to the actual distribution of written exam scores, and concerns over the extent to which the standards used to distinguish better from worse written answers actually correspond to levels of competence as lawyer.

While many of these are quite serious issues, they are not going to be the focus of my comments. Instead, I would like to focus on an area in which I have particular expertise: assessing measurement reliability.

Assessing reliability—the extent to which we should have confidence that if we conducted the same study again we would reach similar results—is a crucial component of the empirical research process. The purpose of these comments is to suggest that even if we were to set aside entirely concerns about measurement validity, the results from the study are indicative of reliability concerns sufficiently serious that the data generated by this study should not legitimately be used to justify *any* cut score.

Specifically, I wish to focus on the appropriateness and reliability of the median cut score and its standard error. These are the central statistical measures taken from the ACS report to inform the options upon which the State Bar of California has called for public comment. In showing why the median is an unreliable measure in this instance, it will become apparent why it is inadvisable to use any of the results of this study to support a particular cut score.

When should empirical research rely on the median as a measure of central tendency?

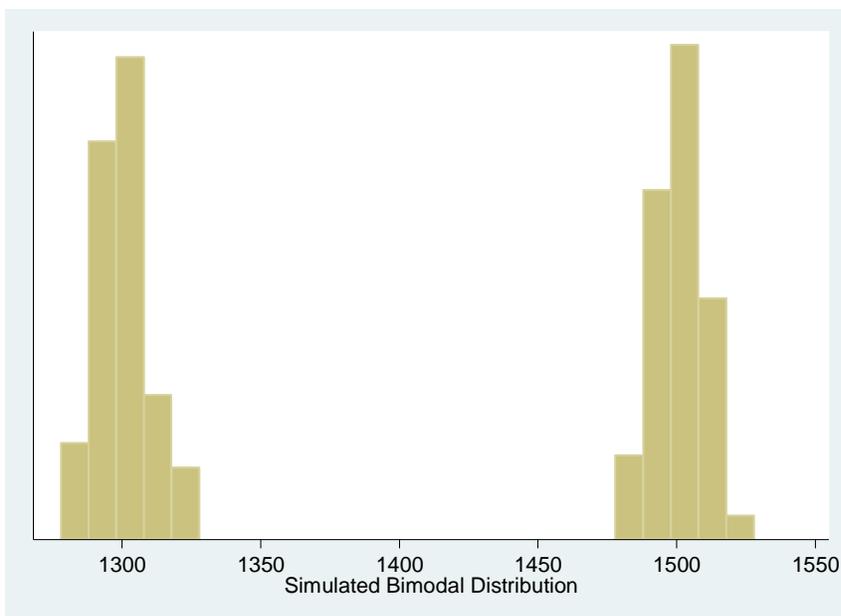
It is worth beginning with a brief explanation of when and how research should rely on the median as a measure of central tendency. The ACS report advocates for relying on the median rather than the mean as a measure of central tendency for this study, asserting that “When the mean and median do not converge, it is generally recommended that the median be used as the better representation of the central tendency of the observed score distribution.”

In many cases, it is indeed more appropriate to use the median than the mean. But it is not, in fact, a “general recommendation” within the field of statistics. While, as the ACS report notes, medians may be less susceptible to undue influence of outliers, the ACS report fails to consider the possibility that for some data no measure of central tendency is justified at all.

Relying on either the mean or the median presupposes the existence of a meaningful central tendency. One should never rely solely on any particular measure of central tendency without further investigation into the shape of the distribution of the data, as any measure of central tendency may be inappropriate for certain distributions. Consideration of the distribution of a variable is an absolutely critical aspect of sophisticated data analysis. One cannot simply turn to median or mean as a ‘rule’ for assessing central tendency. One has to look at the distribution itself to understand what makes sense as a measure. The ACS report does not seem to have taken this critical step.

To understand the importance of this step, consider the possibility of a bimodal distribution of values in which one subset of the hypothetical population of expert assessments cluster around 1300 and another subset cluster around 1500 (as in Figure 1 below). If the two groups are nearly equal in size in a population, the mean cut score of a reasonably sized sample from this distribution will approximate 1400, whereas the median will typically be either slightly over 1300 or slightly below 1500, depending on whether one group or the other is just slightly larger. In this case, the median would be a far less reliable measure of central tendency. To simplify even one step more, if 50 people were at 1300 and 51 were at 1500, to look at the median of 1500 as the proper measure of central tendency would be clearly erroneous – and if just one of those people were at 1300 instead of 1500, the reported median of 1300 would again be an erroneous measure of the central tendency of the group as a whole.

Figure 1. A Simulated Bimodal Distribution



This bimodal distribution is an example of a more general principle regarding the reliability of measures of central tendency such as the median. As the density of data surrounding the ‘center’ of the distribution decreases, the reliability of the median of the sample as a measure decreases.

Is the mean thus a better measure of central tendency in this example? While the mean might be more reliable in the technical sense of the word, it would still be a deeply problematic measure of central tendency. It would capture, accurately, the average result – obviously, since that is what a mean does by definition – but in fact, it would not capture the ‘central tendency’ of the data – as it would be reporting out a measure far from the values reported by any of the participants. For this distribution, then, the mean still fails as an indicator of central tendency. Neither the mean nor the median is a particularly good representation of central tendency for this distribution because *the data do not exhibit a central tendency* that is useful for a researcher or analyst. It is far more meaningful, accurate, and appropriate for a researcher to note that X% of a sample clustered around 1300 and Y% clustered around 1500 than to report any measure of central tendency for this data.

This simple example illustrates why researchers should not make overly general claims about the appropriateness of particular measures of central tendency without first considering the overall distribution of values for a particular variable of interest. And while the distribution of cut scores generated in the ACS study is not as extreme as in the teaching example above, examination of the actual distribution makes readily apparent why the median in this case is not a reliable indicator.

The Distribution of Cut Scores in the ACS Study

Figure 2. The Distribution of Expert Recommendations for Cut Scores in the ACS Study

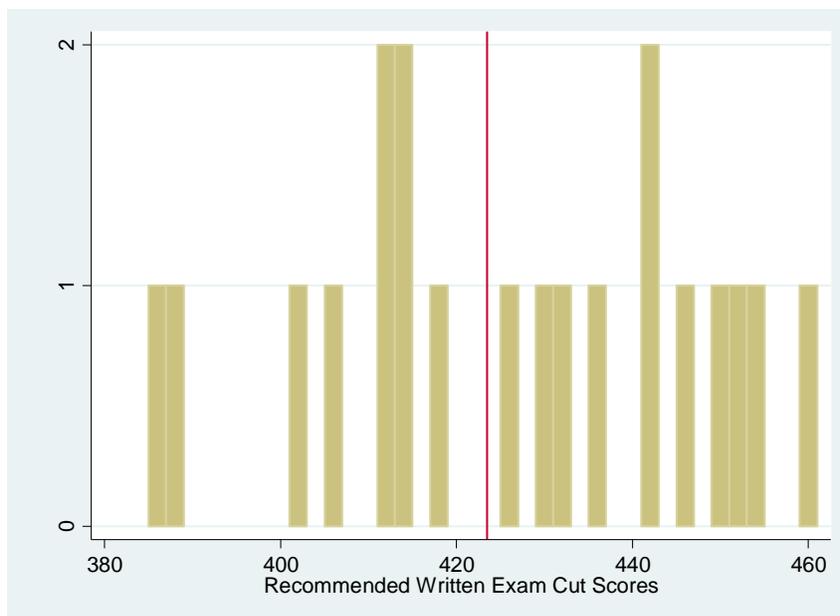
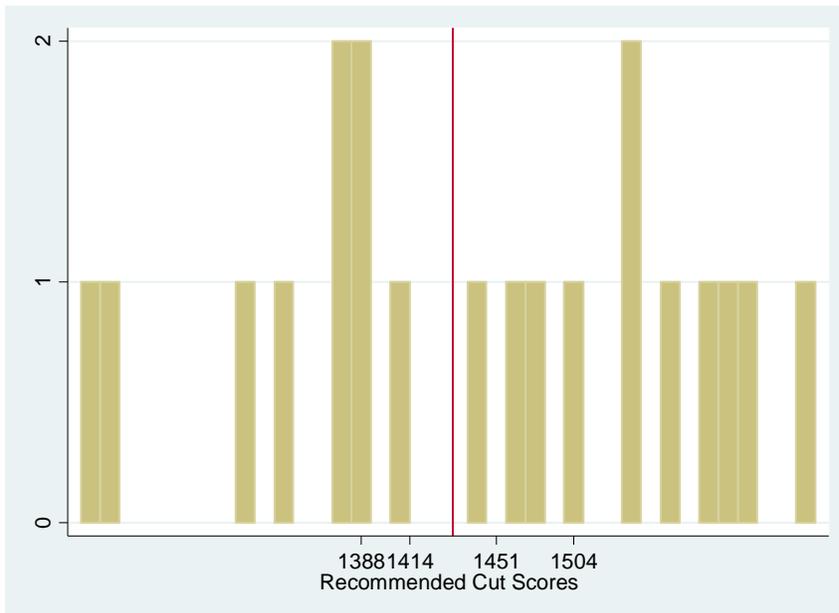


Figure 2 shows the distribution of recommended cut scores by the experts who participated in the ACS study. While the data are not strongly bimodal as in the example in Figure 1, the data are clearly not unimodal either. The data appear either weakly bimodal or roughly uniform across a very wide 75-point range. Of particular note is the sparsity of data surrounding the median reported in the ACS study (423.75, represented with the red line).

It is difficult to interpret the written exam scores without translating these values to an equivalent overall cut score. Unfortunately, the ACS report does not provide an appropriate ‘crosswalk’ for all the values of cut scores for each of the twenty experts, rather they do so for only the reported mean, median and those values that are +/- 1 and 2 SE. Figure 3 plots the same exact distribution but shows the equivalent overall cut score values which can be readily extracted from the ACS report.

Figure 3. Recommended Overall Cut Scores



According to the raw data used in the ACS report, 40% of the experts who participated in the study assessed the written exam and believed an appropriate minimal cut score over 1500 (cut scores that are well above the mean/median + 2 SE value reported in the ACS study). Another 40% of the experts’ assessments would result in a cut score of approximately 1390 or below (below the median/mean -2 SE reported in the ACS Study). The remaining four experts in the middle had recommended cut points of approximately 1410, 1440, 1470 and 1480 (419, 425, 430, 431.25 written exam scores).

Even a brief glance at the distribution suggests two reasons for concern. The fact that the distribution is more accurately represented as being either roughly uniform or slightly bimodal would counsel against attaching strong meaning to any measure of central tendency. The additional fact that the data are especially sparse around the median value reported in the ACS

study would suggest that the median is even less likely to be a reliable measure of central tendency.

Furthermore, and critically, 80% of the experts' recommended cut scores fall beyond the median ± 2 SE range reported in the ACS study. This should raise a red flag to any reader regarding how we interpret the meaning of the reported standard errors.

Assessing the Reliability of the Median

To the extent that the ACS report discusses the reliability of the median, it suggests that the standard errors noted in the report are sufficient to address such concerns. However, the reliance on the standard errors from the report is problematic on multiple grounds, including the fact that the method used to calculate them is inappropriate given the data.

The standard errors of the median reported in the ACS Report were calculated based on simply multiplying the standard error for the mean by 1.25.² However, the equation that justifies this method of calculating the standard error of a median is only valid when the underlying distribution of values in the population is normally distributed. As can be readily seen by visual examination of Figures 2 and 3, such an assumption is hard to defend given this data. The distribution of cut scores is clearly not sufficiently bell-shaped to justify the use of that equation.

To put this bluntly, if you ask almost any properly-trained statistician to specifically consider this question, they would tell you that the equation used to generate the standard errors of the median presented in the ACS report is inappropriate given the data. This makes it quite troubling that the standard error of the median plays a prominent role in justifying one of the options suggested for consideration by the State Bar.

There is no accepted equation that can be used to calculate the standard error of the median for distributions which are, in statistical terms, "poorly-behaved"—such equations are only possible for more normal distributions.³ However, one can assess the reliability (standard error) of a median even when no equation is appropriate by using a method known as non-parametric bootstrapping. Bootstrapping is a procedure by which the researcher repeatedly "re-samples" the data to assess the reliability of a measure given the random presence or absence of particular observations.

This can be done in various ways, but relying solely on relatively straightforward approaches to calculate the bootstrapped reliability of the median cut score, one would typically generate equivalent estimates of the "Median Minus 1 SE" that are 9 to 11 points lower than the sample median, rather than being 5.6 points lower as noted in the ACS report.⁴ Thus the standard error

² Technically, it is multiplied by the square root of $\pi/2$.

³ The reason why a single equation is inappropriate for estimating the standard error of a median should be fairly intuitive: the extent to which a median should be expected to be reliable in the face of sampling variation is highly contingent on the quite specific aspects of the distribution of the data, as in the bimodal distribution example discussed earlier.

⁴ The bootstrap estimates reported here were calculated with a 68% confidence interval for the median, the lower bound of which is treated as equivalent to the Median -1 SE reported in the ACS report.

of the median reported in the ACS Survey is roughly half the size of an appropriate estimate of the uncertainty of the median value.

This suggests not only that the median is a far less reliable measure of central tendency than is suggested in the ACS report, but that the standard errors reported are unjustified.

The Reliability of the Individual Cut Scores

However, merely doubling the standard error of the median still is likely to result in an overestimate of the reliability of these measures, because all of the calculations above and in the ACS report treat the minimally competent threshold scores generated by each expert as ‘true scores’, rather than as scores that are uncertain in their own right. Failing to account for the unreliability of the individual scores not only further overstates the reliability of the measures, but also risks introducing bias if there are systematically different levels of reliability across the individual measured thresholds.

Recall that in the ACS study the estimated threshold of minimal competence for each item evaluated is the average of four scores: the scores determined by Bar Examiners for the two essays that are the best non-competent essays, and the scores of the two worst competent essays.

The ACS report fails to evaluate the extent to which the four scores are consistent and vary in their consistency. Ideally, this study should have resulted in expert assessments of a cut scores that are both internally consistent and closely congruent with Bar Examiners’ scores for the answers examined. This is the only circumstance in which treating the threshold scores determined by the experts as a true score is actually justified.

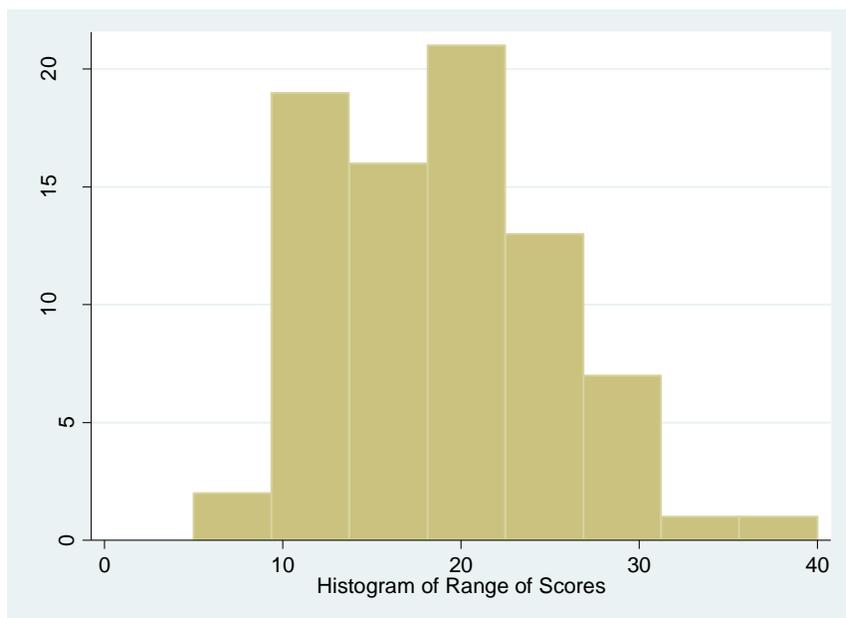
However, one might imagine that the experts in this study, most of whom having no experience in assessing written bar exam answers, might have had different standards from the bar examiners, and that this could have influenced the results.

This concern is something that can be empirically evaluated: if the experts’ assessments are congruent with the bar examiners, the four scores used to calculate the threshold should have scores from the bar examiners that are closely clustered together, and the pile of “competent” essays should primarily include essays that the bar examiners rated more highly than the four exams at the threshold, while the “non-competent” scores should be lower. To the extent that the four scores used to generate the threshold for each expert fail to cluster closely together or the split of essays between competent and incompetent by the experts does not match the scores, we should have greater concerns about the reliability of the individual cut scores.

From a methodological perspective, there are in fact two concerns: the overall reliability of the individual scores, and the variability in that reliability. If some thresholds are estimated by averaging four scores that are closely clustered (e.g. 65, 60, 60, 60) whereas others are widely divergent (e.g. 85, 45, 60, 80), we should not only be concerned that the second threshold is less reliable, but that the reliability of the thresholds varies.

Figure 4 below shows the distribution of the range of scores for each of the 80 cut scores generated by the 20 experts. It is clear that there is a great deal of variation in the extent to which the four scores used to calculate the cut scores cluster. The maximum possible range is 35 or 40 depending on the specific question, and a full 10% of the cut scores are calculated based on essay scores that cover almost the full range of possible scores (30 or more). More commonly, the cut score was calculated based on four numbers for which the minimum and maximum varied by 20 points. Only a quarter of the cut scores estimated were based on four scores that varied by 10 points or fewer. This is and should be enormously concerning and suggests significant reliability concerns about this data.

Figure 4. Histogram of Range of Scores used to Generate Cut Scores



If we have confidence in the reliability of the bar grading process, this suggests we should have concerns about the reliability of the participants evaluation of the written answers in this study. If we have confidence in the reliability of these participants, that suggests reasons for concern about the reliability of the bar examination grading process. It would be valuable to have access to the variability of the exams participants put into the “not competent” and competent” boxes, which would allow more systematic assessment of the congruence of the expert ratings with bar exam scoring, but my understanding is that ACS has declined to provide that data notwithstanding that it was requested by the deans.

While further adjusting the estimates of the reliability of the cut scores generated by the ACS to account for these differences is beyond the scope of these comments, it should be clear that by failing to account for the varying reliability of the individual cut scores, the ACS report fails to consider an important factor necessary to understand the reliability of the results of this study.

Conclusion

Unfortunately, the ACS Report, “Conducting a Standard Setting Study for the California Bar Exam” substantially overstates the reliability of its findings. If the median cut score and the reported standard error of the median are not reliable indicators on which to justify the cut score of the Bar Exam, is there anything else that we can take from the study?

I would suggest that the central finding of this study, when the data are properly assessed, should be that it is difficult to come to a clear, meaningful consensus as to how a minimally competent lawyer would perform. Despite the best efforts of the facilitator and experts involved in this standard setting study, the cutoff scores recommended by the participants were all over the map. When 40% of the experts effectively are recommending increasing the cut score above 1500 while another 40% suggest dropping it below 1390, it is hard to read much into the data except that the experts’ thresholds varied greatly. In this circumstance, to simply look at the median might be Solomonic, but it is certainly not scientifically valid, and should not be treated as such.

It is also clear that further research is needed. This will no doubt involve more careful conceptualization and operationalization of what being a minimally competent lawyer entails and how that is reflected in performance on the bar exam. Alternative research designs may also be valuable, perhaps including efforts to leverage observational data about the relationship between bar exam scores and measures of lawyer competence, or even cross-state comparisons of the relationship between bar exam thresholds and lawyer performance.

Designing research that generates valid and reliable empirical results that can be used to inform the determination of an appropriate cut point for the bar exam is no easy task, so I am sympathetic to the challenges ACS and the State Bar faced. While I appreciate their efforts, in my expert opinion, this study did not result in reliable empirical data that can be used to help inform decisions regarding the cut score for the California Bar Exam.

SALT - Society of American Law Teachers

Comments on 2017 Standard Setting Study Report and Related Options

Submitted to the State Bar of California

August 24, 2017

The Society of American Law Teachers is a national organization of law faculty, administrators, librarians, academic support experts and others dedicated to teaching excellence, social justice, and diversity. We write to comment on the immediate and urgent question of the “cut score” for the July 2017 bar examination.

California historically has played a prominent role in shaping national policy on the bar exam, as is evident from its leadership in pioneering the bar exam’s performance test and in increasing experiential learning requirements for its bar applicants. The recent study of cut scores responds to the heated debate about California’s second-highest cut score in the nation and the concern about the declining first time pass rate. SALT and others have criticized the high cut score because there is no evidence that it protects the public better than lower cut scores adopted in other states. Instead, California’s high cut score harms the public by denying licenses to applicants who would be considered competent to serve clients in every jurisdiction other than Delaware. Delaware, a state that has successfully limited its attorney population to 2,978 people, is no model for any state that values an inclusive profession.

In light of these concerns, it was understandably important to California to assess the cut score quickly in order to apply the results to the July 2017 exam. However, the study undertaken has numerous methodological flaws that affect its value and the decision about how to proceed.

Among the methodological problems are that the study’s essay graders did not have a detailed grade scoring sheet or model answer by which to judge the quality of exam answers; there was no or too little discussion about what constituted a competent answer for most of the questions; comments from essay graders suggest they felt unqualified to grade the essay questions that covered subject matter outside their expertise; and many felt rushed through the evaluation process. Equally important, the wide range of judgments from the participating lawyers about what constitutes minimally competent performance on the individual questions undermines the credibility of the results. Reviewers hired by the State Bar of California identified these and other methodological deficiencies.¹

While the methodological issues call the cut score study’s conclusions into question, the most critical problem is that the process is backwards. Before determining an appropriate cut score, one should first determine whether the licensing exam assesses the appropriate job-related skills.

¹ Evaluation of Mary J. Potoniak, August 2017, available at: <http://www.calbar.ca.gov/Portals/0/documents/admissions/Examinations/Review-CalBar-Standard-Setting-MaryPitoniak.pdf>; Tracy Montez, Ph.D., *Observation of the Standard Setting Study for the California Bar Exam*, (July 2017) available at: <http://www.calbar.ca.gov/Portals/0/documents/admissions/Examinations/Tracy-Montez-ReviewBarExamstudy.pdf>.

As noted by Dr. Tracy Montez, a reviewer hired by the State Bar of California to provide advice and review of the standard setting and validity studies, how much value to place on the exam is connected to the value the exam has in evaluating the knowledge and skills new lawyers need.²

SALT has long argued that the existing bar exam is inadequate to assess an applicant's readiness to practice law.³ It fails to measure a wide range of important lawyering skills new practitioners need, such as identifying and gathering necessary information, advising clients, negotiating and drafting both transactional and litigation documents, strategic and effective use of the litigation process, and the ability to recognize barriers to effective cross-cultural communication. But even the skills the exam does purport to measure—legal knowledge and analysis—are tested in ways unrelated to how lawyers use those skills in practice, undermining the validity of the exam. Requiring memorization of thousands of legal rules as a predicate to answering questions, testing via multiple choice questions that allow only 1.8 minutes to read and analyze a problem, and using a closed book format, all have no relationship to how lawyers use the law in practice. Thus, even with respect to the skills tested, the exam raises validity issues.

The cut-score study of the exam conducted by California did not and could not respond to these concerns. Determining the appropriate cut score to separate the competent from the incompetent on an exam that has not been validated as a licensing test cannot be done with any confidence. Although California should decide to reduce the cut score for the reasons noted below, it should also proceed with a wider-ranging inquiry into the validity of the exam. Beyond looking at whether the doctrinal subjects tested are the ones lawyers practice, the validity study should include an examination of whether the limited skills tested, and the manner of testing those skills, produces a valid test and hence a reasonable public protection licensing mechanism.

Looking carefully at the validity of the exam is particularly important because the exam has a discriminatory impact that increases as cut scores increase. By analogy, in an employment context, if an employer knows a test has a discriminatory impact, Title VII requires the employer to scrutinize that test and determine if it is a valid measure of the skills needed for the job and to examine alternatives that may better measure job qualifications and have a less discriminatory impact.⁴ States should acknowledge that they have a similar responsibility with respect to bar admission.

A national conversation about possible alternatives has already begun.⁵ We therefore urge California to proceed with a further study of the bar exam to examine its validity as a measure of

² Montez, *supra* note 1, at Chapter 2.

³ SALT Statement on the Bar Exam, 52 J. Legal Ed. 446 (2002).

⁴ For a discussion of Title VII's obligations to examine the validity of an employment test and to search for valid and less discriminatory alternative assessments, see Andrea A. Curcio, Carol L. Chomsky and Eileen Kaufman, *Testing, Diversity & Merit, A Reply to Dan Subotnik and Others*, 9 U. Mass. L. Rev. 206, 213-221 (2014).

⁵ The ABA President has just announced the members of a national commission on legal education, and one of the announced tasks is to look at the bar exam:

http://www.abajournal.com/news/article/members_of_abas_commission_on_the_future_of_legal_education_named.

For an example of just one viable alternative, see Eileen Kaufman, Andi Curcio & Carol Chomsky, *A Better Bar Exam – Look to Upper Canada*, available at: <https://www.lawschoolcafe.org/author/eileen-kaufman-andi-curcio-and-carol-chomsky/>.

competence for new lawyers and to consider alternatives that would better assess the range of skills that new lawyers need

In the meantime, however, given the flaws in the cut-score study, the question remains: what should California do right now about the exam cut score? Is there a viable cut score to adopt in the short term that is defensible as an entry exam and that also decreases the discriminatory impact?

We believe there is. First, the significantly lower bar exam cut scores in other states have not been shown to produce any greater rates of attorney malfeasance, misconduct, or incompetence in those states than in California. The score used by the combination of states with the largest number of attorneys (including New York) is 133. The score used by the largest number of states is 135. Neither of those scores is associated with increased problems of attorney incompetence. Indeed, the staff memo written by Gayle Murphy (Senior Director of Admissions) and Ron Pi (Principal Analyst) for California's Committee of Bar Examiners, acknowledges that: "There is no empirical evidence available that would support a statement that as a result of its high pass line California lawyers are more competent than those in other states, nor is there any data that suggests that there are fewer attorney discipline cases per attorney capita in this state." Given that finding, it would be sensible and justified to adopt a score of 133 as adequately protecting the public while further study of the validity of the exam and exploration of alternatives are done. Reducing the cut score in this way would improve access to justice by providing more attorneys for the people of California, including for underserved communities. It also would ameliorate the discriminatory impact of the exam.

We appreciate that California is devoting substantial time, energy and financial resources to studying lawyer licensing, underscoring California's commitment to a fair and valid licensing process. We trust California will continue to lead as it studies the bar exam's content validity and examines California's own pass rate cut score. For now, given the lack of evidence of content validity of the exam itself, the knowledge that the existing cut scores create a disparate impact, and the flaws in the California cut score study's methodology, SALT urges California to adopt an interim cut score of 133, the score used by states that license the largest number of attorneys across the country.

SUBMITTED ON BEHALF OF THE SOCIETY OF AMERICAN LAW TEACHERS BY:



Sara Rankin
Co-President



Denise Roy
Co-President

I disagree with the intention to shorten the length of the Bar Exam from three days to two days. The sections of the Exam which most harness the ability to “think like a lawyer” are the Performance exams. Two three-hour afternoon sessions required intensive analysis of both the law libraries provided and the detailed fact patterns and an astute synthesis to perform the legal document drafting assignments. It was necessary to integrate the principles of law set forth in the set of cases and statutes with the essential, relevant facts. Both the fact patterns and the law library were complex and it was necessary to determine peripheral information and extract only pertinent law and facts. The two Performance Exams counted for 33 1/3% of the total score. Reducing that section to one ninety-minute session counting for a much lesser percentage (at most 25%) depreciates the entire Exam process. The MBE would now comprise 50% of the total score. In other words, knowledge of seven subjects carries the same weight as knowledge of thirteen subjects coverable on the five Essay questions and one truncated Performance exam. Such disparity is marked and disconcerting and contradicts the goal of being knowledgeable in a “number of fields” of law . This scenario is only avoidable by keeping the length of the Exam at three days and six three-hour sessions leaving intact the most significant sections, the two Performance exams.

In addition, lowering the passing score is a mistake and counterintuitive. Only qualified candidates for the Bar should be admitted to practice. The stated objective of the State Bar Agenda Baseline for passing, to wit, “Rudimentary knowledge of a range of legal rules and principles in a number of fields in which many practitioners come into contact” cannot be achieved by reducing the “number of fields” tested and lowering the standard for what constitutes such “rudimentary knowledge.” The State Bar is essentially acknowledging that a lesser degree of “rudimentary knowledge” is okay. But if there is a change in that level of such knowledge it should be to a higher degree. Certainly, exams for doctors, architects, engineers, accountants, et. al., are not being made easier for those candidates aspiring to practice in those professions. More rigor and more screening is necessary for qualifying attorney exams not less.

Finally, California law schools would be better institutions for preparing attorneys to be effective practitioners (and competent Bar Exam candidates) if there were less emphasis on Socratic instruction and more focus on multiple practicum courses for students to simulate the kinds of tasks required of lawyers, i.e., drafting complex contracts, preparing on point (and to the point) deposition questioning, arguing enough varied motions to be already sufficiently versed and competent when admitted to the Bar.

In sum, maintaining the status quo of the Bar Exam is the optimum decision otherwise there is the inevitability of debasing the currency by which all California attorneys are measured in admitting inadequately prepared and not competent applicants to the Bar.

Jeffrey M. Ginsberg, Esq./SB #231784

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August 24, 2017

Mr. Ron Pi

Principal Analyst, Office of Research and Institutional Accountability
The State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: Recent Standard-Setting Study of the California Bar Examination

Dear Mr. Pi:

Thank you for the opportunity to comment on possible changes to the California Bar Examination, including possible adjustment of the passing score for the exam. I greatly appreciate the decision by the Supreme Court and the State Bar to review the exam and its passing score in response to the precipitous and troubling drop in bar passage rates in California. As discussed more fully below, I strongly urge the State Bar to recommend, and the Supreme Court to approve, an immediate and temporary reduction of the passing score for the bar exam to 1388. After the interim reduction of the cut score, I also urge the State Bar to conduct a complete and unbiased validity study of the content of the exam, as well as an occupational study of the educational and skill requirements for entry-level attorneys. The State Bar should recommend changes to the content and the cut score of the bar exam to the California Supreme Court for the Court's review and approval, rejection, or modification only after such studies are complete.

As you know, our Committee held an informational hearing on California's bar exam passage rate this past February, noting California's exceptionally high passing score, the recent, significant decline in the passage rate for the state's bar exam, and the negative impacts of the state's low passage rate on graduating and prospective law students, law schools, and, most importantly, consumers of legal services. Since then, the passage rate on the exam has dropped even further, with only 34.5 percent of those taking the February 2017 California Bar Examination passing the exam. While the passage rate for the February bar exam historically is lower than the passage rate on the July exam, this year's record-low passage rate raises substantial questions about the purpose of the bar exam, and whether the exam—which should be a test of minimal competence for those entering the legal profession—perhaps inadvertently has become an artificial barrier to the practice of law, implicating antitrust concerns, causing personal and financial hardship to exam takers, and creating negative consequences for California law schools and the state's economy.

The low passage rate on the California Bar Examination is the result, at least in part, of its high passing score, commonly known as its "cut score". The score, set at 1440 in 1986 and not reviewed



or validated for more than 30 years, is higher than the cut scores for *every state in the nation* except Delaware. At our Committee's informational hearing, Elizabeth Parker, the Bar's Executive Director, stated that "there is no good answer" to the question of why the cut score is so high.

After having the Committee of Bar Examiners (CBE) conduct a relatively quick standard-setting study on the bar exam score—which supported the exact same passing score for the bar exam, but recommended a range of possible passing scores below and above the current score—the State Bar asked for public comment on just two options: (1) maintain the passing score at the current level of 1440, or (2) reduce the score to 1414. The Bar did not ask for public comment on another reasonable option supported by the CBE's own study: to reduce the cut score to 1388. The CBE recognized that a score of 1388 would reflect competence on the exam, reiterating that a score from 1388 to 1504 would reflect competence on the exam to a 95 percent confidence level. (Committee of Bar Examiners, *Standard Setting Study for the California Bar Examination and Related Recommendation to Circulate Two Options for Public Comment* (July 28, 2017), p. 8.) It is unclear why, given this broader range of scores, the CBE limited the options for public comment and did not provide an option for lowering the cut score to the lowest range of passing scores that would reflect an exam taker's competence. Again, the California Bar Examination is designed to test the *minimal* competence to practice law and not create an artificial barrier to entrance into the legal profession or reflect an optimal level of competence.

The limited options for public comment are more troubling given the many serious consequences, both personal and societal, of maintaining an unduly high cut score, including the lack of access to legal representation for many Californians. Far too often, low and middle-income Californians with critical legal representation needs, including in divorce, child custody, unlawful detainer, foreclosure, probate, and other civil matters, are unable to find and afford legal counsel to protect their critical legal rights and interests. According to data from Judicial Council, at least 70 percent of family law litigants are unrepresented. While courts seek to help these litigants by providing access to self-help clinics and family law facilitators, they cannot provide an adequate substitute for representation by a competent attorney. And while reducing the cut score for the bar exam and increasing the passage rate on the bar exam would not guarantee that more Californians will have legal representation, it would increase the number of competent attorneys who were available to represent low and middle-income clients in the state.

Even if the passing score on the bar exam were reduced to 1388, California would still have one of the nation's highest cut scores, with only six states in the nation having a higher passing score. Furthermore, there is no evidence that Californians would be harmed by lowering the cut score and increasing the bar exam's passage rate. The CBE itself acknowledges that "[t]here is no empirical evidence available that would support a statement that as a result of its high pass line California lawyers are more competent than those in other states, nor is there any data that suggests that there are fewer attorney discipline cases per attorney capita in this state." (Committee of Bar Examiners, *Standard Setting Study, supra*, at pp. 8-9.) If such evidence of public harm existed, I would not request that the passing score be lowered. Given the lack of correlation between reducing the cut score to the lower end of the scale suggested by the State Bar's recent study and negative consequences to California consumers, it is unclear how California can justify maintaining its current cut score, or even reducing the passing score to 1414 (which would be the third highest in the nation).

I strongly urge the Supreme Court to immediately lower the passing score on the bar exam to 1388, but believe the revised passing score should remain in place only on a temporary basis. I believe that a final decision about the cut score should not be made by the Supreme Court until after the State Bar completes a full review of the content of the bar exam (which is now underway) so the Supreme Court can decide whether to accept or revise the Bar's recommendations for both the content and cut score of the exam. After the validity study is finished and the content of the Bar Exam is determined, I urge the Bar to complete a full and fair study of the passing score. In particular, I recommend that the study should *not* include any panelists involved with the current bar exam to prevent the possibility, or even the appearance, of bias in the study, as was noted by one of the independent consultants evaluating the initial standard setting study, who found that one of the panelists had "extensive" experience with the existing bar exam, having been the chair of the Examination Development and Grading Team, and "his experience, coupled with his outspoken nature, may have influenced other panelists." (Memo from Mary Pitoniak to Ron Pi, *Evaluation of Standard Setting Conducted for the State Bar of California* (August 4, 2017), p. 5.) The question of possible bias and undue influence is particularly concerning given that the CBE's study resulted in a recommendation of maintaining the bar exam's *current* cut score.

I also propose that the State Bar complete an occupational analysis of the qualifications for a minimally competent entry-level attorney in California, as recommended by independent observer, Dr. Tracy Montez, an expert in psychometrics, in her report to the State Bar. The Bar contracted with Dr. Montez to provide advice and consultation regarding its review of the bar exam, including a determination of whether its standard-setting procedures met professional guidelines and technical standards. After evaluating the documents and process used by the CBE, attending the Analytic Judgment Method workshop, and conducting a pre-study methodology review, Dr. Montez recommended that the Bar conduct a comprehensive occupational analysis that is up-to-date and reflects the knowledge, skills, and abilities required of minimally competent entry-level attorneys in California. Dr. Montez found that a state-specific occupational analysis is critical for making high-stakes decisions such as establishing the content for the California Bar Examination, setting the passing score for the exam, and providing preparation and training information to law schools. I recommend that the analysis be conducted by independent psychometricians who specialize in licensing on a state level, such as the Department of Consumer Affairs' Office of Professional Examination Services, which conducts occupational studies of licensees in California.

Again, I greatly appreciate the leadership of the Supreme Court and the State Bar in reviewing the California Bar Exam and its passing score and strongly urge that the passing score be lowered to 1388 on an interim basis, pending completion of the bar exam validity study and then a full and unbiased revised study of the content and cut score for the exam.

Sincerely,



MARK STONE
Chair, Assembly Judiciary Committee

I disagree with the intention to shorten the length of the Bar Exam from three days to two days. The sections of the Exam which most harness the ability to “think like a lawyer” are the Performance exams. Two three-hour afternoon sessions required intensive analysis of both the law libraries provided and the detailed fact patterns and an astute synthesis to perform the legal document drafting assignments. It was necessary to integrate the principles of law set forth in the set of cases and statutes with the essential, relevant facts. Both the fact patterns and the law library were complex and it was necessary to determine peripheral information and extract only pertinent law and facts. The two Performance Exams counted for 33 1/3% of the total score. Reducing that section to one ninety-minute session counting for a much lesser percentage (at most 25%) depreciates the entire Exam process. The MBE would now comprise 50% of the total score. In other words, knowledge of seven subjects carries the same weight as knowledge of thirteen subjects coverable on the five Essay questions and one truncated Performance exam. Such disparity is marked and disconcerting and contradicts the goal of being knowledgeable in a “number of fields” of law . This scenario is only avoidable by keeping the length of the Exam at three days and six three-hour sessions leaving intact the most significant sections, the two Performance exams.

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Jeffrey M. Ginsberg, Esq./SB #231784