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

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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,

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