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The Supreme Court of California
350 McAllister Street
Room 1295
San Francisco, CA 94102

Re: The California Bar Exam

Dear Justices:

I write to provide a different perspective on the current exchange between the legal academy and the bar examiners over the reliability and validity of the California Bar Examination and its often calamitous effects on aspiring applicants. And, though I have e-mailed and copied several authorities representing differing constituencies, the stakeholders most on my mind are this summer's bar applicants, their predecessors over the last two decades, and finally, the public which supports them, shares and suffers in their test-taking tribulations and has an ever-growing claim to their sooner-rather-than-later success.

I understand the Deans' frustration with the recent pass rates (which is, in fact, of twenty-year duration (and) due to overlapping causes), and I applaud their concerted action to address what they perceive to be the culprit; but I believe that the court was correct in deferring action until after the tabulation of results for this summer's exam.

However, there are several less global issues that the Court could readily address in the interim that would significantly improve the bar experience, if not outcome, for a substantial number of our applicants.

While I am, in disclosure, a small-fee contingent-based, supplemental performance test prep course, I have been in training, teaching and/or an administrative capacity for over three decades. I have been lectured to, mentored in, and come to appreciate matters of accreditation, admissions and attrition, bar preparation and examination, and career development, and the promotion and rankings that have afflicted even our finest institutions. I am no longer affiliated with any national bar prep program nor any academic program. But I have been and continue to be an unflinching advocate for our profession and those who aspire to join our ranks. And I whole-heartedly agree that the National Conference and our Committee have given short shrift to those aspirations, e.g., their handling of the MBE cheating scandal, the NCBE's involvement in 'Barmageddon,' its fiats on MBE raw scores and rankings, and the current edition of 25 'experimentals,' in addition to the Committee items discussed below.

The examiners, both National Conference and the Committee, have more faults than they will admit, both in terms of opacity and ulterior agenda, but the tests they have administered over the last three decades have remained – to date – of a measurably constant difficulty. And while it is true that many schools of late have accepted more matriculants with less test-taking skills, they have not been any less diligent or demanding in their classes, assignments, training and testing. The applicants themselves are still as diligent and capable as earlier generations though some may require – on average – an additional exam attempt to demonstrate the advanced multiple-choice test-taking ability that increasingly passes as the ultimate predictor for minimal 'practice' competency in seeking entrance to our profession.

All of which leads me to address the Court in hopes that it might correct, and even redress, some of the Committee's unchallenged processes. And, in all honesty, some of these matters simply deserve to be publicly aired in fairness to the past applicants who struggled – and maybe were denied licensing – due to the strident application of questionable practices.

I recommend the following nine proposals be implemented immediately or as soon as the Court determines is practicable, and be individually applied retroactively to the extent the Court deems equitable:

<u>One</u>. Resolution grades, which are 'third read' grades necessitated by a discrepancy of 15 points or more between the first and second grades, should be logically applied in a consistent manner. Presently, per the Committee, resolution grades are utilized thus:

> "Applicants with grading discrepancies more than 10 raw points between first and second read assigned grades on any question whose averaged total scale score is less than 1440 will have those answers referred to the EDG Team member supervising the grading of that particular question for resolution of the discrepancy (Phase III). The EDG Team member will assign a resolution grade to the answer and the resolution grade will replace the averaged grade for that question. If the applicant's total scale score after resolution grading is 1440 or higher, that applicant passes the examination. If the applicant's total scale score after resolution grading is less than 1440, the applicant fails the examination."

Since a resolution grade could agree (more) with the first reader than the second, it stands to reason that resolution grades should also be used to ***refigure*** the applicant's total scale score ***based on the first read alone***.

As currently announced – and evidently practiced – the effect of the resolution grade can be superseded by other second read assigned down-grades of 5 or 10 points. If the resolution grade is truly the most accurate grade for a contested item, its new, 'resolved' value should be recalculated with the first read grade set ***independent*** of the second read grade set. An applicant who thereby passes after the new first read calculation should be (or have been) considered as having passed after first read thereby rendering the second read grades inconsequential.

In addition to resolving this inconsistency for this summer's upcoming grading, this proposal could – and should – be retroactively applied to the Winter 2017 exam – and historically to the extent the Court feels is warranted.

Two. The Committee should drop randomly-grouped paper distribution on second read; instead, it should rank-order graders after first read to allow for a balanced match-up between first and second reads of higher-grading and lower-grading readers.

Current practice as stated to me by a former director of examinations and subsequently confirmed by the Director of Admissions is that each written item's papers are grouped for random assignment to the first readers; thereafter, papers qualifying for a second read are retained in the same initial groupings and assigned at random to a different grader for the second read. While graders are now subject to three calibration sessions, there is nevertheless clear evidence on the scorecards of most failed applicants who made second read that variance between graders remains an ongoing reality. This reality is incredibly significant since papers are graded in five point increments, and the Committee considers ten point discrepancies acceptable (which on a performance test paper would be a difference of *twenty* raw points)!

And this reality is even harsher when one learns that – contrary to best practices recommended by the National Conference – the Committee no longer submits the papers of applicants who passed the first round by less than 25 scaled points, that is, below 1466 – as was its practice for two decades. For the last decade, those near-failures have been passed without further review. (Tellingly, this change in the grading process was not noted in the History of General Bar Exam Structure and Pass/Fail Rules and the Chronology of Changes referenced during the debate on shifting to the two-day format.)

The fact that the scoring process no longer balances the second read set of papers of near-misses (applicants who score between 1389 and 1440 after first read) with near-fails (applicants who had scored between 1440 and 1466 after first read) not only could induce an inherent bias in the second read (there are now no passers within this Phase!), but also makes the first read outcome a one-and-done phenom that introduces an ineluctable element of luck into the random assignment of papers. An easier-reader draw could mean a first read pass.

Statistically, hundreds of first read passers are licensed due to having, that is, drawing, an easier mix of readers. Without any counter-balance, that is an inescapable fact.

And, statistically, with a second random assignment of papers, hundreds of near-passers after second read are (still) missing their license due to drawing a(nother) tougher mix of readers – or a set of readers who were not as easy as the first set was tough. For example, an applicant who score 1391 is granted a second read. If on second read that applicant now scores 1488, the applicant would still fail as her averaged first and second phase scores would be averaged to produce 1439.5, which is arguably fair until one realizes that the second, now more seasoned readers found this applicant to perform better than hundreds of passed one-time-read, lucky-draw new licensees!

In the last decade, at least 10,000 applicants passed or failed based on luck of the draw(s).

If the Committee is to persist in waiving (lucky-draw) first-read passers without check, the only way to minimize the luck of the draw is to rank-order graders (highest-average grades down to

lowest-average grades) after first read and then assign papers for second read to ranked opposites ('highest' reader papers go to 'lowest' reader; 'lowest' reader papers go to 'highest' reader).

And, since the order in which papers are read might influence subsequent grades, the order of papers for the second read should be reversed. Thus, papers grouped in ascending order for the first read should be regrouped in descending order for the second read.

In 2014, I attempted on three occasions to address the Committee on this point, and was finally granted time by the chair to raise this point – while some of the Committee took a (restroom) break. Reluctant to give up on this unfairness, I left Attachment A with then counsel for the Committee for their (private) reconsideration, and since the final step articulated therein has not been effectuated, I trust the critical first three operative steps also have not been implemented.

(To assume otherwise – and join in a most cynical view of the Committee espoused by some in academe – would actually comport with past practice of the Committee, that is, to change (announced) practice without admission of change – or recognition of past error. By way of example, for years our Committee stated that total scaled scores were 'rounded' to make both interim and final pass-fail decisions without recognizing that no one in the real world outside the laboratory describes 'rounding' to mean, as the Committee persisted, adjusting up to a definitive *ten-thousandth decimal place*. So, after pressing their indefensible meaning to deny petitioning applicants who failed by a fraction of a point, they quietly dropped the word, but arguably not the processing. See Item Eight below for further comment.)

Therefore, the Court should order the Committee to assign papers in the fairest possible manner – if only to follow the steps laid out in Attachment A – to reduce the degree of chance in making career critical licensing decisions. This is not burdensome for the Committee as it frequently conducts this type of reader evaluative exercise (to assist in calibration efforts) to assure itself, its critics and the Court that its grading process is sufficiently reliable – and fair to the applicants!

Three. The Committee should be ordered to retroactively apply the new MBE weighting to any unpassed applicants carrying over from the last two administrations of the exam (Summer 2016, and Winter 2017 – basically, from the time the Court confirmed the new scoring weight of 50% for the MBE section of the exam to commence this Summer 2017) who in that interim would have posted a *passing* Total Scale Score had their MBE score been valued at 50% in the total scale score computation instead of the now discarded 35%. Indeed, any applicant who would have passed these two tests under the new regime is deserving since the 8 writing items allowed greater opportunity to fail than the 6 items under the new regime – meaning such alternate passers are more than qualified under the new guidelines. If 'minimum competence' is truly the standard for bar passage, then passing under the new scoring regime should suffice.

The Committee should not require that these applicants repeat the very same performance level in order to *eventually* pass, and the Court, as a matter of comity if not equity, could grant immediate licensure.

Four. The Committee should once again permit applicants to not repeat a section – written or MBE – that they passed despite failing overall. This "bifurcation" option was offered in the

80's, and deemed a failure as it purportedly caused a reduction in the pass rates; in addition, the experiment ran into the newly added Performance Test, which caused some to opine that the exam would have to be 'trifurcated.'

Per this proposal, the repeating applicant would not carry the earlier passing sub-score forward, but could, *ala* qualified out-of-state attorney applicants who are allowed forego the MBE, opt not to repeat that passed section. And, like the attorney applicants, the section-repeating applicant would still have to pass that remaining section.

The feature that would make this allowance fair to the rest of the applicant pool is that the option qualifying score would have to be 1500 or 1540 on that section. This ***higher*** qualifying score would establish that the applicant had 'earned' the option (again, akin to the attorney applicants who qualify through years of practice), and it would encourage the remaining applicant pool (repeaters as well as first-timers) to work more aggressively on the MBE to ensure that the all-important MBE-dictated pass rate remains high. (Alternatively, the Committee could order a psychometric study of how to integrate an assigned score for the opt-out group to offset the missing MBE performance of these high-scorer MBE opt-outs in equating calculations – in essence, recognizing their existence in the pool without having their scoring input.)

Business and Professions Code Section 6046.6 would permit the (immediate) creation of such an option without the need to provide two-year notice.

As an aside, I don't believe this would, if offered, create a rush of out-of-state applicants to take advantage of bifurcation – especially as they would have to outscore our higher cut-score-plus. Moreover, I predict such an allowance will likely be conceded or forced upon our Committee by a now inevitable federal court challenge pursuant to our new exam configuration. It would be most prudent to establish our own process-cum-standard now than await a less desirable decree.

Five. The Committee should recommend that the Court 'grant' passes to any applicant whose total scale score is one MBE item value within reach of 1440.0.

Current practice – upon almost universal advice from well-meaning faculty and family – is to have failed applicants with scores of 1435-plus/minus request (at cost) to have their MBE scantron form 'hand-graded' to confirm their answers were accurately machine-read. The Committee should delete this money- and hope-suck, and in so doing, introduce a long-needed measure of egalitarianism. Future bar passers will no longer (be able to) look down upon bar repeaters for the simple unknown of "there but for the grace of the Committee …"

This action does not lower the passing standard, i.e., the cut score, but in concurrence with the increased pass rate, which will result from the exam change (and a push by the deans of their charges), accomplishes the Deans' wish without binding the Committee or this Court to future out-of-state licensing demands based on a lowered, nationally-fungible multistate criterion.

Indeed, without the reappraisal process (which for three decades offered *de novo* review of applicants who were within 28 points of passing and did in fact confer passage on a significant number of those near-passers – and is still used on the First Year Law Students Exam), this could

tend to serve as a partial, functional replacement for that enlightened feature of California's bar scoring history.

This proposal could also be retroactively applied to the Winter 2017 exam. (We have examples of past instances of belated passage, one being the Ontario earthquake recount of 1990.) As no pass list is presently posted, the addition of these applicants would not cause an outcry, and, if enacted now would mute November criticism of any change in the anticipated pass rate.) Given the several extant scoring variables noted here, such retro application would be entirely justified.

Six. The Committee should switch the days of the bar examination from Tuesday-Wednesday to Wednesday-Thursday. Since the MBE determines how many applicants will pass the exam, it makes more sense to have the students perform that section of the exam while at their freshest – and without any depression over otherwise first-day writing mistakes. (Such order would have forestalled the regrettable Barmaggedon incident and its negative impact on the Summer 2014 pass rates virtually nationwide.) Reversing test order puts the greater good first. Slower wits and weaker spirits will still cause failure, but not for others.

Seven. The Committee should lobby the National Conference to concentrate the now 25(!) experimental items in the afternoon session or towards the end of each session. With this new wrinkle, each (175) counted MBE question takes on greater individual weight while at the same time the applicants are spending more valuable time on *valueless* (for them) questions. Experimental questions may be more difficult (since by definition they are not vetted beforehand) and thus taking more time and focus away from the applicants. And the fact that there are different versions of the test might mean that some applicants are having less experimentals up front, or in different positions that variegate their downfield effect on following items, and thus the examination could present a differing degree of difficulty *across* each administration – resulting in the abjured uneven playing (i.e., scoring) field.

For a professional licensing exam where success is often a matter of one or two MBE answers, the injection of this arbitrariness must be mitigated as much as is practicable. Possibly the Conference will agree to a 'test' wherein California is provided with experimentals-last versions of the MBE as a control group against the current distribution patterns in order to determine whether there would be differences in scoring attributable to experimentals' placement. Such testing-of-the-test is exactly what the Conference professes to be about in order to ensure the greatest reliability coefficient of its flagship licensing product.

Eight. The Committee should be directed to discard their pretentious eight-digit score presentation that infers an accuracy to the ten-thousandth decimal place, e.g., a total scale score of 1439.6866. When the Committee features a 5-point incremental grading scale and readily lets stand grading discrepancies of 10 raw points per written item, it is truly asinine to proclaim that the scoring process bears accuracy and commands deference to the ten-thousandth of a point. Even the National Conference of Bar Examiners recommends reported total scores no finer than tenths of a point. More important, this numbo-jumbo makes the public think that the California Bar Examination is a finely tuned instrument and that its grading is indeed rocket science.

Nine. The Committee should consider allowing California third-year law students to sit for the winter bar on a limited basis – perhaps by grade or class rank criteria, school allocation or even lottery. The infusion of better test-takers into the winter bar applicant pool would raise that MBE average and thus increase the winter pass rate. This would present *first-time repeaters* from the prior summer with a more supportive cast, and shorten their stay in the pass rate penalty box.

In Summary, several of the above proposals address inequities in the current grading processes (Items 1, 2, 7); several are made to properly improve the pass rate (Items 4, 6, 7 & 9); some are to minimize the vagaries inherent in the subjective grading of written exam items (2 & 5); some are to clarify for the public that the test is as fair as practicable (2) but without a false exactitude (8); and some are to usher in the new regimen without undue recrimination (3, 4, 5).

Again, Proposal Five would accomplish some of what the Deans seek without appearing to water down the exam in a way that undersells the efforts of the last thirty years of successful as well as unsuccessful applicants. Moreover, that item's greatest effect in tandem with Proposal Four would be to reduce the reputational stigma that divides first-time bar passers and repeaters.

All proposals are respectfully submitted in order to forestall further challenge to the exam in a manner that would unfairly and unexpectedly diminish the quality of the license being sought by present bar applicants, yet-to-repeat applicants, and law school matriculants already registered with the Committee for future examination.

It appears that some recent changes made to the California Bar Examination have been done with the ultimate effect if not the intended goal of aligning the California experience with the Uniform Bar Examination juggernaut. The Deans' proposal would unwittingly further that agenda.

Whether the Court ultimately decides to adopt the Uniform Bar Examination and its attendant feature of national licensing is not a decision that should be forced upon it – or upon The State Bar of California – without careful study of the effects it will have upon our present law school eco-system, which is host to thousands of career-hopeful and heavily indebted matriculants – and has just accepted thousands more who will enter the marketplace three to four years hence. To force open this marketplace to tens of thousands of new licensees from across the nation could foreclose many of our instate matriculants from the career paths they have anticipated and would most readily pursue statewide. It is certainly a discussion where they and the young lawyers of the bar should be involved.

I conclude with hope that the Court will see fit to address the above matters in a manner that advances the greatest good for our profession and the public we serve.

Sincerely, I am

John B. Holtz
Bar Member #123144
Amicus Curiae

Post Script: I purposely did not address the matter of the cause of the declining pass rates; however, if called on, I would readily respond – especially as the Committee's first study has predictably reached the same stumbling block in determining causation that the National Conference encountered in 2008.

Attachment

For appropriate distribution by:

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Attachment

Proposal Regarding Second Phase Assignment Of Papers to Graders

STEP ONE: Rank order each item's graders by average of grades submitted. For example, in a group of 12 graders the order would run from the grader with the highest grade average, dubbed Grader +6, in descending rank to the grader with the lowest grade average, Grader -6.

STEP TWO: Assign papers for Second Phase grading to opposite graders. Thus, Phase One papers from designated Grader +6 would be distributed to Grader -6, and conversely from Grader -6 to Grader +6. The same exchange would be applied to all such grader matchups.

STEP THREE: Package the Phase Two papers for each grader in the reverse order of the packages distributed for Phase One grading. For instance, a numerically ascending order of papers batched for Phase One grading would be batched in a numerically descending order for grading in Phase Two.

STEP FOUR: Include mention of the above steps in your description of the grading process provided to all applicants and the public.