

California Assembly Committee on Judiciary

INFORMATIONAL HEARING

“Declining Passage Rates on the California Bar Exam: Possible Explanations and Impacts”

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Hearing Background Paper
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Introduction. Abraham Lincoln never went to law school. He became a lawyer by “reading the law,” the process where a would-be-lawyer became an apprentice to a practicing attorney in order to learn the practice of law. This path, common during the 19th century and before the existence of law schools, was described by Mr. Lincoln as “the cheapest, quickest, and best way” to become a lawyer.¹ He was right; after all, President Lincoln never had to sit for a bar exam.

Today, the vast majority of those who seek to become attorneys attend and graduate from law school. A handful apply to become licensed each year under the Study in a Law Office or Judge’s Chamber program in California.² Regardless of the method of learning the law, in order to practice law in the State of California, a person must be a member of the California State Bar Association (State Bar). (Cal. Const., art. VI, § 9.) Among other requirements, an applicant for admission to the State Bar must pass the general bar examination administered by the Committee on Bar Examiners (CBE) – an entity of the State Bar. (Bus. & Prof. Code, § 6060, subd. (g).)

¹ Lincoln, *Letter to James T. Thornton* (Dec. 2, 1858) Abraham Lincoln Online (<https://www.abrahamlincolnonline.org/lincoln/speeches/law.htm>) (as of Feb. 1, 2017.) Known as the Study in a Law Office or Judge’s Chamber program in California, this avenue is still available for individuals to become admitted to practice law. The key difference now is that every person seeking admission to practice law in California must sit for the California bar exam.

² Rules of the State Bar, tit. IV, rule 4.29.

Notorious for being difficult, California's bar examination (bar exam) has one of the lowest bar passage rates in the country.³ Administered twice a year—in July and February—and currently given over three consecutive days, the bar exam includes six essays, two performance tests, and 200 multiple-choice questions.⁴ Between 2007-2013, the California bar passage rate for first-time exam takers in California was 77.5%.⁵ In comparison, the national bar passage rate for first-time takers was 83.3%.⁶

But there has been a decline—a somewhat precipitous one, both in California and nationally—in the bar exam passage rate. Between 2014-2017, the average California bar passage rate fell to 66.7%.⁷ Nationally, the passage rate on exams given by other states in 2015 fell to 75%.⁸

Although the decline is happening nationwide, the dramatic decline in California has caused alarm—particularly among graduating and prospective law students, law school deans, the State Bar, the California Supreme Court, and consumers of legal services. This background paper seeks to provide a broad overview of the bar exam, the people and institutions affected by the decline in bar exam passage rates, statistical evidence demonstrating the decline, and a number of theories for why the bar exam passage rate has fallen.

I. Separation of Powers and the Inherent Authority of the Judicial Branch Over Qualifications for Admission to the Practice of Law

The judicial power of the State of California is vested in the Supreme Court, courts of appeal, and superior courts. (Cal. Const., art. VI, Sec. 1.) The power to regulate the practice of law, including the power to admit and to discipline attorneys, is among the inherent powers of the Supreme Court.⁹ Distinguished from the regulation of other professions, “Admission to the bar is a judicial function, and members of the bar are officers of the court, subject to discipline by the court. Hence, under the constitutional doctrine of separation of powers, the court has inherent and primary regulatory power.”¹⁰

³ Zaretsky, *Which State Has the Most Difficult Bar Exam?*, (April 4, 2013) Above the Law, (<http://abovethelaw.com/2013/04/which-state-has-the-most-difficult-bar-exam/>) (as of Feb. 1, 2017.)

⁴ Committee of Bar Examiners, *Description and Grading of the California State Bar Examination*, (2016) State Bar of California (http://admissions.calbar.ca.gov/Portals/4/documents/gbx/BXDescriptGrade_R.pdf) (as of Feb. 2 2017.)

⁵ Committee of Bar Examiners, *Statistics*, (2016) State Bar of California (<http://admissions.calbar.ca.gov/Examinations/Statistics.aspx>) (as of Feb. 2, 2017.) Unless otherwise specified, references to passage rates are to first-time takers from law schools accredited by the American Bar Association (ABA) sitting for the July bar exam. This specificity allows for a more consistent comparison to national trends.

⁶ National Conference on Bar Examiners, *Statistics Archives*, (2007-2013) (<http://www.ncbex.org/publications/statistics/statistics-archives/>) (as of Feb. 1, 2017.)

⁷ National Conference on Bar Examiners, *Supra.*, *Statistics Archives*.

⁸ National Conference on Bar Examiners, *Statistics*, (2015) (<http://www.ncbex.org/publications/statistics/>) (as of Feb. 1, 2017.)

⁹ *In re Attorney Discipline System* (1998) 19 Cal.4th 582, 592; *Obrien v. Jones* (2000) 23 Cal.4th 40, 48.

¹⁰ *In re Attorney Discipline System*, 19 Cal.4th at p. 593.

Nevertheless, the Court itself has long understood the Legislature's joint role in overseeing and regulating the State Bar, even though the State Bar is located in the judicial branch and under the direct oversight of the Supreme Court. The Court has described the shared oversight role as follows:

We long have recognized the Legislature's authority to adopt measures regarding the practice of law. "[T]he power of the legislature to impose reasonable regulations upon the practice of the law has been recognized in this state almost from the inception of statehood." "[T]his court has respected the exercise by the Legislature, under the police power, of 'a reasonable degree of regulation and control over the profession and practice of law . . .' in this state. This pragmatic approach is grounded in this court's recognition that the separation of powers principle does not command 'a hermetic sealing off of the three branches of Government from one another.'" ("In the field of attorney-client conduct, we recognize that the judiciary and the Legislature are in some sense partners in regulation.")¹¹

Thus, while the Legislature shares oversight over the State Bar with both the executive and judicial branches, the judicial branch retains sole authority over decisions to admit and discipline attorneys.

II. Overview of the Bar Exam

The Purpose of a Bar Exam. The purpose of a bar exam is to determine if a prospective attorney has the minimum competence to practice law. A bar exam is usually designed to test an applicant's ability to identify legal problems, to know the law, and to apply legal knowledge to specific facts in order to solve a legal problem.¹² To assess minimum competence, bar exams test a broad range of legal subjects and legal skills. This standard is intended to protect consumers of legal services, to encourage students to diligently learn, and motivate law schools to strive for high curriculum standards.¹³

The concept of testing applicants for the qualification to be "admitted to the bar" (i.e. allowed to enter the area in a courtroom between the audience and the bench where the judge is seated, separated from the audience by a gate, low fence, or *bar*) arose during the American Colonial period, when the first bar exam took place. Back then, persons would be admitted to the bar if they could verify to a court that they had some minimum level of knowledge or competence. This was demonstrated by providing either proof of apprenticeship, a verbal exam, or other qualifications determined by a court.¹⁴ Immediately following the American Revolution,

¹¹ *In re Attorney Discipline System*, 19 Cal.4th at p. 602 [Citation omitted].

¹² Hansen, *Note: Do We Need the Bar Examination? A Critical Evaluation of the Justifications for the Bar Examination and Proposed Alternatives*, (Summer, 1995) 45 Case W. Res. 1191, 1204.

¹³ *Id.* at p. 1205-18.

¹⁴ *Id.* at p. 1193-94.

individual states began to develop standards for admission to the bar in those states.¹⁵ For example, states required verbal and written exams, or apprenticeships ranging from one to five years.¹⁶

During the mid-19th century, there was public pressure to relax bar admission standards. As one scholar noted, “[t]he public saw the law as primarily an upper-class profession that exclusively controlled entry and favored applicants who were well-connected and who could easily secure apprenticeships.”¹⁷ Reacting to this public sentiment, many states lowered bar admission standards to the point where almost anyone could practice law.¹⁸

After the Civil War, changes in the socio-political landscape and the emergence of the Industrial Revolution created a higher demand for legal professionals.¹⁹ In response to this demand, law schools sprouted up but without much success. Law schools became more successful after Professor Christopher Langdell created a standardized curriculum for the law schools, and incorporated the case learning method and Socratic teaching.²⁰

It was not until 1921 when the bar exam—as we know it today—finally emerged. During this period, the legal profession began to regulate law schools by requiring minimum educational standards.²¹ Law schools slowly began the process of standardizing curriculum, and sought accreditation from accrediting institutions.²² As more and more law schools began to appear, the bar exam (and its results) forced “inferior schools...out of business.”²³ To this day, the bar exam continues to challenge law schools and graduates.

Although the bar exam has not changed very much in the last several decades, its goal of ensuring that an attorney has minimum competence to practice law has remained constant. Not many dispute this principle; but some believe that the failure of the bar exam to innovate has been detrimental, and that the exam may not actually measure what it should, or even what it purports to, assess.²⁴

California Bar Exam. The California bar exam is administered twice a year—in July and February—and currently consists of three parts: six essay questions, two performance tests, and the multiple-choice Multistate Bar Exam (MBE) that are administered over three days, during morning and afternoon sessions. The bar exam is graded by practicing attorneys who are

¹⁵ Hansen, *Note: Do We Need the Bar Examination? A Critical Evaluation of the Justifications for the Bar Examination and Proposed Alternatives*, (Summer, 1995) 45 Case W. Res. 1191, 1193.

¹⁶ *Id.* at pp. 1195-96.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Id.* at p. 1198.

²⁰ *Id.* at p. 1198.

²¹ *Id.* at p. 1999.

²² *Id.* at p. 1200.

²³ *Ibid.*

²⁴ Chemerinsky, *Does the Bar Even Measure the Right Skills?*, (December 14, 2016) San Francisco Daily Journal, p.5.

selected by the CBE. The points on the written portions of the exam (*i.e.*, the essays and performance tests) account for 65% of the total score, while the points on the MBE make up 35% of the total score.²⁵

Essay Questions: The six essay questions, administered over two days, are designed to measure an applicant's ability to analyze legal issues arising from different factual scenarios.²⁶

Performance Tests (PT): The two PTs, administered over two days, are designed to measure an applicant's ability to understand and apply legal authority in the context of a problem; in other words, practical application of the law.²⁷

Multistate Bar Exam (MBE): The MBE is composed of 200 multiple-choice questions administered over one day. The MBE is designed to measure an applicant's understanding of different areas of law: federal civil procedure, constitutional law, contracts, criminal law, evidence, real property, and torts. The MBE is developed and graded by the National Conference of Bar Examiners (NCBE), a non-profit corporation.²⁸

Grading Exams: Calibrating, Phasing, and Scaling. The bar exam is graded by attorneys selected and trained by the CBE. The CBE uses an internal process called "calibration," in which graders read and grade several sample exams, and then compare their scores. The calibration process is designed to ensure that graders use the same standards when grading exams.²⁹

It appears that this process is designed so that, in most instances, each exam is read through only once—or, in one phase. If an exam is 50 points below the passing score, the exam will be read by a second grader—or, in a second phase. If there is a discrepancy between the first and second grader by more than 10 raw points, the exam will be read by a third grader—or in a third phase. To determine the final score the average of the grades given by all the graders is taken.³⁰

After the exams are graded, the CBE adopts a procedure to ensure that the difficulty of passing an exam is consistent from year to year. This internal process, called "scaling," relies on statistics to convert raw points earned on different portions of the exam, and proportions those scores based on the assigned weight of each portion of the exam. To pass the overall bar exam, an applicant needs at least 1,440 points on the combined grading scale.³¹

²⁵ Committee of Bar Examiners, *supra.*, *Description and Grading of the California State Bar Examination*.

²⁶ *Id.* at pp. 1-2.

²⁷ *Id.* at p. 2.

²⁸ *Ibid.*

²⁹ Committee of Bar Examiners, *supra.*, *Description and Grading of the California State Bar Examination*.

³⁰ *Ibid.*

³¹ *Ibid.*

Changing to a Two-Day Bar Exam. Starting in July 2017, the California bar exam will change from a three-day exam to a two-day exam. Practically speaking, the exam will now consist of five essays questions, one PT, and the 200 multiple-choice MBE questions. Most significantly, the scoring of the exam will change: both the written portions and the multiple-choice portion will account for 50% of the total score. The grading scale of 1,440 and the subject matter will remain the same.³²

The Bar Exam in Other States. The types of bar exams adopted by the rest of the nation can be grouped into two categories: the Uniform Bar Exam (UBE) and individualized state bar exams.

UBE. Created by the National Conference of Bar Examiners (NCBE), the UBE has been adopted by twenty-five states and represents the most common type of bar exam. While administered, graded, and scored by each individual state, the UBE is made up of a standardized essay examination (Multistate Essay Examination, or MEE), two standardized performance tests (Multistate Performance Test, or MPT), and the nationally adopted MBE. In 2016, the State of New York became the largest state to adopt and administer the UBE. Although the UBE itself lasts two days, states may choose to administer a jurisdiction-based component on a third day. An attorney who has passed the UBE in one state may have reciprocity to practice in another UBE-adopted state, so long as the attorney meets that state's admission requirements.³³

Individualized Bar Exams. Most other states that have not adopted the UBE have their own bar exams that are jurisdictionally unique. These exams tend to focus more on state and local legal principles, rather than federal and majority law. These states' exams vary in duration, structure, and grading requirements. As illustrated from above, California has not adopted the UBE and has adopted its own individualized bar exam.

III. Parties With a Stake in the Decline of the Bar Passage Rate

American Bar Association (ABA). Although the ABA is primarily a private attorney membership organization, one part of the ABA—the Section of Legal Education and Admissions to the Bar—is responsible for the ABA's accreditation of many American law schools. Currently, 205 law schools in the nation are ABA-accredited. Of these institutions, 21 of the accredited law schools are in California.

Understandably, many prospective law school students feel that it is important to attend an ABA-approved law school, believing accreditation provides assurance that the school's legal education meets certain minimum standards that correlate with quality.³⁴ Additionally, students believe

³² Committee of Bar Examiners, *Letter of Notice: Future Changes to The California Bar Examination*, (Aug. 14, 2015) State Bar of California, http://admissions.calbar.ca.gov/Portals/4/documents/Examinations/NoticeTwoDay0815_R.pdf (as of Feb. 2, 2017.)

³³ National Conference of Bar Examiners, *Uniform Bar Examination*, (2017) <http://ncbex.org/exams/ube/> (as of Feb. 2, 2017.)

³⁴ Wecker, *Weigh the Benefits, Disadvantages of Attending a Non-ABA Law School*, (Dec. 17, 2012) US News.

that law schools without ABA-approval have lower bar passage rates.³⁵ While bar passage data generally supports this belief, ABA-approved schools have higher bar passage rates because they have to. To maintain ABA-accreditation, the ABA requires its law schools to either maintain a bar passage rate of 75% for three out of five calendar years, or be within 15 points of the average first-time bar passage rates for graduates of ABA-approved law schools in the same jurisdiction.³⁶

Indeed, it appears that recent pressure from the Department of Education has forced the ABA to revisit this rule. Just last week, on February 6, 2017, the Section of Legal Education and Admissions to the Bar proposed a resolution to require ABA-approved law schools to have a 75% passage rate within a *two-year period*. The ABA House of Delegates voted against this proposal, in large part due to criticism raised by law school deans and student associations who argued that the new rule would have devastating effects on racial and ethnic minority law students.³⁷ However, ABA administrators have indicated that this issue will be revisited.

Students who attend ABA-approved schools may also have certain benefits relating to sitting for the bar exam. In many states, a person may not sit for the bar exam unless that person graduated from an ABA-approved law school.³⁸ This is not the case for California. The State Bar allows graduates from ABA-accredited, California-accredited and non-accredited law schools to sit for the California bar exam. As discussed in *California's Bar Passage Rate*, *infra*, this is one reason why California's bar passage rate is generally lower than the rest of the country.

Committee of Bar Examiners (CBE): The CBE is a standing committee of the State Bar that is authorized by statute to examine all applicants for admission to practice law, administer the requirements for admission to practice law, and certify to the Supreme Court those applicants who fulfill specified requirements to be qualified for admission to the bar. (Bus. & Prof. Code Section 6046.) According to the State Bar's website, the CBE is responsible for: (1) determining the moral character of more than 8,000 applicants for admission to practice law in California per year; (2) the development, administration and grading of California's bar exam for approximately 14,000 applicants per year; (3) the development, administration and grading of the First-Year Law Students' Examination for more than 1,200 applicants per year; and, (4) the accreditation of law schools in California that are not approved by the ABA, of which there are 21 in California, and oversight of an additional 25 registered unaccredited law schools.³⁹ As one

³⁵ Wecker, *Weigh the Benefits, Disadvantages of Attending a Non-ABA Law School*, (Dec. 17, 2012) US News.

³⁶ ABA Standards and Rules of Procedure for Approval of Law Schools, Standard 316.

³⁷ Ward, *ABA House Rejects Proposal to Tighten Bar-Pass Standards for Law Schools*, (Feb. 6, 2017) ABA Journal (Feb. 6, 2017.) Available at: http://www.abajournal.com/news/article/aba_house_rejects_proposal_to_tighten_bar_pass_standards_for_law_schools

³⁸ Section of Legal Education and Admissions to the Bar, *Frequently Asked Questions*, (2017) American Bar Association, http://www.americanbar.org/groups/legal_education/resources/frequently_asked_questions.html (as of Feb. 8, 2017.)

³⁹ Committee of Bar Examiners, *Document of the Office of Admissions* (2017) The California State Bar, http://admissions.calbar.ca.gov/Portals/4/documents/CBE/2013_cbedescription0313_R.pdf, (as of Feb. 10, 2017.)

facet of its administration of the bar exam, CBE determines the overall score needed to pass the bar exam, also known as the “cut score.”

The CBE is composed of 19 members: 10 attorney members appointed by the State Bar; three public members appointed by the governor; three public members appointed by the Speaker of the Assembly; and three public members appointed by the Senate Rules Committee. (Bus. & Prof. Code Section 6046.5.) No members are appointed by the judicial branch. All members are appointed for four-year terms, and are eligible for appointment by the State Bar to one-year terms as Chair and Vice-Chair of the CBE.⁴⁰ Members, who are unpaid volunteers, contribute additional volunteer hours through, among other things, participation in examination editing and grading calibration meetings, and visiting bar exam test centers during administration of the examination.⁴¹

Law Schools and Law School Deans. The decline in the bar passage rate has revived the question among stakeholders about the appropriate role of law schools and the type of legal education that is necessary to prepare students for the practice of law. Many academics believe that law schools should focus primarily on teaching a law student to “think like a lawyer.”⁴² However, since the decline in the bar passage rate, others wonder whether law schools should change their focus to passing the bar exam. For example, some of these commentators ask the following: Should law schools teach towards the bar exam? Should students be required to take bar exam subjects? Should students be required to take bar preparation courses?

Beyond the question of whether law schools should make changes to their curriculum, law schools have an interest in obtaining and maintaining the highest possible bar passage rate because the rate affects school ranking, accreditation status, and the ability to attract prospective students. For instance, the school’s bar passage rate has the strong likelihood of affecting a law school’s national ranking and perceived prestige, which in turn, affects a school’s ability to attract highly qualified applicants and students.⁴³ Additionally, under ABA rules, a law school loses its ABA-accreditation if the school’s bar passage rate either drops below 75% in three out of five years, or falls 15 points below the average first-time bar passage rates for graduates of ABA-approved law schools in the same jurisdiction.⁴⁴ (For a more in-depth discussion about the threshold “cut score” for passing the exam, see ***Impact of California’s High Threshold “Cut Score” to Pass the Bar Exam and Its Possible Adjustment***, *infra*.)

⁴⁰ Committee of Bar Examiners, *Document of the Office of Admissions* (2017) The California State Bar, http://admissions.calbar.ca.gov/Portals/4/documents/CBE/2013_cbdescription0313_R.pdf, (as of Feb. 10, 2017.)

⁴¹ *Ibid.*

⁴² Wegner, *Symposium 2009: a Legal Education Prospectus: Law Schools & Emerging Frontiers: Reframing Legal Education’s “Wicked Problems”* (Summer, 2009) 61 Rutgers L. Rev. 867.

⁴³ Morse, *Methodology: 2017 Best Law Schools Rankings*, (March 15, 2016) US News, (<http://www.usnews.com/education/best-graduate-schools/articles/law-schools-methodology>) (as of Feb. 7, 2107.)

⁴⁴ ABA Standards and Rules of Procedures, Standard 316(a) Chapter 3, Section of Legal Education and Admission to the Bar. Available at: http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2016_2017_standards_chapter3_authcheckdam.pdf

National Conference of Bar Examiners (NCBE). The NCBE develops licensing tests used by States and U.S. territories for admission to the bar. As previously stated, the NCBE develops the Uniform Bar Exam (UBE)—which is composed of the Multistate Essay Examination (MEE), the Multistate Performance Test (MPT), and the Multiple Bar Exam (MBE). Every state in the nation, including California, as well as several U.S. territories, has adopted the multiple-choice MBE.

Although not every state has adopted UBE, the exam is slowly gaining traction.⁴⁵ When the NCBE first encouraged states to adopt the UBE, not many did so. In 2010, the State of Missouri was the first state to replace its bar exam with the UBE.⁴⁶ As of February 1, 2017, 23 states have adopted the UBE in its entirety – with four more states planning to administer the UBE in July 2017. Many have called on California to adopt the UBE as well, arguing that the UBE is more efficient, less burdensome, and allows for more mobility than California’s state-specific bar exam.⁴⁷

It remains unclear whether adopting the UBE in California would affect bar passage rates. For example, nationwide MBE scores have been dropping since 2013. Indeed, in July 2015, the national mean MBE score was the lowest it has been in more than 25 years: 139.9 points.⁴⁸ However, the MBE score may have plateaued. In July 2016, the national mean score was slightly higher than it was in 2015: 140.3 points.⁴⁹

Prospective Attorneys. Arguably, recent law school graduates and prospective law students have the most at stake in the recent decline in bar passage rates. Whether takers of the bar exam are students from ABA-accredited law schools, students from State Bar-accredited law schools, students at non-accredited law school, or the rare apprentices who are studying in a Law Office or Judge’s Chamber program, exam takers spend a considerable amount of money and time to prepare for the exam and therefore have a large financial stake in the outcome.

For recent graduates, not passing the bar exam can mean losing employment opportunities, and amassing more debt on top of likely significant legal education debt. According to ABA, the average law school student debt is \$127,000 for graduates of private law schools, and \$88,000 for graduates of public law schools.⁵⁰ For some, the stress of failing the bar exam can be devastating. In November, a recent law school graduate of a California law school learned that

⁴⁵ National Conference of Bar Examiners, *supra.*, *Uniform Bar Examination*.

⁴⁶ Weiss, *With Missouri Move, Idea of Uniform Bar Exam Finally Gets Legs*, (April 29, 2010) ABA Journal.

⁴⁷ Chemerinsky, *It’s Time for California to Accept the Uniform Bar Exam*, (May 11, 2015) Los Angeles Times.

⁴⁸ Zaretsky, *As Bar Exam Scores Continue to Plummet, Early Results Reveal Worse Performance in Decades*, (Sept. 18, 2015) AboveTheLaw.

⁴⁹ Rubino, *Surprise! Despite All Expectations to the Contrary, Bar Exam Scores Went Up This Year!*, (Sept. 1, 2016) AboveTheLaw.

⁵⁰ ABA Task Force on Financing Legal Education, *Report of the Task Force*, (June 15, 2015), American Bar Association, page 8. Available at:

http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/reports/2015_june_report_of_the_aba_task_force_on_the_financing_of_legal_education.authcheckdam.pdf.

he was unsuccessful in passing the California bar exam and died by suicide. For prospective students, the low bar passage rates may be a cautionary signal that deters them from entering law school and pursuing a legal career in favor of less expensive and risky career paths. According to some legal professionals, the compounding effects of mounting debt and the slow legal job market may have discouraged some prospective law students from applying to law school and ultimately affected the quality of the pool of applicants to law schools.⁵¹

State Bar Office of Admissions. The Office of Admissions provides staff support to the CBE and its 60 permanent full-time employees are dedicated to performing the functions assigned to the CBE. The Office is divided into a headquarters unit (Senior Director’s Office) and five departments: Administration, Educational Standards, Examination Development, Operations and Management and Moral Character Determinations. It has an annual budget of more than 19 million dollars, which is funded primarily from applicant fees set by the State Bar, upon recommendation of the CBE.⁵²

U.S. Department of Education. Under federal law, the Secretary of Education may grant authority to an entity or an association to provide an educational institution accreditation status for meeting certain standards. (20 U.S.C. § 1099b; 34 C.F.R. § 602.1 (2002).) The National Advisory Committee on Institutional Quality and Integrity (NACIQI)—an entity within the Department of Education—reviews standards adopted by accrediting agencies, and advises the Secretary of Education on which accreditors the Department of Education should continue to recognize. (20 U.S.C. § 1011c.) The ABA is recognized by the Department of Education as an accrediting body of American law schools.

Last June, the NACIQI held a hearing on whether the Department of Education should continue to recognize the ABA as an accrediting agency. The NACIQI expressed concern over the ABA’s lack of focus on student achievement and student debt. After significant testimony, the NACIQI recommended that the Department of Education suspend the ABA’s ability to accredit new members for 12 months, but allowed the ABA to continue its accrediting ability for existing institutions.⁵³ Despite the NACIQI’s public frustration with the ABA, the Department of Education ultimately decided to continue recognizing the ABA as a nationally recognized accrediting agency, and required the ABA to provide a compliance report by the end of October 2017.⁵⁴

Commercial Bar Exam Preparation Companies. After graduating, law school graduates commonly enroll in commercial bar exam preparation courses to study for the exam. According

⁵¹ Hansen, *What do falling bar-passage rates mean for legal education—and the future of the profession?*, (Sept. 1, 2016) American Bar Association Journal. Available at:

http://www.abajournal.com/magazine/article/legal_education_bar_exam_passage.

⁵² Committee of Bar Examiners, *Supra.*, *Document for the Office of Admissions*.

⁵³ Friedman, *Is the ABA on Verge of Losing Law School Accreditation?*, (June 24, 2016) Bloomberg Law. Available at: <https://bol.bna.com/is-the-aba-on-verge-of-losing-law-school-accreditation/>

⁵⁴ King, *Letter to Barry Currier, ABA Sec. of Legal Ed. and Admissions to the Bar re decision of renewal* (September 22, 2016) Secretary of the U.S. Dept. of Education.

to one California law school, the average bar applicant spends between \$3,500 and \$4,500 on bar preparation courses, but almost all students sign up for a least one course.⁵⁵ Since it is not expected that every law school graduate takes every single bar exam subject during law school, the bar preparation company provides a crash course for each of the subjects that may be included on the bar exam. But not all bar preparation companies are the same. Some companies offer live in-person lectures, while other companies offer their courses entirely online. Additionally, these companies are not required by law to disclose the rates at which their students pass the bar exam and generally do not provide such data.

IV. Decline in Bar Passage Rate

A. California’s Bar Passage Rate

Historically, California’s bar passage rate has been lower than the national average, at least since 1986. This is in part because California allows graduates from non-ABA accredited law schools to sit for the bar exam.⁵⁶ Only Alabama, Georgia, and West Virginia allow similarly situated graduates to sit for the bar.⁵⁷

For All First-Time Takers. In July 2016, the overall bar passage rate was 56.1%—a bar passage rate that was nearly 20% lower than the statewide bar passage rate in July 2008. From 2007 to 2013, the average passage rate was 69.7%. From 2014 to 2016, the average passage rate was 59.1%.⁵⁸

Table A: First Time Takers of the July General Bar Exam

Year	Took	Pass	Percentage
July 2007	6040	4161	68.9%
July 2008	6257	4682	74.8%
July 2009	6152	4334	70.4%
July 2010	6084	4155	68.3%

⁵⁵ University of San Diego, *Commercial Bar Exam Preparation Courses*, (2017) <https://www.sandiego.edu/law/student-affairs/bar-exam/bar-exam-prep-courses.php> (as of Feb. 7, 2017.)

⁵⁶ The California State Bar, Rule 4.26, Division 1, Title 4 Admissions and Educational Standards (2011.) Available at <http://rules.calbar.ca.gov/LinkClick.aspx?fileticket=-2KV5j0w6Cw%3d&tabid=1227>

⁵⁷ Supreme Court of Alabama, *Orders Governing Admissions*, (January 19, 2017) <https://admissions.alabar.org/rules-01192017>, (as of Feb. 7, 2017.) Office of Bar Admissions, *Bar Exam Information*, (2017) Supreme Court of Georgia, <https://www.gabaradmissions.org/bar-examination-information> (as of Feb. 7, 2017.) West Virginia Judiciary, *Rules for Admission to the Practice of Law Rule (3)*, (2017) Supreme Court of West Virginia, <http://www.courtswv.gov/legal-community/rules-for-admission.html#rule3-1> (as of Feb. 7, 2017.)

⁵⁸ Committee of Bar Examiners, *Supra.*, *Statistics*.

July 2011	6080	4218	69.4%
July 2012	6485	4427	68.3%
July 2013	6635	4490	67.7%
July 2014	6220	3818	61.4%
July 2015	5838	3486	59.7%
July 2016	5164	2896	56.1%

First-Time Takers from California ABA-Accredited Law Schools. From 2007 to 2013, the average passage rate among first-time takers who graduated from California ABA-accredited law schools was 77.5%; the bar passage rate during these five years was relatively stable. However, in 2014-2016, the average passage rate dropped to 66.7%. The bar passage rate for the July 2014 exam was 69.4%, the first time in 32 years that the bar passage rate fell below 70%.⁵⁹ In 2016, the passage rate fell to 62.4%—the lowest bar passage rate since 1986.⁶⁰

Table B: First Time Exam Takers of California ABA-accredited law schools.

Year	Took	Pass	Percentage
July 2007	3716	2820	75.9%
July 2008	3745	3114	83.2%
July 2009	3723	2953	79.3%
July 2010	3791	2849	75.2%
July 2011	3910	2978	76.2%
July 2012	4107	3157	76.9%
July 2013	4172	3168	75.9%
July 2014	3796	2633	69.4%
July 2015	3535	2411	68.2%
July 2016	3247	2025	62.4%

⁵⁹ Miller, *California Law School Deans Want Bar Exam Pass Score Lowered*, (Feb. 1, 2017) The Recorder (<http://www.therecorder.com/id=1202778168822/California-Law-School-Deans-Want-Bar-Exam-Pass-Score-Lowered?slreturn=20170102180437>) (as of Feb. 2, 2017.)

⁶⁰ Committee of Bar Examiners, *Supra.*, *Statistics*.

First Time-Takers from ABA-accredited law school, nationally. Bar passage rate data from ABA-accredited law schools is the best metric for comparing national trends. While the passage of graduates from ABA-accredited law schools across the country is higher than the passage rate of graduates from California-accredited and non-accredited law schools, the passage rate among graduates of all ABA-accredited law school has declined. For example, in 2014 and 2015, the bar passage rate experienced a decline of 6-7% from the previous seven years.⁶¹

Table C: First Time-Takers from ABA-accredited law school, nationally

Year	Took	Pass	Percentage
July 2007	5232	3840	73%
July 2008	5269	4256	81%
July 2009	5209	3984	76%
July 2010	5172	3790	73%
July 2011	5258	3869	74%
July 2012	5532	4064	73%
July 2013	5583	4074	73%
July 2014	5102	3415	67%
July 2015	4786	3477	66%
July 2016*	Not available	Not available	Not available

Conclusion. The decline in California’s overall bar passage rate began in 2014 and steadily grew in 2015 and in 2016. From 2013 to 2016, the rate of decline was 11% for all first-time takers, 13% for California ABA-accredited law schools, and 7% for all ABA-accredited law schools nationally.

B. National Bar Passage Rates

National First-Time Takers from ABA-accredited Law Schools. California is not the only one experiencing a decline in the bar passage rate. National trends reflect similar declines in bar passage rates since 2014. However, the decline is not as drastic as the decline experienced in California. From 2007 to 2013, the average bar exam passage rate was 81.9%, while the average

⁶¹ National Conference of Bar Examiners, *Supra.*, *Statistics Archive.*

passage rate from 2014-2016 was 75.5%. As previously noted, a majority of states only allow ABA-accredited law graduates to sit for their respective bar exams.⁶²

Table D: National First-Time Takers from all ABA-accredited Law Schools

Year	Took	Passed	Percentage
2007	55,528	45,443	82%
2008	55,177	46,747	85%
2009	55,398	45,781	83%
2010	55,941	45,568	81%
2011	56,114	45,981	82%
2012	58,263	46,208	79%
2013	58,357	46,989	81%
2014	55,070	42,312	77%
2015	49,726	36,570	74%

C. California Law School Passage Ratings (Selective Schools)

Table E shows a sample of bar passage rates among several California schools. The table represents bar passage rates from ABA-accredited schools, California-accredited schools, and non-accredited schools.⁶³

⁶² Publications and Research, *Statistics and Archives*, (2017) National Conference of Bar Examiners <http://www.ncbex.org/publications/statistics/>, (as of Feb. 7, 2017.)

⁶³ Section of Legal Education and Admissions to the Bar, *Required Disclosures*, (2017) American Bar Association (<http://www.abarequireddisclosures.org/>) (as of Feb. 7, 2017.) Committee of Bar Examiners, *Statistics* (2017) The State Bar of California <http://admissions.calbar.ca.gov/Examinations/Statistics.aspx> (as of Feb. 7, 2017.)

Table E: Bar Passage Rates, Select California Law Schools (2008-2016)

School	2008	2009	2010	2011	2012	2013	2014	2015	2016
Stanford University ^A	96.19	93.27	97.92	88.5	93.64	90.32	86.84	87.5	91
University of Southern California ^A	89.56	90.81	90.23	91.3	87.23	85.78	86.43	87.18	88
University of California, Berkeley ^A	87.72	91.63	92.02	86.78	87.18	85.71	87.85	85.1	84
University of California, Los Angeles ^A	88.5	85.26	83.33	84.74	88.14	88.19	81.36	85.07	82
University of California, Irvine ^A	n/a	n/a	n/a	n/a	90.2	77.78	77.91	80.65	81
University of California Davis ^A	79.89	88.04	80.45	75	78.31	82.89	86	74.16	73
Loyola, Maramount University ^A	85.49	82.93	80.94	82.48	77.22	84.70	81.72	77.23	72
University of San Diego ^A	78.93	75.76	65	73.55	76.29	75	73.33	70.17	71
Pepperdine University Law School ^A	87.21	80	87.29	86.6	85.56	80.92	78.95	68.86	70
University of California, Hastings College of the Law ^A	81.1	84.94	80.31	78.64	76.37	74.23	68.42	67.48	51

University of the Pacific, McGeorge[Ⓐ]	79.78	77.41	69.58	67.77	71.14	67.49	63.44	69.05	61
Chapman University[Ⓐ]	75.45	77.63	68.21	78.16	80	75.29	74.82	71.43	57
University of San Francisco[Ⓐ]	85.98	78.33	73.37	72.06	66.67	74.07	62.09	46.36	36
La Verne University[Ⓐ]	60.61	29.69	48.28	54.81	59.52	55.43	73.33	56.41	31
Golden Gate University[Ⓐ]	71.64	64.16	57.99	62.09	67.71	55.67	45.14	38.89	31
Cal Northern School of Law[Ⓒ]	67	54	45	57	17	57	91	30	n/a
San Joaquin College of Law[Ⓒ]	51	45	62	63	55	58	54	29	n/a
Glendale University College of Law[Ⓒ]	36	27	55	40	41	37	32	31	n/a
Lincoln Law School of Sacramento[Ⓒ]	49	50	38	42	58	49	45	44	n/a
Northwestern California University School of Law[Ⓝ]	30	27	33	21	29	36	30	33	n/a

Ⓐ = ABA-accredited Law Schools

Ⓒ = Committee of Bar Examiners, State Bar-accredited Law Schools

Ⓝ = Non-accredited Law Schools

V. Possible Reasons for the Decline in Bar Passage Rates in California

This section examines a number of competing theories about why bar passage rates have declined in California in recent years, and examines a number of factors that may help explain this phenomenon. We begin with a discussion of socioeconomic factors and the law school applicant pool, followed by a discussion of the role of law school admission standards. Next, we examine law schools and the role they play in training students to be skillful lawyers versus their role in preparing students to take the bar exam.

Socioeconomic Factors and the Law School Applicant Pool: Before law students take the bar exam, before they attend classes in law school, and even before they are admitted to law school, they must decide whether to apply to law school at all and to which schools, if any, they should apply and ultimately attend. These prospective law students comprise the so-called "applicant pool"—the total population from which law school students and bar exam takers are ultimately drawn. Because of this relationship, some commentators have suggested that the declining performance of recent exam test-takers may reflect certain changes in the characteristics of the applicant pool.

These changes, if they exist, may be due to larger socioeconomic factors influencing which students have chosen to attend to law school in recent years. For example, rising tuitions at many law schools, combined with the non-forgivable nature of educational loans, likely have dissuaded some people from pursuing a legal career and even applying to law school. According to available ABA data for the period of 2011 to 2016, the cost of a law school education at several California schools increased by 10 to 20 percent, often approaching and sometimes exceeding \$50,000 per year. (Sample data from three schools is shown below for illustrative purposes.) In some cases where tuition increases between 2011 and 2016 were modest, our research showed that large tuition increases also occurred in 2009 and 2010—a few years earlier than when ABA data became available.⁶⁴

Table F: Tuition Rates, Select California Law Schools (2011 – 2016)

	Tuition, Full-time (2011)	Tuition, Full-time (2016)	Percent Increase
Southwestern School of Law	\$42,200	\$50,090	+18.7%
USC School of Law	\$50,591	\$60,339	+19.3%
Loyola Law School	\$43,060	\$52,760	+22.5%

⁶⁴ ABA Standard 509 Information Reports, available at <http://www.abarequreddisclosures.org/>

In addition, recent economic data show that the prospect of obtaining a legal job in California after graduation does not appear to be getting any easier. According to figures compiled by the Employment Development Department (EDD), California reached a low of 131,600 legal jobs in January and February of 2014, before slowly regaining those jobs over the next two years. After reaching a peak of 138,500 legal jobs in July 2016, that figure recently declined to 136,600 jobs (a loss of 1,900) by November 2016.⁶⁵

With rising tuition and corresponding large student debt a near certainty, and well-paying legal employment after law school a distinct uncertainty, some observers have suggested that qualified students may be looking to other career paths and pursuing other graduate study programs rather than applying to law school. Recent ABA data, for example show a marked decline in applicants to many full-time law programs in California between 2011 and 2016. (Sample data from three schools is shown below for illustrative purposes.)⁶⁶

Table G: Decreasing Application Figures, Select California Law Schools (2011-2016)

	Applicants to Full Time Program	Percent Decrease
McGeorge School of Law	2011: 3,282 2016: 746	-77.2%
UC Hastings College of the Law	2011: 5,167 2016: 3,416	-33.9%
University of San Diego	2011: 4,009 2016: 2,947	-26.5%

In short, these factors may be influencing the overall quality of the applicant pool from which current law students are drawn. However, it is very difficult to assess a negative—specifically, whether qualified people who would make excellent law students but for whom no data exists have decided not to apply to law school.

It has been also suggested, often anecdotally by law school faculty who interact with incoming law students, that current law students are somehow culturally or generationally different than students from previous years, particularly with respect to test-taking or writing skills important for success in law school or on the bar exam. For example, one law school dean reports that "We have confronted the challenges of the worsening ill-preparedness of many of the students (even with reasonably high LSATs and GPAs) who enter law school unable to write, research, or think critically..."⁶⁷ Others have suggested that the so-called "millennial" generation, who have had

⁶⁵ Employment Development Department, *Employment by Industry Data*, (2016) State of California, <http://www.labormarketinfo.edd.ca.gov/data/employment-by-industry.html> (as of Feb. 10, 2017.)

⁶⁶ ABA Standard 509 Information Reports, available at <http://www.abarequireddisclosures.org/>

⁶⁷ Ferruolo. *Time to Adopt the Uniform Bar Exam*, (Dec. 14, 2016) San Francisco Daily Journal.

Internet access most of their lives and are accustomed to having the ability to instantly look up information, may not perform well on the bar exam or other tests that tend to require large volumes of information to be memorized. It should be noted, however, that Committee staff are unaware of any empirical support for the notion that because of subjective cultural or generational differences, today's law school applicant pool is inferior to those of previous years, or that the differences explain the observed declines in bar passage rates. More research needs to be done to understand these types of dynamic, subjective characteristics of the applicant pool in order to determine their effect upon bar passage outcomes.

Law School Admission Standards: The most common quantitative admissions standards used by law schools are an applicant's LSAT score and undergraduate grade point average (GPA). According to research by the Law School Admissions Council, LSAT scores and law school GPA are the best indicators of whether a student will pass the bar exam.⁶⁸ Law School Transparency (LST), a group that advocates for accessibility and affordability of legal education, attributes the decline in bar exam passage rates, in part, to decisions by some law schools to lower their admission standards and admit students with, on average, lower LSAT scores and undergraduate GPAs. Under this theory advanced by LST, these students are presumably failing the bar exam at a higher rate, bringing down exam pass rates at these schools. LST states "Schools today are admitting student who would not have gained admission to any law school five years ago" and "(t)hese students have not suddenly become more capable of passing the bar exam."⁶⁹ They contend—quite controversially--that the reason law schools may be lowering their standards and admitting less qualified students is to prevent further declines in enrollment and help maintain tuition revenue.⁷⁰

According to data reported by law schools to the ABA, there is evidence indicating, at least at some California law schools, a downward in trend in median LSAT scores and undergraduate GPA among recently admitted classes.⁷¹

Table H: Median LSAT Scores and Undergraduate GPA, Select California Law Schools (2012-2016)

	Median LSAT Score	Median GPA
University of San Francisco School of Law	2012: 156 2014: 153 2016: 151	2012: 3.26 2014: 3.19 2016: 3.10
Golden Gate Univ. School of	2012: 151 2014: 149	2012: 3.12 2014: 2.98

⁶⁸ Law School Admissions Council, *National Longitudinal Bar Passage Study*, (1998), p. 39.

⁶⁹ Law School Transparency, *2015 State of Legal Education Analysis*; (2015) available at <http://lawschooltransparency.com/reform/projects/investigations/2015/analysis/>

⁷⁰ McEntee, *Bar Results Fuel Worry About Future of Legal Profession*, (Nov. 24, 2015) San Francisco Daily Journal.

⁷¹ ABA Standard 509 Information Reports, available at <http://www.abarequireddisclosures.org/>

Law	2016: 149	2016: 2.98
UC Hastings College of the Law	2012: 162 2014: 158 2016: 159	2012: 3.58 2014: 3.44 2016: 3.45

It is important to note that this select data does not necessarily mean that law schools are actively adopting policies to lower their admission standards, nor that there is a cause and effect relationship between LSAT and GPA indicators and corresponding bar passage outcomes. By contrast, the UC Davis School of Law has seen its first time bar passage rate slip from 86 percent in 2014, to 74 percent in 2015, and again to 72 percent in July 2016, while the school's median LSAT scores and GPA figures for the entering classes over that time period have remained relatively constant.⁷² The UC Davis figures seem to refute the argument that consistent LSAT and GPA indicators will necessarily prevent a decline in bar passage rates, and suggest that there are other reasons for declining bar exam performance.

Building upon the strong statistical correlation between LSAT scores and bar exam performance, LST researchers have developed a "risk profile" measure for law schools based upon the proportion of admitted students in a class that, because of their LSAT scores, are "at risk" of failing the bar exam. Those who are in the 25th percentile (LSAT scores below 150) are considered at levels of high, very high, or extreme risk of failure, while those at 150 or above are considered to have modest risk, low risk, or minimal risk. Based on LSAT-25 data, there were 87 law schools in the nation that admitted classes with minimal risk of bar failure in 2010; 39 schools with low risk classes; and 41 schools with modest risk classes. According to LST's analysis, three years later, upon administration of the 2013 bar exam, these minimal to modest-risk schools together averaged an 85% first-time bar passage rate and all but seven schools had bar passage rates above 75%.⁷³ By contrast, 30 law schools admitted classes that included a large percentage of students at high, very high, or extreme risk of failing the bar exam under this measure. Of these 30 schools, 18 had a first-time bar passage rate in 2013 of less than 75%.⁷⁴

To the extent that risk profiles based on admission standards are statistically associated with bar exam performance, LST warns that "unless states make the bar exam easier or law schools better prepare students for the bar exam, we can expect pass rates to continue falling because risk profiles have plummeted since 2010." LST expresses strong concern that more law schools are admitting classes of applicants with higher risk of failing the bar exam, as evidence by the fact that 74 law schools are categorized as serious risk based on their 2014 LSAT 25th percentile scores, whereas only 30 schools were in that category based on their 2010 LSAT-25 scores. To these advocates, the decline of bar passage rates is foretold by changes in admission standards involving LSAT and GPA scores, as reflected by the metric of a school's risk profile.

⁷² ABA Standard 509 information reports. Johnson, *Pass Rates Can't Improve if Standards are Silently Being Raise*, (Dec. 14, 2016) San Francisco Daily Journal.

⁷³ Law School Transparency, *Supra.*, 2015 State of Legal Education Analysis.

⁷⁴ *Ibid.*

The use of LSAT scores to predict a student's risk for failing the bar exam is controversial and misguided, according to the Law School Admission Council (LSAC), the administrators of the LSAT. They criticize the LST study and its premise that some law schools have been intentionally admitting "high-risk" students who, based on their LSAT scores, are not likely to pass the bar exam, thus driving down bar passage rates in California. LSAC has criticized the LST research as methodologically flawed in several respects, including (1) improper use of LSAT score ranges to assign potential for successful bar exam passage; (2) improper use of LSAT scores to delineate risk categories; and (3) improper assessment of current bar passage risk based on outdated data from a 1998 LSAC study that analyzed scores from a previous version of the LSAT.⁷⁵ According to LSAC, the LSAT does not measure all attributes that can predict ability to pass the bar exam and "should only be used as one of several criteria for evaluation and should not be given undue weight solely because its use is convenient."⁷⁶

As suggested by LSAC and other stakeholders, there are many other factors besides LSAT scores that may have explanatory power in assessing performance on the bar exam. A high law school GPA or even a good undergraduate GPA can compensate for lower LSAT scores, and other factors, such as where the exam was taken and what activities and programs were available through the law school. For this reason, it appears overly simplistic for a law school to simply employ a "minimal risk" cut off score of 150 on the LSAT, for example, as one of its admission standards.

The deans of several California law schools have asserted a different view as to why bar exam passage rates are less than optimal—namely, that the threshold cut score needed to pass the exam has been set inappropriately high by California's bar examiners (further discussion appears below.) With respect to admission standards, however, law school deans contend that they have taken numerous steps—including reducing class size—to maintain robust admission standards while ensuring high quality students populate their incoming classes. The table below shows the significant decrease in applications to the full-time law program at three California law schools between 2011 and 2016, as well as a corresponding decrease in class size at each school over that period.⁷⁷

⁷⁵ Law School Admission Council, *Why LSAT scores should not be used to label law schools and their students*, (2017) (<http://www.lsac.org/docs/default-source/press-releases/lac-statement-dec-1-final.pdf?sfvrsn=2>) (as of Feb. 10, 2017.)

⁷⁶ Law School Admission Council, *Supra.*, *Why LSAT scores should not be used to label law schools and their students*.

⁷⁷ ABA Standard 509 Information Reports, available at <http://www.abarequireddisclosures.org/>

Table I. Application and Admission Figures, Select California Law Schools (2011-2016)

	Applicants to Full Time Program	Admitted (Class size)	Percentage Decrease in Class Size
McGeorge School of Law	2011: 3,282 2016: 746	2011: 176 2016: 133	-24%
UC Hastings College of the Law	2011: 5,167 2016: 3,416	2011: 414 2016: 348	-16%
University of San Diego	2011: 4,009 2016: 2,947	2011: 273 2016: 165	-40%

In short, a number of law schools have responded to the declining size of the applicant pool and contraction of the legal economy by admitting significantly fewer applicants each year (i.e. decreasing incoming class size) and tightening admission standards (for example, by raising targets for minimum LSAT scores to 150 or more.) While these policy changes may be successful in improving bar exam passage rates, their impact may not be visible until 2018 or later because of the lag time needed for study and evaluation.

Law Schools' Role in Preparing Students for the Bar Exam: As law schools grapple with the challenge of raising their bar passage rates without compromising their educational mission and policies, they are being forced to consider fundamental questions about their role. What is the role of law schools in preparing their students to pass the California bar exam? What should law schools be teaching their students to assure they provide a quality legal education? Might curriculum, classroom teaching methods, or other policies employed by California law schools be responsible, in part, for law students' apparent inability to pass the bar exam?

On one hand, law schools must ensure that their graduates can pass the bar exam if they are to practice law and put their legal training to good use. On the other hand, many law schools are loathe to spend much time "teaching to the exam" when the purpose of the bar exam (i.e. testing minimal competency) is widely considered to be quite different from the purpose of training students to be effective and skillful lawyers. In a recent opinion piece, David Faigman, Dean of UC Hastings College of the Law, summarizes the dilemma as follows:

Ironically, California's low pass rates actually undermine the preparation of lawyers to practice law and are contrary to the California Bar's own stated position about what law schools should be teaching. In a recent effort, the Bar recommended that law schools dramatically expand their "experiential learning" opportunities. This means that the bar advised law schools to give their student greater opportunities to get real-world experience while still in school, in line with what medical schools do. . . While the Bar has been telling lawyers to focus on experiential learning, it has reduced the pass rate to historical lows. Accordingly,

law schools have been left with a choice: take the bar at its word and devote themselves to teaching the skills that produce good lawyers, or adopt a "teach to the test" pedagogy.

Of course lawyering skills like interviewing exercising judgment, responsibility and reliability are not tested on the bar. But law schools were reminded (after the latest test results were announced) that they concentrate on these skills at their peril. . . . Ultimately they are faced with the proposition of having students who are unprepared to practice in the real world and who—despite their schools' "teaching to the test"—still cannot pass the state's licensing exam.⁷⁸

Some of the best law schools in California do not teach to the exam--preferring experiential learning instead-- yet their graduates consistently pass the bar at rates exceeding 85% or even 90%. Other lower-tier schools prioritize teaching closely to the bar, yet their bar passage rates are consistently much lower than the average. For this reason, it cannot be said that gearing one's policies and teaching methods specifically towards the bar exam will even produce the desired effect of raising passage rates. Furthermore, it is difficult to attribute the sharp decline in passage rate that some schools have experienced to teaching methods and policies employed by those schools—particularly, for example, when just a few years earlier those schools enjoyed much higher bar passage rates while they employed those same methods and policies.

These existential questions about the purpose of a legal education are closely linked to questions about the purpose of the bar exam itself. According to the State Bar, the primary reasons for having a bar exam are (1) public protection; (2) to assess knowledge and abilities of those seeking admission to the practice of law; and (3) to have an objective measure of as to whether those seeking admission have acquired through their legal studies the minimum competence expected of those entering the profession.⁷⁹ On this last point, law schools and many other stakeholders agree with the basic premise that the bar exam should serve as a minimal competency test for licensing purposes. But it is also possible that the bar exam has created an artificial barrier to prevent otherwise qualified individuals from being admitted to the bar, and ultimately undermining the quality of a legal education—at least in California—in the process. Whether the current exam is serving that purpose effectively is an open question, and one that is the focus of more detailed discussion in this informational hearing. In any case, law schools do bear some responsibility (and have every incentive) to ensure that their students are prepared to pass the bar exam and some law school deans are already employing new measures to meet this responsibility.

For example, at Loyola Law School, the administration "has increased the support we provide to our students to help put them in the best position to pass the bar"; "(hired) both an academic

⁷⁸ Faigman, *It's not the State Bar's responsibility to control lawyer supply*, Journal (Dec. 14, 2016) San Francisco Daily Journal.

⁷⁹ Committee of Bar Examiners/Office of Admissions, *Information Regarding Modifications to CA Bar Examination Effective July 2017*, (2016) State Bar of California.

support director and a director of bar programs, and offer multiple programs and classes to reinforce skills necessary for the bar exam"; and "provide individual sessions year-round, which offer insights into the MPRE, essay writing and more."⁸⁰ At UC Hastings, the administration is considering a number of curriculum and policy changes intended to better prepare students for the bar exam, including revising requirements to take certain classes covering subjects tested on the bar; eliminating closed book exams for all bar-tested classes; encouraging an MBE-style component to be included in final exams; encouraging midterm exams to be given to allow extra feedback to students; and establishing a program to provide increased evaluation of students' essay writing skills.⁸¹

These responses to the decline in bar pass rates illustrate how law schools are seeking ways to adjust their curriculum and instructional policies and strengthen academic support services that will help students be more successful on the bar exam—but, importantly, without drastically compromising schools' commitment to experiential learning and development of effective lawyering skills not tested through the bar exam. To the extent that there are benefits that can be realized through change to curriculum and teaching practices, only the law schools themselves can decide what strategies to take and how to implement them.

VI. Impact of California's High Threshold "Cut Score" to Pass the Bar Exam and Its Possible Adjustment

As previously described, to pass the California bar exam, a test-taker must score at least 1,440 points on the combined grading scale, as determined by the CBE. This threshold passing score is sometimes referred to as the "cut score." California's cut score, the second highest in the nation (exceeded only by the State of Delaware) has remained at its current level of 1,440 points since 1986, when it was last changed by the CBE.

After the State Bar announced that only 62 percent of first-time takers from ABA-accredited law schools passed the July 2016 bar exam, a number of commentators—led by several law school deans—have been very vocal in questioning why the State Bar has continued to employ such a high cut score in California and have renewed calls to lower the cut score to better reflect the purported function of the bar exam as an assessment of minimum competency. Stephen Ferruolo, Dean of the University of San Diego School of Law, fairly summarizes the view of many of these law deans when he writes, "It is simply unacceptable and unconscionable that 38 percent of graduates from law schools that meet the accreditation standards of the ABA are now deemed not to have the minimum competence to practice law in California. Something is seriously wrong."⁸²

Not all stakeholders agree that there is something seriously wrong with the exam or the cut score. Gayle Murphy, senior director of admissions for the State Bar, has stated that "pass rates

⁸⁰ Waterstone, *Bar should help schools reach out*, (Dec. 14, 2016) San Francisco Daily Journal.

⁸¹ Faigman, *UC Hastings Town Hall presentation*, (January 31, 2017.)

⁸² Ferruolo, *Time to Adopt the Uniform Bar Exam*, (Dec. 14, 2016) San Francisco Daily Journal.

fluctuate with every administration of the exam" and "(g)enerally this is attributed to the skills, abilities and preparations of the applicants who take a particular administration (of the exam), which varies."⁸³ Under this logic, the 62 percent pass rate last year simply reflects the skills, preparedness, and other characteristics of the particular cohort of applicants who took the July 2016 exam and not necessarily any deep concern or flaw with the exam itself. Law School Transparency also does not necessarily find fault with the exam, but maintains that declining bar passage rates are the result of law schools' lower admission standards and high tuition, ultimately resulting in a smaller and less-qualified pool of applicants to law schools who are at greater risk of failing the bar exam.⁸⁴

In contrast, many law school deans argue that low bar passage rates are not evidence that California law school graduates are less qualified than their peers in other states, but that the low rates simply reflect a cut score in California that is unnecessarily high for the purpose of assessing minimum competency to practice law. Jennifer L. Mnookin, Dean of the UCLA School of Law, notes that those who took the bar exam in California had a mean score on the MBE portion of the exam that was several points *above the national average*—including approximately seven percent of test-takers from law schools that are not ABA-accredited. Because State Bar data show a substantial correlation between performance on the MBE portion and performance on other parts of the California Exam, Mnookin contends there is little evidence to suggest that California exam takers are less qualified than the national pool of bar exam test-takers.⁸⁵

Accordingly, the law school deans contend that the current cut score is unnecessarily high and excludes a significant proportion of applicants for bar admission who would be skilled attorneys and who would be admitted to practice law in almost any state *other than California*. Dean Mnookin illustrates this argument below:

Quite a few graduates who failed the California bar would, therefore, have passed had they taken the exam in another state. With the same degree of preparation and the same caliber performance, some fraction of California test-takers would have succeeded in Massachusetts (with a first-time pass rate of nearly 80%) or New York (82%). In the last two years, the pass rate for UCLA Law graduates taking the New York bar has been 100% and 93%, respectively. This state of affairs invites an important question: Would those students who failed in California but would have passed elsewhere actually make worse lawyers than their fellow test-takers who fell just on the other side of California's curve?⁸⁶

In questioning why the CBE continues to maintain one of the highest cut scores in the nation, some law school deans have alleged, somewhat controversially, that the bar exam has ceased to

⁸³ Moran, *State bar exam pass rate lowest in 32 years*, (Nov. 22, 2016) San Francisco Daily Journal.

⁸⁴ Law School Transparency, *Supra.*, 2015 *State of Legal Education Analysis*.

⁸⁵ Jennifer Mnookin, *California grads are not less qualified*, (Dec. 14, 2016) San Francisco Daily Journal.

⁸⁶ *Ibid.*

serve as a minimum competency test and instead has evolved into "a protectionist barrier to entry"⁸⁷ into the legal profession. Dean Faigman of UC Hastings writes:

Why does California have such a low bar pass rate compared to every other state? If it is not a fair estimation of the line that divides the qualified from the unqualified attorney, and if it actually undermines the very values that California espouses for good lawyering, then what is it doing? . . . If one looks at what the astonishingly low pass rates in California have done, the evidence is quite troubling. The primary consequence of the arbitrarily low California bar pass rate is that it limits the supply of lawyers in the state. The issue of whether there are too many lawyers is a fair one to ask, but it is not the California bar's responsibility to control that supply. Such a protectionist motive, if that is the bar's intent, presents substantial policy and, possibly, legal concerns.

Whether the State Bar's cut score is improperly protectionist in nature and therefore violates antitrust laws, as has been suggested, is likely dependent on *North Carolina State Bd. of Dental Examiners v. F.T.C.*⁸⁸ (North Carolina), a 2015 United States Supreme Court decision. In that case, the North Carolina Dental Examiners' Board—controlled by a majority of market participants (i.e. dentists) but not subject to active supervision from the state—took a number of actions intended to exclude non-dentists from the market for teeth whitening services in North Carolina. The Supreme Court found that the “Board was a non-sovereign entity controlled by active market participants that did not receive active supervision by state, and thus its anticompetitive actions were not entitled to *Parker* state-action immunity from federal antitrust law.”

The extent to which the California State Bar's administration of the bar exam and cut score may violate antitrust law remains unclear. *North Carolina* specifies that if the agency is controlled by a majority of market participants and is actively supervised, it would fall under the State's sovereign immunity. The Court did not address specifically what is necessary for a state to engage in “active supervision,” but instead found that such a determination is dependent on the individual facts and circumstances. If and when the question of whether the California's high cut score on its bar exam constitutes an antitrust violation comes before a court, the issue will be whether the California State Bar is “subject to active supervision” by the State, as was the issue in North Carolina. Finally, it should be noted that in September 2016, the Chief Justice of California, Tani Cantil-Sakauye, directed the State Bar to “formulate a policy . . . that the Bar must follow in identifying, analyzing, and bringing to the court any proposed Board action that implicates antitrust concerns”⁸⁹ but there is no indication that the State Bar has yet done so. The

⁸⁷ Ferruolo, *Time to Adopt the Uniform Bar Exam*, (Dec. 14, 2016) San Francisco Daily Journal.

⁸⁸ *North Carolina State Bd. of Dental Examiners v. F.T.C.* (2015) 135 S. Ct. 1101, 191 L. Ed. 2d 35.

⁸⁹ Tani Cantil-Sakauye, Letter to the California State Bar re S237081 – In re Attorney Discipline System, (Sept. 8, 2016) Chief Justice of the California Supreme Court, (http://newsroom.courts.ca.gov/internal_redirect/cms.ipressroom.com.s3.amazonaws.com/262/files/20168/090816_Letter_StateBar.pdf.)

Chief Justice has also expressed “dismay” at the sharp decline in California’s bar exam passage rate in recent years.⁹⁰

Regardless of whether the CBE’s cut-score implicates antitrust concerns, the high cut score raises questions about whether current administration of the bar exam serves the best interests of law students, law schools, the legal profession and--most importantly---the public at large in California. A high cut score may very well be necessary to protect the public from incompetent attorneys. If so, attorneys in California presumably would be more competent than attorneys in other jurisdictions and subject to fewer complaints from the public. The California State Bar presumably has received fewer substantiated complaints about attorney misconduct, at least in terms of basic qualifications to practice law, than regulatory bodies overseeing attorney licensing and discipline in other states. Furthermore, given the decades in which California has maintained a cut score that is higher than virtually every other state in the nation, it should be possible to obtain data about whether or not the high threshold has yielded the protective benefits to the public that backers say necessitates it remaining in place.

On February 1, 2017, nearly all the deans from California’s ABA-accredited law schools wrote a letter to the Supreme Court of California, urging the Court to require the Bar to revisit its scoring methods, and to lower the minimum passing score to the bar exam.⁹¹ In the letter, the deans argued that California’s cut score was atypically and unjustifiably high, citing to the cut scores and passage rates of other states like New York, and Texas. While the deans acknowledged their role in reassessing admission policies, the deans stated that if the cut score remains unchanged, there would be pressure among law schools to focus on teaching toward the exam rather than effective lawyering.⁹²

There is some evidence that adopting a lower cut score would significantly improve bar passage rates, and leave ABA-accredited law schools less vulnerable to losing their accreditations. According to one study, if California adopted New York’s passage rate, all California law schools would see a significant improvement in passage rates: UCLA’s would increase from 82% to 97%; UC Hastings’ would increase from 51% to 83%; Santa Clara’s would increase from 66% to 90%; Golden Gate’s would increase from 31% to 67%.⁹³

While it does not appear that the Supreme Court has yet responded to the deans’ letter, the Chief Justice has publicly expressed concern about the bar passage rate. In a recent article, Chief Justice Tani Cantil-Sakauye said she was “troubled by the sharp decline,” but that she was unsure whether changes needed to be made – especially in light of the recent change to the two-day bar exam.⁹⁴ When asked about whether California should adopt the UBE, the Chief Justice said: “I’m not saying that the UBE is not ever going to happen in California, but we want to be thoughtful about how we make these kinds of changes.”

⁹⁰ Moran, *Chief Justice ‘dismayed’ by declining bar exam passage rate*, (Jan. 13, 2017) Los Angeles Daily Journal.

⁹¹ California ABA-accredited Law School Deans, *Letter to Supreme Court of California*, (February 1, 2017.)

⁹² *Ibid.*

⁹³ Anderson, *California law school bar passage rates recalculated for the New York bar* (Dec. 19, 2016) Witnesseth <<http://witnesseth.typepad.com/>>

⁹⁴ Moran, *Chief Justice ‘dismayed by declining bar exam passage rate*, (Jan. 13, 2017) Los Angeles Daily Journal.

The concurrence of these events in California – declining bar passage rates, well-established law schools being at risk of losing ABA accreditation, and the prospect of the ABA standard becoming even more stringent—has spurred discussion among stakeholders in different states about the proper cut score on their bar exams. According to Barry Currier, the ABA's managing director of accreditation and legal education, “At some point, if California or any state sets its cut score so high that nobody can pass the bar exam, then that actually means they can't have an ABA-approved law school.” As a consequence, according to Currier, “They are going to have to think about whether they are doing the right thing by their students or their applicants by having a score that is so high that a lot of people are unable to pass, have debt, and the lawyers they need in their state to serve their population are not being produced.”⁹⁵

Conclusion. While the need to maintain California’s high cut score may be subject to further debate and study, it is clear that the declining rate of bar exam passage, and the fact that so many prospective attorneys have been prevented from gaining entry into the legal profession in California, has serious consequences and costs on both individual applicants and the state. For the large number of law school graduates who have invested significant time and money into their legal education but do not pass the bar exam on their first attempts, additional expenses to retake the exam and defer potential employment opportunities can be financially devastating. But the high failure rate also has a cost to the state economy, as well. In 2016, around 1,461 applicants were unsuccessful on the bar exam on their first attempt. If these applicants sat for the exam again, they would have to spend at least \$1.16 million just for the fee to re-take the exam. If the cost of paying for bar exam preparation courses and lost wages were also considered, these losses would be far greater. Because unsuccessful applicants would lose a potential \$43 million in lost earnings⁹⁶, the state would also millions of dollars in lost income tax revenue.

For communities of color and advocates for and from underrepresented minorities, an unnecessarily high barrier to entering the legal profession also has significant consequences in terms of its effect on the diversity of the legal profession. For public interest sectors of the legal community and rural areas of the state that might welcome more attorneys to serve the legal needs of underserved communities, there are potential implications on the supply of attorneys and the resulting need to ration scarce legal resources. For law schools in California, there are obvious concerns about the ability to maintain accreditation, attract qualified applicants, and carry out their ability to provide a legal education that is consistent with their individual missions and values. Therefore, the issue of declining passage rates on the California bar exam, regardless of the cause or causes of the trend, has serious policy impacts on the people of the state that merit further examination by all stakeholders in the legal community.

⁹⁵ Moran, *ABA panel approves stricter bar exam passage standard*. (October 24, 2016) Los Angeles Daily Journal.

⁹⁶ This figure is based upon the assumption that the difference between the average earnings of a unlicensed legal assistant and a first year attorney is \$30,000 per year and that a person would be able to maintain full-time employment (as an unlicensed legal assistant) while preparing for the bar exam, which many applicants are unable to do. The difference presumably would be far greater for applicants who are not employed, employed only part-time, or employed at even less lucrative work while preparing for the bar exam.