

September 11, 2017

VIA EMAIL AND PERSONAL DELIVERY

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

RE: The California Bar Exam – Adjustment to the Minimum Passing Score

Dear Chief Justice and Associate Justices:

The undersigned Deans of the California Accredited Law Schools (CALs) request leave to file this Letter Brief to ask the Court to exercise its inherent power to admit persons to practice law in California and to adjust the minimum passing score (cut score) of the California bar exam.¹

Following comprehensive study and analysis of minimum competence, the CALs join with many other stakeholders and experts, including the State Bar of California, in supporting a change in the minimum passing score of the California Bar Exam to 1390, as the one score that represents the intersection of research data, norms, current practice, and policy.

The CALs previously petitioned the Court on March 2, 2017 to request an adjustment to the minimum passing score from 1440 to 1350.² In response, the Court expressed its concern that it “lacks a fully developed analysis with supporting evidence from which to conclude that 1440 or another cut score would be most appropriate for admission to the bar in California.”³ The Court directed the State Bar of California (State Bar) to conduct “a thorough and expedited investigation” that includes “a meaningful analysis of the current pass rate and information sufficient to determine whether protection of potential clients and the public is served by maintaining the current cut score.”⁴

¹ California Rules of Court, Rules 9.3(a) and 9.6(a), as amended and effective on January 1, 2018.

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

³ Letter from Supreme Court of California to State Bar dated Feb. 28, 2017, available at Appendix A-1,

<https://board.calbar.ca.gov/docs/agendaitem/Public/agendaitem1000019983.pdf>.

⁴ Id.

The Court asked for participation by experts and stakeholders in the process, including “psychometricians, law student representatives, and law school faculty or deans.” The result of the Court’s directive was an extensive and comprehensive data gathering, review, and comment process that included participation by the Committee of Bar Examiners (CBE), the State Bar Board of Trustees, the Board of Trustee’s Admission and Education Committee, the State Bar Office of Research & Institutional Accountability, expert psychometricians and professional licensing exam consultants, the Law School Council, the CALS deans, the California American Bar Association (ABA) law school deans, the California Registered law school deans, bar applicants, other law school faculty, the Assembly Judiciary Committee staff and Chairperson Mark Stone, State Bar executives, staff, and members, California bar examinees, the public, legal aid organizations, and other interested parties such as the Center for Public Interest Law.

As a reflection of how comprehensively the question has been analyzed, reports and recommendations have been developed by the State Bar Office of Research & Institutional Accountability,⁵ CALS,⁶ the California ABA law school deans,⁷ the California Registered law school deans,⁸ the Assembly Judiciary Committee,⁹ the Law School Council,¹⁰ and groups such as the Center for Public Interest Law at the

⁵ Office of Research & Institutional Accountability Staff Report to the Board of Trustees of the California State Bar - Final Report on the Standard Setting Study and Public Comments Regarding Pass Line Options, September 5, 2017, referenced as “Staff Report”, available at

<https://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000019982.pdf>

⁶ Letter from CALS Chair James Schiavenza to State Bar, September 1, 2017, available at

<https://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000019986.pdf>

⁷ Letter from ABA Law School Deans to State Bar, August 25, 2017, available at <http://montereylaw.edu/wp-content/uploads/2017/09/ABA-Deans-Letter-in-Support-of-133-139.pdf>

⁸ Letter from Registered Law School Deans to State Bar, August 23, 2017, available at <http://montereylaw.edu/wp-content/uploads/2017/09/Registered-Law-School-Deans-Letter-in-Support-of-139.pdf>

⁹ Letter from Assembly Judiciary Committee Chair Mark Stone to State Bar, August 24, 2017, available at <http://montereylaw.edu/wp-content/uploads/2017/09/Assembly-Judiciary-Letter-in-Support-of-139.pdf>

¹⁰ Law School Council Meeting, September 5, 2017. The Council voted unanimously to recommend an adjusted cut score within the range of 135 to 139, inclusive. Reported in Staff Report, September 5, 2017, p. 37.

University of San Diego.¹¹ For the Court's convenience, links to these reports and recommendations are provided in the footnotes to this brief. In addition, it is expected that many of these reports (and others) have been, or will be, filed as letters, reports, or briefs to the Court.

Predictably, there are differences of opinion regarding the policies, design, implementation, and grading of the bar exam. However, a cross-analysis of the major findings from the State Bar and the primary stakeholders reflects a broad-based, though not unanimous, consensus has emerged for adjusting the minimum passing score for the bar exam from a score of 1440 to a score of 1390.

The CALS join with the following sources and resources that identify or support 1390 as a valid interim or final cut score: the State Bar Standard Setting Study, the State Bar Board of Trustees, the State Bar Office of Research & Institutional Accountability "Staff Report", the Assembly Judiciary Committee staff and Committee Chair Mark Stone, the Law School Council, the State Bar Committee of Bar Examiners long-standing "Second Read" policy, 56 California law school deans (19 ABA, 13 CALS, and 14 Registered), and the Center for Public Interest Law at the University of San Diego. Further, it is also important to note at the outset that a score of 1390 falls within the national norm (1330 to 1390) of the largest ten jurisdictions (other than California).

The above findings were reported as follows:

- The State Bar's Standard Setting Study¹² found that a score of 1390 falls within a range of scores that provide 95% confidence that the score reflects the minimum competency for the first year of law practice.
- The State Bar Board of Trustees voted to recommend 1390 as one of three valid alternatives for the Court's consideration as an interim cut score. After consideration of information presented by the Committee of Bar Examiners, the State Bar Staff Report,¹³ the Standard Setting Study, and public comment, the Board adopted the recommendation of the Office of Research &

¹¹ Letter from Center for Public Interest Law, August 23, 2017, available at <http://montereylaw.edu/wp-content/uploads/2017/09/8-23-17-CPIL-Written-Comments-re-Cut-Score-Recommendation.pdf>

¹² Conducting a Standard Setting Study for the California Bar Exam Final Report, Chad W. Buckendahl, Ph.D., July 28, 2017, available at Appendix B-1, <https://board.calbar.ca.gov/docs/agendaitem/Public/agendaitem1000019983.pdf>

¹³ Staff Report, September 5, 2017.

Institutional Accountability to provide the Court with information on three alternatives – 1390, 1414, and 1440.¹⁴

- The State Bar Staff Report recommended that 1390 be considered as one of three options (1390, 1414, or 1440) for an interim cut score. Staff presented the recommendation of 1390 for three reasons. “First, in response to public comments; second, because 1390 falls within the confidence interval from the Bar’s Standard Setting Study, and; third, in light of the analysis showing the impact on diversity and access that a lower cut score would produce.”¹⁵
- Assembly Judiciary Committee Chair Mark Stone, based on public hearing testimony and an analysis conducted by the Judiciary Committee staff, urged that, “the passing score be lowered to 1388 on an interim basis, pending completion of the bar exam validity study and then a full and unbiased revised study of the content and cut score for the exam.”¹⁶
- The Law School Council, a group of elected representatives representing ABA, CALS, and Registered law schools after considering the recommendation of 56 California law school deans recommended an interim adjustment of the passing score to within a range of 1390 to 1350 for a period of three years.¹⁷
- The score of 1390 has long been the number used by the Committee, and accepted by the Supreme Court, as a score that warranted an applicant’s examination being placed in the Phase 2, or “second read” phase. Grading to the 1390 standard requires no changes to the Bar’s grading protocol.¹⁸
- The Bar’s Staff Report indicates that at the score of 1390, the disparate impact on Blacks and Hispanics examinees would be significantly moderated. Black examinees would improve their passing rate by 40.4% and Hispanics by 26.1%. The passing rate for CALS, schools that traditionally serve a higher percentage of non-traditional students, under-represented populations, and rural communities would increase by 69%. The overall bar passing rate would improve by 20.3%.¹⁹ These findings are coherent with the findings of

¹⁴ State Bar Board of Trustees meeting, September 6, 2017. Minutes not yet posted, but the report from the meeting will be provided directly to the Court.

¹⁵ Staff Report, at p. 37.

¹⁶ Letter from Mark Stone to State Bar, August 24, 2017.

¹⁷ Law School Council meeting, September 5, 2017.

¹⁸ *Infra.* p. 23-24.

¹⁹ Staff Report, at p. 32.

the 56 law schools deans and the Center for Public Interest Law at the University of San Diego, as reflected in their writings and comments.

- An analysis of the minimum passing scores of the ten (10) largest U.S. jurisdictions by population indicates that nine of the jurisdictions, other than California, have established minimum passing scores within the range of 1330 to 1390.²⁰

Based on these findings, the CALS submit that the comprehensive evidence and analyses developed in response to the Court's order demonstrates both objective and policy bases for adjusting the minimum passing score from 1440 to 1390. By making this adjustment, the Court:

- Serves the interests of the citizens of California by providing additional qualified lawyers to support access to justice;
- Maintains a high passing standard, for public protection and other purposes; and
- Serves the interests of the legal profession by providing fair access to licensing in support of a competent and diverse legal profession.

The CALS respectfully ask the Court to take into account the following significant factors in deciding to adjust the minimum passing score from 1440 to 1390. Each of the factors will be discussed in specific sections of this brief (as noted).

1. The public protection function of the attorney licensing process is better assured by comprehensive pre-licensure education, extensive professional ethics training and testing, rigorous moral character and fitness screening, and mandatory continuing legal education than by setting a disproportionately high cut score on the bar exam. (See discussion, *post*, at pp. 7-9.)
2. The public interest of the people of the State of California is best served by providing accessible and affordable legal services. This requires a bar exam passing standard that effectively measures the minimum qualifications for the first year of legal practice without having a disparate impact on minority applicants. (See discussion, *post*, at pp. 9-18.)
3. National standards are an important normative benchmark since: 1) the practice of law in California is highly comparable to the practice in other states; 2) there is no evidence that lower passing standards in other large

²⁰ The National Conference of Bar Examiners National Data for 2015 MBE and MPRE Administrations, (available at <http://www.ncbex.org/publications/statistics>).

- states result in diminished public protection; and 3) California permits many out-of-state attorneys to practice in the state under California Rules of Court 9.46 and 9.40. (See discussion, *post*, pp. 18-25.)
4. The State Bar's Standard Setting Study, while conducted using a valid methodology, was flawed, as were efforts by the Bar to collect support for its findings among State Bar membership. Therefore, the Court should consider Committee of Bar Examiners and State Bar recommendations resulting strictly from the Study as *informative*, but not *determinative*. (See discussion, *post*, pp. 25-28.)
 5. The current bar exam tests very few of the important character, skill, and attitude characteristics of lawyer competency and thus is a poor instrument for protecting the public. A disproportionately high cut score exacerbates this problem by excluding from licensure many applicants with these other valuable characteristics who would be deemed competent if these skills and characteristics were tested and properly accounted for in the measurement of competency. (See discussion, *post*, pp. 28-31.)
 6. An investigation into the causes for lower bar pass rates and the content validity of the bar exam are important initiatives that should be conducted in a comprehensive, inclusive, and transparent process that involves the bench, bar, and academia. However, these investigations and studies are not required to be completed as part of the standard setting analysis to set the cut score measuring minimum competence. (See discussion, *post*, pp. 31-32.)
 7. The current disproportionately high cut score creates inordinate harm to the people of the State of California, both directly (direct cost) and indirectly (lost opportunity). The harm to the State from denying licensure to qualified CALS graduates alone is estimated to be between \$179 million and \$250 million per year. When impacted ABA law school graduates are included in the calculation, the harm to California is estimated to be two-times greater, potentially exceeding \$500 million per year. (See discussion, *post*, pp. 32-34.)

Therefore . . .

8. Adjusting the minimum passing score to 1390 would accomplish the following: 1) provide 95% accuracy in predicting minimum competency (according to the State Bar's Standard Setting Study); 2) address the problem of disparate impact caused by the current arbitrarily high minimum passing score; 3) align with the State Bar's existing Second-Read Policy; 4) continue the ranking of California as the highest and most rigorous standard among

other large states; and 5) require minimal change in the State Bar's current grading procedures. (See discussion, *post*, pp. 34-35.)

DISCUSSION:

- 1. The public protection function of the attorney licensing process is better assured by comprehensive pre-licensure education, extensive professional ethics training and testing, rigorous moral character and fitness screening, and mandatory continuing legal education, than by setting a disproportionately high cut score on the bar exam.**

Public Protection in Attorney Admissions

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

Therefore, minimum competency testing by the bar exam is only one part of securing the public's protection. It should be considered in context with the other three critical components – pre-licensure legal education, professional ethics testing, and character and fitness determination.

Pre-Licensure Legal Education

The vast majority of California bar examinees are graduates of accredited law schools. CALS are accredited by the State Bar, meeting comprehensive and rigorous standards that ensure a sound program of legal education for all CALS graduates. The specific Rules and Guidelines for Accredited Law Schools are established by the Court, the State Bar Committee of Bar Examiners, and the Board of Trustees.²¹ CALS submit an extensive self-study report each year to the Committee of Bar Examiners and undergo a comprehensive on-site evaluation every five years. The schools' performance on admission standards, content and quality of academics and curriculum, attrition rate, grading, examinations, faculty qualifications, and bar exam pass rate are all evaluated in this comprehensive review.

²¹ <http://www.calbar.ca.gov/Admissions/Law-School-Regulation/Law-Schools>

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

ABA law schools go through a similar rigorous accreditation process.²² Their graduates also must be certified as having fulfilled the demanding academic standards established by the American Bar Association.

Therefore, we submit that all certified ABA and CALS law school graduates meet the first of the four critical standards of public protection – a rigorous pre-licensure education.

Moral Character and Fitness Investigation and Screening

Each candidate for licensure is thoroughly investigated by the Committee of Bar Examiners for qualities of moral character and fitness. Candidates are not licensed unless found to be of good moral character. “Good moral character” includes, but is not limited to, qualities of honesty, fairness, candor, trustworthiness, observance of fiduciary responsibility, respect for and obedience to the law, and respect for the rights of others and the judicial process.”²³ The burden is on every applicant to establish his or her “good moral character” to the satisfaction of the Committee.

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

The primary purpose of character and fitness screening before admission to the bar is the protection of the public and the system of justice. The lawyer licensing process is incomplete if only testing for minimal competence is undertaken. The public is inadequately protected by a system that fails to evaluate character and fitness as those elements relate to the practice of law. The public interest requires that the public be secure in its expectation that

²²https://www.americanbar.org/groups/legal_education/resources/standards.html

²³ Rules 4.40 (A) and 4.40 (B) of the Admission Rules.

*those who are admitted to the bar are worthy of the trust and confidence clients may reasonably place in their lawyers.*²⁴

The Committee of Bar Examiners implements a process that assures that California's standards for moral character and fitness are of the highest standard. The Committee is comprised of attorneys and public members appointed by the Court and representatives of the public.

Therefore, the public is protected because each successful candidate for licensure has passed this second of four critical protection mechanisms – a thorough and comprehensive moral character and fitness investigation.

The Multi-State Professional Responsibility Exam (MPRE)

The Multistate Professional Responsibility Examination (MPRE) is a two-hour, 60-question multiple-choice examination developed by the National Conference of Bar Examiners. The scope of coverage includes the following: regulation of the legal profession; the client-lawyer relationship; client confidentiality; conflicts of interest; competence, legal malpractice and other civil liability; litigation and other forms of advocacy; transactions and communications with persons other than clients; different roles of the lawyer; safekeeping funds and other property; communications about legal services; lawyers' duties to the public and the legal system; and judicial conduct. The purpose is to measure the examinee's knowledge and understanding of established standards related to a lawyer's professional conduct.²⁵ MPRE scores are reported on a scale ranging from 50 (low) to 150 (high). Minimum passing scores are established by each jurisdiction and range from 75 (low) to 86 (high). California requires the highest minimum passing score (86) among all U.S. jurisdictions.²⁶

Therefore, the public is protected because each successful candidate for licensure has completed the third of four critical protection measures – passing the MPRE with the highest minimum passing score among U.S. jurisdictions.

2. The public interest of the people of the State of California is best served by providing accessible and affordable legal services. This requires a bar exam passing standard that effectively measures the minimum

²⁴ Comprehensive Guide to Bar Admission Requirements 2016, National Conference of Bar Examiners and American Bar Association Section of Legal Education and Admissions to the Bar, Code of Recommended Standards for Bar Examiners, at p. vii.

²⁵ <http://www.ncbex.org/exams/mpre/>

²⁶ <http://www.ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F205>

qualifications for the first year of legal practice without having a disparate impact on minority examinees.

Public Protection from the Growing “Justice Gap”

“To the extent that higher cut scores reduce the number of licensed attorneys in a given jurisdiction, a high cut score may in fact undermine access to legal services – an important form of public protection.” Statement from the State Bar Staff Report on Pass Line Options, September 5, 2017.²⁷

Public protection and the public interest require access to courts, and affordable advocates to guide, counsel, and protect the public. It is important to recognize that one of the fundamental challenges to public protection is the growing “justice gap” in California. As stated by then State Bar President James Fox and former Executive Director Elizabeth Parker, “[t]he State Bar of California strongly supports access to legal services as a core part of our public protection mission. We support the promise of justice for all, including for low-income people who too often have no choice but to navigate the legal system alone.”²⁸ The public protection mission of the State Bar also “works to expand, support, and improve the delivery of legal services to low- and moderate-income Californians, and promotes diversity in the legal profession.”²⁹

As much as courts continue to try to address the needs of self-represented litigants through a variety of methods – including providing attorneys in self-help centers – it is clear that many litigants need full, independent representation.³⁰ There are many cases and procedures that are simply too complex for effective self-representation. There are also a growing number of litigants who do not have the capacity to represent themselves in court due to limited English proficiency, illiteracy, mental illness, and a variety of other personal challenges.³¹ In recognition of these concerns, Chief Justice Ronald M. George supported AB 590 (Fleuer) in 2009 that authorized the Judicial Council to establish pilot projects to provide representation in areas of critical human need and to develop data on how to effectively identify those litigants who need full representation and what services seem to be most effective.³²

²⁷ Staff Report, at p. 35.

²⁸ State Bar President James Fox and Executive Director Elizabeth Parker joint statement, California Bar Journal (February 2017), (available at <http://www.calbarjournal.com/February2017/TopHeadlines/TH4.aspx>).

²⁹ <http://www.calbar.ca.gov/About-Us>.

³⁰ <http://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf>

³¹ Id.

³² California Law Review. Self Represented Litigants in Family Law: The Response of California's Courts (February 2010), Bonnie Hough, (available at

The California Commission on Access to Justice reported in its 2010 report *Improving Civil Justice in Rural California* that, “low-income Californians throughout the state have difficulty accessing legal services, but those in rural areas face additional challenges. There are fewer legal aid lawyers in rural areas than in urban areas and few private lawyers to fill the gaps.”³³ The report highlighted the need for additional public protection of these vulnerable populations in saying, “Each year at least one third of low-income rural people need legal services for basic human needs. However, the availability of legal aid is extremely sparse in rural areas and legal aid programs often are only able to provide partial assistance.”³⁴ The report acknowledged the critical role that California law schools must play in protecting these communities, saying “[I]t is critical that urban law firms and bar associations, *and the state’s law schools*, partner with their rural colleagues to help address the need (*emphasis added*).”³⁵

When fewer qualified bar examinees from regional law schools such as CALS are licensed, the geographic justice gap increases. The statewide average in California is 4.37 attorneys per 1000 population. Comparing the geographic availability of legal representation in the largest California counties to the number of attorneys in the smaller rural counties, illustrates the effect of the geographic justice gap.

The following chart illustrates the California counties with the greatest access to justice when measured by the number of attorneys per 1000 population.³⁶

<http://www.californialawreview.org/self-represented-litigants-in-family-law-the-response-of-californias-courts>), also see link Harvard Law Review Vol. 123, No. 6 (APRIL 2010), pp. 1532-1539.

³³ *Improving Civil Justice in Rural California*, A Report of The California Commission on Access to Justice, (September 2010), at p. 5.

³⁴ *Id.* at p. 7.

³⁵ *Id.*

³⁶ US Census Bureau Statistics (2015), State Bar of California Attorney Statistics (2015).

California Accredited Law Schools
 Letter Brief to California Supreme Court
 September 11, 2017

Region	Population	Active Attorneys	Attorneys per 1000
California	38,431,393	168,070	4.37
San Francisco	841,138	17943	21.33
Marin	258,821	2128	8.22
San Mateo	750,489	4728	6.30
Sacramento	1,463,149	8311	5.68
Los Angeles	10,053,995	55,181	5.49
Santa Clara	1,871,107	10244	5.47
Orange	3,121,854	17078	5.47
San Diego	3,222,558	15961	4.95
Alameda	1,583,226	7612	4.81

Large Urban California Counties – Attorneys per 1000 population

All of these large urban counties have significantly higher numbers of attorneys per 1000 population than the statewide average. Even in these best-served counties, availability of legal services affordable to economically disadvantaged populations can be very limited. Los Angeles County, for example, has more than 55,000 active attorneys, but it also has more than 2 million people who live at or near the poverty line.³⁷

However, access to justice is even more limited in many of the smaller rural counties of California. This is the threat to public protection previously discussed by the California Commission on Access to Justice.³⁸ It is not a threat to the public created by unqualified graduates being licensed by a lower cut score, it is the threat created by a disproportionately high cut score screening out new lawyers who may be willing to practice in rural settings – including those already resident in these counties who were trained locally by CALS and Registered law schools.

The magnitude of the geographic justice gap is illustrated by comparing the dramatic difference of attorney availability in the rural counties of California.³⁹

³⁷ “Selected Characteristics of People at Specified Levels of Poverty In the Past 12 Months”, 2011-2015 American Community Survey 5-Year Estimates, US Census Bureau Statistics (2015).

³⁸ Improving Civil Justice in Rural California, A Report of The California Commission on Access to Justice, (September 2010), at p. 5.

³⁹ US Census Bureau Statistics (2015), State Bar of California Attorney Statistics (2015).

California Accredited Law Schools
 Letter Brief to California Supreme Court
 September 11, 2017

Region	Population	Active Attorneys	Attorneys per 1000
California	38,431,393	168,070	4.37
Glenn	27,914	17	0.61
Merced	263,481	165	0.63
Kings	150,862	98	0.65
Madera	152,165	99	0.65
Modoc	9,112	7	0.77
Imperial	177,517	143	0.81
Alpine	1,150	1	0.87
Tulare	454,725	405	0.89
Lassen	32,212	29	0.90
San Benito	57,594	53	0.92
Tehama	63,130	62	0.98
Sierra	3,040	3	0.99
Kern	865,923	879	1.02
Yuba	73361	78	1.06
Mariposa	17,758	19	1.07
Stanislaus	526,286	581	1.10
San Bernardino	2,093,306	2360	1.13
San Joaquin	705,027	806	1.14
Sutter	95,287	109	1.14
Colusa	21,432	25	1.17
Del Norte	27,827	35	1.26
Lake	63,843	82	1.28
Solano	425,219	584	1.37
Riverside	2,296,956	3185	1.39
Tuolumne	53,911	76	1.41
Trinity	13,444	20	1.49
Calaveras	44,614	69	1.55
Plumas	18,877	30	1.59
Butte	222,420	388	1.74
Siskiyou	43,773	78	1.78
Humboldt	134,620	257	1.91
Amador	36,602	71	1.94
Shasta	179,137	364	2.03
Monterey	429,123	878	2.05
Fresno	956,102	2004	2.10
El Dorado	181,542	381	2.10
Inyo	18,423	40	2.17

Rural California Counties – Attorneys per 1000 population

With the exception of the two large counties of San Bernardino and Riverside, the counties with the lowest ratio of attorneys per 1000 population are rural counties. These counties have a ratio of attorneys to 1000 population that is less than one-half of the statewide average.

CALS bring this to the Court’s attention because CALS are uniquely qualified to address this aspect of public protection – the needs of rural and minority communities. The regional geographic distribution of the CALS serve the majority of these rural counties. Unfortunately, too many of the CALS graduates who come from

the regions that desperately need additional lawyers are being denied licensure because of the disproportionately high minimum passing score of 1440. This is confirmed by the August 29, 2017 Staff Report to the Committee of Bar Examiners.⁴⁰ According to the report, the adjustment of the minimum passing score on the July 2016 bar exam from 1440 to 1390 would have resulted in a 69% higher pass rate for CALS graduates. Applying the same adjustment for ABA law school graduates would have resulted in only a 17.8% higher pass rate.⁴¹

		2008 CBX			2016 CBX		
Cut Score		1390	1414	1440	1390	1414	1440
ABA	# Passing	3,767	3,571	3,415	2,629	2,387	2,231
	% Passing	82.3%	78.0%	74.6%	63.8%	57.9%	54.2%
	% Increase*	10.3%	4.6%		17.8%	7.0%	
CA Accredited	# Passing	265	225	196	169	131	100
	% Passing	35.6%	30.2%	26.3%	21.9%	17.0%	13.0%
	% Increase*	35.2%	14.8%		69.0%	31.0%	

ABA and CALS Pass Rates at 1390 and 1414 for 2008 and 2016 July Bar Exam

Why Lower CALS Tuition Supports Rural Legal Practice

The lower salaries for public interest law and legal aid organizations also affects the ability of rural counties to serve low-income and under-represented communities.⁴² With an average total J.D. tuition of \$63,498⁴³ CALS graduates are burdened with significantly lower student loan debt upon graduation. In addition to the lower cost, the majority of CALS students attend evening programs that allow them to work during the day and pay their tuition “as they go” rather than relying on student loans.

With low or no-debt, CALS graduates are better positioned to consider working in rural communities. Public interest and legal aid groups have testified that they rely on CALS graduates for staffing rural legal aid services.⁴⁴

⁴⁰ Staff Report, at p. 32.

⁴¹ Id.

⁴² Testimony at public comment hearing, August 15, 2017, available at <https://board.calbar.ca.gov/video.aspx>.

⁴³ 2016 CALS Annual Compliance Reports - Summaries and Data published by the State Bar of California Office of Admissions (January 17, 2017).

⁴⁴ Testimony at public comment hearing, August 15, 2017, available at <https://board.calbar.ca.gov/video.aspx>.

In contrast, the total J.D. tuition for California ABA law schools in 2017 ranges from \$130,050 to \$174,066.⁴⁵ This high cost of tuition and the heavy financial burden of student loans serves as a substantial financial barrier to working in rural legal practices for many ABA graduates.

Serving a Growing Minority-Majority Population

Many California counties now reflect “minority-majority” populations. California law schools, both ABA and CALS, have made significant efforts to reflect this change in California. California ABA law schools minority (reported non-white) enrollment in 2016 was 44%.⁴⁶ The CALS minority enrollment in 2016 was over 47%.⁴⁷ Both of these reflect a significantly higher minority enrollment than the ABA law school national average of 32%.⁴⁸

Unfortunately, State Bar demographics do not reflect a similar success in minority engagement. The total 2017 State Bar minority membership (reported non-white) is approximately 16%. This reflects very little change over the past 15 years from the 14% of minority membership reported in 2001. Over that same period, Asian membership in the Bar remained unchanged, African American membership dropped from 2.4% to 1.9%, and Hispanic membership increased marginally from 3.7% to 4.6%.⁴⁹

This is a stark contrast to the population demographics of California. It is illustrated by the following chart that lists the growing number of “majority-minority” status⁵⁰ California counties.

⁴⁵ <https://www.ilrg.com/rankings/law/tuition/1/asc/State>

⁴⁶ <http://archive.calbar.ca.gov/archive/calbar/2cbj/01nov/page1-1.htm>

⁴⁷ <http://www.calbar.ca.gov/Portals/0/documents/reports/ORIA/Survey-2017.pdf>

⁴⁸ https://www.americanbar.org/groups/legal_education/resources/statistics.html

⁴⁹ <http://www.calbar.ca.gov/Portals/0/documents/reports/ORIA/Survey-2017.pdf>

⁵⁰ <http://www.pewresearch.org/fact-tank/2015/04/08/reflecting-a-racial-shift-78-counties-turned-majority-minority-since-2000/>

California Accredited Law Schools
 Letter Brief to California Supreme Court
 September 11, 2017

Region	Population	% Minority (non-white)
California	38,431,393	61
Imperial	177,517	87
Los Angeles	10,053,995	73
Merced	263,481	70
Tulare	454,725	69
San Bernardino	2,093,306	69
Fresno	956,102	69
Monterey	429,123	68
Alameda	1,583,226	67
Santa Clara	1,871,107	66
Kings	150,862	66
San Joaquin	705,027	65
Madera	152,165	64
San Benito	57,594	63
Kern	865,923	63
Colusa	21,432	63
Riverside	2,296,956	62
Solano	425,219	60
San Mateo	750,489	59
San Francisco	841,138	58
Orange	3,121,854	57
Stanislaus	526,286	55
Contra Costa	1,095,980	54
Santa Barbara	436,076	54
San Diego	3,222,558	53
Sacramento	1,463,149	53
Ventura	840,972	53
Sutter	95,287	51
Yolo	205,485	51

Minority-Majority Counties in California

Comparing the demographic make-up of California counties with the findings of the 2017 survey of licensed attorneys in California shows that while Hispanics make up 35.4 percent of Californians over the age of 18, they represent *less than five percent* of California’s licensed attorneys. African Americans make up 5.9 percent of the state’s population over 18 years of age but account for *less than two percent* of licensed attorneys while Asians comprise 13.8 percent of the population over 18 but *less than six percent* of licensed attorneys.

One reasonable question for the Court to consider when comparing the number of minority students who are graduating from law school to the number of minority attorneys passing the bar exam is whether the existing cut score is having a diverse

impact on minority examinees. The question is raised by the Bar’s Staff Report that stated, “While the root causes of disproportionate rates of passage are beyond the scope of this report, it is clear that applicants of color pass the bar exam at rates that are disproportionate to those of their white counterparts.”⁵¹ The report provided the following data:

		Simulated Cut Scores for July 2008 GBX					Simulated Cut Scores for July 2016 GBX				
		1330	1350	1390	1414	1440	1330	1350	1390	1414	1440
Total	# Passing	7,242	6,920	6,017	5,642	5,329	5,451	5,053	4,010	3,598	3,332
	% Passing	84.1%	80.4%	69.9%	65.5%	61.9%	70.9%	65.7%	52.1%	46.8%	43.3%
	% Increase*	35.9%	29.9%	12.9%	5.9%		63.6%	51.7%	20.3%	8.0%	
Gender											
Male	# Passing	3,795	3,617	3,121	2,911	2,756	2,679	2,484	1,970	1,760	1,635
	% Passing	83.8%	79.9%	68.9%	64.3%	60.9%	72.2%	66.9%	53.1%	47.4%	44.0%
	% Increase*	37.7%	31.2%	13.2%	5.6%		63.9%	51.9%	20.5%	7.6%	
Female	# Passing	3,441	3,297	2,890	2,726	2,568	2,722	2,525	2,005	1,805	1,665
	% Passing	84.5%	80.9%	71.0%	66.9%	63.0%	69.5%	64.5%	51.2%	46.1%	42.5%
	% Increase*	34.0%	28.4%	12.5%	6.2%		63.5%	51.7%	20.4%	8.4%	
Race/Ethnicity											
Asian	# Passing	1,520	1,435	1,205	1,113	1,046	1,161	1,066	835	735	676
	% Passing	81.8%	77.2%	64.8%	59.9%	56.3%	64.0%	58.8%	46.1%	40.5%	37.3%
	% Increase*	45.3%	37.2%	15.2%	6.4%		71.7%	57.7%	23.5%	8.7%	
Black	# Passing	314	287	215	181	164	252	222	146	117	104
	% Passing	66.1%	60.4%	45.3%	38.1%	34.5%	49.8%	43.9%	28.9%	23.1%	20.6%
	% Increase*	91.5%	75.0%	31.1%	10.4%		142.3%	113.5%	40.4%	12.5%	
Hispanic	# Passing	621	591	471	432	397	734	663	478	419	379
	% Passing	76.5%	72.8%	58.0%	53.2%	48.9%	65.7%	59.3%	42.8%	37.5%	33.9%
	% Increase*	56.4%	48.9%	18.6%	8.8%		93.7%	74.9%	26.1%	10.6%	
White	# Passing	4,368	4,200	3,765	3,570	3,392	3,063	2,874	2,369	2,165	2,019
	% Passing	87.6%	84.3%	75.5%	71.6%	68.0%	77.7%	72.9%	60.1%	54.9%	51.2%
	% Increase*	28.8%	23.8%	11.0%	5.2%		51.7%	42.3%	17.3%	7.2%	
Other	# Passing	98	91	71	67	60	100	93	66	56	52
	% Passing	79.0%	73.4%	57.3%	54.0%	48.4%	67.6%	62.8%	44.6%	37.8%	35.1%
	% Increase*	63.3%	51.7%	18.3%	11.7%		92.3%	78.8%	26.9%	7.7%	

Table 3. Simulated Impact of Pass Rates at Different Cut Scores

The CALS support of an adjusted cut score of 1390 takes particular notice of the data in the chart above which indicate that at 1390, Hispanic examinees would have experienced a 26.1% increase and Black examinees would have experienced an increase of 40.4% on the July 2016 Bar exam.

These findings support the CALS position that adjusting the cut score to 1390 can significantly moderate the disparate impact of the disproportionately high minimum passing score of 1440.

Therefore, public interest and public protection of the people of the State of California is best served by a bar exam passing standard that effectively measures the minimum qualifications for the first year of legal practice without having a

⁵¹ Staff Report, p. 35.

disparate impact on minority examinees. A minimum passing score of 1390 accomplishes this policy.

- 3. National standards are an important normative benchmark since: 1) the practice of law in California is highly comparable to the practice in other states; 2) there is no evidence that lower passing standards in other large states result in diminished public protection; and 3) the State permits many out-of-state attorneys to practice in California under California Rules of Court 9.46 and 9.40.**

An Analysis of National Standards

An analysis of the minimum passing scores of the ten (10) largest U.S. jurisdictions by population indicates that all nine of the jurisdictions, other than California, have established minimum passing scores of 1390 to 1330. California's minimum passing score of 1440 is a significant outlier.

The Court has specifically directed the State Bar to provide the Court with supporting evidence from which to conclude that 1440 or another cut score would be most appropriate for admission to the bar in California.⁵² This is particularly important because, as the previous section describes, the evidence is that the higher score of 1440 has a disparate impact for minority law school graduates, particularly those who are Hispanic or Black.

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

⁵² Supreme Court Letter to the State Bar, dated February 28, 2017.

The 10 Most Populous States on July 1, 2014⁵³

Rank	State	Population	Minimum Competency Passing Score⁵⁴
1	California	38,802,500	1440
2	Texas	26,956,958	1350
3	Florida	19,893,297	1360
4	New York	19,746,227	1330
5	Illinois	12,880,580	1330
6	Pennsylvania	12,787,209	1360
7	Ohio	11,594,163	1350
8	Georgia	10,097,343	1350
9	North Carolina	9,943,964	1390
10	Michigan	9,909,877	1350

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

"Absent a compelling reason, such as a reason to believe California test takers are less competent or that the standard to be admitted to practice in California must be a lot higher than elsewhere in the country, it seems reasonable to suggest that California should align its passing threshold with other states, particularly other large states."⁵⁵

⁵³ United States Census Bureau, "Florida Passes New York to Become the Nation's Third Most Populous State, Census Bureau Reports," Press Release No. CB 14-232 (December 23, 2014), (available at <http://www.census.gov/newsroom/press-releases/2014/cb14-232.html>).

⁵⁴ The National Conference of Bar Examiners National Data for 2015 MBE and MPRE Administrations, (available at <http://www.ncbex.org/publications/statistics>).

⁵⁵ Informational Hearing, testimony of Barry Currier, (available at <http://www.calchannel.com/video-on-demand>) at 1:07:30 - 1:18:12.

At the same hearing, Elizabeth Rindskopf Parker, then Executive Director of the State Bar, testified that, “I’m embarrassed to tell you there’s no good answer” to the question of why California maintains such a high passing score on the bar exam.⁵⁶

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

No one pretends that these disparities are justified because practicing law as a new lawyer is more difficult in California than in New York. The MBE cut score is typically more an aspect of a state bar’s culture and history than a purposeful decision. State-by-state cut score disparities are fundamentally illogical. In each profession that uses a national multiple-choice test as a component of licensure, the purpose of the test is to establish minimal competence to practice the profession.⁵⁷

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

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

As of 2015, 1,094,718 out of 1,300,705 attorneys were licensed in the 41 jurisdictions that require a minimum passing score of 1390 or below.⁵⁸ This represents 84% of all licensed attorneys in the U.S. Considering the fact that all nine of the most populous states have established minimum passing scores of 1330 to

⁵⁶ Informational Hearing, testimony of Elizabeth Rindskoph Parker, Executive Director, State Bar of California, <http://www.therecorder.com/more-latest-news/id=1202779158816/Frustrated-Law-Deans-Take-BarExam-Complaints-to-Lawmakers?mcode=1202617583589&curindex=6>.

⁵⁷ Howarth, Joan W., The Case for a Uniform Cut Score (July 28, 2017). Available at SSRN: <https://ssrn.com/abstract=3010168>

⁵⁸ https://www.americanbar.org/content/dam/aba/administrative/market_research/national-lawyer-population-by-state-2015.authcheckdam.pdf

1390, what policy or legal standard supports a minimum passing score higher than 1390? There does not appear to be any which is valid.

A minimum passing score of 1390 would place California at the highest level of rigor aligned with the other major states. It also would place California substantially higher than the other five largest states that have established minimum passing scores of 1360 to 1330. A score of 1390 would clearly achieve the stated policy objectives of the State Bar to ensure the rigor and status of the California standards while addressing other important public policy objectives.

During the public comment hearings, committee members and licensed attorneys expressed grave concern that lowering the minimum passing score to any score below 1440 would place the public at greater risk of professional malpractice. This concern is understandable, but CALS respectfully submit that it is unsubstantiated and not supported by the available facts and research.

Quite to the contrary, the State Bar Staff Report stated that “based on the data available, it appears unlikely that changing the cut score would have any impact on the incidence of attorney misconduct.”⁵⁹

Figure 7. Relationship between Cut Score and Attorney Discipline



⁵⁹ Staff Report, July 31, 2017.

According to the Staff Report, “What the scatter plot shows is that attorney discipline – as measured by private and public discipline per thousand attorneys – appears to have no relationship to the cut score.”⁶⁰

When considering the adjustment of the California cut score to 1390, from the standpoint of public protection and job performance, it is important to note that the State Bar’s Standard Setting Survey found that, “there is no empirical evidence that would support a statement that as a result of its high pass line [1440] California lawyers are more competent than those in other states.”⁶¹

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



Figure from the State Bar Staff Report (July 2017)

Existing California Licensure Below the 1440 Score

The CALS also ask the Court to take notice that the State Bar has a long-standing policy of licensing out-of-state attorneys who scored lower than 1440 on the multi-state (MBE) section of the bar exam. The State Bar waives the MBE requirement of attorneys licensed in other states, even if the attorneys scored lower than 1440.⁶² Theoretically, these attorneys could have passed other state bar exams with scores as low as 1290 and still receive the State Bar waiver.

⁶⁰ Staff Report, at p. 36.

⁶¹ Standard Setting Study, Executive Summary, at p.9.

⁶² <http://www.calbar.ca.gov/Admissions/Requirements/Attorney-Applicants>

There is no evidence that licensing these attorneys with an MBE score below 1440, and in some cases substantially below 1440, has created a greater public risk or that these attorneys have any higher incidents of malpractice or attorney discipline.

In addition, out-of-state attorneys can act as registered in-house counsel without taking the CA bar⁶³ and attorneys unlicensed in California are allowed to appear pro hac vice in California courts.⁶⁴ Again, there has been no suggestion or evidence that these attorneys create a greater risk to the California public while practicing within the State.

The Standard Setting Study and the analysis of national standards both provide an objective basis for setting the minimum passing score at 1390. The third objective basis supporting the use of 1390 as a minimum passing score is the State Bar's long-standing Second-Read Procedure.

The Second-Read Procedure – Potential Variables in Scoring

The score of 1390 has long been the number used by the Committee, and accepted by the Supreme Court, as a score which warranted an applicant's examination being placed in the Phase 2, or "second read" phase. This policy was adopted because 1390 has long been considered close enough to the passing standard of 1440 that all of the applicants who fell between 1390 and 1439 deserved to have their answers read a second time by a new set of graders. According to the Staff Report, the long-standing use of the policy of re-reading exams represents an implicit policy position of having greater tolerance for false positive errors.⁶⁵ This procedure is an acknowledgement that bar exam grading is not an exact science. The difference between scoring 1390 and 1440 can be a few additional scaling points allocated to an essay or performance exam or as few as five additional correct answers out of the 200 questions on the MBE section of the exam.

As previously discussed, the Standard Setting Study established a range of cut scores to consider (1388 to 1504). The second-read procedure likewise suggests that scores between 1390 and 1439 meet a minimum standard that warrants additional consideration. Both of these objective standards support the argument for adjusting the minimum score to 1390.

⁶³ <http://www.calbar.ca.gov/Admissions/Special-Admissions> and

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

⁶⁴ http://www.courts.ca.gov/cms/rules/index.cfm?title=nine&linkid=rule9_40

⁶⁵ Staff Report, at p. 8.

Potential Variables in Scoring – Impact of the Scaling Formula

The State Bar has also established a “scaling” formula to relate essay exam performance to performance on the Multistate Bar Exam (MBE). Under the scaling formula used for the three-day bar examination – and anticipated to be used for the two-day exam – the difference between a 1390 and a 1440 is insignificant in demonstrating minimal competence. Graders find it very difficult to distinguish an applicant at 1390 from one at 1440.

To demonstrate that point, an experienced bar grader explains it this way:

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

The critical point is that getting 10 extra – or fewer – raw points on a PT coupled with five extra points on an essay is very, very common, and within the acceptable range of scores from a calibration standpoint – but that equals the entire difference between a 1390 (failing score) and a 1440 (passing score).”⁶⁶

The Multistate Bar Exam (MBE) has similar impacts, magnified now that the MBE portion is weighted 50% of the score (rather than the previous 35%) and that there are now fewer scored MBE’s (175 rather than the previous 190). The current point

⁶⁶ Explanation provided by Dean Barbieri, former Director of Examinations, State Bar of California and current Dean of JFK University School of Law during public comment hearing, August 15, 2017, summarized; available at <https://board.calbar.ca.gov/video.aspx>.

allocation for the MBE is unknown, since the two-day exam was recently administered in July 2017. Under the formula for the former three-day exam, each MBE was worth three scaled points. Therefore, for the candidate with a 10-point variation on a performance test, the difference between passing and failing the bar exam was a small handful of MBE questions – *fewer than five*.

Now that the weighting of the MBE has increased to 50% and fewer MBE questions make up the scored portion, it is estimated that each MBE question will be worth as many as six scaled points. If this is true, then the difference between a 1390 and a 1440, with a 10-point variation on a performance test, *might be as few as two multiple-choice questions*. This minor difference is certainly not predictive of whether an examinee has the minimum competence for the first year of law practice.

It is important for the Court to consider that the Bar has additional data that could be used to validate 1390 as the appropriate minimum passing standard. The CALS believe that analysis of the data would show that a very large percentage of those applicants who qualify as a “persistent applicant” – meaning that they take the exam again if they fail – who achieved an initial score between 1390 and 1439, ultimately pass the bar exam on a subsequent attempt.

Public comments from both experts and ordinary bar takers revealed that these applicants were not smarter or more competent on subsequent attempts. Instead, they were savvier about how to take and pass the test, how to manage test anxiety, and/or how to better study for the exam. In fact, the effect might be one of regression on practice skills because inordinate emphasis is placed on exam-taking skills in preparing for the bar exam. As one test taker put it in public comment, “it is ironic that in learning how to pass the bar exam, I became less competent in actually practicing law.”⁶⁷

Test takers learn from their past exam performance errors and make adjustments to their exam-taking skills to achieve higher test scores. They do not become more competent to practice law – they become better test takers. It would assist the Court in setting the cut score if the Bar would analyze and release data on the percentage of persistent test takers who score between 1390 and 1439 on their initial attempt and subsequently pass the exam. If this is a significant percentage, it supports the adjustment of the cut score to 1390.

Therefore, a minimum passing score of 1390 aligns and intersects with *all three* of the objective standards discussed – the Standard Setting Study, the analysis of national minimum passing score standards, and the State Bar Second-Read Policy.

⁶⁷ <https://board.calbar.ca.gov/video.aspx>

4. The State Bar’s Standard Setting Study, while conducted using a valid methodology, was flawed, as were efforts by the Bar to collect support for its initial findings among State Bar membership. Therefore, the Court should consider State Bar recommendations resulting strictly from the Study as *informative*, but not *determinative*.

In response to the Court’s initial directive, the State Bar conducted a Standard Setting Study (Study)⁶⁸ and published the results along with a comprehensive Staff Report.⁶⁹ The Study found that a pass line range of between 1388 and 1504 could be set with approximately 95% confidence.⁷⁰

The State Bar has submitted this Study and Staff Report to the Court as the basis for recommending three possible options for the minimum passing score – 1390, 1414, and 1440. All three of these scores fall within the 95% confidence range validated by the Standard Setting Study.

Although the Study validates the CALS recommendation of 1390, CALS submit that owing to its flaws, , the Study findings should be considered *informative*, but not *determinative*. However, when combined with other objective and policy findings from other sources such as the Staff Report, the Study results clearly support an adjusted minimum passing score of 1390.

Concerns Presented during Public Comment

The public comment process during hearings held by the State Bar July 31, 2017, August 14, 2017, and August 15, 2015⁷¹ revealed the following concerns with the Study:

- The participant sample is inadequate. The Study included twenty (20) lawyers out of the approximate 190,000 licensed attorneys in California. This represents the opinions of .01 of 1.0% of the practicing lawyers in California and yet is being presented as a “definitive” definition of minimum competency for the first year practice of law.
- The small sample size makes the risk of error disproportionate to each individual participant answer.

⁶⁸ Standard Setting Study, Dr. Chad Berkendahl (July 2017).

⁶⁹ Staff Report. at p. 9.

⁷⁰ Id.

⁷¹ <https://board.calbar.ca.gov/video.aspx>

- Participant selection was not representative of licensed practitioners or the demographics of current examinees. For example, none of the participants reported practicing in several of the exam subject areas.
- Participant opinions were inherently biased because selection was limited only to attorneys who scored 1440 or higher on the California bar exam. Their only frame of reference for a minimum passing score is their own experience. Other participants were much more experienced than first year lawyers and undoubtedly had difficulty remembering what level of competence they possessed in the first year of practice.
- Participants were asked to identify “minimum competencies” related to their experience of supervising first-year lawyers who, by definition, had all scored 1440 or higher on the California bar exam.
- Participants reported their own lack of competence in many of the legal subject matter areas they were being asked to evaluate. These reports were confirmed by the independent observers present at the workshop.
- Participants were not given a rubric or other guidance on either the substantive law of the subject matter area they were evaluating, or even grading guidelines to help them understand what the examiners were looking for in a passing answer.
- Selection of the exam papers being reviewed was conducted by non-expert statisticians and psychometricians, not competent to evaluate the accuracy of the grades originally assigned to the papers when they were tested on the actual bar exam.
- Participants reported confusion regarding the key definition of “minimally competent for the first year practice of law.”
- The recommendation of 1414 as a possible “interim score” for the July 2017 bar exam is not related to any objective standard.
- The Multistate Bar Exam (MBE) – though now half of the exam – was not even considered in the standard setting study. California applicants outperform the national average substantially on the MBE,⁷² but the minimum score calculation assumed that this extraordinary performance was the “norm” for score determination purposes – an assumption that, alone, virtually ensured the status quo was supported by the standard setting study.

CALS submit that despite these concerns, when combined with supportive findings from other objective resources, the Study findings validate a minimum passing score of 1390.

⁷² “The mean score for California bar takers was 1422 [in 2015], about 25 points higher than the national average . . .” <http://www.latimes.com/local/lanow/la-me-adv-bar-2015-results-20151126-story.html>.

The State Bar Member “Survey”

The recent State Bar member “survey”⁷³ and special public comment site⁷⁴ set up by the State Bar for this matter have resulted in public comments that are biased due to significant methodology and transparency errors. Neither communication – presumably distributed to over 200,000 bar members – mentioned or defined the legal standard of “minimum competence for the first year practice of law” in the context of setting minimum “cut scores”. Both solicitations referred to the Standard Setting Study and staff recommendation without providing any discussion of the serious concerns presented by the independent experts.

In addition, the survey provided a link to the public comment site where members were only offered a “false” choice that was limited to selecting between two scores – the existing 1440 or the proposed “interim” score of 1410. There were no options provided for “neither” or “lower”. The more serious problem is that no explanation or definition of the legal standard “minimum competency for first year practice of law” was provided anywhere in the survey or public comment form. Without the context of this legal standard, how could members be providing public comment on the minimum passing score for the first year practice of law?

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

Therefore, CALS submit that the results of the Study and the subsequent “Member Survey” and public comment site results are best considered in combination with other data, including objective data on national norms, and the impact of the present minimum passing score on the diversity of the profession and the concomitant impact on access to justice in California.

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

⁷³ <https://fs22.formsite.com/sbcta/form45/index.html>

⁷⁴ <http://www.calbar.ca.gov/About-Us/Our-Mission/Protecting-the-Public/Public-Comment/2017-Public-Comment/2017-10>

The Limitations of Utilizing the Present Bar Exam to Measure First Year Lawyer Competency

With California bar exam pass rates at historically low levels, either the bar exam or the law schools are improperly assessing minimum competence; it cannot be the case that both are correct. Almost the entire pool of first-time bar examinees were granted a J.D. degree from an accredited law school, and the vast majority – more than 95% – received their degrees from an ABA-approved law school.

The J.D. is awarded only for successful completion of a rigorous and closely regulated program of legal education, comprising at least 80 semester units (and in most cases more) representing over 3600 hours of student learning activity, engagement with expert faculty, and competency assessment. Law school programs feature both doctrinal and experiential courses, teaching both content and skills, and many include at least some specific evaluations of competency in practice, conducted by expert peers (as in, for example, clinics and skills courses such as advocacy.) In law school, each student is evaluated by more than a dozen experienced professional peers, and completes hundreds of hours of practice, classroom performance, clinical and experiential performance, and testing. The process provides a thorough opportunity to evaluate student competence over the course of three or four years of engagement with the faculty.

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

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

The validity of the bar exam and its minimum passing score naturally invites strident debate when it starts to have the effect of excluding from practice many graduates that the law schools firmly believe to be competent. For all their flaws, law faculties have no incentive to pass people who are not competent. Therefore,

when fewer than 50% of California law school graduates are able to pass the licensing exam, the licensing exam itself has to be critically examined.

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

We ask the Court to consider that if the purpose of the bar exam and other licensure procedures is to ensure that only minimally competent and professionally capable lawyers are licensed, then competence must be accurately understood and an exam designed to test it must include a fair sampling of all those elements. An exam that fails to do so is not ultimately “valid” and does not accurately predict actual minimal competence.

As the Court considers future methodologies for licensing attorneys, the following three seminal studies on lawyer competency are recommended; *A Study of the Newly Licensed Lawyer*,⁷⁵ *Identification, Development, and Validation of Predictors for Successful Lawyering*,⁷⁶ and *Foundations for Practice: The Whole Lawyer and the Character Quotient*.⁷⁷ These empirical studies reveal that many skill, attitude, habit of mind and practice, and personality domains have a great deal to do with lawyer success – and competence. Notably, in the National Conference of Bar Examiners’ own study, only two subject matter content domains ranked in the top twenty-five (25) activities of a newly licensed lawyer, one of which – Civil Procedure knowledge – was only recently and minimally added to the MBE (partly as a result of the study).

The *Foundations for Practice* results are even more stark; of professional competencies rated as “necessary in the short term” by the more than 24,000

⁷⁵ NCBE Job Analysis Survey Results, (July 2012), available at <http://www.ncbex.org/publications/ncbe-job-analysis>.

⁷⁶ *Identification, Development, and Validation of Predictors for Successful Lawyering*, Marjorie M. Shultz and Sheldon Zedeck (September 2008), available at <https://www.law.berkeley.edu/files/LSACREPORTfinal-12.pdf>.

⁷⁷ *Foundations for Practice: The Whole Lawyer and the Character Quotient* (July 2016), available at http://iaals.du.edu/sites/default/files/reports/foundations_for_practice_whole_lawyer_character_quotient.pdf.

respondents to this study (from 37 states, including California), character mattered most, and character included entirely things the bar exam test minimally if at all. The 10 most urgent foundations – necessary in the short term – in the entire study were:⁷⁸

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

In consideration of these empirical study findings, the CALS strongly support the periodic and ongoing validation of the bar exam and the Bar’s planned discussions and studies related to future changes to the California bar exam. It is critical that these activities are conducted in a comprehensive, inclusive, and transparent process that involves the bench, bar, and academia and employ good science, properly implemented.

CALS support and encourage the State Bar’s ongoing efforts. However, we do not believe that these investigations should deter the Court from making an immediate adjustment to the minimum passing score to address the current and future harm caused by the present minimum passing score of 1440.

- 6. An investigation into the causes for lower bar pass rates and the content validity of the bar exam are important initiatives that should be conducted in a comprehensive, inclusive, and transparent process that involves the bench, bar, and academia. However, these investigations and studies are not required to be completed as part of the standard setting analysis to set the cut score measuring minimum competence.**

⁷⁸ See *Table 1: Top 10 Foundations Categorized as Necessary in the Short Term*, Institute for the Advancement of the American Legal System, Educating Tomorrow’s Lawyers Project, “Foundations for Practice: The Whole Lawyer and the Character Quotient”, 2016.

The Additional Studies

As previously discussed, the Court instructed the State Bar “to consider and address whether 1440 is an appropriate score for evaluating the minimum competence necessary for entering attorneys to practice law in California.” In response, the State Bar initiated four separate studies, (1) the Standard Setting Study, (2) the Content Validity Study, (3) the Law School Performance Study, and (4) the Sources of Variation of Passing Rates Report.

However, out of these four studies, only the Standard Setting Study is directly related to the immediate question presented to the Court. The three additional studies address the ongoing discussion related to future changes to the California bar exam. It is critical that these discussions and studies are conducted in a comprehensive, inclusive, and transparent process that involves the bench, bar, and academia.

CALS support and encourage the State Bar’s ongoing efforts to provide the best possible, valid, bar exam. However, we do not believe that these investigations should deter the Court from making an immediate adjustment to the minimum passing score. For example, there is concern that the law school performance study is required to support a decision on what score represents minimal competency. Whether recent law school graduates are more or less academically prepared *before entering law school* – which seems to be the chief focus of the law school performance study – does not speak to whether the current pass line for the bar exam effectively measures minimal competence.

Therefore, the Court should untether ongoing evaluation of the applicant pool or legal education from the decision on how to define – as represented by the bar exam cut score – minimum competence for the first year practice of law.

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

Measurement of Harm

Using the scoring distribution provided by the NCBE for the July 2016 bar exam,⁷⁹ an estimated 440 additional CALS examinees would have passed the California bar exam in 2016 if the minimum passing score had been adjusted from 1440 to 1390.⁸⁰ As unsuccessful examinees, these CALS graduates will be required to pay repeater fees of approximately \$352,000 (\$800 per examinee/per exam) and estimated travel expenses of \$396,000 (\$500 per examinee/per exam) to re-sit for the bar exam one additional time. Assuming that more than 80% of these examinees will be required to take the exam a second time to pass at 1440 (based on 2016 July statistics), they will pay an additional \$598,000 in fees and travel for their second repeat.

This means that these 440 CALS examinees, who would have passed the exam the first time in July 2016 at a minimum passing score of 1390, will be required to pay an additional \$1,346,000 in fees and travel expenses to be licensed (assuming that they all pass upon their second repeat). These costs do not include the additional cost of bar review courses.

Of course, the additional direct examination and travel costs are only a small portion of the harm that these unsuccessful examinees suffer. Assuming a \$30,000 differential in first-year annual salary between the employment opportunity for a law school graduate working as a paralegal versus a first-year licensed attorney,⁸¹ these 440 unsuccessful examinees will suffer an estimated \$13,200,000 in lost wage opportunity each year that they remain unlicensed.

The harm is not only limited to the unsuccessful CALS examinees. The citizens of California are also denied access to the legal services of these 440 law school graduates. Assuming a billable hour value of \$192 to \$275⁸² and an average of 1,950 billable hours,⁸³ California loses an estimated \$164,736,000 to \$235,950,000 in legal

⁷⁹ 2016 Statistics, NCBE's Bar Examiner Magazine, (available at

<http://www.ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F205>) at p. 40.

⁸⁰ This estimate includes examinees from both the 2016 February and July bar exam administrations and includes first-time and repeater examinees.

⁸¹ First-year lawyer salary, \$90,000, Salinas, CA (available at

https://www.glassdoor.com/Salaries/salinas-lawyer-1st-year-salary-SRCH_IL0,7_IM752_KO8,23.htm and Paralegal II salary, \$60,500, Salinas, CA (available at <http://www1.salary.com/CA/Salinas/Paralegal-II-salary.html>)

⁸² <http://www.callawyer.com/2015/11/how-to-prove-an-attorneys-reasonable-hourly-rates/>

⁸³ <http://www.nalp.org/2006maybillablehours>

services each year that these 440 unsuccessful examinees are denied licensure as attorneys.

Using the estimates detailed above, it is reasonable to calculate the potential financial harm caused to CALS examinees and the public by maintaining the minimum pass rate at 1440 vs. 1390 to be between \$179 million and \$250 million *per year*. Again, this estimate of financial harm is only for the impact related to CALS graduates. If the calculations include ABA law school graduates in the same category, the impact on California is estimated to be two-times greater, potentially as high as \$500 million per year.⁸⁴

It is important to keep in mind that these estimates do not include the harm caused by lost job opportunities, the emotional toll of bar exam failure, the negative impact on diversity, and the growing justice gap in rural areas as discussed in the previous sections.

- 8. Adjusting the minimum passing score to 1390 would accomplish the following: 1) provide 95% accuracy in predicting minimum competency (according to the State Bar's Standard Setting Study); 2) address the problem of disparate impact caused by the current arbitrarily high minimum passing score; 3) align with the State Bar's existing Second-Read Policy; 4) continue the ranking of California as the highest and most rigorous standard among other large states; and 5) require minimal change in the State Bar's current grading procedures.**

In Conclusion

The CALS are in support of the ongoing discussion and studies related to future changes to the California bar exam. It is critical that these discussions and studies are conducted in a comprehensive, inclusive, and transparent process that involves the bench, bar, and academia. The process should be on a timeline that follows accepted protocols for these types of content validation and job performance studies, as recently ordered by the Court.

However, there is an immediate and urgent need to make an adjustment to the current 1440 minimum passing rate in order to limit the measurable harm to the public and to examinees. The harm caused is both a financial and professional loss to the unsuccessful examinees and a significant economic and rule of law loss to the

⁸⁴ Adding ABA examinees who would pass at 139 vs. 144 would approximately double the number of additional licensees per year. See statistics available at <http://www.ncbex.org/publications/statistics/mbe-statistics> and <http://www.calbar.ca.gov/Admissions/Law-School-Regulation/Exam-Statistics>.

entire State. Continued use of 1440 as the minimum passing score also harms the Bar's mission to expand, support, and improve the delivery of legal services to low- and moderate-income Californians, and promote diversity in the legal profession.

We respectfully submit that the most appropriate remedy is an adjustment to a minimum competency passing score of 1390 that is based on the following:

- 1) Alignment with the minimum passing score standards recommended by the State Bar's July 2017 Standard Setting Study (**1388** to 1504);
- 2) Alignment with the State Bar Board of Trustee recommendation of **1390** as one of three alternatives for a valid minimum passing score;
- 3) Alignment with the State Bar Staff Report recommendation of **1390** as one of the three recommendations for an interim score;
- 4) Alignment with the Law School Council's recommendation of a minimum passing score in the range between 1350 and **1390**;
- 5) Alignment within the national standards of the ten largest jurisdictions (1330 to **1390**) and establishing California at the top of the scale; and
- 6) Alignment with the minimum passing score standards of the State Bar's Second-Read Procedure (**1390** to 1439).

The CALS join with a broad coalition who identify or support 1390 as a valid interim cut score: the State Bar Board of Trustees, the State Bar Office of Research & Institutional Accountability, the Law School Council, the Assembly Judiciary Committee staff and Committee Chair Mark Stone, 56 California law school deans, and the Center for Public Interest Law at the University of San Diego.

We ask the Court to recognize that passing the California bar exam with a minimum passing score of 1390 means that licensees will have met all four of the critical standards of public protection that have been established by the Court and the State Bar – a rigorous pre-licensure education, a comprehensive moral character and fitness investigation, passing the MPRE based on the highest minimum standard of all U.S. jurisdictions . . . and passing the California bar exam with the highest minimum passing score of the ten largest jurisdictions.

Therefore, the undersigned CALS Deans respectfully request that the Court adjust the interim minimum passing score of 1440 to a score of 1390 that reflects the standard of minimum competency for the first year practice of law. This decision serves the interests of the citizens of California by ensuring a high standard of public protection while providing fair access to licensing for a competent and diverse legal profession.

California Accredited Law Schools
Letter Brief to California Supreme Court
September 11, 2017

Respectfully Submitted,



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Please see attached Proof of Service

SUPREME COURT OF CALIFORNIA

I, Mitchel L. Winick, declare:

I am a citizen of the United States and employed in the City of Seaside and County of Monterey, California in the office of Monterey College of Law at whose direction the following service was made. I am over the age of eighteen years and not a party to the within titled action. My business address is 100 Col. Durham Street, Seaside, CA 93955.

On September 11, 2017 I served a copy of the following document:

Letter from 13 deans of California Accredited Law Schools to the California Supreme Court re: the California bar exam signed September 11, 2017.

[X] by **E-MAIL VIA PDF FILE**, by transmitting via e-mail or electronic transmission the document listed above to the person(s) at the e-mail addresses set forth below.

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California Accredited Law Schools
Letter Brief to California Supreme Court
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California Accredited Law Schools
Letter Brief to California Supreme Court
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California Accredited Law Schools
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Executed on September 11, 2017 in Seaside, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.



Mitchel L. Winick