Comments on California Bar Exam & Buckendahl/ACS Study

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The State Bar of California
180 Howard Street
San Francisco, California 94108

RE: Comments on California Bar Exam & Buckendahl/ACS Study

Dear Sir or Madam:

1. The Buckendahl/ACS study looks flawed.

Most of my comments relate to the California Bar’s recently commissioned study, Chad W. Buckendahl, Ph.D., ACS Ventures, *Conduct a Standard Setting Study for California Bar Exam: Final Report* (Jul. 28, 2017) [henceforth Study]. Many aspects of the Study look odd.

A. The Study is the California Bar’s commissioned self-serving political statement, not a serious scientific inquiry into possible problems with the California Bar.

First, the Study’s purpose is to self-servingly bolster the California Bar’s current scoring practices. This purpose is political rather than scientific. The study presents little critical thinking about possible problems with the current scoring system.

B. The Study looks gamed through “exemplar,” i.e. answer, group labelling and inclusion of far more high-scoring answers for review than in the actual test results.

The Study looks prone to gaming by selecting exam answers for the twenty panelists to review. The Study used twenty panelists to review exam answers. Figure 1 shows the “[d]istribution of observed scores and selected exemplars [answers] for written section of the California Bar Examination from July 2016.” The blue “Actual” bar graph matches the “Actual” percentage distribution in the table in Figure 1. Likewise, the red “Selected” bar graph matches the “Selected” percent-

1 6 para. 3
2 7 para. 4 l. 1 (“Panelists and Observers”).
3 Study 12.
age distribution in the table. “Selected” means the “exemplars,” i.e. exam answers, reviewed by the panel.4

The Study starts with at least two doubtful procedures. First, without explanation, “30 exemplars for each question were selected to approximate a uniform distribution, (i.e., about the same number of exemplars across the range of observed scores).”5 Second, “these exemplars were then randomly ordered and only identified with a code that represented the score that the exemplar received during the grading process in 2016.”6 The panelist then ranked the “exemplars,” i.e. answers.7

But, regarding the first procedure, as Figure 1 shows, including equal numbers of answers across the range put a far higher percentage of high-scoring answers before the panelists than in the actual test July 2016 results. The panelist would then not make as many fine distinctions between lower-scoring answers. By seeing so many higher-scoring answers, the lower-scoring answers would seem less-competent than they might seem in isolation or in a group of more lower-scoring answers as in the actual test results. In other words, the Study’s “verification” procedure itself persuaded the panelists to shift the competence curve upward and away from the mean and median of answers.

Further, regarding the second procedure, labelling the answers with a code destroyed the panelists’ independent ranking by strongly suggesting groupings and rankings.

C. The Study fails to address the charge that its exam is a trade-group barrier.

The Study fails to address underlying biases. The University of California Hastings College of Law Dean Faigman has criticized the California Bar “a trade group that masquerades as a state agency.”8 Nothing in the study or the Bar’s publication’s squarely answers the charge that the scoring seems to be more of trade group. “The panelists were licensed attorneys . . . .”9 Thus, all the panelists had an innate interest in preventing more competition from more licensed lawyers in California. The Study fully fails to address this underlying bias.

4 Study 12 para. 3 (“Operational Standard Setting Judgments”) (stress added).
5 Id. at 11 para. 1 ll. 1–2.
6 Id. at 11 para. 1.
7 Study 7 par. 4 l. 1.
8
D. Much of the review process and exam grading remains opaque.

The comment process remains opaque. None of the “public” comments seem to have been posted online.

The Study leaves the exam grading opaque.

The California Bar maintains that its standard is the same as decades ago, but the older exams are not online for the public to compare them with the latest exams.

The study notes observers. Did the observers have any comments?

2. The California Bar fails to address the exam’s unrealistic time pressures.

Due to time pressure, typing speed can become a significant factor. Former California Governor Pete Wilson famously said he could not have passed the California Bar exam until he took a typing class.

At random, I looked at the California Bar’s example answers for the first essay question in July 2012. The first example answer has 2086 words. Without stopping to think whatsoever, this translates into 35 words per minute for a 60-minute essay. With 15 minutes for planning, thinking, etc., the typing speed rises to 46 words per minute.

Rather than having panelists rank the papers, a more interesting study of the lawyering skills for real-world practice would be to randomly select licensed lawyers without warning to answer three California Bar essays in three hours without a transcriptionist. The Bar would then grade their answers and compare them to the latest exam results.

I hope the California Supreme Court finds these comments helpful.

Though I am in Detroit, I am filing these comments before midnight Pacific Time.

Sincerely,

/Mark R. Carter/