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Gayle E. Murphy
Senior Executive, Admissions
Committee of Bar Examiners of the State of California
Office of Admissions
180 Howard Street
San Francisco, CA 94105-1639

Dear Ms. Murphy:

We thank you for your letter of July 31st (received August 8th) -- which notifies our project team that our request to conduct a study using California Bar data has been turned down. You wrote, "I understand you are disappointed by the Committee's action, but please keep it in mind that it was only after serious study of the matter, and all the information submitted..." We are indeed disappointed. We do not think the reasons you advanced for turning down our request hold up to objective scrutiny. Regrettably, we find it hard to avoid the conclusion that your decision has been driven primarily by a (perhaps institutional) desire to neither study, nor assist others to study, the serious issues we seek to explore. In the balance of this letter, we explain why we think the reasons offered for rejecting our proposal simply won't wash to any fair-minded observer.

1) You claim in your letter that "while [our study members] have made assurances that the identities of individual test takers and law schools would be protected, there remains the possibility that this information could be 'data mined' by someone with the

technical/professional savvy to do so.” This is simply not true, and you know it (or at least should know it, because we have thoroughly debunked this criticism). Throughout this entire process, we have made clear that the actual data files on students taking the bar would be kept in the possession of Drs. Stephen Klein and Roger Bolus, the two psychometricians who currently *already* have access to all the data and who conduct all of the bar’s internal studies. Our study team would receive from these two researchers only the results of aggregated analyses that we ask them to perform on the data. The sole difference between our proposed study and ones the Bar already publishes lies in the questions that would be asked – not the level of person-specificity at which the results would be reported. We have consistently explained that each and every one of the cohorts of applicants on which we might ask that analyses be performed involves hundreds of persons, far more than is necessary to protect the identity of any of the individual test-takers. And to put to rest any residual concerns on this score, we have offered – an offer whose rejection has never been explained – to allow the Bar to review any article using the data well before publication to ensure that nothing any of us on the project says could enable a reader to discern any individual bar applicant’s performance or personal data.

2) You claim in your letter, and have repeatedly claimed over the past year, that personal data of bar exam applicants has been released in the past *only* for those commissioned by the Bar to do the Bar’s own studies. As noted above, our proposed study would stay within this “precedent” by keeping the data in the hands of Klein and Bolus. Moreover, we have recently learned that your statements about the Bar’s own precedent are themselves inaccurate. We have discovered at least two cases in which the Bar released individual information to outside researchers. In 1994 and 1995, the Bar participated in the national Bar Passage Study, conducted not by the Bar itself but rather by the Law School Admissions Council (LSAC). Our information indicates that your office actually supplied LSAC with the very names of students who passed *and who failed* examinations given in those years. And in 2001-02, the California Bar cooperated with the “After the JD” study conducted by the American Bar Foundation (ABF). In this instance, your office supplied ABF with the names of those who had passed the Bar, and cooperated in ABF’s subsequent attempts to locate addresses for these individuals and mail surveys to them. These cases –unlike our proposed study -- actually did involve the release of personal data about bar-takers.

All of this raises the obvious (and completely unanswered) questions: Why is our proposed study, which comes with the backing of the U.S. Civil Rights Commission and a very wide array of distinguished scholars, being treated differently from other major studies you facilitated in the recent past, and why was your own Committee not informed of the Bar's cooperation with these other studies as it considered our request?

3) Your letter to us implies that our study would be inconsistent with the assurances made to those taking the bar. You wrote: “Applicants are not informed that the personal information they provide may be shared by others for purposes unrelated to the bar examination...” Your statement is carefully worded, but when examined provides no support for your decision concerning our proposal. Applicants *are* told by the bar that they must permit the Bar to release extensive data about them “to the law school[s] to which [they] have been or will be allocated for purposes of qualifying to take the California Bar Examination.” (See Declaration that bar

applicants must sign.) But this disclosure of information to the law schools has no purpose any more directly “related” (to use your term) to the bar examination than our study would be.

Moreover, the only forms we know of that are signed by bar applicants do not in fact explicitly authorize the Bar to conduct its own internal studies – let alone studies conducted by the LSAC of the ABF -- which undeniably have included studies of law school admissions practices and the relationship between law school grades and Bar exam scores. The required Declaration signed by students authorizes “educational or other institutions to release to the Committee of Bar Examiners any information, files, transcripts, or records *requested by the Committee in connection with the processing of this application*” (emphasis added). As you know, your office uses this authorization to secure LSAT scores for almost every applicant, often *after* the exams have been taken and graded. This information is not obtained “in connection with the processing of [an applicant’s] application,” as this term might be narrowly read, but rather for research purposes – the Bar’s wide-ranging research purposes.

Let us be clear: We believe the Bar’s earlier studies, and the disclosure to and from the law schools themselves, are in fact “related to the bar examination” (again, your term) in that law school practices, including admissions practices, that affect how various groups fare on the Bar exam are certainly important for those in legal education (as well as in the Bar) to know about. Indeed, you yourself seemed (albeit perhaps unknowingly) to concede as much when, on page 3 of your letter, you wrote that the Bar has in the past published many studies “relative to law school admissions, the bar examination process and *similarly related* issues” (emphasis added).

But this merely brings us back to the simple and compelling reality that there is nothing in our research proposal that is in any way more “unrelated” to the Bar than previous studies or uses of applicant information. As a result, our study in no way even arguably violates any aspect of the agreement – as the Bar itself has interpreted and implemented that agreement in the past and the present – between the Bar and exam takers.

4) We are also quite troubled by what we see as procedural irregularities during the consideration of our request, irregularities that bear on the plausibility and sincerity of the reasons given for turning us down. You and Mr. Barbieri had raised privacy concerns as early as the fall of 2006, and, as you know, we wrote in response a detailed memo last November explaining why our study would not involve disclosure of any individual applicant’s data, and suggesting a variety of safeguards to address any possible concerns in this area. That seemed to be the end of those questions. As you note, Professors Henderson and Sander, and Dr. Klein, were present at the February 2007 meeting of the Committee to discuss our proposal, and yet during this meeting, neither your staff nor the Committee raised any questions about data confidentiality or, for that matter, whether the study fit within the Bar’s mission. Indeed, the only questions we were asked concerned whether we could broaden our study to include socioeconomic factors or other aspects of students’ legal education.

Your office then informed us, many weeks later, that a second meeting on our proposal had been scheduled for May 2007. At this meeting, several data analysts and psychometricians would attend to discuss with the Committee past research done for the Bar and how our proposal

fit within that tradition. Again, during this three-hour session, no one raised a single question about whether our study would implicate the Bar's privacy protections or the agreement the Bar had made with test applicants. Surely, if such questions really existed, that would be the place to discuss them, with experts present who were familiar with the way data is safeguarded in real-world research and under the Bar's procedures. The particulars of our study were raised only once, in a question from Mr. Alan Yochelson (the current Committee chair and a consistent supporter of our proposal), who asked Dr. Klein whether our study was appropriate. Dr. Klein strongly endorsed the study, noting he had done a similar project for the Bar twenty years before and there were many reasons to revisit the question.

You indicated to us after that May meeting that the staff would make a definite recommendation to the Committee at its June 29-30 meeting, and agreed that members of our group should meet with the staff well before that meeting to discuss a variety of issues such as funding of the study, how it should be structured, and so on. We tentatively arranged such a meeting. Then, around June 15th, you stopped returning our phone calls. You notified us by email, on very short notice, that the planned meeting was cancelled. On June 27th, you sent us by fax a copy of a memo sent to the Committee which announced the staff's recommendation to reject our proposal, but which literally gave not a single reason for this recommendation. We learned at this same time that we could attend the subcommittee's discussion of the recommendation on the afternoon of June 29th. As you knew, however, Prof. Sander and Dr. Klein were both unavailable that day, and the other members of our group (Profs. Amar, Williams and Henderson) lived far away. We do not know what happened at the June 29th subcommittee meeting, except that the subcommittee voted 6-1 to ratify the staff's negative recommendation. Prof. Sander was able to attend the June 30th meeting of the full Committee, and was allowed to speak, albeit for only 5 minutes. Even so, the full Committee's vote was far closer: 5-3, as we understand it. Had your staff followed a more reasonable and fair process – notifying us of the staff recommendation more than two days in advance of the meeting, giving us an opportunity to attend the subcommittee's meeting and address any residual concerns in full – we doubt the Committee would have ratified the staff's decision at all. If the Committee also knew, as we now know, about your office's past cooperation with outside research studies, it seems even less likely the Committee, or the Board of Governors, could ever endorse your actions.

All of this suggests the strong possibility that the actual reason for rejecting our request, as you have hinted to Prof. Sander on several occasions and as members of the Committee have said explicitly, is that our proposed study is "controversial" -- that is, it examines sensitive questions involving affirmative action policies and the huge disparities in bar passage rates that sometimes show up among different racial groups attending the same law schools. The fact that a proposed inquiry is controversial *might* be a reason for the Bar not to undertake or to fund such work itself. But it is deeply troubling for a public agency to take exceptional measures to withhold its data from scholars seeking to conduct their own investigation at their own expense.

We are, in sum, dismayed by the way our request has been handled and resolved. We think your stated justifications are, to be blunt, rather poorly-reasoned. For that reason they seem pretextual to us, and will, we believe, so seem to the outside world. We think the public's, and

the Bar's, interests would be best served by more rather than less analysis of available real-world data as it bears on contentious policy questions. For these reasons, we very much hope that you reconsider your decision. We remain willing to explore with your office other ways to facilitate analysis of this crucial information.

We thank you for hearing us out on this matter, and look forward to any additional response you would care to make.

Sincerely,

Vik Amar (UC Davis/ UC Hastings)
Richard Sander (UCLA)
William Henderson (Indiana Univ.)
Doug Williams (Sewanee Univ.)