

January 30, 2007

Whitnie C. Henderson, Chair
Assn. of California Water Agencies
910 K Street, Suite 100
Sacramento, CA 95814

Alan S. Yochelson, Vice-Chair
Office of the District Attorney
210 West Temple Street
Room 18-1128
Los Angeles, CA 90012

Dear Ms. Henderson and Mr. Yochelson:

I am a Professor of Law at the University of San Diego School of Law and former dean of the University of Minnesota Law School. It has come to my attention that the Committee on Bar Examinations of the California State Bar is considering a proposal to study the causes of lower bar passage rates among nonwhites taking the California Bar. As I understand it, a group of distinguished scholars have promised to secure their own funding to study California's unique archive of in-depth data on bar takers and bar results. This study will therefore entail little or no cost to the Bar itself. I also understand that the project team is consulting with a diverse array of other social scientists to develop careful tests of various competing hypotheses. This seems to me a project very worthy of the Bar's support.

All of us who have been active in legal education over the past generation have been distressed by the very large and continuing disparities in bar passage rates across racial lines. The well-known Bar Passage Study conducted by the Law School Admissions Council found blacks were four times as likely as whites to fail that bar on their first attempt. Research by RAND's Stephen Klein – one of the researchers leading the proposed new study – has shown that large numbers of blacks and Hispanics in California do not pass the bar even after repeated attempts. These disparities have been a major obstacle in the effort to advance greater racial diversity in the California bar.

The scholars proposing this new study – including Klein, Dr. Richard Sander of UCLA, Professor Vik Amar at UC Hastings, Professor Bill Henderson at Indiana University and Dr. Doug Williams of Sewanee University – wish to investigate whether students who face a large credentials gap with their law school classmates learn less in such an environment and thus have greater difficulty on the bar. This is undoubtedly a sensitive issue, and I am aware that some in the law school community are concerned that research on these topics might be used to attack affirmative action policies. However, given the recent scholarship on the so-called "mismatch effect", I think this is an important issue to explore, and that well-reasoned results can generate improvements to, rather than simply elimination of, the various existing affirmative action strategies to the

extent they are permitted by law. And the California bar data appears to be quite possibly the best data available anywhere to study these questions carefully.

Also commending the project is the balance of the research team. Within the capable group, Klein has written skeptically in the past about whether there is even a mismatch effect in legal education; Henderson has criticized overreliance on standardized tests; Sander has been a leading proponent of improved academic support programs; and Amar litigated against the constitutionality of Proposition 209 and was an important defender of racial affirmative action in the *Grutter* litigation.

I urge the Committee of Bar Examiners to cooperate in this extremely worthwhile study.

Sincerely yours,

Carl A. Auerbach
Distinguished Professor of Law
University of San Diego
Dean Emeritus & Professor Emeritus
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