

January 15, 2007

Gayle Murphy,  
Senior Executive for Admissions  
Office of Admissions  
State Bar of California  
180 Howard Street  
San Francisco, CA 94105

VIA Fax and Email

Dear Ms. Murphy:

On behalf of the Society of American Law Teachers [SALT], the largest membership organization of law teachers in the United States, we write to ask that the State Bar of California consider the serious implications raised by the release of individual bar exam scores for the research purpose proposed by Dr. Richard Sander, et al.

The bar exam traditionally has been used as a measure of minimum competence,<sup>1</sup> although SALT has questioned whether the existing bar examination is truly a valid measure of competence to practice law.<sup>2</sup> However, even if one accepts that the existing bar examination is a valid measure of what it seeks to evaluate, Dr. Sander's research proposal is based on a radical departure from the exam's stated purpose of simply measuring whether a bar applicant has at least the minimum competence to practice law.

Dr. Sander seeks individual bar exam scores to further test the "mismatch" hypothesis (i.e. that affirmative action actually harms minority students and that many minority students would be better off at non-elite schools). To further test this hypothesis, he and his colleagues seek to use individual bar exam scores as a measure of what law students learned in law schools. To be exact, they state that:

Scores not only let one distinguish the relative performance strength among students who pass the exam (or among those who fail) Just as importantly, the bar scores are a measure of what law graduates *have actually learned*; this allows

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<sup>1</sup> See e.g., *Tyler v. Vickery*, 517 F.2d 1089, 1102 (5<sup>th</sup> Cir. 1975) (noting that the bar exam was designed "solely to assess the legal competence of Bar examinees"); *Dinger v. State Bar Board*, 312 N.W. 2d 15 (N.D. 1981) (noting that the bar examination was intended to assure the public that persons admitted to practice have met minimum requirements). The National Conference of Bar Examiners itself notes that the purpose of the exam is to measure minimum competence. See [www.ncbex.org/multi-state-tests/mbe/mbe-faq/myths-and-facts/](http://www.ncbex.org/multi-state-tests/mbe/mbe-faq/myths-and-facts/) (defending the exam against assertions that it fails to measure minimum competence to practice law).

<sup>2</sup> *SALT Statement on the Bar Exam*, 52 J. of Legal Educ. 446 (2002).

one to study not only how the “mismatch” might affect bar passage, but also how it might affect *actual learning*.<sup>3</sup>

If individual bar exam scores become a measure of how much one has learned in law school, the bar exam shifts from a test seeking to measure overall baseline competency to one in which individual bar scores are understood to deem some as “more competent” to practice than others because some would be shown to have “learned the law” better than others. This paradigm shift opens the door for the misuse of this information by others and sets a dangerous precedent. Using the scores to show how well students “learned the law” also ignores the fact that, as they prepare for the bar exam, students are told repeatedly that it is not an exam they should aim to “ace.” The aim is only to pass. It cannot be reasonable to consider the scores as effectively judging relative merit when the test-takers do not themselves perform with that judgment in mind.

If one equates bar exam scores with what bar applicants have actually learned in law school it would not be illogical for U.S. News and World Report to seek release of the scores so that it can have this information for its law school rankings (to show which schools “better taught” the law). Likewise, potential employers might demand release of this information as a measure of how well potential employees “learned the law” Consumers may seek this information before hiring lawyers.<sup>4</sup> In sum, once the State Bar releases the data for the purpose of using it to measure how well law students have learned the law at their respective law schools, it may be hard to close the Pandora’s Box.

Additionally, the release of bar exam scores for the purpose of this study has serious potential implications for legal education. If bar exam scores become equated with what applicants have learned in law school, law schools may find themselves forced to “teach to the test” at the expense of providing students with a broad-ranging education that exposes them to bigger jurisprudential and justice issues and that prepares them for the broader practice of law. Thus, the release of individual scores to test Dr. Sander’s hypothesis would have wide-reaching potential effects on what is taught in law schools and on how that material is taught.

Finally SALT is concerned about the potential negative impact upon minority bar applicants and attorneys. Minority attorneys already face a variety of misperceptions about their qualifications to practice law, from misperceptions that they were admitted into law school only because of affirmative action, to misperceptions that they simply are not as smart or qualified as their white counter-parts. These perceptions are often based

<sup>3</sup> Sept. 5 2006 Memorandum To Gayle Murphy from Dr. Richard Sander et al at page 3 (emphasis added).

<sup>4</sup> Once exam scores are allowed to be equated with how well applicants “have learned the law” it is not unreasonable to assume the bar exam might metamorphize into a ranking mechanism. Should this occur, it would open the door to a host of legal challenges. See e.g., *Hearn v. City of Jackson*, 340 F. Supp. 2d 728, n. 9 (S.D. Miss. 2003) (noting that if a test is used to rank rather than to screen for minimum competence, validation studies must show that higher test scores predict actual better job performance.)

upon the results of standardized tests which are biased in many respects<sup>5</sup> or upon general biases and prejudices inherent in our society. If it turns out that individual bar exam scores are used to indicate that minority applicants have not "learned the law" as well as their white counterparts at similar schools, something the bar exam was never intended to measure in the first place, then the California State Bar may unwittingly contribute to the misperceptions already confronting minority bar applicants and attorneys.

SALT respectfully requests that, before responding to Dr. Sander's request, the State Bar of California consider these and other wide-ranging implications of releasing individual bar exam scores for the purpose of seeing how well bar applicants "learned the law" at their respective law schools. If the State Bar does decide to release this information to Dr. Sander and his colleagues, SALT urges that the information also be released to other scholars and researchers. This is especially important given that the assumptions and methodology used in Dr. Sander's other articles about the "mismatch" theory have been seriously questioned by many noted academic and empirical scholars.<sup>6</sup> Thus, if this information is made available, it must be made equally available to those seeking to question the validity of the assumptions, methodology and conclusions drawn by Dr. Sander and his colleagues.

Thank you for your consideration of this request.

Sincerely,

Eileen Kaufman & Tayyab Mahmud  
Co-Presidents of SALT

<sup>5</sup> See e.g., Dr. Ray Freedle, *How and Why Standardized Tests Systematically Underestimate African-Americans' True Verbal Ability & What To Do About It*, 80 St. John's L. Rev. 183 (2006) (discussing his and others' findings that standardized tests systematically underestimate the abilities of minority students); see also, Phoebe A. Haddon and Deborah W. Post, *Misuse and Abuse of the LSAT: Making the Case for Alternative Evaluative Efforts and a Redefinition of Merit*, 80 St. John's L. Rev. 41 (2006) (noting that "[a]lthough test makers suggest that there is no cultural bias in the test and they can support this with their own research, the persistence of the sorting effect of standardized tests suggests that there is some relationship between identity and performance of certain cognitive tasks. The debate has centered on genetic and innate differences, on the one hand, and nurture or social, economic, and sometimes cultural differences on the other.)

<sup>6</sup> See e.g., David L. Chambers et al., *The Real Impact of Eliminating Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander's Study*, 57 Stanford L. Rev. 1855 (2003); Ian Ayres & Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers*, 57 Stan. L. Rev. 1807 (2005); David B. Wilkins, *A Systematic Response to Systemic Disadvantage: A Response to Sander*, 57 Stan. L. Rev. 1915 (2005); Daniel E. Ho, *Scholarship Comment: Why Affirmative Action Does Not Cause Black Students to Fail the Bar*, 114 Yale L. J. 1997 (2005).