MEMORANDUM

To: Gayle Murphy and the Committee of Bar Examiners
From: Vik Amar, Bill Henderson, Steve Klein, Rick Sander and Doug Williams
Date: January 26, 2007
Re: Memo to the Committee from William Kidder

We received on Friday, January 19, 2007, a copy of a 20-page memo William Kidder has submitted to the Committee of Bar Examiners. Kidder details several concerns about our proposal to study California Bar data under the auspices of Drs. Klein and Bolus. Although we disagree with most of Kidder's arguments, we are glad to have his arguments set down on paper; it is easier to deal with specific, concrete criticisms than vague concerns and rumors. Indeed, since for the most part, Kidder's arguments reflect either a misunderstanding of our empirical tests or an unfamiliarity with the data and the procedures we have laid out for our analysis, consideration of Kidder's objections and our responses serves to only strengthen the case for our request.

The Feasibility of our Prop 209 Analysis

As discussed in detail in our NSF proposal, one of the three analyses proposed by our team is an analysis of the effects of Prop 209 on bar passage outcomes. Prop 209 sought to prevent public institutions in California from taking race into account in awarding substantive benefits, and it had the effect of limiting the use of race in admissions decisions by California's four public law schools. In the three classes before Prop 209 (1994-96), the four UC law schools matriculated 648 students who identified as black, Hispanic, or American Indian. In the three classes after Prop 209 (1997-99), those same schools matriculated only 343 students from those same groups, a drop of about three hundred students (or nearly 50%). What happened to those students? Some of them no doubt decided to attend law school out of state, but most apparently remained in-state, attended a different law school, and eventually took the California bar. A key analytical question is whether those students did better or worse on the bar exam – in particular, did those students who went to a less elite law school, and thus were closer in credentials to their classmates, perform better or worse on the bar exam as they would have had Prop 209 never passed and they had attended more elite UC schools? We can't know the exact size of this group without examining the bar's databases, but in all likelihood our before-and-after comparison will include many hundreds of students.

Kidder's memo seems not to apprehend our basic methodology here. He is under the (mis)impression that we are primarily interested in examining the outcomes of the relatively small number of black and Hispanic students who have attended the UC law schools post-209. But this group is largely irrelevant to this analysis. Kidder's lengthy critiques on this point are thus completely off the mark.

Similarly misguided are Kidder's particular points about UC Hastings. Kidder contends that Hastings' pre-209 admission procedures mostly relied on socioeconomic factors other than race to grant preferences, and that therefore Hastings should be

"excluded" from the analysis. This is wrong for two reasons. First, the mismatch theory that we are investigating does not make any distinction among types of preferences. If the theory is correct, a student admitted with much lower credentials than his classmates can experience mismatch effects, whether the reason for the preference is race, age, gender, or socioeconomic status. Second, the number of blacks, Hispanics, and American Indians matriculating at Hastings did fall from 166 in the three pre-209 years (1994-96) to 121 in the three post-209 years (1997-99), a seemingly statistically significant drop. This is not as steep a decline as one sees in the other UC schools (a point noted in our NSF proposal) but it still suggests an important shift in the use of preferences by Hastings. Those displaced from Hastings are therefore interesting and relevant to the study.

Confidentiality issues.

        Much of the Kidder memo implies that the personal information of persons taking the California bar – in particular, the bar performance of individual minorities at various UC law schools – will somehow be compromised or revealed by our proposed study. This is a completely groundless concern. Kidder seems to fear that the study would make statements such as, "In 2001, seven of thirteen blacks graduating from Boalt and UCLA failed the bar, and six passed," and that someone might infer from this whether some particular black graduate passed or failed.

        Kidder, perhaps because he is not a professional academic steeped in the culture of a research university, may not fully realize that to suggest those of us doing the study would jeopardize individual information is to make a serious accusation. Universities over the past generation have set up Human Subject Protection committees to insure the privacy and protection of persons covered by research. This study would have to pass through University of California Human Subjects review before any data could be collected or analyzed. This is an extremely careful and exacting process. We, as individual researchers, would be in both legal and professional jeopardy if we disclosed information that could be linked to individuals.

        Dr. Klein has completed dozens of studies for the California Bar over the past generation; in no case has there been any claim that he has disclosed data that could be traced to individuals. Similarly, Dr. Sander has published many studies dealing with a variety of legal education issues. Anyone who examines any of this literature can see the absurdity of claiming that these published findings jeopardize individual identity.

        In the present study, we do not in fact contemplate making *any* school-specific disclosures. To put it even more strongly, it is not necessary for this research to identify even *classes* of law schools, though that is likely to be helpful in explaining the results. The point of this work is to analyze the effect of a key variable, which we can call "academic mismatch" for the sake of convenience, upon bar performance. One can describe this effect through a table showing the impact of a variety of variables on the bar scores of individual bar takers, showing the impact of several different analytic factors – including mismatch – upon the aggregate outcomes of bar takers.

As we noted in our November 19th memo to the Committee, we propose to submit any report or article we prepare to the Committee of Bar Examiners for review. At that point, the Committee would be able to see concretely what types of statements we find it useful to make, and could ask us to remove any data or tables that even remotely risk the disclosure of individual information. We cannot imagine any stronger safeguard.

The Problem of Low Graduation Rates

A third issue raised by Kidder is the problem of disparate graduation rates. He points out that lower-ranked law schools in California have higher rates of attrition than higher-ranked law schools, and is concerned that this could lead to a biased result. To make this more concrete, suppose we have the following example. Twenty students are admitted to Elite Law School with LSAT scores of 155; the school's median LSAT score is 165. Twenty other students with similar LSAT scores (and other credentials) attend Middle Law School, where the school's median LSAT score is 155. Subject to a variety of other tests, we would say the firsts group of twenty faces a "credentials gap" while the other group does not. We are interested in seeing which group does better on the bar exam. Suppose, however, that Middle Law School flunks out half of the twenty students; then we would be comparing ten students from Middle Law School with the twenty at Elite Law School. Kidder's point is that this might not be a fair comparison, because the ten students at Middle have already survived a weeding-out process and might therefore be expected to do better on the bar.

This is a reasonable insight--one that we ourselves had been thinking and talking about. We have two responses. First, the attrition data presented by Kidder vastly overstates the magnitude of the data limitations. The figures reported by Kidder combined 1L academic attrition and 1L "other" attrition. The latter category is overwhelming students who, after a successful 1L year, transfer to a more prestigious institution. (The legal press has amply documented this trend.) The table below disaggregates the relevant data for all California ABA-approved law schools.

School	Academic	Other Attrition	Total	Total Attrition % (used by Kidder)	Academic Attrition %
UC - Berkeley	0	3	3	1.1%	0.0%
UC-Davis	0	1	1	0.5%	0.0%
UC-Hastings	5	8	13	3.0%	1.2%
UCLA	0	16	16	5.2%	0.0%
California Western	30	56	86	29.6%	10.3%
Chapman	4	12	16	8.8%	2.2%
Golden Gate	62	45	107	28.7%	16.6%
Loyola Marymount	18	28	46	10.8%	4.2%
McGeorge	29	18	47	13.1%	8.1%
Pepperdine	14	18	32	12.6%	5.5%

Univ. San Diego	6	22	28	8.3%	1.8%
Univ. San Francisco	20	26	46	18.3%	8.0%
Santa Clara	22	16	38	11.9%	6.9%
USC	3	8	11	5.4%	1.5%
Southwestern	28	31	59	17.5%	8.3%
Stanford	0	1	1	0.6%	0.0%
Thomas Jefferson	26	26	52	13.4%	6.7%
Western State	3	17	20	18.5%	2.8%
Whittier	58	63	121	31.0%	14.9%

As you can see, academic attrition tends to be small proportion of total attrition; at no California law school is academic 1L attrition more than 39% of total attrition, and in most cases, the proportion is much smaller. Further, it is reasonable to assume that the many very successful white and minority students fall into the "other" category—many of them are transferring to more prestigious law schools. Although the data supplied by the California bar will not permit us to capture this movement, these successful students who transfer (and eventually graduate from) a more elite California law school actually bias the sample *against* finding a mismatch. The reason is simple: during their 1L year, their credentials are much more likely to be similar to their classmates.

Our second response is based upon our analysis of the LSAC Bar Passage Study (BPS). Despite the difference in school-level attrition rates, statistical analysis of the LSAC Bar Passage Study (BPS) data reveal that students with similar credentials who attend schools at differing levels of eliteness tend to graduate law school at roughly comparable levels. In fact, in some comparison groups, graduation rates for minorities with relatively high credentials are actually *higher* at less elite institutions. In other words, in our example above, probably 18 of the 20 students at Elite Law School are likely to graduate, but 18 or 19 of the comparable students at Middle Law School are likely to graduate, because they are started out at a relatively strong position in their class. Attrition will not produce a serious confound to our study unless minority students with relatively strong credentials at *less* elite schools are flunking out a significantly higher rates than students with identical credentials (i.e., "matched") at more elite schools. The best available evidence—i.e., the BPS data—does not support the existence of such a pattern.

We noted this issue in our NSF proposal, and we think it is an important matter to keep in mind as we study the data, but there is simply no evidence that this phenomenon will bias our analysis towards finding a mismatch effect. Quite the contrary.

Data Availability

Kidder also raises concerns about our project team having preferential access to the data we are seeking. We discussed the data access issue in detail in our November 19th memo, and we are, of course, still in favor of the widest-possible access to this data that is consistent with the Committee's concerns and protection of individual subjects. There are a couple of overarching points to keep in mind, however. First, we are not actually seeking a "release" of data; we are seeking permission to collaborate with Dr.

Klein and Dr. Bolus on specific analyses. Klein and Bolus would retain possession of the data; we would examine output, suggest tests, and discuss results. Second, we propose to pay all of the costs associated with this analysis. Third, we have already secured an independent appraisal of our research design from the National Science Foundation, which is available to the Committee. Fourth, we have committed ourselves to two reviews of our findings: first, by the Committee itself, and second, by the Journal of Empirical Legal Studies. We are committed to publishing our work in JELS. It would be reasonable for the Committee to consent to any group of researchers who could meet all of these requirements.

Credibility of the Project Team

Kidder's final criticism of our project concerns the makeup of our research team, which he contends is biased against affirmative action. This is simply untrue. Kidder (and probably some other opponents of this work) tend to assume that anyone who is willing to think about racial preferences in an analytical way is an opponent. Hence, Kidder writes that "Dr. Klein has published articles critical (or at least skeptical) of law school affirmative action…" But the only examples Kidder offers are of analytical findings based on Klein's data analyses, such as Klein's conclusion that lower credentials of entering law students are associated with lower grades in law school. The leap involved in finding Klein to be biased is entirely unfounded.

The simple fact is that our group of scholars has an extraordinary record of concern with racial justice issues. Sander was president in the 1990s of two civil rights organizations and was involved in bringing many successful fair housing suits in Los Angeles County. Henderson is not only one of the best-known "testing skeptics" in legal academia, but started his academic career with an investigation of educational inequalities in the Cleveland school system that suggested a political and legal roadmap to regional integration at the K-12 level. Vik Amar, who has joined the project team in the past month, led a legal challenge to Prop 209 when it was passed and contributed to the University of Michigan's defense of racial preferences in the *Grutter* litigation. Both Amar and Klein have written skeptically about the "mismatch effect" in the past. The evidence that this team is biased towards any particular result is simply non-existent.

Conclusion

We have not tried to respond in this short memo to every small point raised in Kidder's 20-page memo. We think we have covered all of his major points, and we are happy to respond to the Committee on any other matter. Our big conclusions are two: first, most of the concerns raised about our study are based on a faulty understanding of what we seek to do; and second, for any genuine concern (such as with data privacy) there are simple and compelling solutions. We think all parties agree that these are very important issues to study; the question, we hope, is not whether to do this research, but how to make it as strong and useful as possible.