Section 1:

Summary

This section addresses the following points:

- The researchers seeking bar records wish to use them to test whether individuals who benefit from admissions preferences perform worse on the bar exam than they would have if they had attended a less elite law school.
- The California Bar was initially enthusiastic about the research, but rejected a collaborative study proposal when law school deans and minority activists objected.
- The Bar also rejected requests that it create an anonymized public database on the basis that it had no legal obligation to release the information.
- Opponents of the research assert bar-taker privacy as the motivation for their objections, but we believe opposition is driven by unjustified fears that the records will lead to a hasty dismantling of affirmative action programs.

The Mismatch Theory

For decades, one of the most distressing issues in American legal education has been the large and persistent gap in bar passage rates among racial and ethnic groups. National studies have shown that blacks are four times as likely as whites to fail the bar on their first attempt, and six times as likely to never pass. Since black law school students are also more likely to drop out of law school, a troubling picture emerges: Only one third of entering black law students will graduate and pass the bar on the first time. Most (more than 50%) will never become lawyers. Similar problems of smaller magnitude afflict Latino law students.

The California Bar (as well as other states) have verified that the bar exam itself is not discriminatory in design, because the racial disparity in bar outcomes disappears when LSAT scores, college grades, and most especially, law school grades were taken into account. The key problem is that African-Americans and Latinos are much more likely to receive low law school grades. Professor Sander and other researchers have hypothesized that the disparity in law school grades is caused, or at least exacerbated, by racial preferences in law school admissions. Upper-and-middle tier law schools tend to admit students belonging to these ethnic groups whose LSAT scores and undergraduate grades are significantly lower than those of their white classmates. Because the

credentials of students admitted without preferences are so similar and tightly bounded, the gaps in entering credentials might cause what social scientists call a "mismatch effect," meaning that students with significantly lower entering credentials will get very low grades, and that these low grades signify actual learning problems that would be avoided, or at least greatly mitigated, if the students attended law schools where their admissions credentials better matched the rest of their class. Sander theorized that the benefit a student would normally get from attending a higher-tiered school is overpowered by the negative effects of mismatch, and that these mismatch effects accompany any aggressive law school preference program, whether racially-based or tied to other types of student characteristics (e.g., some law schools use large preferences for older students or students with disabilities). Sander's research, using the limited records currently available, suggests that fully one half of the black/white bar passage gap may be due to the unintended effects of law school preferences.

The Bar's Records and In-House Research

Why are we seeking California Bar records in particular? The State Bar of California is surpassed only by New York in the number of applicants sitting for the bar annually. It has exceptionally great racial diversity among bar applicants. Most important of all, California has historically collected more data on bar-takers than any other state, which makes its archives by far the best extant source for a careful evaluation of the mismatch hypothesis.

The California Bar has been collecting data about the race, gender, and LSAT score of the vast majority of bar-takers since 1972. It's the only bar in the country that regularly publishes detailed statistical reports, and through the 1990s it was progressive in its pursuit of in-depth research, including studies of the Bar's internal validity, and the ways in which the bar can better test skills involved in legal practice. Much of this research effort was led by Dr. Stephen Klein, formerly of the RAND Corporation and the leading national authority on bar research.

The Bar's in-house research demonstrates that a mismatch study would not be a departure from past studies. One of Klein's reports, called "Are Bar Exam Scores Affected by Law School Admissions Practices", was designed to examine "whether minority students were likely to have a higher probability of passing the bar exam if they went to law schools where their LSAT scores were more similar to those of their Anglo classmates." (Klein and Bolus, 1988.) The report was inconclusive, but Klein and Bolus did find evidence consistent with mismatch effects, despite the crudeness of the models used in the paper. More recently, the Bar performed an analysis using 2000 bar exam data to explore the LSAT's relationship to law school admissions, grades, and ultimately, bar passage, so the Bar has consistently considered law school admissions and performance to be important factors in its bar passage studies.

Our Dealings with the State Bar

Our decision to file suit to compel the State Bar to produce records follows over two years of efforts to reach a cooperative agreement. The timeline below summarizes these efforts. Letters, memoranda, and other documents mentioned in this timeline are available for viewing on our website: www.seaphe.org/state-bar-petition.php

- 2005-2006. Sander had several meetings with Steve Klein, the Bar's psychometric researcher, to design a collaborative study to the effect of law school mismatch on bar exam performance. Klein suggested that Sander approach Gayle Murphy, the Bar's Director of Admissions and chief staff person to the Committee of Bar Examiners, to arrange the Bar's participation.

- June-September 2006. Sander put together a research team of economists and law professors to develop a detailed study proposal. The team provided Murphy with a summary of the research proposal.

- September 2006. Sander and Klein met with the Committee of Bar Examiners. After asking questions and discussing the proposal, the committee voted unanimously to advance the proposal for full consideration. TheVice-Chair, Alan Yochelson, told Sander that he thought this was an exciting proposal and he appreciated that we were studying these difficult issues. Murphy also expressed enthusiasm about the committee's reception of the proposal.

- October 2006. A subcommittee of the Committee of Bar Examiners met with law school representatives to discuss, among other things, the research proposal. After the subcommittee meeting, Murphy's tone became guarded. She told Sander that some law school deans were unfriendly to the study, and raised objections that this was an "anti-affirmative action study" and that the confidentiality of schools or students could be at risk. Sander noted that the concerns were easy to address.

- November 2006. The research team wrote a detailed memo responding to the concerns raised about the study and sent it to Murphy and Yochelson. The memo explained that the research team was generally very supportive of affirmative action, and the study would be led and co-authored by the Bar's own chief research analyst (Klein); a broad array of academics, and the US Civil Rights Commission, supported the study; confidentiality problems were non-existent, since Klein alone would have access to the records, making the study no different in its "privacy" aspects from the dozens of other Bar studies conducted and authored by Dr. Klein; and critics would be invited to get involved with the study.

- December 2006-January 2007. Vik Amar, a constitutional law professor at UC Davis and UC Hastings, joined the research team. Since Amar is a critic of the mismatch theory and an active defender of affirmative action efforts (having been the architect of the constitutional litigation against California's Proposition 209),

his addition to the team further demonstrated the team's lack of ideological tilt against the use of race-based admissions preferences. The research team also submitted external reviews from a National Science Foundation proposal expressing exceptional enthusiasm for the study and letters of support for the study from five US Civil Rights Commissioners, seven leading legal empiricists, and dozens of other scholars. The bar also received two letters of opposition during this period. One was from William Kidder, a staff person at the Office of Student Affairs for the University of California, and one from the Society of American Law Teachers (SALT), an activist organization of law professors. SALT's main objection seemed to be that our study would give undue importance to the bar exam.

- February-May 2007. At two lengthy meetings, the Committee of Bar Examiners reviewed the proposed research. No one raised any question about legal or privacy issues in the research plan. Indeed, at the May 2007 meeting, the only comments made about the proposed research were highly positive ones.

- Late June 2007. Murphy abruptly informed Sander that the State Bar staff would recommend that the proposed study be rejected. Over the objections of Yochelson, both the subcommittee and the full Committee of Bar Examiners voted to accept the staff recommendation and reject the proposal. The odd circumstances of these events are described more fully in a response letter from Amar and Sander to Murphy (www.seaphe.org/state-bar-petition.php)

- August-October 2007. Amar contacted the incoming President of the Board of Governors, Jeff Bleich to ask him to consider having the Board of Governors address the proposal. Bleich told the group that he supported the concept of the research if legal objections could be overcome. At its September 2007 meeting, the Board of Governors agreed to consider the Project SEAPHE research proposal at its November 2007 meeting. Leading up to the November meeting, the research proposal attracted considerable media attention, much of it balanced. However, two UCLA professors, Cheryl Harris and Walter Allen, published an inaccurate attack on Sander's prior research in the National Law Journal, and Harris, along with several civil rights activists, widely distributed emails to minority lawyers in California, painting a false and frightening picture of the privacy implications of the proposed research. The Harris and Allen article…

November 8, 2007. The Board of Governors held a meeting about the collaborative study proposal that was open to the public. As with the June 2007 meeting of the Committee of Bar Examiners, the Board's process seemed designed to derail a substantive discussion of the research proposal. Just before the meeting, the Governors received a closed-door briefing on supposed legal barriers to the Bar's participation in the research project. The team was not given any information about what these legal barriers might be prior to the meeting. After the team's presentation on the value of the research goals and the lack of a need for records to be released, the opponents made their presentation, which

focused on bar-taker privacy and the limitations on the type of research the Bar can perform. They also included false claims about the study, such as an assertion that UCLA's office for the protection of research subjects would not approve the study and that the study team was a polemical group. The research team was not given an opportunity to respond. Under the circumstances, it was foreordained that the Board of Governors would vote to reject the proposal.

- November 2007-January 2008. Sander filed a public information request for an anonymized version of the Bar's records. Sander's request included a mechanism to cluster the requested information so that it could not be used to trace the individual identities of any examinees. The California First Amendment Coalition sent an identical request a few months later. Importantly, the requests fully addressed and mooted the legal concerns raised at the Governors' November 2007 meeting. However, both requests were peremptorily rejected by the State Bar, without discussion, on the basis that it had no enforceable obligation to comply with our request.

- May 2008. Sander submitted a new request for public information, co-signed with Joe Hicks, a prominent civil rights activist, a former member of the California State Bar Board of Directors, and the Vice President of Community Advocates, Inc. The new request was substantively different from the previous request in several ways in order to add even greater privacy protections than what was provided in the first request. The new request supplanted the previous request. Again, CFAC sent an identical request. Sander's new request was rejected. In this way, CFAC's request was effectively rejected as well.

Goals of the Research

If our effort to secure the records is successful, we will make them available to all interested researchers. We have already assembled a team of distinguished social scientists to work on a mismatch analysis.

Our investigation of mismatch is not intended to end all debate about affirmative action, but rather to inform it. The legal community can only benefit from a careful study. If we find compelling evidence against mismatch, then law schools and their students will have confidence that preference admits receive unqualified benefits. An inconclusive study will also be a finding of a sort, as there will be little basis to doubt that minorities benefit from attending more elite law schools. But even a clear finding of mismatch (a finding that will no doubt be the subject of great scrutiny and extensive peer review) supports a wide variety of policy changes. Surely groups that oppose affirmative action on principle will perceive a finding of mismatch as exposing the flaws in preference policies, but law schools and policy-makers wishing to maximize the racial diversity of the bar can use mismatch to find an optimal admissions preference size. To us, transparency is both a means and an end, as it will give law schools incentive to be more accountable for the success of the students they admit, and provide adequate support. (Medical schools, for example, generally see all of their students through the national medical boards). At the

very least, prospective students and applicants will have better information about relative risk of bar failure at different schools that admit them. Regardless of the outcome of the mismatch study, an honest and open discussion about the effects of preferences will serve the public and the legal academy.

For More Information:

… about the Bar's legal obligation to comply with a public records request, see **Section 2: The Public Right of Access**

… about the public records request's privacy protocols, see **Section 3: Privacy Issues**

… about Project SEAPHE, visit our website at **www.seaphe.org**