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Case No. _____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

**REQUEST TO IMPLEMENT A SCORING ADJUSTMENT
ON 2025 CALIFORNIA BAR EXAMINATION
ADMINISTRATIONS AS INCENTIVE FOR
EXPERIMENTAL STUDY PARTICIPATION**



PREPARED BY
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I. INTRODUCTION

Since 2022, the State Bar has been planning to study the effects of various testing modalities and conditions on test taker performance through the California Bar Examination Experiment (Experiment), with support from a grant provided by the AccessLex Institute, a nonprofit policy and research organization. The Experiment aims to compare test taker performance under different conditions, such as extended time versus standard time, remote versus in-person testing, and open-versus closed-book examinations. The project also seeks to gather data to support future recommendations for bar examination delivery and identify opportunities to reduce disparate impacts based on race, gender, ethnicity, or other characteristics.

In August 2024, the State Bar executed an agreement with Kaplan Exam Services, LLC (Kaplan), a subsidiary of Kaplan North America, LLC, to create new multiple-choice questions for

the California Bar Examination.¹ Subject to this Court’s approval of the use of a scoring adjustment to the 2025 administrations of California Bar Examination as an incentive for Experiment participation, the State Bar plans to field test and study the new examination questions and proposed examination administration modalities in advance of the February 2025 administration of the California Bar Examination, and has proposed a revised plan for the Experiment to AccessLex in light of these important new developments.²

The current proposed iteration of the Experiment would be conducted in two phases. In phase 1, to be conducted in November 2024, a sample of the new multiple-choice questions will be field tested remotely and in test centers using the examination administration vendor selected for the February 2025 California Bar Examination. In phase 2, an experimental

¹ The agreement contemplates that Kaplan will develop essay and performance test questions as well as multiple-choice questions in the future. Because the State Bar seeks to conduct the Experiment in 2025, however, the proposed field test only pertains to the newly developed multiple-choice questions.

² The transition to a new vendor for the multiple-choice portion of the February 2025 administration of the California Bar Examination is the subject of a contemporaneously filed parallel petition.

essay and short experimental multiple-choice test will be administered on a third day after the two days of the July 2025 California Bar Examination.

At its August 16, 2024, meeting, the Committee of Bar Examiners (Committee) voted to recommend that the Supreme Court of California direct the State Bar to implement a scoring adjustment and possible financial incentive for participation in one or both phases of the Experiment to maximize participation in the Experiment.³

Pursuant to California Rule of Court 9.6(a), the State Bar, following the recommendation of the Committee, respectfully requests that the Court issue an order permitting the State Bar to implement the grading incentive as described herein.

II. AUTHORITY OF THE COURT

Because this request pertains to admission to the practice of law and, in particular, how the California Bar Examination is graded, it is submitted to this Court for approval pursuant to the

³ The State Bar has included funding for a financial incentive in its revised proposal to AccessLex. The amount of the incentive, if any, will be dependent upon receipt of grant funds for this purpose.

Court's inherent authority over attorney admissions and California Rule of Court, rule 9.6(a).

The Court has inherent authority to admit persons to the practice of law in California. (Cal. Rules of Court, rule 9.3; *In re Attorney Discipline* (1998) 19 Cal.4th 592, 593; *Hustedt v. Workers' Comp. Appeals Bd.* (1981) 30 Cal.3d 329, 336; *Brotsky v. State Bar* (1962) 57 Cal.2d 287, 300.)

Further, under California Rules of Court, rule 9.6(a), the Committee is responsible for determining the California Bar Examination's format, scope, topics, content, and grading process "subject to review and approval by the Supreme Court." The Committee has approved the requested adjustments to the grading of the California Bar Examination⁴ and the State Bar is hereby seeking this Court's approval.

III. BACKGROUND

Subsequent to the initiation of the initial Experiment, a once simmering budget imbalance in the State Bar Admissions Fund began to escalate to a crisis point. Rising facility and

⁴ (Appendix of Exhibits [AE], Ex. A [Committee of Bar Examiners Staff Report for Agenda Item 3.4, dated August 16, 2024 at pp. 4-8].) Hereafter, all references to exhibits refer to exhibits included in the AE.

proctor costs, increasing numbers of testing accommodations applicants, and stagnant examination fees resulted in a 2023 projection of less than three years of solvency in the Admissions Fund. In response, the State Bar initiated fee increases, adopting new bar examination fees for attorney and non-attorney applicants in September 2023, and began to assess how a transition to remote and/or test-center-based examination administration might occur⁵.

The desire to transition to remote examination administration in particular was bolstered by both applicant-expressed preference and data. In January 2024, the State Bar’s Mission Advancement and Accountability Division completed a comparative analysis, *The Impact of Remote Testing on Bar Exam Performance (Oct. 2020—July 2022)* (Remote Bar Exam Analysis), which utilized information collected during the pandemic, when the State Bar was compelled to adopt a remote examination modality, and following the pandemic, when the bar

⁵ If pursued, in-person status quo testing is estimated to cost \$8.4 million in 2025; hybrid/remote vendor options are forecasted at \$4.4 million. After personnel, expenses related to administering the California Bar Examination are the second largest budget item in the Admissions Fund. Reducing these costs is crucial to addressing the structural deficit in the fund.

examination returned to an in-person format. (Ex. B at pp. 10-28.) The analysis indicated no significant performance disparities between the two modalities, nor any substantial differences in performance among demographic groups in the remote versus in-person setting. Post bar examination surveys have consistently reflected an overwhelming preference (more than 75 percent of respondents) for either testing remotely or in a small group setting – like a test center – over the large standard test sites used to administer the bar examination now.

Attempts were made as far back as 2022 to secure the approval of National Conference of Bar Examiners (NCBE) to administer the Multistate Bar Examination (MBE) remotely; these efforts were unsuccessful.⁶

Driven by budgetary constraints in the Admissions Fund, the January 2024 analysis indicating that there were no meaningful differences in examination performance between

⁶ Currently, the Essay and Performance Test components are developed in-house with the help of contractors, while the multiple-choice MBE is supplied by NCBE. Because of this reliance on the MBE, the California Bar Examination schedule and format are dictated by the NCBE, which requires in-person exams at jurisdiction-run facilities, twice annually in February and July.

those who took the examination remotely or in-person, expressed applicant preference, and the inability to make headway with the NCBE, the State Bar issued a Request for Information (RFI) in January 2024 seeking a new vendor to develop questions for the California Bar Examination so that the State Bar could pursue a remote test administration option without being subject to the NCBE's administration restrictions.⁷

Ultimately, the State Bar contracted with Kaplan to develop questions for the California Bar Examination. Utilizing Kaplan to supply examination questions will permit remote and vendor-run test center administration in 2025.⁸ Though it will not be the primary examination delivery modality, a test-center-

⁷ The State Bar continued to repeatedly engage NCBE in discussions to explore the possibility of remote administration of the MBE throughout the vendor solicitation and selection process, but those discussions were not fruitful.

⁸ As described in the parallel petition seeking an order approving modifications to the California Bar Examination, effective for the February 2025 administration of the examination, the State Bar and Committee engaged in outreach with law schools and applicants both before and post-issuance of the RFI. Many of the concerns about a transition to a new test vendor were addressed in the contract with Kaplan. Concerns expressed regarding the need to field-test new questions could not be solely addressed contractually; the present petition outlines the State Bar's plan to ensure appropriate pre-testing of questions occurs.

based in-person option is important for two reasons: 1) survey data indicates that a portion of the applicant population has a preference for an in-person setting; and 2) certain types of testing accommodations may require in-person administration.

IV. PROPOSED EXPERIMENTAL DESIGN

As originally conceived, the Experiment was designed to analyze how different examination features affect various groups of test-takers and the full experiment was to occur in 2024.

Given the State Bar's recent contract with Kaplan, and the potential to deliver the bar examination in new ways, what had at one point been a distinct set of efforts – the Experiment and the transition to a new test development vendor – became connected as the importance of field testing newly developed questions rose to the fore. As a result, the State Bar – in response to stakeholder feedback and working with its psychometric experts – plans to modify the approach to the Experiment, which will now comprise two phases, as follows:⁹

⁹ Law students who are in their final year of law school study and registered with the State Bar, as well as applicants eligible to take the California Bar Examination in 2025, including repeat bar examination takers and those with testing accommodations, will be eligible to participate in both phases of the Experiment.

- **Phase 1 – November 2024:** Participants in phase 1 will be given 90 minutes to field test 49 of the new multiple-choice questions as well as the new remote and in-person test center administration approaches. According to test development and psychometric literature, a sample size of seven questions in each of the seven subjects is minimally sufficient to estimate knowledge in each area for a field test and to estimate the psychometric characteristics of the questions and reliability of a full form of the test.¹⁰ Expert psychometrician Chad Buckendahl and his team will rigorously analyze the responses utilizing established psychometric methods to ensure the validity, reliability, and fairness of the questions.¹¹ The field test will also help

Applicants who participate in the Experiment with qualifying testing accommodations will be given additional time in both phases.

¹⁰ (See Webb, *Criteria for Alignment of Expectations and Assessment in Mathematics and Science Education. Research Monograph No. 6* (1997) Council of Chief State School Officers, Washington, D.C., available at <<https://files.eric.ed.gov/fulltext/ED414305.pdf>> [as of September 9, 2024].)

¹¹ (See Downing, *Selected-Response Item Formats in Test Development* (2006) Handbook of Test Development at pp. 287-302, available at <<https://fatihegitim.wordpress.com/wp->

identify any potential issues with the new administration platform in advance of the February 2025 administration of the examination. The State Bar anticipates that it will have capacity for 4,300 participants for this phase of the Experiment.¹²

- **Phase 2 – July 2025:** The second phase of the Experiment will analyze the impact of various factors including extra time allowances, open-book formats, and the differences between remote and test-center examination administration.¹³ The second phase of the Experiment will

<content/uploads/2014/03/hndb-t-devt.pdf>> [as of Sept. 9, 2024]; Luecht, *Data and Scaling Analysis for Credentialing Examinations* (2017) Testing in the Professions: Credentialing Policies and Practice at pp. 123-152, available at <<https://tinyurl.com/4wwtsk7c>> [as of Sept. 9, 2024].)

¹² In the event that the number of applicants requesting to participate in the experiment exceeds the capacity available in test centers and via live remote proctoring, the State Bar will select the participants through random selection ensuring a representative sample of test takers.

¹³ Phase 2 will further advance previous efforts by the State Bar to analyze the differences in test taker performance between remote and in-person testing. While the Remote Bar Exam Analysis examined both remote and in-person testing modalities, the specifics of those modalities have since evolved. The remote proctoring model used during the pandemic – specifically, the record-and-review method – will be replaced by live remote proctoring, which more closely mirrors the experience of in-

take place the day after the July 2025 California Bar Examination. This phase will include one essay question and a short multiple-choice section, offered both remotely and in test centers. The State Bar anticipates that it will have capacity for up to 8,900 participants for this phase of the Experiment.

V. PROPOSED GRADING ADJUSTMENT AS INCENTIVE FOR PARTICIPATION AND BEST EFFORTS

To ensure that the Experiment data is valid, it is critical that participants are sufficiently motivated to perform well during both phases of the Experiment. Particularly with respect to the November 2024 field test, it is important that a robust sample of test takers participate and that they do so with a level of effort commensurate with efforts to take and pass the actual California Bar Examination.

person exams. Additionally, the State Bar plans to transition from large testing facilities to smaller, vendor-operated test centers for those applicants requesting an in-person examination beginning in 2025. These small test centers are located across the state and even outside of California, enabling more convenient access. Phase 2 will gather data that more accurately reflects these updated modalities and allows for a thorough comparison moving forward.

With these considerations in mind, at its August 2024 meeting, in response to stakeholder recommendations and historical research, the Committee considered a proposal modeled on experimental studies conducted in 1980. In the 1980 studies, participants received a grading adjustment on the California Bar Examination to incentivize their participation. Specifically, in August 1980, following the July administration of the California Bar Examination, the State Bar conducted research involving an “Assessment Center” examination component. (See Ex. C [Stephen P. Klein and Roger E. Bolus, GANSK & Associates, *An Analysis of the Relationship Between Clinical Legal Skills and Bar Examination Results* (1982)] at pp. 30-109.) The Assessment Center was an in-person, two-day study in which applicants took part in written and oral tasks including a simulated case. (See *id.* at p. 45.) Participants in this study who did not pass the July 1980 California Bar Examination were given the opportunity to replace the lower of their morning or afternoon session MBE score with their Assessment Center multiple choice score or, alternatively, to replace their lowest essay score with a higher Assessment Center essay score. (See *id.* at p. 47.) Out of 4,330

applicants who applied to participate in this study, a stratified random sample of 500 applicants was selected. (See *id.* at pp. 47-48.)

Similarly, as part of the administration of the July 1980 California Bar Examination, an optional experimental Special Session was added. (See Ex. D [Stephen P. Klein, GANSK & Associates, *An Analysis of the Relationship Between Trial Practice Skills and Bar Examination Results* (1983)] at pp. 111-140.) The Special Session score was treated as one-sixth of an applicant's total score if they failed the regular examination, incentivizing participation. (See *ibid.*) The Special Session achieved a high participation rate with 98.5% of July California Bar Examination applicants participating in that study. (See *ibid.*)

Having considered the efficacy of these studies in incentivizing participation and producing useful results, and recognizing the need to maximize both participation and effort in the Experiment to accurately field test multiple-choice questions prepared by a new vendor and new delivery methods in advance of the February 2025 California Bar Examination, the Committee

authorized seeking the Court's approval for a grading adjustment on the 2025 administrations of the California Bar Examinations as described below.

A. Eligibility for Scoring Adjustment

Both phases of the experiment will be open for participation to law students who are in their final year of law school study and registered with the State Bar as well as applicants eligible to take the California Bar Examination in 2025, including repeat bar examination takers and those with testing accommodations. Based on recent application numbers and informed by the participation rate in 1980, the State Bar estimates that up to 8,900 individuals would apply to participate in the Experiment should the Court grant this petition.

Participants in the phase 1 fall 2024 experimental study who meet a minimum threshold of performance would be eligible to receive a scale score adjustment on the multiple-choice section on whichever of the 2025 administrations of the California Bar Examination they attempt first.

Participants in the phase 2 July 2025 experimental study who meet a minimum threshold of performance will be eligible to

receive a scale score adjustment on the written (i.e., essay and performance test) section of the July 2025 California Bar Examination.

Applicants who participate in both phases would be eligible for two scoring adjustments, one to their multiple-choice score based on participation in phase 1 and one to their essay and performance test score based on participation in phase 2.

B. Minimum Threshold Score and Scoring Adjustment

Participants in the Experiment will be advised that they will only be eligible to receive a grading adjustment if they meet a minimum threshold score on the Experiment. This score is meant to ensure that participants are expending good faith efforts as they participate in the Experiment and that the resulting data analysis will closely replicate an actual bar examination. The State Bar psychometrician will analyze performance data and recommend to the Committee a minimum threshold score for each experimental group after each phase of the Experiment. The Committee will decide the minimum threshold score as a policy determination.

Through this petition, the State Bar seeks the Court's approval of a scoring adjustment to Experiment participants' scores on the California Bar Examination of up to one standard error of measurement¹⁴ for test takers who participate in and achieve the minimum threshold score in one or more phases of the Experiments.¹⁵ The precise number of points to be awarded for each phase would be determined by the Committee as a policy determination after considering a full psychometric analysis of the examination performance data after each phase and the recommendation of the State Bar psychometrician. The determination of the magnitude of the adjustment will be informed by the post examination data analysis and take into account that applicants must demonstrate minimum competency to pass the California Bar Examination. The same number of

¹⁴ A standard error of measurement is an inferential statistic that estimates the variability in multiple samples of a population. The actual calculation differs from examination to examination, but it is typically approximately 40 points out of the 2000-point scale.

¹⁵ As detailed in the proposed order, while participants who take the July California Bar Examination and participate in both phases of the Experiment will be eligible to receive a scoring adjustment for both the multiple-choice and written components of the examination, the State Bar proposes that the aggregate adjustment for both phases will not exceed one standard error of measurement in total for the entire examination.

points will be awarded to each participant who reaches the minimum threshold of performance in their respective experimental grouping.

Once the Committee determines the number of points to award, any scoring adjustments will only be made after the State Bar's scoring, scaling, and reappraisal procedures and processes have been completed.

Importantly, as the Court is aware, the California Bar Examination has for many years adjusted scores after each administration under its reappraisal process. Specifically, applicants who score within the approximate standard error of measurement – i.e., just below the passing score – receive a rescore of the written components of their examination. The proposed amount of the scoring adjustment as incentive to participate in the Experiment, therefore, would be consistent from a policy standpoint with the adjustments made during the reappraisal process. The proposed post hoc adjustment that would occur as part of the Experiment would be limited to those applicants who are still below the passing score following the regular grading policies and procedures of the State Bar.

Scoring adjustments will not be added to eligible Experiment participants' scores until all final scale scores are determined and thus will not affect the final scale scores of non-participants of future examinations.¹⁶

VI. CONCLUSION

For the foregoing reasons, the State Bar respectfully requests that the Court issue an order approving its request to implement a scoring adjustment on the 2025 Bar Examination administrations as an incentive for participation in the California Bar Examination Experiment as described in this petition and set forth in the attached proposed order.

Dated: September 9, 2024

Respectfully submitted,

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¹⁶ While the Committee has directed staff to offer a financial incentive for participation as well, if funded, the State Bar does not require Supreme Court authority to issue the financial incentive and therefore does not request it in this petition.

ADMINISTRATIVE ORDER

IN THE SUPREME COURT OF CALIFORNIA

EN BANC

[PROPOSED] ORDER GRANTING REQUEST TO IMPLEMENT
A SCORING ADJUSTMENT ON 2025 BAR EXAMINATION
ADMINISTRATIONS AS INCENTIVE FOR EXPERIMENTAL
STUDY PARTICIPATION

The Court is in receipt of the State Bar's Request to Implement a Scoring Adjustment on the 2025 Administrations of the California Bar Examination as an Incentive for Experimental Study Participation, filed on September 9, 2024. The Court, having considered the request, approves it as follows:

Participants in phase 1 of the California Bar Examination Experiment (Experiment), to be administered in the fall of 2024, who meet a minimum threshold of performance will be eligible to receive a scaled score adjustment on the multiple-choice section of the California Bar Examination on whichever of the 2025 administrations of the California Bar Examinations they attempt first.

Participants in phase 2 of the Experiment, to be administered on a third day after the two days of the July 2025 California Bar Examination, who meet a minimum threshold of performance will be eligible to receive a scaled score adjustment on the written (i.e., essay and performance test) section of the July 2025 California Bar Examination.

The minimum threshold performance score for both phases will be determined by the Committee of Bar Examiners (Committee) after psychometric analysis of results of the Experiment evaluating the applicants' motivation to perform.

The Committee shall determine the magnitude of the scaled score adjustment for each phase, informed by psychometric analysis of results of the Experiment. Any such scaled score adjustment shall not exceed one standard error of measurement in total, regardless of whether a participant takes part in one phase or both phases of the Experiment.

Any scoring adjustments for participants shall only be made after the State Bar's scoring, scaling, and reappraisal procedures and processes have been completed.

Chief Justice