

September 17, 2024

Chief Justice Patricia Guerrero  
Supreme Court of California  
350 McAllister Street  
Room 1295  
San Francisco, CA 94102

Re: The California Bar Exam

Dear Chief Justice Guerrero and Members of the California Supreme Court:

The State Bar of California recently filed two petitions with the California Supreme Court: (1) a Request that the Supreme Court Approve Proposed Modifications to the California Bar Examination; and (2) a Request to Implement a Scoring Adjustment on 2025 California Bar Examination Administrations as Incentive for Experimental Study Participation.

As the deans of ABA-approved law schools in California, we write to express our concerns about the planned approach to the California Bar Exam experiment Phase 1 and urge the Court to pause implementation of the transition to Kaplan. At the very least, we request that the Court not use Kaplan for the February 2025 Bar administration (and ideally extend the timeline for implementation beyond July 2025) to afford Kaplan additional time to develop materials and address concerns. In addition, we request that the 40-point incentive for participating in the proposed Phase 1 experimental bar exam be rejected in favor of other incentives. Finally, we ask the Court to consider an across-the-board scoring adjustment to account for the uncertainty all exam takers now face.

We divide our comments below into two broad categories: first, general concerns with the rushed approach to the Phase 1 experiment, and second, a specific concern with the proposed 40-point score adjustment.

### **I.State Bar Petition to Approve Proposed Modifications**

While we continue to have reservations about the State Bar's choice to use Kaplan to prepare its multiple-choice questions, we have grave concerns about whether this project can be completed in a responsible manner for the February 2025 bar examination.

Despite the State Bar's petition indicating that it had not received any public comments regarding test development or transition since May 2024, the California ABA-accredited law school deans wrote a July 29, 2024 letter to the Supreme Court to express several concerns regarding testing development and transition (letter attached). The issues remain unresolved by the State Bar's current plans and petitions. We stress here additional concerns with the current proposal regarding Phase 1 of the Kaplan experiment:

A. The short timeline for the Phase 1 experiment undermines important educational (and ultimately professional) goals. During the traditional bar-preparation period, applicants study intensively, 25-40+ hours per week. Current students will be hard-pressed to find the time to study and prepare while they are taking classes. In fact, the idea that students should take time away from their legal studies to focus on this experiment is concerning. Phase 1 is scheduled for November 8, 2024—just eight weeks after the Phase 1 application was made available on

September 13—a time when many students will be preparing for final exams. We cannot imagine that the Court (or the Bar) wants to encourage students to ignore their legal studies in favor of focusing on a bar exam experiment. Students who do not devote time to preparing for the experimental test will not mimic the typical bar taker that the experiment is trying to test. And the failure to focus on classes and exams might hurt these students when they take a later bar exam.

B. Setting aside the educational impact of conducting the experiment during the academic semester, an additional concern is that some students taking the experiment-test may not have taken or completed their courses on a bar-tested subject. At some schools, students may not take courses like Evidence, Criminal Procedure, or Constitutional Law II until their final semester. While some students do not take all the bar-tested classes during law school, testing students during the fall semester of their final year means that many more will not have completed the relevant coursework. This issue raises questions about the validity of the results.

C. According to the Kaplan contract, they will provide “study guides” for the test, but these consist only of 25 practice multiple-choice questions for students and another 25 questions for faculty, which is inadequate to assist applicants in proper preparation. Graduates preparing for the regular bar exam routinely complete hundreds of practice questions. New content scope outlines published on the State Bar website on September 13, 2024 consist of only a table-of-contents-style list of topics that does not match the blackletter coverage as outlined in the current NCBE coverage outlines. Further, the posted outlines contain errors, including significant errors in organization. The outlines are also missing specificity about the proportion of questions coming from the various topics. Without more robust study guides, Phase 1 will not field test questions under conditions remotely akin to the actual California Bar Examination and thus will not accurately measure the new questions’ validity.

D. The exam conflicts with the November MPRE administration, for which many students have already registered and started preparing. Because current graduates must take and pass the MPRE to practice in virtually all jurisdictions, including California, the timing conflict does not serve the State or graduates.

E. There are large information gaps regarding how accommodations will be handled—raising both ethical issues for those in need and concerns about the scope of representation of test-takers for the experiment. Phase 1 accommodations requests must be submitted by October 13—one month after the application opened on September 13—and supported by “certain documentation,” potentially including a “Qualified Professional Certification Form for the Experimental Bar Exam.” It often takes longer than one month to gather and prepare the required information. It is also unclear how the State will evaluate such requests on an expedited basis—it usually takes more than two months to evaluate the regular bar exam administrations. Furthermore, the State Bar has not provided any information regarding the types of accommodations that might be granted beyond additional time.

F. The State Bar has not provided information about how it will ensure that the sample of test-takers is representative (either the larger group of individuals that indicate their willingness to participate or the random smaller sample). The incentives chosen (see below), the limitations identified above, and the timing of the experiment could easily skew the group of people who apply to participate. For example, we understand the experimental exam is being given only on a workday, which may unfairly preclude participation by many part-time working students.

Moreover, choosing randomly among applicants does not necessarily result in having a representative sample. Even if the larger group of applicants is representative (and we have concerns about this issue), a random sample of that group may not be representative.

G. The experimental bar exam is scheduled for just three months before the February 2025 bar exam. Considering how long it takes to draft valid and reliable questions, it is hard to believe that what can be learned from the experimental exam can be evaluated, communicated to those taking the exam, and implemented in time for the February bar exam. Rushing implementation of something so important to individuals' lives and to the practice of law in the State of California is a mistake.

## **II. State Bar Petition to Implement a Scoring Adjustment.**

The Bar stated in its message to law school deans and in an accompanying FAQ the following: "The State Bar's Committee of Bar Examiners has recommended to the Supreme Court that a bar exam score adjustment of up to 40 points be applied in 2025 for those who participate and perform well on the experimental exams. The purpose of the score adjustment is to ensure that participants are highly motivated to participate in the experiment in good faith and that the resulting data analysis will closely replicate an actual exam."

This proposal raises several new concerns about the accuracy, reliability, and fairness of the 2025 exam administrations. We ask that the Court deny the petition to implement a scoring adjustment and instead explore other incentives such as a reduction in bar exam fees, a reduction in bar dues, or even gift cards. Any incentive chosen should be examined closely to ensure it does not unduly influence the choice to participate, potentially skewing results if one group is more likely than another to seek out the incentive.

While we can imagine reasonable incentives that might be offered, providing additional points for participating in the experiment conflicts with the bar exam's fundamental purpose to measure applicants' minimum competency to practice law. The current passing score for the California bar exam is 1390 out of 2000 total points—a level already higher than used in most other jurisdictions. Giving 40 extra points to experiment participants—potentially raising a "below competent" score of 1350 to a "competent" and passing score of 1390—raises questions about the appropriate passing score level for all participants. This issue is complicated by the undefined "minimum threshold" participants must meet to obtain the score adjustment. Will it, for example, be set at or above the accuracy rate expected for a typical multiple-choice administration such that, despite a close-but-not-passing real-exam score, the State Bar can determine candidates have "demonstrated the minimum competency to pass the California Bar Examination"?

Giving extra points for participating in the experiment is inconsistent with the very rationale for having a bar exam. The justification for the bar exam is that it measures minimum competency to practice law. Although some take issue with whether the bar exam actually measures minimum competency to practice, that is its reason for existence. Those who fail are deemed not qualified for a license to practice law. It makes no sense to say that some individuals who failed the bar, according to the State Bar's standard of competency, are deemed qualified because they helped the State Bar by participating in an experiment.

Also, it is fundamentally unfair to provide this advantage unless it is available to all. The current proposal sets up the situation of two applicants with identical scores on the bar exam, but one will pass and the other will fail because the former participated in the experiment and the other

did not (or could not). Either everyone should get the additional points during the Kaplan transition, effectively lowering the passing score—which also has the effect of bringing California more in line with other jurisdictions—or no one.

### **III. Conclusion**

We recognize that there are various reasons to consider alternative approaches to licensure in California. The proposals before the Court create additional problems, rather than solve current ones. Even more concerning, some aspects of the proposals undermine the Court's and State Bar's interests in ensuring a competent, qualified cadre of practicing attorneys in California. We urge the Court to allow additional time to explore the options, removing Kaplan from any role in the February 2025 Bar, and ideally from the July 2025 bar examination, and rejecting the proposed 40-point score adjustment. Thank you for considering our concerns.

Sincerely,  
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cc: State Bar of California