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10:02 a.m.

State Bar of California

Conference Room

845 South Figueroa Street

Los Angeles, California 90017

APPEARANCES:

APPEARANCE: (cont'd.)

MS. GOODMAN: Okay. So good morning. This is the first of our two opportunities for public comment. My name is Karen Goodman. I'm Chair of the Committee of Bar Examiners.

With me are some of my colleagues on the Committee of Bar Examiners committee. To my immediate right is Jeanne Vanderhoff, who is my vice-chair. To my immediate left is Erika Hiramatsu, who will be the incoming chair in September. The dapper gentleman to my right, in his Don Draper hat, is Lee Wallach, who is the past chair of the committee, and then our director of admissions is Gayle Murphy. Elizabeth Parker is here, as well as Ron Pi, and they both have just come in.

So this is an opportunity for public comment. This is not your only opportunity. We have had an overwhelming response on this really important issue concerning the Bar exam, and we do appreciate everybody's particular, as our web site has, frankly, been deluged with commentary on that, and if you haven't had a chance to comment on the web site, please do so.

Just so you have an understanding in terms of perspective, we have a sign-in list of who wants to speak. We'll go from 10:00 to 2:00 -- correct? -- or earlier if we're done. Everything is being, as you can see, recorded, so you can have an opportunity to review it, and this is not

an opportunity, really, for dialogue.

Just so the process is -- we're taking in the information. We, as the Committee, we had participated in a joint session with the Admissions and Education Committee, with the Board of Trustees, on July 31st, and we will have an opportunity to make a recommendation on August 31st at our meeting, the issues, and, hopefully, everybody has read the various standard-setting studies and the reports.

Really right now there's two alternatives for consideration, and the Supreme Court will ultimately make this decision. Number one is to keep the cut score where it is, at least until different reports have been completed. The second alternative that has also been proposed and for consideration is to drop the cut score, the passing score, for the Bar examination to 1414.

So those are the alternatives, and we obviously invite your input today, as well as we invite your on-line comments, and we very much appreciate, I think, the enthusiastic particular we've seen this year as to the examination of the Bar exam.

So, with those comments, does anyone else up here want to say anything? Yes. Thank you, Elizabeth.

MS. PARKER: Well, thank you, Karen, for all the work you and the Committee have done. I would like to offer a few comments as we begin.

This is obviously a very important activity. It's an opportunity to comment on one of four studies we are hoping to be able to undertake. There has been some confusion, however, about how these studies have been developed, and so I thought it would be useful to put on the record as we begin that, as we consider this pass line study, which, of course, is going to provide important data for the Supreme Court. It will be part of what the Court reviews.

The process for designing and implementing the study, I think, is important to be aware of, and there are six considerations that I think are relevant here. First, this pass line study was commissioned by the State Bar, and it was undertaken by a nationally recognized and independent expert consultant, Doctor Chad Buckendahl. Doctor Buckendahl acted independently and according to standards recognized by the National psychometric community.

Second, the design which Doctor Buckendahl used for the pass line study, based on the analytic judgment method, is a principal method recognized by the psychometric expert community as appropriate for standard setting in professional licensing exams.

Third, Doctor Buckendahl's implementation of the study was conducted, critiqued, and validated by two recognized national and state outside experts. Their

comments critiquing the implementation of the study will be forwarded to the Court, but, in brief, notwithstanding some differences in opinion about technical issues, they each found that the study had been conducted in a way consistent with accepted psychometric standards.

Fourth, the State Bar and Doctor Buckendahl went to considerable effort to ensure that there was continuing stakeholder involvement and consultation during the process. The development of the study preceded them with complete transparency and that type of interaction.

Fifth, neither the staff of the State Bar nor members of the CBE, the A and E Committee, or the Board of Trustees have been involved in the design of the study itself. The role of staff has been to assist in the implementation of the study under the direction of Doctor Buckendahl.

Sixth and finally, the 20 subject-matter experts, the so-called SMEs who participated in the pass line study, who were charged with the responsibility of reviewing and assessing answers to questions on the 2016 Bar exam, were selected by the Supreme Court from nominations made by all stakeholders, legislative oversight bodies, the Office of the Governor, the Committee of Bar Examiners, and the law school deans themselves. The resulting SMEs represent a diverse and balanced group of practitioners and educators

drawn from all stakeholder groups and geographical regions of the state, and they were, as I mentioned, selected by the Supreme Court.

So I think the independence of the pass line study ought not to be in doubt. Not all will welcome the results of the study, but its validity should not be questioned. It is, however, only one important data point as these deliberations continue.

MS. GOODMAN: Okay. Good. Thank you. Thank you very much, Elizabeth.

So, in terms of speakers, I've heard there's -- people have signed up, and if you haven't signed up yet to speak, see Kim Wong, who is back there in the green.

Is Robert Radulescu -- are you here? And I may have mangled your name. Can you come up and speak? I understand you'd like to say a few words. Press into the bottom, and then say your name, and then you can begin.

MR. RADULESCU: Hello?

MS. GOODMAN: Yes, we can hear you.

MR. RADULESCU: All right. My name is Robert Radulescu. First of all, I want to say good morning, citizens, concerned citizens, I should say, on the Committee. I must mention that I flew all the way from Seattle for this meeting, so I find it very important, and I would like to share my comments and my personal experience

regarding the Bar exam.

To start off, I will say I took the Bar exam four times, and I failed each time. Each of the four times, including the first time I took it, I had a scaled score of around 1420 or better.

Unfortunately, until the February 2017 Bar exam, the State Bar would not send you your MBE percentile rank, so a candidate would have no idea how they fared against any other Bar takers on the MBE, which is the multiple choice section. Luckily, the 2017 February Bar exam results came with the MBE percentile rank information, and now I will tell you something that should shock everyone in this entire room.

On my February 2017 Bar exam, I scored in the top seven percentile in the entire nation on the MBE. So I did better than 92.4 percent of all Bar takers nationally, and I still failed, and I have the Bar exam results here to prove it. Granted, I failed by an extremely small margin. I received a total scaled score of 1430.1, but, nonetheless, I failed.

Now, in law school and in our profession, one of the most repetitive concepts we learn about is the notion of "unconscionable" or "reasonable and unreasonable." These words are in every lawyer's vocabulary, like the phrase "How are you" is in every new language that you learn.

There is no defined standard of what makes something unreasonable. It's usually left to the interpretation of every lawyer's good and rational judgment. But I will tell you what. I am willing to bet -- and we can take a hand of votes if you'd like -- that every single reasonable lawyer would find that someone who scores in the top seven percentile in the entire nation on the MBEs should have passed the Bar exam, and should be admitted to practice law, if the other good standing requirements are met.

Think about it. Bar takers, because of their rigorous Bar exam study and preparation, should have some of the highest level of general legal knowledge in the country, even higher than the experienced and practicing attorneys who oftentimes forget general legal knowledge and the intricacies of the major legal subject.

If someone scored in the top seven percent in the country on the Bar exam, I'm going to reasonably make the argument that that someone knows the general legal concepts and subjects better than 99 percent of all practicing attorneys in the country, yet, in this case, that someone was not admitted and failed the Bar exam. Now, that is egregious. It is unconscionable. It is unreasonable by any reasonable lawyer's standard.

By the way, I don't think it can be said that I'm someone who cannot write well, legally. I've clerked for

both state and federal judges, I have clerked for the Public Defender's Office, I have clerked for the Attorney General's Office, and I have only received the highest marks from all of my supervising judges or attorneys, and they've all loved my written work, not to mention that, in some of the -- because, once again, to disclose scores there, there's a re-read, and the Bar examiners have dropped some of my written scores by 10 points on more than one question, I believe, but that's beside the point of the argument that I'm making here.

So I am very, very strongly in support of lowering the cut score to 1414, and I think this example that I just put forward as not a hypothetical, but a real-life example, someone who scored in the top seven percentile in the country, that failed the Bar exam -- that is unreasonable, and that is something that has to be changed.

In the alternative, I think the scoring should not be done in a vacuum. When I say that, I mean that when the score on the MBE is high, let's say in the top 20th percentile, and the written score is lower, but the total scaled score is still above 1400, let's say, or, as one of your proposed alternatives, 1414, I think there's overwhelming reason to pass that candidate. By the same token, if a candidate scores in the top 20th percentile on the written portion, and gets above a 1414 scaled score, I

also think that there is reason to pass that candidate.

I think this practice of scoring in a vacuum can be detrimental to really seeking out who is prepared to practice law in the state of California or in the general -- in the country. I think, as long as someone demonstrates an ability to reasonably write well, reasonably score decent marks on the written portion, and gets so high in the MBEs, they should be passed, or, as I said, by the same token, someone who scores very, very high on the written portion and does average on the MBEs should also pass.

As I said, I just cannot imagine that the system is set up in such a way where something like this can happen. I don't think you can point to any other exam, whether it's in accounting or engineering or any other sort of profession that is regulated by a state agency, where someone scored in the top seven percentile of that country, on a fundamental portion of that test, and failed that exam, and is not admitted to practice, whatever that profession is.

So thank you for your time. I would love to once again strongly urge the lowering of the cut score to 1414, and, in the alternative, if that's not granted, I think this would be a very sensible solution, alternative, to not score in a vacuum, and compare the MBE score to the written score, and see -- if someone scores in the -- I'm not saying top

seven percent, but in the top 20 percent on that portion, and reasonably still does well, and above a threshold like a 1414 -- they should be admitted to practice.

MS. GOODMAN: Thank you very much, Robert.

MR. RADULESCU: Thank you.

MS. PARKER: Thank you.

MS. GOODMAN: Okay. William Patton.

MR. PATTON: Good morning.

MS. GOODMAN: Good morning.

MR. PATTON: Thank you for holding these hearings. There's no question we're all here to try and draw the same conclusion. What we're trying to do is balance three public policies. We're trying to determine how to protect the public and consumers, while at the same time increasing access to justice, while, as a result of the cut score, also increasing diversity in the Bar. So we have three public policies we're balancing. The question is, how do we best do that?

I have submitted to the Committee seven empirical studies now, so I'm not going to talk about the ones that I sent to Ron Pi earlier, and thank you, Ron, for all your help in doing my empirical studies. I've submitted this morning a new empirical study, and that's one that analyzes the methodology of Doctor Buckendahl's study. I strongly disagree with the opening remarks, that we should not

question the validity of Doctor Buckendahl's study because two other psychometricians have looked at that data and concluded that it, as far as I'm concerned, using the vernacular of the Bar exam, meets minimal competency in terms of methodology.

I want to rehearse (sic) -- since there's an attitude on the Committee that there's presumptive validity now of Doctor Buckendahl's study, I want to rehearse (sic) what one of your consultants said about Doctor Buckendahl's study.

She said that in many areas, his study did not meet best practices. She said that the evidence demonstrated from her perspective, as well as from the comments of the panelists, there was insufficient training on how to grade. She stated that there was insufficient time for the graders to evaluate the examinations.

She said that, not only in her own opinion, but in the opinion of two other experts that she consulted with, that the methodology was faulty, because it didn't provide any kind of guidance, such as a grading rubric, or any guidance on the weight of the four variables that are inherent in the definition of "minimal competence" as set out by the State Bar.

She also said that she thought that the evidence demonstrated that many of the panelists did not have a

sufficient grasp on the criteria to be used to judge. She also said that that could have led to misconceptions, and that Doctor Buckendahl did not follow best practices by trying to determine, prior to the evaluations, whether or not the panelists had misconceptions about how they were to grade, and the expectations of -- pragmatics of determining whether or not an essay was not competent, minimally competent, or highly competent.

Now, what I want to talk about today is the new empirical study I've given you, you haven't had a chance to read yet, and what Doctor Pitoniak, in her study of Doctor Buckendahl's study, said is that there were no fatal flaws. Well, in my analysis, there are several fatal flaws that basically demonstrate that there's no validity to the study.

The first is, and it's not one mentioned by either of your consultants, is that Doctor Buckendahl misstated the State Bar's definition of "minimal competence." This had serious consequences in terms of the panelists deciding which of the three categories the exams would fit into.

As you well know, the State Bar defined "minimal competence" in terms of four categories. The first was identifying facts. The second was identifying relevant law. The third was application of law to facts. The fourth was conclusions of law.

Unfortunately, in what he described as a "general rubric" that he passed out to the panelists to help them in their grading, he changed the four-part test of competence, as defined by the State Bar, into a five-part test. Instead of having conclusions as only one category, in other words, 25 percent of the deliberation, he changed conclusions into two different kinds of conclusions, thus making it a five-part test, in which he changed the weight for the panelists of evaluating conclusions from 25 percent of the overall evaluation to 40 percent of the evaluation.

Why is this so significant? It's significant because I'm sure all of you have attended calibration sessions, like I have. In a calibration session, or if you look at the actual grading rubrics that are provided to the graders of the California Bar exam, one of the sections that gives the least amount of points in grading these exams is the conclusions section. So not only did he inflate the value of conclusions in the evaluations by the panelists, he evaluated it on the one area of the exam that is not highly evaluated by the graders on the July 2016 examination.

Therefore, because he misdefined the definition, which was the centerpiece of these attempts to define "minimally competent exams," we can have no assurance, and nor is there any validity that we could generalize from the examination selected as minimally competent by the panelists

would have any correlation with the actual examinations as selected by the graders on the actual July 2016 exam. Therefore, this study is not worth the paper it is written on.

A further example of a serious methodological flaw by Doctor Buckendahl is his failure to provide the panelists with a weighting of the variables that they were to determine in terms of minimal competence. I've given you in my analysis a simple example, where every single one of the 20 panelists decides that an essay has one section that -- excuse me -- two sections that are highly competent, one section that is minimally competent, one section that is not competent. I've given you six ways that a reasonable panelist, without guidance on the value or weight of each of those four variables, could have made -- could have selected that exam as not competent, as minimally competent, or as highly competent.

The error value in trying to determine the validity is quite great, because we know in the methodology what actually occurred is that if an essay was selected as highly competent, it was excluded from the later determinations and discussions. So, if exams which, had they been given information about weighting, might have been not competent or minimally competent, we never had an opportunity to find out that an individual grader graded

that highly competent, and, therefore, it was excluded from discussion.

So, again, the failure to give a rubric, the inadequate definition of "minimal competence," and the failure to give a weighting of the procedures demonstrates the invalidity of the study.

The other is -- and I basically take this from Doctor -- I've read all of Doctor Buckendahl's studies. One of the things that he indicates, which is basically best practices, any time -- and Mr. Pi would agree with this -- any time your study has significant deviations in low and high scores, any time you have significant deviations between the median and the mean, you have serious questions of validity. In this test, what we had is both among the panelists, as well as individual panelists within the seven essays that they graded, some of the greatest diversity I've ever seen on an empirical study.

For instance, on one question, there was a -- this is not just one essay, but the 30-essay medians as established by two panelists. One had a median, of the 30 essays, of 45, a grade of 45. The other had a grade of 70. So we had a 25-point distinction. How can anyone, if this is a reliable study, have any confidence in Bar grading if two individual graders using the same criteria come to such radically different perspectives on a pile of 30 essays?

Again, what this demonstrates is they were insufficiently guided on the criteria to use. In fact, if we take a look at the individual panelist grading, the patterns of each grader, not among graders but each grader, what we find is the median deviation among the graders was significant. One grader, for instance, had a median deviation of only six percent among all of the 270 essays that were graded. Another grader had a standard deviation of 22.5 percent on the median.

Again, what this indicates -- and Mr. Pi would know this -- that this is a variant of what we call the "halo effect." The person who graded all exams almost identically basically used a criteria in which the panelist was unable to distinguish significantly among very poor exams and very high exams. Again, when you have an individual panelist with significant deviations of grading, that raises questions of validity.

Finally, I question, and I actually, in my paper, call it, a selection bias by Doctor Buckendahl. What he did is, he chose not to provide the panelists with the actual ratio of graded exams that occurred on the July 2016 exam.

For example, on the actual 2016 exam, the grade of 75 comprised 4.2 percent of the exams graded. The exam score on his study was only 13.2 percent. The deviation is significant because he did the same thing at the low end.

On the actual Bar exam, the grade of 55 occurred at a rate of 27.3 percent, but, on the panelist essays, it appears at only 13.2 percent.

Now, he didn't even discuss or justify why he deviated so considerably, nor did he indicate how this might affect the psychology of grading. I'll give you a very simple example. I give you 10 exams to grade. Nine of them are 75. One of them is a 55. In other words, they're very low. You're going to see the 55s as significantly less qualified as the 75 because it's such a distinction. It's an outlier.

Unless you replicate the -- at least come close to the percentage of exams as they actually existed on the July 2016 exam in terms of the selection you give to the graders, you are going to have bias that's going to affect their psychological perception of the value of the spread of the exams.

Again, I do question the validity of Doctor Buckendahl's study. I do question the validity of the State Bar's proposal to only consider lowering the cut score to 141. I don't think you, based on Buckendahl's study, have anything to justify what you're asking us to vote on, "Do you want 144 or do you want 141?"

What I suggest is that you have another study, by another independent psychometrician, that does a study

similar to Buckendahl, but take into account what your two consultants and what I've said about the methodological validity. Take into consideration what is required under best practices. Let's see what a more methodologically sound study would give before you vote on something that has no empirical base. Thank you very much.

MS. GOODMAN: Thank you very much, William.

So our next speaker is Joan Howarth.

MS. HOWARTH: Good morning.

MS. GOODMAN: Good morning.

MS. HOWARTH: I've been a proud member of the California Bar since 1980. I'm the dean emerita and professor of law at Michigan State University College of Law, currently serving as distinguished visiting professor at the Boyd School of Law, UNLV, and I speak only for myself this morning. So thank you for the opportunity to testify, and thank you also for the scrutiny you're giving to the Bar exam.

I have submitted for your consideration a paper, "The Case for a Uniform Cut Score," which puts the current MBE cut score discussions in the context of professional licensing more generally. I looked at 16 professions that use a national multiple choice licensing test as a component of their state licensing exams, doctors, nurses, engineers, dentists, CPAs, vets, social workers, physical therapists,

architects, and more.

Much to my surprise, I have to say, actually, to my shock, I found that 15 out of 16, everybody else but law, is currently using a uniform cut score for the multiple choice component that anchors their state tests. Of course, states may be individual in other ways.

For example, to be licensed as an engineer in California, you have to pass an extra test on seismic activity, a requirement for which we are all grateful, but, for their common national multiple choice test, the equivalent of our MBE, every jurisdiction of engineers, dentists, architects, and the other professions I looked at, nurses, doctors, vets, CPAs, they use now a uniform cut score. We need a uniform cut score for the same reasons that all those professions have adopted them.

First of all -- and I say this with the utmost respect and seriousness -- proper standard setting is too burdensome for states, individually, to handle well. We see this in law. California, I would say -- I give you credit, California, or us credit. We lead the country. You all lead the country in the professionalism and resources devoted to our licensing test. But California has not revisited its cut score in decades.

Nurses routinely revisit their cut score every three years, engineers every five years. That's because

they have -- their national testing organization has taken that over, with the expertise and the resources to be able to do that. Psychometric standards say that if the profession changes, the tests change. Cut scores need to be revisited every time there's a significant change in the exams. States simply do not have the resources, expertise, or the political will, really, to handle MBE cut scores appropriately.

Secondly, handling the cut score well matters, because the cut score is itself an aspect of the validity of the uses of the exam. You all know validity means that the test does what it says it does, and our national problem of extreme cut score disparity on the MBE undermines validity. Protection of the public starts with validity. Clearly, geographic boundaries are mattering less and less. Professional mobility is increasingly important.

Fourth, it is illogical to use the same pass/fail test to measure the same thing, minimum competence to practice law, but set the passing line at different places. We've been using the MBE since 1972, 45 years. It's possible it will take another 45 years for law to move to a uniform cut score, but I doubt it, and I certainly hope not. The same forces that caused the other professions to overcome their habits of local control over cut score determination will operate in law, and the reason that will

happen is because public protection really is what we're talking about here.

What needs to happen, therefore, in law is that the outlier jurisdictions, those with very low or very MBE cut scores, need to move towards the middle. This is not conformity for the sake of conformity. It's conformity for the sake of validity.

Standard-setting studies can be a useful part of the process when they are done routinely in the context of content validity studies. Doctor Montez' comments about the need for fundamental validity studies are, I think, especially important on this point. We knew, you know, standard setting is a contested and difficult field, but even a flawlessly designed and executed standard-setting study, standing alone, is not sufficient. It cannot be undertaken once in a generation. That has an aspect of randomness that's undeniable.

The magnitude of the effort that it took to pull this one off should not cloud the limits in the usefulness of the results. This goes to my earlier point. States by themselves, even states with the size of resources of California, do not have the capacity to handle this as well as it would be handled nationally.

So, the question of what should be the recommended cut score. One advantage of our current disparities, and

maybe the only one, but it's a significant one -- one advantage of our current MBE cut score disparities is that, instead of relying on the contested studies, outlier jurisdictions can look to the mainstream, specifically, look for evidence of problems from more moderate cut scores.

As your reporting knowledge is, there is no evidence that states with mainstream cut scores are suffering problems as a result. In the absence of such evidence, California needs to justify why it is not choosing a middle-ground cut score.

One thirty-five is the score used by the greatest number of states. One thirty-three is the score used by states with the largest attorney population. The record of those jurisdictions is very significant evidence related to proper cut score placement, and this I think I'm saying -- presenting its cut score, California should embrace crowd-sourcing.

Finally, a word on the values that are implicated in the cut score decision. As you know and we all agree, protection of the public is the touchstone. An MBE cut score that is set too low risks unleashing on the public new attorneys with inadequate ability to memorize and analyze legal doctrine, but no one is seriously suggesting that California's cut score is too low. The question before you is whether California's cut score is too high.

A cut score that is too high harms the public in the following ways. First of all, access to justice is hurt by limiting the number of attorneys, and reduced numbers then lead to higher costs. Also, diversification in the profession is hurt, because a cut score that is too high is depriving under-served communities of attorneys who are competent, but not licensed. Failure to license competent attorneys disproportionately hurts under-served communities, communities who do not have enough attorneys.

Diversification of the profession is also hurt, and values of nondiscrimination and inclusion are implicated, because an extreme cut score disparity undermines validity of the test's use, and test validity must be paramount when test results are persistently racially disparate.

Legal education is hurt by a cut score that's too high, because an unusually high cut score requires extreme focus on doctrinal memorization, especially of first-year subject, and test-taking skills, at the cost of more advanced courses and skills courses that teach a broader range of lawyering competencies.

Finally, a cut score that's too high creates the appearance of protectionism, which, as you all understand, is an improper value in standard setting and professional licensing. Thank you very much for the opportunity to talk

with you today.

MS. GOODMAN: Thank you very much, Joan.

So our next speaker will be Sean Scott.

MS. SCOTT: Good morning.

MS. GOODMAN: Good morning.

MS. SCOTT: So I am here on behalf of SALT, the Society of American Law Teachers. I have been a member of the California Bar, a proud member, since 1987, and I'm a tenured professor at Loyola, where I have taught for the last 25 years or so. So thank you very much for the opportunity to speak with you about this today, and, as others have echoed, I commend the State Bar for its willingness to examine the validity of the cut score.

SALT strongly supports the idea of lowering the cut score. Consistent with Dean Howarth, we would even recommend adopting a lower score. As she indicated, adopting a score of either 133 or 135 would represent, generally, what the median is across the nation.

Despite the support that we have for lowering the score, we do have some concerns, both organizationally and, for me, anecdotally, as a faculty member for the last 25 years, having graded thousands upon thousands of contracts exams. So, first, we really would like to encourage the Bar to take seriously the need to validate the Bar exam itself. Right?

I'm not an empiricist, but, to my knowledge, there has not been in recent history an attempt to assess what the exam should measure, how it should measure it, and whether the mechanism that we are currently using is an effective tool. I think that's critically important, given the way in which technology is radically changing what it is we do and practice, and what it is we should be teaching in the classroom, and I think that we are going to see a sea change, and to have an exam reflect that, I think, is critically important.

Second, I would say, concerning the validity of the exam itself, underlying the discussion about the cut score, there's an assumption that the lower pass scores will create an increased risk of harm to the public, and it seems to me that that is an assumption that needs to be explored, and evidence provided that the lower cut score either correlates to or causes an increase in attorney malfeasance. It seems to me that currently no data has been provided that supports that assumption.

Third concern, again one that has been shared. We are concerned about the disparate impact that the exam may have, and currently seems to have, on people of color. It's a primary concern for SALT, but I would also add that the potential invalidity of the exam has a negative impact on everyone, right, and can have a negative impact on access to

legal services in California.

I do also have some concerns about the process used to determine the appropriate cut score as reflected in the materials that I have reviewed. Again, I am not an empiricist, and so I'm speaking anecdotally. The conditions under which you asked the panelists to grade the exams, to me, seemed to be inconsistent about what we know about both pedagogy and assessment, so to grade the number of essays that the panelists were asked, in the period of time given, was, I think, an extraordinary request.

I get to the point where I grade -- where I have to say, "No more," because I begin to think unkind things like "Well, did you come to class all semester?," at which point I know it's time to put it away and have a glass of wine, which I assume there was no alcohol provided. Well, that, too, might have been a mistake.

The other things that I think are causes of concern -- so, when I grade my exams, I draft my exam, I take my exam, and then I come up with a rubric. It takes me about four hours to come up with a good rubric, and I know what I'm testing. I've been teaching for 25 years. I think to not have any guidelines provided, no rubric, is irresponsible, and makes me question the results. I think that the comments from the essay graders themselves revealed their concerns about the validity of the process.

It seemed to me that what you asked the panelists to do would be akin to my saying to a torts faculty member, "Here are my contracts exams. Tell me what you think. Grade them, and whatever grades you come up with, those are the ones that are going to determine whether these students pass that contracts clause," and that's without giving my torts colleague the benefit of having a grading rubric.

Bright people, intelligent people know torts inside out. Should they be grading my contracts exam without any guidance? Probably not. So I think I was concerned about what it was you asked your panelists to do, and whether, again, it reflects what we know about teaching and what we know about assessment.

Having said that, I do want to reiterate that we support a change in the cut score, given both the invalidity of the exam itself and some concerns that we have about the study. Thank you.

MS. PARKER: Thank you.

MS. GOODMAN: Thank you very much, Sean.

So our next speaker will be Bridget Gramme. Is she here? There she is. Good morning.

MS. GRAMME: Good morning.

MS. GOODMAN: Good to see you again.

MS. GRAMME: Thank you. My name is Bridget Gramme. I'm with the Center for Public Interest Law at

University of San Diego Law School. I just want to echo, quickly, the prior two speakers. I totally agree with their assessment of everything that's happening so far, and what needs to happen. I'm also going to be providing my written comments, but I'm just going to summarize them here for you.

On behalf of the Center for Public Interest Law, I am pleased to submit this testimony, and I'm very grateful for this opportunity, and I'm grateful to the Court for their taking this really important issue on.

As the administrative director of the Center for Public Interest Law, I have personally been monitoring the State Bar, with a particular interest in the antitrust implications involved in the Bar exam for the past three years. I also served as the assembly judiciary committee's nominee as a subject matter expert panelist on both the cut score study and the content validation study for this California Bar exam. So I come with some different perspective than, I think, some of the other people that are speaking today.

I believe there was a general consensus in the room at the July 31 meeting of the Committee of Bar Examiners and the Admissions and Education Committee that this is really just a starting point here, that this is a matter of great, great importance that is probably going to take years to do right, and I really, really encourage you

to do it right.

As everyone has said before -- and I really liked the comments of my predecessors here -- validity is public protection, and if you do have such a disparate extreme of cut scores across the country, that is not protecting anyone, and I do agree -- and I already testified to this, and will put it in my comments -- I do agree that there were some flaws with the way that the standard-setting study occurred.

A lot of those, I think, were just driven by the impossibly short time frame that we had to conduct the study, and I think most of the issues surrounded this definition of "minimally competent attorney," but, for purposes of today, I really believe -- and especially having had two additional experts review the study and conclude that, even though there were some flags, they were not fatal enough -- I believe that -- I actually recommend that you reduce the cut score to 139, which is the two standard errors below, and that still has a 95-percent certainty rate, according to the study.

The reason I say that is because I think it's taking into considering the flags that people are pointing out here today. What I believe myself as a panelist -- I don't think everyone had the same understanding of a "minimally competent attorney," what that really meant, and

we just didn't have the time to really go through that.

So, taking those into consideration, as well as the policy issues that have been raised before you with access to justice, and also diversity of the profession, I think it makes sense, and you do have something statistically sound, at least for the interim, right now, to present to the Supreme Court, that is justified by this study. It's better than what you have now in the status quo, which I believe was totally arbitrarily set, and use that right now as an interim, until you can do the study correctly.

I want to briefly talk about, very quickly, the Center for Public Interest Law and where we come from, has a long history of studying the State Bar, but not just the State Bar, all occupational licensing agencies in California, and we've done this since 1980, and CPIL's founder, Professor Robert Fellmeth, was appointed to be the State Bar discipline monitor from 1987 to 1992.

So we come with a lot of background and understanding about the way the Bar has functioned for a long time, and he and CPIL staff put together 11 reports during that time, and our work has resulted in significant reform, including reform that's happening right now with the de-unification of the Bar. And so, again, we come at this with a unique perspective, and our mission is public

protection. So I would not be standing here before you today recommending a low cut score if I thought that the public would be harmed by this recommendation.

One thing that's a little different and has been alluded to, but I want to talk about it more, and that is, I need you to be aware of the difference between protecting consumers and protecting the profession, and that really has to do with the overall aspects of occupational licensing.

As you know, this cut rate, or the cut score that was set 30 years ago, was set by the Committee of Bar Examiners, or recommended by the Committee of Bar Examiners and the Board of Trustees that were dominated by attorneys, and this type of self-regulation is common in state licensing boards. It's a delegation by the government to professionals to regulate their own profession, but it is increasingly coming under fire, for good reason, and that is as most recently summarized by the U.S. Supreme Court's decision in the North Carolina Dental Board case.

In that case, you may or may not be familiar with it, but basically there was a board of dentists who were dominated by dentists, and they made some policies that they were going to prohibit teeth-whitening in North Carolina unless you were a dentist. They did this in the name of public protection. They were protecting the public from, you know, bad teeth-whiteners, but really what they were

doing is protecting their market share as dentists.

I think this is a really important thing for you to understand when you're thinking about this cut score, and it's something that's not immediately apparent. I'm sure none of the Committee of Bar Examiners are sitting around talking about how you can deprive people from entering the legal profession, and how you can be anti-competitive. I'm sure that's not the point, and I know there are a lot of you there that are -- a lot of public members that are really dedicated to consumer protection.

I also think there's a real risk, and sometimes these lines can be blurred, especially when this has been just deeply ingrained in our system for such a long time. I took the Bar exam. You know, all of us did, and I think, you know, it's hard. It's hard to separate out and to take a big view, a bird's-eye view, of this process, and to make sure that this is actually accurate, but I have to say that I echo many people today, that there is no evidence, none, right now before you that shows that if you lower this cut score, you're going to harm the public.

The biggest reason for that is that we haven't undertaken a content validation study. We're in the process of it now, and, as Doctor Montez recommended, I really think you should take her recommendation and do a California-specific occupational analysis. That's critical.

And so we can't tell. Right now there's just no correlation between the existing Bar exam and minimum competence to practice law, and so you can't say that the way that the exam is formulated right now -- if you lower it, you're going to correspondingly harm the public.

So those are my biggest things. The last thing I just wanted to put out is that the Department of Consumer Affairs here in California has been required for at least 20 years to establish its own occupational analysis and exam validation process. So every regulated profession in California under that umbrella, which includes doctors and nurses and contractors and engineers, they have to go through this re-validation process every five years, by law.

This has to happen going forward, it has to, and it's really inconceivable that it hasn't happened at this Bar in 30 years, if ever. So that's one thing I recommend that has to happen, and that this Bar, the State Bar, needs to have resources and a staff dedicated to be able to do that.

My final point is, I'm also very concerned about the National Committee of Bar Examiners not giving you -- my understanding is they didn't provide the data that we needed as panelists to be able to assess the validity of that test, and that is a big problem.

So I recommend, and I will be submitting with my remarks, the Department of Consumer Affairs policy that they've established pursuant to Business and Professions Code Section 139. That has a very specific section about validating national exams. As my predecessor talked about, you know, these other licensing agencies, like the nurses, they do use a national exam, but the Department of Consumer Affairs has very specific requirements for national exams. So I really recommend that you take a look at that as well. Thank you very much.

MS. GOODMAN: Thank you very much, Bridget.

So our next speaker is John Holtz.

MR. HOLTZ: Good morning, Madame Chairman and members of the Committee, dean, professors, director, and concerned citizens. I would like to make a point of information, or ask a point of information. I know that that was not the dialog or the process that you wanted.

I just wanted to know two things. One is, the survey that was sent out, I received it, my wife received it, and I understand Bar applicants received it. Did all registered law students receive it?

MS. PARKER: Ron would know.

UNIDENTIFIED SPEAKER: I think we did send it to --

MR. HOLTZ: Well, I'm just curious, because --

okay. Gayle might know this. When will we get preliminary results from the National Conference regarding this summer's MBE scoring, or when will they make it known to those early jurisdictions, and, therefore -- like, everybody kind of knows the national trend is to go up.

UNIDENTIFIED SPEAKER: For July, October, September, October.

MR. HOLTZ: Mid-September, they start to release -- you know, some groups start to release their scores, the smaller states. So I'm just curious, because it seems like we're flying blind in one sense here. That's the only thing I bring to that.

I don't want to fly under false flags. I put down "Attorney" because I wasn't sure how I should indicate myself. I do operate a writing course, preparation for the Bar exam. However, what we're discussing today, in many respects, is not in my line of the Bar. I always tell my students I only help determine, or assist people in determining, who will pass, not how many will pass. That is the function of the MBE, and that's, of course, what we're doing here, and I'll get to that in just a second.

I did want to make some comments about the people that have spoken here. Robert, I applaud you for coming down. I think that was fantastic. I can sympathize with him. I guess, going back to who am I representing, as a

stakeholder, I would also -- I would like to represent Bar applicants, because they seem to be left out of the mix. We have the schools, we have citizens, we have individual Bar applicants, but we don't have the group.

Over 25 years, going on 30, for just Bar review, since I took the Bar, I've worked with a number of people who, like Robert, I felt should have passed the Bar first time or an earlier occasion, but, through misguidance or luck or what have you, were not able to make it, and I think that they're unfairly denigrated in our profession, if not in the public, due to the fact of the Bar pass being such a symbolic rite of passage, and I applaud the fact that you're considering not only changing the Bar format, but also the cut rate, because that will have an impact on some students.

In terms of Robert's situation, as I was listening, I did write an amicus letter to the Court in June, and four of them, in three proposals. I did touch upon what affected him, without knowing his scores. I do believe that someone in his situation -- as he indicated, his last score was 1430. I think he should have passed, or should be passed retroactively. You know, for him to have to take another Bar when he's already demonstrated -- because my guess is your MBE score was above 1500.

MR. RADULESCU: That is correct. It was 1554.

MR. HOLTZ: See, he should be in.

As he mentioned about the high scores for the MBE, I did make a proposal that we return to the days of bifurcation, which is actually before my time, but bifurcation would allow for -- bifurcation means that if you score high enough on one part, the written section or the MBE section, you don't have to retake that section. You come back and sit for the part that you failed.

Since the MBE is most readily passed, and we want focus on that, because that affects the pass rate, if we can get more people to put in the energy on the MBE, our pass rate will go up, and that's why we're all here today, is the pass rate has been in a trough. What's not discussed is that it's been in a trough since 1998, and there are reasons for that.

Finally, he also would have qualified years ago, but prior to his time, under reappraisal. He would have been above the 1412 threshold, which would have allowed for a third review, in which you would have had an individual senior grader look at your paperwork and determine on a whole whether this person evidences competency to be admitted, without more, and, in fact, it's a de novo -- or it was a de novo review, and I'm rather sad that the Bar took that away. I think that, instead of going to the current -- we'll look at all the scores that had variances of over 10 points, which is the point that Mr. Patton brings

up, the discrepancies that are allowed under the Bar exam.

Finally, I think, in terms of both Mr. Patton and Robert, the current way the Bar operates, with the study of the cut score identified, Mr. Buckendahl -- the idea that the Bar has a public policy to promote false positives by allowing people -- once they pass the first time, if they're above 1440, they allow them to pass without re-read, whereas, prior to 2007, you had to pass 1465. You had to get a 1466 to be allowed to pass after first read. Otherwise, you were thrown back in the mix. In the world in which I operate, we call that "double jeopardy." You could then lose your score.

I trust that probably Robert, as he indicated, has had these discrepancies, where, if you took one grader -- and that's called "cherry-picking," and I'm not here to promote that, but, if you allowed to cherry-pick, you would actually -- not just cherry-pick, but just pick one of the slates, the first slate of graders or the second slate of graders -- maybe the second late you would have passed.

I made that recommendation to the Committee in summer of 2014, and since the fourth part of that recommendation was that you publish it, that you rank-order your graders between first and second read, and -- because there is a difference between graders. Some graders are easier and some graders are harder. It may that their paper

mixed. But why would you risk that for the perception -- you know, it just don't take much. But I will leave that paper or send it further, send that paper on to you. I do believe, in my letter to the Court, I did append that on.

So let me turn, then, to the survey. The reason I asked about the survey was -- and I appreciate that you did that, but the fact that you're doing it for the Bar applicants, I think that's going to give you, maybe, a false positive. I mean, I would certainly encourage, and will encourage, all my students, you know, to do that, because I'm a contingent fee-based course.

Unlike most of my fellows, I decided years ago, prior to being a dean in a law school -- so I do have that perspective as well -- but that, if I'm going to speak about the Bar as a whole, not just my section, then I should not have an interest in my section.

I saw too many MBE course that would downgrade, denigrate, poo-poo the other sections of the Bar, and the thing is, students would do MBE, which at the time was only a third, more than 35 percent, and they'd fail the written portion, because they'd put all their faith in that instructor in that specialty course. And so I feel that that has been a -- was a problem. So, actually, I applaud the fact that you're going to lower the cut score. It means that I will make more money, you know, this year alone, as

you just did.

The survey would have been nice for the two-day Bar format. I think that would have addressed a lot of concerns for the schools, as well as applicants, and I do think it will have further efficacy in what seems to be an underground or darkroom debate about whether we should join the UBE, and if you do want to have that debate -- because it seems like you've aligned your changes -- this cut rate drop also would play into that -- with the uniform Bar exam.

That would be a debate that I, as an entrance student or a current law student, would be really concerned about, because, if we were to join the UBE uniform licensing, that would mean that, instead of competing with 5,000 students for jobs two or three years down the road, I might be competing with 30,000 students, and that would have a bearing, because we have talked about the public and the profession in terms of the cut score to those two.

We haven't talked about the lawsuits, and that's an angle that has to be addressed, especially -- the L.A. Times indicated a year ago in a article that there's a very high attrition rate. I didn't come prepared for this discussion on that point, but you might want to check it out. They indicated 80 percent in California schools. I think they meant accredited and not ABA, but a very high attrition rate.

Those people are paying -- essentially, they're buying cars, and then, you know, getting kicked out of school, because schools are worried about not have a pass rate. It's called balancing your budget on the back of your entering class, your first-year class, and a California dean years ago warned me of that, and I took it to heart, and I see that played out all the time.

I think the move to 1440 -- or 1414, excuse me -- institutionally and politically, is already 90 percent. You're on your last leg. You're going to go there. I think you need cover for the two-day format. I think it hasn't been debated. Maybe it has been within your circles, and I'm just not aware, so please forgive me.

You said at the time that it would save money for the -- you know, you wouldn't have to increase the rates, the Bar could operate more efficiently, but it won't for long, because, when you lower the cut score, or when we increase the pass rate, which I've encouraged students to pour more energy into the MBE -- when they do, and because of the 50-percent weight now, they will, and once they do that, you're going to get a higher score. You're also going to get a boost on that, based on the cut score.

I'm not arguing against lowering the cut score. I'm just saying that, to some way of thinking, in retrospect, it will be cover for you, because, when the pass

rate jumps, people will go, "That's because they lowered the cut score." No, it's because the new format, with the 50-percent weighting, drove more people to spend more time on the MBE. Consequently, the pass rate goes up. How many people pass goes up. Now, individually, it goes back to who will pass, so that's a different matter.

You also mentioned, in your pros and cons that were debated, it could lead to faster Bar results, but that won't happen. It never could, because, to get to faster results, even though you drop from eight items to six items, it means it still takes time to grade all of those papers for those six items. It means you have to increase the number of graders, which, as Robert pointed out, alluded to, that's just not feasible.

I mean, they all agree, you know, ideally, it's one grader grades all, for a small state, but when you start to increase your grading pool, then you have more opportunity for outliers, which then gets into the balance of graders, which then gets into a problematic where you have outcomes which -- I haven't reviewed his papers, and I've never spoken with Robert before, but I could well see, you know, your 10-point variances, and I've seen 15-, 20-, 25-, and a 30-point variance.

So it's kind of like -- you know, that drives me crazy, and I will not try to -- I have been an apologist for

the Bar for years, because one of my students years ago ended up on the Committee, and I only asked her one question, ever, when I saw her and she saw me. I was a dean, and she was on the Committee on Examinations, and I asked, "You said, when you got on the Bar" -- she actually predicted she would do it because she was connected -- "that you would find out if it was fair."

So I only asked her one question. I said, "Is it fair?" And she said, "It's as fair as we can make it." And I said, "Okay," and I took that away. 1995, I took that away. For 20 years, that's what I've preached. For 10 years now, I've -- and before that, I heard it intermittently, but I always poll every class I do, so up and down the state, and I get students from every school. I get them from every state. I get them from different brackets, however you want. They're a diverse group.

I asked, as a public service announcement, "Have you heard" -- not that "You believe," but "Have you heard that the Bar is going to have a lower pass rate because we have too many attorneys. And some of them raised their hands, and many of them, you know, "Yes," they wave.

They've heard it. I mean, embarrassingly, it's not as much down here. San Francisco seems to be the hotbed. I don't know why. But they indicated that, and I said, "You can't do that. You cannot go out there in the

field and let that canard persist. It is not true. The Committee has no effect over the pass rate. The National Conference with the MBE determines pass rate."

Our Committee has equated since '86, basically right after my exam, which was the second-lowest in history -- right after my exam, you went to an equation, so the written part is equated to the MBE. So I tell students, "Look. Don't freak out, because, if you get thrown an oddball question, the Committee is not trying to depose you or deny you entrance. It will all be put out in the wash, because the MBE determines that."

At any rate, that continues to persist, and so I feel that it's something that has to be and will be -- it will come out now that this is being discussed, this process.

As to the studies, I don't have enough information for the second and third study regarding the competency and the cut rate. I did read, and I noticed the comments that people referred to. I did see those comments, and I think that some of it is well taken.

Mine would be in the first study that was done regarding the recent performance changes on the California Bar exam, which was to look into the causes of declining pass rate, but Doctor Bolus (phonetic) could only give a well-documented, I would say, rough guess.

I think this is more a factor of the information that the client gave him, because, as every attorney knows, if your client doesn't give you good information, you can't do your job, and I think -- that was an analysis/attorney metaphor -- I think he wasn't given -- not that you purposely withheld -- you don't have the information. You couldn't give it to him. Now, he's anticipating that it's going to come up in the next one, the fourth study, when they go to the law schools, and I don't think that's going to occur, either.

I did note -- it was interesting to read, because, like Director Bridget, Ms. Gramme, I've been watching the Bar exam, a student of it, for years and years and years, albeit with a vested financial interest, but you learn to like students when you get them for a few days, and you get to know them, et cetera. The table that was given for the Bar -- and I don't have extra copies. I didn't bring them to pass around. But it was a chart that shows the progression of the pass rate every summer from 2008 to 2016 -- I'm sorry, from 2000 to 2016.

Three things stand out in that. One is, you chose for the start of the study -- or I don't know how it was chosen -- 2008, which was a peak. The reason it was a peak is because of Bar review. Bar review was starting, and the National Conference had the same problem. In 2008, they

looked at "How did the pass rate jump?"

Doctor Case (phonetic), who was the psychometrician for the National Conference at the time, wrote in an article and said, "We can account for 20 percent of the increase, but we really are lost as to what the rest of it is due to." Well, I could have told her.

There was a change in Bar review provision across the country, and there was free Bar review on the MBE, Bar workshops on the MBE. People that would not have necessarily ordinarily been able to afford it or access it took it, and that accounted for it. It only lasted for one year, because then the tides of commercialism and competition -- the marketplace closed up, and that got shut off, but for that one shining moment.

So you've chosen, you know, to march your decline -- or mark your decline -- you've chosen abnormally or atypically high, and nobody talks about it, because you don't have that perspective.

Also, the early years in that study, from 2009 to 2012, you're basically looking at a plateau. Although it's called a "decline," if you look at your own chart, you'll see that there was a valley, from 2002 to basically 2005 or '6, that's much lower, okay, statistically, significantly lower, not by a great margin. Excuse me. I don't mean to puff that up.

In the first part of the oughts, what we had is, Bar review was dominated by one course, and that one course did not have a large incentive. Consequently, training was not at its peak, at its best -- I'll just say that -- whereas, in 2009 to '10, '11, you had competition. You had more people coming in to the marketplace, and the way that people have always entered the marketplace is through the MBE. I'm an outlier. But they come in through the MBE, so they focus on the MBE. When they focus on the MBE, boom, there goes your pass rate. It goes up.

The drop, the third feature. The drop was in 2013, '14, '15, and he couldn't account for that, you know, but I think I could. You got, in 2014, "Barmageddon." For people in the audience who aren't aware, that was where ExamSoft had a writing problem or a submission problem, and across the country, people were not able to submit their tests on time. Consequently, they were up until all hours of the night.

The next day, they took the MBE on a few hours of sleep, anxiety that they'd already failed the test, et cetera. It occurred to some California students who had tried to send in their first submissions, too, as well. It was litigated, and, I think, poorly litigated. I would then fault the National Conference. As the director mentioned before, they were not forthcoming in the data that they

could have provided for the effect of that situation, in my opinion.

Also, the next year, we had the introduction of civ pro. Although it came on a winter Bar -- you always introduce everything in the winter Bar. You all know that. We always do those things, except for this one, because you needed a big summer Bar to trot it out. But that summer, 2015, was the first time we had civ pro. The courses hadn't gotten enough civ pro material for practice, and people were afraid.

What I'm saying is that we could have a halo effect. Mr. Patton alluded to that earlier. In this instance, the halo effect would be, you take a civ pro question and, you know, darn it, you're just not sure, because you haven't had enough training. You haven't seen enough of the patterns. And the next question is, say, a contracts question, and it's a contracts question that you should normally get right, you know, nine times out of 10, but because you're still thinking about the civ pro question, you're struggling now, and you get something wrong.

I think that introduction of civ pro should not be or cannot be downplayed. In fact, as Robert mentioned or noted -- and it wasn't the Committee's fault -- the Conference, National Conference, announced in March of 2016

that they would not -- fait accompli -- they would not be releasing raw scores, raw subsets, raw scores. There will just be a scaled total score. Boom, done deal. They were afraid of the civ pro effect. They were afraid that civ pro would come in as low raws, and students would look and just go, "I failed because of civ pro," even though it couldn't be equated.

I told students, "Don't worry about it when you take the exam. It's going to be equated out. It's still going to be high. Even if you guys all get nine points right on the civ pro question, it's going to come out right," which then leads me to the fact that this year, as you pointed out, they suddenly announced percentiles. What's with that?

I would suggest to the Committee that that's an effort to allow for all students to be able to come to California and say, "I scored 97 percentile. I should be able to be admitted to your state without more." Otherwise, you have to do too much work to get the percentile, but the National Conference is splitting it. So I think there's an agenda, and I don't know whose agenda it is, but there is an agenda on that.

In light of all this, I would say that your next study, the fourth study, is not going to have the right data, because, again you're not going to have the totality

of Bar preparation. You're going to have a slice from law school, and even though the law programs I am -- Loyola's is to be lauded. USD has an MBE and a very strong "one and done" program.

I've taught at both -- I held my workshop at both schools. Excuse me. I know your people -- but most schools don't. They don't spend all that time and that energy. They leave it to Bar review, and, consequently, Bar review is left with picking up -- everybody assumes that Bar review is, you know, universal, ubiquitous, uniform. It is not.

Consequently, you have distinctions there, and I kind of alluded to you about this in 2014. That was the Professor Sander (phonetic) problem. He assumed that Bar review -- and that was in his first writings -- that Bar review has no effect on pass rate. Therefore, it's all the schools. So you guys could abduct that lawsuit, but I don't think I was clear enough at the time.

The bottom line on that scenario is, I would be happy to consult with W.G. Vess (phonetic), if they want information, a perspective that they're not, evidently, including, and I appreciate it. There is kind of a standoff, although, you know, I've had good relationships with their directors of examinations, et cetera, through the years, and, again, I'm not one who points fingers at the Committee, and I don't think it's the Committee. I think

it's (indiscernible) Bar review. That's my opinion. There are other factors, honestly, but, you know, it's the person who had it last. That's the kind of thing I would go off of.

Regarding the two options, I think either number two has been mis-worded or you have a third option, and that would be to reset and interim cut score of 1440, to be used for the July 27, 2017, and February 2018 CBX only. In fact, your Committee's recommendation or staff recommendation was just as an interim, and for some reason, and I don't know where in the process, it became July 27th only, and that will have an adverse effect.

Subsequently, I think 1414 is a fine pick, but you've got to go with February 2018 included in the mix as well. Substantively, it was referred to early. The 1414 is exactly one standard error, so it's well justified. Historically, 1412 was the threshold for making reappraisal, the third round, where a senior staff member could make a decision, a senior grader could make that de novo decision, and so I think that 1414 is probably, you know, an appropriate mention there.

As a matter of -- well, similarly, it was mentioned 1390, 1390 actually being the threshold for re-read. So it's amazing that your studies actually have vindicated, you know, your benchmarks along the way, and I

think the Bar has not been active in defending itself, but, again, that's above my pay grade. I think that you've made the decision, or the decision is being made, politically, to go to a lower score. I'm fine with that. It's just that other areas have to pick up the slack, and I do think that, again, once the pass rate starts to rise, just through the introduction of the two-day format and the further emphasis on the MBE, I think we'll see pass rates return to what people were happy with, which was 1996, '97, in that era, where you had 62 percent-plus overall pass rate.

I also appreciate the fact that you're lowering the cut rate, or that it would be lowered, because what hasn't been mentioned, although Robert is an example, the scarlet letter of the Bar is "Have you failed?" It seems that people have a hard time handling that as they proceed through life, through their career.

It seems to be something, a cudgel, that others hold over their heads, which, since the Bar doesn't release your score if you pass, it's rather a pernicious thing, shouldn't be done, but, you know, since the difficulty of the Bar exam is universally known in the public, people have to sit for the Bar. You can't have a JD in California and not get a license. That just doesn't work.

So, to the extent that this would take the monkey off of people's back -- because, by changing to the new

format, what you've done, in essence, is everyone going forward cannot say, "I passed the Bar the first time," because they don't know if they would have passed under the old regime, and the old-timers don't know if they would have passed under the new regime, with its emphasis on the MBE.

So I think just the change alone is something that clears the baffles, and it's wonderful, and I think it should be loudly promoted, and as a PSA, you know, in the future. I always cut people short when they start to talk about, you know, "I passed the first time." Doesn't matter. There's too many factors in play that you don't know.

Procedurally, I think going to a 1418 -- or 14, excuse me, 14, and extending it to the February 2018 CBX would be good, because, without including February 2018, you are affecting the ecosystem of the applicant pool, because, when you take out that big chunk of "almost passes," then, for winter 2018, they're not there, and that will disrupt the pass rate for 2018. It will drop, because those are the people most likely to excel or exceed, and so you're taking away too many of the good people from that.

Psychologically, a lower cut for just the summer would devastate a number of people. I'm sure that that was part of the impetus, where he's going, "My God. I could have just sat for this Bar and passed, easily," wherein the people sitting for the winter, if it's not adjusted, would

be going, "My God. I missed that golden opportunity in the summer, and now I'm still 26 points out," and all those people -- you know, everybody is 26 points back, further back, and, again, that cohort missing means that the MBE will drop, so then it becomes even harder to get your license.

I made that recommendation in my letter to the Bar -- or to the Court, that you need to pump up the MBE in the winter, and, therefore, you might want to introduce or allow for a third year on same basis, lottery, what have you.

Finally, if you don't push winter 2018, you're going to end up coming back for it, because, what I've heard today, if there is a division on the studies, the validity of the studies that were done, and this drags out, you're going to come back again to the Board, to the Court, and make another recommendation to lower the pass rate for the winter Bar only, and that's going to get you, because it's going to look like you weren't aware of what you should be doing, and, therefore, you weren't prepared. So I would do that.

If you don't do it, I think, you know, other people will. I think the Board will see it as a public situation. The Court might even consider it as an equitable matter that should be resolved, but, regardless of that, I

do applaud what you're doing. I do applaud that you're taking the time, and I appreciate that you let me speak. I was riffing on some of the earlier points that were made. It's a problem as a teacher. Thank you very much, and I would offer assistance in whatever way I can.

MS. GOODMAN: Thank you, John.

MR. HOLTZ: Sure.

MS. GOODMAN: So our next speaker is --

MR. HOLTZ: Sorry I took too much time.

MS. GOODMAN: Our next speaker is Ira Spiro.

MR. SPIRO: Thank you, but I'm going to pass.

MS. GOODMAN: Pardon?

MR. SPIRO: I will pass.

MS. GOODMAN: Okay. Great. So our next speaker is Jennifer Mnookin.

MS. MNOOKIN: Good morning. Thank you for this opportunity to speak today. I'm Jennifer Mnookin. I'm the dean at the UCLA School of Law, and I strongly favor seeing a reduction in the cut score to the California Bar. Of the two proposals that you've put forward, I therefore prefer the one that lowers the Bar score, though, frankly, I don't think that goes far enough.

Now, I'm the dean at UCLA, which is one of the strongest law schools in this state and in this country, and our students are very strong by every measure, including

academically. Our media LSAT for last year's first-year class was, in fact, the second-highest in the state, second only to Stanford. Our Bar passage rate is also impressive. If I look over the last decade, our rate has varied between about 82 and 90 percent, depending on the year.

So I sit here as the dean of a law school whose students are really quite successful in this space, and, nonetheless, I sit here as somebody who believes that we would be serving our state much, much better if we did, in fact, move closer to the national average, and I'd like to just spend a couple of minutes describing why.

First of all, I think it's important to say -- and I realize that all of you certainly do already understand this -- but our cut score currently isn't just a little bit above the national average. It's a lot higher. Interestingly, in fact, two of the other states with high cut scores that were not quite as high, but close to ours, Oregon and Nevada, have both this year made the decision to lower theirs. Nevada has gone from -- it's gone to 138, and Oregon has gone now down to a 137.

This does mean that, even at the 141 -- I'm using the three-digit, rather than the four-digit, versions, because that's more akin to how other states report it out. Even at 141, California would actually still be the second-highest in the country, and let's also note that

that's second to Delaware.

With all due respect to Delaware, Delaware is basically irrelevant in this conversation, because do you know how many people took the Delaware Bar in 2016, which was the last public data I saw? It was 198. That's right, 200 people. So, if we bracket those 200 people, California would still be the single highest cut score in the country, even at the level that you are proposing.

Moreover, and I know you are all well aware of this as well, but the evidence clearly shows that California Bar takers currently perform better than the national average on the multistate portion, which, at least until now, has also been the driver of the overall scoring structure here in California, and yet many more of them fail the Bar, and that's after investing substantial amounts of time, typically three years, and money, in their professional education.

So, in a way, this hearkens back to Joan's point earlier about crowd-sourcing, but it seems to me that if we are going to retain a minimum competency level that is unusually and atypically high, we need to have very good evidence that we really get performance benefits from that decision. If we had that evidence, if you could show me that having this higher cut score really did help mean that we had truly better lawyers in California, or that it

genuinely benefitted the public, I would want to know that, and I would want to hear that, and I could come to supporting that, but right now we do not have that evidence.

There is absolutely no evidence that California's unusually high cut score actually produces better lawyers than in states like New York, Pennsylvania, and Illinois, none. There is no evidence that California's lawyers -- no evidence that I know, anyway -- that California's lawyers face less disciplinary actions, or do their jobs better, or better meet the needs of their clients and their community.

My academic subject is evidence. I'm an evidence scholar. In some ways, this feels like it's a question about burdens of proof. There is no doubt that this has been an understudied issue across the country, and I laud you and this state for beginning to take steps to develop a research basis, although I think we have a very long ways to go.

I'll return to that in a moment, but, in the absence of clear evidence that this higher cut score helps, given that we have very clear evidence of its costs, I think we should very concerned about retaining it. What are some of those costs? Well, one of them -- and, again, I know you are all very well aware of this -- is that this higher cut score makes our state's lawyers meaningfully less diverse than they would otherwise be.

This unusually high cut score has its particular effects on minority test takers, in aggregate, and I think this has very clear negative consequences, without any proof that this high cut score actually produces better lawyers, and this disparate impact concerns me greatly.

I spent a decent part of this past weekend both watching the events in Charlottesville and then writing a message to my own community about what happened there. It was my former hometown. I used to be on the UVA faculty, and so this hit pretty close to my heart.

Watching the continuation of overt bigotry and racism in this country is absolutely heartbreaking. I know we have none of that here, but we still do have significant amounts of implicit bias and unfairness that hurts people who are diverse, coming from communities of color and/or of lower socioeconomic status, and so setting our Bar score/cut score at a place that keeps more candidates like that from being able to be lawyers, without strong evidence that that high cut score is actually producing better lawyers, is something that I think we should all be very, very worried about.

Now, at UCLA, we're proud of our Bar passage rate, but there's no question that it's still significantly lower than it would be in almost any other state. One analysis that was done, it's not my own analysis, but said that if we

were facing the New York Bar passage rate, we would have -- instead something like, this past year, in the low to mid-80s, we'd be more like 97 percent of our students would pass.

I see firsthand how, among the students that don't pass the first time, they face significant and real costs, and career consequences. Those who are still looking for jobs, of course, find them significantly harder to get. Some lose jobs that they had. Some are able to keep their employment, but there's no doubt that they lose standing, wherever they are, within their fledgling professional positions, even if they are able to stay.

Now, from my school, the vast majority of students who take the exam the second time do pass that second time, but why is it that we are forcing them to go through this ordeal twice, and has that second run-through somehow actually made them better lawyers? Did they really lack minimum professional competence the first time around?

New York wouldn't have said so, but we did. California said that. And yet they miraculously developed it through this additional time, which wasn't spent lawyering, but was, in fact, largely spent doing further Bar preparation through a Bar prep course, whether it's BARBRI or Themis or who knows who else.

Now, most of the students from UCLA who don't pass are quite close to the pass level, and I believe that they were, in fact, minimally competent in that first go-around. I believe that it is our cut score that's getting it wrong, not their capacities, and I will say to you again that, in virtually every other state with identical performance, they would have passed the first time.

In addition -- and this has been referenced by other speakers as well -- our unusually high cut score has meaningful and, in my view, deleterious effects on the law school curriculum at a number of schools, and at the margins, even including my own. Twenty-first-century lawyers need to be broadly educated. Twenty-first-century lawyers need to be agile problem solvers and impactful leaders. Of course they need to be strong conventional legal analysts, but what they need starts there, but does not stop there.

I am enormously proud of our broad and deep curriculum. I am proud of our significant experiential program that gives students the change to develop on-the-ground legal skills while still in law school. I'm proud of the ways that we have courses that encourage students to be interdisciplinary and to think about law as a set of social problems, not merely as a question of doctrine. But none of these broader skills are tested

directly on the Bar, and, to make the matter more acute, over time, there's been an increase in the number of core subjects that are tested and covered.

What this does, when combined with California's unusually high cut score, is it pushes students into Bar classes that may have absolutely nothing to do with their professional goals, and sometimes that's in lieu of classes that would, in fact, be far more beneficial to them over the course of their careers.

At UCLA Law School, we believe that every single student we accept clearly has the capacity to pass the Bar, but I want to tell you that my fundamental goal as an educator is to create extraordinary lawyers and leaders, not extraordinary Bar takers, and a cut score closer to the national average would help my school and others stay focused on what's truly most important about legal education for the long term, not just for this high-stakes test.

In addition, the current high cut score has effects that some people don't really notice on the entire California lawyer marketplace. I've seen the way it makes many small firms and government agencies extremely reluctant to make any hiring decision until after candidates have passed, and, frankly, given the overall pass rates, that's a pretty understandable response from employers, but what this means is that, compared to other states, more of

California's law graduates will not have jobs by graduation, even from top law schools.

It means that many are still hunting, and can't fully get anything confirmed, and, given how late we tend to get our results, and then the holidays, it's often not until the New Year that they're able to continue their search in full. This obviously creates additional financial pressures for graduates. It also hurts California schools in the national rankings, which look at both job placement at graduation and job placement 10 months afterwards, and, again, these consequences happen without any clear and defined benefit from our higher cut score.

Now, I very much appreciate that the State Bar and the Supreme Court are taking these issues seriously, and I appreciate the efforts to begin to study this in a serious way, including Doctor Buckendahl's study with his focus group of 20 lawyers, which concluded that, while it might be justifiable to reduce the cut score, that the current cut score also appeared to be reasonable.

Unfortunately, in my opinion, that study was too rushed and too hastily constructed to be worth giving very much significant weight to. I will note that I've said that all along, as several of you know, including well before I had any idea what results the study would come to, and I also appreciate that part of that speed was in response to

the Supreme Court's interest in having you begin to study these questions, but I think it is a problem, and I think that it means that that study can't simply be considered to be valid, and can't, frankly, be considered to offer very much substantive evidence in favor of or against any particular cut score.

You've heard from several other speakers about some of the flaws, and I'm not going to go over those again, but I will mention, briefly, two additional concerns that I didn't hear earlier, although one of them, at least, has already been surfaced elsewhere. I think the presence of an experienced Bar grader among that group was really a cause for concern. I don't think that fits best practices of this kind for a standard-setting study, and I've heard both in the expert reports and from those who were present that that person was extremely forceful, and I think that's a real issue that we need to recognize in assessing what happened.

I also think there's an interesting double problem with the combination of a lack of a rubric, and I understand there were arguments why that might be better. That's a hard question, but when you combine that with the distribution of exams that the group saw, I think that's really a very concerning issue.

The distribution that the focus group looked at was not sampled in relationship to actual takers. It was

instead a sampling across -- a much more even sampling of the different score relations. What this means is that strong exams were over-sampled compared to the real distribution. So those reading these exams saw many more strong exams, as evaluated by their Bar exam score, than is in the real distribution.

When you combine that with a lack of a rubric, and when you combine that with the reality that those 20 people, they're all qualified California lawyers, but they have areas they know a lot about and areas they don't know a lot about, the truth is, they were grading, in essence, on a curve. Inevitably, that's what they were doing, and, having talked to a couple of people who participated, they confirmed that they were inevitably doing that.

So we had over-sampled strong exams, no rubric, and an implicit curve, and, given that, it's hardly surprising that, even though this group found a significantly higher portion of the exams they saw to be minimally competent or better than the overall pass rate, it resulted in numbers that don't come out that way, and I think that's an additional very significant flaw that we need to assess.

While it's true that one of the expert reports concluded, after detailing a set of concerns, that there were no fatal flaws, I have to say, when I read that, it

reminded me of how I feel when I'm writing a tenure letter for somebody, where I've got a bunch of concerns, but I don't want to come out and say, "Gee. This person shouldn't get tenure," and what I do is I describe all of the concerns, and then I sort of say, "To be sure, there's meaningful value in this scholarship," and it would be quite understandable if this person were given tenure at their law school, and what I mean to be saying is signaling that there's very real weaknesses, but that I don't want to be the one to say that this is too weak for them to continue their position.

So I think it would be a real error to take that "no fatal flaws" conclusion out of the broader context of the set of flaws that that expert detailed, and which I think, for reasons we've already heard earlier, is very substantial, but, nonetheless, still incomplete.

From where I sit, and I have said this all along, I think to do these kinds of studies well and right simply will take longer. I think it's a good idea. I think it's terrific that you're taking first steps toward doing that. But I think we continue to have a kind of "in the meantime" question, because academic research of this kind, done carefully and thoroughly, with adequate time to vet the "minimum competency" description that was not, in my opinion, adequately vetted, with adequate time to look at

all of these challenging issues, it just can't be done on this kind of time scale.

Now, I appreciate that the Court wanted concrete information to support its decision making, but I think that there are many other forms of concrete information that suggest that it would be better for the moment to get meaningfully closer to the state -- I mean, to the national average, while we continue to learn more about the validation of any particular cut score.

I also believe that, in one version of the Buckendahl study, he did suggest 139 as a possible level, and in the course of back and forths, perhaps with the other experts and others, that possibility was removed. Of the three numbers that I've heard today, that would seem to me to be the most appropriate, though I will say that, from where I sit, even a 139, I think, would be unjustifiably high, and still be one of the very highest in the country.

I do appreciate that some critics of changing the cut score suggest that the problem is that law students have become weaker over time, and it is true that there has been a significant decline in interest in law schools over the whole nation in the past decade, and that that has had some effects on what students law schools are taking, but I want to be crystal clear that there is no evidence that this is the entirety of the issue.

Furthermore, what these declining Bar pass rates are showing, they're showing a problem that's existed for a very long time, and they've just made it much more acute and visible than it was before. It's not a new problem, and I say this again as a school where our Bar pass rate has been between 82 percent and 90 percent over this entire period, and yet we see enormous negative consequences from the fact that it's so much lower than it would be elsewhere.

I also appreciate that some people say we in California, we are the greatest state in this nation, so we should have the greatest lawyers, and so we should have the toughest Bar exam. Some people think we should be proud that, again, except for those 200 people in Delaware, our Bar is the toughest one to pass.

I fully appreciate and agree that California is an extraordinary state, and I'm enormously proud to be leading one of the great law schools in our great state, but I simply don't think that we serve the public, lawyers, law schools, or law students by expressing that greatness by making our graduates jump over an unusually high hurdle that has clear costs and no clear benefits.

So, even if 141, California would be still the second-highest in the country, and, again, for all practical purposes, the very highest. At 139, it would still be one of the highest in the country, and if we moved significantly

closer to the national average, I think we would be doing even better for our state, though I realize that that's probably not on the horizon currently.

I guess I just want to conclude by saying that, from my perspective, a failure to shift at all would be an extraordinary contrast with what I think are truly the core values of our great and very diverse state. I want to see us be forward-thinking, not hidebound. I don't want to see us dig our heels in the ground in continued preservation of a number that was created without any clear justification, and which continues not to have any substantial justification for it.

I think we have the opportunity to make decisions here that will increase diversity, increase access to justice, and serve our state, and I hope you decide to go down that path. Thank you very much for the opportunity to comment.

MS. GOODMAN: Thank you very much.

So our next speaker is Jackie Gardina.

MS. GARDINA: Good morning --

MS. GOODMAN: Good morning.

MS. GARDINA: -- and thank you. I will be brief. There is a danger to being here at 11:50, keeping people from lunch, and much of what I had to say has been said, but I felt it was important to stand up as the dean of the Santa

Barbara and Ventura Colleges of Law, which is a California accredited law school.

I think it was important to discuss the unique circumstances that our students find themselves in, which is that they are only eligible to sit for the California Bar. They have chosen to live, learn, and work in the communities in which they attend law school, and most, if not all of them, stay in those communities. So, unlike graduates of American Bar Association schools that may choose and have the option to be mobile, our students do not.

Just to give a little bit more background for those who aren't familiar with our school, we have been in existence for almost 50 years. We have almost 2,000 alum who have served or have served with distinction the profession in this state.

Our students are unique in the demographics, and I'll talk a little bit more about that as I go further with my discussion today, but let me just start with, I'm urging the Committee to recommend to the Supreme Court a 139 Bar exam pass line.

Much has been said about why I think that's important, so I will just be brief about why I think it's important first. It's within the range identified within the study. It is with a 95-percent confidence level that the true cut score falls between 139 and 150.

Second, there is absolutely no evidence that choosing a 139 Bar exam pass line will undermine public protection. As others have said and pointed out, over 84 percent of all attorneys in the U.S. are licensed in jurisdictions with a cut score 139 or below, and there's no evidence, as the staff report pointed out, that discipline cases or malpractice cases are fewer in California than in those other jurisdictions.

Let me speak to the other two policy ideas at play here. One is the commitment to bridging the access-to-justice gap, and the commitment of the State Bar to improving diversity. I think that California accredited law schools, and my law school in particular, are well situated in both cases.

The Colleges of Law is located in counties that lack adequate access to legal services. They've chosen to attend the school in part because they are rooted in their communities and want to serve the communities in which they live, and, unlike many ABA law school graduates, for whom debt often serves as a substantial financial barrier to rural or local legal practice, the total Colleges of Law JD tuition is just over $67,000.

Most of our graduates self-pay, although we do have access to Title Four financial aid, so many leave with little or no debt, because they're working adults, who

usually work full-time while they attend law school.

Finally, there's significant evidence that adjusting the pass line will positively affect the diversity of the profession. I know this is one of significant importance to the State Bar. Many of the California counties currently identifies as minority-majority populations, and that's true for Santa Barbara and Ventura Counties, which identifies 45 percent and 42 percent, respectively, as Latino or Hispanic, yet, in the State Bar of California, as far as I see, the statistics indicate that 4.2 percent of our attorneys identify as Hispanic.

Colleges of Law student demographic reflects the demographics of the county in which we exist. We have over 40 percent of our students identify as Latino. Over 50 percent grew up in a home that speaks something other than English.

So I think it speaks to the idea not only of diversity, but with the California courts having an increased focus on language access implementation plan, we have a growing number of students who are bi- or multilingual at our school, which obviously has an implication for their performance on a standardized test, but doesn't necessarily implicate their ability to be sound, competent, practicing attorneys who can aid their communities.

The staff report indicated that the Colleges of Law -- or, I should say, the Cal-accredited law school Bar pass -- would increase by 31 percent at the top end with a 141. It's not clear to me what the Bar pass rate would be with 139, but I can say that the last time we received statistics from the State Bar -- and, hopefully, will be getting those again soon -- the Colleges of Law had a 70-percent cumulative Bar pass rate.

So, if that's accurate, that we have a 31-percent increase, our students are going to be well situated to serve the counties and the communities in which they live. Then, if you look at the Bar pass rate for Hispanics, according to the staff report, you're going to see a 10-percent increase at the top end, if not higher, for those who identify as Hispanic who are taking the Bar.

So I think, based on the balancing of the policies that you have before you, public protection, bridging the access-to-justice gap, and the increasing diversity, it favors lowering the Bar pass rate, and I urge you to consider 139. Thank you.

MS. GOODMAN: Thank you very much, Jackie.

So, a couple other speakers that were on the list. Darren Greitzer? Is Darren here? Must have left.

Okay. Stuart Webster?

MR. WEBSTER: Yes.

MS. GOODMAN: Okay. Thank you, Stuart.

MR. WEBSTER: Good morning, just. Thank you for this opportunity to address the Committee. I've had the benefit of reading the various reports, including Doctor Buckendahl's report, the staff report, and also the observers' reports. I've also had the benefit of viewing the video session of the joint committees on the 31st of July.

I want to address two issues, and the first is really a challenge to the validity of the standard-setting study. It seems that there's a disjunct between what an exam candidate is required to do, according to the preamble on the front page of the essay questions, and the definition of the "minimally competent candidate" as modified and adopted by the panel for their study purposes.

If I can refer to page 11 of Doctor Buckendahl's report, the factors considered to be important in determining whether a person is minimally competent include, at paragraph two, and I'm quoting here:

"Ability to distinguish relevant from irrelevant information when assessing a particular situation in light of a given legal role" -- and this is important -- "and identify what additional information would be helpful in making

the assessment."

Point is that nowhere in the preamble to the examination are the candidates asked to indicate what further information might be important. How is it that you can assess a minimally competent candidate on the basis of a task that a candidate was not asked or required to do?

The second issue I wish to address is in relation to foreign attorney takers. I accept that the current test regime is the basis of a range of bad alternatives, and then it goes (sic) what previous speakers have mentioned. The other methods are subjective, heavy on resources, and difficult logistically, and, quite frankly, expensive. So I understand how the current methodology has been adopted and used.

The essay part of the current test calls for an unrealistic response, under enormous time pressure, exclusively from recall, and without access to materials. That is not reflective of real legal practice, except on very rare occasion when one is required to think on their feet. The MBE has no equivalence in practice. Life is not a series of multiple choice questions.

Now, much emphasis has been placed on recent graduates. Please spare a thought for attorney takers. The difficult question of finding the answer to the decline in pass numbers should not ignore what is also happening with

attorneys who are already qualified to practice elsewhere.

Attorney takers have presumably been unleashed on the public in other states for years, and these candidates are not distracted by the MBE, because they don't have to sit that part of the test, yet the average pass rate is traditionally very low, and can I just -- I'll refer to the statistics over the last five to six years, and it's published by the NCBE.

The low point for attorney takers was in January -- sorry -- in July 2014, at 31 percent. The high point was February 2014, at 54 percent. But if you take the averages over the years, the lowest average was in 2011, with 39 percent, and it's taking both February and July into account. In February 2014, the average rate was 44 percent. So there is, I think, still a difficulty, when you look at those figures, at why is the California Bar failing people who are competent notionally in other jurisdictions, in large numbers?

So I should have been advocating for a special cut rate for this category of candidate. When considering the balance between access to justice, on the one hand, and protection of the public on the other, and especially the false negative side of the equation, please bear in mind those whose approach to written expression is slow and methodical, and the keyboard-challenged over-50s.

Does that make them any less competent, because they have not recently been in a learning environment where pressure tests are de rigeur? How many of the sample essays reviewed by the panel were handwritten? Should the work of a recent graduate who is touch-type proficient, and in 60 minutes able to cover more issues, develop more accurate rule statements, and provide greater depth to the legal and factual analysis represent greater competence over someone with rudimentary typing skills?

I have been practicing law without censure in a foreign jurisdiction for 30 years, at least 10 years of that at senior partner level. I have just sat the California Bar for the fifth time. Foreign attorneys are not exempted from the MBE, as out-of-state attorneys are. My best score was 1419. My other scores have not been far behind. In virtually every other state except Delaware, I would have been licensed.

I am least able to judge whether I have the legal competence required to practice in this jurisdiction, but certainly the California Bar is truly difficult, and takes a heavy toll financially and psychologically.

The exigencies of practice, client attrition, common sense, peer supervision, and a robust and effective discipline regime should mitigate against the worst impact of the false positive. So it is not surprising that I favor

lowering the cut rate to 1414, or lower still. These factors should feature in your thinking. Thank you.

MS. GOODMAN: Thank you very much, Stuart.

Our next speaker is Amy Breyer. Amy here? Great.

MS. BREYER: Thank you very much.

MS. GOODMAN: Thank you.

MS. BREYER: I graduated from Northwestern Law School in 2000, which is, as you probably know, one of the best-ranked schools in the country. It's about 12. During my time in law school, I clerked for the State's Attorney's Office. I clerked for the U.S. Attorney's Office, clerked for a judge in the Northern District of Illinois.

I passed the Bar on the first time, ran my own practice. I was very involved in both the Chicago Bar and the Illinois State Bar. I was a principal founder of two different sections, one of the Chicago Bar, one of the Illinois Bar. I participated in other sections. I had notable rulings in a number of cases of first impression in my field.

I moved to California a few years ago, because my fiancé had gotten a job here, and I tried to start a nonprofit. I had done some nonprofit work for a few years. But I wanted to speak here today because I am not qualified to practice in California. I failed the February Bar, so I was hoping, by outing myself, this is what the face of

failure looks like. This is what not being qualified to practice looks like for an attorney taker, as the speaker just previous to me had noted.

I understand the natural incentive for all of the attorneys who practice here now who have already passed, who have no interest in seeing the score lower, because it's a point of pride, but, as many other people have already observed, there is simply no empirical evidence that the score where it stands now -- or lowering the score, I guess I should say -- would have some sort of negative impact on the people of the state of California.

I would add that whatever test it was that those test takers in California took years ago, that they cling to as such a badge of honor, is not the Bar exam that people are taking today, and I'd like to offer a few observations which I think tie in, actually, to a lot of the empirical evidence we've heard, which I think has been some great research, but just my own personal observations, having studied now for this test.

If you look at what's on the State Bar web site as sample strong answers from July 2006, it's a 70-page document, and if you look at what's on the sample strong answers from July 2016, just 10 years later, it's a 107-page document, and the reality is that the examinees who pass today aren't necessarily smarter, but they have learned the

secret sauce to beating this test, and I think, in a lot of cases, the secret sauce is just length.

I would point to, for example, in July 2015, 13 pages on jurisdiction. I would challenge anybody to handwrite 13 pages on jurisdiction in an hour, even if all you were doing was copying over this essay. It goes back to being a little bit computer-challenged. I handwrote the first essay, the February test. I handwrote in Illinois, and I passed.

I think that there is a certain amount of bias for at least attorney takers who aren't averaging out the score with the MBE. The entire score is just based on the written exam, and, particularly for people who have been in practice for a while, who have never used ExamSoft before, who didn't want to risk a professional license on the nuances of software that -- I don't need to go through the horror stories. Even though ExamSoft is a lot better than it had been, it's not perfect, and it seems like an awful lot to ask somebody to risk getting a license on software they have never used before.

So you talk about, you know, 13 pages on jurisdiction. Well, this (indicating) is from the July 2016 essay. This was a real property:

"The problem, however, is that, in closing, under the merger doctrine, the

land contract merges into the deed, and cannot be used to provide relief to the buyer. Under the merger doctrine, the contract is said to merge into the deed, and the buyer may not use the contract to recover for defects on the property. Here, closing the land-sale contract that they entered into would be said to merge into the deed. Thus, even though the contract was breached at closing, there could be no relief afforded under the terms of the contract. As such, plaintiff cannot make a breach of contract claim here. So, in conclusion, the contract claim would fail, because the merger doctrine merged into contract deed, and it can no longer afford relief to the plaintiff."

They said one thing, but, because they're typing, it took half a page, and this was considered a sample strong answer. Sometimes what gets written is, for example, "The facts indicate that, upon his death in 2004, Tim died." In case you wanted to look at it, that was February 2006, answer A to question two.

July 2015:

"Generally, tenants in common are not entitled to contribution from other co-tenants, because the cost expended to repair -- because you can't recover for cost expended to repair improved property."

Flat-out wrong point of law, but the person passed the test, and not only did they pass, it's a sample strong answer.

This is from February 2016. This is a professional responsibility question:

"Well, in this case, the lawyer also breached her duty of care. A lawyer must act in good faith and as a reasonably prudent person, with the same care, skills, and caution as would be expended on her own matters."

There is no duty of -- this is a corporations concept. You have a duty of care in a corporations context. In law, we have duties of loyalty and confidentiality and a whole host of others. This is flat-out wrong, but, because they were able to type quickly, and type a lot of it, they passed.

Here's personal favorite. Again, this was a professional responsibility question. This is from July

2011:

"Under the ABA rules, an attorney may threaten criminal or disciplinary action as an attorney, so long as the charges are sufficiently related to the civil action."

No, but they passed. And I've got to say -- and there's plenty more, but, you know, you guys get the idea. As somebody who has practiced for the last 17 years, I am a little offended by the notion that I am considered a greater threat than somebody else who was under the impression that it's okay to threaten disciplinary action as long as it's related to the litigation.

As the gentleman behind me just pointed out, I do think that there's a bias in this test against older examinees, and it's implicit. I'm sure it's not like people are sitting around thinking, "How can we do this?" For example, once you get to be a certain age, maybe you just don't type as quickly as you used to. Maybe you've never used ExamSoft.

I think that the whole ExamSoft issue also goes into some of the bias that other speakers have brought out about other communities, for example, we call "communities of color." Maybe they go to schools where they're not able to invest in ExamSoft, as part of the reason why they come

to take this test and they're not scoring as well. There's just layers of things that are going on that have nothing to do with a person's competency to practice law.

I'm just a member of the public trying to get my law license. I don't know the discussions that went on that prompted this Committee to come up with "Well, there's only two choices. We either keep things they way they are, or we go to a 141.4."

It would seem to me that there's a whole universe of choices out there, and I would certainly encourage, while there's this review underway, not to exclude other possible choices, and we've heard dozens of very valid reasons for not excluding other possible choices already.

Had I taken the Bar just about any other state, including New York, I would not be sitting here talking with you right now, because I would be working.

As a final point, I would like to suggest -- I don't have the exact numbers with me, but there were over like a thousand test takers in February alone that were transfer attorneys from other states. My understanding is the annual Bar dues here is about $400. Even, say, 1,000 people at 400 bucks, it's an extra $400,000 a year of revenue to the State Bar. There's some incentive right there. Thank you very much.

MS. GOODMAN: Thank you very much.

So is there anybody else that would like to speak? Okay. Come on up. I didn't get your name.

MS. MILANEZ: Patricia.

MS. GOODMAN: Okay. So, when you get up there, say your first and last name, so we can get that.

MS. MILANEZ: Okay. Good afternoon. Patricia Milanez. I'm from Brazil.

MS. GOODMAN: Can you spell your last name, just because we don't have a list?

MS. MILANEZ: M-I-L-A-N-E-Z.

MS. GOODMAN: Okay. Thank you, Patricia.

MS. MILANEZ: Okay. So I'm licensed attorney in Brazil, and I just took the Bar exam for the first time. So I'm talking on my behalf and from my experience so far. I don't have so much to share, but so far what I've seen, what I've heard here (sic).

I've been immigration paralegal for many years now here in the United States, and I took the Bar exam back in 2005 in Brazil, and I think the score should be lowered to 1414, because it give us a chance. I would love to become an immigration lawyer here, and help people, because that's what I do. That's what I love to do. I do not for the money, but it's personally rewarding when I see -- when we exercise the compassion, and when we can somehow improve the law, come to this country to improve the law.

Of course, I'm going to only know if I passed or not in November, but I would like to also thank you so much for this opportunity, and thank you so much for the opportunity for the foreign lawyers to be able to take the California Bar, even without L and M (phonetic). So this is great. So thank you so much, and thank you for the opportunity to comment. Sorry. I just have to go little by little.

One thing that bothered me the most is how people deal with the Bar studies. I saw people saying outside -- because I saw those inserts the lady just said. I said, "How come you're going to do all day one hour?" It's such a rush, and so much to memorize. There's a language barrier, and it's all that, and even hard for the people who study here, went to law school here. And the answers were like essays only, to be perfect. You just have to -- whatever you remember, you just type. I don't think this is effective.

For example, when I took the Bar in Brazil, one difference is that here we have to know all subjects in writing the essays. In Brazil, we can choose. We have the multiple choices, and the essays we can choose whichever we like better, whichever we would like to practice or something, because sometimes you just throw information there, and you're not ever going to see in your life again.

So that would be some suggestion, about, like, giving the opportunity for the people to at least choose something that they would like to write about. That would be something to add. Yes.

I agree with Robert, who said that there should be a balance between MBEs and essays. That was a good suggestion, and I do agree with many people said about it doesn't prove that you're going to be a good lawyer, because there was even a some (sic) that California State Bar post, over 15,000 misconduct for lawyers, ethical and -- yes. I think it was regarding lawyers who don't return phone calls to clients and all that.

So it's not only about practicing law. It's about caring about your clients. So I think this is a big part of being a good lawyer, is caring about, truly care about your clients, not just throw things to the paralegals and they do all the work. No. The lawyer should be hands-on.

I think this is really important, and something that, if I were able to practice here, I would love to do, because it's about compassion, about caring, and go an extra mile to help your client, and to work with honesty, because there's so many disciplined lawyers because of business conduct, and that shows us that just knowing the law is not enough. It's much more than that, and I agree with the higher score limits, the number, the diversity of

the attorneys, because we can bring so much to the table, and combine some things from our countries. Foreign lawyers also can contribute with something to the American law, to this country, and also the money that people spend.

From my experience, the people have took the Bar review, so people go to crazy loans, and they've been taking five times, three times. I don't know. It's endless. So they go into debt, and that information also that the applications dropped -- in (indiscernible), a lady told me it was since 1970, it hasn't been lower like now, the law school applications. So this might be a factor, because people don't want to take the risk and say, "Okay. I'm going to have a $200,000 loan, and then how many times I'm going to have to take the Bar?"

What I saw, it's people having fear. I don't remember someone that was confident. They would be freaking out. I would say, you know, there should be a sense of community or something, but everybody there (indiscernible), yes, because everyone is going crazy. Everyone has fear of the test so much that there's anxiety, and then the consequences. In my case, I didn't see anything, but we hear the horror stories, and I don't think, out of nervousness, you're going to take good, effective test.

Also, the typing, three hours. Sometimes we need to think. We are not all like just a (indiscernible).

Everybody typing makes us nervous, makes a lot of us nervous, because you feel like "They're typing so fast, and I'm still here spotting the issues." And so this is something that -- maybe be more flexible with the time.

Sorry. I just have to see the (indiscernible). Yes. And it's a lot to memorize, at the end to say, "Okay. The samples" -- you don't have to be perfect. As I said before, like, you just write -- just throw information there, and I don't think this is effective. We need to apply the law consciously, not just in a crazy rush of whatever that we remember, because we see the samples, like, "Wow. I'll never be able to type like that." And people would say, "Don't worry about it. You just need to show the minimal competence," but I don't think that, in one hour for each essay, it's possible to do all that.

I agree that lowering the score is not going to be harm to the public, because, again, there's so many misconducts from lawyers, and for ethical things, so it's beyond the law, and it's a whole perspective that you should -- I don't know if I expressed myself right, but I don't think it's going to harm the public, because you can do your research. I don't know this, but I can do some research, and do the best of my ability to help my client. So it's not because I don't know certain rule, I don't remember at the time, that I cannot do some research later.

Another point is, I heard many things in my lectures that -- some professors say -- they say, "This is Bar exam. This is not real life. So you should do this, this, and this." We should have more questions talking about real life, real issues, not something that we have to learn out of -- we have to get out of our way. It's already hard to deal with clients every day, and deal with the real questions, but we kept on learning, "You should answer this." The Bar world is not the world I live in. It's something else. So we have to learn somehow totally different things than we see on a daily basis. So I think the Bar exam should be more real, real life.

I agree with we should make extraordinary leaders, not Bar takers. This was very good, too. Yes. And based on my classmates -- I tried to remember everything, so I can express. Yes. The main concern that I saw from my experience with my classmates were the debt they're in. They're Uber drivers now. One of our friends, he took three times. He's driving Uber, so he can somehow help his family to pay the loans, his student loans, and he got something like 1420. So I'm talking on behalf of this man. I'm sure that he would be very happy to know that I could talk about it.

The passing rate, 34.5 percent is very low with only two repeat that (sic), and out of 200 foreign

attorneys, who I'm sure they're very talented people, too, I didn't find this number anywhere, but people told me. Out of 200 foreign lawyers, 33 passed, so 14 percent, around that. So we should be given this chance to show how we can be -- how we can contribute to this society, how we can provide the good work ethic, honesty, and compassion for our clients, return the phone call, not leaving everything for the paralegal to do. Just, I want to be a hands-on lawyer.

So thank you so much.

MS. GOODMAN: Okay. Thank you, Patricia.

MS. MILANEZ: Thank you.

MS. GOODMAN: Okay. Good. Anyone else that wants to give a public comment?

MR. GIELEGHEM: Good morning.

MS. GOODMAN: Can you state your name, then?

MR. GIELEGHEM: My name is Neil Gieleghem, last name G-I-E-L-E-G-H-E-M.

MS. GOODMAN: Thank you, Neil.

MR. GIELEGHEM: I will try and be brief, and I will try not to repeat any of the comments that have been made by some of the other speakers.

Let me give you, as briefly as I can, a little context as to who I am, and I'm afraid I don't have prepared remarks this morning, because I had not intended to speak. I'm a graduate of what was then McGeorge Law School in

Sacramento in 1982. I took the California Bar in '82, passed it the first time.

When I was in law school, I was a judicial extern for Associate Justice Frank Newman, graduated Order of the Coif. First year out of law school, I was the elbow clerk for Chief Justice Gunderson of the Nevada Supreme Court, took the Nevada State Bar while I was up in Nevada, or over in Nevada, passed it the first time.

I was a grader for the California Bar exam in '83 through about '85, if memory serves. I was one of the experiment takers for the PT, for the performance test, when that came in, in '85, '86, and since about '86, moving forward, I have been a pro bono coach, which is the way I phrase it, for people who are taking the Bar exam. Typically, they are what I call "repeaters," people who have failed it at least once.

I did that for probably about four, five years, until I met then-Dean Parker at our law school, and ultimately taught a class at McGeorge in Bar preparation. We called it something else, for various reasons, but that's my experience in this area, and I continue to pro bono coach to this day.

What I'm about to say are simply my opinions as a practitioner. You know, certainly they're not attributable to my law school, to Dean Parker, or to anyone else, but I'm

afraid I'm going to have to take, up to a point, a position of the loyal opposition. I think that what's being contemplated here is the wrong fix, for the wrong reason, to the wrong problem, and, having said that, I agree with many of the comments made by some of the other speakers.

It is a traumatic experience to fail. It has consequences, both personal and professional, that are very regrettable, and can people a long, long time to overcome. The model answers on the State Bar web site, I agree, have reached ludicrous proportions. There are sections in there that are either inaccurate or flatly wrong. That's the nature of the grading process. I also have to admit that I'm not that familiar with, you know, how the grading process works now, at least as to the essay questions and as to the PT, but I don't think it's changed very much.

You know, can there be errors? Can graders go out of calibration? Sure. Can you pull up exam answers where a grader has mis-graded, at least in my opinion? Sure. But, overall, in my tenure as a grader, I thought the process was remarkably fair, and, in fact, that's one of the reasons why I became a grader, to see behind the curtain, to see what the Wizard of Oz was really doing back there, and I was amazed how quickly 10 to 15 people on a grading panel, from various practice areas, could quickly calibrate so that we were all within the required five points. The system back

then was fair, and I have no reason to believe that it's not fair now.

There's been a decline in the passage rate, yes. We all know that. But, in my experience, it's largely that the applicant seems to approach the exam in a way that I find utterly inexplicable, given the amount of money, the amount of time, the amount of effort that these people have spent to get through law school and be in a position to take the exam. Frankly, I don't understand it, because they need to pass this test in order to make money.

You know, am I going to offer some, you know, sociological explanation for it? No. I'm not competent to do that, although I do resent, you know, the implication that somehow anyone who talks about the facts is somehow harboring some sort of racial animus or wants to hang on to his exalted position as somebody who passed the Bar back in 1982. That's not where I'm coming from.

I would love to see the applicants that I have to deal with -- I don't have to -- but that the applicants that I work with, the repeaters, who I deal with every sitting of the Bar -- I would love for them to pass the first time, before they get to me, but that's not what's happening.

You know, again, with all respect to some of the people who've spoken, and I'm sure they're very intelligent, very competent people, my read would be they're probably

taking the exam the wrong way, which leads to my final area, which is, the most interesting thing I heard raised here today was the idea that there has never been any kind of a real validation study as to whether the exam, in its current format, really does test as to whether somebody will be a good lawyer.

You know, I mean, it started out -- when I took it, it was nine essay questions, an hour apiece, you know, and one could make an argument that that really didn't test, and then we went to the performance exam in about '86, and it's very hard for an outsider at this point, and I am, to get somebody to explain to me exactly why the performance test was added.

You know, I think -- I'm actually pretty confident -- it was added in an attempt to make the exam fairer to older people, and I say that now as somebody who's 64, but, you know, older people who'd been out working in an environment, and they weren't people who'd gone through life on -- or hadn't gone through college and then law school on what I call the "Mom and Dad plan." They'd actually had to work, the way I did.

To the extent that the PT wanted to make the exam fairer for that group of people, which may have included some people of color, you know, which may have been intended to broaden the demographic base, that was a great idea, and

I stand behind it 100 percent.

My problem, as former grader, and as a coach for the last 15 years, I have never -- and I've looked at, you know, thousands of Bar exam answers -- I have never seen a correlation between life experience and a PT score that's higher than the essay scores, or vice versa.

In my experience, the essay scores are always in the same ball park, to use a lay term, the same ball park as the PT scores, and if I understand the rationale for the PT correctly, I should have -- at some point in my career, I should have seen an applicant who's failed, who comes in, and the essay scores are grossly out of sync with the PT scores. I'll represent to this panel I have never seen that, and I don't think I ever will.

Could this test -- could the exam process as a whole, you know, warrant further review? Yes, absolutely. Again, validation study. Show me why the current model really does ensure a minimum level of competency, as opposed to some other system, and that's the kicker for me, because, other than simply lowering the cut score in a way that I -- first of all, it's contrary to the survey.

It's contrary to the research that you have before you, and in a way that, to me, sounds very arbitrary, but anybody who's advocating that, I think the burden is on them. There was some discussion about burden of proof or

burden of persuasion. The burden is on them to come up with an alternative.

I'm kind of left with a quote that's been attributed to a number of people. I think Winston Churchill is the one that I always remember. It was to the effect that "Democracy is the worst system of government, except for everything else."

What I've told my repeater applicants, what I've told law school classes, is "If you can come up with a better way to do this, a fairer way to do this, a way that will ensure the minimal level of competency and include all the professional and the demographic and the social factors that are in play, I want to hear it. Tell me about it, because I'll push for it." And so far, out of the last like 25 years, I haven't heard it, and I sure haven't come up with it.

So, unless the panel has any questions, thank you.

MS. GOODMAN: Thank you, Neil.

MS. PARKER: Thank you.

MS. GOODMAN: Okay. Anybody else?

(No response.)

MS. GOODMAN: Okay. I think this concludes our Los Angeles version of our public comments. We had some great comments. We will resume tomorrow in San Francisco at 10:00 o'clock, for public comments there, and then we will

have further discussion with the Committee of Bar Examiners on August 31st. So thank you, everybody that attended today.

(Proceedings in the above-entitled matter were concluded.)

CERTIFICATION OF TRANSCRIBER

I, Holly Martens, do hereby certify that the foregoing 100-page transcript of proceedings, recorded by digital recording, represents a true and accurate transcript of the hearing in the matter of The State Bar Court of the State of California Annual Public Hearing, held on August 14, 2017

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Date Transcriber