

AGENDA ITEM

November 126

Release of Bar
Examination Applicant
Data

DATE: October 22, 2007

TO: Members, Board of Governors
Members, Board Committee on Regulation, Admissions and Discipline
Oversight

FROM: The Committee of Bar Examiners
Gayle Murphy, Senior Executive, Admissions

SUBJECT: Release of Bar Examination Applicant Data

EXECUTIVE SUMMARY

The Committee of Bar Examiners (Committee) recently denied a request from Professor Richard Sander and his research team (collectively "Professor Sander") for certain data regarding bar examination applicants. Professor Sander had requested the Committee furnish to him information regarding applicants' race, gender, bar examination performance, LSAT scores, law school grade point averages and undergraduate grades. Some of the data was collected by the Committee in the past but is no longer part of an applicant's record. Most of the data was collected with the understanding that it would be kept confidential and used by the Committee in its research and publication of general statistics, and otherwise only shared with law schools or other bar admission authorities. Professor Sander wanted to use the information to support his "mismatch theory," which suggests that affirmative action programs in some law schools affect certain minority law students negatively.

In the interest of ensuring that the bar examination remains fair, valid and reliable, the Committee has over the years authorized its testing consultants to conduct studies that use the data provided by applicants as well as other information gathered from sources such as the law schools and the Law School Admissions Council. The Committee has never released applicant data to third parties in the absence of customized individual signed releases from the affected applicants.

Because of the publicity generated by the op ed pieces authored by Professor Sander, in which the Committee's decision to deny the request for the release of confidential information has been criticized, it has been determined that Board review of the Committee's decision would be appropriate.

SUBJECT/ISSUE

Review of the Committee of Bar Examiners' decision denying Professor Richard Sander's request to release confidential bar examination applicant data.

BACKGROUND

During the online registration application process, admissions applicants are asked to voluntarily provide personal information regarding their race/ethnicity and gender. They are advised, "The following information is to be furnished by each applicant as part of the application process. The Committee of Bar Examiners is gathering this data to assist in the continuing evaluation of the examination. This information will be treated in a confidential manner and will be used only for research purposes. It will not be retained by the Committee as part of your application." There is no penalty for not providing the information, and some applicants elect not to do so.

The Committee of Bar Examiners (Committee) began to collect this information approximately 30 years ago in response to concerns that were raised by minority groups (particularly African Americans and Hispanics) that minority candidates were not passing the bar examination at the same rate as non-Hispanic Caucasians or Asians, and if that was true, they wanted to know the source of the difference. Specifically, their concern was whether the bar examination was biased against these groups, or was something else occurring?

At that time, however, no bar applicant data was available to determine whether there was a difference in passing rates among different minority groups, let alone the magnitude or source if there was. This led the Board of Governors (not the Committee) to commission Stephen P. Klein (the Committee's psychometric consultant) to conduct a study that involved gathering racial/ethnic and gender data along with LSAT scores and law school grade point averages (GPAs). This study found that (1) there were large differences in passing rates among these groups and (2) these differences corresponded very closely to differences between groups in their law school GPAs. No bias in the bar examination itself was detected. After this study was published, minority groups requested that the Committee collect gender and race/ethnic data on a routine basis, which the Committee agreed to do. General statistics from the bar examination, which contain detailed information relative to minority and gender pass rates and individual California law school pass rates have been maintained since 1977.

Over the years, the Committee has commissioned several related studies, which were conducted by Dr. Klein, all of which focused on the examination itself, such as whether the generally low pass rates for minority applicants is due to a possible bias in the examination's questions, time limits, or other features. This is in keeping with the Committee's mission to ensure the "quality" of the bar examination as indicated by its

validity, reliability, fairness, and cost effectiveness. Attached as Appendix A is an index of studies that have been authorized by the Committee, which have been prepared by Dr. Klein. The Committee has never authorized a study that would have used bar examination applicant data solely to investigate the effects of specific law school programs, such as schools' affirmative action policies. The Committee does provide various examination sub-scores of the applicants (as a group) to the California law schools that they are allocated to for each administration of the examination, which allows law schools to monitor the effects of instruction (such as whether their students are having more difficulty with certain subjects) and to compare the performance of their graduates to other law schools in the same categories. Attached as Appendix B is a sample of the report that is currently provided to the law schools, individually, which shows how their students perform on the bar examination compared to the overall numbers and other law schools in their categories.

The fact that any individual is an applicant for admission to practice law in California is considered a privacy issue; all information provided by the applicant is treated confidentially until the individual passes the bar examination. Even then, the Committee releases only the names of those who pass the examination. The only exceptions occur when the Committee confirms an applicant's legal education qualifications and through the moral character investigation process when questionnaires are sent to employers, references and other licensing boards. The applicant is required to sign releases as part of both the bar examination and the moral character determination application process.

The bar examination application release specifically authorizes the Committee to “. . . release information regarding my application to take the bar examination and my bar examination scores and pass/fail status to the law school to which I have been or will be allocated for purposes of qualifying to take the California Bar Examination.” The only other authorized release of related information is to other bar admission authorities.

Request Submitted by Professor Sander

In response to his request for a meeting, in May 2006, Richard Sander, Ph.D., a professor at the University of California Los Angeles School of Law, met with staff from the Office of Admissions. During that meeting, he inquired as to whether he might be able to access the bar examination applicant data maintained by the State Bar's Office of Admissions to continue with his study of affirmative action programs in law schools and their possible negative effect on minority law students. He was advised that he was welcome to submit a request to the Committee for its consideration, although generally the Committee did not release confidential information to third parties.

Following that meeting, a request dated September 5, 2006 from Professor Richard Sander, UCLA, Dr. Stephen Klein, GANSK & Associates, Professor William Henderson of Indiana University and Professor E. Douglass Williams of Sewanee University,

entitled "Proposal for analyses of state bar data" (Appendix C), was received. Professor Sander and Dr. Klein appeared at the September 2006 Committee meeting and made a presentation on the proposal. The Committee deferred making a decision on the request to enable it to study the proposal further, and to discuss it with the Law School Council, which is composed of ten law school deans elected by their colleagues by category of school, three Committee members and the Chair of the Board Committee on Regulation, Admissions and Discipline Oversight. Also, Committee members expressed their desire to seek advice of counsel.

During its October 2006 meeting, the proposal was discussed by the Law School Council. Several deans voiced their concerns about the proposal. In particular, they believed that: 1) if the data were released to Professor Sander's group, it should be available to anyone else who might ask for it for the purpose of doing their own study(ies); 2) there were questions regarding the independence of the research team, as it might have its own motives related to proving certain theories; and, 3) the confidentiality of bar applicant data should be preserved. Professor Sander was advised of the concerns that were raised during the meeting, and he responded with a supplemental memorandum dated November 19, 2006 (Appendix D). In addition, a telephone conference call was set up, at Professor Sander's request, between the Committee's Subcommittee on Examinations Chair, Alan Yochelson, Gayle Murphy, Dean Barbieri, Examinations Director, and Professor Sander to discuss the proposal further.

Consideration of the proposal, which included the supplemental information that had been gathered, was scheduled for the Committee's December 2006 meeting, but at Professor Sander's request, further review was deferred to the February 2007 Committee meeting. Several letters, some in support and others not, were received regarding the proposal, which included letters from five members of the U.S. Commission on Civil Rights, from John Steele (on his own behalf), from Judy Sakaki, Vice President, Student Affairs, University of California, transmitting a memorandum by special assistant Bill Kidder, and from Eileen Kaufman and Tayyab Mahmud, Co-Presidents of the Society of American Law Teachers (Appendix E). A response was sent to the members of the Commission on Civil Rights advising them of the status of the request (Appendix F).

The Committee had the proposal on its agenda for discussion and possible action during its February 2007 meeting. Included in the agenda item was a new memorandum from Professor Sander's group dated January 26, 2007 (Appendix G). During that meeting, the Committee also considered advice from counsel during the closed portion of the agenda. The Committee decided again to defer making a decision on the request so that it could further study the matter. Before making a decision on the request, there was a consensus that the Committee would benefit from more information regarding research studies that it had authorized in the past, and possible

research studies that it might conduct in the future related to ensuring the fairness and validity of the examination process.

During its May 2007 planning meeting, a briefing was received from the Committee's psychometric consultant, Stephen Klein, Ph.D., on the research that had been conducted in the past on the California Bar Examination, and presentations from him and another independent measurement consultant, Edward Haertel, Ph.D., on what future studies the Committee might consider were also received. Professor Sander was invited to attend the meeting in the belief he might find it interesting; however, consideration of his specific request and proposed study during the May meeting was not contemplated nor cited as an item on the agenda.

Having studied the matter in great detail, it was anticipated that a final decision regarding the proposal submitted by Professor Sander's group would be made at the next Committee meeting, which was scheduled for June 29 and 30, 2007. Professor Sander contacted staff and asked that another meeting be scheduled with him (and others) to discuss how the ". . .study might be handled as an internal bar contractual study." In a June 15, 2007 email, Professor Sander wrote to Gayle Murphy, "I realize you had wanted to make a report to the committee at the end of the month, and this timeline squeezes that...but certainly from our perspective, we'd rather have a chance to talk through the specific issues and explore different formulations for the study, than get an early answer, so a slower timeline would be fine with us." Because of scheduling conflicts, an additional meeting with Professor Sander and others he had wanted to have there could not be held before the June Committee meeting.

There was a general consensus between Committee members and staff that a final decision needed to be made on the original proposal. Professor Sander was advised that the Committee would be taking action on the proposal during its June 29 and 30, 2007 meeting. A decision regarding this particular proposal did not preclude further discussions of possible alternative studies and the methods by which they could be conducted. No additional presentations from the proposal's authors were contemplated nor planned. Professor Sander voiced concern that the Committee would be making its final decision in his absence, and arrangements were made so that he could address the full Committee on the matter during its meeting on the morning of June 30, 2007. He attended the meeting, made his presentation, and after substantial and substantive discussion, the Committee voted to deny his request for use of the bar examination applicant data.

A formal letter was sent to Professor Sander and Professor Henderson advising them of the Committee's decision and outlining some of the reasons the request was denied (Appendix H). The Committee's primary reason for denying the request was that applicant information is collected with the understanding that it is confidential and will only be used by the Committee for purposes related to the bar examination and the

publication of general examination statistics. The Committee generally does not release applicant data to third parties in the absence of customized individual signed releases. Professor Sander wrote a letter to the Committee in response (Appendix I) to its decision. In that letter, which was very critical of the Committee's process for consideration of the request and the decision that was made, was a statement to the effect that the Commission on Civil Rights would be asking the Committee to reconsider its decision. On August 24, 2007, the *Wall Street Journal* published a commentary from Gail Heriot objecting to the decision of the Committee. Since then several op ed pieces authored by Professor Sander and his colleagues have appeared in various newspapers, in particular the *Daily Journal* and *The Los Angeles Times*, in which the State Bar has been criticized for not granting Professor Sander's request. Additional articles and letters to the editor concerning the matter appeared in *The Recorder*. And, just recently, an article critical of Dr. Sander and in support of the Committee's decision appeared in *The National Law Journal*. Nothing has been received to date from Professor Sander or his colleagues specifically seeking reconsideration of the Committee's decision.

General Comments

Providing bar examination applicant data for use in the proposed "mismatch" study would be a significant departure from past research practices. The closest the Committee came to doing something similar was in the late 80's when a type of mismatch study was authorized: "Are Bar Exam Scores Affected by Law School Admissions Practices." The findings of that study were: ". . . Black and Latino passing rates on the bar exam probably would not be improved by encouraging minority group applicants to attend law schools with students whose LSAT scores are more similar to their own scores. And, in all racial groups, high ability applicants (as measured by LSAT) have about the same high probability of passing the bar exam. . . ." It should be noted that it appears that one of the major limitations of Professor Sander's proposed research is that unlike the study that Dr. Klein did almost 20 years ago, law school GPA data is no longer available as part of the data collected by the Committee. This is important because law school GPA typically is usually a far greater predictor of success on the bar examination than is the LSAT. Twenty years ago the Committee routinely gathered law school GPAs, which was complicated by having to convert all the different systems for reporting grades (4-pt, 100-pt, letter grades, etc.) to a common scale of measurement. The practice of recording law school GPAs was discontinued many years ago for several reasons, such as changes in computer systems and personnel, availability of resources, cost, etc.

Another problem with the request is that the Committee does not have undergraduate grade point averages (UGPA) data available as part of the data it currently collects, which is necessary for some of the analyses Professor Sander hopes to complete. If the decision is modified and available data is released to Professor Sander, only LSAT

scores would be available as part of determining the qualifications at the point of entry into law school, even though more selective law schools also give significant weight to UGPA.

Professor Sander is asking also for some data that the Committee is not authorized to share with third parties, such as data related to applicants' LSAT scores. Most likely, written consent from the Law School Admissions Council would need to be obtained before LSAT data could be released to Professor Sander.

Comments have been made to the effect that the Committee has cooperated with an outside entity in the past by providing bar applicant data to the Law School Admission Council (LSAC) for its bar passage study. This is true, however, it should be noted that this was not without special permission to do so. A letter was sent to Chief Justice Malcolm Lucas from the then State Bar General Counsel, Diane Yu, requesting the Court's assistance and instruction on how to comply with the request of the LSAC for confidential bar application information (this was for the examinations administered during the period July 1988 through February 1991). After an agreement between the LSAC and the State Bar was signed, the LSAC provided the Committee with the list of names of applicants, all of whom had signed a release permitting the release of this information to the LSAC, and data, which included specific details relative to their bar examination performance, was then compiled and provided to the LSAC.

After surveying bar administrators in several other United States jurisdictions, it does not appear that Professor Sander, nor any of his colleagues, have approached any other bar admission agencies for release of similar data. While most states do not collect racial/ethnic and gender data in the first place, only one administrator indicated that release of any bar examination applicant data to an independent research group, such as Professor Sander's, might be approved by the Bar Examiners. The National Conference of Bar Examiners has begun to collect ethnic/race and gender data from applicants applying to take the Multistate Professional Responsibility Examination and with that data intends to conduct its own studies.

Future Considerations

Denying Professor Sander's request does not preclude the Committee from considering future studies of its own or in partnership with others. The Committee has as an ongoing goal, in fact, one that is included in its strategic plan, to consider and authorize future studies to ensure that the examinations it administers (the First-Year Law Students' Examination and the California Bar Examination) remain fair, valid and reliable tests. Following a decision as to what additional studies should be completed, the appropriate data to be collected needs to be identified, funds to pay for the studies need to be allocated, whether working with other entities is appropriate should be contemplated, and modifications to the current release forms signed by the applicants

may need to be considered. The Committee believes that these future discussions should be done in partnership with the law schools – keeping in mind the different roles they have. If a law school's graduates are not performing well on the bar examination there is a legitimate need for the law school to determine why, and the sharing of certain data collected by the Committee may be helpful in making those assessments.

FISCAL AND PERSONNEL IMPACT

None

BOARD BOOK/ADMINISTRATIVE MANUAL IMPACT

None

RULE AMENDMENTS

None

PROPOSED BOARD COMMITTEE/BOARD RESOLUTIONS

Following a presentation by the Chair of the Committee of Bar Examiners, and comments received during the meeting, if the Board Committee on Regulation, Admissions and Discipline Oversight believes that the Committee of Bar Examiners' decision denying the request from Professor Richard Sander for the release and use of California Bar Examination applicant data should be confirmed or modified, a resolution will be drafted for consideration by the Board Committee and the Board of Governors during their meetings on November 8 and 9, 2007.