

Memorandum

To: Gayle Murphy, Senior Executive for Admissions, Office of Admissions,
State Bar of California

From: Dr. Richard Sander, UCLA
Dr. Stephen Klein, GANSK & Associates
Prof. William Henderson, Indiana University
Dr. E. Douglass Williams, Sewanee University

Re: Proposal for analyses of state bar data

Date: September 5, 2006

Overview

This memo summarizes our proposal to examine new ideas about the sources of the relatively low bar passage rates of African-American (black) and Hispanic applicants. This research has practical policy implications, would be conducted primarily with existing data, and would involve little or no cost to the state bar.

Introduction

For decades, one of the most distressing issues facing bar examiners in the United States has been the large and persistent gap in bar passage rates among racial and ethnic groups. In California, for example, the first-time bar passage rate of whites taking the bar from 1997 through 1999 was 76% whereas for blacks it was only 43%. The statistics are much the same and sometimes worse in other jurisdictions. A national study commissioned by the Law School Admissions Council during the 1990s, known as the Bar Passage Study (BPS), found the blacks were four times as likely as whites to fail the bar on their first attempt, and six times as likely to never pass the bar. Smaller but still very serious disparities affect Hispanic bar takers.

Many critics contend that these disparities exist because bar exams are somehow discriminatory in their design. However, studies by Dr. Klein and others have demonstrated that racial differences in bar exam results (in, e.g., California, New York, and Texas) disappear when one controls for the admissions credentials and law school grades of bar takers.

A recent study by Dr. Sander, an economist and law professor at UCLA, confirmed that on a national level, racial differences in bar performance disappear when one controls for the admissions credentials and law school grades of bar takers. The key problem is that blacks in particular (and Hispanics to a lesser degree) are much more likely to receive low law school grades than their classmates. It has been hypothesized that this disparity has been exacerbated by the aggressive racial preferences that many law schools use in admissions. Upper-and-middle tier law schools tend to admit black

students whose LSAT scores and undergraduate grades are significantly lower than those of their non-Hispanic white classmates. However, the admissions credentials of the blacks who attend a given school are often high enough to qualify for race-blind admission at a less elite school. It is theorized that the difference in admissions credentials between black and Hispanic students on the one hand, and whites and Asians on the other, is so large at many schools that blacks and Hispanics are likely to struggle to keep up with instruction aimed at the majority of the students who were admitted with higher academic credentials. Consequently, because of what social scientists call a “mismatch,” blacks and Hispanics get lower grades and actually learn less than they would at a less elite school. Poor performance in law school may then handicap these students in graduating, passing the bar, and obtaining desirable legal employment.^[0]

A variety of evidence is consistent with the mismatch hypothesis. For example, in one analysis, Sander examined data for some twelve hundred blacks who applied to law schools and were admitted to their first choice school. Most of the accepted blacks went to their first-choice school – usually a school that used preferences to admit them – but about one-sixth of the blacks turned down the elite school to attend a less-elite school, usually for financial or geographic reasons. In the absence of a social experiment where similarly qualified blacks are randomly assigned to elite and non-elite schools, a sample where we know that all the blacks attending both elite and non-elite schools are equally qualified in the eyes of law schools is the next best group for studying mismatch effects. Sander found that the blacks going to less elite schools were half as likely as other blacks to fail the bar on their first attempt. The better performance persisted after controlling for a range of background variables. The blacks who attended their “second-choice” school had outcomes that were nearly as strong as those of whites.

The possible mismatch effect in law school has been widely debated at law schools and discussed extensively by the *New York Times*, *Wall Street Journal*, the *National Law Journal*, the *Stanford Law Review*, and elsewhere. The United States Civil Rights Commission recently held hearings on this work. Thus far, the academic debate is far from conclusive. Some studies have argued that the mismatch effect is small or even nonexistent while other studies reach a different conclusion. A common constraint, however, is the imperfect nature of the currently available data.

Given the high stakes for minority students attempting to enter the legal profession, it is obviously of great importance to know whether the “mismatch hypothesis” is in fact true. If it is correct, then it may be possible to narrow black/white (and presumably Hispanic/white) disparities in bar performance, and thus to expand minority representation in the bar.¹ If the hypothesis is incorrect, this information would be important to minority students trying to determine whether to take full advantages of the racial preferences that are available to them. To this end, the authors of this memo are seeking to commission a study by one or more state bars to use bar exam and other data to measure the extent and seriousness of the “mismatch effect.”

¹ Possible solutions would include not only modifications in current methods of using preferences, but also better methods of academic support in law school.

California is the best jurisdiction for an analysis of racial disparities. The State Bar of California is surpassed only by New York in the number of applicants sitting for the bar annually; it has exceptionally great racial diversity among bar applicants; and it has by far the most extensive record of any bar in the nation of conducting careful research on the exam itself. It has a long and close association with Dr. Klein, a nationally respected research scientist. California is one of only a few states that collects detailed data on bar takers, which makes it one of the few places where a careful evaluation of the mismatch hypothesis is even possible. And, as we discuss below, California has the unusual history of a partial ban on the use of racial preferences, which provides rich and important analytic opportunities.

Proposed Analyses

The best way to study possible “mismatch” effects on the bar is with bar examination data. Prior studies by Sander and his critics have relied on data on bar *passage and failure* from the LSAC Bar Passage Study. Knowing whether a student passed or failed the bar is a much cruder measure than knowing a student’s actual scores; with data on scores, one can measure outcomes with a much finer resolution. Scores not only let one distinguish the relative performance strength among students who pass the exam (or among those who fail). Just as importantly, the bar scores are a measure of what law graduates have actually learned; this allows one to study not only how the “mismatch” might affect bar passage, but also how it might affect actual learning.

We are proposing two distinct studies that use California bar data to measure mismatch effects. The first study uses the natural experiment created by Proposition 209. This proposition, which was passed in 1996, established a state policy against the consideration of race in a variety of state programs, including admissions decisions by state universities. In theory, this means that the four public law schools in California (Boalt, UCLA, Davis, and Hastings) stopped considering race in admissions from 1997 onwards, while the many private law schools were free to continue doing so. In practice, the public law schools have strongly opposed Prop 209 and, especially in recent years, have adopted practices that have blunted its initially large effects on minority admissions. But there is no question that the use of racial preferences (and minority enrollments) at these schools fell sharply between the years just before Prop 209 (1994-96) and the years immediately after (1997-99). This makes possible a rich series of analytical comparisons of various cohorts of black and Hispanic students: between the public schools before and after Prop 209, between public and private schools in California after Prop 209, and between in-state and out-of-state law graduates taking the California bar before and after Prop 209. For example, it should be the case that average LSATs of blacks attending California law schools were slightly closer at individual schools to those of white students after Prop 209 than before (i.e., smaller “mismatch”). No similar effect should exist for out-of-state students. With regression analysis, one can readily pinpoint whether the differences in bar scores predicted by the mismatch hypothesis actually occur.

The data for this first set of analyses consists of LSAT scores, race, gender, law school attended, repeater status, and bar exam scores of all those taking the bar exam for the first time between from 1997 through 2003 (the relevant bar examination years corresponding to school admissions from 1994 to 1999). Dr. Klein and Dr. Roger Bolus

already have these data in hand in electronic form but need Committee approval to use these data for the planned analyses.

The second proposed study takes advantage of variations in the extent to which black and Hispanic law students receive and capitalize on racial preferences. In this analysis, pairs of 2004 and 2005 law graduates are formed where the two members of the pair have comparable background characteristics (such as LSAT scores, undergraduate grades, race, and gender) but they attended different law schools and thus have differing degrees of potential “mismatch.” The question for investigation is whether graduates perform better or worse on the bar depending on their degree of law school mismatch. Simply put, the research question is whether students tend to do better in law school and on the bar exam if they go to a law school where their classmates are more like themselves (in terms of admissions credentials and other background characteristics) than if they go to a law school where most of the students have substantially better admissions credentials.

In any social science analysis, it is very desirable to use different techniques to analyze data; finding consistent results from a variety of methods makes it more likely that one’s conclusions are sound. The second study is a nice complement to the first study for three reasons. First, we can focus on more recent data (confirming that mismatch patterns, if they are found, continue to exist). Second, the analysis focuses on individual comparisons rather than group comparisons. Third, the techniques are different (matching rather than regression analysis). One potential obstacle to the second analysis is the need for additional data collection beyond what the Bar already has – it requires information from individual schools on the academic credentials and performance of students, the sort of information the Bar has collected in the past for its periodic “validity” studies of the bar examination.

Practical Questions

Cost and funding. We propose to conduct the analyses described above at no cost to the State Bar. We have submitted a detailed proposal to the National Science Foundation, and we have discussed possible funding with several other sources. Given the extensive data that already exists, and the involvement and experience with this data of Drs. Klein and Bolus, this is a very efficient project from the point of view of many funders, and therefore an attractive project to support. Dr. Sander has funding in hand to cover his own time spent on the project and incidental expenses. Prof. Henderson and Dr. Williams have committed a significant portion of their research time in 2007 to the project as well. While we would seek the Committee’s help in securing the cooperation of participating schools, we would assume costs associated with collecting data from the schools.

Personnel. We have assembled a strong research team for this project. Dr. Klein is of course well known to the Committee. He will be assisted on this project by Dr. Bolus, who has also done extensive work for the Committee. Dr. Sander has been a national leader in research on legal education for over ten years. Dr. Williams is Chair of the Economics Department at Sewanee University, a skilled econometrician, and the author of several widely-used studies of the legal profession. Professor Henderson is a

leader of the new “empirical legal studies” movement and the author of a recent, highly-respected critique of the LSAT. We bring diverse skills and viewpoints to the project and our collective findings should carry considerable weight.

Timing. We expect to have funding in place by the end of 2006 and would propose beginning the project in January 2007. The first analysis (using the existing data from 1997 through 2003) would be completed in the spring of 2007. The second analysis would involve data-gathering by the law schools and the dataset would probably not be complete until September 2007; we would expect that analysis to be complete by December 2007.

Confidentiality of data. In our NSF proposal, we outline a detailed mechanism for protecting the confidentiality of information of those taking the bar examination. In essence, this research will use the types of confidentiality mechanisms that Dr. Klein and Dr. Bolus have used in their research for California and other state bars over the past 30 years. Only persons under Dr. Klein’s supervision will have access to the data. Individual applicant data will not be released to anyone. Our reports will not refer to schools by individual name, but by general type.

Reporting. We will produce a report on each of these analyses for the State Bar, and we will provide the Bar with this information forty-five days before releasing our findings to funding agencies or in any other medium, so that the Bar can provide us with feedback and prepare any other statement it wishes to issue. We also expect to produce a scholarly article based on the research.

Conclusion

We believe this research presents an unusual opportunity for the State Bar to both serve its constituency and to advance understanding of an important public question. At effectively no cost to itself, the Bar can study the types of exam validity questions it has studied in the past, but also study the degree to which law schools may have both the opportunity and the responsibility to improve minority graduates’ prospects of becoming attorneys.