IN THE SUPREME COURT OF FLORIDA

AMENDMENT TO RULES OF THE SUPREME COURT RELATING TO ADMISSIONS TO THE BAR	)	CASE NO SC96869

REPLY TO COMMENTS

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REPLY TO COMMENTS

The Florida Board of Bar Examiners, by and through its undersigned attorney, replies to the comments submitted to the Court pertaining to the Board's pending proposed rule amendments and states:

JURISDICTION

The Board acknowledges that the Court has jurisdiction of this matter pursuant to Article V, Section 15 of the Florida Constitution and Rule 1-13 of the Rules of the Supreme Court Relating to Admissions to the Bar (hereinafter referred to as "Rules").

CERTIFICATE OF TYPE SIZE AND STYLE

The size and style of type used in this brief is 10 spaces per inch Courier.

STATEMENT OF THE CASE

The Board filed with the Court on October 29, 1999 certain proposed amendments to the Rules of the Supreme Court Relating to Admissions to the Bar. By letter dated December 27, 1999, the Court requested The Florida Bar to publish the proposed rules amendments in the next Bar News and to notice that any comments should be filed with the Court on or before February 14, 2000.

By notice dated February 4, 2000, the Court extended the deadline for comments to April 10, 2000. That as of April 10, 2000, various individuals and organizations filed comments with the Court. By notice dated April 27, 2000, the Court gave the Board until May 10, 2000 to file a reply to the comments received by the Court.

SUMMARY OF ARGUMENT

The Board's pending rule amendment to increase the pass/fail standard for the Florida bar exam generated comments from various groups and individuals. A few were favorable, but most were in opposition to the Board's proposal.

Some of the commentators assaulted the Board for its use of Stephen P. Klein, Ph.D. as the Board's technical advisor in studying the pass/fail standard. Dr. Klein is portrayed as a charlatan.

Dr. Klein's credentials, however, are unimpeachable. He has assisted courts, has served on blue ribbon panels for the National Research Council, and has consulted for 25 boards of bar examiners, law schools, the Association of American Law Schools and the National Conference of Bar Examiners.

The attack upon Dr. Klein's methodology is not well founded. The primary accusation that Dr. Klein's methods improperly inflated the pass/fail standard has been proven false by actual case experiences. The commentators also overlook that an article detailing the methodology of Dr. Klein's model used in Florida in 1999 was first published by Dr. Klein in 1986. The allegation that Dr. Klein had rejected his methodology in a previous sworn statement proves to be without merit under scrutiny.

Some commentators describe the Board's Lawyers Study and Readers Study as nothing more than blind guesswork. Nothing could be further from the truth.

With assistance from the Court, the Board assembled a diverse and distinguished panel of judges, practicing lawyers and law school representatives to conduct the Lawyers Study. The participants of the Readers Study are eminently qualified having achieved high marks both in law school and on the bar exam. The participants of the Lawyers Study and Readers Study were well qualified to perform the task asked of them.

Many of the commentators properly voiced concern as to the impact upon minorities that the Board's proposal might have. In attacking Dr. Klein on this important issue, the deans attempt to avoid the truth that disparities among passing rates of racial/ethnic groups simply mirror the disparities that existed when bar examinees graduated from law school.

Notwithstanding the abundance of data from studies during the 1990's on the issue of disparities, the deans ask the Court to study the issue for another two years. The studies suggested by the deans would be valueless and would serve only to delay the adoption of the Board's sound proposal.

Up until now, there has never been an empirical basis for the the pass/fail standard in Florida. With guidance from the preeminent expert in the field, the Board conducted a comprehensive study of such standard. The study was sound, thorough and conducted in good faith. Throughout the study process, the deans' input was sought and even the participation of their representatives was obtained as to the Lawyers Study.

Florida, like all jurisdictions, has the absolute right to use a bar exam to ensure the protection of the public by testing its

applicants for a minimum level of competency. The bar exam, however, would serve no useful purpose without a meaningful pass/fail standard. By its proposal, the Board offers such meaningfulness based upon its thoughtful and considered judgment after its nearly yearlong study of the pass/fail standard. The Court is urged to adopt the Board's recommended increase to the pass/fail standard.

REPLY

-I do not exalt bar examinations, but I regard them as necessary and proper. They provide a stimulus to the law schools, a means of encouraging the schools to do the best job they can in legal education and not to slough it off in any way simply because the numbers of their students have become so large.[1]

In response to the Board's pending rule amendments, the Court received comments from a variety of groups and individuals. All of the comments except one[2] concerned the recommended increase to the pass/fail line of the bar examination. The Board has recommended that the pass/fail line in Florida be raised during a two-step process from the current scaled score of 131 to the eventual scaled score of 136.

The Florida Bar and one individual commented in favor of the Board's proposal. Based upon the recommendation of a special study committee, the Board of Governors of The Florida Bar at its April 7, 2000 meeting "resolved to support the petition of the Florida Board of Bar Examiners in this matter, provided that adequate consideration be given to whether any of the proposed rules in this filing would disproportionately affect minorities or otherwise unduly impact minority access to the profession." (Letter of Harkness dated April 10, 2000)

Assistant State Attorney Kevin C. Frein from Broward County submitted the following comment: "By raising the passing score for admission to the Bar, the Legal Profession of Florida is sending a necessary message to the citizens of Florida: lawyers will be competent." Mr. Frein also suggested the addition of a "practical skills" test to the bar exam and a limitation upon the number of times an applicant can take the exam. (Letter of Frein dated January 31, 2000)

One other individual opined that the Board's proposal would not "make much of a difference" based upon his perceived incompetency of law school graduates. (Letter of Swavely dated January 31, 2000) There have also been several editorials and columns appearing in

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1 Griswold, In Praise of Bar Examinations, 60 A.B.A.J. 81 (Jan. 1974). Erwin N. Griswold served as dean of Harvard Law School and as Solicitor General of the United States.

2 Attorney Gail E. Dawson commented in opposition to proposed Rule 1-70 pertaining to immunity and privilege. The Board rests on the original rationale submitted with such rule amendment. (Appendix to Rules Petition at 3-4).

Florida newspapers on the Board's proposal.[3]

The remaining comments submitted on the pass/fail line proposal were in opposition to the Board's recommended increase. Unfavorable comments were submitted by the following: five deans and one associate dean from six Florida law schools; Society of American Law Teachers; Florida State Conference of NAACP Branches; Florida Chapter of the National Bar Association; two local bar associations; and several individuals.

In Sections A. and B. below, the Board will address what it perceives as the primary allegations of deficiencies of the Board's study as alleged in several of the comments filed with the Court. In Section C. below, the Board will revisit the issue of the impact on minorities of the recommended increase to the pass/fail standard. In Section D., the Board will reply to specific representations contained in some of the comments. Lastly, in Section E., the Board will address the deans' request for additional studies.

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[3] Miami Herald, Jan. 8, 2000 (Raising the Bar, Excellence in Defense of Liberty and Property); Orlando Sentinel, Jan. 22, 2000 (Raise the Bar); The News Herald, Panama City Feb. 1, 2000 (Raising the Bar: All Should Embrace Elevated Standard); and Tampa Tribune, April 21, 2000 (Guest Column by Florida attorney Richard Hadlow: Aspiring Lawyers Should Be Required to Achieve at least 59 Percent on Bar Exam).

A. Board's Use of Stephen P. Klein, Ph.D.

-Dr. Stephen Klein [is] perhaps the leading psychometrician analyzing bar exams....[4]

Several of the comments challenged the use of Stephen P. Klein as the Board's technical advisor during the Board's study of its pass/fail line. In their comments, the Florida deans described Dr. Klein as "an interested advocate." (Joint Statement of Law School Deans, hereinafter "Deans" at 3) The deans also assert that Dr. Klein's "report is deeply flawed, employing methods he rejects in sworn testimony and in his past publications." (Id. at 3-4)

The Society of American Law Teachers viewed Dr. Klein with similar disdain claiming that the Board's recommendation is "based on the flawed empirical studies and statistical analysis of an interested advocate, such as Dr. Klein." (Comments of the Society of American Law Teachers, hereinafter "Law Teachers" at 4) The law teachers attempt to portray Dr. Klein as a traveling salesman whose professional mission is to "convince Boards of Bar Examiners in Ohio and Florida - and now more recently in Minnesota - to raise the passing scores in their respective jurisdictions." (Id. at 3)

One individual commentator (who cites law school representatives as his source) even goes so far as to allege "that after a state is convinced to raise its pass/fail line, Dr. Klein markets himself to law firms in that state as a consultant for dealing with the problem of increased bar failure." (Response of Herman at 6) The Board is unaware of any factual basis for such allegation.

The ad hominem arguments aimed at Dr. Klein are, of course, fallacious and unworthy of this Court's consideration. Contrary to the comments referenced above, Dr. Klein's credentials are impeccable.

One court discussed Dr. Klein's qualifications in the following manner:

> Dr. Stephen P. Klein is employed as a Senior Research Scientist with Rand Corporation in Santa Monica, California. In addition, he operates his own consulting practice. Rand Corporation is a research institute with approximately 1,000 employees of which over half are at the Ph.D. level in a wide variety of disciplines. Dr. Klein graduated from Tufts University with a bachelor's degree in psychology in 1960. He received his master's degree and his Ph.D. in industrial psychology from Purdue University with a doctorate being awarded in January 1965. Following receipt of his doctorate, he was employed by the Educational Testing Service in Princeton, New Jersey, for 4 years before moving to UCLA, where he taught in

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4 Grosberg, Should We Test For Interpersonal Lawyering Skills?, 2 CLINICAL L. REV. 349, 370 (Spring 1996).

> the graduate school of education. In connection with the Educational Testing Service, Dr. Klein conducted research dealing with evaluation and educational program development, educational testing, and various kinds of analyses in the field of education. At UCLA, he taught in the graduate school of education where he did research and taught courses in research methods testing and measurement. His teaching work included research methodology, statistics in education, and educational and testing measurements.
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> While at Rand, Dr. Klein has designed, conducted, and supervised research projects in a wide variety of areas. Currently, Dr. Klein is working on a research project for the National Science Foundation designed to determine whether or not certain teaching methods are achieving desired outcomes. * * * In connection with his research work, Dr. Klein has published over 200 papers in a variety of fields, including education, health, criminal justice, fuel, and military manpower. In addition to that, he has authored a book on the licensing of teachers. He has testified in a number of cases, has served as a consultant to the United States District Court and has testified in Congress.
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> In addition to his work in education, Dr. Klein also serves as an advisor to Boards and Bar Examiners in over two dozen states, including the State of Ohio. A substantial portion of Dr. Klein's work includes utilization of statistical analysis, including regression techniques. In addition, Dr. Klein has served on three blue ribbon committees for the National Research Counsel. Dr. Klein is currently serving on a panel that involves a nationwide examination of school finance plans for public schools at the K-12 range.

DeRolph et al. v. Ohio, 712 N.E.2d 125 (Ct.C.P., Perry County, Ohio 1999).

With such impressive credentials, it was not surprising that the court in DeRolph "[gave] great weight to Dr. Klein's testimony and [found] his conclusions...persuasive" as to several matters. Id. at 192. In another case, a federal district judge appointed Dr. Klein as a technical advisor to the court in that the case "involve[d] the highly technical field of psychometrics, and present[ed] problems of unusual complexity beyond the normal questions of fact with which judges routinely grapple." The Ass'n of Mexican-American Educators et al. v. California et al., 195 F.3d 465, 492 (9th Cir. 1999) en banc review granted __F.3d__(2000 WL 332910) (9th Cir.

Mar. 27, 2000).

As observed by the judge in DeRolph, Dr. Klein has done extensive work on bar examinations. He has consulted for the National Conference of Bar Examiners, 25 state boards of bar examiners, the Association of American Law Schools and several law schools.

As for the allegation that Dr. Klein is on a mission to raise bar exam pass/fail lines, nothing could be further from the truth as to the experience in Florida. The pass/fail line was last adjusted in 1982 when the Court sua sponte reduced the pass/fail line from 133 to 131. Florida Board of Bar Examiners re Amendment to Rules, 416 So.2d 803 (Fla. 1982). The pass/fail line has remained at 131 since 1982.

It was not until the Fall of 1998 that the then Chair of the Board, Franklin Harrison, formally formed a task force to undertake a comprehensive review of the pass/fail standard. Dr. Klein did not solicit the Board's business. Quite the contrary, the Board was simply interested in locating the best consultant to advise the Board on its pass/fail study. The research conducted by the Board's staff confirmed that Dr. Klein was the leading authority.

The Board only retained Dr. Klein after independently concluding that he was the best qualified expert in the area. The Board is unaware of any interest or bias by Dr. Klein in favor of or against the raising of Florida's pass/fail standard. Dr. Klein simply assisted the Board in conducting the Readers Study and the Lawyers Study, in analyzing the data from such studies, in reporting the results, and in making professional recommendations based upon such results. The Board would have expected no more or no less from Dr. Klein or any other expert the Board has used on

previous occasions.

Lastly, Dr. Klein's qualifications are unwittingly bolstered by the number of times some of the commentators rely upon his studies and professional opinions in support of their comments. The deans, for example, cite approvingly to Dr. Klein's 1991 published article on racial/ethnic disparities in bar exam passing rates and to his 1995 published article pertaining to options for combining Multistate Bar Examination (MBE) and Essay Scores. (Deans at 5, 18) For some commentators, it thus appears that Dr. Klein's work as the leading psychometrician analyzing bar exams becomes only "deeply flawed" when it yields results that they don't like.

B. Criticism of Klein's Methodology

-The lady doth protest too much, methinks.[5]

The law teachers and the deans assert that Dr. Klein's methodology is flawed. The deans claim that such methodology "inflates the recommended passing score it generates." (Deans at 16) Similarly, the law teachers assert that such methodology "inflates the assessment of what a passing score should be." (Law Teachers at 15) Both the deans and the law teachers rely upon and attach to their comments an unpublished article by Professors Merritt and Hargens at Ohio State University and Professor Reskin at Harvard University (hereinafter the Merritt article).

Pursuant to the request of the undersigned counsel, Dr. Klein has provided a response to the criticism of his methodology set forth in the Merritt article. A copy of Dr. Klein's letter dated May 8, 2000 and attachments are reproduced at the accompanying Appendix at 1-10.

In his recent letter, Dr. Klein points out the underlying hypothesis of the Merritt article has been proven inaccurate in actual case studies. In both Pennsylvania and Puerto Rico the same study as the Florida study resulted in a lower pass/fail line. (Accompanying Appendix at 4) Dr. Klein also expands on his statements in his original report to the Board regarding the difficulty of predicting the impact should the pass/fail standard be raised as recommended by the Board. Dr. Klein also highlights

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[5] Shakespeare, Hamlet III.ii..

the favorable experience (regarding the bar exam passage rate for its students) at Thurgood Marshall School of Law at Texas Southern University due to policy and curricular changes at that law school. (Accompanying Appendix at 7-8)

As to the coincidental timing of the Merritt article, the deans assert: "Shielded from the adversary process, this critical flaw in Klein's methodology has eluded detection." (Deans at 17) Such assertion is without merit.

In 1985, Dr. Klein served as a consultant to Puerto Rico in its efforts to improve its bar examination. An eclectic model was developed for setting the pass/fail standard. A description of the Puerto Rico plan including a detailed statement of such plan's methodology was published by Dr. Klein in 1986. Klein, Establishing Pass/Fail Standards, THE BAR EXAMINER 18 (Aug. 1986) The methodology of the Puerto Rico model is basically the same as that used to conduct the Lawyers Study in Florida 14 years later in 1999.[6]

It is baffling that an article published in THE BAR EXAMINER, the journal of the National Conference of Bar Examiners, has been able to elude detection by law school scholars and legal educators for nearly 14 years. Clearly, the deans and the authors of the Merritt article are aware of and have access to issues of THE BAR EXAMINER in that they all make references

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[6] The Lawyers Study in Florida omitted step 8 (majority decision by the team in addition to the decisions of the individual team members) of the 1985 Puerto Rico model. Such step was eliminated from the model because such practice "sometimes led to one or two panelists dominating the team." (Accompanying Appendix at 1 at fn1)

to other articles published in THE BAR EXAMINER.

The fact that Dr. Klein published his eclectic model in 1986 is highly relevant. Courts applying both the Frye[7] and Daubert[8] tests of admissibility have viewed with favor the publication in a peer-reviewed journal of the scientific methodology in issue.[9] Additionally, Dr. Klein presented a paper on his eclectic model at the meetings of the National Council on Measurement in Education in Chicago in 1991. (Accompanying Appendix at 1)

The deans also state that Dr. Klein relied upon analytic scoring in conducting the standard setting study in Florida, a method of scoring the deans claim that Dr. Klein rejected in previous sworn testimony. (Deans at 3-4) The deans refer to an affidavit submitted by Dr. Klein in the case of In re Bettine, 840 P.2d 944 (Alas. 1992) as proof that "Klein's own testimony discredits his [Florida] study." (Deans at 14)

As observed by one testing and measurement expert: "A number of different procedures have been developed for grading essay examinations, but all of the procedures can be thought of as variants of two basic methods: analytic scoring and holistic scoring." Lenel, The Essay Examination Part III: Grading the Essay Examination, THE BAR EXAMINER 16 (Aug. 1990). As to analytic scoring, Dr. Lenel observed:

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[7] Frye v. United States, 293 Fed. 1013 (D.C.Cir. 1923).

[8] Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).

[9] See Mahle, The Impact of Daubert v. Merrell Dow Pharmaceuticals, Inc., on Expert Testimony: With Applications to Securities Litigation, 73 FLA. BAR. J. 36 (Mar. 1999).

> [A] model answer is prepared and then broken down into specific points or elements that a good answer should include. The elements in the model answer are often listed in the form of a checklist. The examinee's score is based on the number of elements that are included in his or her answer.

Id. Whereas, "[i]n holistic scoring, readers are instructed to read each answer rapidly and make judgments about its overall quality, without making counts of particular elements." Id.

In the excerpts from his affidavit quoted in the Bettine case, Dr. Klein clearly supports the use of holistic grading by the Alaska bar examiners because the analytic method "does not increase precision." Id. at 997. Several years after the Bettine case, Dr. Klein published an article that discussed in much greater detail the different methods for grading essay answers from a bar examination. Klein, Options for Assigning Essay Scores, THE BAR EXAMINER 24 (Feb. 1996).

In the above-cited article, Dr. Klein addresses the different methods of grading essay answers to a bar examination:

> Analytic scoring usually produces greater consistency between readers than the holistic approach, it facilitates training readers to use the same standards (i.e., where there are two or more readers per question), and a well constructed analytic scoring guide can be very helpful in maintaining consistent grading standards (such as when there are a lot of answers to score) and in explaining to unsuccessful applicants where they went awry. However, not all bar exam essay questions lend themselves to analytic scoring, many readers find that it takes much longer to grade the answers using this approach, and the advantage in reader consistency that is gained from the analytic method usually does not have much influence on the reliability of overall pass/fail decisions.
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> * * *
>
> Another common practice is to take advantage of the merits of both approaches by using a semi-analytic scoring system. Under this plan, a reader uses a holistic system to grade each of a question's three to five major issues or sections and then sums the scores across these parts to obtain a total score for the question. This is an especially good compromise for readers who have to grade answers to 30-minute or longer questions.

Id. at 25.

Another expert in the field has observed that "[b]oth analytic and holistic scoring methods have been shown to be reliable methods for scoring essays when they are well-designed and readers receive appropriate training." Lenel, supra at 17. Significantly, in the case of The Florida Bar re Williams, 718 So.2d 773, 776 (Fla. 1998), the Court cited approvingly the above-quoted statement by Lenel in upholding the holistic grading method of the real estate lawyer certification examination.

As did Dr. Klein, Dr. Lenel also notes that "[p]erhaps the greatest disadvantage of the analytic method is that it is very laborious and time-consuming." Id. at 17. Dr. Lenel further agrees with Dr. Klein that "[f]or grading bar examination essays, the holistic method has much to recommend it." Id.

It is clear that Dr. Klein (like Dr. Lenel) is supportive of the holistic method of grading bar exam essay answers. Dr. Klein simply has not observed an appreciative gain in reliability by using the analytic over holistic grading especially when considering the increased labor factor required by analytic grading.

To represent, however, as the deans have done, that Dr. Klein has rejected the analytic method as unreliable is simply inaccurate. In making this sophistic attack upon the credibility of Dr. Klein, the deans were well aware of Dr. Klein's 1996 published article on analytic and holistic methods of scoring. In fact, they quote approvingly from such article as to another issue regarding the selection of "benchmark" answers in the grading of essay answers. (Deans at 15) It is perplexing that the deans somehow overlooked Dr. Klein's stated position on analytic/holistic scoring that appeared in

the same article.

The deans also argue that the participants of the Lawyers Study in Florida had "no guidance in how to set passing scores" thereby resulting in a recommended pass/fail standard "through blind guesswork." (Deans at 12-13) To respond to the deans' argument, it is helpful to review the facts pertaining to the information provided to the participants of the Lawyers Study.

Contrary to deans' assertion, much information and materials including instructions were given to the participants of the Lawyers Study. In advance of the review session held in Orlando on June 17, 1999, the participants of the Lawyers Study were provided with the following: background information on the bar examination in Florida; a copy of the Board's bar exam study guide including instructions to examinees on drafting an answer to an essay question; and a copy of the essay question and a memorandum of research for such question.

In the initial letter from the Board seeking volunteers to participate in the Lawyers Study, potential volunteers were advised of the different subject areas and the anticipated composition of each panel (i.e. two practicing attorneys, one legal educator, one judge and one Board member). Such letter also furnished the following information on how the review session would be conducted:

> The team will review the essay question and a memorandum of research on the issues expected to be covered in answers. They will then review a representative sample of answers written by examinees from the July 1998 and February 1999 General Bar Examinations. For each of these answers, each team member will determine whether the answer is clearly passing, marginally passing, marginally failing, or clearly failing. The review team is expected to discuss among themselves their opinions, although it will not be required that they be in agreement on

each answer.

The above-referenced materials and information were supplemented by oral directions given by Dr. Klein at the actual review session. (Accompanying Appendix at 9) The deans apparently find objectionable Dr. Klein's instruction to the panelists to use their own standards in assigning answers to one of the four categories.

In support of their objection, the deans rely upon the case of Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) for the proposition that the United States Supreme Court in that case "insisted upon rational standards rather than guesswork when modified standards increased racial disparities." (Deans at 13) A review of the law and the facts of that case is helpful to demonstrate the lack of merit of the deans' argument.

As to the law, the Albemarle case involved the legality of employment testing challenged under the provision of Title VII of the Civil Rights Act of 1964. Case law is clear, however, that Title VII rulings are inapplicable to bar examinations:

> ...Title VII, by it own terms, does not apply to the bar examination. The Board of Bar Examiners is neither an "employer," an "employment agency," nor a "labor organization" within the meaning of the Act.

Woodard v. Va. Bd. of Bar Examiners, 598 F.2d 1345 (4th Cir. 1979) (citations omitted).

Even if one were to disregard the established law as the deans have done, the facts of Albemarle are readily distinguishable from the good-faith standard setting activities of the Board. In Albemarle, the employer used the Wonderlic Personnel Test (which purports to measure general intelligence) in determining promotions. The company chose such test "in

rather casual fashion" and "made no attempt to validate the test for job relatedness." Albemarle, supra at FN 24 and page 428.

A few months prior to the trial in Albemarle, the company hired an industrial psychologist to validate its testing program. As to such undertaking, the Supreme Court properly noted:

> It cannot escape notice that Albermarle's study was conducted by plant officials, without neutral, on-the-scene oversight, at a time when this litigation was about to come to trial. Studies so closely controlled by an interested party in litigation must be examined with great care.

Id. at FN 32.

The validation study conducted in Albemarle consisted of the following:

> The study dealt with 10 job groupings, selected from near the top of nine of the ten lines of progression. Jobs were grouped together solely by their proximity in the line of progression; no attempt was made to analyze jobs in terms of particular skills they might require. All, or nearly all, employees in the selected groups participated in the study--105 employees in all, but only four Negroes. Within each job grouping the study compared the test scores of each employee with an independent "ranking" of the employee, relative to each of his coworkers, made by two of the employee's supervisors. The supervisors, who did not know the test scores, were asked to "determine which ones they felt irrespective of the job that they were actually doing, but in their respective jobs, did a better job than the person they were rating against..."

Id. at 429-430 (footnotes omitted). It was against this factual background that the Supreme Court made its observation quoted by the deans as to the lack of any kind of criteria used by the supervisors in their ranking of employees.

In stark contrast to the facts in the Albemarle case are the facts surrounding the Board's efforts to establish a scientifically sound basis for the pass/fail line or cut score for the bar examination in Florida. With technical guidance from Dr. Klein, a nationally recognized expert on

psychometric characteristics of bar examinations, the Board conducted two studies: the Lawyers Study and the Readers Study.

As to the Lawyers Study, the Board expended much energy to bring about a blue ribbon panel of Florida attorneys. With assistance from the Court, the Board obtained six Florida circuit judges to participate in the Lawyers Study. The Board also identified and recruited attorneys certified in the subject area that they were asked to review.

Recognizing the importance of the law school community, the Board solicited the deans of the Florida accredited law schools for volunteers. The Board obtained four law school professors and two associate law deans representing five of the Florida accredited law schools. Lastly, the Board actively sought diversity for its study and obtained representatives from the Virgil Hawkins Bar Association and the Central Florida Association of Women Lawyers. Additionally, two of the six Board members who participated were minorities.

It is unquestionable that the Board was highly successful in putting together a diverse and distinguished group of representatives from the judiciary, the legal profession and the law school community in Florida. Contrary to the deans' argument, the participants of the Lawyers Study possessed the knowledge and experience to make them well qualified to perform the task of reading 40 essay answers during the daylong review session held in Orlando last June based upon the directions provided to them.

From the tenor of the comments of the deans and law teachers, it seems apparent that nothing the Board could have done would have been acceptable to them if it resulted in an increase to the current pass/fail standard.

If, for example, the panelists had been given greater directions, then the Board might possibly be replying to criticism that the study was flawed because the panelists were discouraged from exercising their independent, individual judgment.

As to the Readers Study, the Board relied upon the actual graders of the essay answers from two recent administrations of the bar exam. The credentials of the readers are outstanding in that they all must have performed well both during law school and on the bar exam. Many of the readers have been serving the Court and the Board for years and have graded literally thousands of essay answers. The experience level in grading essay answers of the Board's seasoned graders would surely rival the experience level of many law school professors.

Not unlike the task routinely performed by law school professors and teachers when determining a passing or failing grade for their students, the Board readers (from the February and July administrations of the bar exam) were simply asked to determine the minimum score required to pass the essay question that they had previously graded. Yet, for undisclosed reasons, the deans apparently view the Board's readers as not competent to make the determination asked of them.

There exists another significant factual distinction. In Albemarle, the company performed a validity study of its employment test. The Albemarle decision properly noted the deficiency of such study. The Board, however, did not conduct a validity study of its bar examination. Instead, the Board conducted a standard setting study.

Unlike the employment test in Albemarle, the validity of the bar examination is well documented. Some of the rulings of courts on bar exams

and their validity are set forth below.

> If a state has the right to insist on a minimum standard of legal competence as a condition of licensure, it would seem to follow a fortiori that it may require a demonstration of such competence in an examination designed to test the fundamental ability to recognize and deal with legal principles. * * * Both the essay and MBE portions of the [Georgia] examination are designed solely to assess the legal competence of bar examinees; and while the minimum passing score of 70 has no legal significance standing alone, it represents the examiners' considered judgments as to "minimal competence required to practice law," the precise quality the examination attempts to measure.

Tyler v. Vickery, 517 F.2d. 1089, 1101-1102 (5th Cir. 1975) cert. denied, 426 U.S. 940 (1976).[10]

> The court believes no genuine issue of any material fact exists as to whether the Bar examination is rationally related to the state's strong interests in the professional competence of its attorneys. The essay portion of the examination and the MBE test a broad spectrum of basic legal principles. The examination requires rapid legal analysis of fact situations and the ability to convey that analysis in reasoned written form. These attributes are the hallmark of the legal profession.

Petitt et al. v. Gingerich et al., 427 F.Supp. 282, 294 (Md. 1977).

> The state has a substantial interest in assuring that persons licensed to practice law meet minimum standards of professional competence. The bar examination provides such a guarantee. Lawyers must be versed in the major areas of the law. They must be trained in legal craftsmanship and capable of understanding legal writing, because knowledge of the law is communicated primarily through writing. The law itself is codified in statutes and construed in written decisions. The constitution the Court applies today is a written document. The lawyer must be able to analyze facts to determine their legal significance. And perhaps most importantly, the lawyer must be able to communicate the relevant facts and the applicable law in writing. If he cannot do so, he will not be able to draft wills, contracts and other legal instruments for his clients,

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[10] The Tyler decision is binding precedent for the United States Court of Appeals, Eleventh Circuit. Jones v. Bd. of Commissioners of the Ala. State Bar, 737 F.2d 996, FN 8 (11th Cir. 1984).

> and he will not be able to adequately defend his client's interests in litigation.

Lewis v. Hartsock., No. 73-16 (S.D. Ohio, Mar. 9, 1976) quoted in Petitt, supra.

It is also significant that one of the deans who signed the joint statement of the deans has acknowledged the reliability and validity of both the MBE and essay questions as used on the bar exam. In an article commending the addition of a performance test component to existing bar examinations, Dean Joseph D. Harbaugh of Nova Southeastern University, Shepard Broad Law Center, observed:

> If, for example, a half day of examination time is devoted to performance testing, the cost will be either one hundred Multistate Bar Examination questions or three essay questions. These tried and true testing units are high ticket items. They have proven to be both reliable and valid measuring devices and should not be traded for a method that does not guarantee similar testing value.

Harbaugh, Examining Lawyers' Skills, THE BAR EXAMINER 9, 13 (Nov. 1990).[11]

In judging the Board's proposal to raise the pass/fail line, the Board submits that the following standard should apply: "Cut scores must be set by some systematic process that reflects the good-faith exercise of professional judgment." The Ass'n of Mexican-American Educators et al. v. Calif., 937 F.Supp. 1397, 1421 (N.D.Calif. 1996) (citation omitted). Notwithstanding the specious protests presented by some of the commentators as to the methodology of the Board's study, the Board's recommendation is soundly based on its yearlong systematic review of the pass/fail standard of

[11]It is noteworthy that as of the February 2000 administration of the bar exam, Florida started to include multiple choice questions with a performance testing component. (Accompanying Appendix at 11)

the bar examination. The pending proposal to increase such standard is simply a reflection of the Board's "good-faith exercise of professional judgment."

C. Impact on Minorities

-I never give them hell. I just tell the truth, and they think it is hell.[12]

As perceived by President Truman, the truth can sometimes be difficult to accept. As the Board will point out under this section, the deans and the law schools teachers submitting comments to the Court have avoided the truth as to the issue of impact on minorities. Such avoidance is apparently prompted by the unpleasant situation they find themselves in as a result of the true facts surrounding this important issue.

Initially, the law school teachers allege that "the Board's proposal to increase the bar pass score without taking meaningful steps to determine and assess the probable impact of its proposed rule on minority Bar admissions is irresponsible in the extreme." (Law teachers at 7) To label the good-faith study performed by the dedicated members of the Board as extremely irresponsible is not only insulting to the members of the Board but also to the Court who personally appointed each member.

The law school teachers also assert that the Board "concedes that

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[12] Harry S. Truman as quoted in LOOK, April 3, 1956.

raising the pass score is likely to have a disproportionately negative impact on minority admissions." (Law teachers at 7) The deans echoed the same assertion: "[T]he Board grudgingly concedes that the petition may disproportionately impact minority applicants...." (Deans at 2)

It is unclear how the law teachers and deans were able to discern such concession by the Board from a reading of the Board's original petition and rationale. For the record, the Board actually stated the following:

> In recommending an increase to the pass/fail line, the Board has full confidence in the opinion of its expert that such increase will have no measurable effect on existing differences among the passing rates on Florida's bar examination for the minority and non-minority groups.

(Appendix to Board's original petition at 43)

Seizing upon another opportunity to attack Dr. Klein by innuendo instead of fact, the deans also state: "Responding to criticism that his recommendations disproportionately exclude minority bar candidates, Klein has argued that minority students fail the bar exam because they prepare poorly." (Deans at 3) What possible purpose does such statement serve except to unfairly and inaccurately suggest to the Court that Dr. Klein is somehow biased against minority bar candidates?

For the record, the undersigned counsel is aware of two published works by Dr. Klein addressing the issue of disparity in passing rates among racial/ethnic groups: Klein, Disparities in Bar Exam Passing Rates Among Racial/Ethnic Groups: Their Size, Source and Implications, 16 THURGOOD MARSHALL L. REV. 517 (1991); and Klein & Bolus, The Size and Source of Differences in Bar Exam Passing Rates Among Racial and Ethnic Groups, THE BAR EXAMINER 8 (Nov. 1997).

In his 1991 Thurgood Marshall article, Dr. Klein makes the following

observations and conclusions:

> Virtually all of the disparities in bar exam scores and passing rates among groups can be explained by differences in their law school grades. [Citation omitted]

THURGOOD MARSHALL L. REV. at 523.

> If two students have the same LGPA [law school grade point average], they are likely to do equally well on the bar exam regardless of whether one of them is a minority student.

Id. at 524.

> Racial/ethnic group is not a very good predictor of whether a candidate will pass the bar exam. The reason is simple. There are many very capable minority students and, they do well in law school and on the bar exam. A significant percentage of minority students have higher bar exam scores than many non-minority students.

Id. at 524-525.

> In 1989, 14.4% percent of the candidates who took the California exam for the first time were black, hispanic, or Asian. In that same year, 14.1% of those who passed were members of these three groups. In short, the minority share of those who passed was virtually identical to their share of those who sat for the exam. [Reference omitted]
>
> This happened because a minority group's eventual passing rate is much higher than the passing rate among its first timers. [Citation omitted] And, while non-minority candidates tend to pass on their first attempt, a much larger share of their minority classmates tend to pass after their first attempt. [Emphasis original; reference omitted]
>
> The educational backgrounds and opportunities of minority students who enter law school often lag somewhat behind those of their classmates. This gap cannot be made up during law school. Thus, minority students frequently need more studying time, tutoring, and practice than do their classmates. However, if they stick at it, most minority students eventually pass...even in California.

Id. at 526-527.

Based upon his findings, Dr. Klein proposes several policies for consideration by law schools including the acceptance of more minority students and the dismissal of "students after the first year who cannot make

the grade." Id. at 528. Dr. Klein concludes his Thurgood Marshall article with the following:

> I recognize that letting more minority students in and then flunking out a large share of them after the first year has the downside risk of the school appearing to be insensitive to minority student needs. But, is this policy worse than allowing students to complete three years of law studies only to find that they cannot pass their state's bar exam?
>
> To increase minority passing rates and the minority's share of the bar, we will have to put our money on the best bets -- the students who do well in law school. We should not let it all ride on admissions practices. In the long run, more minority students will graduate; and, more will pass the exam if we give more minority students an opportunity to go to law school, but only promote and graduate those who do sufficiently well in their studies that they have a reasonable chance of eventually passing.

Id. at 528-529.

In his 1997 Bar Examiner article coauthored with Dr. Roger Bolus, Dr. Klein reaffirms his findings set forth in his Thurgood Marshall article:

> The grades applicants earn in law school are highly predictive of how well they will do on the bar exam. * * * The bar exam itself is not the source of the differences. It merely reflects the disparities that were present when the students graduated from law school.

BAR EXAMINERS at 12.

> On the average, members of racial/ethnic minority groups do less well on the bar exam than their classmates. This finding has held up in every jurisdiction that has examined the passing rates of different groups. The size of these disparities varies from state to state as a function of several factors (such as whether first-timer or eventual passing rates are studied). Nevertheless, it is clear that no matter how the computations are made, minority applicants and especially Blacks, have significantly lower passing rates than Whites.
>
> Over the past 25 years, several studies have investigated many potential sources of the differences in passing rates among racial/ethnic groups. These studies have found that the disparities are not a function of certain questions or types of questions, subject matter areas covered by the exam, test format (essay, multiple-choice, or performance), the racial or ethnic group of the lawyers who grade the essay answers, the time limits imposed, or even the types of law schools from which the

> applicants graduate. None of these factors have a significant effect on the differences in passing rates between groups.
>
> What does matter is the applicant's mastery of the law as indicated by the knowledge and abilities that are needed to do well in law school. * * * In short, the differences in passing rates among racial/ethnic groups stem from differences in their legal skills and abilities rather than from some unique feature of the test. The exam works about the same way for everyone.

Id. at 15.

Contrary to the insinuation of the deans, the above-quoted portions of Dr. Klein's published works are clearly inconsistent with the inflamed rhetoric of a racially prejudiced individual. But are Dr. Klein's findings valid -- have they been corroborated?

The Law School Admission Council (LSAC) conducted a six-year-long national study of bar exam passage rates. The LSAC study tracked more than 27,000 students entering law school in 1991. Pursuant to authorization from the Court, the Board actively participated in the study. The results of the study were released in 1998. Among the findings were:

* The eventual passage rate for all study participants of color was 84.7 percent.

* Both law school grade point average (LGPA) and LSAT score were the strongest predictors of bar examination passage for all groups studied.

* When a series of background variables typically identified as potential contributors to low academic achievement were examined, they showed no relationship to bar passage or failure. These variables included academic expectations for self, language spoken in the home, need to work for pay during undergraduate school, and financial responsibility for others during law school.

* A demographic profile that could distinguish first-time passing examinees from eventual-passing or never-passing examinees did not emerge from these data.

Wightman, LSAC National Longitudinal Bar Passage Study at Executive Summary

(1998). The findings from the LSAC study affirm what Dr. Klein was reporting as early as 1991.

In commenting upon the LSAC study, Judge Laura Taylor Swain[13] observed:

> The strong correlation identified in the Study among LSAT scores, law school academic performance, and bar exam success also counts as good news, for the Study finds as well that ethnicity, socio-economic status, and similar factors widely hypothesized to be significant parts of the mix are not in fact significant variables in the analysis of bar examination outcomes. Gender is also excluded as a significant factor.
>
> The Study offers important messages for candidates, academia, and society alike. For candidates, it shows clearly that the disparity in passage rates is not due to some mysterious, inexplicable, and irrational bias built into examinations. Rather, bar examinations identify many of the same abilities and skills that contribute to good academic performance in law school. Students whose LSAT scores and/or early law school grades are not superior may be able to make a difference not only in their class standing but in their first-time bar examination results by focusing on further development of their analytical, expressive, and other relevant lawyering skills.
>
> For academia there is, in my view, a challenge. Simply preparing students to graduate is not sufficient. The Study is quick to point out that mere grade inflation will not do the trick -- no surprise there. Program enrichment for struggling students may, however, help to prepare such students to succeed earlier on the bar examination as well as to be better lawyers.

Swain, Thoughts on the LSAC Bar Passage Study -- Good News and Good News, THE BAR EXAMINER at 16-17 (Nov. 1998) (footnotes omitted).

In her comments on the LSAC study, Professor Katherine L. Vaughns[14] noted

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13 Judge Swain is a United States Bankruptcy Judge in New York. She is a former member of the New York State Board of Law Examiners and has served on several committees of the National Conference of Bar Examiners.

14 Professor Vaughns is a law professor at the University of Maryland School of Law. She is a former member of the California Committee of Bar Examiners. She also served on an advisory group for the LSAC bar passage study.

"the gap in academic achievement that begins early in the educational experiences." She suggests:

> Meanwhile, until such time as the quality of the primary and secondary educational experiences is equalized for all students in this country, it remains for legal educators to figure out methods for closing the gap at the law school level.

Vaughns, LSAC's National Study Findings on Bar Passage Rates: Do They Augur the End of Old Debates and Controversies About Discrepancies in Bar Passage Rates Among Ethnic Groups?, THE BAR EXAMINER at 20-21 (Nov. 1998) (footnote omitted).

As set forth above, Dr. Klein is not biased against minority students. His findings on the issue of disparities in bar exam passing rates have been confirmed by the LSAC study. His recommendations to legal educators are not dissimilar to the comments of Judge Swain and Professor Vaughns.

Perhaps Judge Henry Ramsey, the former dean of Howard University School of Law, said it best: "Minority students, like all students, are entitled to a legal education and training which gives them the skills needed to pass the bar examination on the first administration." Ramsey, Law Graduates, Law Schools and Bar Passage Rates, THE BAR EXAMINER 21, 26 (Feb. 1991).

It is unclear why deans in Florida are so vehemently opposed to Dr. Klein. Perhaps the deans do not wish to be reminded of the truth that the disparities in bar passing rates among racial/ethnic groups are simply a reflection of the existing disparities when students graduated from law school. As stated by President Truman, such truth places them in a very unpleasant situation. What is most troublesome, however, is the unwillingness by the deans to acknowledge (let alone accept) the challenge issued to them by Dr. Klein, Judge Swain, Professor Vaughns and Judge Ramsey

regarding the improvement of legal education.

D. Miscellaneous Comments

-Facts do not cease to exist because they are ignored.[15]

Some of the comments filed with the Court contained inaccurate representations. Such representations along with the Board's reply are presented below.

COMMENT: "[H]alf of the Florida Bar Exam, that is the Multi-State portion of the exam, tests common law rules that are no longer, and in some instances never were, applicable in Florida." (Law teachers at 11)

BOARD'S REPLY: Untrue. The Multistate Bar Examination (MBE) tests on the following areas: Constitutional Law, Contracts, Criminal Law and Procedure, Evidence, Real Property and Torts. Constitutional Law tests on legal principles pertaining to the federal constitution. About half of the constitutional law questions on the MBE test on principles involving individual rights including due process, equal protection and First Amendment freedoms. NATIONAL CONFERENCE OF BAR EXAMINER, 2000 Information Booklet (1999) at 12-13.

As to some of the other areas, MBE questions on Contracts "assume that Articles 1 and 2 of the Uniform Commercial Code have been adopted and are

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[15] Aldous Huxley, A Note on Dogma.

applicable when appropriate." Id. at 13. The Uniform Commercial Code has been adopted in Florida. Florida Statutes Chapters 670-680.

MBE questions on Evidence "should be answered according to the Federal Rules of Evidence." The Florida Evidence Code "is patterned after the Federal Rules of Evidence. Many of its provisions are identical to the Federal Rules." Ehrhardt, Florida Evidence § 102.1 (2000 Edition) Of course, in addition to preparing for the bar exam, it would seem prudent for Florida bar applicants to know the differences between the Florida Evidence Code and the Federal Rules of Evidence in that they may wish to practice in both state and federal courts located in Florida.

The remaining areas tested on the MBE cover issues that are relevant to the practice of law in Florida including comparative negligence and strict liability, covenants and easements, and constitutional protection of accused persons. It would appear that the law school teachers are unfamiliar with the content of the MBE. For information on the development of test specifications for the MBE, see Smith, The MBE Specifications Review Project, THE BAR EXAMINER 4 (Feb. 1996).

COMMENT: "Candidates that fail the bar will be given little guidance, as the MBE score is reported as a single number, but scores for the six subjects covered on the MBE are not reported separately." (Response of David M. White at 7-8) (Citation omitted)

BOARD'S REPLY: Not true. The separate scores for each of the six subject areas of the Florida portion and for each of the six subject areas of MBE portion of the bar exam are reported to unsuccessful candidates by the Board. A copy of an example of a score report provided by the Board is provided with this response. (Accompanying Appendix at 12-13)

COMMENT: "The MBE has become mainly a reading test rooted in trickery rather than a test focused primarily on a candidate's knowledge of the law." (Paul S. Cherry's letter to the editor/The Florida Bar News attached to the letter of Wilfred C. Varn dated February 7, 2000)

BOARD'S REPLY: Untrue but a common myth regarding the MBE. The exacting and fair process of drafting, selecting and reviewing questions used on the MBE is set forth below:

> MBE questions are designed to be a fair index of whether an applicant has the ability to practice law. MBE questions are written by Drafting Committees composed of men and women who are law teachers and practitioners. Before it is administered, every MBE question is reviewed at several levels: at least twice as it is edited by the Drafting Committee; by psychometric experts to insure that it is fair and unbiased; by the practicing members of the MBE Policy Committee and their academic consultants; and by the members of Boards of Bar Examiners across the country. After a form of the MBE is administered, any question that performs in an unanticipated manner--is very difficult or is missed by applicants who did well on the rest of the test--is flagged by psychometric experts and reviewed again by content experts on the Drafting Committees to insure that no ambiguity exists in the question and that the key is unequivocally correct. Should an error be detected even after this thorough scrutiny, two or more answers may be deemed correct in order to insure that no applicant is disadvantaged by having a particular question appear on the form of the MBE he or she took.

Myths and Facts About the Multistate Bar Examination, THE BAR EXAMINER 18 (Feb. 1995).

COMMENT: "Neither the Readers Study group nor the Lawyers Study group was guided by a 'model' answer or list of objective criteria by which their answers were scored." (Response of Florida Chapter of the National Bar Ass'n at 9)

BOARD'S REPLY: The Readers Group consisted of the actual readers of the bar exam answers under review. In addition to a memorandum of research on

the essay question, such readers would have had a detailed analytic grading score sheet or checklist developed during the calibration conference conducted the weekend following the bar examination.

As for the Lawyers Group, each participant (in advance of the review session held in Orlando) was furnished a copy of the bar exam question along with the memorandum of research for such question.

E. A Call for Inaction

-As plants are suffocated and drowned with too much moisture, and lamps with too much oil, so is the active part of the understanding with too much study.[16]

The Board shares the concern of the commentators regarding diversity among the members of The Florida Bar. Such diversity is a laudable goal that the entire legal profession must embrace. As discussed in greater detail under Section C. above, such lack of diversity cannot, however, be attributed to the bar examination. The passing rates among racial and ethnic groups on the bar exam simply reflect the disparities that existed at the time examinees graduated from law school.

The deans who signed the joint petition filed with the Court request that consideration of the Board's proposal be deferred for several years to allow for more studies. The deans suggest two specific studies, both of

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16 Montaigne, Essays I.xxv.

which are discussed below.

The deans first suggest:

> 1) The Board should prepare a study evaluating whether lawyers recently admitted with Bar Examination scores of 131-136 disproportionately are incompetent, using existing data on bar examination scores for recent examinees, disciplinary records of the Florida Bar, and other appropriate data.

(Deans at 23) Such a study is unnecessary in that the results are already known.

In his Minority Report filed with the Court, Board Member Noel G. Lawrence reported on evidence that would be available should such a study be undertaken:

> Discipline statistics kept by The Florida Bar from July 1, 1998 through June 30, 1999 show the actual number of disciplinary actions against attorneys. Incompetence was revealed in only six cases out of 365; others fell into categories of character flaws which would not be detected through a test of academic knowledge and skills.

(Minority Report at 5-6) Mr. Lawrence's report was served upon all of the deans of the Florida accredited law schools.

There are, of course, sound reasons for the lack of data noted by Mr. Lawrence. As the Court knows, the grievance/disciplinary system of The Florida Bar is complaint driven. If no one complains about a lawyer's conduct, then there is no record and no data.

One can easily imagine numerous examples of incompetency by any professional (including a lawyer) that go unreported. For example, clients may be unaware of the fact that inadequate representation was provided to them. If a legal client (unknowledgeable in the law) with a meritorious claim is turned away by a lawyer who failed to recognize the available cause of action, what possible reason would motivate such client to file a

complaint with The Florida Bar? The client would simply abandon his or her claim or seek the advice of another lawyer.

In recommending this study, the deans overlook the fact that it is impossible to draw an absolute line between competency and incompetency. As expressed by one testing and measurement expert:

> All standard-setting methods are in a certain sense arbitrary. They are arbitrary in that they depend on subjective judgments. Raters must answer the question, "How good is good enough?" and reasonable raters can disagree. Standards are also arbitrary in the sense that they make absolute distinctions where such distinctions may not exist. The purpose of setting a standard on a bar examination is to help distinguish two groups of people: those examinees who are at least minimally competent to practice law and those examinees who are not competent. Unfortunately, there is no clear line that separates these groups. Competency to practice law (or the skills that make up competency) can most appropriately be thought of as a continuous trait. Examinees are more or less competent, but there is no absolute standard that separates those who are competent from those who are not competent.

Lenel, Choosing a Standard: The Nedelsky and Angoff Methods, THE BAR EXAMINER 23-24 (Feb 1989).

Notwithstanding her observations, Dr. Lenel does not suggest that bar examiners abdicate their responsibility to establish a pass/fail standard. Quite the contrary, she advised:

> Because there will always be some degree of arbitrariness in the standard-setting process, no standard-setting method can guarantee error-free decision making or a standard that is above challenge. However, standard setters can make sure that the choice of method is well considered, the procedures are carefully designed and systematically implemented, judgments are thoughtfully made and thoroughly discussed, and all steps in the standard-setting process are well documented.

Id. at 28. As detailed in the rationale for the Board's proposal filed with the Court last October, the Board fully complied with Dr. Lenel's advice including full discussion with the deans throughout the nearly year-long

study.

In the case of In re Reardon, 378 A.2d 614 (Del. 1977), the Supreme Court of Delaware addressed a challenge to action taken by its Board of Bar Examiners in scoring the bar examination. The petitioners claimed that the bar examiners had acted in a "manifestly unfair" manner. In rejecting such claim, the Delaware Supreme Court noted that the Board "acted carefully and exercised deliberate judgment after due consideration...." Id. at 617. The court then held that it would not substitute its judgment for the judgment of the Board and aptly observed that "[t]ests, like taxes, can never be perfect and completely fair to all." Id.

The deans further suggest:

> 2) The Board should conduct a two year study to identify the percentage within each minority group and among white examinees who obtain a score of 131 or higher, 133 or higher, and 136 or higher.

(Deans at 23)

The deans want to know the precise impact a higher pass/fail standard will have on their graduates including especially those individuals of color. The deans' request is apparently being prompted by their desire to have a particular number of their graduates be admitted to The Florida Bar regardless of a demonstration of competency at the higher and more sound pass/fail standard being recommended by the Board.

The desire of the deans is understandable. No law school wants to graduate students and then have them fail the bar exam. The deans' desire, however, disregards the sole purpose of the bar examination: the protection of the public.

The Board's pending proposal is not about the size of the number of how

many bar applicants should pass the bar exam. The Board would be thrilled if every graduate of a Florida law school were to pass the bar exam at the Board's recommended pass/fail line.

The Board's proposal is, instead, about standards. When one understands that fundamental distinction underlying the Board's pass/fail study, then the need for the deans' suggested two-year study vanishes.

As one authority on testing and measurements of bar examinations stated:

> If your passing score is not empirically determined, your passing score probably means very little. The question is not whether 95 percent of the applicants or 5 percent of the applicants pass the bar examination. The question is whether the applicants who do pass or fail should have passed or failed. Did we do our best to determine a passing score that is as accurate as possible in its determination of which applicants do possess the minimum required knowledge to be professionally competent lawyers?

Descy, Setting Standards and Cut Scores: Where Do We Draw the Pass/Fail Line?, THE BAR EXAMINER 17, 21 (Nov. 1988). By undertaking a comprehensive and empirically based study of the pass/fail standard, the Board complied with the relevant issues as identified above by Dr. Descy.

Furthermore, as stated by Dr. Klein, "[i]t is difficult to predict the effect of a change in passing scores." (Accompanying Appendix at 7) The true impact cannot be accurately measured until the standard is actually adopted. As observed by Dr. Klein, law schools and their students can and do rise to the challenge of a higher standard.

For example, Dr. Klein commented on how Thurgood Marshall School of Law in Texas was able to improve its bar passing rate by an average of 30 percent since 1993. Such improvement is even more dramatic in that it occurred during the same time period as when Texas was raising its pass/fail standard. (Accompanying Appendix at 7-8)

Why are the deans who signed the joint petition so opposed to the challenge of a higher standard? Why is the Board more confident than the deans that graduates of Florida's law schools can rise to meet the challenge if provided a solid legal education by their schools. Why should many of the graduates of Florida's law schools be considered by their deans as unable to pass a bar examination in the 33 other jurisdictions that have a higher pass/fail standard than Florida's current 131? Bar applicants in Florida would be better served by having the deans study the pressing issue of the need for improvement to the legal educational experience especially among the students graduating in the lowest quartile of their graduating class.

Additionally, the second study suggested by the deans will yield nothing of value to the wealth of data already collected. The bar passage rates in Florida during the early 1990's were examined by the Court's Racial and Ethnic Bias Study Commission and Dr. Klein. (See Exhibit "A" to Minority Report) With authorization from the Court, the Board also participated in the LSAC study for bar exams administered during 1994-1996.

The gathered data reviewed by Dr. Klein over the years and more recently by the LSAC study group on the issue of disparity involved many different jurisdictions including states with higher pass/fail standards than Florida's. These studies have consistently yielded the same finding that the examinees' performance during law school was a strong predictor of success on the bar exam. How many times do the deans need to have the same issue studied and the same results obtained before they will act positively to the challenge such studies have indicated?

Lastly, pursuant to authorization granted by the Court, the Board will

be able to monitor the results of future bar examinations to ensure that the differences in passing rates remain stable as the higher pass/fail standard becomes effective. The Board's data on the performance of examinees on the Florida bar exam is always available to the Court for its independent review.

If you want to kill a meritorious proposal, then advocating that it be studied to death is an appealing course of action. This is the approach the deans have taken. The studies suggested by the deans are unwarranted. The time for action has arrived.

CONCLUSION

The current pass/fail line of 131 in Florida has no empirical basis. It was predicated upon the considered judgments of the Board and Court at the time in their good-faith attempt to reproduce the same results of the historical practice of passing all examinees within a particular set of points of the top scores of the examination. With the results of the Board's 1999 study, the Court now has the opportunity to set a pass/fail standard based on the results of the Board's comprehensive and sound study of the issue.

One of the commentators opposing the Board's proposal quoted approvingly the old adage: "If it ain't broke, don't fix it." (Response of F. Malcolm Cunningham Sr. Bar Ass'n at 3) In response, the Board endorses the homespun wisdom expressed by Dean Harbaugh when he confronted the same adage in his recommendation that performance testing should become a part of the bar exam:

> Having given you candid responses to the questions earlier

> posed, permit me to reform the "ain't broke, don't fix" proverb in the following way: "Tinker with 'somethin' that ain't broke only if you're dang sure it's gonna run a lot better."

Harbaugh, supra at 12.

Having no empirical basis for the existing pass/fail line of 131, the Board engaged in a good-faith study of such issue with the guidance of a nationally renowned expert in the field. Having replied to the comments in opposition to its proposal, the Board remains "dang sure" that its recommended increase to the pass/fail standard is scientifically sound, reasonable and fair.

In a 1981 decision, the Supreme Court of North Dakota addressed challenges made against its bar examination. In noting the importance of having a pass/fail standard, the North Dakota Supreme Court reasoned:

> [E]very test or examination, to have any value or significance, must have a passing line or standard that must be met, otherwise such test would be a mere exercise in futility for the test is to give the public the assurance, and the protection, that those admitted to practice law have met the minimum requirements. Thus, in the final analysis the test or examination is for the protection of the public.

Dinger v. State Bar Board, 312 N.W.2d 15, 18 (N.D. 1981) (Citation omitted).

Based upon the results of its good-faith study, the Board concluded that the pass/fail standard for the Florida bar examination should be increased to ensure the protection of the public. The Court is urged to reach the same conclusion.

WHEREFORE, the Board respectfully requests the entry of an order amending, confirming and adopting all of the amendments to the Rules as reproduced in the appendix attached to the Board's petition dated October 29, 1999.

DATED this 10th day of May, 2000.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing KEYBOARD()Reply and accompanying Appendix has been served by U.S. Mail this 10th day of May 2000 to the following list of individuals:

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