IN THE SUPREME COURT OF FLORIDA

FLORIDA BOARD OF BAR EXAMINERS RE AMENDMENT TO RULES OF THE SUPREME COURT RELATING TO ADMISSIONS TO THE BAR	)	Case No. 96,869

FLORIDA STATE CONFERENCE OF NAACP BRANCHES' RESPONSE TO BAR EXAMINERS' PROPOSED BAR EXAM PASS/FAIL LINE AMENDMENT

INTRODUCTION

Forty years ago, the importance of the African-American role in American jurisprudence was aptly noted in the following excerpt from Samuel Selkow's article: *Hawkins, The United States Supreme Court, and Justice*:

> "The Negro lawyer is of critical importance to the advancement of Negro rights essential to legal change. Not until Howard University began in the 30's graduating numbers of Negro lawyers trained in civil rights did the race relations picture begin to change"[1]

This need for legal diversity and the barriers to achieving that diversity were further addressed in the 1991 *Report and Recommendations of the Florida Supreme Court Racial and Ethnic Bias Study Commission*, which stated in the section of the report entitled: *Minority Lawyers in Florida: A Precious Resource Excluded and Untapped* that:

> ". . . the civil rights movement forced the country to confront a broad array of discriminatory practices. The legal professsion nationwide played a prominent role in that movement . . . Against this backdrop of dramatic change, it is especially ironic to witness how the legal profession has itself remained static in the area of equal opportunities for minority lawyers. By its very nature, the legal profession should be a model of opportunity for all. Yet, countless minority attorneys have documented ... that the legal profession in Florida, notwithstanding its central importance to the administration of justice, is a profession in which "equal opportunity for all" remains an elusive ideal. [2]
>
> The foreground of that legal landscape, for many minority law students, contains a formidable boulder which threatens to block their timely entrance in the profession".[3]

The bolder referred to in that section of the report is the Florida Bar Exam. The Commission report contained ten pages of analysis and recommendations for dealing with the bar exam boulder. Nine years later, it is clear that the Florida Board of Bar Examiners has not addressed these recommendations with all deliberate speed. In the pending petition, the Board has finally proposed implementation in the year 2000, of the record-keeping recommendation (resumption of compiling of racial statistics) of the Supreme Court Commission's 1991 report. As necessary as that first step is, the accompanying proposal to increase the bar exam bolder's pass/fail line without first following the Commissions' 1991 recommendations, and curing the types of problems which led the Commission to conclude that the exam served to exclude or delay the admission of otherwise qualified minority applicants, substitutes a larger bolder for the existing obstruction, instead of leveling the playing field, as recommended by the Court's Commission.

Opposition to the Pending Bar Exam Proposal Does Not Constitute

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[1] Samuel Selkow, *Hawkins, The United States Supreme Court, and Justice*, 31 J. Negro Educ. 97, 97 (1962), (citing Jack Greenburg, Race Relations and American Law 22 (1959)).

[2] Report and Recommendations of the Florida Supreme Court Racial and Ethnic Bias Commission, December 11, 1991, at 62.

[3] Id at 113

Advocacy for Admitting Unqualified Appliants to the Practice of Law

The State Conference is aware of and supports the goal of assuring Florida's citizens that lawyers licensed to practice are competent. Many minority and poor citizens of the state are likely to find their choices for affordable legal assistance will limit them to seek assistance from lawyers who have recently entered the profession. As noted, however, in two sections of the Bias Commission report:

> "As a matter of public policy, occupational testing should not exclude any qualified persons from engaging in occupations of their choice. If steps can be taken to minimize differences in success rates without compromising the efficacy of the tests as measures of qualification, those steps should be taken"
>
> "The Commission is fully aware of the often-times complex nature of law. Certain legal words, concepts, and principles are, by their very nature, complex and difficult. Testing on these naturally complex items is obviously appropriate. What the exam should avoid, however, is unnecessarily convoluted or tricky language or structural components which contain no testing value in and of themselves and which provide an intrinsic advantage to those who speak one language or dialect or are otherwise simply "test-wise".[4]

The Board of Bar Examiners' failure to address these issues, and assure the court that these problems have been resolved prior to proposing a higher pass/fail score helps perpetuate the stereotype that bar exam performance demonstrates that minority applicants are inherently less qualified. The repeated assertions during the debate of this proposal, that a raised pass/fail score will cause bar applicants to study harder, also carries with it an implicit assumption that minority applicants are lazy individuals who must have the prod of the higher score to motivate them to study. Both assumptions fly in the face of the demonstrated abilities of the many prominent minority lawyers and jurists in this state and nation. Neither assumption should be asserted or believed to be valid, without utilizing the type of analysis recommended by the Bias Commission to solve the riddle of the disparity between minority and non-minority bar exam performance. Any proposal to raise the pass/fail line on the bar exam before this riddle is solved, poses the foreseeable risk of exacerbating the exam's potential to exclude minority applicants on the basis of factors which have no relation to the ability of these applicants to provide competent legal services to potential clients. Such a proposal is contrary to the Commissions' request for "a Bar Exam which fairly tests those analytical abilities"[5] In the Commission's view:

> "This disparity in performance is, by itself, cause for significant concern.[6]

Dr. Stephen Klein (the individual selected by the Board of Bar Examiners to to study the pass/fail proposal) attempts to skirt this issue by contending that the raised score will "have no measurable effect (in either direction) on the disparity in bar passage rates that currently exists among racial/ethnic groups"[7]. Arguing that the proposal will not increase the existing disparity can hardly provide comfort, or be asserted as a means of addressing the recommendations of the Commissions' 1991 report. A score increase that continues the same disparity between minority and non-minority applicants will harm efforts to achieve the goals of the Racial and Ethnic Bias Commission. The attached diagram portrays bar applicants as sections of a sheet cake. Each decision beyond the decision 50 years ago to abolish the diploma privilege cuts off an additional section of applicants who would be admitted to practice in Florida under the existing rules. The

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[4] Id at p. 116 and 120.

[5] Recommendation 5, Id at 122.

[6] Id at 116.

[7] S. Klein, , *Panelist and Reader Judgments Regarding the Passing Score on the Florida Bar Exam,* August 12, 1999, at p. 5.

proposal's effect is to remove another slice of applicants from the cake. Under the Klein analysis, (no measurable effect on the disparity) the largest percent of that slice will consist of minority applicants who would become lawyers if the pass/fail line is not changed. The prospect of decreased bar passage can scarcely be considered a motivating factor to recruit top minority undergraduate students away from companies offering lucrative post-undergraduate careers, and towards three years of law school and limited prospects for admission to the bar.

Although the Federal Courts have been reluctant to inject themselves into State regulation of the legal profession, potential constitutional issues involving violations of Title VII of the Civil Rights Act of 1964, have raised judicial concern in Federal litigation over state administration of bar exams. In his 1989 article: *Racial and Ethnic Barriers to the Legal Profession: The Case against the Bar Exam,* Maurice Emsellem observes:

> "The scientific deficiency in the test's design has not gone unnoticed in court challenges to the bar examination. While equal-protection suits premised on the discriminatory impact of the examination have generally failed, questions concerning the "validity" of the examination have seriously troubled the one federal court which has specifically addressed the issue. In a candid display of concern, a panel of the United States Court of Appeals for the Fourth Circuit concluded:
>
> > While the Bar Examiners do not concede that they would lose under Title VII, we believe the record is inadequate to demonstrate either "criterion" ("predictive"), "content", or "construct" validity under professionally applicable methods. Thus if we were to determine that Title VII standards were applicable, it would be necessary to reverse and declare the South Carolina Bar Examination constitutionally invalid."[8]

SLICING THE LAW SCHOOL GRADUATE SHEET CAKE

1 - Lawyers Admitted Under Existing Bar Exam

GROUP A

Lawyers that would pass Bar Exam if New Passing Score Adopted, who also would have been admitted under pre-1981 Rules and Diploma Privilege

Group B

Lawyers that would pass Bar Exam if New Passing Score Adopted, who also would have been admitted under pre-1981 Rules but not under Diploma Privilege

2 - Lawyers Admitted Under Higher Bar Exam Score

GROUP A

Lawyers that would pass Bar Exam if New Passing Score Adopted, who also would have been admitted under pre-1981 Rules and Diploma Privilege

Group B

Lawyers that would pass Bar Exam if New Passing Score Adopted, who also would have been admitted under pre-1981 Rules but not under Diploma Privilege

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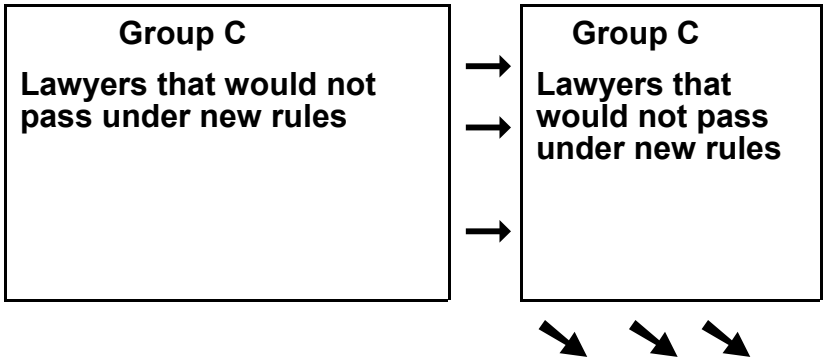
[8] M., Emsellem, *Racial and Ethnic Barriers to the Legal Profession: The Case against the Bar Exam*, New York State Bar Journal, April 1989, 42 at p. 44, citing *Richardson v. McFadden,* 540 F. 2d. 744, 746-747 (4th Cir. 1976), *opinion reversed in part, on rehearing en banc.* 563 F.2d 1130 (1977), *cert. denied,* 435 U.S. 968 (1978) While Federal decisions continue to shield State Bar Examinations from suits alleging that the exam violates Title VII of the Civil Rights Act, the fact that this shield enables the exam to evade Title VII standards should not be a source of pride or comfort. If this Court seeks to fulfill the goals and objectives of its Racial and Ethnic Bias Study Commission, it should strive to attain an exam which meets the constitutional standards of Title VII.



3. Applicants Not Passing w/Proposed Raised Score

Applicants who would have passed under pre-1981 Rules but would not pass under current rules or proposed rules, and would not qualify for Diploma Privilege	**Applicants that would pass under old rules but would not pass under new rules**	**Applicants who would have been admitted under Diploma Privilege (Florida law school graduates)**

Underrepresentation of Minority Lawyers in the Legal Profession

The prospect that the existing bar exam, and the proposal to alter its pass/fail score is disproportionately excluding qualified minority applicants to the Florida Bar cannot be ignored as the Court reviews the current proposal In its 1991 report, the Racial and Ethnic Bias Commission made the following conclusions about the problem of underrepresentation of minorities in the legal profession, and it impact on the judicial system and society:

> " First, the underrepresentation of minorities as attorneys and judges perpetuates a judicial system which is unfair and insensitive to individuals of color in ways established in the Commissions' initial report. Through institutional policies and practices, minorities tend to be treated more harshly in the criminal justice system than their White, English speaking counterparts. This harsher treatment contributes to the severely disproportionate representation we witness today of minorities, particularly minority males, in Florida's jails and prisons.
>
> Second, attorneys - especially those practicing in larger private law firms in Florida - tend to have a greater role in public policy development, inasmuch as these attorneys are able to accept leadership positions in state and local government. As long as minorities are underrepresented among the ranks of attorneys, especially in these firms, minorities will have less say in public and social policies or matters which directly or indirectly impact upon the disproportionality of incarcerated minorities.
>
> Third, an individual's achievement of lawyer status empowers both the individual and his or her community. The presence of minorities as attorneys and judges creates a source of leadership from which the minority community can draw inspiration. It provides a magnet which can pull other minorities through the educational system to the ranks of the legal and other professions. Without that presence, hope is replaced by despair, and young minorities are diverted away from the pursuit of an education and profession.
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> Fourth, Florida's judicial system derives its strength and order from the tacit consent of the governed. The underrepresentation of minorities as attorneys and judges reinforces a climate of distrust and dissatisfaction which threatens to result in withdrawal of that tacit consent, thereby weakening our "system of ordered liberty", and the essence of democracy upon which our society is based.
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> . . . When these vital links between the disproportionately high representation of minorities among those incarcerated and the disproportionately low representation of minorities as attorneys are considered, the current system of justice administration can be said to harm both the individual and society as a whole."[9]

Minority/Non-Minority Bar Passage Disparity - The Unsolved Riddle

In her 1990 bar exam article, Edna Wells Handy, Executive Director of the New York State Judicial Commission on Minorities states:

> "Over my ten-year involvement in the City Bar's supplemental bar review program, I have seen a consistent, sizable core of students, who despite their best efforts and mine, continue to fail the exam. . . .This core, like the core of whites who with them make up the 30 to 40 percent failing the exam, hold the key to understanding whether the exam is serving our profession well and why." [10]

By failing to analyze the factors enumerated in the 1991 Florida Supreme Court's Racial and Ethic Bias Study Commission Report, we are left with an unsolved riddle:

> Does the disparity between minority and non-minority bar passage rates demonstrate the unfitness of significant numbers of minority bar applicants, or indicate that the current bar exam is not accurately measuring the skills and knowledge most directly related to the

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[9] *Report and Recommendations of the Florida Supreme Court Racial and Ethnic Bias Commission,* December 11, 1991, at 5.

[10] E. Handy, *Low Minority Pass Rate has Wider Implications*, Manhattan Lawyer, June 1990, 19, at p.21.

practice of law?

This riddle cannot be solved by simply compiling statistical bar passage data by race. Unless it is possible to peel away the veneer of the applicants' score, and review the type of errors which led to that score, the issue of whether it is the exam or the applicant that is failing to demonstrate legal competence remains unresolved. This can only be accomplished through independent in-depth analysis of bar exam questions, and a quantitative and qualitative analysis of what multiple choice questions are frequently answered incorrectly by minority and non-minority applicants, and what deficiencies exist in the essay answers of these applicants. (Simply stating that panelists would grade an answer as failing or passing, tells us nothing about the deficiencies of those answers. Without this knowledge, we can neither answer the riddle, nor remedy exam or applicant deficiencies.)

In its review of the bar exam, the Court's Commission noted the barriers imposed by national bar exam administrators to prevent full access to information about bar exam performance.[11] Despite those limitations the Commission was able to obtain sufficient data to arrive at the following alarming conclusions:

> 1. "[A] stark disparity - of up to 35% - exists in the passage rates of White and Black candidates on Florida's Bar exam. Specifically for February administration, 74% of the White candidates passed the Florida and multistate portions of the exam, while only 39% of the Black candidates passed the exam. For the July administration, 76% of the White candidates passed, while only 46% of the Black candidates passed. While this stark disparity is present for all types of questions, the difference in performance between White and Black candidates is larger on the essay questions than on the multiple-choice questions."[12]
>
> 2. "Even when comparing the performance of White and Black candidates who were relatively similar in terms of their overall proficiency levels, sophisticated statistical analysis reveal that over 10% of the Florida multiple-choice items showed a significant level of differential functioning against Black candidates. As for the essay questions, all three essays for the February administration, and one essay for the July administration, showed a statistically significant difference in performance among the two groups. These results tend to indicate that differences in individual ability levels are not the only contributing factor accounting for the passage rate disparity."[13]
>
> 3. "Significantly, the content review by the expert panel showed that most of the items on which minority students scored significantly lower than non-minorities contained culturally stereotypic language or situations, or structural components, which may have disadvantaged minority candidates."[14]
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> 4. ". . .[A] review of the entire exam showed that additional questions present technical, language and/or structural problems which, while possibly affecting the performance of all candidates, may carry a greater impact for minority candidates.
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> The use of "superstandard" English was identified by the panel as a frequently-reoccurring problem. "Superstandard" English refers to vocabulary or sentence structure which is unnecessarily convoluted, complex, or tricky. The basing of a single question on half-page descriptions of fact situations; "double-barrelled" answer choices; undue reliance on the roman numeral format; and the use of double-negatives, are all examples of "super-standard" English contained in Florida's Bar exam. Bilingual or bi-dialectal candidates who may have adequate knowledge of the law may not, because of differences in cognitive interpretative styles related to language or culture, process the material in the same manner

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[11] *Report and Recommendations of the Florida Supreme Court Racial and Ethnic Bias Commission,* December 11, 1991, at 15.

[12] Id. at 116

[13] Id. at 117

[14] Id. at 118

as White candidates. Moreover, in view of these cultural differences, they may tend to take longer than other candidates to work through the complexity of the language and sentence structure."[15]

Not only has the Board of Bar Examiners' failed to demonstrate that these problems have been resolved, but the following finding of the 1991 Commissions Report provides plausible reasons to expect that these problems remain unresolved:

> "Significantly, it should be noted that the item-writing guidelines of the Florida Board of Bar Examiners specifically address and prohibit most of these technical problems noted above. . . . The Commission regards these item-writing guidelines as responsible and applauds the Board for their promulgation. Increased efforts are now needed **to ensure that sufficient attention is paid to these guidelines when drafting and reviewing items for use on the exam.**" (Emphasis added)[16]

This polite reference to the Board's failure to follow its own item-writing guidelines in drafting the exam questions studied by the Commissions, when combined with the lack of implementation of the remaining recommendations of the Commission, increases the probability that these same violations of the item-writing guidelines found in the prior exam exist in the current exam. Without curing these deficiencies, the proposal to raise the pass/fail score is a virtual guarantee of increased exam failure by minority applicants.

The second component to the unanswered riddle of minority/non-minority exam performance disparity is the Multistate portion of the exam. Regrettably, the decision to out-source the preparation and grading of this portion of the Bar exam has limited the Board's ability to remedy similar item-writing deficiencies in that exam. As noted in the 1991 Commission report:

> "Despite requests made on behalf of the Commission, the National Conference of Bar Examiners has refused to provide the Commission the raw scoring data which would allow for analysis regarding that portion of the exam. While the Commission regards very seriously the issue of confidentiality, the cooperation of Florida's Board of Bar Examiners shows that studies of this sort may be conducted without violating the students' right to confidentiality."[17]

To the extent that similar reluctance by the National Conference is encountered in any new effort by the Court to obtain the data needed to answer the disparity riddle, a legitimate question needs to be asked concerning how long the Court will allow the tail to wag the dog. Of all sections of the exam, the Multistate portion is the only component that does not test knowledge of Florida

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[15] Id. At 119. The Bias Study Commission hoped that a Law School Admissions Council (LSAC) study of this problem from a national perspective, would generate meaningful data about the disparity between minority and non-minority bar passage rates (although the Commission noted that the study would not evaluate the factors inherent in the Bar exam itself that may contribute to the disparity) Id. at 114. Regrettably, the authors of the LSAC study report, while claiming they were willing to let the results speak for themselves, also expressed concern in the report that a finding of disparity, might be misused by affirmative action opponents as proof that law schools were admitting unqualified minority applicants. To preclude that possibility, the LSAC study used "eventual passage" rates for their data, rather than providing first time and eventual passage data. (This is crucial in analyzing the impact of the bar exam on African-Americans, as data exists to show that the financial and psychological impact of first time failure causes approximately half of African-American bar applicants to decide against retaking the exam. L. Wrightman, *Through a Different Lens: A Reply to Stephan Thernstrom*, 15 Const. Commentary 45, 55 (1998)) and also combined the high passage percentage of such minority groups as Asian Americans, with the lower passage rates for African-Americans, and concluded that the reports of a disparity were false, and that "minority law students graduate and pass the bar examination in significant numbers. *LSAC National Longitudinal Bar Passage Study* at 3. These "significant numbers" are a small consolation when the LSAC study shows virtual all white applicants pass the bar, but approximately 1/4 of African American applicants do not achieve an "eventual passage" admission. The implications of the actual findings of disparity are confined to a last-page statement that: "Both legal education and the legal profession need to examine this loss through hard questions about their policies and practices." Id. at 14

[16] Id. at 120

[17] Id. at 115

law. The lure of delegating this test-writing task to a third-party must be balanced against any unwillingness of that entity to cooperate with efforts to resolve the disparity issue. If this third-party source of exam materials will not assist in curing a disparity which may be caused in part by the out-sourced exam, it may be necessary for the Court to inform the National Conference that failure to provide the data may result in an ending the use of that component of the exam.

Despite the absence of direct access to Multistate Bar Exam (MBE) materials, individuals who have analyzed the MBE have come to conclusions that parallel the conclusions the Commissions' experts made when they analyzed the Florida components of the Bar Exam.

The conclusions in New York attorney and former professor Jeffery M. Duban's 1990 article entitled: *Rethinking the Exam: The Case for Fundamental Change*, not only demonstrate why otherwise competent law school graduates experience difficulties obtaining the current passing score, but confirm the exam-format problems that the 1991 Bias Commission wanted to eliminate from the exam:

> "The MBE, allowing 1.8 minutes per question, tests in minute detail under extraordinary pressure.
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> The MBE was developed in response to bar examiners' concern about the mounting burden on local examining boards in preparing and grading exams in light of increasing applications to the bar. Thus the administrative, as opposed to intellectual or even practice-oriented, impetus behind the MBE contributed to making it the wrong kind of exam valued for the wrong reasons. . . .
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> In embracing the MBE, New York and other states conceded some of their autonomy in setting standards for bar admissions. Although retaining the ability to set their own MBE passing scores, the states relinquished testing on their own laws for testing on the MBE's "majority view" - a legal abstraction of little utility to any practitioner in any state.
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> The intrinsic difficulty of the MBE aside, the MBE and essay exam in combination comprise a bar exam more difficult than the sum of its parts. The MBE tests contracts, torts, property, evidence, criminal law, and constitutional law, largely according to the majority view. The multiple-choice format requires passive knowledge of the materials - the ability to choose the correct response by recognizing what is given. The state essay section, however, requires a active knowledge of the materials - the ability to compose the correct response by providing what is sought. . . . In areas such as criminal law where majority view and New York law differ significantly, the student must master two essentially separate bodies of law for the same testing area. . . .
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> The MBE does not, as examiners have suggested test "basic knowledge" or the ability to recognize a proper answer when directly confronted with it. Nor is it the case, as the examiners also assert, that MBE questions are based on "general" law and seek to "deal with six basic subject areas as they are commonly treated in law school courses. The MBE instead convulses from one subject to another, interjecting recondite and nuanced information into improbable fact patterns of often distracting proportions. To any or all of the one to four multiple choice questions for each fact pattern, additional facts may be supplied. In the process the examinee may be instructed to ignore information provided on previous questions or in the fact pattern itself, all of which requires a taxing reassessment of the whole. Through it all, the MBE nowhere provides the "right answer", but only a "best answer" or in some cases, an answer which is best solely because it is not patently wrong.
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> Moreover, the best MBE answer invariably calls for specific knowledge of the majority view, i.e. the rule followed in most states. Law school training, by contrast, does not call for a "best" answer, or necessarily any answer. The focus in on spotting issues rather than on predicting results, on the rights, liabilities, and defenses of the parties, rather than on, say the best defense. This, it seems is how subject areas have been and are "commonly treated in law school courses". . . .
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> The 200 MBE questions dwell largely on interstitial information - the fine lines between such definitions or concepts . . . Attempting to make six hours of such distinctions at a rate of 1.8 minutes per question is little facilitated by answers rife with confounding qualifiers and negations - "would not . . . unless", "would. . .but only if", . . hasn't" - through

which one perseveres in shifting quest of "the best aid," "the worst defense", the most likely result," "the least helpful solution," and the like. The framing and unraveling of MBE questions involve a process whereby the "basics" are divested of their identity. The Vegematic is kinder to carrots than is this process to the brain. . . .

Where the rigors of law practice often require protracted attention to a single, precisely defined issue, the MBE is premised on the fleeting and fragmented attention that 1.8 minutes allows for issues as numerous as they are replete with contrivance. The MBE tests no one's competence or intelligence. It tests only the ability to pass the MBE. . . .

The MBE, moreover little reflects the indeterminateness of legal or judicial thinking, but only penalizes for it. Robert Feinberg, the founder and national director of PMBR Multistate Specialist, Inc., a bar review service, estimates that on any given MBE, there are as many as 20 questions that could go either way, although "double credit" is given for only five or six. At least two "correct" answers are simply incorrect, he maintains. The MBE, says Feinberg, is really "quite subjective, and "the bar examiners are the Supreme Court." [18]

Duban is not alone in criticizing the MBE. In his article *Racial and Ethnic Barriers to the Legal Profession: The Case Against the Bar Examination,* Maurice Emsellem states:

"Even the most prominent defender of the test, Dr. Stephen Klein, acknowledges that "(n)o studies have attempted to correlate MBE (Multistate Bar Examination) scores with 'success as a lawyer', citing the "difficulty of obtaining agreement as to the valid measure of success." Rather, he defends the test based primarily on the significant statistical correlation between an examinee's results on the bar examination and both her law school grade-point average and Law School Admission test score."[19]

Emsellem's critique of the bar exam raises further questions that suggest the answer to the bar exam disparity riddle have little to do with the Black law school graduates' ability to competently practice law.

"The basic criticism of the present bar examination is that the examiners have not attempted, in preparing the examination, to identify and measure those qualities which distinguish good lawyering from bad. In the jargon of social scientists, the criticism is that the test lacks "content validity". A showing of content validity, one of the least stringent measures of test validity, requires the examiner to conduct a detailed job analysis before drafting the instrument and to establish that the actual content of the test is related to and representative of the tasks required of the job. It is also the measure most frequently imposed upon defendant employers in Title VII litigation to demonstrate that an examination is job-related. . . .

In the case of the bar examination, Dr. Richard S. Barrett, a leading critic and a member of a commission appointed by the New York State Legislature to study potential bias in post-secondary and professional school admission tests concludes that the examination is "indefensible" a "psychometric anachronism" on the grounds that it assertedly fails to satisfy the minimum requirements of test validity."[20]

Peeling Away the Bar Exam Veneer to Solve the Diparity Riddle

The constant factor inhibiting bar exam and bar applicant analysis is the historic secrecy Bar Examiners employ to shield the exam from external scrutiny. No meaningful answers to the bar exam disparity riddle can be obtained without lifting this veil of secrecy. If the problem is not exam content but rather law school curriculum, or a bar applicants' preparation or abilities, neither can modify their studies or preparation, until they can analyze the reasons for poor bar exam

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[18] J. Duban, *Rethinking the Exam: The Case for Fundamental Change*, Manhattan Lawyer, June 1990, 16, at p. 16-17.

[19] M. Emsellem, *Racial and Ethnic Barriers to the Legal Profession: The Case Against the Bar Examination,* New York State Bar Journal, April 1989, p. 42, at 44

[20] Id. at 44.

performance. Both law schools and their graduates are likely to repeat the same errors, without access to this information. If the problems lie in the types of structural exam question problems described in the Bias Commission study, the extent of these problems will remain unknown without independent analysis of bar exam questions and answers.

Access to such information has historically been denied in Florida, though other states have allowed limited review by bar applicants. One example of limited review provided to applicants in other states is cited by Ellen Lieberman, (a former head of the New York State Bar's committee on the bar exam), in her article: *Demystify the Test and Diversify the Graders:*

> "No notes may be made during the inspection which must take place in Albany, and only citations may be taken from the answers provided by the board. The applicant may be accompanied for the inspection by a duly admitted attorney not associated with a bar review course."[21]

As restrictive as the New York procedure is, it at least allows the failed applicant some insight into the type of errors that led to his or her score. A similar procedure to review the answers of groups of applicants, with some provisions for notes about the qualitative factors affecting exam performance needs to be conducted, utilizing the type of procedures employed by the Racial and Ethnic Bias Commission in its study of the exam questions.

The justifications cited for opposition to such review normally is based on two considerations: (1) To protect the exam from misuse by bar review courses, and (2) To protect the confidentiality of bar applicants. Ms. Lieberman responds to the fear of bar review course use as follows:

> "The rationale of secrecy, not to make it easier for the bar review courses is a fallacy. In fact, those who conduct the bar review courses are the only ones, other than the board and graders, who quickly learn virtually all the questions. Further the rationale makes it seem as though the bar review courses were the enemy of the examiners rather than a necessary ingredient of the equation. It is the format of the present exam, in fact, that has made the review courses a necessary part of the bar exam process."[22]

Florida already releases essay questions from past exams. The view that bar review courses are a "necessary ingredient" for bar passage has been an accepted premise utilized by programs implemented by the Florida Bar Foundation and the MPLE, to assist minority students in obtaining access to these courses and similar "test-skills" programs. [23]

The confidentiality problem was successfully resolved by the Florida Supreme Court's Racial and Ethnic Bias Study Commission. As noted in their report:

> "The Commission should emphasize that the Florida multiple choice and essay scoring data used in its study was provided in such a way that neither the consultant nor anyone with whom he worked could associate the racial or scoring information with the name of the

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[21] E. Lieberman, *Demystify the Test and Diversify the Graders*, Manhattan Lawyer, June 1990, p. 18, at 22.

[22] Id. at 22.

[23] As necessary as this ingredient may have become, it remains a tragic misallocation of the resources available to assist minority bar applicants (as well as a misallocation of the private resources non-minority applicants allocate to these courses). These courses may enable bar applicants to achieve the goal of passing the bar exam, but the courses do nothing to teach the students how to practice law. Once admitted, the lack of lawyering skills training will hamper the ability of the newly admitted lawyer to survive the practice of law. Regrettably, if Emsellem's and the Fourth Circuit's contentions about the disparity between exam content and job requirements are valid, the exam's current structure leaves no alternative but to continue to misallocate these resources to enable applicants to jump the first hurdle to bar admission, while leaving the admitted attorney (and his or her unsuspecting clients) unprepared for the remaining hurdles of the practice of law.

individual examinee. In this way, all confidentiality considerations have been preserved."[24]

With the availability of adequate means to address both concerns of Bar Examiners, a limited lifting of the veil of secrecy with adequate safeguards for the concerns of Bar Examiners is necessary to solve the disparity riddle. There is no place in this new century for unsubstantiated allegations that failed applicants are lazy and need to study harder. Accurate answers to the riddle, based on sound analysis, rather than speculation, is long overdue.

CONCLUSION

The Florida State Conference of NAACP Branches is concerned about the exam's impact on both minority applicants, and the public who is served by those applicants who are licensed. Action on the recommendations of this Court's Racial and Ethnic Bias Study Commission are long overdue. As noted by Commission on Minorities Executive Director Handy:

> **"It would not be the first time in our history that a matter deserving of widespread attention sprang from the experiences of an identifiable minority."[25]**

In its statement supporting the Bar Examiners' proposal, the Florida Bar added the following qualifier:

> "provided that adequate consideration be given to whether any of the proposed rules disproportionately affect minorities of otherwise unduly impact minority access to the profession."

Clearly, the cart cannot be placed before the horse. Implementation of the pending or any other proposal concerning the grading of the bar exam should be deferred until the Bias Commissions' recommendations are acted upon, and the issues raised in this response are addressed.

Respectfully Submitted, this __10th__ day of April, 2000

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HARLEY SCOTT HERMAN
Florida Bar # 252311
Attorney for Florida State Conference
of NAACP Branches
P.O. Box 1012
Fruitland Park, FL 34731
(352) 787-5297

[24] *Report and Recommendations of the Florida Supreme Court Racial and Ethnic Bias Commission,* December 11, 1991, at p. 115 -116.

[25] E. Handy, *Low Minority Pass Rate has Wider Implications*, Manhattan Lawyer, June 1990, 19, at p.21.