

1 February 1, 2017

2 Supreme Court of California  
3 San Francisco, CA 94102

4 Re: The California Bar Exam

5 Dear Justices:

6 We, the Deans of 20 of California's ABA-accredited law schools, write  
7 collectively to request that the Court exercise its legal jurisdiction over the California  
8 State Bar to adjust its scoring methods to bring them in line with the nation's at large.  
9 California's current practice of setting an atypically high 'cut score' (the minimum  
10 passing score set by each state that is keyed to the Multistate Bar Exam (MBE) portion  
11 of the exam), has resulted in the nation's lowest bar pass rate as measured over the  
12 past couple of decades. This arbitrarily high cut score is not supported by any valid  
13 basis and we believe it causes multiple public harms both to our students and beyond.

14 This year, the pass rate of those who took the July 2016 California bar fell to  
15 historically low rates: 43 percent overall, and 62 percent for first-time takers from  
16 ABA-accredited law schools, the lowest overall pass rate in 32 years. Thirty-eight  
17 percent of the graduates of ABA accredited law schools did not pass what is  
18 understood to be a minimum competency exam.

19 California consistently ranks near or at the very bottom of pass rates nationally.  
20 By contrast, in New York, the pass rate this year for all first-time takers from ABA-  
21 accredited schools was 83 percent, and Texas saw a similar 82-percent pass rate for its  
22 Texas ABA accredited first-time takers. Pennsylvania: 75 percent for first time takers;  
23 Ohio, 76 percent. We are a distinct outlier.

24 Critically, California's lower pass rate is not due to those who take the  
25 California bar being less qualified, or poorer exam-takers, than those in other states.  
26 Rather, it is a result of California's atypically high cut score of 144 for the MBE portion  
27 of the exam. This cut score is higher than that of all other states in the country save one  
28 (Delaware) and directly generates the low pass rate in California.

29 In fact, California bar takers, as a whole, performed better than average on the  
30 MBE portion of the exam by national standards. The national average score on the  
31 MBE was 140.3. California's overall average was 143, and for those takers from  
32 California ABA-accredited schools, the average score was 145.7. (Unlike California,  
33 most states permit only graduates of ABA-accredited law schools to sit for the bar.) In  
34 other words, California bar takers from ABA law schools perform considerably better  
35 than the national average on the one part of the exam that is given nationally, and yet  
36 fared significantly worse in terms of passing the bar exam, simply because California  
37 uses an atypically high cut score on the MBE portion of the exam. While the content of  
38 the essay portion of the exam varies across states, it is statistically scaled to the MBE  
39 — meaning, in essence, that the aggregate MBE scores drive the scaled aggregate

1 grades on the essays as well.

2 We recognize that there have been legitimate concerns, in California and across  
3 the country, about law school admissions in recent years, including whether law  
4 schools are admitting less qualified students than in the past. We certainly agree that  
5 this important issue deserves attention and assessment. But the discrepancy between  
6 California's pass rates and those of other states given the performance of California bar  
7 takers on the multistate portion of the exam cannot be explained away in these terms.  
8 Let us say it again: California graduates of ABA-accredited schools are performing  
9 better than average, and yet many of them — graduates of our law schools who would  
10 have passed the bar with similar performance in virtually any other state — are failing  
11 it in our great State, simply because of where California has decided to draw the line  
12 between passing and failing.

13 California's low pass rate would be regrettable but understandable if there  
14 were a valid justification for the State Bar's atypically high cut score. This high cut  
15 score was set 30 years ago, in 1986, but we are aware of no valid evidence showing  
16 that this unusually high cut score distinguishes accurately between those who should  
17 and those who should not be licensed to practice law in California, or produces better  
18 lawyers for the citizens of California than those permitted to practice in states like New  
19 York and elsewhere.

20 Given that we can find no justification for the present practice of scoring the  
21 bar exam, the costs of the high failure rate should be deeply concerning to us all. The  
22 most immediate and direct costs fall upon the students who do not pass the California  
23 bar, particularly those who would have passed in other states. Many will retake the  
24 exam, and most will ultimately succeed in passing on their second or subsequent  
25 attempts. However, as a consequence of their initial failure, many of these students  
26 lose jobs or employment opportunities and months of income. Each of these students  
27 will incur substantial costs, often including newly incurred debt, to pay for further  
28 administrations of the exam, to take additional bar preparation courses, and to pay  
their costs of living while focusing on test preparation. Those seeking jobs as lawyers  
find their efforts stymied while they focus on preparing for the exam. For many, failure  
causes psychological harms as well. Although the bar results are often described in  
statistical terms, the choice of the cut score profoundly impacts real lives.

Beyond our students, the negative consequences of California's high cut score  
also impact the people of our State more broadly. Although it is by now an urban  
legend that there are 'too many lawyers,' in many parts of the State and in many areas  
of the law there may well, in fact, be too few. Geographically, for example, the Central  
Valley is perennially short of practicing attorneys. And by subject area, many areas are  
short of legal counsel, including family law, and immigration, as well as for large areas  
of 'low-bono' practice on behalf of people of modest and middle class means.  
Moreover, the State's elevated cut score has a direct effect on minority populations. In  
particular, law schools seeking to improve their respective state pass rates are forced  
to take fewer chances on non-traditional students, and will seek to admit as many

1 strong test takers as possible rather than making more holistic evaluations. This will  
2 ultimately have a dire impact on minority representation in law schools and,  
ultimately, in the legal profession.

3 Furthermore, California's high cut scores generate pressure for California law  
4 schools to design their educational programs with even more focus on the bar exam  
5 itself than is required in other states. This may, at the margins, drive schools and  
6 students to additional emphasis on memorization, multiple-choice exam skills and overt  
test preparation rather than the full range of skills necessary for effective lawyering.

7 We admittedly do not know precisely what cut score would be appropriate for  
8 determining who passes and who fails a state licensing exam. However, in the absence  
9 of valid support for California's atypically high cut score, we believe that it violates  
10 basic fairness, undermines the public interest, and inflicts considerable financial,  
11 emotional and psychological costs on prospective members of the Bar, for California to  
hold to its historical practice of a pass rate 1.5 standard deviations below the national  
average.

12 The California Bar has had thirty years to study whether its cut score is justified  
13 or truly produces more competent lawyers than those in New York, Texas,  
14 Pennsylvania, Massachusetts or virtually anywhere else. Given the lack of meaningful  
15 evidence to support the validity of this elevated cut score, and the significant costs to  
16 our students and the public of our current outlier approach, we strongly believe that  
17 while we wait for such evidence, the threshold should be shifted. Unless or until we  
18 have strong justification for the benefits of California's approach, we ought to bring our  
19 exam in line with the approach taken by other economically significant states, most of  
20 which use a cut score between 133 and 136.

21 We would welcome careful investigation and thoughtful study of the  
22 appropriate cut score, and we are prepared to support and collaborate with the  
23 California State Bar in such a study. But we strongly believe that our State cannot wait  
24 to act. We therefore propose that the California Supreme Court order the California  
25 State Bar, beginning with the July 2017 administration, to employ a cut score in line  
26 with other states. In the absence of information regarding what cut score is best, a cut  
27 score within the range we suggest (133-136) is likely the best approximation for what  
28 is fair. We believe that this standard should be maintained until the State can complete  
a full study of the bar exam, and we would like to re-emphasize that we are eager to  
participate in that study in any way that we can.

Should you have any questions we would be pleased to meet at any time to  
discuss both our proposal and our deep concerns on behalf of our students and  
schools.

Sincerely,

(signed by 20 CA Law School Deans)