THE OHIO STATE UNIVERSITY
MORITZ COLLEGE OF LAW

Drinko Hall
55 West 12th Avenue
Columbus, OH 43210

January 23, 2023

Board of Trustees
State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: Proposed Amendments to the Rules of the State Bar, With "High-Level Framework," Pertaining to Testing Accommodations on the State Bar – Oppose Unless Amended

Dear Chair Duran, Vice-Chair Stalling, and Trustees Broughton, Chen, Cisneros, De La Cruz, Knoll, Shelby, Sowell, and Toney:

I am a Distinguished University Professor at the Moritz College of Law at The Ohio State University, and a member of the Ohio bar. I am writing to provide comments on your proposed amendments to the State Bar Rules with respect to the testing accommodation process. I am joined in this letter by two of the co-authors of the Best Practices Panel Report created by the consent decree between The Department of Fair Employing and Housing, the U.S. Department of Justice and LSAC.

I am a well-recognized expert on disability law, especially with regard to testing accommodations. *See* Ruth Colker, *Test Validity: Faster Is Not Necessarily Better*, 49 SETON HALL L. REV. 679 (2019); Ruth Colker, *Extra Time as an Accommodation*, 69 U. PITT. L. REV. 413 (2008). I am joined in this letter by Nancy Mather, Ph.D., Professor Emeritus, Department of Disability and Psychoeducational Studies, College of Education, University of Arizona; and Nicole Ofiesh, Ph.D., Nicole S. Ofiesh & Associates, LLC. They are each well-recognized experts in the fields of learning disabilities and testing accommodations.

Because your recommendations purport to be consistent with that consent decree, we will especially emphasize ways in which it sharply contrasts with The Department of Fair Employment and Housing v. LSAC Consent Decree and, in fact, moves backwards from recent developments in disability law that emphasize universal design rather than an onerous and invalid accommodation process.

Universal Design

Let us start with a brief comment on the lack of consideration of universal design in your recommendations. When we sat on the Best Practices Panel, we were not allowed to make recommendations about the LSAT, itself, as an exam. By contrast, you have influence over the content and structure of the bar exam itself. We would therefore strongly urge you to start by considering the structure of the exam from a universal design perspective. It is a highly time pressured exam with few breaks. On the first day, for example, a candidate is expected to answer three 60-minute essays questions, with no breaks. In the afternoon, they are expected to answer two 60-minute and one 90-minute test, again with no break.

How did California arrive at these time protocols? Did they find that people who took 90 minutes rather than 60 minutes to answer those essay questions were less capable to be lawyers in California? Did they find that people who took breaks between sections were less capable? On the exam, itself, have they studied the examination answers from applicants who did not complete these questions within these time limits to those who did? California requires applicants to go through an arduous process to obtain extended time for those questions. As Professor Colker argues in her *Seton Hall* article, testing entities should have to justify the time limits, themselves. Research suggests that breaks are especially helpful for people with ADHD. California requires applicants to spend thousands of dollars to request that they get reasonable breaks between these exam questions. Few people are likely to demonstrate their abilities well with several hours of work with no breaks. We urge you to request that the exam preparers re-think their use of breaks and time limits for all test takers *without* making the exam even more difficult.

As a law professor, Professor Colker abandoned time-limited exams decades ago. Many of her colleagues have followed suit. (She gives her students 12 hours to answer an exam that would traditionally be offered as a 4-hour exam.) By offering an exam without functional time limits, she no longer gets the student exam that ends with "out of time." Instead, she learns their actual knowledge on the subject. She still gives some students a D or F because they did not learn the material, but she can be confident that she is testing them on their knowledge and abilities rather than on their disability and test anxiety.

It is disappointing to see California move in the direction of even more rigorous gatekeeping for extended time consideration rather than benefit from the decades of research on the advantages of universal design models that largely avoid time pressures altogether. Some of the universal design experts work in California and sat on the Best Practices Panel. We would be happy to meet with you and help you move towards more modern conceptions of disability justice.

Accommodation Process Itself

These proposed rules are inconsistent with the Best Practices Report, which became part of the LSAC Consent decree, and have governed LSAC's accommodation process even after the Consent Decree expired.

First, the five-year rule for substantiation of disability is inconsistent with the Best Practices Report. We recommended that LSAC accept documentation from age 13. *See* Best Practices Report, at n. 7 (justifying age 13 cut-off). We used the age 13 cut off (*not* a five year rule) because the Consent Decree provided that LSAC provide the equivalent testing accommodations to an individual who has previously received such accommodations under the ACT or SAT, so long as the individual indicates (without additional documentation) that they are still disabled. In other words, to be consistent with the Best Practices Report, California should accept evidence that the applicant was previously accommodated on another standardized exam *or* has documentation from age 13 that demonstrates a disability.

Second, the proposed rules give no weight to a decision by a university or law school to accommodate a test taker. By contrast, the Best Practices Report gave conclusive weight to an accommodation decision under a student's IEP or Section 504 plan, which would be comparable to an accommodation decision at a university or law school.

Third, the proposed rules give insufficient weight to a medical professional who has met the candidate in contrast with a bar examiner reviewer. The Best Practices Report recommended that

more weight be given to qualified professionals *who have previously examined the candidate* because those evaluations are likely to be more accurate than someone who merely reviews a file.

Consequences of California's Proposed Rules

The first problem imposes a significant expense and time commitment on most applicants who seek accommodations since there is typically no reason for disabled people to obtain such documentation. Because they could have obtained accommodations on the LSAT based on prior accommodations on other standardized exams, they are unlikely to have such documentation. The costs of such testing in California typically exceeds $4500. Applicants would also have to schedule multiple days of testing during their third year of law school when they have many other pressing concerns such as studying for the bar exam itself, which increases the stress of the examination process itself.

The second problem is pernicious because exam takers, who have spent three years in law school being evaluated for their work under particular, accommodated circumstances, will now have to potentially demonstrate their knowledge and abilities under different circumstances, depending on how California responds to their accommodation requests.

The third problem misunderstands the disability identification process. There is no single "test" that determines, for example, if an applicant has an anxiety disorder or ADHD. Those kinds of evaluations are made by interviewing and treating individuals. The applicant's self-report is also an important aspect of that evaluation process. A California reviewer is in no position to second-guess the judgments of treatment professionals who have met the applicant.

Conclusion

California has recently been a national leader in the standardized testing context by eliminating the consideration of standardized exams for admissions to its state colleges and universities. Those changes were made, in part, because of the recognition of how those time-pressured exams had a disparate impact against the admissions prospects of applicants with disabilities and many minority applicants. The American Bar Association is also on the cusp of permitting law schools to admit applicants without consideration of an LSAT score. Because of those developments, which are consistent with a universal design model for education, many students will enter law school without having taken time-pressured, high-stakes exams. They will also not have had to hire medical or other qualified professionals to document their need for extended time on such tests. California should be seeking to advance disability justice by moving towards a universal design model rather than creating even higher hurdles for those who want to enter the legal profession.

One mantra of the disability justice movement is "Nothing about us without us." The proposed changes do not reflect the consensus within the disability community for how to offer fair exams that measure candidates' knowledge and abilities rather than disabilities. We would be happy to recommend people who could have leadership positions within your organization to make that reality more possible.

Sincerely yours,

Ruth Colker

Ruth Colker
Distinguished University Professor &

Heck-Faust Memorial Chair in Constitutional Law
Moritz College of Law
The Ohio State University

Nancy Mather

Nancy Mather, Ph.D.
Professor Emeritus
Department of Disability and Psychoeducational Studies
College of Education
University of Arizona

Nicole S. Ofiesh

Nicole Ofiesh, Ph.D.
Nicole S. Ofiesh, Ph.D., LLC