

TO: The Chief Justice of California and
Associate Justices of the Supreme Court of California
FROM: Arthur G. Scotland
DATE: November 12, 2019
SUBJECT: Report of the Investigation of the State Bar of California's
Pre-Examination Disclosure of July 2019 Bar Exam Topics

The Supreme Court of California retained Nielsen Merksamer to conduct an independent investigation into the State Bar of California's pre-examination disclosure, to 16 law school deans, of the topics to be tested in the July 2019 bar examination, and the State Bar's subsequent decision, three days prior to the bar examination, to reveal the topics to all the applicants taking the examination.

This report summarizes information obtained during the course of the investigation and includes a detailed narrative of the events at issue and summaries of the State Bar's relationship with the Supreme Court, the State Bar's interactions with the Court, an evaluation of remedial measures being adopted by the State Bar to prevent recurrence of the premature disclosure of examination topics, and other recommendations. As this report explains in detail, the pre-examination disclosure of topics on the July 2019 bar exam was an inadvertent human error, and the State Bar's leadership decided to disclose the topics to all exam participants without involving the Supreme Court in the decision-making process.

The State Bar fully complied with my investigative team's requests for documents relevant to the issue and, with one exception, members of the State Bar Board of Trustees, the State Bar's executive leadership team, and employees of the State Bar interviewed during the investigation were professional, forthcoming, and candid in responding to questions posed to them during the interviews, and provided us with information needed to complete the investigation and submit our findings and recommendations. Only General Counsel Vanessa Holton was at times recalcitrant during her interview.

SACRAMENTO1415 L STREET, SUITE 1200
SACRAMENTO, CA 95814

T 916.446.6752 F 916.446.6106

SAN FRANCISCO BAY AREA2350 KERNER BLVD, SUITE 250
SAN RAFAEL, CA 94901

T 415.389.6800 F 415.388.6874

I. The State Bar's Relationship With the Supreme Court

The State Bar's decision to release the July 2019 bar examination topics to all participants shortly before the examination without seeking guidance from the Supreme Court was in part a consequence of the State Bar's lack of clear understanding of the Court's expectations regarding the Court's oversight role.

The State Bar is a government entity within the judicial branch and is an administrative arm of the Supreme Court. (*Obrien v. Jones* (2000) 23 Cal. 4th 40, 48 ["the State Bar [is] a constitutional entity within the judicial article of the California Constitution," and the Supreme Court has "powers to regulate and control the attorney admission and disciplinary system . . . at every step"]; *Sheller v. Superior Court* (2008) 158 Cal. App. 4th 1697, 1710 [the Supreme Court has "inherent judicial power" over "the State Bar, which acts as [an] administrative arm" of the Court]); *see also* Bus. & Prof. Code § 6008 ["All property of the State Bar is hereby declared to be held for essential public and governmental purposes in the judicial branch of the government"].) Even the website of the State Bar acknowledges it is "a regulatory arm of the Supreme Court." (<http://www.calbar.ca.gov/About-Us/Our-Mission> <http://www.calbar.ca.gov/About-Us/Who-We-Are>.)

Nevertheless, the State Bar is an incorporated entity, with a Board of Trustees, that operates with a degree of autonomy. The Supreme Court appoints five of the thirteen members of the Board of Trustees, each an attorney with a four-year term, with the remainder appointed by the Governor, the Senate Committee on Rules, and the Speaker of the Assembly.

Three members of the State Bar's Board of Trustees and members of the State Bar's executive leadership team interviewed for this investigation acknowledged the Supreme Court's authority over the State Bar. Executive Director Leah Wilson stated the State Bar is an arm of the Supreme Court and "report[s] up" to the Court.

The Supreme Court's Administrative Order 2017-09-20 regarding "antitrust issues and impacts on competition" is an example of its authority to "review" and "modify or reject any policy or action of the State Bar relating to the regulation of the practice of law." State Bar leadership also described a course of dealing with the Supreme Court as generally seeking to learn the Court's views on significant matters before acting. Ms. Wilson understood the need to not "get out ahead of the Court" on such issues or "surprise" the Court.

In some instances, Ms. Wilson felt the Court was careful to not explicitly direct the State Bar's decisions, but would signal its preference. Sometimes, State Bar leadership understood the Court's preferences to have been clear; in others, leadership felt the Court did not take a position on issues brought to its attention. One Board member felt the Court had "delegated" its authority to the State Bar to handle matters such as the bar examination and presumably did not expect to be involved in decisions involving the exam—including the premature disclosure of exam topics at issue in this report. In Ms. Holton's view, the State Bar does not "know the rules of engagement" with the Court, and there is "ambiguity on what the Court wants to know about."

Presently, the Supreme Court has been more active and engaged in overseeing the State Bar than it has in the past. It is readily apparent that some at the State Bar have not adapted well to this enhanced oversight.

II. When and How the State Bar Interacts With the Supreme Court

The primary point of contact between the State Bar and the Supreme Court has been the State Bar's Executive Director and the Chief Justice of California's Principal Attorney, who is the information conduit between the State Bar and the entire Court. They normally have weekly calls during which the Executive Director provides updates and requests direction from the Principal Attorney on issues of interest to the Court. In addition, the State Bar's Executive Director and the Chair of its Board of Trustees have had meetings with the Chief Justice of California.

As previously noted, the Supreme Court has become more active in overseeing the State Bar. In the view of Ms. Wilson, the Bar's interaction with the Court via the Principal Attorney in the Court's "oversight" role "feels more adversarial" than in the past when it was more "supportive," a view also expressed by Ms. Holton.

III. How and Why Pre-Examination Disclosure of Topics Occurred

As explained below, the State Bar has procedures in place that are intended to strictly control access to the topics and questions on future bar exams but, as described here, a series of errors resulted in the inadvertent disclosure of the July 2019 bar examination's topics prior to the exam.

A. Pre-Examination Handling of Bar Exam Topics

The State Bar treats information regarding upcoming bar exams as sensitive. Questions for each year's exam are developed starting the year before the examination takes place. The manager responsible for development of the questions is Lisa Cummins, Program Manager III, Examinations.

Ms. Cummins, along with another staff member and six people who comprise the Exam Development Grading Team (EDG), develop the questions for each exam. Through a process of nominating and culling subjects, the EDG team selects proposed exam questions, which are kept on the State Bar's secure "Z" drive, not its "V" drive employees use for their daily work. Hard copies of the bar exam questions are kept in a locked room at the State Bar, which only Ms. Cummins and two other staff members can access. One of the others with access is Christina Doell, Program Manager, Examination Grading, who reports to Ms. Cummins.

In late April or early May, the topics (but not the questions proposed by the EDG team) are provided to the Committee of Bar Examiners (CBE) in advance of a meeting to select the bar exam questions. The CBE uses this information to assign persons to individual questions based on the topics. A week and a half before the question selection meeting, each CBE member responsible for a topic is provided the proposed question on that topic, but not the other questions. Accordingly, at this point in the process, the State Bar has not provided anyone in the CBE with the full examination.

The question selection meeting is a closed meeting at which the CBE members are provided the full exam. (There are five essay questions, one practical test question, and two alternative essay questions and one alternative practical test question.) The CBE members may approve the proposed questions or determine that they want different questions. Ms. Cummins ensures that all of the binders or folders with questions in them are numbered and collected at the end of the meeting, with no one permitted to leave the room until all materials are collected. CBE members are admonished to not discuss the questions via email or in documents, are required to sign a non-disclosure agreement, and are instructed to keep the materials secure. Ms. Cummins has never heard of a breach by the CBE.

Approximately 49 days before the exam, the questions are loaded on a State Bar secure drive to which a printing contractor has access.

In the normal course, Ms. Cummins gives Ms. Doell the exam topics the month before the exam, in hard copy only, so Ms. Doell can arrange for exam graders. The topics are needed so appropriate graders can be invited and assigned to each question. There are approximately 90 graders for each exam. Ms. Cummins also instructs Ms. Doell to keep this hard copy list under lock and key.

Accordingly, in the ordinary course, it appears that over 100 people outside of the State Bar permanent staff, and the exam printers, have knowledge of the exam topics before the exam, if not the actual questions. Confidentiality is preserved through guidance, non-disclosure agreements, and physical control of the documents. Within the State Bar, no more than three employees (not including staff assisting with Bar correspondence) should have access to the topics. Confidentiality is preserved internally through guidance, attempted sequestration of the electronic files on secure servers, and locking the paper files in a secure room.

B. The Exam Calibration Process

The measures described above to preserve the confidentiality of the exam topics failed in July 2019 when an invitation containing the exam topics was prematurely sent in a memorandum to 16 law school deans before the exam. The memo was intended to support the post-exam grading calibration process, described here.

The Examination Grading Unit, comprising Ms. Doell and a staff of five, is responsible for hiring all of the bar exam graders and arranging all of the logistics for the graders' meetings, and is responsible for all the yearly bar examinations, including two regular bar exams and two exams for first-year law students. The Examination Grading Unit also provides the examination materials to the graders, receives the grades from the graders, processes the grades, and ultimately posts the grades on the applicant portals of the Bar's public website. Additionally, due to a perennial shortage in exam proctors, Ms. Doell is often tasked with proctoring one of the exam sites. (For the July 2019 bar exam, all but four managers in the San Francisco and Los Angeles State Bar offices were asked to proctor the exam.)

For each exam, the grading of the questions goes through three calibration efforts to ensure the grading is consistent. At the Second Calibration Session, graders read actual participant answers as a group and grade them. The team leader will lead a conversation regarding the range of scores and where, collectively, they agree the score should be. The goal is that, at the end of the calibration meeting, all of the graders are grading the exact same way and would award the same points for any given answer.

The State Bar invites a selection of law school deans to observe the Second Calibration Session, which generally occurs two to three weeks after the bar exam. The State Bar has been inviting deans to observe this meeting for over 30 years. The invitation sent to the deans, which includes the exam topics, is called the Second Calibration Memo and is supposed to be sent after the bar exam. The purpose of providing the law school deans with the exam topics is to help ensure that someone who is interested and qualified in a particular subject is assigned to observe the calibration of that subject's grading.

C. The July 25, 2019 Second Calibration Memo

As noted, the Second Calibration Memo contains the exam topics, is sent to a selection of law school deans, and is supposed to be sent after the bar exam. The same memo is used for each exam, needing only an update to the invitees, the date when an RSVP is due, and the six exam topics that will appear on the exam. On a chart of tasks regarding the July 2019 exam, the entry for the Second Calibration Memo is associated with the date of August 6, 2019, indicating that is approximately when the task should be done—i.e., after the July 2019 exam.

Knowing that she would be out of the office proctoring an exam site, ██████ attempted to get a head start on certain post-exam work before the exam. Thus, on July 24, 2019, she directed one of her administrative staff, ██████, to prepare the Second Calibration Memo. In an email at 10:59 a.m., she told him she had chosen the 16 schools to receive the invitation to the Second Calibration Session and said she would review the memo he was updating "before we send the invitations out."

As noted above, [REDACTED] needed the exam topics to prepare the memo. Normally, staff would obtain the topics from [REDACTED]. In this case, however, [REDACTED], an examination Program Analyst and co-worker of [REDACTED], had been copied on an earlier email that included a document containing the topics. To assist [REDACTED], she forwarded the document to him on July 24, 2019, at 12:22 p.m. The document with the topics was a chart identifying the locations where certain exam topics would be discussed at the Second Calibration Session. Although the topics were apparently provided in paper form to the staff member who prepared the chart, that person emailed the chart to [REDACTED] and copied [REDACTED]. (Contrary to [REDACTED] statement and an email produced by the State Bar in which [REDACTED] forwarded the document to him, [REDACTED] said that [REDACTED] directed him to a location on the computer network where the topics could be found.)

[REDACTED] incorporated into the draft Second Calibration Memo the topics from the document provided by [REDACTED], had [REDACTED] review the draft, and forwarded the draft to [REDACTED] at 4:23 p.m. She replied, "I think it looks good, too, but let's send tomorrow." Consistent with this direction, [REDACTED] sent the memo containing the exam topics by email to the deans the following day, Thursday, July 25, 2019, at 1:41 p.m.

Although sent by [REDACTED] at the direction of [REDACTED], the memo stated it was from Amy Nunez, the State Bar's Director of Admissions, who had not seen it because she was recused from involvement in the July 2019 bar exam due to her friendship with Leah Wilson and her son who was taking the July exam. Ms. Wilson also had recused herself for this reason.

The premature sending of the Second Calibration Memo to 16 deans of law schools was the product of human error. State Bar staff was working to complete contracts for all the exam graders, and five out of the six staff in [REDACTED]'s office, including her, were assigned to proctor exams in the coming weeks, which would remove them from the office for several days. Staff also described the added pressure caused by a transition to a new information system that had a problematic implementation; and the July 2019 exam was the first exam administered fully electronically. In sum, the inadvertent disclosure was primarily the result of a manager seeking to stay ahead of a challenging schedule of work in advance of being assigned to proctor an exam. [REDACTED]'s error also reflects gaps in both training and the above summarized measures meant to control access to sensitive information before the exam.

IV. How State Bar Leadership Reacted to the Disclosure

The inadvertent disclosure of the exam topics was discovered by the Dean of the University of West Los Angeles School of Law, Jay Frykberg, on Saturday, July 27, 2019. From another dean, he was able to obtain the work cell phone number of Natalie Leonard, a State Bar employee who works with law school deans on issues of accreditation. Dean Frykberg told her that he was invited to the Second Calibration Session but could not attend and that, while discussing the opportunity with a professor, they realized the invitation disclosed the topics of the exam. Ms. Leonard was initially skeptical that the topics had been disclosed and asked him to forward the invitation email he received. Ms. Leonard then tried to reach Ms. Cummins, Ms. Doell, and Amy Nunez (the State Bar's head of Admissions, to whom Ms. Cummins reports).

As discussed above, Ms. Nunez had recused herself from matters involving the July 2019 bar exam. On Saturday, July 27, 2019, when the inadvertent disclosure was discovered, Ms. Nunez was hiking and without cell phone service until 2:00 p.m., when she received her phone messages.

After compiling a list of deans who received the Second Calibration Memo, Ms. Doell forwarded it to Ms. Nunez, Ms. Cummins, and Ms. Leonard at 2:28 p.m. Following discussions with Ms. Cummins and Ms. Nunez (who recused herself), Ms. Doell contacted Donna Hershkowitz, the State Bar's Chief of Programs and the person to whom Ms. Nunez reports.

Ms. Hershkowitz recalls that she was first contacted several minutes before 3:00 p.m. Ms. Nunez was not involved after that point due to her refusal.

Because Executive Director Leah Wilson had recused herself from any involvement with the July 2019 bar examination, Ms. Hershkowitz was the senior State Bar executive handling the State Bar's response. In her interview, she explained she was on vacation at the time, had family visiting from out of town, and had dinner plans that evening in Santa Monica. She postponed her plans for an hour while she continued to coordinate with State Bar staff. She spent some time driving in a car, then had poor phone reception in the restaurant during dinner.

V. When and How the State Bar Decided to Disclose the Topics to All Test Takers

At 4:03 p.m., Ms. Hershkowitz emailed General Counsel Vanessa Holton, Board Vice Chair Alan Steinbrecher, and Trustee Sean SeLegue, explaining there was a “fairly significant issue” arising from a memo sent to 16 deans that included the exam topics, which should have been sent after the exam but was mistakenly sent early “[i]n an effort to be efficient.”

She contacted Mr. Steinbrecher and Mr. SeLegue because they were litigation and Office of General Counsel liaisons with whom she previously worked on the issue of Ms. Wilson’s recusal. Mr. SeLegue was working at his law office at the time. His State Bar email was not functioning properly, and he did not focus on Ms. Hershkowitz’s email until she also sent it to his work email. Ms. Holton was at dinner with a friend and was unaware of, and did not participate in, the decision to disclose the topics to all test takers.

In her 4:03 p.m. email, Ms. Hershkowitz’s email identified three options for consideration.

The first option, which Ms. Hershkowitz identified as the “preferred option,” was to email all participants to provide them with the exam topics. She reasoned the State Bar did not know how many deans had shared the exam topics with their students and, because the schools had an interest in providing their students with an advantage, the State Bar would not be able to “take their word for it that they didn’t or won’t share the topics.” During her interview, Ms. Hershkowitz also noted the State Bar did not have the deans’ cell phone numbers, and it would have been difficult to contact them on a Saturday. Fundamentally, she said, the State Bar had lost custody of the exam topics and had no information about the number of people to whom the deans had forwarded the information, perhaps not noticing the State Bar’s email contained the exam topics.

The second option Ms. Hershkowitz presented was to contact the deans, ask if they shared the topics, and either do nothing if they had not done so, or revert to the first option if they did. (When efforts were later made to contact the deans, the State Bar learned that several deans had shared the information with staff and faculty [five deans never responded].)

The third option was to do nothing.

At 4:06 p.m., Ms. Hershkowitz also emailed Board of Trustees Chair Jason Lee at his State Bar email address, and followed the email with a text at 4:09 p.m. Mr. Lee responded with a text asking her to forward the email to his outside work email address (he was having problems with his State Bar email address). Ms. Hershkowitz told him that she had not heard back from Ms. Holton or the two Board members she emailed. Mr. Lee's phone was not receiving emails, so he asked Ms. Hershkowitz to copy her email into text messages.

Meanwhile, as Ms. Hershkowitz was emailing Mr. Lee, she continued her emails to Ms. Holton, Mr. Steinbrecher, and Mr. SeLegue. At 4:24 p.m., only 18 minutes after first emailing them about the disclosure, she sent them a draft email to all exam participants. At 5:36 p.m., Mr. SeLegue responded: "I defer to Jason [Board Chair Jason Lee] to make the call but am happy to weigh in." At 6:04 pm, Ms. Hershkowitz emailed Mr. SeLegue that "Per Jason, we will send the email now" to all bar exam participants.

Over a period of time not reflected in the text exchanges, Mr. Lee asked whether the State Bar had other exam questions in reserve to use. After Ms. Hershkowitz said, "Not that we've got downloaded, printed and ready to go. And not that have been approved by CBE or selected based on what has been tested recently, etc.," Mr. Lee concluded "Option 1 seems the only real option. Let's get the entire PR package ready before we do this [notify all of the bar exam participants]. Anyone have a different opinion?" Ms. Hershkowitz said Mr. SeLegue agreed.

In her interview, Ms. Hershkowitz explained the decision to disclose the topics to all exam participants was a combination of the State Bar's loss of control over the information, the desire to level the playing field for all exam takers, the unwillingness to tolerate that any exam takers might have an advantage, and the sense of urgency to make a decision.

Board Chair Jason Lee asked to "talk" the following afternoon, Sunday, July 28. At Mr. Lee's request, Ms. Hershkowitz sent him a draft of an email to all participants notifying them of the exam topics. Mr. Lee also directed Ms. Hershkowitz to email a reporter "on background" and also "let Neil know" [referring to Sunil "Neil" Gupta, the Chief Justice of California's Principal Attorney and the information conduit between the State Bar and the entire Supreme Court].

Replying she had emailed Mr. Gupta and that a member of the State Bar's staff was handling the "communications strategy," Ms. Hershkowitz asked Mr. Lee: "Did you want to: 1) send email to [the reporter] tonight? 2) wait to send email to applicants til after call on Sunday (this makes me a little nervous) 3) include on the call: Sean, Alan, Vanessa, and (if the call is after email is sent to applicants), Leah[?]" Mr. Lee responded: "Let's email [the exam participants] now. Then [the reporter]." After providing an edit to the email to the exam takers, Mr. Lee wrote: "Touch base tomorrow" and ceased to have a role in subsequent events that night.

Although the decision to do so was made around 6:04 p.m., the email disclosing the exam topics to approximately 8,900 exam participants was sent at 9:06 p.m. Of these, there were some (less than a dozen) who had invalid email addresses and about 100 emails that were not immediately successful ("retry sending").

VI. When and How the State Bar Informed the Supreme Court of the Disclosure and the State Bar's Decision

This investigation revealed that the State Bar decided it would notify the Supreme Court through the Principal Attorney after its decision to disclose the topics to all exam participants had been made. However, the email to exam participants was not sent until about three hours later, during which time the Principal Attorney sought answers to his questions. The State Bar became unresponsive to his questions in the hours just before the email was sent to all exam participants; and some members of the State Bar's leadership became resentful that the Principal Attorney expressed frustration with their lack of communication.

At 5:11 p.m. on Saturday, July 27, 2019, Trustee Sean SeLegue asked "Should we alert Neil as well?" Ms. Hershkowitz answered at 5:17 p.m. that she thought the State Bar needed to "alert him," but asked "not in the decision making we're engaging in right here, right?" She clarified that the choice was "waiting for him to weigh in on response option or proceeding and informing him. I believe the latter." Mr. SeLegue replied at 5:29 p.m.: "FYI for Neil so he and the justices don't hear this from the press first. No need to delay issuing the memo in my view."

Ms. Hershkowitz sent an email to Mr. Gupta at 5:57 p.m. informing him of the inadvertent disclosure and the agreement among her, Mr. Lee, and Mr. SeLegue on the need to notify all participants of the exam topics.

She explained to Mr. Gupta that “the deans have a vested interest in their students performing better than other students, so we cannot risk one or more sharing the information with their students, to the disadvantage of others.” She included the text of “[t]he email we are planning on sending” and said: “We are also planning the communications strategy, and will be in touch with our psychometrician as soon as reasonably possible. We wanted to make sure neither your [*sic*] nor the justices heard about this from someone other than the Bar.” Ms. Hershkowitz also gave her cell phone number to Mr. Gupta if he wished to call her.

Consistent with the decision to “alert” the Supreme Court as an “FYI” but not invite the Court’s participation in “the decision making [the State Bar was] engaging in,” Ms. Hershkowitz’s email to Mr. Gupta did not ask for his or the Court’s input into the decision to publish the exam topics to all exam participants.

At 6:06 p.m., Board of Trustees Vice Chair Alan Steinbrecher entered the internal State Bar discussion for the first time to say he agreed “with Option #1 and informing Neil once we get this ready to go, but before, or as, it goes out. He shouldn’t hear it from any source before us.” (As noted, the email notifying Mr. Gupta had already been sent nine minutes earlier.)

At 6:27 p.m., Ms. Holton entered the discussion for the first time, stating, “My only suggestion to Donna [Ms. Hershkowitz] is to try to get our psychometrician’s opinion for cover.”

Mr. Gupta’s immediate response to the notification, at 6:02 p.m., was to say he appreciated the notification. Ms. Hershkowitz forwarded this email to Mr. Steinbrecher and Mr. SeLegue at 6:11 p.m. Mr. Steinbrecher and Mr. SeLegue were not copied on the emails between Ms. Hershkowitz and Mr. Gupta until 11:36 p.m. and had no further role in the actions of the State Bar that evening.

When Ms. Hershkowitz emailed Mr. Gupta to first notify him of the disclosure, he had been renovating his home, was exhausted, and replied that the revelation made him “speechless.” Based on what she had written, it seemed to Mr. Gupta that the State Bar had made up its mind to disclose the exam topics to all the test takers and was immediately poised to do so. He forwarded Ms. Hershkowitz’s email to the Chief Justice of California, her Chief of Staff, and her Assistant Chief of Staff.

Mr. Gupta began emailing questions to Ms. Hershkowitz starting at 6:39 p.m. and again at 7:07 p.m. to gather more information for the entire Court that night. The more time that elapsed without a reply to his emails from the State Bar, the more Mr. Gupta thought the email to all exam participants had been sent. He asked to see the email sent to the deans, asked who sent that email, asked about the role of the psychometrician, and asked for the list of 16 deans who received the email. He was concerned that the way the draft email to exam participants was phrased suggested the State Bar questioned the integrity of the deans: "You have to consider that your decision to respond as the bar has elected to, has illustrated a distrust of these 16 individuals, whether merited or not."

Ms. Hershkowitz replied at 7:29 p.m. that she was away from her computer, would find it difficult to send the information by phone, and would respond in full later that evening, but also stated: "As to the deans, I think we need to look at it as reducing the appearance of an unfair tilting of the scales in favor of some applicants, and not an opinion about the deans. The schools would benefit if their students had information about the questions that other students did not. And since we cannot personally attest to what they communicated, this seemed the best route."

Ms. Hershkowitz did not write again to Mr. Gupta until 11:09 p.m., three hours and forty minutes later. Although her entire email chain with Mr. Gupta also copied Mr. Lee and Ms. Holton, they did not respond to his subsequent questions. (As noted above, Mr. Lee was having difficulty receiving emails on his phone.)

At 7:45 p.m., Mr. Gupta emailed Ms. Hershkowitz that, in the absence of more information about the identities of the 16 deans or how the exam topics were disclosed prematurely, he was "troubled that the bar's response is going to generate more criticism and investigation than other possible responses. [¶] A mistaken email to 16 persons is much different than a mea culpa to hundreds of bar applicants. One is a quiet mistake, the other is a loud one." Believing the Bar's decision had been made and the email to all participants had been sent, he wrote he was "not persuaded yet, without more information, whether the latter action was necessary."

At 8:24 p.m., Mr. Gupta tried unsuccessfully to reach Board Chair Jason Lee by telephone.

Mr. Gupta's email to Ms. Hershkowitz at 7:45 p.m. and at 9:59 p.m., indicated his mistaken understanding that the State Bar knew about the premature disclosure for two days without informing the Court. At 9:59 p.m., Mr. Gupta told her that he had been able to obtain a copy of the email the State Bar sent to all applicants only because the Chief Justice of California's Assistant Supervising Attorney had located it on Twitter.

Frustrated the State Bar did not provide the email to him directly, and, therefore, he could not provide it to the justices, Mr. Gupta asked "why the Court was not consulted about the appropriate solution to Thursday's leak" and said that the State Bar's "uni[n]formed course of conduct is now obviously the source of ridicule on social media, and the mainstream media cannot be far behind." (By then, Mr. Gupta had seen contemptuous posts on Twitter about the disclosure of bar exam topics.) He ended the email by saying he was "[v]ery displeased and disappointed about how this was handled" but was "open to discussing solutions [and the court, perhaps, has a few to suggest] to mitigate this problem."

In our interviews with State Bar executive staff, it was apparent some were bothered by Mr. Gupta's email observations and questions, and decision to copy the Chief Justice of California starting with his 9:59 p.m. email.

At 10:50 p.m., Ms. Hershkowitz notified the full Board of Trustees that the exam topics had been inadvertently disclosed two days earlier and an email had been sent to all participants notifying them of the exam topics.

At 11:09 p.m., Ms. Hershkowitz finally responded to Mr. Gupta's emails and explained the State Bar knew about the inadvertent disclosure for only a few hours; provided a list of the law schools whose deans received the inadvertent disclosure; and included the memo sent to the deans. Their correspondence continued to 12:10 a.m. on Sunday, July 28, 2019, discussing Mr. Gupta's questions about the feasibility of substituting exam questions or using a past exam, and the work of the psychometrician.

VII. Why the State Bar Did Not Involve the Supreme Court in the Decision-Making Process

The communications summarized above establish that, soon after learning of the inadvertent disclosure of the exam topics, the State Bar quickly decided it would not invite the Supreme Court to participate in the decision about what to do in response to the inadvertent disclosure.

Mr. Lee stated in his interview that, because of the close relationship between the State Bar and the Court, he wanted to tell the Court what was happening and expected that, through the course of preparing the email to all exam participants, the State Bar would receive input from the Court and take it into account. However, after approving the email to all participants, he went to dinner and left his phone in his hotel room. He did not see Mr. Gupta's emails until the following morning.

In his interview, Mr. Steinbrecher agreed with the decision to notify the Court of the State Bar's decision without inviting the Court to provide input. He emphasized the urgency of the situation and his belief that the Court delegated to the State Bar the authority to deal with the bar exam and problems arising from it. He believed that in the past, the State Bar exercised such authority in response to earthquakes and power outages. He did not think the Court would have expected to weigh in on this issue. In sum, he thought the Court would have expected the Bar "to take care of this problem in real time and keep them informed." As a practical matter, he also thought the State Bar could not wait another day to get a decision from the Court. He noted that Mr. Gupta did not ask that the Court have an opportunity to be involved.

In his interview, Mr. SeLegue explained that, when discussing what to do about the inadvertent topics disclosure, he thought the State Bar had a "timing problem" in which "every hour counted" so it needed to make a decision quickly. In addition to the urgency, he assumed the Court would not want to be engaged in this sort of issue on a Saturday night. At the time, he felt it was an administrative issue, that the State Bar should make what it thought would be the right decision, and that it made the right decision. He, too, noted that Mr. Gupta's initial response was to thank the State Bar for notifying him. Mr. SeLegue emphasized, however, he was not copied on the later emails between Ms. Hershkowitz and Mr. Gupta. He explained that, if he had seen those emails at the time they were sent, he would have intervened to ask Mr. Gupta if the State Bar should hold off on sending the email to the exam participants.

In her interview, Ms. Hershkowitz explained the decision to exclude the Court was "a matter of timing." On Saturday, July 27, "there was a lot that was going on" in a "very short period of time" and "it wasn't like there was a sort of debate about" seeking the Court's input or not wanting it.

In Ms. Hershkowitz's view, Mr. Gupta was informed within about an hour of her communicating with the State Bar's Board members. From her perspective, Mr. Gupta could have, but did not, tell the State Bar to wait for the Court's input. Had he said so, she was certain the Board members would have waited for the Court's direction. She acknowledged, however, that Mr. Gupta believed the decision was final and the email to the exam participants was imminent, although in fact the State Bar did not send the email to participants for several hours after Mr. Gupta was notified.

In his interview, Mr. Gupta stated that, based on what Ms. Hershkowitz initially said, he believed the State Bar decided to disclose the bar topics to all and, as time elapsed without replies to his emails, he thought the notification had been sent. Upon receiving her 7:29 p.m. email, however, Mr. Gupta felt there still might be time for the Court to provide input regarding the issue. Thus, he was surprised when learning the email to applicants was sent late on Saturday without input from the Court. Mr. Gupta also was surprised that no one at the State Bar he copied on his emails had responded to him or reached out to him for several hours while he was raising questions about the State Bar's decision. (He was unaware that Ms. Wilson was recused.)

VIII. What Steps the State Bar is Taking to Prevent Such Disclosures in the Future; and Our Assessment Whether More is Needed

Following her review of the report prepared by Jean Gaskill, whom the State Bar retained to conduct an investigation into why the Second Calibration Memo was sent out prematurely, Ms. Hershkowitz met with Ms. Nunez, Ms. Cummins, and Ms. Doell to discuss changes to be made to help prevent similar mistakes from happening in the future. (Among this group, only Ms. Hershkowitz reviewed the Gaskill report.)

This group discussed the inconsistency between Ms. Cummins and Ms. Doell keeping the list of bar exam topics under lock and key but State Bar staff having been able to access the information, put it in a computer drive accessible to all Admissions staff, and share it with the Committee of Bar Examiners earlier than necessary.

They further discussed the particular documents the Admissions staff prepared, which were referenced in the Gaskill report, including the invitation to law school deans to attend the Second Calibration Session, the document described in the Gaskill report as the "floor plan," the July 1, 2019 memo to the Committee of Bar Examiners, and the task list.

The inadvertent disclosure of the exam topics was made through the State Bar's invitation to deans to attend the Second Calibration Session. To the template for this document, the Bar will add a text box on page 1, highlighted in yellow, indicating: (a) the document is confidential; (b) it is not to be sent until after all examinees have completed the exam; (c) only page 1 may be completed in advance of the exam; and (d) staff must confirm the "from" line with the Director of Admissions. A text box will also be added on page 2, highlighted in yellow, indicating that page is not to be completed before the bar exam.

The State Bar also has decided there is no need to prepare and provide to CBE members in advance of the bar examination the memo indicating the room to which they are assigned if they attend the Second Calibration Session, and including the exam topics. Any similar memo in the future, if one is deemed necessary, will be distributed after the bar exam.

Another document the group reviewed is a confirmation memo sent to law school observers who RSVP'ed to attend the Second Calibration Session. A text box will be added, highlighted in yellow, indicating that this document is to be sent one week before that calibration session. Thus, the timing of this memo is after conclusion of the examination by all examinees.

The group considered a chart reflecting exam question topics, EDG team members and CBE members assigned to the topics, and law school observers assigned to each question for the Second Calibration Session. A text box will be added, highlighted in yellow, indicating the chart is to be created one week before the Second Calibration Session and indicating the chart is not to be created before the completion of the bar examination.

The non-disclosure agreement that accompanies the memorandum inviting law school deans to attend the Second Calibration Session will now have a text box added, highlighted in yellow, indicating it is not to be sent before the exam.

The bar examination task list, which specifies individual tasks and due dates, will be updated to reflect clearly those items that are not to be completed or sent prior to completion of the exam. It will highlight items that cannot be taken out of sequence or sent before a particular date.

Exam questions and question topics will remain kept under lock and key before the examination, including keeping them off of the Admissions shared “V” drive before the examination.

In addition, Christina Doell spoke with her staff individually to discuss the early release of topics, the importance of confidential materials, and the processes that broke down in this instance. She then met with her staff as a group and discussed confidential materials, processes and the changes to processes going forward.

There also will be staff training in advance of the February 2020 bar exam to ensure that everyone understands the process, the confidentiality of the information, and the items on the task list that may be completed on or about the date specified and those items that must be completed on the date specified, no earlier, and those items to be completed only after the bar examination is held.

These measures are sensible solutions aimed at preventing the same error from happening again. By using training to raise awareness of the confidentiality of the information, improving the process and the tools guiding that process, limiting the unnecessary distribution of sensitive information, and reevaluating and more clearly marking documents that cannot be disseminated before an exam, these measures should prevent a repeat of the same error.

We also recommend the State Bar consider addressing the shortage of bar exam proctors. This shortage placed the Admissions office staff under pressure, leading to the shortcut in procedures that produced the inadvertent disclosure. It is our understanding there has been some turnover in personnel responsible for hiring exam proctors, and there might not be an accountable staff person assigned to this responsibility.

IX. Other Proposed Remedial Measures, e.g., Emergency Policy and Procedures; Clarification of the Supreme Court’s Expectations

The State Bar’s response to the premature disclosure of bar topics also highlighted a need for reforms in other aspects of its operations.

There was a consensus among the executive leadership and trustees who were interviewed that the State Bar needs formal procedures to deal with emergencies, which it currently lacks.

State Bar staff must be able to reach key decision-makers during an emergency. Two key members of the Board of Trustees, including its Chair, were not receiving emails on their State Bar accounts. Staff also should have access to the cell phone numbers of all State Bar leaders, which may allow for more rapid and effective communication than emails.

An emergency policy specifying who is to be contacted in the event of different kinds of emergencies would be valuable, especially if the policy identifies the person who should be contacted in the event the primary contact is not available. One board member discussed adopting a policy whereby State Bar leaders would be scheduled to serve as a responsible "officer on duty" for particular periods of time.

The interpersonal relationships that connect the leadership of the State Bar to the Supreme Court should be strengthened; and the State Bar must adapt better to the Court's enhanced oversight and input.

The Supreme Court should consider further clarifying for the State Bar the Court's view of the nature of its relationship with the State Bar and the Court's expectations regarding when it should be involved in State Bar decisions (e.g., Administrative Order 2017-09-20). Following the State Bar's decision to release the July 2019 exam topics to all participants prior to the exam, its leadership learned the Supreme Court was dissatisfied that it was not involved in that decision-making process. State Bar leadership indicated that they are receptive to having the relationship between the State Bar and the Supreme Court further clarified.

* * *

Thank you for the opportunity to conduct this investigation and provide the Supreme Court with these findings and recommendations.

Respectfully,



Arthur G. Scotland