

# AGENDA ITEM

NOV 121

**DATE:** October 26, 2012

**TO:** Members, Regulation, Admissions and Discipline Oversight Committee

**FROM:** Sean M. McCoy, Chair, Committee of Bar Examiners  
Gayle Murphy, Senior Director for Admissions

**SUBJECT:** **Proposed Amendment to *Accredited Law School Rules* Re Minimum, Cumulative California Bar Examination Pass Rate for California-Accredited Law Schools – Return from Public Comment**

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## EXECUTIVE SUMMARY

The Committee of Bar Examiners (Committee) approved in principle an amendment to the *Accredited Law School Rules* to include a new rule, Rule 4.160(M), that would require California-accredited law schools to maintain a minimum, cumulative bar examination pass rate to remain accredited, subject to a period of public comment authorized by the Board Committee on Regulation, Admissions and Discipline Oversight. The public comment period concluded September 17, 2012, and included one public forum to allow interested persons to provide their comments in person. The Committee considered the public comment received and took action during its October 19 and 20, 2012 meeting adopting the amendment, subject to approval by the Board of Trustees.

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## BACKGROUND:

The Committee of Bar Examiners' Advisory Committee on California Accredited Law School Rules (RAC), which is composed of three representatives from California-accredited law schools (CALs) and three Committee of Bar Examiners (Committee) representatives, recommended to the Committee that the *Accredited Law School Rules* and the *Guidelines for Accredited Law School Rules* be amended to include a minimum Cumulative Bar Examination Pass Rate (CBEPR) as a new standard for accreditation. The Committee considered the matter during its June 29, 2012 meeting and approved the recommendation in principle, subject to a public comment period that would include a public forum for receiving oral comments. The Board Committee on Regulation, Admissions and Discipline Oversight (RAD) approved the request to circulate the proposed new rule for public comment.

Under the current rules and regulations, the Board of Trustees approves any amendments to the *Accredited Law School Rules* and the Committee approves any amendments to the *Guidelines for Accredited Law School Rules*, which would occur

after a period of public comment and consideration of any comments that have been received.

Attachment A contains the proposed new rule, Rule 4.160(M), and Guidelines 12.1 and 12.2 that were circulated for public comment.

Since the current accreditation rules and guidelines went into effect in 2009, no time period has been established in which to assess the “cumulative success” of the graduates of CALS on the California Bar Examination (CBX), and no quantitative percentage rate has ever been set to define “cumulative success.” Under the guidelines that were circulated for public comment, the success rate of CALS’ graduates on the CBX (or any other bar examination) over a five-year time period would be used to calculate their schools’ CBEPRs. The schools’ CBEPR would be calculated annually as a rolling, cumulative average based upon the total number of their graduates who had taken and passed the CBX (or the bar examination of any other state), divided by the total number of their graduates who had taken the CBX (pass or fail) over the same period of time. Graduates of a CALS who choose not to take the CBX or any bar examination would not be counted in the calculation of a law school’s CBEPR.

As provided by the version of Guideline 12.1 that was circulated for public comment, in order to remain compliant and maintain their accreditation in good standing, CALS would be required to calculate and report a CBEPR at the rate of 50% by the fall of 2015. By the fall of 2013 and again in 2014, however, the CALS would be required to report a CBEPR of 45% to remain in compliance with Rule 4.160(M). Before the Committee would issue a notice of noncompliance to any CALS that reported a noncompliant CBEPR, however, a request would be made to the law school to provide evidence of its efforts to improve the pass rates of its graduates by means of changes to its admission policies, grading, probation and scholastic standards and academic support program.

The RAC met on October 4, 2012 to further consider proposed new Rule 4.160(M) and Guidelines 12.1 and 12.2 and to consider the public comment, both written and oral, that had been received. The RAC unanimously voted to recommend that the Committee adopt the new accreditation standard, Rule 4.160(M) that had been circulated for public comment. The Committee agreed and took action during its October 19 and 20, 2012 meeting adopting the new rule, subject to approval by the Board of Trustees.

After consideration of the public comment received and further discussions, the RAC did not agree that the proposed guidelines that had been circulated for public comment be recommended for adoption. Rather, RAC recommended that a revised version of the guidelines be circulated for public comment, which would occur during the period the proposed amendment to the accreditation rules would be considered by the Board of Trustees. Although there was not unanimous agreement by the RAC with the revised version of the guidelines, which: 1) replaces the 50% with a 40% CBEPR; 2) requires the CALS to begin calculating and reporting their respective CBEPRs with the submission of their 2013 Annual Compliance Reports; 3) specifies that a Notice of Noncompliance may be issued by the Committee to any school that fails to report in its 2013 Annual Compliance Report that it is compliant with Guideline 12.1; and 4) based

upon the CBEPR that is reported in its 2016 Annual Compliance Report, any school not then in compliance would be placed on probation under the provisions of Rule 4.172. The Committee agreed to circulate the revised version of the proposed guidelines (Attachment B) for an abbreviated public comment period.

The Committee will again consider the matter of the language of the guidelines during its November 30 and December 1, 2012 meeting, which will include consideration of all discussions and public comment received to date and any additional comments that may be received relative to the revised version of the guidelines. Final adoption and implementation of new guidelines will be subject to approval of the proposed accreditation rule, which is before the Board of Trustees and the Board Committee on Regulation, Admissions and Discipline Oversight during their November meetings.

### **ISSUE:**

Whether the proposed new Rule 4.160(M) of the *Accredited Law School Rules* should be approved.

### **SUMMARY OF PROPOSAL:**

The request is to approve a proposed new Rule 4.160(M) of the *Accredited Law School Rules*. The proposed new Rule 4.160(M) will, for the first time, require that California-accredited law schools maintain a specified minimum, cumulative bar examination pass rate. If ultimately approved, the proposed new rule will replace existing Guideline 6.2(K), which is listed as only one of the criteria for determining whether a law school maintains “a qualitatively and quantitatively sound program of legal education.” Under the current guideline, when evaluating the soundness of a law school’s program of legal education, the Committee considers: “The cumulative success of the law school’s graduates on the California Bar Examination over such period of time as the Committee determines is appropriate” in addition to the ten other criteria.

### **REPORT OF PUBLIC COMMENTS RECEIVED:**

During the public comment period, 21 comments were received. Please keep in mind that the comments received are relative to both the proposed rule and guidelines that were circulated for public comment, and that the only matter before the Board of Trustees and the Board Committee is whether the proposed accreditation rule (and not the guidelines) should be approved.

Copies of the public comments received are available upon request; the following are excerpts from the comments received.

#### Public Comments in Support:

A minority of the written comments submitted support the current proposal. Those in support cite a number of reasons, including the perception of too many, poorly performing accredited law schools and the financial hardships placed on too many individuals who are allowed to enroll in law school with too small a chance to pass the bar examination. Among the comments submitted in support were those of Ms. Barbara

Treash-Osio, Staff Attorney to the Legal Aid Society of San Diego: "I support the proposal;" the comment of Mr. Frank Maul, Fresno: "I support the proposal to require at least a 50% pass rate for accreditation as a way for the Bar to give young people who aspire to a legal career fair warning about attending an under-performing school;" the comment of David Korsunsky: "I support the proposal to link accreditation to bar passage rates as a step on the right direction. There is simply no reason to allow law schools to collect tuition and fees, most of which come from taxpayer funds, if their students cannot even pass the bar exam in sufficient numbers;" Douglas Stewart: "This abysmal situation has existed for far too long and the state bar must act to link accreditation to meaningful pass rates;" Jon Lucchese: "This is a good plan;" Christopher Rupert: "I believe that the ABA and all state bar associations need to have more stringent standards for accrediting law schools;" James G. Luce: "...I think this is a good idea, but I think that a fixed 50% does not accomplish what the Bar is trying to do...Because such a fixed percentage does not take into consideration the variable difficulty of each year's Bar Exam...In order to properly compare schools the required pass rate minimum should be based on a statistical analysis of the standard deviation from the norm *each year*..." Michael McVey: "IF the pass rate for ABA approved schools is twice that of California accreditation, and the object is to stabilize the pass = success rate, the solution currently exists: no California accredited schools;" Troy Garrett: "I first want to thank you for taking on the issue of low bar passage rates for schools."

#### Public Comments in Opposition:

A majority of the comments received opposed the current proposal. Those that wrote in opposition considered the proposed 50% CBEPR, or any minimum rate at all, to be unwise since it would cause law schools to "teach to the bar;" that it was not needed since the market place would control which schools students would attend, or that it was "elitist" and an effort by the State Bar to discriminate against certain schools and communities. Allan Frostrom, San Diego, wrote: ". . . surely the accrediting organizations can do better than to use such a clumsy measure;" Jim Turney: "Let the free market in student selection of law schools determine which schools survive and which do not;" Dennis Isenberg: "All it would do is force law schools to teach how to take the bar exam rather than the importance of learning as much about the law during law school. I think this is a stupid idea;" Jennifer Conner: "Requiring a 50 percent pass rate would be elitist. That is not what the California State Bar is about;" Russell Dalton: "I oppose the proposal because it is a bad idea, likely to accomplish no good and possibly do harm." Kim Vuu commented: "How is Gayle Murphy accredited as a non-attorney to be making decisions about a State Bar that attorneys have to pass=does not make sense. This seems incredibly unfair for schools who have students who do not always pass the bar on the first try...Ridiculous proposal by a non-attorney." Jonathan Solomon wrote: "I just finished reading your article on California state accreditation. There seems to be a lack of discussion about students of these schools; what would happen to a student at a school that loses its accreditation...There should be a grandfather clause for students of schools that lose their accreditation that would allow them to sit for the Bar..." Carol Fallon ended her comments with: "...I believe the State Bar of California would be better served if it were to support innovation in law education instead of considering changes that will likely have the detrimental effect of stifling the ability of non-traditional students to obtain a legal education." Mary Wells writes: "...I

see these rules as unnecessary and nothing more than an attempt to further discriminate against law schools that are accredited by the Committee of Bar Examiners of the State Bar of California. As such, I oppose these proposed rules entirely.”

#### Comments in Opposition Submitted by CALS Deans:

A majority of the deans of all California-accredited law schools submitted or joined written statements that opposed the current proposal of setting the minimum CBEPR at 50% by 2015. Most, however, do favor the proposed rule and the adoption of using a law school’s CBEPR as an accreditation standard. In two separate comments/alternative proposals submitted by Dean Winick of the Monterey College of Law on behalf of most of the CALS deans, the deans suggested that the Committee should approve an alternative, lower CBEPR (varying between 25%-40%), not force the CALS to calculate their respective rates “retroactively” in being forced to be judged on their CBEPR for classes that graduated well before this new standard went into effect, and different sanctions for those schools that are eventually found noncompliant. In support of their opposition, Dean Winick and the other deans argued that the proposed 50% rate was unrealistically high given the average, historical pass rates of the CALS, that it would subject almost half of all CALS to being found noncompliant as soon as a 50% rate went into effect, was potentially unlawful since it was not supported or based on any current data.

Several of the CALS deans (Dean Joseph Moless, Lincoln Law School, San Jose, Dean Jane Gamp, San Francisco Law School, Dean Myron Steeves, Trinity Law School, William Robertson, Empire College School of Law and Dean Stanislaus Pulle of the Southern California Institute of Law), while more-or-less supportive of the proposed rule that would establish a minimum CBEPR as a new accreditation standard, were significantly more adamant in their opposition to the proposed 50% minimum rate. In support of their opposition, these deans submitted a statement that made a number of legal arguments that including an argument that the Committee lacked a sufficient factual basis to enact the proposed Guidelines as a lawful regulation, and that the current proposal would be unlawfully retroactive in operation. These deans also argued that enactment of the current proposal would cause a “sea-change” in how CALS students were taught (i.e. it would “compel law schools to teach to the test to secure higher bar pass rates.”

#### Oral Comments during the Public Forum:

As earlier mentioned, a public forum was conducted to allow members of the public and members of the State Bar to appear and make oral comments in support or opposition to the proposed new rule and guidelines. The forum was held on August 23, 2012, at which time a majority of the Committee (Steven Renick, James Vaughn, Larry Sheingold, Archie “Joe” Biggers, Scott Bovitz, Sean McCoy, Alan Yochelson, Richard Frankel, Patricia White, Jeanne VanDerhoff and KV Kumar) attended. During the course of the public forum, several of the CALS deans (Dean Robertson, Dean Winick, Dean Steeves and Dean Heather Georgakis) spoke, along with Dean Gregory Brandes, Dean of Concord Law School a registered, unaccredited distance-learning law school. The deans that appeared at the public forum spoke at length in general opposition to the current proposal and offered alternative means and metrics to be considered by the

Committee in amending the current proposal for adopting a new accreditation standard that would eventually set a minimum CBEPR at 50% for 2015.

Following the formal conclusion of the public comment period and the October 2012 RAC meeting, the Chair of RAC, Dean Geroge Dezes, submitted a letter to the Committee on behalf of a majority (11-2) of the CALS deans in which he communicates their recommendation that the revised version of the proposed guidelines (Attachment B) be adopted by the Committee. Attachment B is currently circulating for public comment and will return to the Committee for consideration during its December meeting.

**EFFECTIVE DATE OF PROPOSAL:**

If the Board of Trustees approves the amendment to the accreditation rules, it would become effective January 1, 2013.

**FISCAL / PERSONNEL IMPACT:**

None.

**RULE AMENDMENTS:**

Rule 4.160(M) of the *Accredited Law School Rules*.

**BOARD BOOK IMPACT:**

None.

**RECOMMENDATION:**

The Committee of Bar Examiners recommends that the Board Committee on Regulation, Admissions and Discipline Oversight and the Board of Trustees approve the proposed new Rule 4.160(M), *Accredited Law School Rules* for implementation January 1, 2013.

**PROPOSED BOARD COMMITTEE RESOLUTION:**

Should the Regulation, Admissions and Discipline Oversight Committee agree with the above recommendation, the following resolution would be appropriate:

**RESOLVED**, that upon the recommendation of the Committee of Bar Examiners, the Regulation, Admissions and Discipline Oversight recommends that the Board approve the proposed new Rule 4.160(M), *Accredited Law School Rules*, in the form attached hereto, effective January 1, 2013.

**PROPOSED BOARD RESOLUTION:**

Should the Board concur with the Regulation, Admissions and Discipline Oversight's recommendation, the following resolution would be in order:

**RESOLVED**, that upon the recommendation of the Regulation, Admissions and Discipline Oversight, the Board hereby approves the proposed new Rule 4.160(M), *Accredited Law School Rules*, in the form attached hereto, effective January 1, 2013.