

AGENDA ITEM

133 MARCH 2017

DATE: March 10, 2017
TO: Board of Trustees
FROM: Leah Wilson, Chief Operating Officer
SUBJECT: Bar Exam Studies

EXECUTIVE SUMMARY

This item outlines proposed bar examination studies and seeks formal Board approval to initiate and fund those analyses.

BACKGROUND

The Committee of Bar Examiners (Committee), concerned about the declining pass rates on the California bar examination, decided at its January 2017 meeting to move forward with four studies designed to better understand the issue and inform potential modifications to exam content and/or scoring.

On February 14, 2017, the Assembly Judiciary Committee held a hearing on the bar exam, similarly focused on declining bar passage rates.

The Committee and the Bar's psychometric consultant Roger Bolus, Ph.D., met with the Board of Trustees' Committee on Admissions and Education on February 15, 2017, to discuss feedback received at the hearing and to determine specific next steps with regard to the contemplated studies. Ms. Erica Moeser, President and CEO of the National Conference of Bar Examiners, also participated in that meeting, and provided national context and perspective for the discussion.

Most recently, on February 28, 2017, the State Bar received a letter from the Supreme Court directing thorough and expedited study of the declining bar pass rates, with all analyses to be completed by December 1, 2017. That letter is provided as Attachment A. The studies and process outlined below are responsive to this directive.

DISCUSSION

The four studies either underway or contemplated are as follows:

1. Sources of Variation of Passing Rates. This study involves a review of historical examination data to determine to what degree scores have changed over time, how examination passage rates have changed over time, the composition of the test-taking

population over time, and the likelihood of eventually passing the examination over time. The report is expected to be completed shortly.

2. Collecting and Linking Law School Performance. This study will require receiving data from individual law schools, including LSAT scores and final GPA's. Such data will provide necessary information for studying the impact of applicants' ability level, as measured by performance during law school and entry qualifications, on bar examination performance.
3. Evaluating Content Validity. This study will include an assessment as to whether the content of the examination aligns with the minimum competence in skills and knowledge required for an entry level practitioner.
4. Evaluating the Passing Standard. This study will investigate whether the required passing score continues to be appropriate for protecting the public by ensuring minimal professional competence.

In anticipation of the Board's formal approval of these studies, a working group comprised of Board of Trustee Supreme Court appointees Terry Flanigan and Alan Steinbrecher, and CBE Chair Karen Goodman and member Larry Sheingold, as well as Supreme Court Senior Staff Attorney Greg Fortescue, has been established to oversee and inform study progress. This working group has already held its first meeting; one of the early decisions made was to regularly develop and distribute updates to California law school Deans to ensure that they are informed about and included in the process.

In addition to the ambitious scope and timeline of this body of work are issues relating to the availability of data that will be needed to conduct some of these studies. The type of data requested from law schools specifically may include LSAT scores, law school GPAs, undergraduate GPAs, the names of the undergraduate university attended, and law school pass rates. In the past, law schools provided data to the State Bar that was used to conduct research regarding the bar examination. When the law changed in 2016 making the State Bar subject to the California Public Records Act (CPRA), law schools stopped sending data to the State Bar due to concerns that the data would be subject to public disclosure. The Bar will be convening a meeting of Law School Deans on April 6, 2017, to discuss the studies and corresponding data needs. At that time, the Deans will be assured that the State Bar will assert all applicable CPRA exemptions to protect the data from disclosure.

FISCAL/PERSONNEL IMPACT

The total cost of all four studies is not expected to exceed \$150,000. Costs will be shared by the Admissions budget and the General Fund.

RULE AMENDMENTS

None

BOARD BOOK IMPACT

None

BOARD GOALS & OBJECTIVES

2h: Conduct Bar Exam validity and pass line studies to determine whether or not additional changes to exam content, format, administration, or grading are needed, and implement needed changes.

BOARD COMMITTEE RECOMMENDATIONS

RESOLVED, that the Board approves the *Sources of Variation of Passing Rates, Collecting and Linking Law School Performance, Evaluating Content Validity, and Evaluating the Passing Standard* studies; and

RESOLVED, that the Board approves up to \$150,000 in funding for these studies from the Admissions and General Funds.

ATTACHMENT LIST

- A. Supreme Court Letter, Bar Exam



Supreme Court of California

350 McALLISTER STREET
SAN FRANCISCO, CA 94102-4797

TANI G. CANTIL-SAKAUYE
CHIEF JUSTICE OF CALIFORNIA

(415) 865-7060

February 28, 2017

James Fox, President, Board of Trustees
Elizabeth Parker, Executive Director
State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: **California Bar Exam**

Dear Mr. Fox and Ms. Parker,

The Supreme Court of California received the attached February 1, 2017, letter from the Deans of 20 ABA-accredited law schools, in which the Deans request the court order the State Bar of California to lower the “cut score” of 144 that the State Bar applies to the Multistate Bar Exam (MBE) portion of the California bar exam. In support of their request, the Deans observe that California’s cut score of 144 is the second highest in the nation. They note California bar takers, on average, score higher on the MBE portion of the exam than the national average, yet fare significantly worse at bar admission — and they contend this is so because California uses an atypically high cut score.

Leaving aside the question of what has caused this situation, the Deans raise a significant concern, particularly given the high cost of attending law school and the reality that non-admission to the bar could mean the loss of employment opportunities while student loan debt continues to compound. It appears prudent to consider and address whether 144 is an appropriate score for evaluating the minimum competence necessary for entering attorneys to practice law in California.

Of course, there may be reasons to question how much the cut score is contributing to the pass rate. For one, the cut score has remained consistent for three decades as overall bar pass rates have fluctuated. It is unclear, therefore, whether the July 2016 pass rate, a 30-year low, constitutes evidence that the cut score needs to be lowered.

James Fox
Elizabeth Parker
February 28, 2017
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Yet given the significant impact of the pass rate on law school graduates, the issue calls for a thorough and expedited study. The court is informed that the State Bar has begun investigating the potential causes of the declining California bar pass rates and is reviewing the bar exam and its grading system. The court agrees such an investigation is critically important, and directs the State Bar to ensure the investigation includes: (1) identification and exploration of all issues affecting California bar pass rates; (2) a meaningful analysis of the current pass rate and information sufficient to determine whether protection of potential clients and the public is served by maintaining the current cut score; and (3) participation of experts and stakeholders in the process, including psychometricians, law student representatives and law school faculty or deans.

The court directs that, once the investigation and all studies are concluded, the State Bar make a report to the court. The report must include a detailed summary of the investigation and findings, as well as recommendations for changes, if any, to the bar exam and/or its grading, and a timeline for implementation. The State Bar's report and recommendations should be submitted to the court as soon as practicable, and in no event later than December 1, 2017. The State Bar is further directed to submit bi-monthly letter reports to the court regarding the progress of its investigation, beginning March 1.

Sincerely



Tani G. Cantil-Sakauye

Attach.

cc: *Sent via email*

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Judith F. Daar, Whittier Law School
Allen Easley, Western State College of Law
David L. Faigman, University of California, Hastings College of Law
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James Fox
Elizabeth Parker
February 28, 2017
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cc: (con't)

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Susan Westerberg Prager, Southwestern Law School
Niels B. Schaumann, California Western School of Law
Deanell Reece Tacha, Pepperdine University School of Law
John Trasviña, University of San Francisco School of Law
Rachel Van Cleave, Golden Gate University, School of Law
Michael E. Waterstone, Loyola Law School

February 1, 2017

Supreme Court of California
350 McAllister Street
Room 1295
San Francisco, CA 94102

Re: The California Bar Exam

Dear Justices:

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

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

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

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

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

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the MBE – meaning, in essence, that the aggregate MBE scores drive the scaled aggregate grades on the essays as well.

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

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

Given that we can find no justification for the present practice of scoring the bar exam, the costs of the high failure rate should be deeply concerning to us all. The most immediate and direct costs fall upon the students who do not pass the California bar, particularly those who would have passed in other states. Many will retake the exam, and most will ultimately succeed in passing on their second or subsequent attempts. However, as a consequence of their initial failure, many of these students lose jobs or employment opportunities and months of income. Each of these students will incur substantial costs, often including newly incurred debt, to pay for further 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 strong test takers as possible rather than making more holistic evaluations. This will ultimately have a dire impact on minority representation in law schools and, ultimately, in the legal profession.

Furthermore, California's high cut scores generate pressure for California law schools to design their educational programs with even more focus on the bar exam itself than is required in other states. This may, at the margins, drive schools and 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.

We admittedly do not know precisely what cut score would be appropriate for determining who passes and who fails a state licensing exam. However, in the absence of valid support for California's atypically high cut score, we believe that it violates basic fairness, undermines the public interest, and inflicts considerable financial, 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.

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

We would welcome careful investigation and thoughtful study of the appropriate cut score, and we are prepared to support and collaborate with the California State Bar in such a study. But we strongly believe that our State cannot wait to act. We therefore propose that the California Supreme Court order the California State Bar, beginning with the July 2017 administration, to employ a cut score in line with other states. In the absence of information regarding what cut score is best, a cut score within the range we suggest (133-136) is likely the best approximation for what 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,

Erwin Chemerinsky
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Raymond Pryke Professor of First Amendment Law
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SUPREME COURT OF CALIFORNIA

I, Katelyn N. Madar, declare:

I am a citizen of the United States and employed in the City and County of San Francisco, California in the office of a California law school at whose direction the following service was made. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 200 McAllister Street, San Francisco, California 94102.

On February 1, 2017, I served a copy of the within document(s):

- **LETTER FROM 20 DEANS OF CALIFORNIA ABA-ACCREDITED LAW SCHOOLS TO THE CALIFORNIA SUPREME COURT RE THE CALIFORNIA BAR EXAM SIGNED FEBRUARY 1, 2017**

- ☐ by **FACSIMILE TRANSMISSION**, by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.
- ☒ by **UNITED STATES MAIL**, by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California addressed as set forth below. I am readily familiar with this law school's practice of collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the U.S. Postal Service, in a sealed envelope(s) with postage fully prepaid.
- ☐ by **COURIER** placing the document(s) listed above in a sealed envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a Delivery Service agent for delivery.
- ☒ by **PERSONAL DELIVERY**, by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.
- ☒ by **E-MAIL VIA PDF FILE**, by transmitting via e-mail or electronic transmission the document(s) listed above to the person(s) at the e-mail address(es) set forth below.
- ☐ by **ELECTRONICALLY POSTING** to the ECF website of the [COURT AND VENUE]. The Court performed service electronically on all ECF-registered entities in this matter.

☐ by **ELECTRONICALLY SERVING** the document via Lexis Nexis File & Serve as described above on the recipients designed on the Transaction Receipt located in the LexisNexis File & Serve website.

BY U.S. MAIL AND E-MAIL

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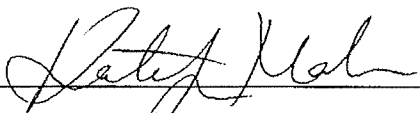
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BY PERSONAL DELIVERY AND E-MAIL

Vanessa L. Holton
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Executed on February 1, 2017 in San Francisco, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.



Katelyn N. Madar