

Gomez, Francisco

From: Jackie Gardina <jgardina@collegesoflaw.edu>
Sent: Tuesday, September 05, 2017 5:08 PM
To: Gomez, Francisco; dmyers@co.los-angeles.ca.us
Subject: Bar Exam Pass Line
Attachments: CALS Bar Exam Letter to SB Trustees (4).pdf

Trustee Myers, I am writing to you in your capacity as a member of the State Bar Board of Trustees. My name is Jackie Gardina, I am the dean of the Santa Barbara and Ventura Colleges of Law, a California Accredited Law School. I wanted to provide you with some information related to the bar pass line discussion slated for this week. At the August 14 public hearing, I urged the Committee to recommend a 139 bar pass line.

Adjusting the bar pass line is appropriate for four interrelated reasons: it is consistent with the Standard Setting Study (Study), it continues to protect the public, it helps bridge the access to justice gap, and it increases diversity within the legal profession.

First, a 139 bar exam pass line is within the range identified by the Study. According to the Study, “there is an approximately 95 percent confidence level that the ‘true’ cut score falls between 139 to 150.”^[1] Additionally, 139 aligns with the State Bar’s “second read” policy. Under the current grading procedure, bar exams that fall within a range of 139 to 143 are considered to meet the threshold of an acceptable passing score and are submitted to be read again. According to the Committee of Bar Examiner’s Staff Report (Staff Report)^[2], the long-standing use of the policy of re-reading exams that achieved a minimum score of 139 “represents an implicit policy position of having greater tolerance for false positive errors.”^[3] It is also an acknowledgement that bar exam grading is not an exact science. The difference between scoring 139 and 144 can be a few additional points allocated to an essay or performance exam or as few as five additional correct answers out of the 200 questions on the MBE section of the exam.

Second, there is no evidence that choosing a 139 bar exam pass line will undermine public protection. As of 2015, 84 percent of all attorneys in the U.S. are licensed in the forty-one jurisdictions that require a minimum passing score of 139 or below. As the Staff Report stated, “[t]here is no empirical evidence available that would support a statement that as a result of its high pass line California lawyers are more competent than in other states, nor is there any data that suggests that there are fewer attorney discipline cases per attorney capita in this state.”^[4] In addition, out-of-state attorneys can act as registered in-house counsel without taking the California bar exam and attorneys unlicensed in California are allowed to appear *pro hac vice* in California courts. There has been no suggestion made or evidence presented that these attorneys create a greater risk to the California public.

Third, increasing the number of licensed attorneys committed to practicing in underserved areas and aiding underserved populations will help bridge the access to justice gap. One of the fundamental challenges to public protection is the growing “justice gap” in California. As stated by State Bar President James Fox and Executive Director Elizabeth Parker, “The State Bar of California strongly supports access to legal services as a core part of our public protection mission. We support the promise of justice for all, including for low-income people who too often have no choice but to navigate the legal system alone.”^[5]

COL graduates are uniquely qualified to address this aspect of public protection. COL is located in counties that lack adequate access to legal services. The graduates have chosen to attend the school, in part, because they are rooted in their communities. Moreover, unlike ABA law school graduates for whom student debt often serves as a substantial financial barrier to rural or local legal practice, a COL total J.D. tuition is just \$67,620, one-third to one-half of a traditional JD. Because COL students are working adults, many leave with little or no debt, especially as compared to their ABA counterparts.

Fourth, there is significant evidence that adjusting the pass line will positively affect the diversity of the profession. The State Bar has long recognized diversity within the legal profession as one of its key strategies.

From the State Bar's perspective, it is important that the demographics of the legal profession reflect the general population figures. This will enable the profession to be more responsive to the needs of our diverse communities and provide more effective legal representation locally and in the context of the growing global marketplace. It will also serve to enhance the public image of the legal profession and the judicial system.^[6]

Many of our California counties now reflect "minority majority" populations. In Santa Barbara and Ventura counties, where COL is located, the population is now over 50 percent non-white, with 45 percent and 42 percent respectively, identifying as Latino or Hispanic. COL student population closely aligns with the county demographic. Yet, according to the California State Bar Association, Hispanics or Latinos comprise only 4.2 percent of California attorneys.

According to the Staff Report, the adjustment of the minimum passing score on the July 2016 bar exam from 144 to 141 would have resulted in a 31 percent higher pass rate for CALS generally.^[7] It is estimated that at 139, the bar exam pass rate for CALS will improve by 36 percent. The report also confirmed that Hispanic examinees would have experienced an 8.8 percent and 10.6 percent increase in pass rates in 2008 and 2016 respectively, while Black examinees would have experienced even a greater increase in pass rates with a 141 minimum passing score, 10.4 percent in 2008 and 12.5 percent in 2016.^[8]

In the final analysis, a 139 pass line serves the interests of the citizens of California by providing a high standard of public protection while meeting the obligation of the legal profession to provide fair access to licensing that regulates a competent and diverse legal profession.

Jackie Gardina

Dean and Chief Academic Officer



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^[1] Chad W. Buckendahl, Ph.D, Conducting a Standard Setting Study for the California Bar: Final Report ACS Ventures, July 28, 2017), at 8 available at <http://apps.calbar.ca.gov/cbe/docs/agendaItem/Public/agendaitem1000001929.pdf> (last visited Aug. 12, 2017).

^[2] Committee of Bar Examiners Open Agenda (July, 28, 2017), Staff Report, Item O-100, [hereinafter "Staff Report"], at 9, available at <http://apps.calbar.ca.gov/cbe/docs/agendaItem/Public/agendaitem1000001926.pdf> (last visited Aug. 12, 2017).

^[3] Id. at 8.

^[4] Id. at 8-9.

^[5] See State Bar encourages attorneys to provide pro bono legal services and support legal aid, CA. BAR J. (Feb. 2017) available at <http://www.calbarjournal.com/February2017/TopHeadlines/TH4.aspx> (last visited Aug. 12, 2017).

^[6] See Report and Recommendation of the Diversity Pipeline Taskforce (State Bar of California, Aug. 2006) at 1.

^[7] See supra n. 2 at 9.

^[8] See id.

Gateway to Opportunity in Law



CALS
Association of California
Accredited Law Schools

September 1, 2017

VIA E-MAIL

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RE: Interim Adjustment of the Minimum Passing Score for the California Bar Exam

Dear President Fox, Executive Director Parker, Mr. Colantuono and Ms. Wilson,

The California Accredited Law Schools (CALS) are writing in response to the recent action taken by The State Bar of California Committee of Bar Examiners (CBE) and the Law School Council (Council).

This past week, the Council and the CBE met to consider the recently released State Bar Staff Report¹ related to recommendations for an interim adjustment for the

¹ Report to the Admissions and Education Committee and the Committee of Bar Examiners Regarding Public Comments on the Standard Setting Study, August 29, 2017.

minimum passing score on the California Bar Exam. The report was issued in response to a directive by the California Supreme Court delivered by letter to the State Bar of California (Bar) on February 28, 2017. In its communication with the Bar, the Court expressed its concern that it “lacks a fully developed analysis with supporting evidence from which to conclude that 144 or another cut score would be most appropriate for admission to the bar in California.” The Court directed the State Bar to conduct “a thorough and expedited investigation.”

The Court has ordered an immediate and urgent review of the minimum passing score of the bar exam under its inherent authority to regulate the practice of law and set admissions requirements for attorneys. This is in response to concerns that the dramatic recent decline in the pass rate affects public protection, diversity of the profession, and access to justice. Over the past eight months, law schools, applicants, the legislature, and the public have voiced these concerns in communications and public hearings. The recently amended California Rules of Court² are also a response to these concerns.

In response to the Court’s directive, the Bar employed nationally recognized experts in the fields of professional certification, testing, and psychometric evaluation to conduct a Standard Setting Study. The study was completed and reported to the A&E Committee of the State Bar Board of Trustees and the CBE on July 31, 2017. The initial Staff Report and Standard Setting Study was released for public comment and a subsequent amended Staff Report following the close of public comment was submitted August 29, 2017 to the Council, the CBE, and now to the Board of Trustees (Trustees).

Taking into consideration the recommendations of the Standard Setting Study, the amended Staff Report, an important commentary from the Assembly Judiciary Committee Chair Mark Stone, and public comment received from 56 California law school deans representing the ABA, CALS, and Registered law schools – the Council voted to recommend a three-year interim adjustment of the minimum passing score for the California bar exam to a score within the range of 135 to 139, inclusive. The three-year period provides the opportunity to complete additional studies and investigations in a professional and timely manner.

At the CBE meeting yesterday, many members expressed their unwillingness to proceed with a score adjustment recommendation at this time in the absence of additional data and information. We certainly respect the CBE’s concerns and their

² Amendments to the California Rules of Court, Title 9. Division 2. Chapter 2. Rule 9.3(a) and 9.6(a). (Adopted by the Supreme Court on June 21, 2017, Effective on January 1, 2018.)

desire to follow what they believe is their proper administrative decision-making process.

However, the CALS share the apparent urgent concern of both the Court and the Assembly Judiciary Committee that - based on the current information available to the Court, the Trustees, and the public - the continued application of 144 as the minimum passing score is causing immediate and irreparable harm to the citizens of California and current bar examinees. We furthermore believe that continued application of the 144 minimum passing score subverts the public protection obligation of the Bar and its stated mission to increase diversity within the profession.

The CALS submit that adequate information currently exists from the Standard Setting Study, the amended Staff Report, Assembly Judiciary Committee Chair Mark Stone's comments, and public comment from 56 California law school deans - and that the information and data warrant a recommendation to the Court that the interim minimum passing score be adjusted to 139.

We will be submitting a Letter Brief to the Court later next week (subject to final editing that includes data and findings of the amended August 29, 2017 Staff Report) that discusses in detail the critical aspects of public protection, diversity of the profession, and public policy that are fully accomplished by an interim minimum passing score of 139.

As a courtesy to the Bar, we are providing a draft copy of that Letter Brief to the Trustees along with this letter.

Without repeating the details of the amended Staff Report and Letter Brief, we ask the Trustees to consider the following:

- The Standard Setting Study finds that a score of 138.8 falls within a range of scores that provide 95% confidence that the score reflects the minimum competency for the first year of law practice.
- The amended Staff Report states that "after reviewing public comments submitted during the public comment period, staff now recommended that the Committee consider a third option: reducing the cut score to 1390 on an interim basis. Staff presents this third option for three reasons. First, in response to public comments urging further reduction to 1390; second, because 1390 falls within the confidence interval from the study, and; third in light of the analysis showing the impact on diversity and access that a lower cut score would produce."

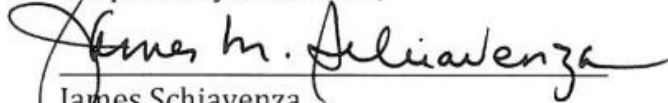
- Based on data evaluated by the Assembly Judiciary Committee staff, Committee Chair Mark Stone urges that, “the State Bar recommend, and the Supreme Court to approve, an immediate and temporary reduction of the passing score of the bar exam to 1388.”
- The score of 1390 (139) has long been the number used by the Committee, and accepted by the Supreme Court, as a score which warranted an applicant’s examination being placed in the Phase 2, or “second read” phase. Grading to the 139 standard requires no changes to the Bar’s grading protocol.
- At the score of 1390, the dramatic disparate impact on Blacks and Hispanics would be significantly remedied. Black examinees would improve their passing rate by 40.4% and Hispanics by 26.1%. The passing rate for CALS, schools that traditionally serve a higher percentage of non-traditional students, under-represented populations, and rural communities would increase by 69%. The overall bar passing rate would improve by 20.3%.
- An analysis of the minimum passing scores of the ten (10) largest U.S. jurisdictions by population indicates that nine of the jurisdictions, other than California, have established minimum passing scores of 133 to 139. As of 2015, 1,094,718 out of 1,300,705 attorneys were licensed in the U.S. in 41 jurisdictions that require a minimum passing score of 139 or below. The State Bar has no evidence that attorney malpractice or attorney discipline is higher in these 41 jurisdictions than in California. To the contrary, the Standard Setting Study report stated that “there is no empirical evidence that would support a statement that as a result of its high pass line California lawyers are more competent than those in other states, nor is there any data that suggests that there are fewer attorney discipline cases per attorney capita in this state.”

In summary, adjusting the interim minimum passing score to 139 would accomplish the following: 1) provide 95% accuracy in predicting minimum competency (according to the State Bar’s Standard Setting Study); 2) address the problem of disparate impact caused by the current arbitrarily high minimum passing score (reported by the amended Staff Report); 3) align with the State Bar’s existing Second-Read Policy (discussed in detail in the CALS Letter Brief to the Court); 4) continue the ranking of California as the highest and most rigorous standard among other large states; and 5) require minimal change in the State Bar’s current grading procedures.

California Accredited Law Schools
Letter State Bar Board of Trustees
September 1, 2017

We respectfully ask that the Trustees adopt a recommendation to the Court for an adjustment of the interim minimum passing score for the California bar exam to 139.

Respectfully Submitted,


James Schiavenza
Chair, California Accredited Law Schools

CC: California Accredited Law School Deans, California Assembly Committee on Judiciary

Enclosure: California Accredited Law School Deans' Letter Brief to California Supreme Court, Draft - September 8, 2017.