

COMMITTEE OF BAR EXAMINERS

OPEN SESSION AGENDA ITEM

AGENDA ITEM: February 2018 – O-200

DATE: January 22, 2018

TO: Subcommittee on Examinations

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SUBJECT: **Proposed Guidelines for Allocation of Applicants, Production of Examination Statistics, and Law School Lists**

BACKGROUND

The Committee of Bar Examiners (Committee) started publishing bar examination statistics in the late 1970's. Attached (Attachment A) is a sample of the first statistical report that could be located. In addition to the overall statistics, school-by-school and ethnicity statistics were reported. The school information was collected during the eligibility stage of the process and the ethnicity information was collected on a voluntary basis from the applicants when they filed their applications to take an examination. The same processes for collection and publication were substantially the same throughout the next several decades.

When applicants applied to take the examination they completed the survey information regarding ethnicity (and gender). This information was "hidden" as part of the Admissions database so that it was unavailable to all staff, which was crucial to avoid any claims of discrimination based on staff having access to such information as part of the application process. The ethnic (and gender) data was only used at the point statistics from a particular examination were generated by an outside psychometric consultant, or in connection with a special study that was authorized by the Committee. Several years ago, it was decided that it would be best to collect the data as part of the process of registration with the Committee as a law student or attorney applicant, instead of with each examination, since generally it was information that would not change over time. This eliminated collecting the same information multiple times for applicants taking the examination more than once.

Also part of the application process, for both registration with the Committee and applying for the bar examination, applicants are to provide information about the law schools they are attending and expect to graduate from. They are required to update this information at the time they are intending to qualify to take the California Bar Examination (CBX). Prior to the administration of an examination, lists containing the names of first-time applicants are provided to the schools to which they have been

allocated and each school must certify that such applicants have met the necessary legal education requirements (“certification lists”), and then follow up such certification with transcripts within 45 days of administration of the examination.

Until just recently, the schools would also be sent what were called “allocation lists” following each administration of the CBX. This list would contain the names of all applicants who were being allocated to the schools according to the records maintained in the Admissions database for a particular administration of the CBX, and who had applied to take the examination (but not necessarily have sat for the examination). It would not be known until later which applicants did not actually take the examination. The schools were asked to confirm the allocations so that the statistics produced following each administration of the CBX were as accurate as possible.

For many years, applicants had the opportunity to request that their examinations not be graded. Many made such requests because they did not complete all portions of the examination for whatever reason (e.g., illness) or because they believed they didn’t do well. Such applicants were treated as though they had not taken the examination. This allowed applicants who passed the second time that they took the examination to credibly state that they had passed on their first attempt. The Committee changed this several years ago so that everyone who began the examination would be counted as having taken it – whether they completed all portions or not.

These processes were all revised when legislation was passed that required additional confidentiality measures be taken to protect applicants’ privacy and also required that the State Bar comply with the California Public Records Act. In addition, the Committee was involved in a lawsuit that was also related to ensuring the confidentiality of applicants’ information. As a result of these factors: (1) school-by-school statistics were no longer published, because many schools had fewer than 11 takers (as a result of the *Sander v. State Bar of California* litigation, 11 was deemed to be a number that was reasonable with regard to ensuring applicant confidentiality); (2) allocation and pass/fail lists were no longer provided to the law schools; and (3) the individual California law school reports were only provided to law schools with at least 11 first-time takers and also were released to the media after public records act requests were made.

Last year, two additional factors were added to this mix. First, during the early part of the year, the Committee agreed with staff’s recommendation to start reporting examination statistics for only those applicants who were considered as having actually taken the examination, i.e., completing all portions of the examination with scores of at least a 40 for each written question (essays and performance tests). This new policy was first implemented in connection with the release of results from the February 2017 CBX, but it wasn’t until the release of results from the July 2017 CBX that this new way of producing the statistics elicited controversy. The other factor was legislation (SB 690, amendments to Business & Professions Code section 6060.25) that was ultimately signed by the Governor that would permit the Committee to once again share applicants’ information with the law schools. The language in the legislation, however, was not as clear as it could have been, and different interpretations surfaced with regard to exactly what information could be provided to the law schools prior to the July

2018 CBX. Ultimately, the issue was addressed by providing to the law schools information that was considered necessary for the law schools to meet their regulatory obligations. In November 2017, the schools were sent lists with the names of the graduates who were allocated to their schools, with an indication as to whether they passed the examination and if it was the first time the applicant took the examination.

DISCUSSION

Ethnic/Gender Survey

Since the subject of this discussion is statistics, as a primary consideration, the Committee should determine whether it should continue to ask applicants to provide additional information for the purpose of research; and, if the answer is yes, whether there is any additional information that could be collected, such as self-reported LSAT scores. Attached (Attachment B) is the ethnic survey language that is now included as part of the application to register with the Committee as a law student or an attorney applicant.

Law School Lists and Reports

Samples of (1) an allocation list; (2) a pass list; and (3) an individual law school report (which are provided only to California law schools) are attached (Attachment C). To date, staff has not resumed sending schools their allocation lists. It appears that providing the information contained in such lists would not be allowed by the language in SB 690, which only permits disclosure of information “that is necessary for the purpose of the law school’s compliance with accreditation or regulatory requirements.” Several schools have expressed their belief that the allocation lists are necessary for regulatory purposes and that the practice should be resumed.

For example, a professor from Southwestern Law School has argued:

ABA accredited law schools are required to complete an annual questionnaire that asks, among many other things, about a law school’s bar pass rates. In order for law schools to complete the questionnaire, we must have bar result information for each alum, including the jurisdiction they took the exam, whether it was their first attempt, and the results for each examination. Beginning with the latest questionnaire, we need to account for all alum, not just for alums who sit in a jurisdiction that makes up the majority for that group. This means we need to also account for alums who did not sit for an exam at all.

The Allocation Lists were the first step in ensuring that we were able to maintain accurate and up-to-date bar data for our students. The utility of this list was that it allowed us to begin confirming the applicants that had been allocated to us for a particular exam, well in advance of bar results being released 4 months later. For the July exam, having the ability to confirm the names well in advance is particularly helpful because the July bar results are already released at a busy time for law school - at the end

of the semester, when our Registration Office is making preparations for final exams, and just before the Thanksgiving holiday, which means offices are closed in the midst of bar results being released. This often delays our ability to timely process bar results by 1-2 weeks. Particularly with the new changes to the ABA questionnaire, an Allocation List would also be beneficial for tracking alum who did not sit for a bar exam. Knowing that an alum registered for CA, even if they did not sit for the exam after all, would be helpful information because this way we know which jurisdiction a candidate is considering.

Beginning with the release of results from the July 2018 CBX, schools will be sent information regarding their graduates who were unsuccessful on the examination and who consent to the release of their scores to the law school. While the final format has not yet been decided, in the interim, schools will be sent the information from the February 2018 California Bar Examination in the same format as it was provided for the July 2017 CBX.

The format of the individual law school reports was decided many years ago, after many discussions with the law school community. The law schools wanted more information in order to assist their students who were unsuccessful on the CBX and this was the information the Committee agreed to provide. This will change, however, beginning with the July 2018 CBX, as the law schools will begin receiving much more detailed information regarding those who were unsuccessful. Since these reports can now only be provided to schools with 11 or more takers, and in light of the additional information that will be provided later this year, perhaps these reports should be retired. Input from the law schools would be helpful before making any final determination.

Takers vs. Completers

In response to the controversy surrounding the change in how examination information was being reported, and after discussion with several different stakeholders, staff has reconsidered its original recommendation and now proposes a different definition of “takers” that should be used in the production of statistics and lists following administration of each examination. Attached (Attachment D) are proposed guidelines that define “takers” for purposes of the General Statistics published by the Committee following the release of results for each examination. A survey was conducted of other states, and there does not appear to be a consensus among them as to how such statistics are reported. Some states only report those applicants who have scores for all portions of the examination and others use the number of those who started the examination. What is interesting about the survey is that some states have never had anyone who left an examination during its administration. For this past July’s California Bar Examination, 72 applicants, out of the 9,183 who took the examination, did not complete the examination.

It should be noted that these proposed guidelines are for purposes of “Allocation of Applicants, Production of Examination Statistics and Law School Lists” and are not intended to change the manner in which the scaling formulas, data analytics, or technical reports are done for each examination, by using only complete sets of

applicant scores. By definition, a “complete set of scores” for these purposes would not include any applicants who have a grade of less than 40 on the written portion of the examination or a missing MBE score.

Statistics

Attached (Attachment E) is a sample of the general statistics that are published following the release of results for each administration of the CBX and the First-Year Law Students’ Examination. Also attached (Attachment F) is a copy of the July 2015 CBX statistics, which contain the school-by-school breakdowns that used to be provided. The Committee should decide whether it wishes to continue publishing the statistics in the manner they have been for the last four administrations or make some changes. The school-by-school statistics were first published before any of the schools were required to report their own statistics. Now all law schools must publish statistics in accordance with their regulatory requirements. Attached (Attachment G) are samples of an ABA “Bar Passage Questionnaire” (collects information for purposes of Standard 509, Consumer Information) and a California-accredited law school report.

When contemplating what, if any, law school statistics should be published following the implementation of additional confidentiality requirements imposed by the legislation enacted in 2017, several different options were considered. Perhaps only percentages would be provided – but that could be misleading, as a law school with one only student who took the examination and also passed could claim to have a higher passing percentage than Stanford or all the UCs. While true, that assertion would not appear to meet the consumer protection test of full disclosure. Statistics could be provided only for those schools with 11 or more takers, which, again, gives a fairly incomplete picture of what information a consumer should have before making important decisions. Attached (Attachment H) is a sample of how the February 2017 statistics would have looked if this approach was used. More statistics could be provided if only “all takers” were used, but this would tend to drag down the individual law school passing percentages, as several law schools have applicants who take the examination over and over again without success. This might work for the individual law school reports, but not for the side-by-side comparisons that were part of the general statistics report.

RECOMMENDATION

It is recommended that the Committee decide at this meeting whether to approve the draft Guidelines for Allocation of Applicants, Production of Examination Statistics and Law School Lists, including how to define “takers” for those purposes. It is further recommended that, before the Committee makes final decisions on the remaining items under the “Discussion” section above, additional comment and input be solicited and received from law schools and other stakeholders at the next Law School Council and Law School Assembly Meetings.

PROPOSED MOTION

Pending.