

COMMITTEE OF BAR EXAMINERS OPEN SESSION AGENDA ITEM

AGENDA ITEM: March 2018 – O-403

DATE: March 19, 2018

TO: Subcommittee on Educational Standards

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SUBJECT: Implementation of Committee of Bar Examiners Guideline for
Minimum Cumulative Bar Examination Pass Rate (MPR)
Calculation

BACKGROUND

A. Definition of “Taker”

At its February 2018 meeting, the Committee of Bar Examiners (Committee) adopted “*Guidelines for Allocation of Applicants, Production of Examination Statistics and Law School Lists*” (**ATTACHMENT A**). Sections 1.2, 1.3, and 1.4 of these Guidelines merely restate longstanding Committee policies and procedures. Section 1.1 (Definition of Examination “Takers”), however, effects an important change in Committee policy and procedure, and does so in a manner that impacts how each California Accredited Law School (CALS) is to calculate and report their individual, minimum cumulative bar examination pass rates (MPRs) as required by *Accredited Law School Guideline 12.1*.

Guideline 12.1 provides in pertinent part:

For purposes of MPR calculation, a “qualified taker for the reporting period” includes any student who both graduates from the law school during the reporting period, and takes any administration of the California Bar Exam (CBX) during the reporting period or the first February administration after the reporting period that was also no more than 10 administrations after the taker’s graduation. A student who does not meet both requirements is not a qualified taker for the purpose of the MPR report and is not to be included in the calculation of a law school’s MPR.

The definition of a CBX “taker” is therefore crucial to an accurate calculation by each CALS of its respective MPR. Which applicants have been considered and then statistically reported by the Committee to be a “taker” of the CBX has differed over time.

For many years, the Committee had a “Do Not Grade” policy that permitted applicants to request that their examination answers not be graded, which many applicants did because they did not complete all portions of the examination for whatever reason (e.g., illness), or because they believed they had not done well. Such applicants were treated as if they had not taken the examination; i.e., they were not considered to be “takers.” This allowed applicants who passed the second time that they took the examination to credibly state that they had passed on their first attempt. Although the number of times an applicant has taken the examination has never been made public, the law schools use the “first-time” designation in reporting some of their statistics required for regulatory purposes.

Several years ago, the Committee changed the policy so that all applicants who began the examination would be counted as “takers” and their answers were graded, whether or not they completed all portions of the examination. As a result, a CBX “taker” was then defined as any applicant who was in attendance for any portion of the examination (i.e., at least one session). If you were there at the examination, your answers were graded and you would be reflected as having taken, and passed or failed the examination. As such, the statistics for each examination included those who did not submit a full set of answers as well as those who were there but did not upload their examination answer files; i.e., they were included in the fail numbers.

Early last year, a question arose as to whether applicants who had not completed the examination should be included in the statistics, since those applicants had no likelihood of passing and including them in the pass/fail statistics could be considered misleading. For that reason, beginning with the February 2017 administration of the CBX, the Committee adopted a different policy for determining which applicants were to be considered as having “taken” the examination for purposes of the pass/fail statistics that the Committee publishes at the time results from each CBX are released. Rather than looking at whether an applicant was present for any session of the examination, an applicant would be included in the pass/fail statistics only if he or she had “completed” the entire examination, which necessarily meant that the applicant was in attendance for all sessions. Under this policy, the definition of a “completer” included the requirement that an applicant have a complete set of written scores plus a score for the Multistate Bar Examination (MBE) and, moreover, that the “complete” set of written scores could not include a score of zero for any essay or performance test answer. A very small number of applicants for each administration of the CBX fall into the category of having been in attendance for every session of the examination, but also having a score of zero on one or more of their written answers. The policy of counting only “completers” as “takers” of the examination was also used to report the pass/fail statistics for the July 2017 administration of the CBX.

The change elicited controversy. In response, and after input from several different stakeholders, the Committee reconsidered the “completer” policy and looked instead at a different definition of “taker” that should be used in the production of statistics and lists following administration of each examination.

Adopted at the Committee’s February 2018 meeting, new Section 1.1 of the “*Guidelines for Allocation of Applicants, Production of Examination Statistics and Law School Lists*”

provides a slightly modified definition of “takers” that will be used for the February 2018 CBX and going forward.

1.1 Definition of Examination “Takers”

- (A) An applicant considered to have taken an examination is an applicant who has a multiple-choice score and a complete set of written scores (First-Year Law Students’ Examination); a Multistate Bar Examination (MBE) score, both AM and PM sessions, and a complete set of written scores (General Bar Examination); or a complete set of written scores (Attorneys’ Examination).
 - (i) “Written scores” may include zeros if an applicant was in attendance at the examination for its entirety. If an applicant was absent from a test center for any portion of the examination during its administration, the applicant is not considered as having completed the examination.
 - (ii) If an applicant is absent for any portion of the examination, the applicant is considered as having not taken the examination; the applicant’s written answers will not be graded; and the applicant will be advised that, if he/she intends to take a future administration of the examination, he/she will be subject to the same application filing deadlines applicable to first-time applicants rather than the deadlines applicable to immediate repeaters.

In contrast to the definition of “taker” prior to 2017, which considered an applicant to have taken the exam if he or she was in attendance for one session of the examination, this new definition of “taker” requires that an applicant attend all sessions of the examination. Moreover, in contrast to the 2017 definition of “completer,” which considered someone not to have completed the examination if he or she had a score of zero on any written answer, a “taker” under this new definition may score a zero on one or more written answers so long as they were in attendance for all sessions of the examination.

To summarize, the key definitional difference between 2017 and 2018 turns on whether the applicant scored a zero on any written answer. Prior to 2017, an applicant was considered a “taker” if he/she was present for any session, regardless of whether the examination was completed. In 2017, an applicant was considered a “taker” if he/she was present for all sessions, with the additional requirement that the examination be “completed” (with no written score of zero). From 2018 forward, an applicant is considered a “taker” if he/she was present for all sessions and had a complete set of scores, which could include zeros on the written portion.

It is significant to note that, even though 2017 applicants who were present for every session of the examination, but who had zeros in their written scores, would meet the

2018 definition of “taker,” they were not defined as “completers” in 2017 (and thus not “takers” either) for purposes of being included in the general examination statistics.

B. Calculation of MPR

As stated above, identifying which applicants are now considered and counted as a “taker” of the CBX has a material effect on how a CALS is to calculate and report its MPR under *Guideline 12.1*. Given that the MPR of each CALS is publicly reported on the State Bar’s website, it is important that the Committee and each CALS understand how this change in who is considered a “taker” affects this key accreditation metric. To appreciate the impact of this change, it is necessary to understand how the MPR statistic is calculated.

In accordance with *Accredited Law School Guideline 12.1*, the “reporting period” for a law school’s MPR “covers the five most recent twelve-month periods (August 1 through July 31) prior to the calendar year in which the MPR is reported to the Committee.”

Using this definition, the next five-year reporting period that each CALS is to report its respective MPR runs from August 1, 2012 through July 31, 2017. To calculate its MPR, a CALS must identify and count each graduate who both graduated and took at least one CBX administration during the reporting period, whether they passed or failed. Each such graduate is then counted as a “qualified taker.” The only exception is that someone who graduates during this reporting period may take the February 2018 CBX and still be counted as a “qualified taker” within the reporting period.

As further provided by *Guideline 12.1*: “A law school’s MPR is to be calculated as a fraction that is the sum of all qualified takers for the reporting period who passed any administration of the CBX during the reporting period or the first February administration after the reporting period that was no more than 10 administrations after the taker’s graduation (the numerator) divided by the sum of all qualified takers for the reporting period who, whether they passed or failed, took any administration of the CBX during the reporting period or the first February administration after the reporting period that was no more than 10 administrations after the taker’s graduation (the denominator), with the resulting numeral being expressed as a percentage.”

Thus, for the MPR report due this upcoming July 1st, each CALS must identify and count each “qualified taker” for the reporting period and then determine if they passed or failed the CBX. To do so, a CALS must be informed of the pass/fail results for each of its graduates on each of the CBX from the February 2013 through the February 2018 administrations of the examination.

To provide such information, and as was done in past years, the Office of Admissions will prepare and send all California law schools (including each CALS) a “pass/fail” list with the names of their graduates who passed or failed each CBX administration. Due to a change in California law that took effect in 2015, such lists were not prepared nor sent for any of the CBX administrations in 2015 or 2016. However, with a more recent change in California law, the Office of Admissions was able, in late 2017, to prepare and then send confidential pass/fails lists to all California law schools for each CBX

administration in 2015 and 2016. Each such list was compiled in accordance with the governing guidelines for each of these years.

As a result of the February 2018 adoption of Section 1.1 of the *Guidelines for Allocation of Applicants, Production of Examination Statistics and Law School Lists*, revising the definition of who is to be counted and reported as a CBX “taker,” the previous determinations of which applicants had passed and which had failed the examination needs to be modified. Under the new Section 1.1 definition, neither the publicly-reported pass/fail statistics nor the pass/fail lists sent to law schools will report or use or name any applicant as a “fail” if they are not considered to be a “taker” under the Committee’s new definition, *i.e.*, someone who attended each and every session of the CBX, whether or not they received a zero for any particular session.

Given that the new definition of who is considered a “taker” will start with the February 2018 CBX administration, the issue is that the pass/fail lists sent to the CALS for the CBX administrations from 2013 through 2016 listed as having failed applicants who, under the current guidelines, would not be considered to have even taken the examination. Similarly, applicants who took the exam in 2017 and received a grade lower than a 40 (*i.e.*, a zero) on a written answer would have been shown as not having completed the examination, but under the current guidelines, if they stayed for the entire time, would in fact be deemed to have taken and failed the examination.

This anomaly cannot be ignored if each CALS is expected to report its MPR accurately. Thus, to avoid having a CALS count any graduate(s) in its upcoming MPR calculation who no longer will be listed as a “fail,” but were named as such on prior pass/fail lists, or who, under the current guideline would be considered to have taken and failed the examination, a review of each CBX administration from the February 2013 through the July 2017 administration by each CALS has now been conducted by staff.

As confirmed by this review, a total of 39 applicants (today’s non-takers) were previously listed as a “fail” on one or more pass/fail lists sent after each administration of the CBX during the period 2013-2017. In addition, with respect to the February 2017 CBX and July 2017 CBX data, a small number of students from a handful of CALS were not reported as “completers” because, even though they sat through all sessions of the examination, they had zeros in their written scores. Since they were not “completers” (*i.e.*, “takers”), they were removed from the statistics for the affected schools and not reported as having failed in 2017. Applying the 2018 definition of “taker” to these same students, 4 applicants for the February 2017 CBX would go from non-takers to taker-failers and 3 applicants for the July 2017 CBX would go from non-takers to taker-failers. Office of Admissions staff plans to supply affected CALS with all of this information for the upcoming MPR calculation.

For the July 2017 administration of the CBX, State Bar staff has already provided information to the affected schools that identified which of their graduates fell into the category of those who were in attendance for the entire examination, but who had at least one score of zero on the written portion, and thus were not “completers.” With that information, the affected law schools will be able to determine which students would be considered to be a “taker” under the new definition. Although not yet done to date, staff

will also provide the same information with respect to the February 2017 administration of the CBX, so that the affected CALS will have complete information for 2017.

DISCUSSION

The issue now before the Committee is how a CALS is to calculate its respective MPR statistic for the 2012-2017 reporting period, that is, should the CALS be using the definitions in effect at the time of each CBX administration, or the current definitions.

Given that staff has now identified each applicant who was previously identified as “fail” on any of the prior pass/fails lists, and each applicant previously listed as a non-completer, staff can provide each CALS confidentially the name(s) of each graduate who should now not be used in the denominator of its MPR calculations. That information could be provided at the time that pass/fail lists are prepared and then sent to each law school for the February 2018 administration of the CBX that is now being graded, most likely by the end of this May.

Since the Committee accredits the CALS and the Committee is imposing the MPR reporting requirement through its own guideline, and since the Committee is providing the data with which to calculate the MPR, the Committee should consider providing clear direction to the CALS as to how the Committee expects them to meet their obligations for reporting their MPRs.

The Committee has various options from which to choose, the minimum being to instruct the CALS to calculate their MPRs using the information they currently have and will receive for the February 2018 CBX, which will incorporate differing and inconsistent definitions of “taker.” Another option is to decide that the newly adopted definition of “taker” would only apply retroactively to the 2017 CBXs. Neither of these options, however, would provide accurate information based on the Committee’s current determination of the most accurate method for reporting bar passage, and both would engender public confusion.

RECOMMENDATIONS

In an effort to ensure consistency in the preparation of the MPR reports due on July 1st, and to ensure the Committee’s best and current thinking on how bar passage should be defined, staff offers the following recommendations for the Committee to consider:

1. The Committee’s newly adopted definition of “taker” be applied retroactively to each pass/fail list previously sent to each CALS for the CBX administrations reported in 2013 through 2017, so as to allow each CALS, pursuant to *Guideline 12.1*, to calculate accurately its MPR statistic for the reporting of August 1, 2012 through July 31, 2017;
2. To accomplish this, staff will provide each CALS, confidentially, (a) the name of each of its graduates who took and was reported as a “fail” on any CBX

administration for the years 2013 through 2017 if, under the current definition of a CBX “taker,” said graduate would not have been named on a pass/fail list if said list were prepared in 2018; and

- . (b) the name of each of its graduates who took, but was considered a “non-completer,” on the February 2017 or the July 2017 administration of the CBX, if, under the current definition of a CBX “taker,” said graduate would have been named on a pass/fail list if said list were prepared in 2018.
3. All such information will be provided to each CALS with its pass/fail list prepared and submitted to each law school with the results of the February 2018 CBX.

PROPOSED MOTION

Should the Committee agree with the above recommendations, the following motion would be appropriate:

Move that the definition of “taker,” as set forth in the Committee’s *Guidelines for Allocation of Applicants, Production of Examination Statistics and Law School Lists*, be applied retroactively to each pass/fail list previously sent to the California Accredited Law School (CALS) for the administrations of the California Bar Examination (CBX) reported in 2013 through 2017, so as to allow each CALS, pursuant to *Accredited Law School Guideline 12.1*, to calculate accurately its MPR statistic for the reporting of August 1, 2012 through July 31, 2017; and that staff is directed to provide each CALS with the information necessary to assist them in preparing their MPRs in compliance with the Committee’s guidelines.