



# The State Bar *of California*

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## **OPEN SESSION**

### **AGENDA ITEM O-202**

**MARCH 2021**

### **COMMITTEE OF BAR EXAMINERS**

**DATE:** March 26, 2021

**TO:** Members, Committee of Bar Examiners

**FROM:** Lisa J. Cummins, Program Manager III, Examinations

**SUBJECT:** Reconsideration of "Takers" and "Completers" Policy in the Context of the Lowered California Bar Examination Cut Score and the Online California Bar Examination

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## **EXECUTIVE SUMMARY**

The Committee of Bar Examiners (Committee) last considered and revised its policy and guidelines for applicants who are defined as "takers" and "completers" of the California Bar Examination (CBX) and the First-Year Law Students' Examination (FYLSX) in February 2018. In July 2020, the Supreme Court directed that the passing score on the CBX be permanently lowered from 1440 to 1390 and that the State Bar administer the CBX online remotely in response to the conditions caused by the COVID-19 pandemic, starting with the administration of the October 2020 California Bar Examination. Since then, the Supreme Court directed that the February 2021 CBX and the upcoming July 2021 CBX also be administered online remotely. Given these recent changes that were not contemplated in February 2018, it is appropriate for the Committee to examine its current policy regarding how "takers" and "completers" are defined for purposes of both grading the exams and reporting of statistics from the exams to determine if changes are necessary.

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## **BACKGROUND**

As part of the application process, for both registration with the Committee and applying for the bar examination, applicants provide information about the law schools they are attending and expect to graduate from. 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.

The schools were 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.

#### “Do Not Grade” Policy and Pre-2017 Grading Policy

For many years, the Committee had a “Do Not Grade” policy that permitted applicants 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 did not do well on the exam. Such applicants were treated as though they had not taken the examination.

The Committee subsequently changed this policy so that all applicants who began the examination were counted as having taken it – whether they completed all portions or not. Their answers were graded and their results were reported to them. Under that policy, resources were being spent on grading answers of applicants who had no real statistical chance of passing the examination with the 1440 cut score in effect because they did not answer one or more of the written questions, or did not take the Multistate Bar Examination (MBE) when they were scheduled to do so. In addition, applicants who were in attendance for the written sessions but who did not subsequently upload their answers obviously failed the examination but were counted as having taken it. The statistics for each examination included those who did not submit a full set of answers and those who were in attendance but did not upload their examination answer files.

Grading and scoring the California Bar Examination is a lengthy process. One contributing factor (in addition to the sheer volume) is managing exceptions to the normal process. Dealing with applicants that did not complete the examination is one of those exceptions.

#### Current Grading Policy: “Takers” and “Completers”

During the early part of 2017, the Committee started reporting examination statistics for only those applicants who completed 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.

Beginning with the release of results from the July 2018 CBX, after clarifying amendments were made to Business and Professions Code section 6060.25, schools were sent information regarding their graduates who were unsuccessful on the examination and who indicated consent in their bar exam applications to the release of their scores to the law school. The law provides in relevant part:

(b) . . . [S]ubdivision (a) does not prohibit the disclosure of any of the following:

(1) – (2) \*\*\*

(3) Information provided to a law school that is necessary for the purpose of the law school's compliance with accreditation or regulatory requirements. Beginning with the release of results from the July 2018 bar examination, the information provided to a law school shall also include the bar examination results of the law school's graduates allocated to the law school and the scores of any graduate allocated to the law school who did not pass the bar examination and who consents to the release of his or her scores to the law school. Consent of a law school graduate to the release of his or her scores may be obtained by a check-off on the graduate's application to take the bar examination. For purposes of this paragraph, "scores" means the same scores reported to a graduate who did not successfully pass the bar examination.

In response to questions surrounding the 2017 change in how examination information was being reported, the Committee reconsidered its policy and adopted a new definition of "takers" to be used in the production of statistics and lists following administration of each examination. Attached (ATTACHMENT A) are the guidelines adopted by the Committee in February 2018 setting forth the definition of "takers" for purposes of the General Statistics published by the Committee following the release of results for each examination. In pertinent part, examination "takers" are currently defined as follows:

#### 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.

Under these Guidelines, "takers" are defined as applicants with "complete" sets of written scores. Applicants are considered to have "completed" the examination if they were in attendance at the examination for its entirety (completers). In this context, the terms "takers" and "completers" can be used interchangeably. In the interest of consistency, only the term "takers" will be used in the Discussion section of this agenda item.

It should be noted that these 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 any written question of the examination or a missing MBE score. The only grade less than 40 is a zero. An applicant's answer to a written question receives a zero if it does not meet the minimum threshold to at least identify the subject of the question and attempt to apply the law to the facts of the question.

#### Format of Online Remote Exams (CBX and FYLSX)

Prior to the June 2020 FYLSX and the July 2020 CBX, these exams had traditionally been administered with paper exams at in-person test centers with live proctors and State Bar staff on site.

The standard format of the 2-Day General Bar Examination (GBX) consisted of: Day #1 – (1) AM written session of 3 hours during which three essay questions were administered together; (2) PM written session of 3 ½ hours during which two essay questions and one 90-minute performance test (PT) were administered together. Day #2 – (1) MBE-AM session of 3 hours during which a set of 100 multiple-choice MBE questions were administered; (2) MBE-PM session of 3 hours during which a set of 100 multiple-choice MBE questions were administered.

Note that the 1-Day Attorneys' Examination (AX) is comprised of the Day #1 GBX written components only (no MBE). The umbrella of the CBX encompasses both the CBX and the AX.

The standard format of the FYLSX consisted of: Day #1 – (1) AM written session of 4 hours during which four essay questions were administered together; (2) PM session 3 hours during which a set of 100 multiple-choice questions were administered.

While there was a scheduled lunch break in between the AM and PM sessions for both the CBX and the FYLSX, there were no scheduled breaks in between questions within each session.

Applicants are required to upload their written examination answers using the ExamSoft system. Under the traditional in-person testing conditions for the CBX, applicants are required to upload two exam files, one for each written session - a morning (AM) session and an afternoon (PM) session - for the written portion of the bar examination. The morning session answer file contains three written answers (Q1, 2, 3), and the afternoon session answer file contains three written answers (Q4, 5, PT). For the MBE sessions, applicants are required to bubble their answers on a Scantron answer sheet, which is sent to the National Conference of Bar Examiners (NCBE) to score. For the FYLSX, applicants are required to upload one exam file for the written session, containing 4 written answers (Q1, 2, 3, 4). The answers to the multiple-choice session, answers are bubbled on a Scantron answer sheet and returned to the State Bar for scoring.

On July 16, 2020 the California Supreme Court lowered the passing score on the CBX from 1440 to 1390, postponed the July 2020 CBX to October 2020, and directed the State Bar to deliver an online remote administration of the October 2020 CBX.

For the first-ever online remote CBX in October 2020, the NCBE provided 100 MBE-like multiple choice questions, not the usual 200 MBE questions. However, for the February 2021 online remote bar exam, the NCBE provided the full 200 question MBE, and it will do so again for the July 2021 online remote exam.

For the online remote exam administration, exam integrity and security considerations required that the exam formats be changed. Accordingly, the standard exam format for the 2-Day GBX for the online remote exam consists of: Day #1 – five separate written sessions during each of which a 1-hour essay question is administered, plus one separate written session during which a 90-minute PT is administered; Day #2 – four separate multiple-choice sessions during each of which a 90-minute set of 50 MBE questions is administered (i.e., MBE 1-50, MBE 51-100, MBE 101-150, and MBE 151-200).

The standard exam format for the 1-Day FYLSX for the online remote exam consists of: Day #1 – (1) four separate written sessions during each of which a 1-hour essay questions is administered; (2) two separate multiple-choice sessions during each of which a 90-minute set of 50 multiple-choice questions is administered (i.e., MC 1-50 and MC 51-100).

There is a scheduled one and one-half hour lunch break midway through the sessions on each day and there are scheduled 30 minute breaks in between each question to allow adequate time for the applicants to get up, stretch, get water, and conduct the ExamID (facial recognition) and login at the beginning of each exam session.

A significant distinction between the format of the traditional in-person exam administration and the new online remote exam administration is the length of each exam “session” and how many questions are administered in each exam “session.” Another significant distinction is the need for video monitoring (ExamMonitor) to proctor the exam remotely.

Under current “online remote exam” conditions for the CBX, applicants are required to upload six separate examination files for grading – one for each written exam question. In addition, applicants must upload a video monitoring file for each exam session, including the four MBE sessions. The ExamSoft system does not prohibit the applicant from taking subsequent exam sessions if an applicant misses an exam session. However, current exam policy is that the answers submitted after a missed session are not graded. Staff verifies attendance during a remote exam in one of two ways: 1) by receiving an uploaded answer file; or 2) by watching the recorded proctor monitoring video post-examination.

Additionally, if the applicant is a General Bar Exam 2-Day applicant, they must upload four multiple-choice (MBE) exam session files to be considered as having completed (“taker”) the General Bar Examination.

According to current Committee policy, applicants who are absent for any session of the exam (“partial” applicants) are precluded from having their answers graded. In addition to not receiving a score for the exam, partial applicants do not receive their answers back after the release of results. For unsuccessful applicants, their answers on the exam may serve as a useful study aid in conjunction with the Selected Answers that are posted on the State Bar’s website.

## **DISCUSSION**

The new online remote format of the CBX, in combination with the lowered passing score, has created a circumstance with regard to application of the Committee’s “taker” policy that was not contemplated in February 2018 when the current policy was adopted.

Pursuant to exam policy for the traditional in-person exam, applicants who arrive at the test center after one hour of testing time has elapsed are not permitted to enter the test center for any portion of the exam. Also, if an applicant did not attend one of the exam sessions, staff prohibited the applicant from sitting at subsequent exam sessions. If an applicant did not attend or was unable to complete a required, scheduled exam session, they are considered a partial exam taker and their exam is not graded. With the traditional CBX format, a written session contained multiple questions administered in 3-hour and 3.5-hour blocks wherein the questions were not split up. Therefore, missing one exam session meant missing multiple questions.

Pursuant to exam policy for the online remote exam, applicants who log in after 10 minutes of testing time has elapsed are not permitted to begin the exam session that has started and are locked out of the question in progress. Any answers to questions in subsequent exam sessions are not graded or scored. With the online remote CBX format, a written session contains a single question so that an applicant who is absent for one session (e.g., one essay question) is not missing as much of their exam as they would have with the traditional in-person exam where one session is comprised of more exam material (e.g., 3 essay questions).

There are many reasons why an applicant might miss an exam session, examples of which might be technical difficulties logging into the exam session for the online remote exam or sudden

illness or family emergency. Staff does not have specific information about what caused any particular applicant to miss an exam session.

It was mathematically possible for an applicant to pass the CBX with multiple missing questions (0 scores) under the old 1440 criteria. The exact scores needed to achieve a 1440 score would vary based on the scaling equation unique to the particular exam. Assuming perfect scores (the maximum possible) for the questions that were actually answered, an applicant could have up to 3 missing written scores (1, 2 or 3 essays; or 1 essay and the PT) and still achieve a minimum 1440 score. It would be virtually impossible, however, for someone to have earned perfect scores on the remaining questions even though it is mathematically possible.

Although it was mathematically possible for an applicant to pass the CBX with one or more missing questions under the old 1440 cut score, the 50-point drop in the cut score to 1390 now makes it more mathematically possible (although still extremely unlikely) for an applicant to miss one or more written question sessions and still pass the CBX.

In a prior analysis done several years ago by the Committee's psychometrician, using data from 10 bar exams, it was shown that no applicants who were missing a question on the exam actually passed the exam when the cut score was 1440.

Given the possibility of passing the exam with missing exam sessions and the format of the online remote exam with a single question per session, the Committee may want to reexamine its current policy regarding how "takers" are defined for purposes of both grading of the exams and the reporting of statistics from the exams and decide if modifications are appropriate.

Does the Committee want to provide an opportunity, despite the low probability (no matter how small) to pass the exam, for applicants who may have had a problem that caused them to miss an exam session? If so, the Committee may want to consider the following parameters for redefining a "taker":

- Must have missed less than three written question sessions (essay question or performance test); and
- Must not have missed any Multistate Bar Examination (MBE) session.

Staff provides the following pros and cons of revising the "taker" policy or keeping the "taker" policy as is at status quo:

#### **CURRENT "TAKER" POLICY**

<b>Pros</b>	<b>Cons</b>
Does not impact a law school's ABA or MPR (CBE Minimum Pass Rate) requirements; only CBX "takers" are included, i.e., applicants who	While it is possible with the lowered (1390) cut score for an applicant to miss up to three question sessions and still pass the exam, the

complete the exam; so as not to allocate to a law school an applicant who starts the exam, but does not finish the examination. See Guideline 1.4(B): “Following the release of results from an examination, lists containing the names of all applicants who took the examination (defined as “takers”), whether they passed the examination, and whether it was the first time they took the examination, are provided to the law schools to which the applicants have been allocated.” Without meeting a set Minimum Pass Rate (MPR) law schools may lose their accreditation with the Committee of Bar Examiners.	current definition of “taker” would preclude the applicant’s exam from being graded.
First-time applicants who do not complete the exam are not considered to have taken the exam; therefore, they retain the status of first-time CBX takers when they sit for a future exam and complete it.	Applicants who miss an exam session are considered “partial” applicants and not “takers”; partial applicants do not have their answers returned to them after results are released.

### **REVISED “TAKER” POLICY**

<b>Pros</b>	<b>Cons</b>
Provides an opportunity to pass the exam for applicants who may have had a technical problem that caused them to miss an exam session.	Impacts a law school’s ABA or MPR (CBE Minimum Pass Rate) requirements; only CBX “takers” are included, which under the revised definition includes applicants who do not complete the exam; so as to allocate to a law school an applicant who starts the exam, but does not finish the examination, most of whom end up failing the exam. See Guideline 1.4(B): “Following the release of results from an examination, lists containing the names of all applicants who took the examination (defined as “takers”), whether they passed the examination, and whether it was the first time they took the examination, are provided to the law schools to which the applicants have been allocated.” Without meeting a set Minimum Pass Rate (MPR) law schools may



	lose their accreditation with the Committee of Bar Examiners.
Applicants previously considered “partial” applicants will have their answers returned to them after results are released if they are unsuccessful on the exam.	The policy is revised to potentially benefit a relatively very small number of applicants.
	The rule would have to apply to all applicants who miss a portion of the exam, regardless of reason – technical problem, overslept, did not prepare for the question presented, wants to take the extra time to study on the day of the exam, etc. This would effectively allow applicants to create their own bar exam experience and not take exam questions required of other applicants.
	Time it takes to grade the exam is longer and more costly because of additional time and expense needed to grade the answers from partial applicants, which are not graded under the current “taker” policy.

After considering all of this information, the Committee may want to either reconsider and change, or keep as is, its current policy regarding how “takers” are defined for purposes of both grading of the exams and the reporting of statistics from the exams.

## **FISCAL/PERSONNEL IMPACT**

None

## **AMENDMENTS TO RULES OF THE STATE BAR**

None

## **AMENDMENTS TO BOARD OF TRUSTEES POLICY MANUAL**

None

## **STRATEGIC PLAN GOALS & OBJECTIVES**

Goal: None - Core business operations

## **RECOMMENDATION**

Pending

## **PROPOSED MOTION**

Pending

## **ATTACHMENT LIST**

- A.** Guidelines for Allocation of Applicants, Production of Examination Statistics and Law School Lists (adopted February 2018)

## **ATTACHMENT A**

### **GUIDELINES FOR ALLOCATION OF APPLICANTS, PRODUCTION OF EXAMINATION STATISTICS AND LAW SCHOOL LISTS**

The Committee of Bar Examiners publishes statistics following the release of results for each examination it administers. The General Statistics published on the State Bar of California's website contains general categories of applicants as may be determined by the Committee, which includes law school categories and other groups that have at least 11 first-time applicants or repeater applicants. The General Statistics reflect the examination results of those who have taken the examination ("takers"). No statistics are published for categories with fewer than 11 applicants.

#### **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.

#### **1.2 First-Year Law Students' Examination (FYLSX)**

- (A) Applicants qualifying to take the FYLSX are allocated to the school they most recently attended at the time they apply for the FYLSX. If an applicant is not currently attending law school, the applicant is allocated to the law school most recently attended.
- (B) The allocation of an applicant remains in effect until the applicant passes the examination or transfers to another school. Applicants who transfer to different

law schools are allocated to the new schools for subsequent examination administrations. A school that enrolls the student for credit assumes the allocation of that student until the student passes the FYLSX or enrolls in another school.

- (C) Applicants who are disqualified or who are special students attending an ABA-approved or California-accredited law school are allocated to the school from which they earned their first year of law study. In the published statistics, they are identified as having been disqualified or as special students.

### 1.3 California Bar Examination (CBX)

- (A) Applicants qualifying to take the General Bar Examination (GBX) are allocated to the school from which they graduated.
- (B) Applicants qualifying to take the GBX through accumulation of law study credit over the course of four years as determined by the Committee are allocated to: "4-Year Qualification."
- (C) Applicants qualifying to take the GBX through completion of the Law Office/Judges' Chambers study program are allocated to: "Law Office/Judges' Chambers."
- (D) Foreign-education applicants who qualify to take the GBX by completing an additional year of study at an ABA-approved law school or a California-accredited law school are allocated to: "Foreign Educated/JD Equivalent + One Year US Education."
- (E) Attorney applicants admitted in other jurisdictions within the United States, etc. are allocated to: "US Attorneys Taking the General Bar Exam."
- (F) Attorney applicants admitted in foreign jurisdictions are allocated to: "Foreign Attorneys Taking the General Bar Exam."
- (G) Applicants taking the GBX who attended law schools no longer in operation are allocated to: "Schools No Longer in Operation."

### 1.4 Law School Lists and Reports

- (A) The month following the administration of each examination, law schools with students or graduates allocated to their law schools are sent a list of applicants who tentatively have been allocated to the law school (Allocation Lists). The Allocation Lists contain the names of applicants who applied to take an examination who are allocated to a particular law school. The law schools are given two weeks to challenge any allocation. These lists are confidential.

- (B) On the Monday following the release of results from an examination, lists containing the names of all applicants who took the examination (defined as “takers”), whether they passed the examination, and whether it was the first time they took the examination, are provided to the law schools to which the applicants have been allocated. The law school has the opportunity to challenge any allocation within a two week period following the distribution of the lists. These lists are confidential.
- (C) Approximately four to six weeks following the release of results from the CBX, law school reports are generated for California law schools. These reports provide information relative to schools’ graduates and how they performed on different parts of the examination. The data relating to applicants who were takers is used in the production of these reports. These reports are not confidential.