

October 25, 2023

Board of Trustees
The State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: Proposal for a Portfolio Bar Examination

Dear Trustees of the State Bar of California:

California Lawyers Association (CLA) submits these comments in response to the recommendation to adopt a Portfolio Bar Examination (PBE) as an alternative pathway to licensure to practice law in California.

1. Background

CLA has evaluated several different proposals from the State Bar to adopt an alternative pathway to licensure. Although we have encouraged continued exploration of potential revisions to the California Bar Exam, we have consistently expressed concerns with proposals that would completely eliminate the requirement to take and pass the bar exam. Thus, in 2020 and again in 2022 we noted our opposition to proposals to create a pathway to licensure for provisional licensees that would not have ultimately required passage of the bar exam. We also submitted comments in connection with the work of the Blue Ribbon Commission on the Future of the Bar Exam (BRC), when that work was ongoing, and in response to the BRC's final Report and Recommendations, again opposing a pathway to licensure that would not have required passage of the bar exam.

We also note that the BRC considered several different possibilities for an alternative pathway to licensure. After extensive discussion, the BRC reached no consensus on a bar exam alternative pathway and none of the five separate motions voted on was able to garner a majority of commissioners present and voting. Therefore, the BRC did not advance any recommendation regarding a bar exam alternative. CLA endorsed the determination to not advance any recommendation regarding an alternative pathway that did not include a bar exam.

Following consideration of the BRC's final Report and Recommendations, the Board of Trustees directed staff to ask former BRC members who *supported* a bar exam alternative to develop a proposal for this pathway. The Alternative Pathway Working Group was then created and has now released a Report to the Board of Trustees of the

State Bar of California: Proposal for a Portfolio Bar Examination (Report). Although the PBE includes the term “bar examination” it mirrors proposals that the BRC did *not* advance as a recommendation as it would be an *alternative* to the two-day bar exam. Thus, we remain concerned because the proposed PBE would eliminate objective and uniform testing, raises significant implementation and integrity concerns, and may have an adverse impact on efforts to increase diversity in the legal profession.

2. The Proposed Portfolio Bar Examination Would Eliminate Objective and Uniform Testing

We recognize that the current California Bar Exam is not a perfect method of measuring the qualities, training, and capabilities necessary to ensure that an individual is competent to practice law in this state. The bar exam does, however, contain an objective component and is standardized. For any given bar exam, the same test is provided to all test takers at the same time. The PBE would have no objective component (aside from the Multistate Professional Responsibility Exam, which does not test knowledge of specific subject matter areas of the law) and would not be uniform. Moreover, it would be an optional licensing path that candidates may choose instead of the two-day bar exam, further undermining any notion of uniformity by creating two distinct pathways to the identical license.

With respect to knowledge of subject areas, the Report states:

Practice Areas. We would not limit the type of practices in which candidates work. As noted above, *practice in any legal field inevitably draws upon doctrinal knowledge from multiple areas*. Candidates will be required to document that breadth in their portfolios (point 9 below). We also note that a candidate’s ability to become competent in a particular practice area is a strong signal that the candidate will develop that competency in other practice areas. Entering a new practice area requires a learning curve for any lawyer, but the best predictor of that lawyer’s success is not their existing doctrinal knowledge of the new area, but the strength of their lawyering skills and their success in learning the doctrinal knowledge of other areas.

(Report, at p. 34-35, emphasis added.)

Under “Demonstrations of doctrinal breadth” the Report states:

The professional responsibility essays, other written work, and cover sheets must demonstrate that the candidate has *drawn upon knowledge*

from at least seven of the doctrinal subjects that the BRC recommended including on the two-day bar exam.

(Report, at p. 36, emphasis added.)

Drawing upon doctrinal knowledge from multiple areas differs significantly from being tested on that doctrinal knowledge. We believe consumers of legal services will not be adequately protected if there is no requirement that a person seeking to be licensed to practice law in California demonstrate a basic working knowledge of key legal principles and concepts under some objectively measurable and uniform standard.

3. The Proposed Portfolio Bar Examination Raises Significant Implementation and Integrity Concerns

CLA remains concerned about the ability to implement and maintain the integrity of a pathway to licensure that would not require passage of the California Bar Exam. The Report addresses important issues, such as qualifications, responsibilities, and training of supervisors under the PBE, but our concerns are not alleviated.

The Report recommends using the same supervisor qualifications and responsibilities that California adopted for the Provisional Licensure Program. But the Provisional Licensure Program was launched in response to the challenges facing law students due to the COVID-19 pandemic as a *temporary* program given the extraordinary circumstances. More importantly, that program was never a pathway to permanent licensure and always required participants to eventually take and pass the California Bar Exam, whether under the Original Program or under the Pathway Program (where those who scored between 1390 and 1439 on a California Bar Exam administered between July 2015 and February 2020 were not required to take another bar exam, based on what had become the permanently lowered passing score after they took the bar exam). Ultimately, post-graduation, supervised practice may be a desirable component as an adjunct to the bar exam but supervised practice takes on a much greater significance if passing the bar exam would not be required at all.

The proposed grading of the portfolios raises additional concerns. We acknowledge, as the Report notes, that California already maintains a system that supports grading of more than 60,000 essays and performance tests each year. The Report suggests that “the State Bar establish a parallel system for grading portfolios, with training and monitoring focused on portfolio components as well as the performance of graders who apply the rubrics to candidates’ work product.” (Report, at p. 39.)

The portfolio under the PBE would fundamentally differ from the essays and performance tests that are currently part of the California Bar Exam. All applicants who

sit for a bar exam administered on a given date are tested on the same set of essay and performance test questions in a controlled environment and scores are then scaled. In marked contrast, under the PBE, although there would be overarching portfolio requirements, the specific work product in each portfolio would be unique, resulting in lack of uniformity in the substance of the various portfolios that form the basis of the grading.

Another significant difference is that the content of the PBE portfolio submission may not be that of the applicant alone. As the Report states:

The components included in a PBE portfolio may reflect some input from colleagues, written sources, and electronic resources, but the candidate should be the one who identifies that input, assesses its value, and synthesizes it into a final product.

We recommend achieving the latter goal as follows: First, in addition to providing information about the research supporting each piece of written work, candidates should provide information about whether they used a document template as a foundation for the work; the extent to which they received input from other lawyers; and the extent to which they relied upon artificial intelligence. If their writing derives from a template, they should provide that template along with a version showing their customization. Candidates who intentionally misrepresent any of these matters would be subject to dismissal from the PBE and would face challenges in establishing their good moral character if they subsequently pass the two-day exam.

Second, the supervisor should attest that, after reviewing the writing and assistance noted by the candidate, they believe that the work product sufficiently reflects the knowledge, research, analysis, and writing of the candidate that an examiner can meaningfully assess the candidate's competence from the writing. Examiners will be able to glean much of this information from information provided by the candidate, but the supervisor's attestation will provide additional assurance. Supervisors who intentionally misrepresent a candidate's contributions to work product would be subject to discipline by the State Bar.

(Report, at p. 38.)

Although we are not suggesting intentional misrepresentation by candidates or supervisors, we believe it will be difficult at best to achieve uniform and full compliance with some of these recommendations and for the State Bar to monitor and ensure

compliance. As two examples, we anticipate widespread differences in how candidates would report “the extent to which they received input from other lawyers” and how supervisors would attest that they “believe that the work product sufficiently reflects the knowledge, research, analysis, and writing of the candidate that an examiner can meaningfully assess the candidate’s competence from the writing.”

Ultimately, effective monitoring and quality control of the various components of the proposed PBE will be time-consuming, labor intensive, costly, and potentially unequal. We question whether sufficient resources would be available to adequately ensure that individuals licensed to practice through the PBE are competent to practice law in this state.

4. The Proposed Portfolio Bar Exam May Have an Adverse Impact on Efforts to Increase Diversity in the Legal Profession

As the Report notes, some members of the Council on Access and Fairness (COAF) and the Committee of Bar Examiners (CBE) have expressed concern that candidates from traditionally disadvantaged groups would have trouble finding supervisors. (Report, at p. 22.) In Response, the Report states that data from the State Bar Survey suggests just the opposite, pointing to experience with the Provisional Licensure Program (*Id.*)

CLA shares the concerns expressed by some members of COAF and the CBE. Although it is not possible to predict the outcome of the proposed PBE with certainty, we believe reliance on data based on experience with the Provisional Licensure Program is of limited utility. That is a short-term program affecting a relatively small group of attorney candidates. Given potential scaling of the PBE to include all eligible graduates of law schools located in California and possible expansion to graduates from out-of-state schools, the sheer number of participants would be much greater, which would have an impact on the available opportunities to secure a supervisor.

As a rough benchmark, over the past several years about 5,000 applicants have been first-time takers of the July bar exam. Although the PBE would be an optional licensing path that not all applicants would choose, we think it is reasonable to assume that the PBE will be a much more popular choice than the two-day bar exam.

Given the number of applicants every year, we anticipate a potential gap between the demand for supervisors and the available opportunities to secure a supervisor. The demographics of the pool of available supervisors may skew toward those who are currently the most represented in the legal profession and against those who are the least represented. Some may easily secure a colleague or have ready access to a supervisor while others may be far removed from any such possibilities. Equity issues

related to securing a supervisor could therefore create a two-tiered system, undermining efforts to increase diversity in the profession.

Rather than eliminating the requirement to take the bar exam by creating an alternative pathway to licensure, CLA strongly endorses the recommendation of the BRC that, if the Supreme Court adopts the BRC's recommendation to develop a California-specific exam, the design of the bar exam be consistent with the guiding principles adopted by the BRC, including crafting an exam that is fair, equitable, and minimizes disparate performance impacts based on race, gender, ethnicity, disability or other immutable characteristics.


We also strongly encourage pursuit of other efforts aimed at minimizing disparate impact of the two-day bar exam. Several such efforts are noted in the State Bar's [*Diversity, Equity, and Inclusion Plan: 2023–2024 Biennial Report to the Legislature*](#):

- Continuing the [Mindsets in Legal Education Program](#), also known as the California Bar Exam Strategies and Stories Program, which has proven to increase California Bar Exam scores for people of color and first-generation college students.
- Minimizing potential bias in bar exam question development and grading.
- Providing implicit bias training for bar exam graders.
- Analyzing grader performance to ensure fairness and equity in the scoring process.

The impact of bar exam reformation and other efforts should be studied before California introduces an entirely new process that would eliminate the requirement to take the California Bar Exam.

We appreciate your consideration of our comments.

Sincerely,

A handwritten signature in blue ink that reads "Betty J. Williams". The signature is written in a cursive, flowing style.

Betty J. Williams
President