

September 23, 2019

Via Hand Delivery

Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Re: Adverse Effects of the California Bar Exam Cut Score

Dear Chief Justice Cantil-Sakauye and Justices of the Supreme Court of California:

We, the undersigned, are bar associations and legal organizations that believe the State should have a fair admissions system for aspiring lawyers. We understand that the State, in part because of concern about the declining bar passage rate, is currently conducting a review of the bar exam pass line (or “cut score”) and the test’s overall content. For over 30 years, California has maintained a bar cut score of 144, which exceeds the national median cut score by nine points. For the reasons below, we believe that a reevaluation of our current admissions system for law practice is warranted and urge the Court to align California’s bar cut score with national standards while it identifies a less discriminatory alternative that effectively assesses minimal competency.

As members of the bar, we share an interest in protecting the public and believe that the Bar Exam should serve the valuable purpose of ensuring that lawyers have the knowledge, skills, and abilities needed to practice law. However, the inexplicably high cut score for California’s Bar Exam does not serve that purpose. First, scholars, practitioners, and bar associations have long critiqued bar exams in their current form for focusing on rote memorization, not practical lawyering skills.¹ Second, the State’s cut score is the second highest in the nation, exceeded only by Delaware, and is significantly higher than the cut scores of states that have legal practices comparable to ours, such as New York and Texas. We do not believe that there is sufficient basis to conclude that law practice in California warrants a higher cut score than New York (133) or the national median (135), particularly given the legitimate critiques of whether the Bar Exam in its current form actually measures competency in today’s legal practice.

¹ See, e.g., Curcio et al., *How to Build a Better Bar Exam* (2018) N.Y. St. B. Ass’n J. 37, 38 (describing critiques that “the bar exam is not a valid measure of new lawyers’ competence because it fails to test the wide array of skills lawyers need; the multiple-choice questions assess legal knowledge and analysis in an artificial and unrealistic context, and the closed-book format rewards the ability to memorize thousands of legal rules, a skill unrelated to law practice”); Professor Deborah Jones Merritt, letter to Hon. Tani G. Cantil-Sakauye and Associate Justices, Docket No. S244281: In re California Bar Exam, Oct. 1, 2017 (noting that the bar exam has never been validated, which “means that no job analysis or other scientific study links the exam’s content to the skills and knowledge needed by new attorneys”); see also Bleich, *We must set a reasonable standard for passing the bar*, Daily J. (Aug. 7, 2019) <<https://www.dailyjournal.com/articles/353764-we-must-set-a-reasonable-standard-for-passing-the-bar>> (noting that the bar exam focuses on memorization and critical reasoning yet overlooks “other essential real-world lawyering capabilities and traits . . . [such as] capacity for persuasion, sound judgment, the ability to negotiate, or to be a team player”).

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We are also concerned by the data on bar passage rates in California by race and ethnicity. Over the last eleven July administrations of the exam, white test-takers' average pass rate was 33.95% higher than black test-takers; 18.91% higher than Hispanic test-takers; and 10.65% higher than Asian test-takers.² This gap is not new. The State Bar first identified the racial disparity in bar passage rates over thirty years ago, when a study found that Asian, Latino, and black test-takers passed the 1985 and 1986 exam administrations at rates 10 to 33 percentage points below white test-takers.³ Given California's longstanding public policy against discrimination in employment and professional licensing, these statistics are troubling and warrant a re-examination of the cut score.

The disproportionately low passage rates for test-takers of color negatively affects the bar's ability to meet the legal needs of our state's diverse population. California is a leader in promoting and celebrating diverse workforces, yet our legal profession fails to reflect the racial diversity of our state. Today, fewer than four in ten residents are white, yet California's legal community remains overwhelmingly white. Using the State Bar's own statistics, a minor adjustment of the cut score to align with national standards would significantly increase the admission of qualified lawyers of color.⁴

Attorneys are desperately needed to address the legal needs of California residents. Corporate clients have loudly called for greater diversity in the legal profession.⁵ In addition, the California Commission on Access to Justice has classified much of California as an "attorney desert," where residents are unable to obtain legal assistance within their own communities.⁶ Outside of urban centers, most regions and counties contain fewer than one attorney per square

² The pass rates presented here were calculated from publicly available information. See State Bar of Cal., *California Bar Exam Statistics* (2019) <<http://www.calbar.ca.gov/Admissions/Law-School-Regulation/Exam-Statistics>> (as of July 11, 2019). Notably, there is no publicly available data on pass rates for Native American test-takers, even though the state is home to the largest population of Native Americans in the country and 109 federally recognized tribes. Cal. Courts, *California Tribal Communities* <<https://www.courts.ca.gov/3066.htm>> (as of Sept. 5, 2019).

³ Klein & Bolus, *Comparisons of Eventual Passing Rates in the 1985 and 1986 Cohorts* (Oct. 30, 1988) p. 3 <http://www.seaphe.org/pdf/past-bar-research/Comparisons_of_Eventual_Passing_Rates_in_the_1985_and_1986_Cohorts.pdf>. The study also found that "[l]owering the score required for passing would increase the *passing rate* in all groups, but this increase would be greater for minority groups than for Whites." *Id.* at p. 8 (emphasis in original).

⁴ For example, if the cut score had been adjusted to the national median of 135 for the July 2016 exam, more than double the number of black test-takers would have passed, in addition to almost 75% more Latino test-takers and almost 58% more Asian test-takers. State Bar of Cal., *Report to the Supreme Court of the State of California: Final Report on the 2017 California Bar Exam Standard Setting Study* (July 28, 2017) *append. I*, at p. 11, <<https://www.calbar.ca.gov/Portals/0/documents/communications/CA-State-Bar-Bar-Exam09122017.pdf>> (hereafter *State Bar Report*).

⁵ Daniel S. Wittenberg, ABA, *Corporate Clients Demand More Diversity from Law Firms* (June 20, 2017), <<https://www.americanbar.org/groups/litigation/publications/litigation-news/business-litigation/corporate-clients-demand-more-diversity-law-firms/>> (as of Aug. 14, 2019).

⁶ See Cal. Comm'n on Access to Justice, *California's Attorney Deserts: Access to Justice Implications of the Rural Lawyer Shortage* (July 2019) p. 1 <<http://www.calbar.ca.gov/Portals/0/documents/accessJustice/Attorney-Desert-Policy-Brief.pdf>> ("Massive parts of rural California are attorney deserts, where residents must drive many miles to reach an attorney who can represent them.").

mile and those attorneys may not be representing or accepting individual clients.⁷ Lack of access to legal assistance corresponds with high rates of poverty; additional legal resources would increase access to other beneficial resources, such as greater housing stability and public benefits.⁸ As the Commission concluded, aligning the California cut score with national standards would likely have a positive effect on the availability of attorneys in underserved communities.⁹

At a time where corporations are demanding more diversity from law firms and there is a shortage of legal help in underserved and minority communities, California should be doing all it can to eliminate arbitrary barriers to the admission of qualified attorneys of color.

Sincerely,

Bar Associations

California Asian Pacific American Bar Association

California Association of Black Lawyers

California Indian Law Association

California La Raza Lawyers Association

Asian American Bar Association of the Greater Bay Area

Bar Association of San Francisco

Bay Area Lawyers for Individual Freedom

Charles Houston Bar Association

East Bay La Raza Lawyers Association

Filipino Bar Association of Northern California

National Lawyers Guild – San Diego Chapter

Santa Clara County La Raza Lawyers Association

South Asian Bar Association of Northern California

⁷ *Id.* at pp. 2, 9.

⁸ *Id.* at pp. 7-8.

⁹ *See id.* at p. 12 (“A higher pass rate would likely bolster the number of rural practitioners, while also presumably resulting in a more diverse profession. This prospect is supported by the fact that many graduates of Cal-accredited schools, especially those located in rural areas, tend to stay and practice in those locales.”); see also State Bar Report, *supra*, at pp. 39-40 (citing studies that attorneys of color are more likely to practice in public interest and public service law and concluding that “the issue of diversity appears to be linked to the issue of access”); Erwin Chemerinsky, Dean of the University of California, Irvine, School of Law et al., letter to Supreme Court of California, The California Bar Exam, Feb. 1, 2017, p. 2 (suggesting that the high cut score is related to a shortage of attorneys in underserved geographic areas who serve lower- and middle-class Californians).

Legal Organizations

Asian Americans Advancing Justice – Asian Law Caucus
Asian Americans Advancing Justice – Los Angeles
Bay Area Legal Aid
Bet Tzedek
California Rural Legal Assistance, Inc.
Central California Legal Services
Centro Legal de la Raza
Community Legal Services in East Palo Alto
CRLA Foundation
Disability Rights Education & Defense Fund
East Bay Community Law Center
Elder Law & Advocacy
Equal Justice Society
Equal Rights Advocates
Esperanza Immigrant Rights Project, CCLA Inc.
Homeless Action Center
Justice in Aging
Law Foundation of Silicon Valley
Lawyers’ Committee for Civil Rights of the San Francisco Bay Area
Legal Aid Association of California
Legal Aid at Work
Legal Aid Foundation of Los Angeles
Legal Aid of Marin
Legal Services of Northern California
Mental Health Advocacy Services
Oasis Legal Services
Public Advocates Inc.
Public Counsel
Public Interest Law Project

Root & Rebound

San Diego Volunteer Lawyer Program, Inc.

Western Center on Law & Poverty