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State Bar of California, Board of Trustees

Public Comment by the Consumer Protection Policy Center Concerning the Proposal for a Portfolio Bar Examination

By Marcus Friedman, Administrative Director,
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On behalf of the Consumer Protection Policy Center (CPPC) at the University of San Diego School of Law, I am pleased to submit the following memorandum to the Committee of Bar Examiners and the Board of Trustees of the State Bar of California regarding the following solution to the California Bar Exam. CPPC urges the State Bar of California and the Supreme Court of California to consider an alternative pathway to licensure for applicants affected by the February and upcoming July bar exams.

CPPC Expertise in State Bar Matters

CPPC is a nonprofit, nonpartisan academic and advocacy center based at the University of San Diego School of Law. Since 1980, CPPC has examined and critiqued California's regulatory agencies, including the State Bar of California. CPPC attorneys and student interns have attended the Bar's meetings and followed its activities for over 40 years. From 1987 to 1992, our Executive Director, Professor Robert Fellmeth, served as the State Bar Discipline Monitor (under now-repealed Business and Professions Code section 6086.9), under appointment by then-Attorney General John Van de Kamp, with CPPC (then named Center for Public Interest Law (CPIL)) serving as the Monitor's staff. The State Bar Discipline Monitor position was created by the Legislature and — over the course of almost five years — CPPC wrote eleven reports on the operation of the State Bar's discipline system, reporting to the Judiciary Committees and to the Chief Justice of the California Supreme Court. We worked with Senator Robert Presley and a succession of State Bar Presidents to fashion some 40 reforms of the system, including the passage of Senate Bill 1498 (Presley), 1988 legislation creating the current independent State Bar Court. We participated actively in the proceedings and deliberations of the 2010 Governance in the Public Interest Task Force, whose work culminated in the Legislature's passage of SB 163 (Evans) (Chapter 417, Statutes of 2011), as well as the 2016 and 2017 Governance in the Public Interest Task Force, the recommendations of which are still being implemented today. Our work and research prompted further reforms contained in SB 387 (Jackson) (Chapter 537, Statutes of 2015), and is further reflected in SB 36 (Jackson) (Chapter 422, Statutes of 2017). We are well aware the Bar is part of the judicial branch under the aegis of the California Supreme Court. And we are similarly familiar with all executive branch agencies that license and regulate other professions and trades in California.

Reasons Why The Supreme Court of California Declined to Adopt the PBE and CPPC Resolutions

On October 10, 2024, the Supreme Court of California declined to adopt the PBE due to conflicts of current law, validity of applicants' competency, and unreliability to consistently gauge competence among applicants.

First, the Court stated the PBE is barred from current law because only the general bar examination is permitted under Business and Professions Code section 6060(g) and Cal. Rules of Court 9.3(a). Further, current law does not discriminate based on an applicant's manner or school in which they acquire their legal education.

These current law concerns can be addressed via emergency legislation, which CPPC has drafted on behalf of the State Bar and the Court. First, a subsection would be added to Business and Professions Code section 6060(g) to allow licensure by the PBE up until July 1, 2027. Second, new sections 6060.4 and 6060.41 can be added to the code to provide authority for the State Bar to administer the PBE and prevent discrimination based upon the manner or school in which they acquire their legal education (*see* Attachment 1). Lastly, section 6062(a)(3)(A) can be added to the code to authorize applicants that are licensed in other states to complete the PBE as well for licensure.

Second, the Court emphasized an array of ethical and practical problems due to fairness, validity, and reliability when measuring an applicant's competence. The Court argues that applicants that are placed with higher skilled or more dedicated supervisors may be better positioned to provide better portfolios, and there are few safeguards against portfolio items based on templates written by someone other than the applicant. Further, the Court argues the grading committee may have difficulty assessing an applicant's issue-spotting since a portfolio may contain missing information from real-world scenarios unknown to the committee or biased supervisors that experience an ethical dilemma due to high stakes and high privacy concerns of the client. Lastly, the Court argues an unreliable measure of an applicant's competency as supervisors have an ethical duty to turn an applicant's work into a suitable work product for actual clients, thus the grading committee would be unable to assess the applicant's true work product before the supervisor's corrections.

These are valid concerns for any professional licensing assessment, but can be addressed to ensure an accurate review of minimum competency. First, the Rules of Professional Conduct may be amended to provide ethical guidance for supervising attorneys to ensure any change in a PBE applicant's work product is not changed by the supervisor before submission. This will ensure a supervisor is responsible for checking an applicant's work product before submission and avoid ethical concerns about submitting work product that is not completed by anyone other than the applicant. Second, the grading committee can establish separate methods of grading based on identifiable practice areas with experts in those areas, such as litigation, agency, and transactional practices. Different requirements based on unique practice areas can help ensure minimum competency for each applicant. Since there are different identifiable practice areas, a limited license to practice law in these areas based on the applicant's work product is feasible. For example, an applicant can show proficiency in litigation and agency work and thus receive a limited license to practice law in those specific areas, but would need to show minimum competency in transactional work to be able to practice in that area of law, or pass the standard Bar examination.

While the above helps avoid the issues of fairness, validity, and reliability, CPPC is aware not all issues can be addressed. However, this does not mean that the PBE is not a suitable way to measure minimum competency and receive a license (even a limited license) to practice law. There may be no way to ensure an applicant has the same fairness in a competent supervising attorney as other applicants, but that should not mean that this pathway to licensure should be unavailable to all potential attorneys. Even under a less competent supervisor, an applicant should be able to provide suitable work product for the grading committee to determine minimum competency. Similar to the disadvantages to the traditional Bar exam (such as an applicant's ability to study full-time for the exam or have an advantageous environment over other applicants), there will be natural disadvantages for some applicants. With this in mind, CPPC urges the State Bar and Supreme Court of California to view this pathway for licensure as a whole compared to traditional bar examinations and conclude a PBE pathway is just as capable of measuring minimum competency for future lawyers.

Further, as a policy argument, applicants that can prioritize real-world attorney work and be compensated via the supervising attorney is more beneficial to an applicant's quality of life than studying full-time for the traditional bar exam. While this avenue is not available to all potential applicants, it will alleviate the burden for those applicants that can begin attorney work and help sustain their current lives in the process. The traditional bar examination will always be available for applicants that are unable to qualify for the PBE program.

<u>Improvements to the Previous PBE Program</u>

The PBE pilot program, as previously proposed, would establish a PBE Committee of experts to decide the format of the PBE. According to the report from the Alternative Pathway Working Group (report) dated September 21, 2023, this committee's goal is to offer "valid, reliable, and fair assessments of candidates." *Id.* at p. 2. The PBE Committee is responsible for the portfolio requirements. The committee was given a working blueprint to estimate the range for each component item. The working blueprint of the portfolio contents is as follows:

1) 2–3 essays analyzing issues of professional responsibility, professionalism, or civility that have arisen in the candidate's practice, with citations to appropriate sources.

2) 6–10 other pieces of written work produced by the candidate that reflects the candidate's analysis of a variety of substantive legal matters.

3) Structured cover sheets providing context for each piece of written work and describing the research that the candidate undertook to produce the work.

4) Demonstrations of doctrinal breadth.

5) Materials assessing two negotiations. (The PBE rules would allow negotiations to occur in any context, including litigation, transactional, regulatory, or other matters. The rules would also make clear that these negotiations need not focus on final resolution of an entire substantive matter; they may focus on preliminary or interim matters.)

6) Materials assessing two client encounters. ("client" to be defined broadly; allow prosecutors to use interviews with complaining witnesses to satisfy this requirement).

7) Timesheets documenting the candidate's hours.

Id. at pp. 35–37. The report states candidates would obtain provisional licenses to construct the portfolios and work under the supervision of a licensed California lawyer for four to six months.

The PBE Committee would develop a rubric suggested by the research of Dr. Anderson and Dr. Buckendahl. The report's recommendations include: [1] a group of subject matter experts (legal educators (likely professors who teach legal writing, client counseling, negotiation, and/or clinics), entry-level practitioners, and supervisors of entry-level practitioners) would work with a psychometrician to develop rubrics for each of the portfolio components; [2] a group of graders (individuals who will use the rubric to score portfolio components) would individually score a small set of sample components; and [3] continuation of the process until the scores reach a sufficient level of reliability (during which, the rubric designers and graders will obtain information about the best way to train graders for consistency). *Id.* at pp. 38–39.

Once a rubric is finalized, a group of experts, under the initial recommendations of the PBE Committee, would determine a cut score for candidate portfolios. A policy body would determine the cut score rather than the graders. Independent examiners would anonymously grade candidate portfolios. Based on input from Dr. Anderson and Dr. Buckendahl, the report recommends the following process to train portfolio graders: [1] graders would apply the scoring rubric to samples, developing consistent interpretation and application of the rubric during training and collaboration; [2] embedded performances with known scores would be used to evaluate the reliability of the scores, graders, and resultant decisions; and [3] embedded performance data could be used to remediate or improve grading accuracy and consistency of the score and decision. *Id.* at p. 39.

CPPC believes this is a well-thought-out system for the PBE pilot program. However, certain variables should be considered to ensure proper methods to assess a candidate's minimum competence to practice law. As demonstrated in the State Bar Survey within the report, entry-level lawyers routinely draw upon different knowledge areas depending on their practice area. Some legal professions require different "minimum competency" for entry-level lawyers depending upon the specific legal practice. For instance, the survey revealed an average of 5.5 doctrinal areas are relied upon for entry-level lawyers. *Id*. at p. 11. Further, 25.5% of those surveyed stated they relied upon eight or more subjects. In contrast, others listed their general practice area ("employment law") without any listed doctrinal subjects used in that legal practice. *Id*. However, the scholars concluded that all the entry-level lawyers relied upon at least four subject areas in their practice area. *Id*. Thus, what may be important for one type of legal practice to determine minimum competency can drastically differ from another. If there is only one rubric to evaluate a candidate's portfolio based on the candidate's legal practice, it can place certain candidates at a distinct disadvantage when evaluated under the uniform rubrics.

Further, some legal practices take an inherently longer period to develop the required portfolio content that must be submitted to the PBE. A candidate who is supervised in litigation may have multiple options of negotiation examples to submit to the PBE compared to a candidate supervised in transactional or policy advocacy matters. Similar to the above, this discrepancy in legal professions puts certain candidates at a disadvantage when constrained by the four to six-week supervision period.

RECOMMENDATIONS:

In light of the comments and observations above, CPPC recommends the following:

1) ***Work with the Legislature and Governor to ensure emergency legislation can be enacted and give the State Bar authority to use the Portfolio Bar Examination.*** This will alleviate the issues with current law that prevents applicants from receiving a license outside the traditional bar examination.

2) ***Provide new Rules of Professional Conduct to ensure supervising attorneys do not influence an applicant's work product.*** Changes to the rules will give authority to the State Bar to monitor a supervisor's conduct and ensure the supervisor does not unethically influence the applicant's work product. This will also provide guidance to a supervisor throughout the duration of the PBE process and provide fairness and validity between applicants.

3) ***Enlist legal experts in the various legal practice areas to provide alternative rubrics to ensure candidates meet the minimum competency requirements to practice in the designated supervised practice area.*** This will ensure a fair grading structure for each candidate when evaluated to be a licensed attorney. As the State Bar is aware from the State Bar Survey referenced on page 11 of the report, various knowledge areas are

necessary depending on the practice area. While some practice areas rely upon eight or more legal knowledge areas (25.5% percent reported as such), other areas may require more or less legal knowledge. *Id.* Ignoring the different minimum competency requirements per legal practice area disadvantages candidates based on the supervised legal practice area. Creating different rubric standards based upon specific practice areas will ensure fair evaluation of candidates based on the chosen supervised practice area.

4) ***Allow candidates to submit portfolios on a quarterly-annual basis over the course of three years*** to allow candidates in various legal professions to build substantial work product before PBE submission. While this may create a longer period of supervised time, there is a clear difference in the amount of work product created based on the practice area. By allowing candidates to collect work product over a longer period, candidates will gain more experience under supervision before licensure and compile a more comprehensive portfolio to prove minimum competency before PBE evaluation. This will further balance any differences in practice areas to ensure a fair evaluation of an individual candidate.

CONCLUSION

CPPC favors the State Bar's efforts to implement an alternative to the two-day bar exam. The State Bar is faced with many challenges, such as administering a traditional bar examination with current implementation issues and agency budget concerns. We believe this initiative provides well-qualified candidates an opportunity to acquire licensure and will, in turn, provide expanded access to legal services for the disenfranchised public. CPPC strongly urges the State Bar and the Supreme Court of California to consider the recommendations above to ensure well-qualified candidates have a fair pathway to licensure based upon the varying different legal practice areas available.

Sincerely,

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From: Marcus Friedman, Administrative Director of the Consumer Protection Policy Center

Date: March 28, 2025

RE: Alternative Pathway to Liscensure: State Bar of California

BUSINESS AND PROFESSIONS CODE - BPC

DIVISION 3. PROFESSIONS AND VOCATIONS GENERALLY [5000 - 9998.11]

(Heading of Division 3 added by Stats. 1939, Ch. 30.)

CHAPTER 4. Attorneys [6000 - 6243]

(Chapter 4 added by Stats. 1939, Ch. 34.)

ARTICLE 4. Admission to the Practice of Law [6060 - 6069]

(Article 4 added by Stats. 1939, Ch. 34.)

6060.

To be certified to the Supreme Court for admission and a license to practice law, a person who has not been admitted to practice law in a sister state, United States jurisdiction, possession, territory, or dependency or in a foreign country shall:
(a) Be at least 18 years of age.
(b) (1) Be of good moral character.
(2) (A) In reviewing whether an applicant is of good moral character under this subdivision, the staff of the State Bar or the members of the examining committee shall not review or consider the person’s medical records relating to mental health, except

if the applicant seeks to use the record for either of the following purposes:
(i) To demonstrate that the applicant is of good moral character.

(ii) As a mitigating factor to explain a specific act of misconduct.

(B) The staff of the State Bar and members of the examining committee shall not request or seek to review any medical records relating to mental health, including by obtaining the consent of the applicant to disclose such records, except as requested by an applicant and for a purpose specified in subparagraph (A).

(c) Before beginning the study of law, have done either of the following:
(1) Completed at least two years of college work, which college work shall be at least one-half of the collegiate work acceptable for a bachelor’s degree granted

on the basis of a four-year period of study by a college or university approved by the examining committee.

(2) Have attained in apparent intellectual ability the equivalent of at least two years of college work by taking examinations in subject matters and achieving the scores as are prescribed by the examining committee.

(d) Have registered with the State Bar as a law student within 90 days after beginning the study of law. The State Bar, upon a showing of good cause, may permit a later registration.

(e) Have done either of the following:

(1) Had conferred upon them a juris doctor (J.D.) degree or a bachelor of laws (LL.B.) degree by a law school accredited by the examining committee or approved by the American Bar Association.

(2) Studied law diligently and in good faith for at least four years in any of the following manners:

(A) (i) In a law school that is authorized or approved to confer professional degrees and requires classroom attendance of its students for a minimum of 270 hours a year.

(ii) A person who has received their legal education in a foreign state or country where the common law of England does not constitute the basis of jurisprudence shall demonstrate to the satisfaction of the State Bar that the person's education, experience, and qualifications qualify them to take the examination.

(B) In a law office in this state and under the personal supervision of a licensee of the State Bar of California who is, and for at least the last five years continuously has been, engaged in the active practice of law. It is the duty of the supervising attorney to render any periodic reports to the State Bar as required.

(C) In the chambers and under the personal supervision of a judge of a court of record of this state. It is the duty of the supervising judge to render any periodic reports to the State Bar as required.

(D) By instruction in law from a correspondence law school authorized or approved to confer professional degrees by this state, which requires 864 hours of preparation and study per year for four years.

(E) By any combination of the methods referred to in this paragraph.

(f) Have passed any examination in professional responsibility or legal ethics as the examining committee may prescribe.

(g) Have passed the general bar examination given by the examining committee, or:

(1) have passed the portfolio bar examination given by the portfolio committee.

(h) (1) Have passed a law students' examination administered by the examining committee after completion of their first year of law study. Those who pass the examination within its first three administrations upon becoming eligible to take the examination, shall receive credit for all law studies completed to the time the examination is passed. Those who do not pass the examination within the number of administrations allowed by this subdivision, upon becoming eligible to take the examination, but who subsequently pass the examination, shall receive credit for one year of legal study only.

(2) (A) This requirement does not apply to a student who has satisfactorily completed their first year of law study at a law school accredited by the examining committee and who has completed at least two years of college work prior to matriculating in the accredited law school, nor shall this requirement apply to an applicant who has passed the bar examination of a sister state or of a country in which the common law of England constitutes the basis of jurisprudence.

(B) The law students' examination shall be administered twice a year at reasonable intervals.

(Subsection (g)(1) is set to expire on July 1, 2027)

6060.4

Neither the board, nor any committee authorized by it, shall require that applicants for admission to practice law in California pass different final portfolio bar examinations depending upon the manner or school in which they acquire their legal education.

This section does not prohibit the board, or any committee authorized by it, from establishing a different portfolio bar examination for applicants who are admitted to practice before the highest court of another state or of any jurisdiction where the common law of England constitutes the basis for jurisprudence.

(This code section is set to expire on July 1, 2027)

6060.41

(a) The board shall create a portfolio committee tasked with the creation of a temporary portfolio licensing exam.

(b) Applicants must have completed law school courses in the nine doctrinal subjects identified by the BRC as the subject matters necessary for establishing minimum competency.

(c) Applicants shall be granted provisional licenses to have authority, responsibilities, and duties similar to post-bar employment, under the proper supervision of an attorney supervisor.

(d) An attorney supervisor must hold active California licenses and not be immediate family members of candidates.

(e) Applicants must complete 700 to 1000 hours of legal work over a period of 17.5-25 weeks, with the precise number of hours to be determined by the portfolio committee.

(f) Applicants must submit work product in an amount determined by the portfolio committee. The work product shall contain issues of professional responsibility, professionalism, or civility that arose during the practice period.

(g) Portfolios will be graded anonymously by independent examiners appointed by the portfolio committee.

(h) An applicant that passes the portfolio bar exam shall be limited in a practice area similar to the work product provided. Examples of such limited areas include: litigation, transactions, ___________.

(i) An applicant that receives a limited practice license under the portfolio bar exam and wishes to practice in a separate category of practice must pass the general bar exam or complete the necessary portfolio requirements in the different practice area.

(section 6060.41 is set to expire on July 1, 2027)

6062.

(a) To be certified to the Supreme Court for admission, and a license to practice law, a person who has been admitted to practice law in a sister state, United States jurisdiction, possession, territory, or dependency the United States may hereafter acquire shall:

(1) Be of the age of at least 18 years.

(2) Be of good moral character.

(3) Have passed the general bar examination given by the examining committee. However, if that person has been an active licensee in good standing of the bar of the admitting sister state or United States jurisdiction, possession, or territory for at least four years immediately preceding the first day of the examination applied for, he or she may elect to take the Attorneys' Examination rather than the general bar examination. Attorneys admitted less than four years and attorneys admitted four years or more in another jurisdiction but who have not been active licensees in good standing of their admitting jurisdiction for at least four years immediately preceding the first day of the examination applied for must take the

general bar examination administered to general applicants not admitted as attorneys in other jurisdictions.

(A) Until July 1, 2027, a person who has been admitted to practice law in a sister state, United States jurisdiction, possession, territory, or dependency the United States may hereafter acquire, may pass the portfolio bar exam given by the portfolio committee in lieu of the general bar examination.

(4) Have passed an examination in professional responsibility or legal ethics as the examining committee may prescribe.

(b) To be certified to the Supreme Court for admission, and a license to practice law, a person who has been admitted to practice law in a jurisdiction other than in a sister state, United States jurisdiction, possession, or territory shall:

(1) Be of the age of at least 18 years.

(2) Be of good moral character.

(3) Have passed the general bar examination given by the examining committee.

(4) Have passed an examination in professional responsibility or legal ethics as the examining committee may prescribe.

(c) The amendments to this section made at the 1997–98 Regular Session of the Legislature shall be applicable on and after January 1, 1997, and do not constitute a change in, but are declaratory of, existing law.