



State Bar of California, Board of Trustees

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

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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 testimony to the Office of Admissions and the Board of Trustees of the State Bar of California regarding the Portfolio Bar Examination (PBE) proposal. While CPPC welcomes alternative pathways to licensure apart from the two-day bar exam, CPPC provides the following recommendations.

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1987 to 1992, our Executive Director, Professor Robert Fellmeth, served as the State Bar Discipline Monitor (under now-repealed Business and Professions Code section 6086.9), under appointment by then-Attorney General John Van de Kamp, with CPPC (then named Center for Public Interest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.

The Pilot Program Structure Must Be Reconsidered Before True Implementation of the PBE

The PBE pilot program, as 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) ***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.

- 2) ***Allow candidates to submit portfolios on a bi-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. 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. However, CPPC strongly urges the State Bar 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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