

OCT 10 2024

Jorge Navarrete Clerk

Deputy

ADMINISTRATIVE ORDER 2024-10-10-01

IN THE SUPREME COURT OF CALIFORNIA

EN BANC

**ORDER CONCERNING RECOMMENDATIONS
OF THE BLUE RIBBON COMMISSION ON THE FUTURE OF THE BAR
EXAM AND THE ALTERNATIVE PATHWAY WORKING GROUP**

The court has considered the report and recommendations of the Blue Ribbon Commission on the Future of the Bar Exam (Commission) and a separate proposal offered by dissenting members of the Commission.

As a joint effort convened by the court and the State Bar of California, the Commission was charged with evaluating whether changes might be made to California's General Bar Examination, including whether to adopt alternative or additional testing or tools to ensure minimum competence to practice law. The Board of Trustees of the State Bar forwarded the Commission's final report and associated recommendations to this court for its consideration. Separately, the Board of Trustees convened five dissenting members of the Commission, in a group known as the Alternative Pathway Working Group (Working Group), to develop an alternative to the General Bar Examination. The Working Group developed the Portfolio Bar Examination (PBE) as a proposed alternative pathway for attorney licensure and forwarded the PBE proposal to this court for its consideration as well.

Through this order, the court adopts in part, and with modifications, most of the Commission's recommendations. It declines to adopt the PBE proposal.

**RECOMMENDATIONS OF THE BLUE RIBBON COMMISSION
ON THE FUTURE OF THE BAR EXAM**

After due consideration, and with appreciation for the Commission's work, the court makes the following orders concerning the Commission's six recommendations.

1. The court adopts the Commission's recommendation to develop a California-specific bar examination. The recommended general scope for such an examination is adopted with the following modifications:

The Blue Ribbon Commission recommends that the future, California-developed bar exam, will continue to cover legal theories and principles of general application, which would include ~~federal~~ law applicable throughout the United States and ~~that, for certain subject areas such as Civil Procedure and Evidence, California law and rules may also be applicable.~~

2. The court agrees with the Commission's recommendation to test nine topics on the examination, but orders the list of test topics supplemented to include three additional topics, as follows:

- *Administrative Law and Procedure*
- *Civil Procedure*
- *Constitutional Law*
- *Contracts*
- *Criminal Law and Procedure*
- *Evidence*
- *Professional Responsibility*
- *Real Property*
- *Torts*
- *Employment Law*
- *Family Law*
- *Estate Planning, Trusts, and Probate*

3. The court adopts the Commission's recommendation to test the following seven skills on the examination. It orders the recommendation supplemented with a further directive, as follows:

- *Drafting and Writing*
- *Research and Investigation*
- *Issue-spotting and Fact-gathering*
- *Counsel/Advice*
- *Litigation*
- *Communication and Client Relationship*
- *Negotiation and Dispute Resolution*

In considering the feasibility of testing some of these skills, such as client interviewing and negotiation, the State Bar of California should review the results of the 1980 Assessment Center, its related special sessions, and the availability of any new technologies, such as artificial intelligence, that might innovate and improve upon the reliability and cost-effectiveness of such testing.

4. The court adopts the Commission's recommendation concerning the examination's testing of knowledge and skills, as follows:

It is recommended that in developing the exam, there should be a significantly increased focus on assessment of skills along with the application of knowledge and performance of associated skills for entry-level practice, deemphasizing the need for memorization of doctrinal law. The precise weight of content knowledge versus skills should be determined after the development of the exam.

The commission further recommends transparency on topics and rules to be tested, including the extent to which candidates are expected to recall such topics and rules or possess familiarity with such topics and rules.

5. The court adopts the Commission's recommendation concerning fairness and equity in designing the examination. It orders the recommendation supplemented with further directives, as follows:

If the Supreme Court adopts the Blue Ribbon Commission's recommendation to develop a California-specific exam, the State Bar of California, in consultation with subject matter experts in exam development and other specialists, shall be tasked to design an exam. The design shall be consistent with the guiding principles adopted by the Blue Ribbon Commission, including crafting an exam that is fair, equitable, and minimizes disparate performance impacts based on race, gender, ethnicity, disability, and other immutable characteristics. In a further effort to minimize these disparities, and to the extent that any eventual test design may have separately scored components, consideration should be given as to whether unsuccessful applicants should be permitted to retake only those components that they failed, without having to retake the entire examination.

The court further supports and encourages the use of intervention programs, such as the California Bar Exam Strategies and Stories program, to potentially ameliorate disparities in passing rates based on race, gender, ethnicity, disability, and other immutable characteristics. In addition, the State Bar of California is encouraged to survey applicants and assess any demographic and situational factors, such as psychological stress and financial hardship, that might be addressed by such programs.

6. The court declines to adopt the Commission's recommendation to revise the requirements for the admission of attorneys licensed in other United States jurisdictions by allowing their admission through reciprocity, in lieu of taking all or part of the General Bar Examination. The requirements for admission are governed by statute. (See Bus. & Prof. Code, § 6062, subds. (a)(3), (b).)

THE ALTERNATIVE PATHWAY WORKING GROUP'S PORTFOLIO BAR EXAMINATION PROPOSAL

The Working Group's PBE proposal would allow graduates of law schools accredited by either the American Bar Association or the Committee of Bar Examiners to engage in a period of supervised practice and generate a portfolio of work product while advising and representing actual clients. That portfolio would be subsequently graded by a special committee to determine whether the applicant has demonstrated the minimum competence to practice law. After the Working Group submitted its proposal to the Board of Trustees, the board added the requirement that PBE applicants must also successfully pass up to two performance tests, a current component of the General Bar Examination, in order to become licensed.

The court declines to adopt the PBE proposal for the following reasons.

The PBE proposal is barred by current law because it is not the "general bar examination" given by the Committee of Bar Examiners, and the committee has not approved the use of the PBE to determine an applicant's minimum competence to practice law. (Bus. & Prof. Code, § 6060, subd. (g); see also Cal. Rules of Court, rule 9.3(a).) In addition, applicable law forecloses the use of different examination pathways "depending upon the manner or school in which they

acquire their legal education,” but the PBE would be available only to graduates of accredited law schools. (Bus. & Prof. Code, § 6060.5.)

Furthermore, a portfolio program based within a supervised practice model involving actual clients implicates an array of ethical and practical problems that would compromise the PBE’s fairness, validity, and reliability as a measure of an applicant’s competence.

In terms of fairness, the PBE proposal anticipates that the supervising attorney will be involved in creating the portfolio of work product used to assess the applicant’s competence, but this involvement will introduce variance in the assessed work product dependent on the aptitudes of the supervisor rather than the applicant. Applicants placed with higher skilled or more dedicated supervisors may present better portfolio items than those who secure positions with less skilled or committed supervisors. In addition, the proposal offers few convincing safeguards against the possibility that portfolio items will be based on templates mostly written by someone other than the applicant, thereby allowing some applicants to unfairly benefit compared to those applicants who genuinely created their own work product. As a result, PBE scores may not have the same meaning for all applicants by not ensuring that performance is based on the *applicant’s* ability.

In terms of validity, the PBE is unlikely to be an adequate measure of an applicant’s competency in issue-spotting or in conducting client interviews and negotiations. Unlike a preconstructed question containing both relevant and irrelevant facts or law, for which the grading committee will have identified the issues a competent attorney should spot, the issues involved in a real-world scenario are unknown to the committee. If an applicant fails to identify a crucial fact or crucial legal issue in creating a client’s work product, that missing information is also unlikely to come to the attention of the grading committee.

Concerning the testing of client interviews and negotiations, the PBE grading committee would be unable to directly view an applicant’s utilization of

these skills. Instead, the PBE would score these skills only indirectly through redacted assessments of the applicant's performance, authored by the applicant and the supervisor. Aside from the concern that such self-assessments might be biased, these redacted assessments are unlikely to contain sufficient information from which a grading committee can objectively determine the applicant's competence in performing these skills. Moreover, there is the ethical dilemma of compelling inexperienced applicants to conduct negotiations and client interviews which often carry high stakes and high privacy concerns for the client. Under these circumstances, for example, a supervisor might be reluctant to submit an assessment declaring that the applicant performed an incompetent, failed negotiation for a client.

In terms of reliability, the above-described circumstances raise the concern that PBE scores will be unreliable in consistently gauging the competence of applicants. Further adding to this potential unreliability are ethical tensions inherent in the PBE's supervised practice foundation in which a supervisor undertakes a significant investment in hiring and training an applicant who then must independently generate work product for actual clients and subsequent review in the PBE. These concerns, which are not addressed by the PBE proposal, will likely create disincentives for a supervisor to reliably and objectively attest that the portfolio work product represents the applicant's independent effort.

For example, the PBE proposal does not address what occurs if the grading committee judges a piece of client work product as not meeting minimum competence. In that instance, the grading committee may have an ethical obligation to inform the client who received a deficient work product and may need to determine whether the applicant's supervisor should be reported to the State Bar for failing to adequately supervise the applicant's work. (See Cal. Rules of Prof. Conduct, rules 5.1(c), 5.3(c) [making a supervising lawyer responsible for a subordinate lawyer's incompetence or a nonlawyer assistant's incompetence, respectively].) Given this possibility, a supervising attorney would be compelled

to correct an applicant's deficient work product before its use for actual clients, while at the same time aspiring for the applicant to succeed in the PBE. These circumstances further exacerbate the risk that PBE scores will be unreliable because portfolio items may reflect the skills of the supervisor rather than the applicant.

Finally, adding two 90-minute performance tests to the PBE proposal will not solve these inherent problems with the fairness, validity, and reliability of the overall proposal, nor would this addition alleviate the ethical concerns previously described.

The court wishes to express its appreciation to the Commission members for conducting a comprehensive review of issues related to attorney licensure and for their thoughtful consideration of ways to determine an applicant's minimum competence to practice law. Moving forward, the court expects that the Committee of Bar Examiners will continue to serve as the court's steward and advisor as changes are implemented to the General Bar Examination.

GUERRERO

Chief Justice

CORRIGAN

Associate Justice

LIU

Associate Justice

KRUGER

Associate Justice

GROBAN

Associate Justice

JENKINS

Associate Justice

EVANS

Associate Justice