

California Legislature

June 18, 2020

Chief Justice Tani Cantil-Sakauye
The Honorable Ming Chin
The Honorable Carol Corrigan
The Honorable Goodwin Liu
The Honorable Mariano-Florentino Cuéllar
The Honorable Leondra Kruger
The Honorable Joshua Groban
Supreme Court of California
350 McAllister Street
San Francisco, CA 94107

Re: Racial Discriminatory Impact of the Passing Score of the California Bar Exam

Dear Chief Justice and Associate Justices of the California Supreme Court:

We are writing to express our dismay at the continued discriminatory impact of the California Bar Exam on minority test takers, most recently exemplified by the February 2020 exam results, and to again request that the Supreme Court approve an immediate reduction of the passing score for the exam to, at most, 1388. The passing score of the bar exam—while certainly not the only step necessary to address systemic racism in the civil and criminal justice systems, legal profession, and the judiciary—is an important place to start.

As you know, the Assembly Judiciary Committee held an informational hearing on California's bar exam passage rate in February 2017, noting California's exceptionally high passing score, the significant decline in the passage rate for the state's bar exam, and the negative impacts of the state's low passage rate on graduating and prospective law students, law schools, and, most importantly, consumers of legal services. The passage rate on the exam has dropped even further since then, with a historically low passage rate of just 26.8 percent of those taking the February 2020 California Bar Exam passing the exam.

While the overall passage rate is concerning enough, what is even more disconcerting is the disproportionately low passage rate for non-white test-takers, particularly for Black test takers. The passage rate for the February 2020 California bar exam for first-time bar exam takers was 50 percent for white applicants, but only 25 percent for Latino applicants, 28

percent for Asian applicants, and, 18 percent for Black applicants.¹ Most alarming, only five percent of Black first-time bar exam takers who graduated California ABA-accredited law schools passed.² These data points are just the latest to confirm that the California bar exam has a racially discriminatory impact on exam takers and, therefore, on the legal profession as a whole. The California Bar reviewed bar passage rates for the past decade and determined that, for all bar exams administered from February 2009 to February 2019, the overall white passage rate was 52 percent, but only 36 percent for Latino applicants, 40 percent for Asian applicants, and, again most alarming, 24 percent for Black applicants.³ If the passing score on the exam had been reduced to 1390, five percent more white test takers would have passed the exam, but eight percent more Latinos, seven percent more Asians and 13 percent more Blacks would also have passed.⁴ If the passing score were reduced to 1350, those increases would be 11 percent for white test takers, 18 percent for Latinos, 15 percent for Asians, and fully 32 percent for Blacks. These data make clear that the California bar exam, like similar standardized tests, has a racially discriminatory impact on all people of color, but particularly on Black test takers.

The passing score of the bar exam is just one of the many reasons why the legal profession and judiciary still fall far short of adequately representing the demographic makeup of California.⁵ People of color are underrepresented in colleges, universities, and law schools, reflecting educational institutions and professions more broadly. Academic pipeline problems are particularly troublesome for underrepresented minorities, and issues can be attributed to numerous hurdles to advancement that these students often face in the United States including institutional biases, the overall educational achievement gap, and the discriminatory impact of standardized testing. These problems begin long before students apply to law school and extend at least through the bar exam. Unfortunately, despite numerous and long-standing programs to diversify the legal profession, diversity has not significantly increased. While California as a whole has become more diverse, existing programs have barely kept pace with the changing demographics of the state and have not appreciably moved the needle. The legal profession and the judiciary, especially at the top ranks, remain significantly overrepresented by white males and underrepresented by everyone else. Lowering the passing score of the bar exam will not erase years of discrimination, both explicit and implicit, but is a step that the Supreme Court can take today to reduce racial bias in the legal profession.

The reduction in the passing score can be done without any reduction in public protection from unqualified attorneys. There is no evidence that Californians would be harmed by a lower cut score and higher bar exam passage rate. The Committee of Bar Examiners of the California State Bar (CBE) acknowledged that "[t]here is no empirical evidence available that

¹ The State Bar of California, Office of Admissions, *General Statistics Report: February 2020 California Bar Examination*, p. 2.

² *Ibid.*

³ The State Bar of California, Office of Research and Institutional Accountability, *Simulation of the Impact of Different Bar Exam Cut Scores on Bar Passage, by Gender, Race/Ethnicity, and Law School Type*, at 5 (March 18, 2020).

⁴ *Id.* at 7.

Ibid.

⁵ See Assembly Judiciary Committee, *How Can California Increase Diversity of the Legal Profession and the Judiciary?* (May 14, 2019).

would support a statement that as a result of its high pass line California lawyers are more competent than those in other states, nor is there any data that suggests that there are fewer attorney discipline cases per attorney capita in this state."⁶ The Bar has stated that "the relationship between discipline rates and minimum competence . . . is unclear at best" and as a result, there are doubts that "changing the cut score would have any impact on the incidence of attorney misconduct."⁷ If any such evidence of public harm existed, we would not request that the passing score be lowered.

We are pleased that the State Bar and the Supreme Court are creating a blue ribbon commission to study the future of the bar exam in California, including the passing score. There are many important issues that this commission can tackle. However, the time to take bold action to eliminate racial bias in California is now. Given that the California Bar Exam is designed to test the *minimal* competence for the first year of law practice and not to create an artificial barrier to entrance into the legal profession, or reflect an optimal level of competence, it is only reasonable to select the *lowest* passing score that ensures minimal competence and does not discriminate against people of color. Relying on the State Bar's own studies, we believe that score is, at most, 1388.

Selecting any higher passing score is especially troubling, given the many serious consequences, both personal and societal, of maintaining an unduly high cut score, including the lack of access to legal representation for many Californians. Far too often, low and middle-income Californians with critical legal representation needs, including in divorce, child custody, unlawful detainer, foreclosure, probate, and other civil matters, are unable to find and afford legal counsel to protect their critical legal rights and interests. According to data from Judicial Council, at least 70 percent of family law litigants are unrepresented and the number appears to be increasing. While courts seek to help these litigants by providing access to self-help, this is not an adequate substitute for representation by a competent attorney. Our state has many urgent legal needs, and while reducing the cut score for the bar exam and increasing the passing rate on the bar exam cannot guarantee that more Californians will have legal representation, it will increase the number of competent attorneys who are available to represent low and middle-income clients in the state. Greater opportunity for justice for these critically-underserved residents has been a priority for the Court and should be a priority for all Californians, as well.

Given the lack of correlation between minimally reducing the cut score and any reduction in public protection, and both the disproportionate impact on applicants of color and the negative consequences to California consumers of retaining the current passing score, it is unclear how California can justify maintaining its current cut score on even a temporary basis. We greatly appreciate the leadership of the Supreme Court in reviewing the California Bar Exam and its passing score, and strongly urge the Court to lower the passing score to, at most, 1388 on an interim basis, pending the recommendations of the soon-to-be-created blue ribbon commission. After the interim reduction of the cut score, we urge the Supreme Court to

⁶ CBE, *Standard Setting Study for the California Bar Examination and Related Recommendation to Circulate Two Options for Public Comment* (July 28, 2017) pp. 8-9.

⁷ Report of the California State Bar to the Supreme Court of the State of California, *Final Report on the 2017 California Bar Exam Standard Setting Study*, (Sept. 12, 2017) pp. 42, 44.

revisit the passing score and the overall exam to ensure that the examination appropriately tests the educational and skill requirements for entry-level attorneys and is free of any racial bias.

Finally, given the continued uncertainty about when and how the next bar exam will be administered, we urge the Supreme Court to help the COVID-19 law school class of 2020 by permitting them to practice law in the interim, with appropriate oversight.

Now more than ever, we must become a nation of anti-racists, rooting out explicit and implicit bias wherever it lurks, particularly in the legal profession which must stand up and protect the rights of Californians and provide access to justice for all.

Sincerely,




MARK STONE
Chair, Assembly Committee on Judiciary



REGINALD B. JONES-SAWYER, SR.
Chair, Assembly Committee on Public Safety



LORENA GONZALEZ
Chair, Legislative Latino Caucus



SHIRLEY N. WEBER, Ph.D.
Chair, Legislative Black Caucus