

# COMMITTEE OF BAR EXAMINERS

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*Protection of the public, which includes support for greater access to, and inclusion in, the legal system, shall be the highest priority for the State Bar of California and the board of trustees in exercising their licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount.*

— Business and Professions Code § 6001.1

The Committee of Bar Examiners (Committee or CBE) was established in 1939 by the State Bar of California, pursuant to Business and Professions Code section 6046, to examine all applicants for admission to practice law; administer the requirements for admission to practice law; and certify to the Supreme Court for admission those applicants who fulfill the statutory requirements to practice. Specifically, the Committee develops, administers, and grades the California bar examination, oversees moral character of State Bar applicants; accredits law schools in California that are not accredited by the American Bar Association (ABA) (collectively, “California Accredited Law Schools (CALs)”); and oversees additional registered unaccredited law schools.

The Committee is comprised of 19 members: 10 attorneys or judges, and nine public members. At least one of the attorney members must have been admitted to practice law within three years from the date of appointment to CBE. Pursuant to section 6046.5 of the Business and Professions Code, the Speaker of the Assembly, the Senate Rules Committee, and the Governor each appoint three public members.

Specific rules pertaining to admission to practice law in California are set forth in Title 9 of the California Rules of Court, and Title 4 of the Rules of the State Bar. Pursuant to Rule 9.4 of the California Rules of Court, the Supreme Court is responsible for appointing the 10 attorney members of the Committee, at least one of which must be a judicial officer in this state, and the balance must be licensees of the State Bar. All members of the Committee serve four-year terms.

Rule 9.5 of the California Rules of Court requires that all “rules adopted by [CBE] pertaining to the admission to practice law must be approved by the Board of Trustees and then submitted to the Supreme Court for its review and approval.”

Effective January 1, 2018, pursuant to section 6026.7 of the Business and Professions Code, as amended by [SB 36 \(Jackson\) \(Chapter 422, Statutes of 2017\)](#), CBE is now subject to the Bagley-Keene Open Meeting Act, section 11120 *et seq.* of the Government code, and must conduct its business in public, with notice as specified in the Act.

At this writing, CBE divides its work into four subcommittees: Operations & Management (exam administration, fee and deadline waivers, reports of alleged cheating, and admissions budget and personnel); Moral Character (conducting moral character evaluations of State Bar applicants); Examinations (administration, development, and grading of the First Year Law Student’s Exam and the California Bar Exam); and Educational Standards (administering the CALS accreditation process, and regulating the registration of unaccredited schools).

The State Bar Board of Governors (the predecessors to the current Board of Trustees) created the Law School Assembly (LSA) in 1986 as a forum for disseminating information from CBE to the law schools and providing feedback from the law schools to CBE. One representative from each law school in California (whether ABA, Cal-accredited, or unaccredited), CBE members, and liaisons from the State Bar Board of Trustees comprise the LSA. Each school elects

its own representative at LSA's annual meeting. Law schools participate in setting the agenda for the LSA's annual meeting, where discussions involve relevant topics of law schools' shared interests and policy questions concerning law students. Meetings are open to the public, they are noticed on the State Bar's website at least 10 days in advance, are required to comply with the Bagley-Keene Open Meetings Act and are webcast when feasible. Law schools are permitted to attend via teleconference.

The Law School Council (LSC) considers matters related to the content and format of the Bar examination, coordinates curricula related to bar-tested subjects and aspects of law school education relevant to licensure, suggests topics for ad hoc working group creation, and identifies representatives from ABA accredited law schools to serve on ad hoc working groups. Seven deans or their representatives from ABA-approved schools comprise the LSC. Members serve three-year terms and the Chair serves for one year.

In 2019, CBE established the Committee of State Bar Accredited and Registered Schools (CSBARS) to replace the Advisory Committee on California Accredited Law Schools Rules (RAC). CSBARS provides advice and feedback to CBE and State Bar on matters relating to the promulgation of new rules, guidelines, and amendments to the Accredited Law School Rules and the Guidelines for Accredited Law School Rules. CSBARS suggests topics for ad hoc working groups within the State Bar's regulatory scope and identifies law school deans or administrators to serve on ad hoc working groups. These groups comply with the Bagley-Keene Open Meetings Act, participants can attend via teleconference with proper notice, and the meetings are webcast when feasible. During regularly scheduled CBE meetings, CSBARS presents their recommendations. There are seven members that comprise CSBARS: three accredited law school deans; two registered unaccredited law school deans, and two members selected by CBE, one of

whom may include a non-voting consultant with expertise in accreditation issues. Each member serves a three-year term.

On August 25, 2020 the California Supreme Court [reappointed](#) attorneys James Efting and Paul Kramer, and Administrative Law Judge Robert Brody, to CBE for four-year terms, effective mid-September 2020. The Court also appointed Judge James Herman, Assistant Presiding Judge for the Superior Court of Santa Barbara County, to fill the vacancy created by the death of attorney James Fox. On the same day, the court appointed Esther P. Lin, an attorney at Best, Best & Krieger, to serve as Committee chair for a one-year term, and public member Alex Lawrence as Committee vice chair.

## **HIGHLIGHTS**

### **The COVID-19 Pandemic Brings Significant Changes to the California Bar Examination**

The COVID-19 pandemic has wreaked havoc in recent months on the legal profession's most important requisite for licensure—the Bar exam. With giant convention centers full of thousands of test-takers being infeasible during the pandemic, the California Supreme Court [ordered](#) the State Bar to come up with alternatives to in-person administration of the July 2020 Bar exam on April 27, 2020, and postponed the July exam to September 9–10, 2020. The order came after the Committee of Bar Examiners' (CBE) March 30, 2020 emergency and special [meeting](#) over teleconference in which the Committee considered and heard extensive public comments with respect to the challenges presented by the COVID-19 pandemic, including a multitude of comments from law students, and the Bar's subsequent April 15, 2020 [letter](#) to the Supreme Court, summarizing the Bar's recommendations for proceeding. [[25:2 CRLR 104–107](#)] Over the next few

months, CBE considered multiple options, including: a delayed in-person exam; a remote online exam; and the provision of “diploma privilege,” which would automatically grant a license to practice law to the class of 2020 law graduates without having to take the Bar exam. The Board of Trustees also continued to receive voluminous public comments—mostly from law students—during its meetings on this topic.

On July 16, 2020, the California Supreme Court sent a [letter](#) to the State Bar, acknowledging the continued challenges presented by the pandemic, its conversations with the National Committee of Bar Examiners (NCBE), the actions being taken by other states, and the letters and comments they had received from law students, deans, and the public. The Court announced that it would cancel the September administration of the exam and ordered the State Bar to instead administer the exam in an online format on October 5–6, 2020. In addition, the Court announced that it would permanently lower the passing score on the Bar exam to 1390, beginning with the October administration of the exam, citing the Bar’s 2017 standard-setting study as well as recent data from ongoing studies about the Bar exam as justification for the new score. [*see* [23:1 CRLR 158–161](#)]. Finally, the Court declined to allow diploma privilege for law students, citing California’s unique circumstances in that there are nearly four dozen law schools which are not accredited by the American Bar Association in the state, and the need to find a solution that would not exclude all graduates of those schools. Instead, the Court directed the Bar to “implement, as soon as possible, a temporary supervised provisional licensure program—a limited license to practice specified areas of law under the supervision of a licensed attorney.” According to the letter, this program will be made available for all 2020 graduates of law schools based in California or those 2020 graduates of law schools outside California who are permitted

to sit for the California Bar Examination under Business and Professions Code sections 6060 and 6061.

On August 10, 2020, the California Supreme Court formally issued [Administrative Order 2020-08-10](#) Concerning Modifications to the California Bar Examination. The order directs the State Bar to administer the October 5–6, 2020 Bar exam online, and permanently reduces the passing score of the exam to 1390 beginning with the October administration of the exam. The order and accompanying letter to the Bar declined to retroactively apply the lowered passing score to previous administrations of the exam, which had been requested by many law school deans and legislators. The order prompted Assemblymember Mark Stone, who chairs the Assembly Judiciary Committee, to introduce [House Resolution 103](#) on August 18, 2020, which “strongly encourages” the California Supreme Court to make the new 1390 cut score retroactive to July 2015.

At CBE’s October 16, 2020 [meeting](#), staff reported that the administration of the October Bar Exam went well with few technical issues.

## **California Supreme Court Approves State Bar Provisional Licensure Program for 2020 Law Graduates, Adopts Rule 9.49 of the California Rules of Court**

On July 16, 2020, the California Supreme Court sent a [letter](#) to the State Bar of California, directing it to “implement, as soon as possible, a temporary supervised provisional licensure program—a limited license to practice specified areas of law under the supervision of a licensed attorney,” in response to the COVID-19 pandemic and the challenges it presented to new 2020 law school graduates. At its meeting on the same day, the State Bar Board of Trustees [appointed](#) Board Member Hailyn Chen to carry out the Court’s order and delegated to her the authority to appoint

a working group or take other steps necessary to implement the direction of the Supreme Court. [Agenda Item 705].

Accordingly, Ms. Chen established a Provisional Licensure Working Group comprised of judges, private practice attorneys, government attorneys, attorneys responsible for hiring and recruitment, representatives from law schools, the Legislative Counsel of California, members of the Committee of Bar Examiners (CBE), and others. The working group met on [August 7, 2020](#) and [August 18, 2020](#), to develop a proposed rule of court using California's Multijurisdictional Practice rules and Practical Training of Law Students rules, as well as rules adopted in other states to inform the process.

The working group circulated the [draft rule](#) for public comment on September 1, 2020, for a 15-day public comment period which closed on September 15, 2020. According to a [memo](#) that Ms. Chen presented to the Board of Trustees at its September 24, 2020 meeting, the working group received 193 public comments on the proposed rule. The group met again on [September 18](#) and made some additional amendments to the proposed rule, which the Supreme Court liaisons on the working group determined were not substantive enough to require circulation for an additional public comment period.

Ms. Chen [presented](#) the Working Group's proposed rule and program implementing the Court's direction as to Provisional Licensure to the Board of Trustees at its September 24, 2020 [meeting](#), and the Board voted to adopt the recommendations and submit them to the Supreme Court for Approval [Agenda item 708]. Accordingly, on September 30, 2020, the Bar filed a request for approval of a California Rule of Court to create the temporary supervised provisional licensure program for all persons who became eligible to sit for the California Bar Examination between December 1, 2019 and December 21, 2020.

On September 24, the Board also directed the Provisional Licensure Working Group to reconvene to further discuss whether to recommend extending Provisional Licensure to individuals who previously scored 1390 or greater on the bar exam, and if so, whether to recommend granting these individuals admission to the State Bar following the successful completion of a defined number of hours of supervision as a Provisionally Licensed Lawyer. The group [met](#) on October 14, 2020 and is scheduled to meet again on November 20.

On October 22, 2020, the Supreme Court issued [Administrative Order 2020-10-21-01](#), granting the Bar's request and establishing Rule 9.49 of the California Rules of Court, as set forth in Attachment I to the order.

The program allows eligible 2020 law school graduates to practice law as provisionally licensed lawyers under the supervision of fully licensed lawyers. Provisionally licensed lawyers will be able to engage in the same activities that a fully licensed lawyer is permitted to engage in, under their supervising lawyer's direct supervision and subject to certain restrictions. Both provisionally licensed lawyers and their supervising lawyers are subject to liability, discipline, and sanction from the State Bar and the California Supreme Court, should the provisionally licensed lawyer fail to adhere to State Bar rules and guidelines governing regularly licensed lawyers.

Provisionally licensed lawyers will be allowed to provide a significant portion of legal services for clients, including appearing before a court; drafting legal documents, contracts or transactional documents, and pleadings; engaging in negotiations and settlement discussions; and providing other legal advice, provided that the work is performed under the supervision of a qualified supervising lawyer. Under this rule, supervising lawyers have discretion to decide the limits on what a provisionally licensed lawyer "can do, or what needs to be done under direct



versus general supervision.” Provisionally licensed lawyers may have more than one supervising lawyer, who need not work at the same law firm.

Only those eligible under Business and Professions Code sections 6060 and 6061 to sit for the California Bar Examination between December 1, 2019, and December 21, 2020, either by graduating from a qualifying law school with a juris doctor (JD) or master of laws (LLM) degree during the time period, or by otherwise meeting the legal education requirements, are eligible to apply for provisional licensure. Application is not predicated on having taken the California Bar Exam, so long as candidates have already submitted a complete Application for Determination of Moral Character to the State Bar. Those who have had an adverse determination of moral character and fitness are precluded from applying. Those who sit for the bar exam during the provisional licensure program but do not pass can continue to practice until they pass the bar exam or until June 1, 2022, when the program is set to expire.

Consistent with the Supreme Court’s directive, the State Bar has posted a [Frequently Asked Questions](#) sheet about the program on its website. Rule 9.49 becomes effective on November 17, 2020.

## **Two New Studies Reveal the California Bar Exam Cut Score’s Racially Disparate Impact, and State Bar of California Continues its own Study of the Bar Exam**

In October 2020, two studies analyzing the various ways in which California’s minimum bar exam passing score (“cut score”) on the Bar exam impacts examinee outcomes were published. Both studies were conducted by the same authors, and were funded by the AccessLex Institute, the same nonprofit institution that funded the 2019 [California Attorney Practice Analysis \(CAPA\)](#)

[survey](#) to all California licensed attorneys, which the State Bar of California is currently utilizing to inform various reform efforts related to the Bar exam. [[25:1 CRLR 149](#)]

The first study, entitled [Examining the California Cut Score: An Empirical Analysis of Minimum Competency, Public Protection, Disparate Impact, and National Standards](#), was released on October 15, 2020, and provides an empirical analysis that shows how higher cut scores create disparities within the attorney licensing system and affect the diversity of new licensees. The study's first data set included 85,727 examinees who sat for 21 administrations of the California Bar exam from 2009 to 2018. Simulation analysis using actual examinee scores confirmed that selecting a lower cut score would have significantly narrowed the achievement gap between whites and racial and ethnic minorities, and would have increased the number of newly-admitted minority attorneys in California.

The study also found that a high cut score does not result in greater public protection when measured by disciplinary statistics. The study's second data set used the American Bar Association (ABA) discipline data from 48 U.S. jurisdictions from 2013 to 2018 and the cut scores in each jurisdiction to examine the relationship between minimum cut scores and rates of attorney discipline. The study determined that no relationship exists between the selection of a cut score and the number of complaints, formal charges, or disciplinary actions taken against attorneys. Taken together, these findings indicate that maintaining a high cut score does not result in greater public protection, but does result in the exclusion of minorities from admission to the bar and the practice of law at rates disproportionately higher than whites.

The second study, entitled [A Five-Year Retrospective Analysis of Cut Score Impact: California's Proposed Supervised Provisional License Program](#), was released on October 23, 2020. There, the authors analyzed a group of 39,737 examinees who sat for the California Bar

exam over five years between 2014 and 2018. Using a simulation model based on actual exam results, the authors evaluated how the cut scores of 1440, 1390, 1350, 1330, and 1300, if used as qualifying scores for a provisional licensing program, would affect the number of previous examinees, by race and ethnicity. The study concluded that selecting a qualifying score lower than the current California cut score of 1390 would significantly increase both the overall number of eligible participants and the diversity of the group eligible to participate in the State Bar of California's new provisional licensure program, which the Supreme Court of California [approved](#) on October 22, 2020.

The State Bar has been examining the propriety of its cut score on the Bar exam since 2017, when the Supreme Court of California ordered it to conduct a series of studies after the deans of 20 of the 21 law schools accredited by the American Bar Association in California petitioned the Court to lower the score following a dismal pass rate on the July 2016 exam. [[23:1 CRLR 158–161](#)] While the Court declined to lower the score that year, it did order further study of the exam. [[23:2 CRLR 254–256](#)] This prompted the State Bar Board of Trustees to establish the California Attorney Practice Analysis (CAPA) Working Group to analyze and determine the knowledge, skills, and abilities needed by entry-level attorneys in California to practice law ethically and competently, in 2018. [[24:2 CRLR 275–276](#)] The CAPA Working Group submitted its [final report](#) on May 11, 2020. The final report coincided with a national practice analysis by the National Conference of Bar Examiners regarding content and format of the Uniform Bar Exam (UBE).

Following the release of the CAPA report, State Bar Board of Trustees voted to establish a [Blue Ribbon Commission on the Future of the Bar Exam](#), in partnership with the Supreme Court of California, at its May 14, 2020 [meeting](#) (Agenda Item 705). The Board adopted a charter for the Commission at its July 16, 2020 [meeting](#), and voted to approve the composition of the Commission

as follows: two former members of the CAPA Working Group; two members of the Committee of Bar Examiners; one member of the NCBE Testing Task Force; two members of the Council on Access and Fairness; two members of the California Lawyers Association (at least one whom shall be a lawyer who took the bar exam within the past 3 years); two law school deans or faculty members; two Judges (active or retired); one appointment from the California Department of Consumer Affairs; one member of the current State Bar Board of Trustees; one national expert on examination development or grading; and one expert on online testing software, security, and privacy evaluation.

According to the charter, the “Blue Ribbon Commission is charged with developing recommendations concerning whether and what changes to make to the California Bar Exam, and whether to adopt alternative or additional testing or tools to ensure minimum competence to practice law.” As part of its work, the Commission will review the results of the California Attorney Practice Analysis and the recommendations from the CAPA Working Group; the National Conference of Bar Examiners practice analysis and its recommendations for the UBE content and format; and the results of additional recent studies on the California Bar exam conducted by the State Bar, including data examining the pass rates of applicants of color.

Applications for the Blue-Ribbon Commission are currently open and will be accepted through November 30, 2020. The commission is expected to have its first meeting in January 2021, and a final report on the Commission’s findings and recommendations will be made no later than January 31, 2022.

# MAJOR PUBLICATIONS

The following reports/studies have been conducted by or about the State Bar of California as it relates to the work of CBE during this reporting period:

- [\*The Practice of Law in California: Findings from the California Attorney Practice Analysis and Implications for the California Bar Exam\*](#), State Bar of California Attorney Practice Analysis Working Group, May 11, 2020 (In 2018, the State Bar established the California Attorney Practice Analysis (CAPA) Working Group to oversee a practice analysis study to gauge alignment between the content of the California Bar Exam and the practice of law in California. The Working Group used the results of the study to recommend changes on exam content (see HIGHLIGHTS). [[25:2 CRLR 107–108](#)])
- [\*Examining the California Cut Score: An Empirical Analysis of Minimum Competency, Public Protection, Disparate Impact, and National Standards\*](#), AccessLex, October 15, 2020 (empirical analysis demonstrating how higher cut scores create disparities within the attorney licensing system and affect the diversity of new licensees) (see HIGHLIGHTS).
- [\*A Five-Year Retroactive Analysis of Cut Score Impact: California’s Proposed Supervised Provisional License Program\*](#), AccessLex, October 23, 2020 (Analyzes a group of 39,737 examinees who sat for the California Bar exam between 2014 and 2018 and uses a simulation model based on actual exam results to evaluate how various lower cut scores would have affected the number of licensed attorneys, by race and ethnicity. Concludes that selecting a qualifying score lower than the current California cut score of 1390 would significantly increase both the overall number of eligible participants and the diversity of the group eligible to participate in the State Bar of California’s new provisional licensure program. (see HIGHLIGHTS).)

# RULEMAKING

The following is a status update on recent rulemaking proceedings that the State Bar of California as it relates to the work of CBE has initiated:

- **Provisional Licensure Program for 2020 Law Graduates:** On October 22, 2020, the California Supreme Court [approved](#) new Rule of Court 9.49, codifying the State Bar’s proposal for the provisional licensure of 2020 law school graduates. The rule became effective November 17, 2020 (see HIGHLIGHTS).

# LEGISLATION

- [HR 103 \(Stone\)](#), as introduced on August 18, 2020, includes a series of legislative findings pertaining to the Bar exam, and “strongly encourages the California Supreme Court, in order to help make California attorneys more representative of the state, better support recent law school graduates, and provide greater access to justice for low- and middle-income Californians, to make the reduction in the passing score of the California Bar Examination retroactive to July 2015.” The Assembly adopted the measure September 1, 2020, and ordered the Chief Clerk of the Assembly to submit copies of the resolution to the California Supreme Court and the State Bar of California.

- [AB 3362 \(Committee on Judiciary\)](#), as amended August 7, 2020, and as it applies to the Committee of Bar Examiners, amends sections 6026.7, and 6060, of the Business and Professions Code to narrow exemptions to the Bagley-Keene Open Meeting Act as it applies to the State Bar, and also amend requirements pertaining to the first-year law student examination. Specifically, the bill amends section 6026.7 to clarify that closed-session discussions of examinations are now restricted to the preparation of examination materials, the approval, the

grading, or the security of test administration of those examinations. Additionally, this bill requires the State Bar to accept public comment in open session on all matters that are agendaized for discussion or decision by the board of trustees, whether in an open or a closed session. Finally, the bill amends section 6060 to provide that any law student taking the June 2020 first year law student exam be permitted an additional fourth administration of the examination to pass to receive credit for all law studies completed by the time the examination is passed. Governor Newsom signed AB 3362 on September 30, 2020 (Chapter 360, Statutes of 2020).

## LITIGATION

- *Gordon, et al. v. State Bar of California, et al., Case No. 20-16899 (9th Cir.)*. On September 14, 2020, three plaintiffs with disabilities filed a [complaint](#) in the Northern District of California against the State Bar of California, its Executive Director, and the National Conference of Bar Examiners, alleging that the State Bar’s plan for the administration of the October Bar Exam online unfairly disadvantaged exam takers with disabilities by requiring those who needed accommodations to take the exam in person in violation of the Americans with Disabilities Act (ADA) and California’s Unruh Civil Rights Act. Additionally, they moved for a preliminary injunction to enjoin the State Bar from requiring them to take the bar exam in person. At issue was the Bar’s inability to accommodate three remote-testing conditions—no bathroom breaks during a test session, no paper tests, and no physical scratch paper—but it did offer such accommodations in-person, with heightened COVID-19 protocols developed by an epidemiologist including private hotel rooms for each test taker. On September 30, 2020, the District Court denied Plaintiffs’ motion for preliminary injunction, finding that they were not likely to prevail on the merits because the Plaintiffs could not demonstrate irreparable harm. Plaintiffs appealed to the Ninth Circuit, and that

court [upheld](#) the District Court’s denial of the preliminary injunction on October 2. At this writing, the Bar’s motion to dismiss the complaint is pending with the District Court.

- ***Kohn v. State Bar of California, et al., Case No. 20-cv-4827 (N.D. Cal.)***. On July 18, 2020, plaintiff filed a [complaint](#) against the State Bar and CBE, alleging that defendants violated the ADA and California’s Unruh Act by failing to provide him all the reasonable accommodations he requested for his physical and psychological conditions and by their deliberate indifference with respect to his previous attempts at taking the California Bar Exam in February 2019 and February 2020, as well as the October 2020 administration of the exam. The court denied plaintiff’s motion for preliminary injunction on August 13, 2020, finding that plaintiff’s motion was not ripe for adjudication, and on October 27, 2020 [granted](#) the Bar’s motion to dismiss the case in its entirety. Specifically, the court found that the State Bar and CBE had Eleventh Amendment immunity from claims for damages under the ADA; plaintiff did not have the fundamental right, protected by the Fourteenth Amendment, to take the California Bar Exam or to practice law; defendants did not violate plaintiff’s procedural due process rights in responding to his accommodation requests; the remote testing policy did not violate the Equal Protection Clause or Title II of the ADA; the State Bar was exempted from California Government Code provisions prohibiting the denial of benefits and discrimination on basis of sex, race, color, religion, and other categories; and plaintiff could not state a claim that defendants violated California’s Unruh Act.