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October 13, 2023

Board of Trustees
State Bar of California
180 Howard Street
San Francisco, California 94105-1639

Re: Proposal for Portfolio Bar Examination

Dear Sir/Madam:

The Orange County Bar Association (“OCBA”) respectfully submits the following comments concerning the Proposal for Portfolio Bar Examination.

Founded over 100 years ago, the OCBA has over 7,000 members, making it one of the largest voluntary bar associations in California. The OCBA is made up of practitioners from large and small firms, with varied civil and criminal practices, of different ethnic backgrounds and political leanings.

While we appreciate the State Bar’s efforts to further its mission of protecting the public, we have concerns that the Proposal for Portfolio Bar Examination (“PBE”) would not actually further that mission – at least as currently proposed. Our concerns and suggestions are as follows:

Concerns about the Process

- We are concerned that the proposal was rushed, having been put together in just a few months. Similarly, we believe a 30-day comment period is insufficient if the State Bar wants to receive meaningful input from the public.
- As we understand it, the Alternative Pathway Working Group is made up of a subgroup of the Blue Ribbon Commission. That subgroup consists only of the members of the Blue Ribbon Commission who, according to the State Bar, “were proponents of an alternative pathway.” Such a one-sided working group seems counterproductive and not intended to meaningfully vet diverse ideas. We believe any working group on these issues would benefit from hearing and considering countervailing views – and not just after-the-fact, but during the deliberative process. We also note that the Working Group is comprised of all academics and one judge, and no practicing attorneys. We believe limiting the Working Group in this way – *i.e.*, excluding practicing attorneys – gives the impression of being results oriented and not helpful for obtaining meaningful input and diverse ideas.

The Proposal's Failure to Serve the Bar's Primary Focus of Protecting the Public

- We are not able to discern from the Report how the PBE will further the Bar's mission of protecting the public. Section III.C. of the Report, entitled "Protection of the Public," discusses details of the program that would be set up to ensure public protection. Leaving aside whether the program's details would ensure some level of protection of the public, what we do not see in the Report is a compelling explanation for why implementation of the program itself would advance public protection, other than a broad and unsupported statement that the program will "enhance public protection by producing more practice-ready lawyers." It is obvious why requiring licensees to take and pass a bar exam protects the public – it assures that future lawyers have some minimal level of legal knowledge and intellect. Dispensing with the exam certainly jeopardizes that assurance, apparently without any compelling justification – at least not one that is articulated in the context of public protection.
- One of the rationales the Report provides is that "the practice-ready candidates licensed through [the PBE] will better protect clients and more effectively serve the public." But we see no support for this statement in anything other than broad pronouncements. Are there any objective studies finding that lawyers who did not or could not pass a Bar exam are more "practice ready" because they worked for four to six months for another lawyer? In any event, if the State Bar believes that working for another lawyer is a helpful or even necessary part of becoming a good, practice-ready lawyer, it should study and consider an apprenticeship program for *all* lawyers. But any such apprenticeship program should be in addition to, and not instead of, the Bar exam.
- The Report appears to justify dispensing with the Bar exam for some applicants based on fairness to the applicants themselves. But that is not the same as public protection, and does not seem to be a valid reason to upend the long-standing and nationally recognized Bar exam system. And while it may be inconvenient, as the Report hypothesizes, for certain applicants to take several months off work to study for the Bar exam, that is certainly less inconvenient than requiring applicants to spend three years in law school. Yet, we would not suggest that the State Bar should shutter all law schools so as not to inconvenience certain would-be applicants. The reality is that it is not easy to become a lawyer, and that is as it should be. The public, including clients who ultimately hire lawyers, rightfully expects a level of competence, knowledge, and intellect that the Bar exam is intended to ensure. And while the Bar exam may not be a perfect measure of that competence, knowledge, and intellect, it seems better than no Bar exam.

Concerns and Suggestions about the Specifics of the Program

- The Report provides that the supervising attorneys merely need to be practicing lawyers in good standing, who are not immediate family of the candidates. If we are to understand that the supervisor requirements will be modeled after the supervisor requirements of the Provisional Licensure Program, then the supervisors will need only four years of experience, including two in California. Four years, however, is not sufficient time for a lawyer to supervise another lawyer in the manner proposed. To the contrary, lawyers with four years of experience themselves probably require ongoing supervision. We believe significantly more experience, and probably no fewer than ten years, would be preferable.
- The concept of the program is that candidates will obtain experience in many different areas of law and practice different lawyering skills over the course of several months. But unless those candidates work at a large law firm, it is very unlikely they will find a supervisor who can provide such varied experiences – especially in such a short time. So, unlike those candidates who study for the Bar exam, the PBE candidates’ training and learning almost inevitably will be limited to a narrow field or fields, and involve only a small subset of the expected lawyering skills. And while we recognize that the surveys cited in the Report purport to conclude that the candidates for the Provisional Licensure Program routinely use a wide set of skills in a broad range of legal areas, experienced lawyers would tend to question the survey responses of lawyers with so little experience, who may think answering an email about a family law question is comparable to weeks of studying the details of family law. The reality is that it would take far longer than four to six months for a law graduate to learn anything meaningful about these varied practice areas without actually studying for a comprehensive exam.
- They say the devil is in the details. But the Report provides little details on how exactly the candidates’ portfolios will be graded. Without that information, it is difficult for the public to assess and fully comment on the proposal.
- In our experience, the work product of any new lawyer is heavily edited such that the final work product is an amalgamation of more than one lawyer’s work. How will the so-called “experts” determine which portion of the work product is attributable to the candidate? And while the Report notes that the candidate will have to identify which part is his or hers, that is a nearly impossible task in most instances.

Concerns about the Proposed Applicants

- The Report suggests the ideal candidates are the 100 or so individuals still enrolled in the Provisional Licensure Program (referred to in footnote 1 as the “Original Program”). But

as we understand the explanation in footnote 1, these are the 100 or so law school graduates who still have not passed the bar exam, and excludes those in the program who have since passed the bar exam (who presumably are now full lawyers). So the proposal appears geared not just for individual law graduates who struggled to pass the Bar exam, but rather for those individual law graduates who continue to struggle, or have given up, to pass the Bar exam. We question whether this group of individuals are really the best candidates for a new program (pilot or otherwise), or even whether they are qualified to be lawyers at all. It is particularly troubling that this group of individuals could be the group representing low-income clients in distress, criminal defendants, or family law litigants.

Lack of Data

- The Report refers to similar programs being considered in other jurisdictions. To the extent there have been any studies of the results from those jurisdictions, those should be discussed and evaluated before reaching a decision in California. To the extent these other jurisdictions are too early in their implementation of such a program, we suggest waiting for some of these smaller jurisdictions to have some preliminary results that can be studied before jumping into a similar program for such a massive jurisdiction like California.

No Statutory Authority

- The Report states that, in the Working Group’s opinion, the BPE would fit within the definition of “general bar examination” under Business and Professions Code section 6060(g) such that amendment of that statute would be unnecessary. Although we recognize this is a legal question, we find the Report’s conclusion to be unsupported and probably frivolous, and would encourage the State Bar to seek legislative guidance – and likely an amendment to Section 6060(g) – before pursuing this program.

Fiscal Concerns

- Although the Report states that “[t]here is no fiscal impact associated with the requested action of the Board today,” that is highly misleading. The “no fiscal impact” conclusion refers to the mere posting of the proposal for public comment. The Report provides no information about the fiscal impact of the proposed program itself. It appears, however, that the fiscal impact would be significant – particularly if the portfolio review process is more than perfunctory. Given the State Bar’s well-known financial problems, this would appear to be an unwelcome and unnecessary expense.

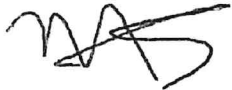
The Bar exam is not perfect. But it does ensure that individuals seeking a law license obtain and demonstrate some basic knowledge about a variety of legal subjects. That is extremely

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important, even for lawyers who ultimately go into a relatively narrow field of law. If an individual is not able to pass the Bar exam – even at the recently lowered passing level – that means, at a minimum, that person does not have the requisite legal knowledge to effectively operate as a lawyer. The result is that clients (and the public) will suffer from inadequate legal representation. And, as we know, the clients who suffer will not be the Fortune 500 companies, but rather will be individuals, including criminal defendants and family law litigants, who can least afford bad legal advice.

We appreciate the Board's consideration of our comments and suggestions.

Sincerely,

A handwritten signature in black ink, appearing to read 'MAG', written over a horizontal line.

Michael A. Gregg
2023 President
Orange County Bar Association