

COMMITTEE OF BAR EXAMINERS OPEN SESSION AGENDA ITEM

AGENDA ITEM: October 2014 – O-401

DATE: October 8, 2014

TO: Subcommittee on Educational Standards

FROM: George Leal, Director, Educational Standards

SUBJECT: **Open Report on Pilot Program re Calculation of Cumulative Bar Examination Pass Rates**

BACKGROUND

Since January 1, 2013, Rule 4.160(M) of the *Accredited Law School Rules* requires that all California Accredited Law Schools (CALs) “must maintain a minimum, cumulative bar examination pass rate as determined and used by the Committee in the evaluation of the qualitative soundness a law school’s program of legal education.”

To quantify the new standard, the Committee of Bar Examiners (Committee) amended the *Guidelines for Accredited Law School Rules* by adopting two new Guidelines: Guidelines 12.1 and 12.2. Guideline 12.1 sets the current, minimum MPR at 40% and requires each CALs is to calculate its respective pass rates as a rolling, five-year annual percentage. To calculate its pass rate, a CALs is to divide the total number of its graduates who take and pass the California Bar Examination (CBX) over a five-year period of time, by the total number of graduates who take any administration of the CBX during the same period of time, whether or not they pass. Graduates who choose not to take the CBX are not counted in calculating a law school’s cumulative rate.

The Committee’s goal in adopting a MPR as an accreditation standard was to have all CALs calculate and report an accurate, consistent and verifiable metric. Soon after Guidelines 12.1 and 12.2 were adopted, however, several CALs Deans expressed concern that the methodology described in Guideline 12.1 was unclear and ambiguous as to which CBX administrations should be used and which eligible graduates should be counted to calculate an accurate pass rate. The Deans were concerned that, as adopted, Guideline 12.1 would likely produce inaccurate and inconsistent reporting.

The Committee deferred implementing Guidelines 12.1 and 12.2 to address the Deans’ concerns and the requirement that the CALs report by November 2013 was suspended pending efforts to amend Guideline 12.1. The Committee’s Accredited Law School Rules Advisory Committee (RAC) then drafted proposed amendments to Guideline 12.1 which, it was thought, would eliminate the ambiguity as to which CBX administrations and which graduates were to be used to calculate an accurate pass rate. The proposed

amendments were considered by the Committee at its March 2014 meeting and, after public comment, all were adopted and became effective as of April 26, 2014.

As now amended, Guideline 12.1 required the CALS to calculate and report their respective pass rates on a Committee-approved form by this past July 1st. However, during the effort to draft a compliance reporting form that would incorporate the amendments to Guideline 12.1, the methodology it described was found to be both internally inconsistent and unworkable. The underlying problem was due to the requirement that the MPR “reporting period starts with the July administration of the California Bar Examination in the first year and ends with the February administration of the California Bar Examination in the same calendar year in which a MPR is reported.”

To correct the problem, staff worked extensively with the RAC Chair Dean Heather Georgakis to draft both new amendments to Guideline 12.1 and a compliance reporting form that would offer the CALS a consistent and workable methodology. Attachment A contains the red-lined, proposed further amendments to Guideline 12.1 and 12.2 and the associated compliance reporting form that explains the proposed methodology.

Each was then submitted to the RAC and the Committee for consideration during their respective meetings this past June. At the RAC meeting, member Dean Patrick Piggott of Humphreys College School of Law and Dean Jane Gamp of San Francisco Law School (who is not a member of RAC) objected to the methodology devised by staff and Dean Georgakis as being overly strict and unfair in its interpretation of the MPR accreditation standard. They argued that it offers the very last class of graduates in each reporting period only one opportunity to take and pass the CBX. In its place, Deans Piggott and Gamp suggested using a “flexible” approach that would give all such graduates an additional opportunity to take and pass the CBX by using the results of one additional administration in each law school’s cumulative pass rate.

They proposed using the February CBX administration given after the close of each five-year reporting period. Under this proposal, a total of 11 CBX administrations for each five-year reporting period could be used to calculate a school’s pass rate since it would include an administration given after the close of each reporting period. The Deans, however, agreed that only 10 administrations would be used for any graduate who passes the CBX and then is counted within a school’s pass rate. Attachment B sets out proposed amendments to Guidelines 12.1 and 12.2 and an applicable reporting form that, if approved, would adopt the Deans’ “flexible” methodology.

The methodology recommended by staff, which was an agenda item considered by the Committee in June, requires that each CALS calculate its pass counting only those students who both graduate and take the CBX at least once during the reporting period. Under this method, while the most recent graduates in a reporting period have only one opportunity to take and pass the CBX, those who graduate within the first few months of any reporting period will have a full 10 administrations to pass. As a rolling average, the most recent class of graduates counted in any reporting period will remain within the reporting period the following year, and then for three more years for a total of five years so, if needed, they will have no fewer than 10 administrations to take and pass the CBX.

Because there was no consensus by RAC with regard to which methodology should be recommended, it recommended to the Committee that it conduct a “Pilot” MPR reporting program that would require each CALS to calculate and report its pass rate using both methodologies. The Committee accepted this recommendation so a second reporting form that embodied the “flexible” approach was prepared (Attachment B). Both forms were then sent to each of the CALS with a request to calculate and report then using both methodologies for a one-time report to be submitted on or before September 15th.

As defined in both reporting forms, the inaugural reporting period extends from August 1, 2008 through July 31, 2013. To report accurately, each CALS was to identify and report the names of all who graduated from the law school during this period and then, for the staff-recommended methodology, also took any CBX administration during the reporting period; using the Deans’ recommended methodology, a CALS was to report all who passed the CBX during the reporting period, plus any who graduated within the reporting period but may have taken the CBX after the close of the reporting period, *i.e.* the February 2014 administration. All such students were to be counted as “qualified takers” whether or not they passed that administration of the CBX.

Each CALS responded to the Committee’s request and their respective rates, calculated using each methodology, have been reported confidentially to the Committee.

DISCUSSION

Use of the staff-proposed methodology produced an overall average, cumulative pass rate for all CALS reporting of 54%. In using the “flexible” methodology, the overall average, cumulative pass rate for all CALS reporting was 59%, a 5% overall difference. The 5% percent increase between the two methodologies highlights the “flexible” nature of the methodology suggested by the CALS Deans.

In being able to use their graduates’ results on one additional CBX administration, all of the CALS except one counted several additional “qualified takers” who graduated in May 2013 (within the reporting period) and then took either or both the July 2013 and February 2014 administration of the CBX. When any of these graduates then passed either administration, they were then counted among the passing “qualified takers” which resulted in the higher cumulative pass rate reported by all the CALS but one.

In using the staff-recommended methodology, any CALS student who graduated in time to take July 2013 CBX administration, but chose not to, could not be counted as a “qualified taker” since they did not both graduate and take the CBX during the reporting period. The resulting 5% average difference in the overall cumulative average is not inconsequential; approximately 35% of the CALS reported a cumulative rate below 50% using the staff-recommended methodology, while only 23.5% of the CALS using the Deans’ proposed “flexible” methodology reported a cumulative rate of below 50%.

The 5% difference between the two methodologies does not, however, appear to create any material difference in the MPR’s role as an effective accreditation standard. Each CALS that reported a compliant cumulative rate under the “flexible” methodology, was also compliant using the staff-recommended methodology.

Given the lack of any material difference in its role as an accreditation standard, it appears that adopting the flexible methodology is reasonable for at least two key reasons. First, as was suggested by the Deans, using the results of an additional February administration offer a more fair approach by giving all CALS graduates at least two opportunities to take and pass the CBX. As such, the rate reported would reflect a truer, cumulative average. Moreover, by adopting the “flexible” approach and its overall higher average cumulative rates, there is now solid, verifiable evidence that shows that the current 40% minimum rate could and should be increased sometime in the future.

Finally, on a small but technical issue, the “flexible” approach increases the likelihood that all CALS graduates will have the minimum of 10 administrations to pass the CBX. This issue arises since the majority of CALS students graduate in late May or early June. As a result, due to the start date of the reporting period (August 1st), the first cohort of graduates from most CALS that are counted in any reporting period do not qualify to take the first CBX administration (a February administration) in each reporting period since they do not graduate for several months thereafter. As a result, under the flexible method, the use of an additional February CBX administration after the close of each reporting period will give all CALS graduates (whenever they graduate) at least 10 CBX administrations (instead of nine) to pass and then be used to their school’s MPR.

Thus, if adopted, the flexible method would use the same five-year reporting period as that proposed by staff (August 1st – July 31st) and, within this reporting period, it will also classify each “qualified taker” as only those who graduate within the reporting period. The only material difference is that the “flexible” approach will count any qualified taker who passes any administration either within the reporting period or the additional February administration. While the use of this additional administration will result in the use of 11 administrations, both the CALS Deans and staff agree that no more than 10 will be used to count any qualified taker who passes this last CBX administration.

Finally, the only negative factor to be noted in the adoption of the flexible method will be that with its use of an additional February administration it will be impossible for any CALS to submit its MPR compliance report until at least July 1st since the pass/fail results for any February administration are not issued until late May. A July 1st deadline will therefore result in the passage of 11 months, from the end of each reporting period until each CALS reports, before the Committee is informed of any school’s compliance.

RECOMMENDATION

Subject to any additional input or additional amendments that the RAC may wish to offer, it is recommended that the Subcommittee recommend to the Committee that the open report on the Pilot Program be received and filed; that the proposed amendments to Guidelines 12.1 and 12.2 of the *Guidelines for Accredited Law School Rules* in the form as they appear in Attachment B be approved in principal, subject to a 30-day public comment period; that any comments received be forwarded to the Committee’s Advisory Committee on California Accredited Law School Rules for its review and comment; and that this matter be

placed on the agenda for final consideration by the Committee at its December 2014 meeting.

PROPOSED MOTION

If the Subcommittee agrees, the following motion is suggested:

Move that the open report on the Pilot Program re Calculation of Cumulative Bar Examination Pass Rates be received and filed; that proposed amendments to Guidelines 12.1 and 12.2 of the *Guidelines for Accredited Law School Rules*, as attached hereto, be adopted in principle; that the proposed amendments be circulated for a 30-day public comment period; that the proposed amendments and any comments received be forwarded to the Committee's Advisory Committee on California Accredited Law School Rules for its review and comment; and that this matter be placed on the agenda for final consideration by the Committee at its December 2014 meeting.