The Supreme Court
State of Washington

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To:	Justices
From:	Chief Justice González
Date:	March 1, 2024
RE:	Law Deans' Bar Exam Cut Score Recommendation En Banc Case Conference, March 6, 2024, Tab O

The deans of our three law schools ask us to lower the Uniform Bar Examination cut score from 270 to 260 immediately. I recommend we do so for this year and 2025. In 2026, NextGen Bar Exam, which will have a different scoring system, will be available and we can decide then what steps to take.

BACKGROUND

The current Uniform Bar Examination (UBE or bar exam) is scored out of 400 points. Minimum passing (cut) scores vary from 260 to 270.[1] Under our current rules, Washington examinees must earn a cut score of at least 270 to pass though we temporarily adjusted the cut score during the pandemic.[2] APR 4(d)(1).

Deans Lawson, Rooksby, and Varona have asked us to adopt a cut score of 260, consistent with the "overwhelming research on fairness and access to the profession." The deans do not offer supporting argument or citation, but their request is supported by a great deal of evidence that the bar exam disproportionately burdens BIPOC and low-income examinees. *See* Washington Bar Licensure Taskforce, A Proposal for the Future 1-3 (2023), https://www.courts.wa.gov/content/publicUpload/Washington%20Bar%20Licensure%20Task%20Force/WBLTF%20Alternatives%20Recommendation%20%20Working%20Draft%2010101123.pdf; Michael B. Frisby et al., *Safeguard or Barrier: An Empirical Examination of Bar Exam Cut Scores,*70 J. LEGAL EDUC. 125 (2020); Eli Wald, *A Primer on Diversity, Discrimination, and Equality in the Legal Profession*

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[1] See Appendix 1, Figure 1.
[2] We reduced Washington's cut score to 266 for the exams in 2020, 2021, and Winter 2022.

or Who is Responsible for Pursuing Diversity and Why, 24 GEO. J. LEGAL ETHICS 1079 (2011).

There is a statistically significant negative relationship between the percentage of Black and Latinx students in a law school's student body and the bar passage rates of that school's graduates, indicating that the bar exam is a more significant barrier to practice for students of color than their white peers. Scott Devito et al., *Examining the Bar Exam: An Empirical Analysis of Racial Bias in the Uniform Bar Examination*, 55 U. MICH. J. LEGAL. REFORM 597, 599 (2022). A 2020 AccessLex Institute study in California found that "maintaining a high cut score does not result in greater public protection as measured by disciplinary statistics but does result in excluding minorities from admission to the bar and the practice of law at rates disproportionately higher than Whites."[3] MITCHEL L. WINICK ET AL., EXAMINING THE CALIFORNIA CUT SCORE: AN EMPIRICAL ANALYSIS OF MINIMUM COMPETENCY, PUBLIC PROTECTION, DISPARATE IMPACT, AND NATIONAL STANDARDS 2 (2020) [hereinafter WINICK ET AL. (2020)].[4]

Of the thirty-nine states currently using the UBE, six have set their cut scores at 260.[5] Utah adopted 260 in 2023; public comments from the deans and faculty of BYU Law School and the S.J. Quinney College of Law at the University of Utah[6] attest that the most important factor in bar passage is the ability to devote oneself to exclusive study (usually correlated with affluence) and that the bar exam disproportionately "burdens and disadvantages women, racialized minorities, and low-income earners." *See* Proposed Utah State Bar (USB) Rules 14-0711 and 14-0712 (Utah 2023). Appendix 2 at 6.[7]

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[3] Although California does not use the UBE, this study looked at relative changes in cut scores, making its analysis transferrable to other exams. The California analysis was cited in the public comment when Utah, which does use the UBE, lowered its cut score to 260 in 2023.

[4] https://www.accesslex.org/grant-research-and-data-tools-and-resources/examining-california-cut-score-empirical-analysis

[5] See Appendix 1, Figure 1.

[6] Available in their entirety in Appendix 2.

[7] Full public comment available at: https://legacy.utcourts.gov/utc/rules-comment/2023/05/05/rules-governing-the-utah-state-bar-and-rules-of-professional-practice-comment-period-closes-june-19-2023/. Expert comment excerpted in Appendix 2.

Projected Impacts in Washington

On average 84 people score between 260 and 269 (inclusive) on the UBE each year.[8] While the WSBA does not track the demographics of that cohort, California data suggests that this is likely to be made up of people of color. WINICK ET AL. (2020).

Recommendation

I recommend we grant the request and drop the cut score to 260 for this year and the next via an emergency rule change to APR 4(d)(1). I have attached a revised rule for review. I welcome your thoughts.

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[8] Data from the WSBA reflects all exams between Winter 2018 and Summer 2023. See Appendix 1, Figure 1.

Appendix 1: Figures

Figure 1: Cut Scores in UBE States

MINIMUM PASSING UBE SCORE*	JURISDICTION
260	Alabama, Minnesota, Missouri, New Mexico, North Dakota, Utah
264	Indiana, Oklahoma
266	Connecticut, District of Columbia, Illinois, Iowa, Kansas, Kentucky, Maryland, Montana, New Jersey, New York, South Carolina, Virgin Islands
268	Michigan
270	Alaska, Arizona, Arkansas, Colorado, Idaho, Maine, Massachusetts, Nebraska, New Hampshire, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Vermont, Washington, West Virginia, Wyoming

https://www.ncbex.org/exams/ube/ube-minimum-scores

Figure 2: Washington UBE Examinees Scoring Between 260 and 269 (inclusive)[9]
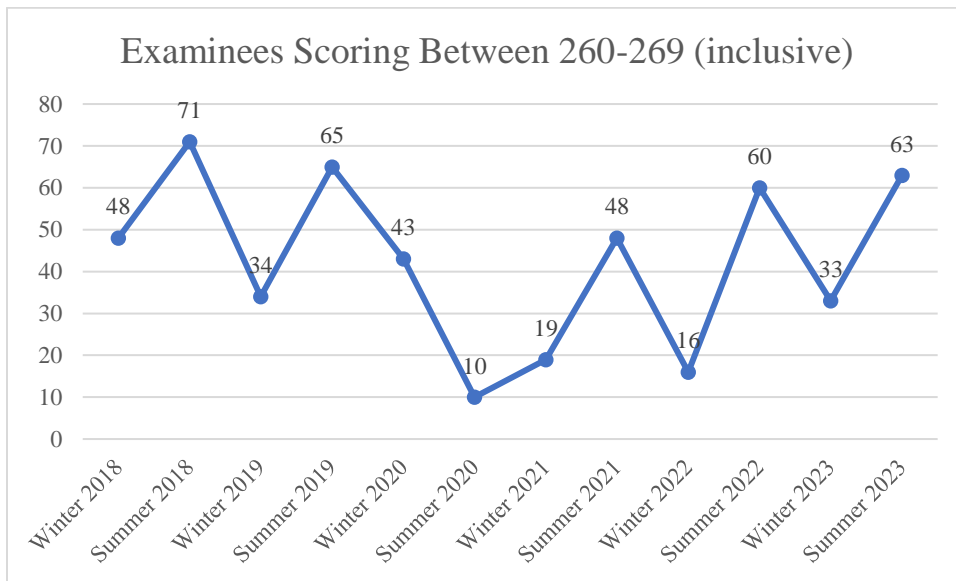
Data courtesy of the Washington State Bar Association

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[9] Due to the COVID-19 emergency, we reduced Washington's cut score to 266 for the exams in 2020, 2021, and Winter 2022. Some of the examinees represented in this graph may have achieved licensure on those exams. However, the exam itself remained unchanged and the scoring distributions represented here are accurate and generalizable.

Appendix 2: Expert Comment re: Utah's Proposed Cut Score Change

Dean Elizabeth Kronk Warner [S.J. Quinney College of Law, University of Utah]
May 23, 2023 at 3:22 pm

I write to support the proposed amendment lowering the passing bar examination score from 270 to 260. I appreciate the Court's willingness to consider this important issue and comments submitted by the public.

First, I wholeheartedly support the comments submitted by Dean Gordon Smith and Professor Catherine Bramble. Both have done an excellent job of explaining why the passing bar examination score should be lowered to 260.

My comments focus on the discriminatory impact of the existing 270 passing bar examination score. As Dean Smith explained, many, including myself, question whether the bar exam is a test of competency. We can agree that the current exam is flawed, as the NCBE has announced the release of the Next Generation Bar Examination in the coming years. The bar examination is a test of affluence and not competence as most test takers must invest significant time and money into preparing for the exam. For example, if a law student were to accept a post-graduation job making $60,000 per year, the student would lose approximately $15,000 in salary if they took time off from work to study for the bar examination. [It is recommended that students study between 400 and 600 hours to adequately prepare for the bar exam, or 10 to 15 weeks.] Additionally, the student might pay up to $3,500 for bar preparation costs. The financial cost to the student could be upwards of $20,000 to study for the bar exam.

As a result of these costs, the bar exam disproportionately burdens and disadvantages women, racialized minorities, and low-income earners. In turn, those falling between a 260 and 269 bar score are more likely to fall within one of these impacted groups than those scoring a 270 or higher. The higher passing score in Utah excludes recent graduates who would add significant diversity to the practice of law. The ABA recently released data showing the difference in bar passage. In 2022, the first-time pass rate for white test takers was 83%, while 57% of Black examinees passed on their first attempt. For first-time Hispanic and Asian test takers the pass rates were 69% and 75% respectively.

The 270 passing score only exacerbates the disparate impact of the bar exam. In 2020, the AccessLex Institute released a study confirming that a lower cut score "would have increased the number of newly admitted minority attorneys in California." Further, "[t]he study also 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. The study results indicate that maintaining a high cut score does not result in greater public protection as measured by disciplinary statistics but does result in excluding minorities from admission to the bar and the practice of law at rates disproportionately higher than Whites." Examining the California Cut Score: An Empirical Analysis of Minimum Competency, Public Protection, Disparate Impact, and National Standards, **https://www.accesslex.org/grant-research-and-data-tools-and-resources/examining-california-cut-score-empirical-analysis**. Although California is not a UBE state, the analysis from this study is equally applicable to Utah.

Further, an unfortunate and significant consequence this disproportionate impact on women, racialized minorities, and low-income earners is the public's access to justice. There is evidence that non-majority lawyers provide a disproportionately high percentage of services to "minority" and underserved communities. By excluding people who would likely serve underserved populations, the 270 bar examination pass score negatively impacts many of those most in need of legal services throughout our state. Access to justice is an issue of significant and increasing concern in Utah. The task force created in 2018 to research and make recommendations on this critical issue states in its August 2019 Final Report that "'[a]n estimated five billion people have unmet justice needs globally. This justice gap includes people who cannot obtain justice for everyday problems, people who are excluded from the opportunity the law provides, and people who live in extreme conditions of injustice.'" The report explains that the lack of access to justice is not limited to those in underdeveloped countries; rather, "an astonishing '86% of civil legal problems reported by low-income Americans in [2016-2017] received inadequate or no legal help.'"

Since joining the legal academy in 2006, I have known many students who missed the passing bar exam score by a mere handful of points. In most instances, they failed because they were unable to take two to three months off from work to study for the exam, and not because of their competency. All would have been excellent additions to the legal bar (and many eventually passed after retaking the bar exam at significant cost to themselves or took the bar exam in a state with a lower passing bar exam score requirement). As at BYU Law School, only a small number of students at the S.J. Quinney College of Law fail to pass the Utah bar exam on the first try, and most of those would have been admitted in other states. All of these students would be a welcome addition to the Utah practicing bar. Because our students are passionate about access to justice and pro bono, I am also confident that these students would have helped the most vulnerable Utahans. I therefore agree with Dean Smith that the proposed amendment is in the best interest of the public.

For these reasons and those advanced by other commentators, I support the proposed amendment as it is consistent with notions of anti-racism and will advance access to justice in Utah. Again, I very much appreciate the Court's consideration of these comments.

https://legacy.utcourts.gov/utc/rules-comment/2023/05/05/rules-governing-the-utah-state-bar-and-rules-of-professional-practice-comment-period-closes-june-19-2023/

Dean Gordon Smith [BYU College of Law]
May 5, 2023 at 11:54 pm

Lowering the passing score on the bar examination from 270 to 260 is a welcome step on bar licensure. According to the National Conference of Bar Examiners (NCBE), the Uniform Bar Exam (UBE) "assures a high-quality, uniform system of assessment of minimum competence." Nevertheless, the NCBE has never been shown to be a valid test of competence to practice law. Indeed, in 2018 the NCBE appointed a task force "to ensure that the bar examination continues to test the knowledge, skills, and abilities required for competent entry-level legal practice," and the task force implicitly acknowledged the failure of the UBE to accomplish its stated goal,

recommending a major overhaul of the examination that has come to be called the "Next Generation Bar Examination."

Even if we assumed the current UBE was well-designed to test competence to practice law, no one — including the NCBE — could tell us the score at which "minimum competence" would be established. Thus, it is impossible to justify any passing score as the correct one. Perhaps not surprisingly, therefore, the 39 states currently using the UBE have seven different passing scores, even though no one seriously argues that "minimum competence" varies from state to state. Two law professors who studied the setting of these so-called "cut scores" concluded that they were the result of "a peculiar mixture of psychometrics, tradition, and politics." Joan W. Howarth & Judith Welch Wegner, Ringing Changes: Systems Thinking About Legal Licensing, 13 FIU L. REV. 383, 413 (2019). In some instances, cut scores have been explicitly connected to controlling the number of lawyers, rather than establishing the standard of minimum competence.

Utah's choice of 270 seems to have been motivated primarily by the fact that 270 was the modal score among states that had adopted the UBE. Among UBE states, Utah and 17 other states require a passing score of 270, but 18 other states (plus the District of Columbia and the Virgin Islands) have established lower passing scores, including six states with a score of 260.

While the change in cut score from 270 to 260 suffers from the same problem as the initial setting of the cut score at 270, namely, the lowering of the score is not justified by any connection between that score and minimum competence to practice law, moving the cut score to the lower boundary of UBE passing scores follows the recent trend of states lowering cut scores to acknowledge significant problems with relying on the UBE as a test of minimum competence to practice law. Utah now has the third highest cut score in the nation. Given the limited value of the UBE as a test of minimum competence to practice law, it should not present such a barrier to licensure for people who have already completed three years of graduate study in law (which is, itself, an unusually high barrier to licensure compared with other countries).

BYU Law School typically has only a small number of graduate who score below 270 on the UBE, and almost all of those graduates could be admitted to practice law in another jurisdiction. Knowing these students, I am confident that they would be a credit to the Utah Bar, and many of them would work in jobs that promote greater access to justice for Utahns. The proposal to lower the passing bar examination score from 270 to 260 is a small change, but I am confident that it would serve the public's interest. Thus, I endorse the proposal.

Beyond the proposed amendments. I would welcome the inclusion of some modest retroactivity for this change. I would allow all applicants who have already applied for the July 2023 administration of the UBE (the final filing deadline date was April 1) to update their existing applications with a prior score. This would affect a small number of people, but would obviate the need for this limited group of people to retake an examination for which they have already obtained a passing score.

I am grateful to the Utah Supreme Court for its constant efforts on behalf of the people of Utah, and I hope these changes will be embraced by the Utah Bar and the public.

Professor Catherine Bramble [BYU Law School]
May 16, 2023 at 12:44 pm

I am strongly in favor of the Utah Supreme Court's proposal to lower the passing score from 270 to 260 and appreciate the Court's continued interest in and thoughtful attention to ongoing issues with attorney licensure and the Uniform Bar Exam.

I graduated in 2005 and was admitted to the Utah Bar that same year. I never thought about the Bar Exam again until a few years ago when, as a law professor, I became involved in BYU Law School's efforts to support students post-graduation. What I have learned over the past 4 years while critically studying the Bar Exam has completely changed my perception of it. In a profession that prides itself on critical thinking, evidence-based conclusions, and modernization when evidence and logic demonstrate that the way things have previously been done are no longer warranted or supportable, I would hope that we as members of the Utah State Bar will become informed about the issues surrounding attorney licensure and supportive of the Utah Supreme Court in its efforts to improve the licensure process.

The Uniform Bar Exam (used in Utah and 40+ other jurisdictions) is administered by the National Conference of Bar Examiners (NCBE) and is an exam that was not created based on any evidence-based research to determine what is required for an attorney to be minimally competent. In October of 2020, results were published from the most comprehensive study ever done of what minimum attorney competence is by researchers completely unaffiliated with the NCBE. Building a Better Bar: The Twelve Building Blocks of Minimum Competence, Deborah Merritt & Logan Cornett (October 2020). The study was the first to use qualitative research and involved 50 focus groups of practicing attorneys in 18 locations spread across the U.S. including junior and experienced lawyers across multiple areas of practice. The study concluded that there are "12 building blocks of minimum competence"—the ability to identify legal issues, the ability to conduct research, and the ability to communicate as a lawyer, to name a few. The study further included 10 recommendations for future licensure processes including that (1) written exams are not well-suited to assessing all aspects of minimum competence, (2) multiple-choice questions should be using sparingly, if at all, as they are a poor way of assessing threshold understanding of legal doctrine, and (3) test questions should be open book given that legal practice is open book.

Interestingly, the NCBE chose to run a study at the same time to determine what minimum competence is and concluded that it includes many of the same skills identified by The Twelve Building Blocks study. However, the NCBE's list of skills included multiple skills that have never been tested on the Bar Exam in any fashion (e.g., client counseling and advising, negotiation and dispute resolution, and legal research). As a result of its own study, the NCBE promised to overhaul the existing exam by 2026 with the "NextGen Bar Exam." Given that the rollout is taking several years, the NCBE has still defended its current exam—the UBE—as a completely reliable test of minimum competence even while admitting that its own study demonstrated that family law, trusts and estates, conflict of laws, and secured transactions are not sufficiently relevant to be tested for minimum competence. The NCBE, however, claims it has no way of removing these areas from the Bar before 2026 since exams are written so far in advance.

Therefore, the current Bar Exam fails to test critical skills needed for minimum competence, continues to test areas that it admits are irrelevant to minimum competence, and uses improper methods to test those areas it does focus on, including requiring significant amounts of memorization with 50% of the test-taker's score being from 200 multiple-choice questions. In the meantime, the UBE has become a test of privilege, requiring students to spend up to $4,000 on a commercial Bar prep course and devote hundreds of full-time study hours during the 10-12 weeks following law school graduation.

This test of privilege has resulted in significant racial disparities in Bar Exam results. According to data from the American Bar Association, in 2020, only 66% of Black first-time test takers passed as compared to 88% of white first-time test takers.

Perhaps the disparate impact could be justified if it played a necessary role in protecting the public. However, just as the lack of research has resulted in a current Bar Exam that does not test the right things in the right way, there has never been any evidence from any jurisdiction that having a lower cut score has resulted in an increase in attorney malpractice. In fact, a 2013 study showed that the most common areas of discipline for attorneys have nothing to do with the skills tested on the Bar Exam. The most common areas of attorney discipline identified from that study were (1) failing to communicate with clients (20%); lack of diligence (17.93%); and failure to safeguard client property (11.26%). A Study of the Relationship Between Bar Admissions Data and Subsequent Lawyer Discipline. **https://ssrn.com/abstract=2258164**.

Furthermore, the NCBE itself claims that the Bar Exam is a completely reliable test of minimum competence that will better protect the public while, in the same breadth, claiming that individual jurisdictions can pick any score between 260-280 and the results will be equally reliable. If minimum competence is truly a minimum standard, which is presumably a yes/no question, how can there be a 20-point spread that jurisdictions can arbitrarily choose from?

Finally, from an anecdotal standpoint as the most oft-cited reasoning I hear to support attorneys' opinions on the Bar Exam is based on their personal experience as Bar taker or Bar grader, I have now worked with hundreds of students preparing for the Bar Exam. I have worked with students who failed by one or two points in Utah, earning a score that made them "minimally competent" in many other U.S. jurisdictions that have chosen a slightly lower pass score. Some of these students have moved out of Utah to be licensed elsewhere and have had wonderfully successful careers as attorneys. More than one of them have been students who would have added to the diversity of Utah's attorneys, but an arbitrary pass score kept them out. Others have stayed here and spent the next 6 months studying again with all of the cost that entails—not working for 6 months, paying again for a prep class, paying again for the Bar Exam, and not being able to contribute their legal skills to the citizens of Utah; none of this is to mention the severe mental and emotional stress of retaking the Bar Exam to earn 1 or 2 more points. Not one student has ever reported that the second time through resulted in them gaining helpful legal knowledge or skills they didn't have before; rather, they drill down on test-taking strategies and practice hundreds of multiple-choice questions to memorize obscure legal rules that have nothing to do with their area of legal practice.

Turning back to evidence-based argument, California lowered its cut score a few years ago, and it resulted in significantly more underrepresented populations being admitted to the California Bar while having no effect on increasing malpractice rates.

I applaud the Court for being willing to carefully consider the issue of attorney licensure given the current Bar exam options available. I hope my colleagues in legal practice will do the same and support not only a lowering of the passing score to 260—a score the test-makers themselves claim is reliable in demonstrating minimum competence—but also support further reform in the area of attorney licensure in the coming years.