

Why is California's State Bar pinching pennies at the public's expense?

Protecting the public—not thrift—is the bar's primary regulatory purpose, and its focus on cutting corners has arguably diluted the bar exam from the nation's hardest to something that weakens public protection.

By David A. Carrillo and Stephen M. Duvernay

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The California Supreme Court recently [rebuffed](#) the State Bar's plan to revise its bar examination, which would have featured a novel set of privately contracted questions and an experimental test that awarded real-exam bonus points to volunteers. This is the latest in a long series of dubious changes to California's bar exam, from [reducing](#) the number of days to [cutting](#) exam locations. Most of these reforms have been justified by cost savings, and conserving taxpayer money seems at first a good call, especially for a cash-strapped state agency. But protecting the public—not thrift—is the bar's primary regulatory [purpose](#), and its focus on cutting corners has arguably diluted the bar exam from the [nation's hardest](#) to something that weakens public protection.

California's bar has long suffered from financial woes. Its general fund revenue (or about a quarter of its overall [budget](#)) comes mainly from attorney licensing fees. That fee amount is set by statute, which turns out to be a major vulnerability for the state's least-influential administrative agency. With few friends and no political clout, the bar's fee bill is often a political football in Sacramento. The legislature sometimes holds the fee bill hostage as leverage for whatever agenda is in play, as it did when [pushing](#) the bar to split off the sections. And governors have threatened to veto fee bills.

Gov. Pete Wilson (Berkeley Law '62) did so in 1998, declaring that dues were excessive and [calling](#) the bar "bloated, arrogant, oblivious and unresponsive." The humbled bar asked its members to voluntarily pay their dues, and the California Supreme Court took the extraordinary step (*In re Attorney Discipline System* (1998) 19 Cal.4th 582) of ordering all licensed attorneys to write checks for partial payment. Gov. Arnold Schwarzenegger vetoed another fee bill in 2009, [charging](#) that "a lack of internal controls" allowing a former employee to embezzle nearly \$676,000 showed that "the State Bar cannot continue with business as usual."

And the bar at times is its own worst enemy, stumbling from one public controversy to another. Remember the [leak](#) of topics planned for the July 2019 exam? The latest calamity is an offshoot of the Tom Girardi debacle, featuring former executive director Joe Dunn in a [scandal](#) involving corruption, bribery, influence-peddling, and misuse of the bar's resources. All this after divesting the regulatory functions from other roles in 2017 was [hailed](#) as a long-needed structural reform that would cure every ill.

Yet here we are, with the bar in another financial crisis. Indeed, money is the bar's core problem—and some mismanagement identified in [back-to-back](#) audits. But to its credit, the bar has long recognized the headaches its scant funds (and their squandering) cause and it has given thought to possible solutions. Unfortunately, in doing so the bar missed the forest for the trees by trying to minimize costs in ways that jeopardize its core function: public protection. The bar exam is the best example of this.

For many years California's bar exam had several unique features. As the only practical path to practicing law in the state the bar exam was exclusive, in part because California has never established reciprocity with any other professional law licensing systems. It was onerous, because it remained a three-day exam after other states started using a more relaxed two-day exam. And it was proudly both of those things, on the theory that a license to practice law in this state required rigorous validation to protect the public.

But the bar exam is expensive to administer, and it's an obvious choice for cost-cutting initiatives due to the bar's control over how much it charges test-takers or spends administering the exam. (Those things don't require legislative approval.) The bar's solution for this year's \$8 million [deficit](#) in its exam fund is to switch from buying into the nationally administered

Multistate Bar Examination to using exam questions provided by private contractor Kaplan Exam Services, saving \$3.8 million annually. This is the latest in a series of decisions that arguably diluted California's law licensing examination.

The first change was switching to a two-day exam. The bar tried for [years](#) to find support for a shorter exam, largely because it would save about \$1 million annually. The California Supreme Court eventually [approved](#) the bar's request to shorten the exam to two days starting with the July 2017 test. Pass rates cratered the following year, and the bar scrambled to recalibrate the exam.

The second front was the cut score. The bar pushed for lowering the cut score despite its [studies](#) on that option being inconclusive, with one study suggesting that people are maybe getting dumber: it concluded that a substantial portion of the pass decline was "attributable to changing applicant abilities" rather than the cut score. In 2017 the California Supreme Court initially [rejected](#) the bar's request to lower the cut score and ordered further study. Then the pandemic happened, and for the July 2020 exam the court [ordered](#) the test to be conducted online, lowered the cut score, and [formed](#) a blue-ribbon commission to study further changes. And now the bar's latest request—to abandon the national multistate exam—is again [justified](#) as saving money.

Bar examinations are often [framed](#) as designed to evaluate the minimum competence necessary for attorneys to practice law in the state. It may be time to rethink that least-common-denominator standard. The public is best served by high standards for professional services. It's true that lowering barriers to entry will broaden access to justice, and providing legal services to underserved communities is a longstanding problem. But laudable as those goals are, they are subordinate to the bar's overarching public protection mission: shielding citizens from those unfit to practice. Would you want a doctor from an unaccredited medical school who barely passed a watered-down licensing exam doing your heart transplant? No one would, which is why 15 deans from ABA-accredited law schools [expressed](#) "grave concerns" about the bar's current plan. You don't need to be Erwin Chemerinsky to understand that a cut-rate bar exam is the opposite of public protection.

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