



Supreme Court of California

350 McALLISTER STREET
SAN FRANCISCO, CA 94102-4797

TANI G. CANTIL-SAKAUYE
CHIEF JUSTICE OF CALIFORNIA

(415) 865-7060

October 1, 2020

SENT VIA EMAIL: echemerinsky@law.berkeley.edu

Dear Deans:

Thank you for your September 14, 2020 letter suggesting that the October California Bar Examination be administered as an open book exam and without the use of remote proctoring software. The court appreciates your concerns about the software being used to administer the exam.

As the attached letter from the State Bar explains, the proctoring software will not determine any examinee's identity, integrity, eligibility, or passing grade, nor will the software be used to prevent any applicant from completing their exam. Instead, multiple layers of human review of the exam videos will permit human proctors to make those determinations.

In addition, to alleviate any privacy concerns involving the use of the proctoring software, the court has just recently expressed agreement with the State Bar's decision to exercise its contractual authority to request that ExamSoft, and its third-party providers, destroy all of the personally identifiable information collected by the proctoring software. (See attached.) The court has also directed the State Bar to provide a timetable to outline the process of how this deletion will take place.

Lastly, concerning the request to allow an open book administration of the exam, none of the jurisdictions administering the online exam next week have switched to an open book format. In addition, administering the exam "without limits on what materials the student may consult during the exam" would violate the National Committee of Bar Examiners (NCBE) **policy** concerning the Multistate Bar Examination that will be administered on October 6. To date, the NCBE has not changed that policy.

RE: California Bar Examination
October 1, 2020
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The court thanks you and your colleagues for your letter and is looking forward to your continued participation in this challenging planning process.

Sincerely,

A handwritten signature in black ink that reads "T. Cantil-Sakauye". The signature is written in a cursive style with a large initial "T" and a long, sweeping underline.

Tani G. Cantil-Sakauye

Attachs.



Supreme Court of California

JORGE E. NAVARRETE
CLERK AND EXECUTIVE OFFICER
OF THE SUPREME COURT

EARL WARREN BUILDING
350 McALLISTER STREET
SAN FRANCISCO, CA 94102
(415) 865-7000

September 25, 2020

Mr. Sean M. SeLegue
Arnold & Porter
3 Embarcadero Center, 10th Floor
San Francisco, CA 94111

Dear Mr. SeLegue:

As the date for the online administration of the California Bar Examination (CBX) on October 5- 6, 2020 fast approaches, the court has received letters from applicants and supporters expressing deep concern regarding the sensitive nature of the personally identifiable information (PII), including biometric data, that the State Bar's third-party vendor, ExamSoft Worldwide Inc., intends to collect and retain from applicants in the course of administering the CBX. The court understands that collection of this data is critically important to ensure the integrity and security of the examination process. At the same time, ExamSoft's Privacy Policy appears to permit the company to use and disclose applicants' data for many purposes, some of which appear to be unrelated to the administration of the examination. Thus, the court shares applicants' concern that any unnecessary retention of their sensitive PII data may increase the risk of unintentional disclosure.

With this in mind, the court understands and supports the State Bar's decision to exercise its contractual authority to request ExamSoft and its third-party providers destroy all of the PII that it has collected, and will have collected, from the October 2020 CBX applicants as soon as possible after the exam and to the fullest extent permissible under the parties' agreement as amended. The court understands that such a request for destruction will likely need to be staggered to permit the retention of certain PII collected from applicants receiving Chapter 6 Notices for possible examination conduct violations while the conduct violation is being resolved. The State Bar has indicated that upon resolution of such conduct violations, or such earlier date as may be possible, the State Bar will exercise its authority to request the destruction of this PII as well. Therefore, the State Bar should prepare a proposed timetable for destruction of all applicants' PII retained by ExamSoft and its third-party providers that takes into account these and any other relevant considerations. The court directs the State Bar to submit the timetable to the court within 60 days of the date of this letter. The court hopes this will provide examinees with additional peace of mind as they prepare for the October online administration of the CBX.

Very truly yours,

A handwritten signature in blue ink, appearing to read "J. Navarrete", written over a circular stamp.

JORGE E. NAVARRETE
Clerk and
Executive Officer of the Supreme Court

cc: Donna Hershkowitz, Interim Executive Director, State Bar of California



The State Bar of California

OFFICE OF THE EXECUTIVE DIRECTOR

845 S. Figueroa Street, Los Angeles, CA 90017

donna.hershkowitz@calbar.ca.gov
213-765-1356

September 21, 2020

SENT VIA EMAIL

Nicole A. Ozer
Technology & Civil Liberties Director
ACLU Foundation of Northern California

Melissa Goodman
Director of Advocacy / Legal Director
ACLU Foundation of Southern California

David Loy
Legal Director
ACLU Foundation of San Diego and Imperial Counties

Jennifer Jones
Technology & Civil Liberties Fellow
ACLU Foundation of Northern California

Dear Ms. Ozer, Ms. Goodman, Mr. Loy, and Ms. Jones:

At the request of the Supreme Court, I am responding to your July 16 letter expressing concerns that the proctoring software for the online Bar examination will be using facial recognition technology for purposes of identification and defending against integrity breaches.

We are aware of and take very seriously the concerns expressed by the ACLU. *We want to assure you that we will not rely upon facial recognition technologies to determine any applicant's identity, integrity, eligibility, or passing grade or to prevent any applicant from completing their exam.*

Rather, we have instituted a system that allows every applicant to complete their exam regardless of any issues flagged by the software. Furthermore, our process relies on several independent layers of human review to assess the validity of any issues flagged by the software, and all final determinations will be made by State Bar reviewers in keeping with our standards. We believe the backstops and process we have put in place eliminate the issue of perceived or actual bias related to facial recognition software.

You further identified concerns about ExamSoft maintaining and/or using the biometric data that was or will be collected as part of the exam proctoring. ExamSoft states that biometric data is only used for and shared with proctoring partners for the purpose of providing the remote proctoring services. Biometric data is never sold and is retained only so long as required to provide these services. Upon request by the State Bar, the data will be purged after the exams are successfully administered and the review of recordings is completed. The State Bar of California is working with ExamSoft to confirm their efforts to mitigate privacy and security risks.

While the State Bar will not rely upon facial recognition technologies for any final determinations, the facial recognition software will be used at several intermediate steps throughout the exam, as described in greater detail below:

- After the examination begins, ExamSoft will run a deferred identification and verification of the photo taken by the applicant at the start of each exam session. This functionality focuses on Facial Matching. This technology will not prevent any applicant from completing the test on test days. Rather, the technology will help to flag any issues for human investigation while the applicant continues with their examination. No applicant will be denied entry to the exam pending verification.
- As a further layer of protection to ensure that all applicants are able to begin the exam sessions, applicants who experience network issues will be able to get a code from ExamSoft to enter the exam session during the logon period, even without internet access.
- Similarly, after the exams are administered, the software will aid in screening applicants' ExamMonitor videos to flag possible instances of integrity breaches for human reviewers to resolve. At no point will the technology determine that any applicant has violated exam rules or conditions. Any issues flagged by the software will trigger a minimum of four independent layers of human review (two by human proctors through ExamSoft's proctoring partners and at least two by the State Bar reviewers) before we make any final determination that an applicant has violated the identity or integrity standards.

Under the direction of the California State Supreme Court, the State Bar is doing everything in its power to plan for and administer the upcoming attorney licensing exam in October amid an unprecedented global pandemic. We believe that facial recognition technology is necessary to ensure the integrity and security of the exam process for those applicants taking the exam without live human proctors. We are confident that the backstops we have put in place

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throughout the examination process will eliminate the issue of perceived or actual bias related to facial recognition software.

We are committed to building a just and inclusive legal profession and will continue to work closely with the communities we serve to ensure everyone has fair and equal access to becoming licensed attorneys in the State of California.

Should you have further questions, please do not hesitate to contact me at donna.hershkowitz@calbar.ca.gov or 213-765-1356.

Sincerely,

/ s/

Donna S. Hershkowitz
Interim Executive Director