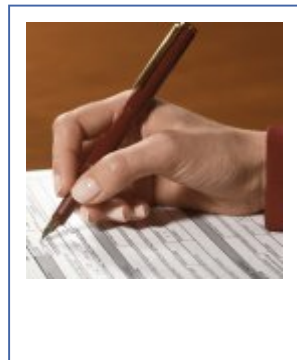


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New York's New Bar Exam Requirement Affects Law School Pass Rates

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The average pass rate for first-time takers of the July state bar exam was 76 percent — down one percentage point from the prior year and two points below the 2003 rate. It was the first time in more than 20 years that candidates were required to score an additional five points to qualify for licensure, an extra hurdle that has affected individual campus statistics and as many as 170 candidates.

According to a confidential projection provided to campus officials by the State Board of Law Examiners in Albany, the first-time pass rate would have been 78 percent if not for the higher cut score. Applying the projected average to the 8,609 first-time applicants means that as many as 170 candidates who failed the exam in July would have passed it last February.

The data released this week showed the new cut score -- 665 points out of 1,000 versus 660 points in the past — affected both the traditional high and low ends of the law school scale:

- New York University School of Law and Columbia Law School reported three- and four-point drops, respectively. In part, that contributed to Cornell Law's surpassing both institutions, with a pass rate of 95 percent -- three points over its 2004 rate.
- At the historically lower end of the scale, three campuses reported decreased pass rates: Pace Law School dropped three points, Touro Law Center dropped four and City University of New York School of Law decreased five.
- There was little change at the middle level, apart from Cardozo Law rising above Brooklyn Law and Buffalo Law. New York Law, which in 2004 placed near the bottom, returned to the middle ranks in 2005.

Although the downward trend in bar pass rates was numerically obvious, a handful of campuses -- notably New York Law School and the Benjamin N. Cardozo School of Law, each of which increased their pass rates by six points -- posted surprising gains for 2005.

"The data mask huge amounts of variation and oddities," New York Law Dean Richard A. Matasar said of the exception to the trend.

Matasar and other campus officials had vigorously opposed the new cut score.

In addition to providing a projected statewide average for first-time candidates under the former scoring system, the law board told each school what their pass rates would have been under the old standard.

Albany Law School, for instance, showed a projected bar pass rate of 82 percent under the old standard -- four points higher than its percentage under the new cut score, according to Dean Thomas F. Guernsey.

Likewise, Brooklyn Law School's projection was 86 percent -- two points higher than the official score, a campus official said.

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Not all law schools would disclose their confidential projections. And in response to a query from the Law Journal, the law board denied it had broken down data from the July exam in order to make such projections at this time.

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"I expected these individual figures to be lower, and I also expected the statewide average to be lower," said Melinda Saran, vice dean for students at University at Buffalo Law School. "People are a lot more afraid of this exam now."

But Dean David M. Schizer of Columbia Law did not see his school's decreased pass rate as necessarily related to the new score.

"I don't feel as if I know a definite connection," he said. "There will always be fluctuations. But there's certainly more that I want to know -- and we will, eventually -- about those students who didn't pass."

Still, the release of the statistics upset anew law school officials across the state who called the law board's insistence on the new cut score unjustified and said it is damaging the career hopes of hundreds of would-be attorneys.

"Think about the impact this has on those individuals," said David Rudenstine, dean of Cardozo Law. "If they're already working [as lawyers awaiting licensure], this puts their jobs at peril. If they're not yet working, it's going to be very hard to get a job."

For two years, the deans of the state's 15 laws schools, along with the heads of all the state's mainstream and special-interest bar associations, have expressed objection to the score increase. Several campus officials confirmed talk of litigation among opponents of the new score.

Rudenstine and Matasar, however, said it was unlikely that law schools could initiate litigation. Dean Hannah R. Arterian of Syracuse University College of Law said student groups would be more likely to file suit, as they could show direct damages.

As principal evidence for their criticism, campus officials cited the downward turn in the law board's reported statewide average pass rate of 76 percent, the confidential projections and volatility at the historically high end of the rankings, led by Cornell Law School advancing to the number one slot past New York University School of Law and Columbia Law School.

And, they said, those who failed the exam by five or fewer points negatively impacted their respective campus statistics, numbers crucial to law school marketing, fund raising and trustee happiness.

STUDY REQUESTED

Last year, the Court of Appeals, which appoints the five-member law board, asked for an impact study of the new cut score's effect on such students and their alma mater.

The Court also declared a moratorium on further increases to the score -- five more points were to be added for the July 2006 exam and another five points for the July 2007 exam, for an ultimate pass rate of 675 -- until the law board reports the study's results.

"I can't say when we'll be able to make a report," said John J. McAlary, executive director of the law board.

Guernsey of Albany Law questioned the wisdom of conducting an impact study after increasing the cut score rather than before.

"They feel that there's a need to raise the score in order to protect the public," he said of the board's unanimous decision. "But they have no evidence that shows the public is being harmed in any way by people scoring between 660 and 665 points on a bar exam."

Arterian was equally skeptical. "If you believe in a bar exam, you have to establish a cut-off point of some sort," she said. "I don't know that you have to defend that point. But if you change it, then you have to have a very, very good reason."

"They [the law board] have no correlation at all between performance on the bar exam and performance in practice," she added. "If they could demonstrate that, if they had historical data to show the relationship between the score you get and malpractice or ethics complaints -- anything like that -- then why wouldn't they undertake to show that before raising the cut score? And what assurance do we have that the moratorium will remain in effect?"

Arterian joined Matasar of New York Law and Dean Lawrence Rafal of Touro Law Center in speaking out against the law board's position during a May 2005 joint hearing in Albany before the state Senate's education and judiciary committees. Defending the law board was its chairwoman, Diane F. Bosse, a partner in Buffalo's Volgenau & Bosse.

At that hearing, according to the deans in attendance, Bosse reiterated the law board's rationale for raising the cut score:

- Some state bar licensing organizations have higher passing scores than New York.
- A study commissioned by the law board saw clinical psychologist Stephen P. Klein, who interprets tests for professional licensure boards around the country, generally supporting the concept of a higher cut score in New York.
- Consumers in need of legal services must be protected against incompetence, a point she also made in a January 2003 letter to the New York State Bar Association.

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Klein's methodology for the New York study was denounced by the New York City Bar Association. Bar groups in several other states, notably Minnesota and Florida, have likewise attacked his work.

On the last point, the three deans said Bosse was closely questioned by senators as to documented evidence -- rather than anecdotal -- of incompetent New York lawyers. The deans said Bosse offered no documentation.

In an e-mailed response for comment, Bosse wrote, "The purpose of the bar exam is to protect the public by providing reasonable assurance that those licensed to practice law in New York have met minimal competency standards. The criteria for determining who is qualified ... are set by the courts and include the requirement that applicants pass the bar exam. ... The passing score is intended to separate those applicants who are minimally competent ... from those who have not yet met that standard."

She added, "The bar exam samples broadly the legal knowledge and lawyering skills of the population of candidates for admission to the bar. Malpractice claims and disciplinary complaints are snapshots of individual performances in practice. They are not a systematic or comprehensive evaluation of the competence of lawyers, either individually or collectively. While we looked at some available evidence ... these measures don't give us enough information either to validate an existing passing score or to support some alternative standard."