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Letter to Massachusetts Board of Bar Examiners

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November 15, 2021

Marilyn J. Wellington
Executive Director
Massachusetts Board of Bar Examiners
John Adams Courthouse
One Pemberton Square, Suite 5-140
Boston, MA 02108
Sent via first-class mail and electronic mail to bbeinfo@jud.state.ma.us

Re: Addressing Menstruation in Bar Examination Policies and Procedures

Dear Ms. Wellington:

We write to urge the Massachusetts Board of Bar Examiners to adopt the enclosed Menstruation and the Bar Exam Policy and Operating Provisions, created by our client, Menstrual Policies and the Bar (“MP and the Bar”). Founded in 2020 by law professors Elizabeth B. Cooper (Fordham Law School), Margaret E. Johnson (University of Baltimore School of Law), and Marcy L. Karin (UDC Law), MP and the Bar’s mission is to remove menstruation-related barriers to entering the legal profession, including during the bar exam. MP and the Bar is available as a resource and for technical assistance as you consider the enclosed Model Policy.

We hope to work with you to best address test takers’ concerns about menstruation-related barriers to the bar exam. We understand that you are similarly concerned about any possible sex discriminatory barriers that may exist in the administration of the bar exam and invite you to join us for *Addressing Menstruation in Bar Exam Policies* on December 3, 2021 at 12:00 P.M. EST.¹ This dialogue will cover cited concerns about the experience of menstruating test takers during the bar exam, existing policies related to menstruation (including some recent changes), examiners’ concerns about maintaining exam security and integrity, and MP and the Bar’s Model Policy. We also want to hear from you to learn about any concerns, questions, and potential policy modifications to adequately address menstruation and the bar exam.

By way of background, MP and the Bar has conducted extensive research, surveys, and analysis on existing bar exam policies regarding menstruation.² Currently, these policies fail to adequately recognize that examinees may menstruate and, consequently, may cause examinees’ harm related to: (1) privacy and respect; (2) fairness and non-discrimination; (3) health; (4) denying accommodations; and (5) lack of policy transparency.³ For example, some jurisdictions prevent personal menstrual products from being brought into the exam, declare that products may be brought only in a clear bag, or require menstruating examinees to surrender their products and go through a check out process to access them.

¹ RSVP for the dialogue at <https://bit.ly/MPandTheBar-Dialogue>.

² See Marcy L. Karin, Elizabeth B. Cooper & Margaret E. Johnson, *Menstrual Dignity and the Bar Exam*, 55 UC DAVIS L. REV. 1 (forthcoming 2021), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3790439.

³ *Id.* at 7.


Test takers have experienced harassment, such as when proctors demand, as one examinee reported, “Do you really need those?”, or by limiting menstruating examinees to examiner-provided products accessible solely in women’s restrooms—creating additional barriers for some transgender, genderqueer/nonbinary, and intersex individuals.⁴ Additionally, many jurisdictions do not provide administrative accommodations for these FDA-classified medical devices.⁵ Further, unscheduled bathroom breaks are limited, time consuming, or prohibited altogether. As one examinee recalled, she reluctantly accepted bleeding through her pants during the exam, stating she felt the administrator “doesn’t care.”⁶


Many menstruators reported feeling anxious or frustrated by the lack of transparency of BOBE policies related to menstruation and their inability to properly manage menstruation on exam days. Moreover, survey respondents expressed fear regarding lack of access to bathrooms, additional clothing, and products intended to capture menstrual flow. These concerns led some test takers to report thoughts, and some actions, of self-adjusting birth control to attempt to skip their period, or of postponing or withdrawing from the exam if they were to have their period on exam days.⁷

Building on this work, MP and the Bar developed the enclosed Model Policy to address these harms, without compromising the integrity of the exam. The policy also builds on a July 2020 MP and the Bar letter, co-signed by over 2800 members of the legal community, asking for clarity and public bar exam policies related to menstruation, including, at a minimum, allowing examinees to bring personal menstrual products into the testing room.⁸ It also is consistent with ABA Resolution 105 and the work of a range of other academics, lawyers, and bar leaders.⁹

Accordingly, to fulfil your commitment to inclusion and non-discrimination, we urge adoption of the enclosed policy and again invite you to join MP and the Bar on December 3rd at 12 pm EST to explore these issues and policy revisions. RSVP at <https://bit.ly/MPandTheBar-Dialogue>. We can be reached at MPandTheBar@gmail.com should you have questions. Thank you again for your time and consideration.

Sincerely,


Amanda Weber, Student Attorney


Jonteal Hasty, Student Attorney


Marcy L. Karin, Director

CC: Professor Elizabeth B. Cooper, Professor Margaret E. Johnson

⁴ *Id.* at 69.

⁵ *Id.* at 49.

⁶ *Id.* at 28.

⁷ *Id.* at 43.

⁸ Letter from Elizabeth B. Cooper, Margaret E. Johnson, Marcy L. Karin et al., to Judith Gundersen, President & CEO, Nat’l Conf. of Bar Exam’rs (July 20, 2020), <https://bit.ly/30Aga8w>.

⁹ AM. BAR ASSOC., ABA MID-YEAR HOUSE OF DELEGATES RESOLUTION 105 (Feb. 22, 2021), <https://www.americanbar.org/content/dam/aba/directories/policy/midyear-2021/105-midyear-2021.pdf>; *see, e.g.*, ASSOCIATION OF ACADEMIC SUPPORT EDUCATORS, BEST PRACTICES FOR ONLINE BAR EXAMINATION (2021), <https://associationofacademicsupporteducators.org/statements/association-of-academic-support-educators-bar-advocacy-committee-best-practices-for-online-bar-examination>; Bridget J. Crawford, *Menstruation and the Bar Exam: Unconstitutional Tampon Bans*, 41 COLUM. J. GENDER & L 63 (2021).