



The State Bar of California

OFFICE OF THE EXECUTIVE DIRECTOR

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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