



# The State Bar of California

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## **OPEN SESSION AGENDA ITEM PROVISIONAL LICENSURE WORKING GROUP 2020 OCTOBER**

**DATE:** October 14, 2020

**TO:** Members, Provisional Licensure Working Group

**FROM:** Donna S. Hershkowitz, Interim Executive Director

**SUBJECT:** Discussion of Expansion of the Provisional Licensure Program to Previous California Bar Exam Takers Scoring 1390 or above with a Pathway to Licensure

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## **BACKGROUND**

On July 16, 2020, the California Supreme Court directed the State Bar of California “to implement, as soon as possible, a temporary supervised provisional licensure program – a limited license to practice specified areas of law under the supervision of a licensed attorney.” The letter clarified that the provisional licensure program shall continue at least through June 1, 2022, and should be made available for all 2020 graduates of California-based law schools (whether ABA approved, California accredited, or unaccredited) or 2020 graduates of law schools outside of California if such graduates are permitted to sit for the Bar Examination under California law. The letter from the Supreme Court is included as Attachment A

Subsequent clarification from the Court provided that the program shall be open to: (1) individuals who graduated in 2020 and did not pass the February 2020 bar examination; (2) individuals who elect to take the October 2020 online bar examination; and (3) 2020 graduates of an LLM program.

The proposed rule for the Provisional Licensure Program was circulated for a 15-day public comment period that closed on September 15. Of the 192 public comments received, 50 were related to the issue of whether the program should be made available to a broader group of law graduates. The suggestions receiving the largest numbers of comments include the following:

- Seven commenters recommended that the rule apply to attorneys licensed in other jurisdictions.

- Six commenters recommended that the rule apply to 2019 law graduates.
- Eleven commenters recommended that the program apply to all who timely applied for the July or October bar exam.
- Eight commenters recommended that the program be open to those who had previously taken a bar exam and scored 1390 or above. Several of these commenters included a recommendation that they need not take a bar exam after completing a specified number of hours of supervision.

In the last few minutes of the September 18 working group meeting, one of the liaisons to the working group commented that although it was beyond the scope of the direction from the Supreme Court, the working group might wish to discuss comments recommending extending the program to individuals who previously scored 1390 or greater on the bar exam. He noted that the group could consider also granting these individuals admission to the State Bar following the successful completion of a defined number of hours of supervision as a provisionally licensed lawyer, without the need to take or pass the bar exam. Because of the magnitude of this issue, the working group agreed to submit the proposed rule to the Board of Trustees for consideration, and to convene an additional meeting to determine if a separate rule should be later presented to the Court expanding the provisional licensure program in this manner.

Commenters recommending that eligibility extend to those who previously scored 1390 or higher on the bar exam typically make one of the following recommendations:

- Eligibility be extended to those who scored 1390 or higher on the February 2020 bar exam.

These commenters tend to note that in its July 16 letter, the Supreme Court commented that “the changing circumstances surrounding the ongoing COVID-19 pandemic in California, and throughout the country, have had an unprecedented impact on professional licensure testing for graduates seeking admission to many professions, including not only law, but medicine, nursing, architecture, and engineering. The Court understands that many law school graduates are being substantially affected by the resulting disruption. Some graduates have lost job offers. Many are about to lose health insurance, cannot find a job to pay bills, or are in fear of deportation if they cannot enter the State Bar in time to retain job offers. Many more have student loan payments that become due in mid-November, but without a law license and the ability to work, they fear going into default.” To the extent the reduction in the pass line from 1440 to 1390 is attributable to this rationale, they note, those who took the February 2020 exam are dealing with the same circumstances, the threat of COVID-19 was already present by the end of February 2020, and if the Court will not apply the change to the passing score retroactively, they should have the benefit of the provisional licensure program.

In directing the creation of the provisional licensure program, the Court also noted that

it: “recognizes that postponement of the bar examination may impact employment prospects, delay incomes, and otherwise impair the livelihoods of persons who recently have graduated from law school. Moreover, the Court recognizes 2020 graduates may not be in a position to study and prepare for a fall bar 2020 examination. Therefore, in order to mitigate these hardships faced by graduates while fulfilling the responsibility to protect the public by ensuring that persons engaged in the practice of law are minimally competent to do so, the Court directs the State Bar to implement, as soon as possible, a temporary supervised provisional licensure program. ...”

Staff notes, however, that in its decision to lower the pass line to 1390, the Court, in the same letter, did not appear to rely on these factors for its decision, stating that “in consideration of the fact that California is one of two states with the highest pass score for its minimum competency exam, and based on findings from recently completed bar examination studies as well as data from ongoing studies, the Court directs the State Bar to modify the pass score for the California Bar Examination to allow for a minimum passing score of 1390, which is approximately two standard errors below the median recommended cut score of 1439 from the 2017 Standard Setting Study.” The Court later clarified that this reduction will not be applied retroactively. A complete copy of the Supreme Court’s July 16 letter is included as Attachment A.

- Eligibility be extended to those who scored 1390 or higher on the July 2017 bar exam or a later bar exam.

Commenters suggesting this date point to the State Bar’s study of the passing line in 2017, pursuant to which the Board of Trustees recommended to the Supreme Court in September 2017 (in time for application to the results of the July 2017 exam), the following options: (a) no change to the cut score; (b) reduce the cut score to 1414; or (c) reduce the cut score to 1390. In offering those options, the Board relied on the conclusions of its study that “while 1439 is the best estimate of the ‘true’ cut score . . . one could select a value anywhere within the range from 1388 to 1504 and still have 95-percent confidence that the ‘true’ cut score is within this range. The agenda item and the staff summary presented to the Board of Trustees may be accessed here: <http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000019981.pdf>; <http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000019982.pdf><sup>1</sup>

- Eligibility be extended to include those who scored 1390 or higher on any bar exam within the last five years.

Proponents of this date point to rule 4.17 of the State Bar Rules which provides applicants a five-year window from the last day of the administration of the bar

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<sup>1</sup> The complete submission to the Board of Trustees is available at: <http://board.calbar.ca.gov/Agenda.aspx?id=13540&tid=0&show=100015119&s=true#10022989>.

examination to meet all requirements for admission and be certified to the California Supreme Court for admission. A complete copy of rule 4.17 is included as Attachment B.

## **ATTACHMENTS LIST**

- A.** July 16, 2020 Letter from the Supreme Court to the State Bar of California
- B.** Rule 4.17 of the Rules of the State Bar



## Supreme Court of California

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

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July 16, 2020

### **SENT VIA USPS AND EMAIL**

Alan K. Steinbrecher, Chair  
State Bar of California, Board of Trustees  
180 Howard Street  
San Francisco, CA 94105  
asteinbrecher@steinbrecherspan.com

### **RE: California Bar Exam**

Dear Mr. Steinbrecher,

The changing circumstances surrounding the ongoing COVID-19 pandemic in California, and throughout the country, have had an unprecedented impact on professional licensure testing for graduates seeking admission to many professions, including not only law, but medicine, nursing, architecture, and engineering. The court understands that many law school graduates are being substantially affected by the resulting disruption. Some graduates have lost job offers. Many are about to lose health insurance, cannot find a job to pay bills, or are in fear of deportation if they cannot enter the bar in time to retain job offers. Many more have student loan payments that become due in mid-November, but without a law license and the ability to work, they fear going into default.

With these considerations in mind, the court has sought the safest, most humane and practical options for licensing law graduates by encouraging and working with the State Bar to pursue the option of administering the California Bar Examination online as a remote test, to avoid the need for, and dangers posed by, mass in-person testing. The court also directed the State Bar to engage in focused conversations with the National Conference of Bar Examiners (NCBE) to address the ability to administer an online version of the multiple-choice Multistate Bar Examination.

Our sister states also struggle with similar issues. Many have recently canceled in-person testing plans and have increasingly turned to online solutions. Although a few less populous states have been able to accommodate a diploma privilege that grants entry for all of the graduates of their states' constituent American Bar Association (ABA)-accredited law schools, the law schools in California, unlike in other states, represent a diverse array of ABA-accredited, California-accredited, and California-registered schools. If California were to adopt diploma-privilege criteria used by other states, graduates of nearly four dozen California law schools would not meet those criteria and would be excluded.

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With these considerations in mind, the court seeks a path that ensures the fair and equal treatment of all graduates, regardless of law school accreditation status, while also ensuring that protections remain in place for consumers of legal services.

After considering all letters, comments, the actions of other states, discussions with the NCBE, consultations with the informal state bar workgroup on the status of the bar exam, and having given careful thought to the expressed needs of bar applicants, the court directs the State Bar as follows:

The September 9-10 administration is cancelled. Joining at least 15 other jurisdictions that have, to date, taken similar measures, the State Bar is directed to make the necessary arrangements for the online remote administration of the bar examination on October 5-6, 2020, and extend registration for this exam through July 24, 2020. The State Bar has worked diligently on measures for the successful deployment of the exam online. Based on that work and current information, the court has determined that an online exam can be administered and delivered without the need for an examinee to have a high-speed or constant internet connection. The court asks that the State Bar clearly explain the necessary system requirements and other details concerning the circumstances of an online exam in a “Frequently Asked Questions” guide.

The court strongly encourages law schools to assist those graduates who lack internet access at home, or who have home environments not amenable to two days of uninterrupted examination, by employing the same and similar measures, including the use of school facilities and equipment, that schools have utilized to allow students to complete the Spring 2020 semester.

In consideration of the fact that California is one of two states with the highest pass score for its minimum competency exam, and based on findings from recently completed bar examination studies as well as data from ongoing studies, the court directs the State Bar to modify the pass score for the California Bar Examination to allow for a minimum passing score of 1390, which is approximately two standard errors below the median recommended cut score of 1439 from the 2017 Standard Setting Study. This modified minimum passing score is effective for the administration of the bar examination on October 5-6, 2020, and will be applied prospectively to future administrations of the California Bar Examination (irrespective of whether the exam is administered online in the future). The court will consider any further changes pending recommendations offered by the forthcoming Blue-Ribbon Commission on the Future of the California Bar Examination.

The court recognizes that postponement of the bar examination may impact employment prospects, delay incomes, and otherwise impair the livelihoods of persons who recently have graduated from law school. Moreover, the court recognizes 2020 graduates may not be in a position to study and prepare for a fall bar 2020 examination. Therefore, in order to mitigate these hardships faced by graduates while fulfilling the responsibility to protect the public by ensuring that persons engaged in the practice of law are minimally competent to do so, the court directs the State Bar to implement, as soon as possible, a temporary supervised provisional licensure program — a limited license to practice specified areas of law under the supervision of a licensed attorney.

This program will be made available for all 2020 graduates of law schools based in California or those 2020 graduates of law schools outside California who are permitted to sit for the California Bar Examination under Business and Professions Code sections 6060 and 6061. More information will be forthcoming regarding this program, and the State Bar will issue a

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“Frequently Asked Questions” guide concerning the details. At a minimum, this provisional licensure program shall remain in effect until at least June 1, 2022 to permit 2020 graduates maximum flexibility. This timeframe will afford the 2020 graduates several opportunities to take the exam of their choosing through February 2022 and await the exam results. In addition, in order to expedite relief and pursuant to the court’s inherent authority over the admission of attorneys into the practice of law, the State Bar should afford a public comment period of at least 15 days for any proposed supervised provisional licensure program rules. (*In re Attorney Discipline System* (1998) 19 Cal.4th 582; Cal. Rules of Court, Rule 9.3.)

With the exception of postponing the October 2020 First-Year Law Students’ Examination to November 2020 or any amendments to the rules governing the number of times an examinee can sit for that exam, this letter supersedes the court’s prior April 27, 2020 letter.

Sincerely,



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

cc: Donna Hershkowitz

## Rules of the State Bar of California

### Rule 4.17. Admission certification and time limit

(A) No later than five years from the last day of administration of the California Bar Examination the applicant passes,

- (1) an applicant must meet all requirements for admission for certification by the Committee to the California Supreme Court; and
- (2) upon receipt of an order from the Court, take the attorney's oath and meet State Bar registration requirements to be eligible to practice law in California.

(B) The State Bar may extend this five-year limit for good cause shown by clear and convincing evidence in a particular case but not for an applicant's negligence or the result of an applicant having received a negative moral character determination.

(C) An applicant may request a review by the Committee of the State Bar's decision within 30 days of service of the notice of decision.

*Rule 4.17 adopted effective September 1, 2008; previously amended effective November 14, 2009; amended effective September 1, 2019.*