

COMMITTEE OF BAR EXAMINERS OPEN SESSION AGENDA ITEM

DATE: February 20, 2018

TO: Committee of Bar Examiners

FROM: Destie Overpeck, Assistant General Counsel
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SUBJECT: Committee & Subcommittee Structure Under Bagley-Keene

BACKGROUND AND DISCUSSION

The Committee of Bar Examiners (“Committee”) consists of 19 members (currently there are 18) and four Subcommittees: Educational Standards (8 members), Examinations (7 members), Operations & Management (6 members), and Moral Character (9 members). As of January 1, 2018, pursuant to amendments to Business and Professions Code section 6026.7, the Committee and its Subcommittees became subject to the Bagley-Keene Open Meeting Act (“Bagley-Keene,” Gov. Code sections 11120, et seq.) Under Bagley-Keene, if a quorum of members of a subcommittee is meeting, non-subcommittee Committee members may not participate in the discussions, may not ask questions, should sit in the audience section and may not be present at the closed sessions. If a Committee member is in the audience, it is also not appropriate for that member to make a public comment.

During the February 2, 2018 meeting of the Subcommittee on Operations and Management, it was recommended, in order to allow all Committee members to participate in the subcommittee discussions and decisions, that the Committee dissolve its Subcommittees. Each former chair of the eliminated subcommittee would act as the Committee liaison and could seek assistance with that role from another Committee member. Those individuals would review the pertinent issues before each meeting and present the matters to the Committee. It was also suggested that the Chair of the Committee could designate two Examinations Subcommittee members from Northern California and two from Southern California to review testing accommodation petitions (“TA”) appeals and make recommendations to the Committee.

However, upon further analysis, staff proposes an alternate approach for the Examinations Subcommittee.

Examinations Subcommittee

In connection with each examination administered by the Committee (the California Bar Examination (“CBX”) at the end of February and July each year and the First-Year Law Students’ Examination (“FYLSE”) at the end of June and October each year), applicants with disabilities may file petitions for testing accommodations. These petitions are filed throughout the year, but are at their most voluminous in the months of and immediately preceding each examination. Specialized staff in the Office of Admissions process all new and expanded petitions within the time constraints set forth in the Admissions Rules. The deadline for filing of testing accommodations petitions is on the 15th of the month preceding the month of each examination (i.e., January 15 for the February CBX; June 15 for the July CBX; May 15 for the June FYLSE; and September 15 for the October FYLSE). *Admissions Rule 4.84(C)*. A separate deadline exists for the filing of emergency petitions for testing accommodations (i.e., applicants who become disabled after the regular filing deadline), which is 10 days before the first day of the examination. *Admissions Rule 4.87*.

Decisions on whether to grant, partially grant or deny the requested accommodations are initially made by the Director for Admissions on a case-by-case basis from the information contained in each applicant’s file, which includes the petition, disability verification forms, all supporting documentation submitted, reports and recommendations from the Committee’s outside consultants, etc.

Applicants have the right to appeal any adverse determination made by the Director for Admissions. The deadline to file an appeal is 10 days after the date of denial or, no later than the first business day of the month in which the examination is to be administered. *Admissions Rule 4.90(A) and (B)*.

The appeal is first reviewed and decided at the staff level by the Director for Admissions. The next level of administrative appeal lies with the Committee under the current *Admissions Rule 4.90(D)*, which provides that:

If the [Director for Admissions] does not grant the appeal, the Committee must consider it as soon as practicable. . . . The review must be conducted in closed session either at a regular meeting or one specially convened by teleconference. If a subcommittee has been assigned to consider the appeal, the entire Committee must consider it upon the request of any member of the subcommittee.

Under the Committee’s current structure, the Examinations Subcommittee is assigned to consider testing accommodations appeals. At least a quorum of that subcommittee reviews the TA appeal and makes a recommendation to the full Committee, which adopts or revises the recommendation. Similarly, the Examinations Subcommittee also handles examination petitions, which are often time-sensitive matters that need to be decided prior to the administration of the applicable examination.

Chapter 6 of the *Admissions Rules (Rules 4.70 to 4.74)* governs the conduct of applicants at examinations. Currently, petitions relating to Chapter 6 violations as well as petitions involving examination eligibility determinations are assigned to be considered by the Subcommittee on Operations and Management. These types of petitions can be extremely time sensitive when tied to a particular administration of an examination.

Unless the Examinations Subcommittee has delegated authority to make decisions on the TA appeals, examination petitions, examination eligibility determinations, and other time-sensitive requests, Subcommittee recommendations will have to be adopted by the whole Committee prior to being communicated to the applicant. The only way this could be accomplished would be for the entire Committee to be available to meet outside of regular Committee meetings during the months prior to and the month of each of the four annual examinations. Attached as Appendix A is a chart of number of the TA appeals submitted from 2015 to 2017 to illustrate the volume and timing of the TA appeals received. The TA Appeals that needed to be addressed by the Subcommittee between Committee meetings and prior to exams are those listed in the column entitled “Appeals Submitted for Subcommittee Conference Calls.”

Addressing testing accommodation appeals, examination petitions, and some examination eligibility requests are time sensitive, especially within the four weeks prior to the CBX or the FYLSX. To allow the Examinations Subcommittee to timely act on testing accommodation and examination matters, the CBE previously adopted the following policy:

During months when no meetings of the Committee of Bar Examiners (Committee) are scheduled and/or during the four weeks prior to administration of the California Bar Examination and First-Year Law Students’ Examination, the Subcommittees of the Committee are authorized to take action on behalf of the Committee in matters over which they have been given jurisdiction. Examples include moral character informal conference decisions (Moral Character Subcommittee), eligibility determinations (Educational Standards Subcommittee) and testing accommodations appeals (Testing Accommodations Subcommittee). The actions of a Subcommittee taken in accordance with this policy shall be affirmed at the next regularly scheduled Committee meeting following the action taken.

Moral Character Informal Conferences Are not “Meetings” Under the Bagley-Keene Act

Please note: The current Moral Character informal conferences are not a “meeting” as defined by the Bagley-Keene Act because “a quorum of the body” is not convening. Additionally, they are not exercising any delegated authority. Instead, two to four representatives from the Subcommittee meet at other times each month to hold informal conferences with applicants. Those individuals report back to other Subcommittee members at the regular meetings. If the Moral Character Subcommittee is eliminated, staff could appoint two to four Committee members to attend the informal conferences.

RECOMMENDATIONS

There are four issues presented in this agenda item:

1. Eliminate all Subcommittees except the Examinations Subcommittee

To allow all Committee members to fully participate in issues that were previously discussed in Subcommittee meetings, it is recommended that the Committee eliminate its Subcommittees except for the Examinations Subcommittee. Each current chair of a subcommittee could be appointed to act as the Committee liaison and the liaison may seek assistance with that role from at least one additional Committee member. Those individuals will review the pertinent issues and documents before each meeting and present the matters to the Committee.

2. Assign the review of Chapter 6 testing violations and other time-sensitive exam determinations currently handled by the Operations and Management Subcommittee to the Examinations Subcommittee

The Chapter 6 testing violations and other time-sensitive exam determinations are currently reviewed by the Operations and Management Subcommittee. If the Operations and Management Subcommittee is eliminated, it would make sense to have the Chapter 6 violations and other time-sensitive exam determinations reviewed by the Examinations Subcommittee. Specifically, *Admissions Rule 4.71* requires the Committee to designate a Subcommittee to consider the reports of the Chapter 6 Notices.

3. Delegate decision making authority to the Examinations Subcommittee to decide TA appeals, examination petitions, and time sensitive exam eligibility requests

In order to comply with Bagley-Keene and to allow the Examinations Subcommittee to timely respond to TA appeals, examination petitions and time sensitive eligibility requests, the staff recommends that the Committee delegate the authority to make decisions on TA appeals, examination petitions, and time-sensitive eligibility requests to the Examinations Subcommittee. The Committee could delegate decision making

authority to the Examinations Subcommittee for all TA appeals, examination petitions, and time-sensitive exam eligibility requests. Alternatively, the Committee could limit the delegation of authority to make decisions (similar to the previous policy) for the periods during months when no Committee meeting are scheduled and/or during the four weeks before the CBX or FYLSX to ensure that applicants receive prompt replies. The Committee should not require an affirmation of the Subcommittee's decisions at the next meeting because such a requirement implies that the Subcommittee did not have an actual delegation of authority and because the TA accommodation was either already provided, revised or denied. To ensure that all TA appeals are processed and responded to in a timely manner, closed session telephonic meetings as needed would be properly noticed during the four weeks prior to an exam. If the Subcommittee members are delegated the authority to decide the TA appeals, examination petitions, and time-sensitive eligibility requests, following each meeting staff would be able to communicate the decisions to the applicants.

4. Future Planning: Request State Bar staff to draft proposed new procedures for handling TA appeals

Recommendation 3, above, will address the immediate needs regarding handling TA appeals in a timely manner. However, it may be time to consider revising how TA appeals are reviewed. For example, it may be difficult for the Examinations Subcommittee members to be available for meetings with the frequency that is required in the months preceding the administration of the CBX and FYLSX. For informational purposes, the Committee could request staff to draft a new proposed procedure for State Bar staff to handle and respond to individual TA appeals without involvement from the Committee or Subcommittee members. This would require a revision to *Admissions Rule 4.90*, but could be an efficient method for handling TA appeals. If the Committee resolves to request the staff to provide a suggested alternative TA appeal procedure, staff could report back with a proposal and recommended rule changes for the May Committee meeting.

PROPOSED MOTION

Should the Committee agree with the above recommendation, the following motion would be appropriate:

Move that the Committee

- (1) eliminate its Subcommittees except for the Examinations Subcommittee. Each current chair of a subcommittee will be appointed to act as the Committee liaison and may seek assistance with that role from at least one additional Committee member. Those individuals will review the pertinent issues and documents before each meeting and present the matters to the Committee
- (2) assign review of Chapter 6 testing violations to the Examinations Subcommittee

- (3) delegate the authority to make decisions on TA appeals, examination petitions, and time-sensitive exam eligibility requests to the Examinations Subcommittee either:
 - a. for all TA appeals, examination petitions, and time-sensitive exam eligibility requests; or
 - b. for the periods during months when no Committee meeting are scheduled and/or during the four weeks before the CBX or FYLSX, to ensure that applicants receive prompt decisions.
- (4) request staff to draft proposed new procedures for individual TA appeals, to be handled by State Bar staff without involvement by the Examinations Subcommittee or Committee, including a proposed revision to *Admissions Rule 4.90*, and to report back with a proposal and recommended rule changes for the May 2018 Committee meeting.

Appendix A
TA Appeals Statistics 2015 – 2017

	Modified Decisions Made by Director for Admissions+	Appeals Submitted for Subcommittee Conference Calls	Appeals Submitted for CBE Meetings
2015			
January	7	4	6
February	2	6	0
March	0	0	1
April	1	0	2
May	3	4	0
June	2	6	7
July	2	13	0
August	1	0	0
September	0	0	0
October	1	0	0
November	2	0	0
December	1	2	0
Total	22	35	16
2016			
January	5	0	8
February	2	8	0
March	1	0	1
April	2	0	2
May	3	2	0
June	2	1	5
July	11	9	0
August	1	0	2
September	0	0	1
October	1	0	0
November	2	0	0
December	2	0	0
Total	32	20	19
2017			
January	1	9	9
February	9	0	0
March	0	0	0
April	0	0	4
May	2	2	0
June	7	4	5
July	3	15	0

	Modified Decisions Made by Director for Admissions+	Appeals Submitted for Subcommittee Conference Calls	Appeals Submitted for CBE Meetings
2017 [continued]			
August	0	0	4
September	0	0	0
October	1	0	2
November	0	0	0
December	2	0	0
Total	25	30	24

Yellow Highlighting = The month of and the month preceding the February and July California Bar Examinations (CBX)*

* The CBE would also need to consider and decide TA appeals filed in connection with the First-Year Law Students' Examination (FYLSE), administered in June and October of each year.

+ **Modified Decisions** = Appeals where new or additional information submitted by the applicant resulted in the appeal being granted in its entirety at the Admissions staff level.