



The State Bar *of California*

OPEN SESSION AGENDA ITEM DECEMBER 2019 COMMITTEE OF BAR EXAMINERS ITEM O-300

DATE: December 6, 2019

TO: Members, Committee of Bar Examiners

FROM: Tammy Campbell, Program Manager, Office of Admissions

SUBJECT: Examination & Administration Appeals Process Review

EXECUTIVE SUMMARY

This agenda item recommends procedures for Committee of Bar Examiners' (CBE) approval regarding the staff review process for issuing sanctions for examination and administration violations, as well as the process for appeals of such sanctions to the CBE. The specific proposed procedures are provided in the "Policies and Procedures Regarding Staff Review, Determination, and Administrative Review of Chapter 6 Conduct Violations" and the "Procedures Regarding Requests for Review by the Committee of Bar Examiners of State Bar's Chapter 6 Findings and Recommendations".

BACKGROUND

Chapter 6 of the Admissions Rules pertains to the conduct of applicants at the examinations that may be reported to the State Bar of California as a Chapter 6 Notice or, in extreme cases, may require dismissal from the examination test center. Rule 4.71 and Rule 4.72 were modified to transfer the initial determination and the administrative hearing process from the CBE to State Bar staff. Rule 4.73 and Rule 4.74 modified the procedure for an administrative hearing, as well as the process for review of the State Bar's findings and recommendations by the Committee.

DISCUSSION

The procedures set forth in the attached document, "Policies and Procedures Regarding Staff Review, Determination, and Administrative Review of Chapter 6 Conduct Violations" and the

“Procedures Regarding Requests for Review by the Committee of Bar Examiners of State Bar’s Chapter 6 Findings and Recommendations,” are similar to the “Guidelines for Conducting Administrative Reviews of Adverse Determinations of Moral Character by the Committee of Bar Examiners” that were approved and adopted by the Committee in August 2019. However, there are certain key differences between the moral character review procedures and the proposed Chapter 6 review procedures. Those key differences are:

1. Unlike the moral character review procedures, Chapter 6 rules have specific violations that are undisputable, such as bringing an electronic device into the examination room. Sanctions associated with this type of violation are not entitled to an administrative hearing or review by the Committee.
2. There are also fewer levels of review associated with Chapter 6 violations as compared to adverse moral character determinations. Applicants who are issued a Chapter 6 violation with a negative determination, and is upheld in an administrative hearing, can request review of the determination by the Committee. If the negative determination is upheld by the Committee, the applicant may appeal to the Supreme Court.

The new Chapter 6 Administrative Hearing procedures are very similar to the “Procedures of Chapter 6 Administrative Hearings” previously established by the Committee. The goal of the new proposed procedures and guidelines is to create uniform and consistent application now that staff will be conducting the administrative hearings. To further ensure uniformity and consistency, staff would like to discuss the development of procedures or guidelines that address specific violations and corresponding sanctions at a future CBE meeting.

RECOMMENDATION

Staff recommends that the Committee of Bar Examiners approve and adopt the “Policies and Procedures Regarding Staff Review, Determination, and Administrative Review of Chapter 6 Conduct Violations” and the “Procedures Regarding Requests for Review by the Committee of Bar Examiners of State Bar’s Chapter 6 Findings and Recommendations.”

PROPOSED MOTION

If the Committee agrees, the following motion is suggested:

Move that the Committee of Bar Examiners approve and adopt the “Policies and Procedures Regarding Staff Review, Determination, and Administrative Review of Chapter 6 Conduct Violations” and the “Procedures Regarding Requests for Review by the Committee of Bar Examiners of State Bar’s Chapter 6 Findings and Recommendations.”

POLICIES AND PROCEDURES REGARDING STAFF REVIEW, DETERMINATION, AND ADMINISTRATIVE REVIEW OF CHAPTER 6 CONDUCT VIOLATIONS

POLICY/PRACTICE:

Chapter 6 Notices of Violation of Examination Rules or Policies are issued to applicants for conduct violations occurring during the administration of the First-Year Law Students' Examination or the California Bar Examination.

PROCEDURE:

Initial Determinations

1. Office of Admissions staff consisting of the Program Manager, Operations and Management, and the Program Manager, Examinations, or his or her designee(s), will review and consider Chapter 6 violations issued during the administration of the examination and thereafter make recommendations to the Program Director, Admissions, or his or her designee(s). Violations will be reviewed as soon as practicable, but no later than the first Committee of Bar Examiners (Committee) meeting following the examination. It is important to note that time limits for State Bar actions specified are norms for processing and that the State Bar may extend them for good cause.
2. A proposed determination and sanction, if any, for each violation will be documented for final review with the Program Director, Admissions. The Program Director, Admissions will make the final determination, which can either be in agreement with, or different from, the recommended determination.
3. The applicant will be notified in writing by first class mail of the final determination and proposed sanction (if applicable) in writing within thirty (30) days of the staff decision.

Administrative Hearings

1. An applicant notified of a conduct violation for which a specific sanction has not been established by examination rules or guidelines may file a request for an administrative hearing.
2. Within twenty (20) days after receipt of the written notice of determination by mail, the applicant may file a written request for an administrative hearing to contest the finding or sanction.

3. The written request for an administrative hearing must be sent to:

Office of Admissions
The State Bar of California
845 South Figueroa Street
Los Angeles, CA 90017
Attn: Program Manager, Operations and Management

4. If the applicant does not request an administrative hearing within twenty (20) days of receipt of the notification, the Office of Admissions' determination and sanction will become final and take effect.
5. A hearing will be scheduled to take place at the nearest State Bar Office to the applicant within ninety (90) days from receipt of a timely request. The State Bar shall notify the applicant in writing of the time and place of the hearing.
6. A panel of three (3) Program Managers and/or Program Supervisors from the Office of Admissions who were not involved in making the original staff determination, one of whom shall be designated as the "Lead" panel member, will conduct the administrative hearing pursuant to the procedures established by the Committee of Bar Examiners, and thereafter render the hearing panel's Findings and Recommendations. General Counsel will attend the hearing as an observer, but will not actively engage in the conversation.
7. The procedures established by the Committee of Bar Examiners for conducting the administrative hearings on Chapter 6 conduct violations are attached hereto.
8. The hearing panel may adopt the original staff determination and proposed sanctions or make other determination or sanctions as it deems appropriate. The State Bar will serve notice of the Findings and Recommendations on the applicant by mail no later than thirty (30) days after the hearing.
9. If the applicant does not request review of the State Bar's Office of Admissions Findings and Recommendations within ten (10) days of service, the Findings and Recommendations become the decision of the Committee.

**PROCEDURES REGARDING REQUESTS FOR REVIEW BY THE COMMITTEE
OF BAR EXAMINERS OF STATE BAR'S CHAPTER 6 FINDINGS AND RECOMMENDATIONS**

POLICY/PRACTICE:

Chapter 6 Notices of Violation of Examination Rules or Policies are issued to applicants for conduct violations occurring during the administration of the First-Year Law Students' Examination or the California Bar Examination.

PROCEDURE:

1. Within ten (10) days of service of the State Bar's Findings and Recommendations, an applicant may file a written request for review by the Committee of the Findings and Recommendations issued by the State Bar.
2. The written request for review must be sent to:

Office of Admissions
The State Bar of California
845 South Figueroa Street
Los Angeles, CA 90017
Attn: Program Manager, Operations and Management
3. An applicant's request for review must contain a concise statement (1) describing the Chapter 6 conduct at issue and the relevant factual background of the matter and (2) setting forth the reasons why the applicant does not agree with the State Bar's Findings and Recommendations and why they should be revised.
4. If the request for review is received at least thirty (30) days prior to the next regularly scheduled meeting of the Committee, the matter will be placed on the agenda for review by the Committee. The Committee will consider the entirety of the record including the applicant's request for review, the recording of the administrative hearing, if any, the Findings and Recommendations previously issued, and any supplemental material the applicant may provide in accordance with State Bar or Committee requirements.
5. The Committee may request additional information from the applicant or from the State Bar's Office of Admissions staff. Reviews by the Committee are intended to be limited to a review of the record and any supplemental material provided.. Attendance by the applicant, his or her counsel, or anyone else on the applicant's behalf is not permitted. The Committee's review shall be conducted in closed session of its meeting.
6. The Committee may adopt the State Bar's Office of Admissions Findings and Recommendations or take any other action it deems appropriate.

7. Within ten (10) days of the Committee's determination, the State Bar shall notify the applicant in writing of the Committee's determination.



**COMMITTEE OF BAR EXAMINERS
PROCEDURES FOR CHAPTER 6 ADMINISTRATIVE HEARINGS
CONDUCTED BY STATE BAR STAFF**

Rule 4.73: Procedure for an administrative hearing on conduct violation

- (A) All Chapter 6 hearings will be conducted in accordance with the following regulations and procedures:
- 1) Following notice of the scheduled date, time and location of the hearing, the State Bar of California's Director for Admissions or a designee will assume responsibility for communicating with the applicant or, if represented by counsel, with his or her attorney regarding the hearing process and any evidence that may be in available.
 - 2) The proceedings are considered confidential and attendance will be limited to the applicant and his/her counsel, if represented, State Bar staff hearing panel members, the Director for Admissions or his or her designee, representative(s) from the State Bar's Office of General Counsel, witnesses and necessary other staff as designated by the Director for Admissions. Members of the public are not permitted to attend.
 - 3) An applicant may attend the hearing with counsel. Counsel will not participate in the hearing. However, an applicant is permitted to confer with his or her counsel at any time, off the record. Only the applicant will provide oral or written statements and may present documentary evidence. No person other than applicant's counsel may be present with the applicant at a Chapter 6 administrative hearing.
 - 4) The issues that will be discussed during the hearing will be set forth in the affirmation of Chapter 6 Notice (Notice), which will be sent shortly after State Bar staff takes action affirming the Notice. The discussion may extend to issues that arise during the hearing.
 - 5) Information and evidence associated with the issuance of the Notice will be presented by the State Bar's Lead hearing panel member or his/her designee.

- 6) Any relevant evidence is admissible, regardless of the rules of evidence.
- 7) With the permission of the Hearing Panel Lead, witnesses may be called by either the applicant or the Office of Admissions staff member presenting the matter.
- 8) The Hearing Panel Lead may allow nonparty witnesses to participate through electronic means, if the parties to the hearing have an opportunity to participate in and hear while the participation of the nonparty witness is taking place. If the applicant intends to call a nonparty witness who will not be physically present at the hearing, the applicant must notify the Office of Admissions in writing at least ten (10) days before the hearing date of the witness's name and the electronic means by which he or she will be participating in the hearing. The Office of Admissions will determine whether the proposed electronic means is feasible and, if not, will inform the applicant of the alternate means that will be offered.
- 9) The administrative hearing will be recorded, and if the applicant makes a written request within ninety (90) days of the administrative hearing, he or she will be provided with a duplicate recording of the hearing no later than thirty (30) days after the request was received.
- 10) The State Bar has the burden of establishing by clear and convincing evidence that a Chapter 6 violation occurred and that the intended sanction is warranted.
- 11) For good cause shown, the Hearing Panel Lead may permit a continuance of the proceedings for an appropriate period of time. Requests for continuances of a Chapter 6 hearing must be received at least five (5) days before the scheduled hearing. If a request for postponement is received less than five (5) days before the scheduled conference, the State Bar may make its determination on the Chapter 6 Notice from the information before it, unless the applicant demonstrates good cause for not having requested the postponement sooner.
- 12) Except as noted below, members of the Hearing Panel are prohibited from engaging in ex parte communications regarding the substance of the allegations with the parties, Committee of Bar Examiners members, or any other interested persons, while a matter is pending before the panel.
- 13) Members of the Hearing Panel may communicate with each other, Counsel for the Committee, and other Office of Admissions staff regarding a pending matter.
- 14) No applicant is entitled to recover attorney's fees or costs incurred in connection with a Chapter 6 administrative hearing proceeding.