



The State Bar of California

OPEN SESSION AGENDA ITEM O-302 COMMITTEE OF BAR EXAMINERS

DATE: June 17, 2022

TO: Members, Committee of Bar Examiners

FROM: Robbie Brody, Member, Committee of Bar Examiners
David Torres, Member, Committee of Bar Examiners
Donna Hershkowitz, Chief of Programs / Legislative Director

SUBJECT: Recommendation to Eliminate Five Year Timeline for Validity of Passing Bar Exam Score

EXECUTIVE SUMMARY

Rule 4.17 of the State Bar Rules¹ requires an applicant for admission to meet all requirements for certification to the Supreme Court within five-years of the bar exam on which the applicant received a passing grade and requires that the applicant take the attorney's oath within that same five-year period. This agenda item requests that the Committee of Bar Examiners recommend to the Board of Trustees circulating rule changes for public comment to eliminate that five-year requirement as an unnecessary hurdle to admission to the State Bar which no longer furthers public protection. The proposed changes are set forth in Attachment A.

BACKGROUND

Rule 4.15 generally sets out the requirements an applicant must satisfy to be certified to the California Supreme Court for admission to the practice of law, including meeting the requirements for moral character and passing the bar examination.

Rule 4.17 sets a five-year expiration date on a passing bar exam score by requiring that, within "five years from the last day of administration of the California Bar Examination the applicant

¹ All further rule references are to the State Bar Rules unless otherwise noted.

passes,” the applicant must be meet all requirements for certification to the Supreme Court for admission and must take the attorney’s oath.

Rule 4.51 provides that a positive moral character determination is valid for thirty-six months. Rule 4.52 allows an applicant to submit an Application for Extension of Determination of Moral Character to continue the positive determination for an additional thirty-six month period.

Rule 4.17 authorizes an extension of the five-year time limit on the validity of a passing bar exam score “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.” The Committee routinely acts on requests to allow an extension of time, although the number of requests made to the Committee each year is small.

A quick review of the rules and procedures in other US jurisdictions reveals that most other states have time limits² on one or more of the following: (1) how long after passing the bar exam an applicant must act to get sworn into the bar (22 states); (2) how long after passing the bar exam an applicant must satisfy all other requirements for admission (8 states); or (3) how long an applicant has after being certified to the court or governing authority as having met the requirements for admission to get sworn in (19 states).

At the Committee’s April meeting, staff sought the Committee’s feedback on a conceptual proposal to eliminate this five-year time limit. The Committee responded positively to the proposal, and Committee members Robbie Brody and David Torres volunteered to work with staff on developing the proposal to be brought back to the Committee. The proposal before the Committee today is the result of that effort. References in this agenda item to the “working group” are to these Committee members and the staff who worked with them.

DISCUSSION

In March 2022, staff received an inquiry related to an applicant whose request for extension of the five-year period to get certified for admission was denied. Initially, staff reviewed the actions taken to process the applicant’s moral character determination to determine if extension was needed as a result of delays on the part of the State Bar (as opposed to the applicant), or if the denial seemed unreasonable in light of the circumstances. Ultimately, the analysis turned not to a question of whether, in this particular instance, staff and the Committee followed the rules and procedures appropriately (which it appeared they did), but rather, whether there was a rational basis for the underlying rule, and whether it furthered the State Bar’s mission of public protection.

As noted above, the State Bar, like many other states, has a set time line in which an applicant for admission needs to get sworn in to the State Bar. An applicant who fails to get sworn in

² Staff was unable to obtain information from all states. The data reported is based on a review of a state’s website or rules, or in some circumstances, communications directly with the state. The rules were not always clear, and staff made their best effort to evaluate the information readily available.

within that period is required to retake and pass the bar exam in order to be admitted. Some states appear to set a limit on the amount of time in which an applicant has after passing the bar exam to meet all other requirements for admission. Staff found time limits ranging from one year (Missouri, Oklahoma) to five years (Indiana). Other states require the applicant to get sworn in within a certain amount from when they met all requirements for admission, with or without reference to how long might have passed since the applicant passed the bar exam. Staff found states that required the applicant to be sworn in as soon as 90 days after being certified or authorized to get sworn in (Florida, New Jersey), and as long as 2 years (New Hampshire, Tennessee). Finally, some states require meeting all the requirements for certification and getting sworn in within a set amount of time from taking or passing the bar exam. Staff found these time frames ranged from one year (Maine, Rhode Island) to five years (Louisiana, Oregon, Texas, Virginia).

For states setting a time frame from bar passage, California is among those with the longest period of validity for a passing score. However, the fact that our rules are consistent with other states does not explain the need for the rule or how it ties to the State Bar's mission.

HISTORY OF RULE 4.17

A review of the history of rule 4.17 and its predecessors was not especially enlightening on this issue. A memo to the Committee in 1983 detailed some of the history of changes to the rule dating back to 1977, but primarily focused on explaining the reason that the rule changed from two years to five.³ The memo did, however, contain the following statement as to why the Committee, in 1982, felt that five-years from passage of the bar exam was an appropriate outer limit: "the law generally and in California has changed and is changing so rapidly that the Committee does not believe that it can certify an applicant to the Supreme Court as qualified to practice law in California when the applicant has not been tested on his or her knowledge within five-years."

When an applicant for admission has satisfied all requirements, including having passed the bar examination within five years, having achieved at least the minimum passing score on the Multistate Professional Responsibility Exam, and having an active positive moral character determination, the Committee of Bar Examiners, through State Bar staff, submits a motion to the Supreme Court certifying that the named applicants have fulfilled the requirements for admission to practice law in the State of California. By passing the bar exam, the applicants have been determined to possess the minimum competence necessary for entry level attorneys. That fact has not changed simply due to the passage of time.

COMPARISON TO ACTIVE AND INACTIVE ATTORNEYS

³ The memo describes a series of rule changes between 1978 and 1983 which were largely focused on eliminating the inconsistency between one rule that provided five-years to get sworn in for those who had previously received a negative moral character determination, to give them sufficient time to prove rehabilitation and seek a positive determination, and another rule, which provided only two years for all others.

In considering whether an expiration date on one's passing bar exam score is a necessary element of public protection, or just a bar to entry to the profession, the working group first explored how this rule compares to the requirements for a licensed California attorney to return to active status after a period of inactive status. The below scenarios are offered for the Committee's consideration:

Scenario A:

- Alicia takes and passes the July 2001 bar exam.
- Having satisfied all the requirements for admissions, Alicia is certified to the Supreme Court in November 2001 as having met all the requirements for admission.
- Alicia takes the attorney's oath in December 2001 and promptly returns her oath card to the State Bar, at which point she is assigned a bar number.
- In the same month as her admission, Alicia transfers to inactive status.
- Alicia spends the next 20 years working as a schoolteacher and continues to pay the reduced fees of an inactive attorney.
- In 2022, Alicia decides she wants to practice law, returns to active status, and hangs out a shingle.

Scenario B:

- Blanca takes and passes the July 2001 bar exam.
- Having satisfied all the requirements for admissions, Blanca is certified to the Supreme Court in November 2001 as having met all the requirements for admission.
- Blanca takes the attorney's oath in December 2001 and promptly returns her oath card to the State Bar, at which point she is assigned a bar number.
- Blanca accepts a job as a policy analyst at a state agency, working on tax policy. Although her job does not require licensure, Blanca keeps her status as an active attorney.
- In 2022, Blanca decides she wants to follow the passion that took her to law school in the first place and hangs out a shingle as a criminal defense attorney.

Scenario C:

- Chris takes and passes the July 2001 bar exam.
- Having satisfied all the requirements for admissions, Chris is certified to the Supreme Court in November 2001 as having met all the requirements for admission.
- Chris takes the attorney's oath in December 2001 and promptly returns their oath card to the State Bar, at which point they are assigned a bar number.
- Chris goes to work at law firm where they exclusively practice Estates & Trusts law. They pay their active license fees every year and meets their triennial MCLE requirements.

- In 2022, Chris decides they want to go it alone, and hangs out a shingle as a full service neighborhood lawyer, handling contracts, family law matters, neighbor disputes, and the like.

Scenario D:

- Davide did not go to law school thinking he would become a lawyer, having always intended to work as a CPA at his father's accountancy firm. He thought the law school education would be helpful to him in his career.
- Upon graduation from law school, Davide takes and passes the July 2016 bar exam.
- Since he was not intending to practice law, and was not earning a lot of money initially, he did not bother to get sworn in, despite having met all requirements for admission.
- Six years pass. Davide has an existential crisis and realizes he never had a passion for his work as a CPA. He felt forced to do it because it was the family business. He realizes that law was what he always truly wanted to do.
- Davide's passing bar exam score expired one year ago. To pursue his dream of practicing law he must now retake and pass the bar exam.

Although these scenarios may be somewhat fanciful, they draw attention to the question at hand: how are Alicia, Blanca, and Chris any different than Davide? The key difference between Alicia and Davide is that she paid inactive licensee fees over the 20 year period. But she had no continuing education in the law. She of course has to satisfy a duty of competence in the performance of any legal work once she hands out her shingle, as would Davide. Blanca and Chris paid full active licensee fees, and satisfied continuing legal education requirements, but not necessarily in the fields in which they are now planning to practice.

The working group has concluded that the same rationale that justifies allowing attorneys to switch areas of the law and allows inactive attorneys to become active without affirmatively proving they are minimally competent by taking a bar exam, argues for removal of the five-year window in which a person must get sworn in after having successfully passed a bar exam.

REQUIREMENT TO SEEK A MORAL CHARACTER EXTENSION

As described above, the amendments set forth in Attachment A affect two separate populations:

- Those who passed the bar but have not been certified to the Supreme Court because they have one or more requirements for admission yet to be satisfied (most likely achieving a positive moral character determination)
- Those who passed the bar and were certified to the Supreme Court as having met all the requirements for admission, but who have failed to get sworn in.

For those applicants who were certified to the Supreme Court as having met all the requirements for admission, the working group proposes a different five-year requirement than currently exists in Rule 4.17. Specifically, the working group proposes that if they have not been sworn in after five-years, the applicant will be de-certified by operation of law and must file an Application for Extension of Determination of Moral Character. Once they receive the extension of the positive determination, and if all other requirements for admission are met, they will be re-certified to the Supreme Court. This amendment is intended to ensure that the Committee is aware of all activity affecting their character and fitness to practice law since the date their prior positive determination expired. The working group believes this five-year requirement is necessary and appropriate to further the State Bar's public protection mission.

This requirement is not necessary for those who have not yet been certified for admission as they will have to maintain a positive determination in order to get certified for admission.

RETROACTIVITY

When the Committee discussed the conceptual proposal at its March meeting, a suggestion was made that this change not be prospective only, but that it apply to some for whom the five-year period had already expired. The working group proposes, by amendment to Rules 4.17 and 4.60, that applicants who passed a bar exam administered on or after July 2015 not be subject to the current five-year requirement. The selection of this date will allow those whose five-year validity period expired during the pandemic to become attorneys without having to pass another bar exam, as long as all other requirements for admission have been satisfied. The expiration date of a passing score from the February 2015 administration of the bar exam would have been February 2020, before the shelter in place orders and the slow down of many business operations nationwide. On the other hand, for those who passed the July 2015 bar exam, the expiration period was July 2020, and while they may have had every intention of taking and completing all necessary actions to get certified and sworn in during the months immediately prior to that date, the pandemic likely impacted their ability to do so, whether or not quantifiable. The working group felt that making this change retroactive to cover those whose five-year period concluded during the pandemic was most appropriate.

OTHER RULE AMENDMENTS

The proposal in Attachment A includes conforming changes to rules 4.51 and 4.52 related to moral character. The proposal also includes language to clarify that even though the passing score does not expire for purposes of admission to the State Bar, the rule is not intended to affect the obligation of an attorney who has been disbarred to take the bar exam as a condition of reinstatement, or as otherwise ordered by the Supreme Court or the State Bar Court.

AMENDMENTS TO RULES OF THE STATE BAR OF CALIFORNIA

Title 4, Division 1, Chapter 2, Rule 4.17

Title 4, Division 1, Chapter 4, Rules 4.51 and 4.52

Title 4, Division 1, Chapter 5, Rule 4.60

RECOMMENDATIONS

It is recommended that the Committee of Bar Examiners request that the Board of Trustees circulate for a 45-day public comment period the rule changes reflected in Attachment A to eliminate the five-year expiration period on a passing score on the California Bar Exam and enact related changes.

PROPOSED MOTION

Should the Committee of Bar Examiners agree with this recommendation, the following motion would be appropriate:

MOVE, that the Committee of Bar Examiners recommends to the Board of Trustees to circulate the proposed rules set forth in Attachment A for a 45-day public comment.

ATTACHMENT LIST

- A.** Proposed Amendments to Title 4 of the Rules of the State Bar, Rules 4.17, 4.51, 4.52, and 4.60 (Redline)

Proposed Amendments to Title 4 of the Rules of the State Bar, Rules 4.17, 4.51, 4.52, and 4.60 (Redline)

Rule 4.15 Certification to California Supreme Court (No Change Proposed; Provided for Information Only)

To be eligible for certification to the California Supreme Court for admission to the practice of law, an applicant for admission must:

- (A) be at least eighteen years of age;
- (B) file an Application for Admission with the State Bar;
- (C) meet the requirements of these rules regarding education or admission as an attorney in another jurisdiction, determination of moral character, and examinations;
- (D) be in compliance with California court-ordered child or family support obligations pursuant to Family Code § 17520;
- (E) be in compliance with tax obligations pursuant to Business and Professions Code section 494.5;
- (F) until admitted to the practice of law, notify the State Bar within thirty days of any change in information provided on an application; and
- (G) otherwise meet statutory criteria for certification to the Supreme Court.

Rule 4.15 adopted effective September 1, 2008; previously amended effective January 17, 2014; amended effective September 1, 2019.

Rule 4.16 Application for Admission (No Change Proposed; Provided for Information Only)

- (A) An Application for Admission consists of an Application for Registration, an Application for Determination of Moral Character, and an application for any required examination. Each application must be submitted with the required documentation and the fees set forth in the Schedule of Charges and Deadlines. The State Bar determines when an application is complete.
- (B) The Application for Registration must be approved, before any other application is submitted. The applicant is required by law either to provide a Social Security

Number on the application or to request an exemption because of ineligibility for a Social

Security Number. Registration is deemed abandoned if all required documentation and fees have not been received within sixty days of submittal. No refund is issued for an abandoned registration.

- (C) After approval of the Application for Registration, an applicant for admission may submit an Application for Determination of Moral Character, an application for any examination as required by these rules and any other document or petition permitted by these rules.

Rule 4.17 Admission certification and time limit

(A) An applicant who is certified by the Committee to the Supreme Court as having met all requirements for admission has a continuing duty, until admitted to the practice of law, to be of good moral character, inform the State Bar within 30 days of any changes to information provided on an Application for Determination of Moral Character and an Application for Extension of Moral Character Determination, and otherwise meet the criteria set forth in Rule 4.15.

(B)(1) Applicants for admission who are certified by the Committee to the Supreme Court as having met all requirements for admission shall, within five years from the date of the order certifying the applicant for admission, 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.

(2) Upon the expiration of the five-year period specified in (B)(1), an applicant who has not taken the attorney's oath and met the State Bar registration requirement shall be automatically de-certified and become ineligible to be sworn into the State Bar until subsequently re-certified by the Committee to the Supreme Court.

(C) The Committee shall re-certify an applicant for admission to the Supreme Court only after it is re-established that the applicant continues to meet the requirements of subsections (D), (E), and (G) of Rule 4.15 and meets the requirements of Rule 4.52.

(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~~

(D) The amendments to this rule eliminating the requirement to take the attorney's oath within five-years or be required to retake the bar exam apply to any applicant who achieved a passing score on a California Bar Examination administered on or after July 2015.

Rule 4.42 Duty to update Application for Determination of Moral Character (No Change Proposed; Provided for Information Only)

Until admitted to practice law, an applicant who has submitted an Application for Determination of Moral Character has a continuing duty to promptly notify the Office of Admissions whenever information provided in the application has changed or there is new information relevant to the application. Failure to provide updated information within thirty days after the change or addition to the information originally submitted may be cause for suspension of a positive moral character determination.

Rule 4.51 Validity period of positive moral character determination

A positive determination of moral character is valid for thirty-six months. ~~An applicant with a positive determination who has not been certified to practice law within this validity period must submit an Application for Extension of Determination of Moral Character.~~

Rule 4.52 Extension of positive moral character determination

(A) An applicant who has received a positive moral character determination may submit an Application for Extension of Determination of Moral Character. The application must be filed in the last six months of the initial thirty-six month validity period with the required fingerprints and the fee set forth in the Schedule of Charges and Deadlines. If the State Bar makes a positive determination before the initial thirty-six months expires, the initial thirty-six months is extended an additional thirty-six months. If the State Bar makes a positive determination after the expiration of the initial thirty-six months, an extension of thirty-six months begins at the time of determination.

(B) An applicant may request a review by the Committee of the State Bar's decision to deny an extension request within 30 days of service of the notice of decision.

(C) An applicant who has been de-certified pursuant to Rule 4.17 must submit an Application for Extension of Determination of Moral Character covering the period since the expiration of the prior positive determination.

Rule 4.60 California Bar Examination

(A) The California Bar Examination is given each year in February and July at test centers in California designated by the State Bar. Pursuant to the authority delegated to it by the Board of Trustees, the Committee determines the examination's format, scope, topics, content, questions, and grading process.

(B) The State Bar provides the California Supreme Court a report on each administration of the examination as soon as practical.

(C) A passing score achieved on a California Bar Examination administered on or after July 2015 shall not expire. This subsection shall not be construed as relieving an attorney of any obligation that may exist to take and pass the Attorneys' Examination when seeking readmission or reinstatement pursuant to California Rule of Court 9.10(f) or State Bar Rules 5.440-5.446, or if otherwise ordered by the Supreme Court to take and pass the Attorneys' Examination.