



The State Bar of California

OPEN SESSION AGENDA ITEM O-300 COMMITTEE OF BAR EXAMINERS

DATE: October 14, 2022

TO: Members, Committee of Bar Examiners

FROM: Donna S. Hershkowitz, Chief of Programs/Legislative Director

SUBJECT: Recommendation to Adopt Rule Change Eliminating Five-Year Period of Validity for Passing Bar Exam Score: Return from Public Comment

EXECUTIVE SUMMARY

At its June 17, 2022, meeting, the Committee of Bar Examiners adopted a motion recommending that the Board of Trustees circulate for a 45-day public comment period a rule change that would eliminate the five-year clock on a passing bar examination score as an unnecessary hurdle to admission to the State Bar which no longer furthers public protection. The Board of Trustees, at its July 2022, meeting, concurred with the recommendation of the Committee to circulate the proposal. The Committee received 17 comments during the 45-day comment period; 2 comments appeared to be duplicates of those previously submitted and thus are not reflected in this count. A copy of the comment chart (including those duplicate comments) is included as Attachment A. After review of the comments, staff recommends no changes to the proposed rule, and recommends the Committee request the Board of Trustees to approve the proposed rules and submit them to the Supreme Court for adoption.

BACKGROUND

Rule 4.15 of the Rules of the State Bar¹ 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.

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

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 passes,” the applicant must 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 receives roughly 10 to 20 requests for an extension of this five-year limit annually.

California is not alone in setting a time limit for getting sworn in, or meeting the remaining admissions requirements, after passage of the bar exam. A quick review of the rules and procedures in other US jurisdictions² reveals that: (1) in addition to California, 25 states set an overall timeframe for long after passing the bar exam an applicant must get sworn into the bar; (2) 9 states set a time limit on how long after passing the bar exam an applicant must satisfy all other requirements for admission; and (3) 23 states set a clock on 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. Some states have more than one of these requirements.

On June 17, 2022, the Committee adopted a resolution by a vote of 8-0 (with 2 abstentions) recommending the Board circulate the rule changes for public comment. Following the recommendation of the Committee of Bar Examiners, the Board of Trustees circulated the proposed rule changes for a 45-day public comment period. A total of 19 comments were received, although 2 appear to be from the same individual who had already submitted a comment, reducing the number to 17. Of those, 10 agree with the proposal as circulated, 5 agree if modified, 1 disagrees, and 1 states no opinion.³

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

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, direct communication with the state. The rules were not always clear, and staff made their best effort to evaluate and categorize the information readily available.

³ One individual submitted two comments under his own name, one expressing agreement, one agree only if modified. For purposes of the above count, this individual is treated as agreeing with the proposal only if modified.

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.

The [agenda item](#) for the June 17, 2022, Committee meeting provides lengthy background describing why the rule change was recommended, including a comparison with how this rule operates vis-à-vis rules regarding licensed attorneys who do not actively practice law following admission to the State Bar, or who have no experience in an area of law that they decide to practice. The Committee concluded that the same rationale that justifies allowing attorneys to switch areas of the law and allows inactive attorneys to become active without reestablishing they are minimally competent by taking another 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 a reminder to the Committee, 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 proposed rules create a different five-year requirement than currently exists in Rule 4.17. Specifically, the proposed rules provide that if they have not been sworn in after five-years, the applicant will be de-certified by operation of law (so they could not be admitted) 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 Committee believed this five-year requirement is necessary and appropriate to further the State Bar's public protection mission.

Those applicants not yet certified for admission are subject to the existing requirement to have an active positive moral character determination in order to be certified to the Supreme Court, so no change is required for this population.

OTHER RULE AMENDMENTS

In addition to the changes to rule 4.17, the proposed rules include 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.

PUBLIC COMMENTS

The Committee received 17 public comments on the proposal (subtracting the apparent duplicates from the same individual). Of those comments, 10 agree with the proposal as circulated, 5 agree if modified, 1 disagrees, and 1 states no opinion and is unrelated to the change proposed. The comment chart set forth as Attachment A identifies each commenter, a verbatim recitation of their comment, their position on the proposal (as identified by the commenter) and staff's recommendation as to whether the comment identifies the need for a further change to the proposal. As the Committee can see from Attachment A, staff does not believe any changes to the rule proposal should be made in response to the comments.

The commenter who expressed disagreement with the proposal believes that the five-year time line is necessary to protect the public. The commenter asserts that those who fail to get sworn in within the five-year period after passing the bar are "unwilling to commit to a career," and "lazy and inept" and thus the five-year rule appropriately protects the public from such individuals. The Committee expressed disagreement with the perspective in its discussion of the need for the rule change at the June 17, 2022, meeting.

The five commenters recommending modifications to the proposal submitted nearly identical comments. In short, these commenters support the elimination of the five-year time line if individuals who pass the Bar are admitted to practice "without any further delay," without any further obstruction," "forthwith, "as-soon-as-possible," "without any conditions" (including completion of a supervised practice requirement) and that they be admitted retroactively to the date they passed the bar exam. Staff do not recommend amending the proposed rules in response. As noted in the comment chart, the proposed modifications to require admission "without any further delay," "without any further obstruction," and "forthwith, as soon as possible" are inconsistent with the requirement that applicants meet all other requirements for admission, including having a positive moral character determination, passing the MPRE, and not being in arrears on a child or family support order. The proposed modifications relating to supervised practice are beyond the scope of this proposed rule. As to the final recommendation, staff disagrees that admission to the bar should be back dated. The date of admission is contingent on the time when the applicant satisfies all requirements for admission to the bar and proceeds to get sworn in. There is no reason to back date the date of admission.

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 adoption of the proposed rules, as circulated for public comment and as set forth in Attachments B and C.

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 that the Board of Trustees adopt the rule revisions set forth in Attachments B and C and request approval of the rule changes by the Supreme Court.

ATTACHMENT(S) LIST

- A.** Public Comment Chart
- B.** Proposed Amendments to Title 4 of the Rules of the State Bar, Rules 4.17, 4.51, 4.52, and 4.60 (Redline)
- C.** Proposed Amendments to Title 4 of the Rules of the State Bar, Rules 4.17, 4.51, 4.52, and 4.60 (Clean Version)