



# The State Bar of California

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## **OPEN SESSION AGENDA ITEM O-202 OCTOBER 2022 COMMITTEE OF BAR EXAMINERS**

**DATE:** October 14, 2022

**TO:** Members, Committee of Bar Examiners

**FROM:** Christina Doell, Program Manager

**SUBJECT:** Request to Circulate the Proposed Rule Revisions for Public Comment  
Regarding Testing Accommodations

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### **EXECUTIVE SUMMARY**

The State Bar is conducting a comprehensive review and evaluation of Admission Rules, practices, and procedures, as well as applicant-facing materials, and the Applicant Portal in the Admissions Information Management System. Among the top priorities was consideration of the testing accommodations process. The framework guiding the proposed changes to the testing accommodations process, set forth in Attachment C, strives for transparency, consistency, and a streamlined process, all in compliance with laws governing testing accommodations. As part of the process of developing the framework, the State Bar held two testing accommodations stakeholder input forums, where we heard significant concerns about the current accommodations process and received recommendations for improvement.

This agenda item proposes revisions to the testing accommodations rules to clarify and streamline both the application and file review process, and requests that the Committee of Bar Examiners recommend that the Board of Trustees circulate these rules for a 60-day public comment period. These rule changes are a necessary part of the State Bar's effort - guided heavily by the Consent Decree arising out of *The Department of Fair Employment and Housing v. Law School Admission Council* litigation (LSAC Consent Decree), and the guidelines for testing accommodations issued by the United States Department of Justice - to streamline the accommodations request process.

Although the Committee is not being asked to approve the implementing forms or the framework for evaluating applicant submissions within the parameters of the rules, the framework and draft forms are attached to ensure the Committee has a comprehensive picture of the new process.<sup>1</sup>

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## **BACKGROUND**

The Rules of the State Bar, Title 4 Division 1 Chapter 7, set forth the procedures for requesting testing accommodations for the California Bar Exam (CBX) and the First-Year Law Students' Exam (FYLTX).<sup>2</sup> The rules, and the manner in which they are implemented, are intended to assure that individuals with disabilities have access to the FYLTX, CBX, and LSX equal to those without disabilities, so that the exam evaluates an individual on the knowledge, skills, and abilities the exam is designed to measure, and is not a reflection of the effects of any disability.

Applicants with disabilities may submit a request for testing accommodations to take an exam administered by the Committee. A request is granted when the applicant demonstrates they have a disability or disabilities that prevent them from taking an examination under standard testing conditions; the testing accommodation(s) requested are necessary to address the functional limitations related to their disability or disabilities; and the testing accommodations requested are reasonable and appropriate in light of their disability or disabilities (Rule 4.80(C)).

As part of its process of re-evaluating the testing accommodations process, the State Bar conducted its first testing accommodations stakeholder input forum on June 29, 2022. We received input from 37 unique participants, 1 of whom was representing a disability rights organization. In addition, 15 comments were received from repeat applicants. We also received extensive written comment. Although the vast majority of comments were about individual situations the commenters faced when applying for testing accommodations or taking the bar examination, themes emerged around the following issues: the cost and time needed to secure documentation to support the request for testing accommodations, customer service – including the view that the State Bar takes an adversarial posture in dealing with applicants, the amount of deference paid to recommendations of treating physicians, the timelines for making decisions, and training and conduct of proctors.

Reflecting on the comments provided, the State Bar developed a new framework for implementing Rule 4.80(C). That framework responds to many of the issues raised at that stakeholder forum as well as concerns that have been previously addressed to the State Bar and the Committee, and relies heavily on the LSAC Consent Decree and guidelines issued by the DOJ. This revised process seeks to limit applicants' need to secure additional documentation or testing, relying heavily on proof of past testing accommodations on high stakes exams, and,

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<sup>1</sup> Generally, the Committee does not review and approve forms or internal processes for implementing the adopted rules. In this instance, the process for requests for review of denials or approvals with modifications (previously referred to as "partial grants") set forth in the framework requires a change in the rules, but the remainder of the new approach can be implemented without a rule change.

<sup>2</sup> Although these rules do not govern legal specialization exams (LSX), the process adopted for evaluation of requests for testing accommodations for the CBX and FYLTX is applied to requests for testing accommodations from those sitting for the LSX.

where additional documentation is necessary, limiting it to that which is reasonable and narrowly tailored to determine the applicant's need for the requested testing accommodations.

A second stakeholder input forum was held on September 16, 2022, to receive feedback on the framework. Refinements were made to the framework following that forum, and staff developed prototypes of the Testing Accommodations Request Form and the Qualified Professional Certification Form. The forms, included as Attachments C and D, reflect what a hardcopy form could look like. They are not final, in that they have yet to be reviewed and revised by a plain language editor, and additional formatting is needed by those proficient in creating forms. An instruction form will also be created to assist applicants and qualified professionals in completing these forms, as well as a form describing the standard testing conditions and identifying the typical accommodations approved by the State Bar.<sup>3</sup> Additionally, the forms will be programmed into the Admissions Applicant Portal, as it is expected that most applicants will access and complete them online.

The framework and the forms for the accommodations process do not reflect the full scope of improvements the State Bar intends to implement, which will include training of staff and outside experts, streamlining of application processing, and improving clarity of the website and communications.

## **DISCUSSION**

The proposed rule revisions can be categorized at a high level as encompassing the following areas:

- Clarifying and simplifying terminology (such as eliminating the term “petition” in favor of “request” and eliminating “appeal” in favor of “request for review”; and adding in and defining the terms qualified professional and disability accommodations expert, as these roles are envisioned in the framework.
- Addressing the process for requesting the same or equivalent testing accommodations as those granted by another testing entity.
- Clarifying that the applicants will receive the report of the disability accommodations expert if the request is denied or approved but with modifications.
- Clarifying that timelines in the rules run from submission of a complete application.
- Changing the process for review of a denial or approval with modifications from review by the Committee to review by a disability accommodations expert.

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<sup>3</sup> The description of the standard conditions is intended to ensure that applicants and qualified professionals understand what is expected or allowed during the administration of an exam without testing conditions. This will enable the applicant and the qualified professionals to more effectively identify if the applicant's disabilities require testing accommodations. In addition, State Bar staff have observed that applicants sometimes request as accommodations things that are available to all applicants – such as the ability to leave one's seat and go to the restroom during in-person exams. When someone requests such an accommodation today, staff and the Committee are challenged in adequately explaining communicating to applicants that the request is denied because what the applicant is requesting is available without an accommodation. The description of typical accommodations granted is intended to assist applicants in understanding that certain accommodations received for other exams, such as stop-the-clock breaks, are not available during State Bar administered exams and an equivalent accommodation should be requested.

- Inserting in place of the reviews currently conducted by the Committee, oversight responsibilities of the Committee to ensure consistent application of standards and processes and to monitor trends in accommodation requests and how they are handled.
- Reorganizing the rules for improved flow and making conforming changes to the rules based on the framework (such as elimination of any reference to the multiple forms that are currently in use).

The most substantive changes included in the rule proposal are described below.

## **REPORT OF THE TESTING ACCOMMODATIONS EXPERT**

Currently, many requests for testing accommodations are sent by State Bar staff to consultants with expertise in various disabilities. When requests for testing accommodations are denied or approved with modifications, the letter to the applicant includes excerpts of the rationale provided by those consultants to the State Bar and the Committee. This was an issue that was addressed by several commenters at the stakeholder input forum conducted in June and September. As a result of that input, the proposed rules provide that any recommendation to any notice of denial or approval with modifications will be accompanied by a report from the disability accommodations expert. This applies to the initial evaluation as well as the requests for review.

## **REQUESTS FOR SAME OR EQUIVALENT TESTING ACCOMMODATIONS**

Consistent with the process set forth in the framework that streamline approval of requests for the same or equivalent testing accommodations as approved within the past five years by another testing entity, the rules specify that a request for same or equivalent testing accommodations must be accompanied by a copy of the notice of approved accommodations and certification by the applicant that they are still experiencing the same functional limitations caused by the disabilities for which the accommodations were previously approved.

## **REQUESTS FOR REVIEW**

The new framework is intended to ensure that requests for testing accommodations are handled consistently, in accordance with the governing law, and not based on personal experiences or biases. The framework seeks to streamline the request, the evaluation, and the review (currently described in the rules as an appeal), and to ensure that applicants are only required to submit documentation that is reasonable, limited, and narrowly tailored to the information needed to determine an applicant's disability-related functional limitation(s), their specific access needs, and how those needs relate to the testing accommodation(s) requested. To carry out that intent, the process includes use of a disability accommodations expert to evaluate requests for accommodations as well as a disability accommodations expert to handle requests for review.

This changes the current process of handling requests for review by substituting a disability accommodations expert for the Committee. In addition to ensuring consistency and fairness to all applicants, this should also streamline the review process. Currently, requests for review of

staff denials or approvals with modifications must be brought to a scheduled meeting of the Subcommittee of Examinations. Despite the willingness of the Committee to schedule several meetings in advance of the administration of exams, this procedure necessarily adds time to the review process, and result in applicants not receiving a final determination on their accommodations request until days before the exam administration.

The proposed review shall be de novo and shall be conducted by a different accommodations' expert than the initial reviewer. This amendment will help ensure adequate time for processing and consideration prior to the examination by an expert that is specifically trained and practicing in this field. The proposed rules also clarify that the decision issued after the request for review shall be final, and there is no further opportunity to request State Bar review of the request.

Committee oversight remains essential to ensure that staff is carrying out the process consistent with the rules and framework, that the goals of the revised process are achieved, and that focused attention is given to the impact of the changes in the process. The rules therefore provide that “[t]he Committee of Bar Examiners shall provide oversight to ensure consistent application of standards and processes and to monitor trends in accommodations requests, processing, and decisions. The Committee shall periodically receive written reports highlighting a random sample of cases in which accommodations were granted, denied, or approved with modifications, including those subject to the new review process.” Further specifics about how this information will be presented to and reviewed by the Committee will be worked out with Committee leadership at a later date.

## **TIMELINE**

Proposed rule 4.88(B) leaves unaltered the timeframe within which the applicant is to be notified of the outcome of the State Bar’s evaluation of the request for testing accommodations. The new framework is intended to streamline the processing of requests for testing accommodations. We anticipate generally being able to process the majority of requests – especially those requesting the same accommodations approved for prior exams within the past five years – significantly more expeditiously than under the current processes. However, as we roll out the new process, update the programming in the Admissions Information Management System (AIMS), and gain experience with processing requests under this new framework, it would be unwise to substantially change the timeline in the rules. We anticipate being in a position to update that time frame in a subsequent revision to the rules.

## **AMENDMENTS TO RULES OF THE STATE BAR OF CALIFORNIA**

Title 4, Division 1, Chapter 7 (commencing with Rule 4.80)

## **RECOMMENDATIONS**

It is recommended that the Committee of Bar Examiners approve moving forward with the proposed rule revisions, requesting that the Board of Trustees circulate the draft rule changes for a 60-day public comment period.

## **PROPOSED MOTION**

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

**MOVE** that the Committee of Bar Examiners recommends to the Board of Trustees to circulate the proposed revisions to the Chapter 7 Rules of the State Bar, set forth in Attachment A, for a 60-day public comment period.

## **ATTACHMENTS LIST**

- A. Proposed Amendments to Title 4, Division 1, Chapter 7 of the Rules of the State Bar (Redline)
- B. Proposed Amendments to Title 4, Division 1, Chapter 7 of the Rules of the State Bar (Clean Version)
- C. Testing Accommodations Framework
- D. Testing Accommodations Request Form
- E. Qualified Professional Certification Form