



The State Bar of California

OPEN SESSION AGENDA ITEM

DATE: August 16, 2022

TO: Members, Blue Ribbon Commission

FROM: Amy Nuñez, Director, Office of Admissions

SUBJECT: Recommendations of Pathways to Licensure for Out-of-State Law School Applicants, Out-of-State Attorneys, Foreign Attorneys, and Foreign Educated Applicants

EXECUTIVE SUMMARY

As part of its consideration of the development of a California-specific bar exam and a non-exam pathway, the Blue Ribbon Commission raised questions about whether these measures of minimum competence would be available and appropriate for determining whether to admit applicants who completed their law school education in another state or country, as well as attorneys from other states or countries. In the alternative, the Commission has grappled with what other requirements might apply, especially with regard to attorneys admitted in other states or countries. In addition, the Commission has been considering the existing exam requirements for attorneys licensed in other states or countries, and whether, as part of the Commission's re-examination of the licensing process, those requirements should be relaxed regardless of whether a non-exam pathway is adopted for California. This agenda item sets forth the background to allow the Commission to develop a final recommendation to the Supreme Court.

A discussion of California's unique legal landscape will highlight how the state's differences hinder the ability for CA applicants to benefit from reciprocity/comity or portability. This agenda will describe how Out-of-State Law School Applicants, Out-of-State Attorneys, Foreign Attorneys, and Foreign-Educated Applicants are currently licensed in California and in other state bars. Exploration of processes from around the country may provide models that CA may wish to adopt.

BACKGROUND

Licensure in California

Licensed attorneys from the US or from a foreign jurisdiction with law based on the principles of English common law, such as Canada and India, seeking licensure in California are required to sit and pass the California bar exam for admission. This is called a "first degree in law." Attorneys from other US jurisdictions who have been admitted for four or more years, can select to take the one-day examination; that portion of the exam consists of all of the essay questions and the performance tests. These applicants are not required to take the multiple-

choice portion of the exam. Attorneys from another US jurisdiction with fewer than four years of experience, must sit for the two-day exam which consists of essays, one performance test, and a multiple-choice section.

Attorneys from foreign jurisdictions must establish that they have a first degree in law that is equivalent to a US Juris Doctorate (JD) or that meets the educational requirements to be admitted in the country from which the applicant is coming from. These licensees are required to provide documentation from their home jurisdictions to ensure that they are in good standing. Once eligibility requirements have been satisfied, they are eligible to sit for the two-day exam.

Applicants from foreign jurisdictions that have not been admitted in their home jurisdiction require an evaluation to ensure that they possess a foreign first degree in law. They are also required to complete a US Masters of Law (LLM) degree or complete one year of legal education in an LLM program (based on completion of 20-semester units) from an American Bar Association (ABA) or California-accredited law school. Foreign educated applicants that do not have a first degree in law, must complete their legal education requirements in the United States by earning a JD at a Law School Accredited by the ABA, by a California-accredited, or California-registered Law School, or by completing their legal education through the Law Office Study Program.

Licensure in Other Jurisdictions

Applicants for admission in states that use the National Conference of Bar Examiners (NCBE) administered Uniform Bar Exam (UBE) as the method for determining minimum competence are able to “port” their score to another jurisdiction to establish eligibility for admission. Portability refers to the ability for examinees who take an exam, such as the UBE, the ability to earn a score that can be transferred to seek admission in another jurisdiction that also uses the UBE. Jurisdictions that allow portability require that the applicant’s score satisfy the minimum pass score of that jurisdiction. All states set a limit on how old a score may be to be ported into that state. The maximum age varies between two and five years, with three years being the most common requirement across the states. In 17 jurisdictions, applicants must also satisfy jurisdiction-specific exam requirements, such as an on-line or in-person course or a multiple-choice test. As a non-UBE state, California bar exam takers are not able to port their scores to establish eligibility for admission in another state. All licensed attorneys from any other jurisdiction (whether US or a foreign jurisdiction based in common law) are required to sit and pass the California bar exam for admission in California. Given that the Commission adopted a recommendation to continue with a California-specific exam, portability is not an option for California-licensed attorneys.

In approximately 44 states, licensed attorneys are able to become licensed in that state without having to take a bar examination, either through reciprocity or comity. Reciprocity protocols allow licensed attorneys the ability to be “admitted on motion”, as long as the same privilege is offered to that jurisdiction as well. (See map in Attachment A) Comity refers to the practice of granting reciprocity despite not being afforded the same privilege from the state of the incoming applicant. As noted in Attachment A, a limited number of states “admit on motion” to jurisdictions, regardless of being afforded that privilege to attorneys in their state. Each of these jurisdictions has a minimum number of years of practice required in order to be admitted without a bar examination. The minimum requirement is three years and the maximum required years of experience is five of the past ten years. As such, California

attorneys with sufficient years of practice can become licensed in jurisdictions that offer comity. Given that California does not extend a non-exam privilege to attorneys from any jurisdiction; CA attorneys are not eligible for licensing without an exam in jurisdictions that grant reciprocity. A major caveat to this privilege is that it is extended primarily to licensed CA attorneys graduating from ABA law schools. Approximately 9 states allow CA attorneys graduating from law schools that are accredited or registered by the CBE eligibility to be admitted on motion and do not require reciprocity.

If CA ever elected to grant licensed attorneys from other jurisdictions the ability to be “admitted on motion” (not require bar exam passage), the State Bar and Supreme Court would have to consider how non-ABA law school graduates would fare in the process. Nearly all jurisdictions in the US and its territories require JDs from ABA-accredited law schools; graduates from California-accredited and registered law schools are not eligible to sit for the bar exam in these jurisdictions. This would have to be addressed or negotiated when developing reciprocity policies.

Applicants with foreign law degrees are not eligible for admission on motion in other jurisdictions. Approximately thirty-five jurisdictions allow graduates of foreign law schools to sit for their bar exam as long as certain conditions are met. Nearly all jurisdictions specify that the law degree must be based in English Common Law and require a determination of educational equivalency. Twenty states require additional legal education in the US, and five require admission to another US jurisdiction in order to be licensed in their jurisdiction.

Given how many other states allow attorneys from other jurisdictions to become licensed without an exam, whether by portability, reciprocity or comity, California should explore alternative practices for licensing attorneys from other jurisdictions.

DISCUSSION

At its October 2021 meeting, the Blue Ribbon Commission developed guiding principles that it would apply to develop recommendations concerning whether and what changes to make to the California Bar Exam, and whether to adopt alternatives or additional testing tools to ensure minimum competence to practice law.

They include the following:

- Admission to the State Bar of California requires a demonstration of knowledge, skills, and abilities currently required for the entry-level practice of law, otherwise referred to as minimum competence.
- Admission to the State Bar of California requires minimum competence in professional ethics and professional responsibility.
- Criteria for admission to the State Bar of California should be designed to ensure protection of the public.
- The recommended examination, or examination alternative, should be evidence-based.
- Fairness and equity of the examination, or examination alternative, should be an important consideration in developing the recommended approach. Fairness and equity include but are not limited to cost and the mode and method of how the exam or exam alternative is delivered or made available.
- The recommended examination, or examination alternative, should minimize disparate

performance impacts based on race, gender, ethnicity, or other immutable characteristics.

Exploration of alternative methods for licensing out-of-state and out-of-country attorneys in California should consider these guiding principles. For example, CA currently requires that all US licensed attorneys must provide valid certificates of good standing from their home jurisdiction to qualify to sit for the bar examination. The Commission should consider whether additional assurance is required to demonstrate that the applicant possesses the requisite minimum competence to practice law in California, and that would be sufficient to satisfy the Bar's primary mission of public protection. If practicing as an attorney in another state is deemed sufficient, the Commission could recommend Admission on Motion, without the need to sit for the bar exam in California.

Attachment B contains the 10-year average pass rate for the three applicant categories discussed here: US attorney applicants, foreign attorneys, and foreign-educated applicants for the period between February 2012 and February 2022. This provides information on performance that may help determine an appropriate method for admitting applicants from outside of California. As you can see in the overall average, foreign-educated applicants perform lower than attorney applicants altogether, averaging a 15.5% bar exam pass rate during that 10-year period. US attorneys perform better than foreign attorneys, with a 10-year average of 54.09%. US attorneys performed better than all general bar exam takers (42.8%) for that same period. The 10-year average for foreign attorneys was 20.6% between February 2012 and February 2022.

Other jurisdictions require a minimum number of years of practice in order to get licensed without an examination. Should California allow out-of-state attorneys the ability to become licensed in California? Does the fact that they perform better than general bar exam takers demonstrate sufficient minimum competence to practice in California? California could consider adopting the minimum that most states require: at least three years of law practice experience. The Commission would also have to consider whether active and inactive attorney statuses should be treated equally. Should an attorney's law experience be recent? These applicants would still be required to sit and pass the MPRE and meet all other licensing requirements, like obtaining a positive moral character determination.

As noted earlier, out-of-country attorneys are required to establish that they have a first degree in law that is equivalent to a US JD, and their home jurisdiction must be based in common law, in order to qualify to sit for the bar examination. To ensure that we are meeting our public protection obligation, the Commission should consider whether to continue with a two-day bar examination or to extend the same Admission on Motion privilege being considered for out-of-state attorneys. What does their bar exam performance say about their readiness to practice in California? Should these attorneys be eligible to sit for the one-day exam, that is, only take the written portion of the exam?

As with out-of-state attorneys, these applicants would also be required to meet all other licensing requirements. They would also have to take the Multistate Professional Responsibility Examination and obtain a score of 86 or better. Out-of-state attorneys that have already achieved that score can transfer their score to meet this prerequisite.

Other jurisdictions that provide alternative, non-exam pathways, such as the programs in Ontario, Canada, require that international applicants be assessed to determine whether they meet the legal education requirements equivalent to a Canadian law degree. These are

determined on a case-by-case basis and evaluated on a variety of factors, including the type of legal system where the education was acquired (differentiating between common law or civil law), the length and nature of the education system, the subject areas, the academic performance in core areas, whether the education is recognized by the local regulatory authority, the modality of the program (full-time, part-time, in person or remote), length of time since the degree was earned, professional legal experience and qualifications, and nature and length of applicant's professional legal experience. Applicants with educational backgrounds deemed to be equivalent to a Canadian law degree, are eligible to become licensed via the various pathways allowed in that jurisdiction.

California uses the same approach when determining whether a foreign-educated applicant is qualified to sit for the bar exam. However, when an applicant's law degree is deemed equivalent to a US JD degree, applicants are nonetheless still required to obtain an LLM, or to complete one year of legal education in an LLM program (based on completion of 20-semester units) from an American Bar Association (ABA) or California-accredited law school in order to take the exam. As noted previously, California's additional legal studies requirement is consistent with 19 other US jurisdictions. Despite this, the Commission may want to consider whether to eliminate the additional education required of foreign educated applicants, or determine that it is necessary for ensuring public protection and that it contributes to establishing fairness and equity on the bar exam. Does the low performance on the bar exam demonstrated by this applicant group suggest that the additional legal studies requirement is warranted? Should more legal education be required?

As the Commission considers whether foreign-educated applicants are eligible to participate in a non-exam pathway, Canada's Ontario program serves as a model. Applicants that are deemed as having a law degree equivalent to a Canadian law degree, are allowed to participate in, both, the exam and non-exam pathways. As California embarks on a non-exam pathway, Commissioners may want to consider allowing foreign-educated applicants that have satisfied California's legal education requirements, the ability to become licensed in California the same way, thereby allowing foreign-educated applicants the ability to participate in a non-exam pathway. The concern of low bar exam performance may be allayed by requiring experiential learning and practice as a pathway for licensure in California. The Commission could determine a period of time for supervised practice, and these attorney applicants would be required to work under a CA licensed attorney who would be required to evaluate the work of the attorney applicant to ensure that their work reflects the minimum competence required of an entry-level attorney in California.

Possible Resolutions

Status Quo:

Out-of-state attorney applicants should be required to sit and pass the newly formulated CA bar exam.

Out-of-country attorney applicants that have established that they meet eligibility requirements (hold a first degree of law from a common law country and have practiced in their home jurisdiction) are eligible for licensure in California if they sit and pass the newly formulated CA bar exam.

Foreign-educated applicants that have not been licensed in their home jurisdiction must be evaluated to ensure that their degree is equivalent to a US JD, that is from a common law country and that they have met California's additional legal education required to take the bar exam. Once that is established, these applicants must sit and pass the newly formulated CA bar exam.

Admission on Motion:

Comity without consideration of law school type:

Out-of-state attorney applicants from all US jurisdictions can be admitted to practice law in California based on a minimum number of years of practice. The Commission will determine the minimum years of practice and whether those years need to be recent.

Reciprocity with consideration of law school type:

Out-of-state attorney applicants from jurisdictions that allow ABA-accredited, CA accredited and CA registered law schools the ability to become licensed in their home jurisdiction without needing to sit for a bar exam can be admitted to practice law in California based on a minimum number of years of practice. The Commission will determine the minimum years of practice and whether those years need to be recent.

Reciprocity without consideration of law school type:

Out-of-state attorney applicants from jurisdictions that allow CA attorneys the ability to become licensed in their home jurisdiction can be admitted to practice law in California based on a minimum number of years of practice. The Commission will determine the minimum years of practice and whether those years need to be recent.

Out-of-country attorney applicants can be admitted to practice law in California based on a minimum number of years of practice. The Commission will determine the minimum years of practice and whether those years need to be recent.

Non-Exam Pathway Options:

(If admission on motion is not considered) Out-of-state attorney applicants are eligible to participate in a non-exam pathway as a means for getting licensed to practice law in California. The Commission will determine the parameters of the program, including length of participation and other eligibility criteria.

(If admission on motion is not considered) Out-of-country attorney applicants are eligible to participate in a non-exam pathway as a means for getting licensed to practice law in California. The Commission will determine the parameters of the program, including length of participation and other eligibility criteria.

Foreign-educated applicants that have not been licensed in their home jurisdiction; that have been evaluated as having a degree equivalent to a US JD from a common law country; and, that they have met the additional legal education required to take the bar exam, are eligible to participate in a non-exam pathway as a means for getting licensed to practice law in California. The Commission will determine the parameters of the program, including length of participation and other eligibility criteria.

ATTACHMENT(S) LIST

- A.** Admission on Motion By State (2022)
- B.** Bar Exam Pass Rates for Foreign-Educated, Foreign Attorney, and US Attorney Applicants between February 2012 and February 2022