



# The State Bar of California

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## **OPEN SESSION AGENDA ITEM O-201 COMMITTEE OF BAR EXAMINERS**

**DATE:** January 27, 2023

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

**FROM:** Robert Brody, Committee of Bar Examiners  
Dolores Heisinger, Committee of Bar Examiners  
Christina Doell, Program Manager, Office of Admissions  
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**SUBJECT:** Action on Revisions to the Grading Rules, Recommendation to Circulate for Public Comment

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### **EXECUTIVE SUMMARY**

In 2022, the Office of Admissions embarked on a comprehensive, unit-by-unit assessment of rules, practices, procedures, client-facing material, including the State Bar website, forms, instructions, Admissions Information System (applicant portal) content, staff training material and guidelines. The primary goal of this review process is to improve case processing and customer service, which could be accomplished by providing clarity to applicants, consistency in the application of rules and policies by staff, providing new tools for applicants to understand and meet their obligations, and updating obsolete or outdated rules and practices. An equally important goal is to determine whether the existing rules are necessary and appropriate to ensure public protection and to eliminate any unnecessary barriers to admission. The rules that govern exam grading center around test scores and applicant records, including the handling of sensitive, post-examination materials. This agenda item outlines the rules that govern exam grading, and details the policy on the reconsideration of exam scores, which was determined to be an area needing revision. Committee volunteers worked with Admissions staff to assist with the rule and policy review; they recommended the insight of the full Committee prior to recommending changes to the current policy for requesting score reconsideration.

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### **BACKGROUND**

## **MPRE**

State Bar Rule 4.59 and Bus. & Prof. Code<sup>1</sup> § 6060 are consistent in the requirement that to be certified to the Supreme Court for admission and a license to practice law, a person must take and pass the Multistate Professional Responsibility Examination (MPRE). This two-hour, multiple-choice test is administered three times a year by the National Conference of Bar Examiners. Applicants can take the MPRE any time after completing one year of law study.

## **ACCESS TO EXAMINATION ANSWERS AND SCORES**

Admissions Rule 4.62 requires that within 60 days of the release of exam results, exam answers to the written portion of the exam be returned to applicants who were unsuccessful on the California Bar Exam (CBX), or who have passed or failed the First-Year Law Student's Examination (FYLX). This provision is not applicable to the multiple-choice portion of either exam.

Bus. & Prof. Code § 6065, on the other hand provides that within four months after the release of bar exam results, unsuccessful applicants shall have the "right to inspect their examination papers at the office of the examining committee. . . ."

Current practice does not conform precisely to either the rule or statute. In 2019, the Office of Admissions transitioned from mailing exam answers by USPS to applicants the week after the release of results, to posting applicant answers electronically to the Applicant Portal on the same day as the release of results. Applicants are able to view, print, or download their exam results. However, due to space constraints, if such action is not taken within 30 days, generally the exam answers are no longer accessible through the Applicant Portal. With regard to the multiple-choice portion of the FYLX, applicants may inspect the questions and their answers in a proctored situation in the Office of Admissions. Applicants are limited to a single appointment each exam cycle for an eight-week period after the release of results.

## **COMMITTEE POLICY ON THE DEFINITION OF "PARTIAL" EXAM TAKERS**

The Committee has a written policy and guidelines for applicants who are defined as "takers" and "completers" of the California Bar Examination (CBX) and the First-Year Law Students' Examination (FYLX). The current policy dictates that examinees are required to complete all sections of an exam in order to be considered as having sat for that exam. Applicants who do not complete all portions of the exam will be considered "partial takers," and as such, will not have their exams graded. These applicants will not appear in the general statistics and are treated equivalent to someone who failed to show up to the exam. Consistent with this policy, if an applicant misses a session of an in-person exam, they are not allowed entry to the remaining portion of the exam.

In July 2020, the Supreme Court directed that the passing score on the CBX be permanently lowered from 1440 to 1390 and that the State Bar administer the CBX online remotely in response to the conditions caused by the COVID-19 pandemic. In March of 2021, staff brought

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<sup>1</sup> All further statutory references are to this code unless otherwise noted.

a discussion item to the Committee to reconsider the current partial taker policy. The impetus was that with the lowered cut score, and the fact that the exam sessions were broken up into smaller increments to accommodate the need for breaks, statistically an individual could miss one or more exam questions and still pass the exam. The Committee voted not to change the policy and to keep the current partial taker policy.

#### **COMMITTEE POLICY ON THE RECONSIDERATION OF EXAM SCORES**

Staff were unable to determine the inception of the committee's policy regarding requests for reconsideration of an applicant's exam score; however, this policy was last brought to the committee in 2018 when the committee requested staff draft requirements and deadlines for requesting reconsideration of exam scores.

At the Committee's December meeting, staff presented some initial thoughts about the planned revisions to the exam grading rules and policies. Committee members Robert Brody and Dolores Heisinger volunteered to work with staff on developing proposals for consideration. References in this agenda item to the "working group" are regarding these Committee members and the staff who worked with them. This working group seeks the full Committee's input and guidance prior to changing the policy or recommending rule changes to the Board of Trustees.

### **DISCUSSION**

#### **PASSING SCORE FOR THE MPRE**

Rule 4.59 states that every applicant must take and pass the Multistate Professional Responsibility Examination (MPRE) administered by the National Conference of Bar Examiners, and receive a passing score as determined by the Committee. The examination may be taken following completion of the first year of law study or later. The Committee must receive official notice of an MPRE passing score before an applicant is deemed to have passed the examination. There are no time limits for taking the MPRE in connection with an applicant's qualification for admission to practice law in California, although the requirement must be satisfied before a motion is made to the Supreme Court of California to seek certification of eligibility to practice law in California.

In 2006, the Board of Governors approved the Committees' proposal to increase the required score for the MPRE from a scaled score of 79 to a scaled score of 86. The policy took effect at the beginning of January 2008, after notice regarding the change had been given to the law schools and posted on the admissions' website. Passing scores for the MPRE vary across jurisdictions; the lowest passing score in any jurisdiction is 75 (Georgia, New Jersey, Alabama, Kentucky, Oklahoma, Mississippi, New Mexico, Pennsylvania, and District of Columbia), and the highest passing score is 86 (California and Utah). As the State Bar and the Supreme Court, through the Blue Ribbon Commission on the Future of the Bar Exam, is exploring alternative ways to conduct exams, and alternative methods to determine minimum competence, it seems appropriate to re-consider whether California's highest in the nation passing MPRE score is necessary for public protection or an unnecessary barrier to entry to the profession. The working group discussed whether to reevaluate the passing score required for the MPRE and

discussed the importance of the MPRE in measuring a candidate's knowledge and understanding of established standards relating to the professional conduct of lawyers. The working group will reconvene to discuss the Committee's input and will bring a proposal back at an upcoming Committee meeting.

### **ACCESS TO EXAMINATION ANSWERS AND SCORES**

Rule 4.62 states that within 60 days of the release of examination results, examination answers to the written portions of the examination are returned to applicants who have failed the California Bar Examination or who have passed or failed the First-Year Law Students' Examination. Bus. & Prof. Code § 6065 states that "any unsuccessful applicant for admission to practice, after he or she has taken any examination and within four months after the results thereof have been declared, has the right to inspect his or her examination papers at the office of the examining committee located nearest to the place at which the applicant took the examination." The section further notes that this right of inspection exists whether or not there are markings on the exam.

Our experience suggests that applicants are confused, perhaps by the statutory language, thinking their "inspection of the exam papers" will expose them to the notes and markings made by the graders regarding their exam answers. However, no such markings are made on exam answers. Whether their answers are accessed via the Applicant Portal, or in person, there are no markings for them to witness. Furthermore, as noted in the background section, exam answers are made available in the Applicant Portal immediately upon release of exam results, but only remain accessible for 30 days. Since the applicants have the ability to print or download their answers, staff believe this provides significantly better access than is envisioned in the statutory language.

Section 6065(a) relates to the First-Year Law Students' examinees by allowing applicants access to the multiple-choice portion of the exam. As noted earlier, staff comply with this rule by making the written portion of the exam material available via the Applicant Portal. For the FYLSX multiple-choice section of the exam, applicants are invited to visit either the San Francisco or Los Angeles State Bar office to inspect that portion of the exam because, for security reasons, the multiple-choice sections of the exam must be shared with any applicants in a proctored environment. It is important to clarify the implication of multiple-choice questions being available for inspection for such a time period as it allows question access through subsequent administrations of the exam. For example, June FYLSX results are released in August. An unsuccessful applicant could have access to inspect their papers through December, even if one is registered to take the October exam. Due to the conflict of allowing applicants access to questions and answers through the administration of the exam, staff has limited the multiple-choice review period to 8-weeks. Staff is interested in the Committee input on recommending a statutory change to align the statute to the current practice.

### **COMMITTEE POLICY ON THE DEFINITION OF "PARTIAL" EXAM TAKERS**

An applicant considered to have taken an examination is defined as an applicant who has a multiple-choice score and a complete set of written scores (First-Year Law Students' Examination); a Multistate Bar Examination (MBE) score, and a complete set of written scores

(General Bar Examination); or a complete set of written scores (Attorneys' Examination). "Written scores" may include zeros if an applicant attended the examination for its entirety. If an applicant was absent from a test center for any portion of the examination during its administration, the applicant is not considered as having completed the examination; the applicant's written answers will not be graded; and the applicant will be advised that, if they intend to take the next administration of the examination, they will be subject to the same application filing deadlines applicable to first-time applicants rather than the deadlines applicable to immediate repeaters.

A significant distinction between the format of an in-person exam and the online remote exam is how many questions are administered in each exam session. For in-person exams (CBX), the State Bar administers three (3) written essay questions during the morning session, and two (2) essay questions and a performance test during the afternoon session. If you do not attend the morning session, applicants are not allowed to attend the afternoon session. For remotely administered online exams (FYLSX), each session consists of a single essay question and the exam software does not prevent an applicant from attending a subsequent session if they did not attend the earlier essay question.

There are many reasons why an applicant might miss an exam session, examples of which might be technical difficulties logging into the session, sudden illness, or family emergency. Given the format of the online remote exam with a single question per session and possibility of passing the exam while missing a session, the Committee may want to reexamine its current policy regarding how "takers" are defined for online remote exams. Committee deliberation should include whether to amend this policy regarding online remote exams or the possibility of future remote exams being broken down into shorter sessions. The Committee may want to consider the following parameters for redefining a "taker" during online exams as having missed no more than one written question sessions and not have missed any multiple-choice sessions.

#### **COMMITTEE POLICY ON REQUESTS FOR RECONSIDERATION OF AN EXAMINATION SCORE**

Although staff was unable to determine the inception of the Committee's policy on the reconsideration of exam scores, the policy was last edited in 2014 when the Committee agreed to add text of "documenting evidence" into defining the limited circumstances under which the State Bar will entertain requests for reconsideration of an examination score. The written policy currently states that the committee will consider requests only when an applicant establishes with documented evidence that 1) an arithmetical error or 2) a clerical error resulted in failure or prevented the exam from being properly graded. The committee does not extend reconsideration based on challenges to its grading system or the judgments of its professional graders.

Despite the limiting language of the policy, Admissions has nonetheless permitted reconsideration involving single applicants on a case-by-case basis, and has initiated psychometric analysis for incidents involving larger numbers of applicants.

On average, the State Bar receives 40-50 requests for reconsideration each exam cycle. In practice, applicants often request reconsideration of their exam results by questioning the

committee's standardized grading procedures. There are no adopted rules that govern the grading process used for the California Bar Exam (CBX) or First-Year Law Students' Exam (FYLTX); however, written policies and procedures, some of which have been adopted by this committee and some of which have been implemented administratively, are built into the grading process to ensure applicants are afforded a fair opportunity through the exam grading process.

Before grading begins, staff reconciles the exam answers to ensure all attendees have a complete set of answers. Reasons for incomplete answer sets include applicants forgetting to upload their answer files after the exam, a handwritten answer file erroneously placed in a scratch paper envelope, or applicants not completing the exam. By policy, all answers submitted in accordance with committee policy, written on lined paper, typed using the security software, or printed at the exam, go through the standardized grading process. In order to ensure that all graders on any particular question are grading consistently with each other and that grades are recorded accurately, there are a number of quality control measures that are utilized every grading cycle, including three mandatory calibration meetings, supervision by the Examination Development and Grading Team, monitoring by State Bar staff, statistical analysis, and the verification of grades throughout the cycle. The Committee's policy to limit regrading to issues of arithmetic or clerical issues is in recognition that these procedures are designed to ensure accuracy, consistency, and fairness in grading.

Additionally, both the CBX and the FYLTX use a two-phase grading process. By design, the Committee's two-phase grading system has a built-in regrade procedure that sends the exam answers for applicants who score below, but near the pass line, through a second round of grading. Most jurisdictions, like California, have an automatic re-read/re-grade policy for scores that fall within a specific range of the pass line. Staff research has found that in those other jurisdictions, once the initial grading and regrading are concluded and the exam results are released, there is no further regrade and no appeal of results is permitted. A few jurisdictions offer a single-phase of grading, but may allow appeals for the regrading of answers to the Bar Examiners or Supreme Court, usually upon payment of a fee.

With the transition to grading online, staff no longer assembles exam answers into thousands of printed booklets. Exam answers are now uploaded from the exam security software into the graders' portal. By eliminating the manual process of needing to print, pack and ship exam answer books, coupled with the quality control measures built into the grading process, there is doubt as to whether a reconsideration policy based on a clerical error is still needed. Furthermore, scores are calculated using the grading software, which is also separately calculated and confirmed by staff multiple times prior to the release of results. While a reconsideration policy based on an arithmetical error may have made sense prior to the use of the enhanced grading software, the policy attracts claims of possible arithmetical mistakes by applicants believing their grades should be higher without any demonstration of an arithmetic error. Additional reasons staff has received requests for reconsideration include questioning the process of scaling grades or applicants wishing to pick and choose the higher grade when answers are sent through the two-phases of grading. These do not qualify as arithmetic or clerical errors.

Another concern with the reconsideration policy is its failure to specify how long after the release of results such reconsideration request may be made. After an extensive review and discussion with the working group behind the reasons applicants request reconsideration of an exam score, this agenda item poses two policy options to generate discussion. The working group seeks guidance from the full Committee on suggested policy variations or rule changes, and suggests at a minimum, adjusting the policy to impose requirements and deadlines for those seeking reconsideration.

While this agenda item intends to provoke discussion of this issue, staff identified two options the Committee may wish to focus on:

**Option 1:** Amend Rule 4.62 which addresses access to examination answers and scores to add the following language:

Applicants may not request reconsideration or appeal of exam answers or results. All scores near the pass line after one reading, as defined by the Committee, shall automatically be re-graded prior to the release of results.

The additional language to this rule would not prevent staff from requesting psychometric analysis for applicants that experience confirmed software issues or receive defective materials.

**Option 2:** Modify the current reconsideration policy to remove arithmetical error and set deadlines for requesting consideration:

Incidents occurring during the administration of the exam must be reported by submitting written notice detailing the event no later than 14 days after the final day of administration.

Requests for reconsideration will be considered only when an applicant establishes with documented evidence that a clerical error prevented the exam from being properly graded. All reconsideration requests must be made no later than 14 days after the release of results.

## **AMENDMENTS TO STATE BAR RULES**

Title 4, Division 1, Chapter 5, Rule 4.62

## **RECOMMENDATIONS**

Should the Committee of Bar Examiners agree with the proposed rule change, it is recommended that the Committee request that the Board of Trustees circulate for a 60-day public comment period the rule change reflected in Attachment A.

Should the Committee of Bar Examiners wish to modify the current policy, it is recommended that the “arithmetical error” be stricken from the policy, deadlines be added to the length of time applicants may request reconsideration, and requirements written into the policy for documenting complaints at the test site as set forth in Attachment B.

## **PROPOSED MOTIONS**

Pending

## **ATTACHMENT(S) LIST**

- A.** Proposed amendment to rule 4.62
- B.** Proposed amendments to the policy regarding the reconsideration of grades



**Proposed Amendment to Title 4 of the Rules of the State Bar, Rule 4.62 (Redline)**

**Rule 4.62 Access to examination answers and scores**

(A) Within sixty days of the release of examination results, examination answers to the written portions of the examination are returned to applicants for admission who have failed the California Bar Examination or who have passed or failed the First-Year Law Students' Examination. This provision does not apply to the Multistate Professional Responsibility Examination or the multiple-choice portion of the First-Year Law Students' Examination and California Bar Examination.

(B) Applicants who pass the California Bar Examination are not entitled to receive their examination answers or to see their scores.

(C) Applicants may not request reconsideration or appeal of exam answers or results. All scores near the pass line after one reading, as defined by the Committee, shall automatically be re-graded prior to the release of results.

**Proposed Amendments to Policy Regarding Reconsideration of Grades (Redline)**

The committee believes that its grading and administrative systems afford each applicant a full and fair opportunity to take the exam and a fair and careful consideration of all of their exam answers on the bar exam, and that no useful purpose would be served by further consideration by the Committee. For this reason, the committee will consider requests for reconsideration only when an applicant establishes with documented evidence that a clerical error resulted in failure or prevented the exam from being properly graded.

Incidents occurring during the administration of the exam must be reported by submitting written notice detailing the event no later than 14 days after the final day of administration. All reconsideration requests must be made no later than 14 days after the release of results.

The committee will **not** extend reconsideration based on challenges to its grading system or the judgments of its professional graders. Requests for reconsideration submitted by or on behalf of an unsuccessful applicant must be in writing and meet the criteria noted above. Requests not meeting those criteria may be summarily denied on that basis.