



The State Bar of California

OPEN SESSION

AGENDA ITEM O-501

MARCH 2023

COMMITTEE OF BAR EXAMINERS

DATE: March 24, 2023

TO: Members, Committee of Bar Examiners

FROM: Judge Amy Guerra, Committee of Bar Examiners
Larry Kaplan, Committee of Bar Examiners
Paul Kramer, Committee of Bar Examiners
Tara Clark, Program Manager, Moral Character Determinations
David Lane, Attorney, Moral Character Determinations

SUBJECT: Action on Revision to Rule 4.41 of the Admissions Rules: Recommendation to Circulate for Public Comment

EXECUTIVE SUMMARY

At its January 27, 2023 meeting, staff introduced the idea of revising rule 4.41 of the Rules of the State Bar which currently prohibits an attorney who has been disbarred, is suspended, or is otherwise not in good standing, from submitting an Application for Determination of Moral Character. After the meeting, staff sought volunteers to serve on a working group to revise the rule. The working group recommends amending Rule 4.41 to permit such attorneys to submit an Application for Determination of Moral Character but provides there is a rebuttable presumption that the person does not possess the requisite moral character. The working group recommends that the Committee of Bar Examiners (Committee) advance the proposal to the Board of Trustees (Board) to circulate for a 60-day public comment period.

BACKGROUND

Rule 4.41(A) of the Rules of the State Bar of California currently states, in relevant part:

An attorney who is suspended for disciplinary reasons or disbarred, has resigned with disciplinary charges pending or is otherwise not in good standing for disciplinary reasons in any jurisdiction may not submit an application.

In 2008, the Rules Regulating Admission to Practice Law in California were replaced by Title 4 Admissions and Educational Standards, Division 1 Admission to Practice Law of the Rules of the State Bar of California (Admissions Rules).

Rule VI, Section 2(B) of the Rules Regulating Admission to Practice Law in California stated:

An attorney who has been admitted to practice law in any sister state or in any jurisdiction, territory, dependency or possession that the United States now holds or hereafter acquires or who has been admitted to practice in any foreign jurisdiction, but who is not in good standing in any such state, jurisdiction, territory, dependency or possession because of having been suspended or disbarred from practice as a result of a disciplinary proceeding may not file an Application for Determination of Moral Character while so suspended or disbarred.

When the Admissions Rules were adopted in 2008, the relevant part of rule 4.41(A) stated, “An attorney who is suspended, disbarred, or otherwise not in good standing in any jurisdiction may not submit an application.” The rule was subsequently amended several times until it reached the current version.

In 2022, the Committee and the Board approved the circulation of the revised Admissions Rules pertaining to Moral Character. The version of rule 4.41 returning to the Committee after public comment moved the relevant part of the rule to subsection (C); however, the language remains the same.

Having had the opportunity to take a fresh look at the rules, the working group was asked to explore rule 4.41 to determine if the strict prohibition against submitting a moral character application should be softened, allowing California, and not another state, to be the ultimate arbiter of whether an applicant should be admitted to the practice of law in California, and whether an attorney who is not in good standing in another jurisdiction should be given the opportunity to demonstrate they do possess the requisite moral character. Currently, under no circumstance may staff or the Committee allow an attorney applicant who is not in good standing for disciplinary reasons to submit an Application for Determination of Moral Character.¹

A copy of the Proposed Amendments to Title 4 of the Rules of the State Bar, Rule 4.41 is included as Attachment A.

DISCUSSION

Rule 4.41 protects the public by preventing an attorney deemed by another jurisdiction to be a threat to the public from applying for a moral character determination and being admitted to

¹ Under the current rules, an attorney applicant with prior discipline who is currently in good standing may submit an Application for Determination of Moral Character. An attorney applicant who is not in good standing for nondisciplinary reasons, such as past-due fees or outstanding continuing legal education courses, may also submit an Application for Determination of Moral Character.

practice law in California. The rule currently provides complete deference to the jurisdiction that imposed discipline on an applicant without allowing the State Bar to consider issues related to the discipline that may be relevant to a moral character determination, such as whether the applicant was disciplined for conduct that would not provide a basis for discipline in California.

A degree of deference to the judgment of the jurisdiction that imposed discipline on an attorney applicant is appropriate. The Supreme Court has held that an applicant, “having been disbarred in another state, stands in essentially identical circumstances to a disbarred California attorney seeking reinstatement, and the evidence of rehabilitation should therefore be evaluated under the same rigorous standards,” and that a disbarred applicant, “is not entitled to the benefit of the doubt if ‘equally reasonable inferences may be drawn from a proven fact’ [citation].” (*In re Menna* (1995) 11 Cal.4th 975, 986.)

The working group recommends amending rule 4.41 to address this tension by allowing an applicant who is currently not in good standing for disciplinary reasons in another jurisdiction to submit a moral character application and obtain a moral character determination, while providing for a rebuttable presumption that the applicant does not possess the requisite moral character for licensure. That is, it would be presumed that an attorney applicant who is not in good standing for disciplinary reasons in another jurisdiction lacks the requisite moral character for licensure, and the applicant would have the burden of overcoming the presumption with evidence to the contrary. The applicant may, for example, submit evidence showing that the discipline was the result of proceedings that were procedurally inadequate as to render the decision unreliable.

PROPOSAL

The working group proposes amending rule 4.41 as follows:

- (A) An applicant must submit an Application for Determination of Moral Character with required fingerprints and the fee set forth in the Schedule of Charges and Deadlines.
- (B) An Application for Determination of Moral Character may be submitted any time after filing an application for Registration but is deemed filed only when the application is complete.
- (C) There shall be a rebuttable presumption that an attorney is not of good moral character if the attorney is currently suspended for disciplinary reasons, is disbarred, has resigned with disciplinary charges pending, or is otherwise not in good standing for disciplinary reasons in any jurisdiction.

Two versions of the redlined rule are attached. The first includes the rule in its current form and the second is in anticipation of the adoption of the revisions to the Admissions Rules pertinent to Moral Character.

FISCAL/PERSONNEL IMPACT

Adoption of this rule would result in an increase in the number of moral character applications submitted. The amount of the increase is unknown but is anticipated to be small and absorbable with current resources.

RECOMMENDATIONS

It is recommended that the Committee of Bar Examiners request that the Board of Trustees circulate for a 60-day public comment period the rule changes reflected in Attachment A to revise rule 4.41 of the Admissions Rules.

PROPOSED MOTION

Should the Committee of Bar Examiners agree with the working group's recommendation, the following motion should be made:

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

ATTACHMENTS LIST

- A. Proposed Amendments to Title 4 of the Rules of the State Bar, Rule 4.41

Proposed Amendments to Title 4 of the Rules of the State Bar, Rule 4.41

Rule 4.41 Application for Determination of Moral Character (Current)

- (A) An applicant must submit an Application for Determination of Moral Character with required fingerprints and the fee set forth in the Schedule of Charges and Deadlines. An attorney who is suspended for disciplinary reasons or disbarred, has resigned with disciplinary charges pending or is otherwise not in good standing for disciplinary reasons in any jurisdiction may not submit an application.
- (B) An Application for Determination of Moral Character may be submitted any time after filing an Application for Registration but is deemed filed only when the application is complete.

Rule 4.41 Application for Determination of Moral Character (Current – Redline)

- (A) An applicant must submit an Application for Determination of Moral Character with required fingerprints and the fee set forth in the Schedule of Charges and Deadlines. ~~An attorney who is suspended for disciplinary reasons or disbarred, has resigned with disciplinary charges pending or is otherwise not in good standing for disciplinary reasons in any jurisdiction may not submit an application.~~
- (B) An Application for Determination of Moral Character may be submitted any time after filing an Application for Registration but is deemed filed only when the application is complete.
- (C) There shall be a rebuttable presumption that an attorney is not of good moral character if the attorney is currently suspended for disciplinary reasons, is disbarred, has resigned with disciplinary charges pending, or is otherwise not in good standing for disciplinary reasons in any jurisdiction.

Rule 4.41 Application for Determination of Moral Character (Revised Version)¹

- (A) An applicant must submit an Application for Determination of Moral Character with required fingerprints and the fee set forth in the Schedule of Charges and Deadlines. An attorney who is suspended for disciplinary reasons or disbarred, has resigned with disciplinary charges pending or is otherwise not in good standing for disciplinary reasons in any jurisdiction may not submit an application.
- (B) An Application for Determination of Moral Character may be submitted any time

¹ The revised version refers to the changes to the Admissions Rules pertinent to moral character that came before the Committee in October 2022 and are currently before the Committee again after returning from public comment.

after filing an Application for Registration but is deemed filed only when the application is complete.

- (C) An attorney who is suspended for disciplinary reasons or disbarred, has resigned with disciplinary charges pending, or is otherwise not in good standing for disciplinary reasons in any jurisdiction may not submit an application.

Rule 4.41 Application for Determination of Moral Character (Revised Version – Redline)

- (A) An applicant must submit an Application for Determination of Moral Character with required fingerprints and the fee set forth in the Schedule of Charges and Deadlines. An attorney who is suspended for disciplinary reasons or disbarred, has resigned with disciplinary charges pending or is otherwise not in good standing for disciplinary reasons in any jurisdiction may not submit an application.
- (B) An Application for Determination of Moral Character may be submitted any time after filing an Application for Registration but is deemed filed only when the application is complete.
- (C) There shall be a rebuttable presumption that Aan attorney ~~who~~ is not of good moral character if the attorney is currently suspended for disciplinary reasons, is or ~~is or~~ disbarred, has resigned with disciplinary charges pending, or is otherwise not in good standing for disciplinary reasons in any jurisdiction ~~may not submit an application.~~