



The State Bar of California

OPEN SESSION AGENDA ITEM O-202 COMMITTEE OF BAR EXAMINERS

DATE: March 24, 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

SUBJECT: Action on Revisions to the Grading Rules, Policy & Statute: Recommendation to Circulate State Bar Rule for Public Comment

EXECUTIVE SUMMARY

Beginning in 2022, the Office of Admissions embarked on a comprehensive assessment of rules, practices, procedures, and client-facing material. The primary goal of this review was to improve case processing, customer service, and to update obsolete or outdated rules. This assessment has also been balanced by a review to determine whether the existing rules are necessary and appropriate to ensure public protection and to eliminate unnecessary barriers to admission.

This agenda item summarizes the policies that the working group has deemed appropriate without needing revisions, in addition to detailing the rules and policies where the working group is recommending modifications. The agenda item requests the following actions from the committee:

- Modify the committee's policy on the reconsideration of grades to remove the arithmetical error criteria, and include a time limit for requesting reconsideration after the release of exam results;
- Recommend that the Board of Trustees circulate rule 4.62 for a 45-day public comment period, and adopt as a legislative priority amending Bus. & Prof. Code § 6065, pertaining to the review of applicant materials post-exam.

The proposed change to the policy on the reconsideration of grades is set forth in Attachment A and the proposed change to Bus. & Prof. Code § 6065 is set forth in Attachment B.

BACKGROUND

At its January 2023 meeting, the Committee of Bar Examiners (committee) discussed definitions and policies that govern exam grading centered around test scores, applicant records, and post-examination materials. Committee members Robert Brody and Dolores Heisinger volunteered to work with staff on developing proposals to be brought back to the Committee. The proposals before the committee today are the result of that effort. References in this agenda item to the “working group” are to these committee members and the staff who worked with them.

The working group evaluated the entire set of current rules, committee guidelines, and policies related to exam grading to identify where revisions were needed.

MPRE

State Bar Rule 4.59 and Bus. & Prof. Code¹ § 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 MPRE; however, it is committee policy that sets the passing score. In light of the fact that California and only other state share the highest required passing score in the nation, the working group discussed whether to reevaluate the passing score required for the MPRE. After seeking the insight of the full committee during its January 2023 meeting, the working group reconvened to discuss 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 believes the MPRE is an appropriate measure to ensure public protection and recommends the committee keep the passing score of the MPRE at a scaled score of 86.

“PARTIAL” EXAM TAKERS

The committee last changed its attendance policy in February 2018 for those taking the California Bar Exam (CBX) and the First-Year Law Students’ Exam (FYLX). The committee’s written attendance policy, as communicated in the exam application instructions and the admittance ticket bulletin for the both the CBX and the FYLSX, states that only applicants who compete all portions of the exam will have the exam graded. Applicants who do not complete all portions of an exam will be considered “partial takers,” and as such, will not have their exams graded. These applicants will not appear in the general statistics, are not counted towards their allocated law school’s minimum pass rate², and are not treated as “immediate repeaters” if they register for the next exam administration.

In late 2020, the State Bar began administering both the CBX and FYLSX online remotely in response to the conditions caused by the COVID-19 pandemic. Currently, the State Bar administers the CBX as an in-person exam, however, the FYLSX continues to be administered

¹ All further statutory references are to this code unless otherwise noted.

² Consistent with California Accredited Law School (CALS) guidelines.

remotely online. 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 questions during one session. For remotely administered online exams (FYLSX), each session consists of a single written question. Online exam sessions are broken up into smaller increments to accommodate the need for breaks coupled with the restriction of leaving the view of the camera while testing.

Given the current format of an online remote exam (FYLSX) being administered with a single question per session, the working group felt it important to reexamine its current policy regarding how “partial takers” are defined for remote exams. Statistically an individual could miss one or more exam questions, receive a grade of zero (0) and still pass the exam. Although it is statistically possible to pass the exam having missed a session, there is a low probability that the applicant would also have the near perfect scores required on the remainder of the exam to pass. Given the unlikelihood of this scenario occurring and the potential impact on the law school’s pass rate, the working group does not recommend changes to the definition of partial exam takers at this time.

The discussion section below provides a comprehensive review of two items for which the working group recommends revision: the Committee’s policy on the reconsideration of exam grades, and access to exam scores and answers after the release of exam results.

DISCUSSION

COMMITTEE POLICY ON RECONSIDERATION OF EXAMINATION GRADES

Staff was 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. 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.³

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. Both the California Bar Exam (CBX) and the First-Year Law Students’ Exam (FYLSX) use a two-phase grading process, which 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. The current reconsideration policy attracts claims of possible arithmetical mistakes by applicants believing their grades should be higher, questioning the process of scaling grades, or wishing to pick and choose the higher grade when

³ The current policy is posted on the State Bar website in the Exam section, <https://www.calbar.ca.gov/Admissions/Examinations/California-Bar-Examination/Grading>.

answers are sent through the two-phases of grading. These do not qualify as arithmetic or clerical errors.

Furthermore, with the transition to grading online, exam answers are now uploaded from the exam security software into the graders' portal. 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 without any demonstration of an arithmetic error.

In addition to examining the bases for requesting reconsideration, the working group noted that the reconsideration policy fails to specify how long after the release of results reconsideration requests may be made. The Office of Admissions has received requests for reconsideration many years after the administration of an exam, long after documents have been destroyed in accordance with the State Bar's record retention policy. For example, scratch envelopes, containing an applicant's used exam materials are only kept until the next exam administration. Other paperwork from an exam, such as attendance sheets, timing reports, etc., are kept for one year after the administration of the exam. Delays in requesting reconsideration make investigation of alleged incidents difficult.

The working group sought guidance from the full Committee at its January meeting on suggested policy variations regarding timelines for requesting reconsideration after an exam is administered. Since investigation of an applicant's claim of a clerical error oftentimes involves the need to check the contents of an applicant's scratch envelope or review paperwork from an exam, the working group recommends requiring requests for reconsideration be received by the Office of Admissions no later than two-weeks following the release of results. This will ensure that if any additional grading is needed post-exam, the grading team will still be calibrated to grade appropriately using the established standards set for that administration. The working group recommends that the Committee's policy on the reconsideration of grades be amended to add this two-week deadline after the release of results, as shown in Attachment A.

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 Students' Examination (FYLSX). This provision is not applicable to the multiple-choice portion of either exam. Bus. & Prof. Code § 6065, on the other hand, 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.

Perhaps as a result of the statutory language, applicants on occasion expect that when reviewing their exam answers, they will see notes and markings made by the graders. 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 applicants to review. Furthermore, in 2019, the Office of Admissions transitioned from mailing exam answers by USPS to posting applicant answers electronically to the Applicant Portal immediately upon the release of exam results. Applicants are able to view, print, and download their exam results. However, due to space constraints associated with the case management system, if such action is not taken within 30 days, generally the exam answers are no longer accessible through the Applicant Portal. Since the applicants have the ability to print or download their answers, the working group believe this provides significantly better access than is envisioned in the statutory or rule language.

The working group recommends that State Bar Rule 4.62 be updated to reflect current practice of posting results on the Applicant Portal for 30 days. Additionally, the working group recommends updating the Bus. & Prof. Code § 6065 (a)(1) be amended to align with the timeline established in State Bar Rule 4.62, and to remove the requirement to inspect the papers “at the State Bar offices” in light of current practice of posting exam papers online. Furthermore, the working group recommends that Bus. & Prof. Code § 6065 (2) be eliminated to avoid confusion among applicants, as shown in Attachment B.

FISCAL/PERSONNEL IMPACT

N/A

AMENDMENTS TO RULES OF THE STATE BAR OF CALIFORNIA

Rule 4.62

RECOMMENDATIONS

It is recommended that the Committee of Bar Examiners modify its current policy on the reconsideration of exam grades to remove the arithmetical error criteria and include a deadline of two-weeks after the release of results for requesting reconsideration as reflected in Attachment A.

It is further recommended that the Committee request that the Board of Trustees circulate revisions to rule 4.62 for a 45-day public comment period, and include among the legislative priorities amending Bus. & Prof. Code § 6065, as reflected in Attachment B, to clarify and align with current practice.

PROPOSED MOTIONS

Should the Committee of Bar Examiners agree with these recommendations, the following motions would be appropriate:

MOVE, that the Committee of Bar Examiners amend its policy to remove the arithmetical error criteria and include a two-week deadline after the release of exam results for requesting reconsideration of exam grades.

MOVE, that the Committee of Bar Examiners recommends to the Board of Trustees to amend Bus. & Prof. Code § 6065, as set forth in Attachment B, during the Board's annual review period.

ATTACHMENT(S) LIST

- A.** Proposed amendment to the policy regarding the reconsideration of grades
- B.** Proposed amendments to Rule 4.62 and Bus. & Prof. Code § 6065

Proposed Amendment 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. All scores have been automatically checked for mathematical errors and all answers with scores within the re-read range after one reading have been re-graded a second time by a different set of graders and double-checked for any mathematical errors before grades were released. For this reason, the committee will consider requests for reconsideration only when an applicant establishes with documented evidence that a clerical error one of the following resulted in failure or prevented the exam from being properly graded.

~~1. An arithmetical error in the calculation of the total written score from the final grades assigned to the written questions or in the calculation of the total MBE score; or~~

~~2. A clerical error.~~

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, without further explanation. All requests for reconsideration of grades must be received by the Office of Admissions no later than two-weeks after the release of exam results.

Proposed Amendment to Policy Regarding Reconsideration of Grades (Clean)

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. All scores have been automatically checked for mathematical errors and all answers with scores within the re-read range after one reading have been re-graded a second time by a different set of graders and double-checked for any mathematical errors before grades were released. 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.

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, without further explanation. All requests for reconsideration of grades must be received by the Office of Admissions no later than two-weeks after the release of exam results.

Rule 4.62 Access to examination answers and scores (Redline)

(A) ~~Within sixty days of the release of examination results,~~ Examination answers to the written portion 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. Applicant answers are available to download, print, or save for 30 days after the release of results. After this allotted time, the exam answers from the last administered exam are available upon submitting the Document Copy Request Form and payment of fee. 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.

Rule 4.62 Access to examination answers and scores (Clean)

(A) Examination answers to the written portion 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. Applicant answers are available to download, print, or save for 30 days after the release of results. After this allotted time, the exam answers from the last administered exam are available upon submitting the Document Copy Request Form and payment of fee. 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.

Proposed Amendments to Bus. & Prof. Code § 6065 (Redline)

~~(a) (1) 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 access to their written session examination answers papers for 30 days after the release of results at the office of the examining committee located nearest to the place at which the applicant took the examination.~~

~~(2) The applicant also has the right to inspect the grading of the papers whether the record thereof is marked upon the examination or otherwise.~~

~~(b) This section shall become operative on January 1, 2009.~~

Proposed Amendments to Bus. & Prof. Code § 6065 (Clean)

Any unsuccessful applicant for admission to practice has access to their written session answers for 30 days after the release of results.