



# The State Bar of California

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## **OPEN SESSION AGENDA ITEM III.A APRIL 2023 COMMITTEE OF BAR EXAMINERS**

**DATE:** April 21, 2023

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

**FROM:** James Efting, Committee of Bar Examiners  
David Torres, Committee of Bar Examiners  
Tammy Campbell, Program Manager, Office of Admissions

**SUBJECT:** Action on Revisions to the Admissions Rules Pertaining to Conduct Violations and Exam Administration Policies: Recommendation to Circulate for Public Comment

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### **EXECUTIVE SUMMARY**

The Office of Admissions started conducting a review of Admissions rules, policies, and guidelines in 2022 to ensure the information is still relevant, clear, concise and does not pose an unnecessary barrier for applicants to be admitted while ensuring public protection. The review is meant to provide clarity for applicants and to for consistency when staff applies these rules and policies.

Division 1 of Title 4 of the Rules of the State Bar defines the requirements for admission to practice law in California. The areas of the Admissions Rules that govern Exam Administration include Chapter 5 for Examinations and Chapter 6 for Conduct Violations. Business & Professions Code section 6060.3 also contains language governing exam administration.<sup>1</sup>

This agenda item recommends that the Committee of Bar Examiners take the following action: (1) review and approve the proposed rule changes for Exam Administration, (2) recommend to the Board of Trustees that the proposed rule amendments be circulated for a 60-day public comment period and 3) review and approve the proposed changes to the committee guidelines and policies related to Exam Administration.

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

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## **BACKGROUND**

Chapter 5, Rules for Examinations, includes rules that are specific to the examinations for the First-Year Law Students' Examination (FYLSX) and the California Bar Examination (CBX) (Attachment A). It includes information such as who needs to take the FYLSX, when the exams are held, dates and deadlines for applications, access to exam answers and scores and information that specifies that the Multistate Professional Responsibility Examination (MPRE) is required with a passing score approved by the committee.

## **CALIFORNIA BAR EXAMINATION**

Section 6060.3 sets forth that the bar exam is given in February and July every year and identifies the filing deadlines, late filing deadlines, and the late filing fees. The section also provides generally that application fees, including late fees, shall be refunded if an applicant does not take the bar exam due to the death or serious illness of the applicant or an immediate family member.

State Bar Rule 4.60 similarly identifies the timing of the exams, and Rule 4.61 mirrors statute in terms of the late filing deadlines. The amount of the late filing fees, matching the statutory provisions, are found in the *Schedule of Charges and Deadlines*.

Rule 4.61(A) also sets the date the applications open as October 1 for the February exam, and March 1 for the July exam. The final filing deadlines were revised in 2019 to change the final filing deadline from the 15<sup>th</sup> of the month to the 1<sup>st</sup> of the month for both February and July exams.

Both statute and rule specify that applications will not be accepted after the final filing deadlines.

Rule 4.61(B) is consistent with statute which specifies that an applicant who was unsuccessful on the most recent examination will be allowed 10 business days from the date of the results to timely file an application to take the next scheduled examination.

## **FIRST-YEAR LAW STUDENTS' EXAMINATION**

Section 6060(h)(2)(B) provides that the First-Year Law Students' Examination (FYLSX) "shall be administered twice a year at reasonable intervals."

State Bar Rule 4.56 identifies the months of administration as June and October.

There is no statute that specifies when the application opens, deadlines for timely or final filing, late fees, or withdrawal deadlines for both first-time examinees and immediate repeaters. The fees for the examination are set forth by in *Schedule of Charges and Deadlines*. While there is

no statute specifying specific deadlines for the FYLSX, staff apply the same methodology for the application opening, timely filing, and final filing deadlines, as well as withdrawal deadlines for the bar exam.

## **CHAPTER 6 RULE FOR CONDUCT VIOLATIONS**

Chapter 6 of the Admissions Rules (rules 4.70 through 4.74) contain the rules addressing conduct violations during the bar exam and the FYLSX. There is no corresponding statutory guidance or direction.

To assist applicants in understanding conduct violations, the staff developed, and the committee adopted, Guidelines Governing the Interpretation and Application of Chapter 6 of the Admissions Rules (Attachment G). Generally stated, applicants are issued a Chapter 6 Notice of Violation of Examination Rules or Policies during the exam, or shortly following an exam, when they have violated an examination rule or policy. After staff review the Chapter 6 Notice, any reports written by staff and proctors on the circumstances surrounding the violation, and the applicant's statement that was submitted within 10 days after the notice was issued, staff determine if the Chapter 6 Notice should be affirmed. If the notice is affirmed, an appropriate sanction is applied. Staff reference the Chapter 6 Administrative Hearing Outcomes Decisional Matrix that the Committee adopted and identifies what violations/sanctions are disputable by applicants, and which ones are indisputable.

A disputable violation allows the applicant to request an administrative hearing that is comprised of three staff hearing panelists. Upon conclusion of the hearing, the hearing panel will issue Findings and Recommendation. If the hearing panel chooses to uphold a sanction, applicants may request that the committee review the decision of the hearing panel's Findings and Recommendations on appeal. Any violations categorized as indisputable are not entitled to an administrative hearing.

The instructions accompanying the application to sit for an examination include the Examination Administration Rules and Policies and important deadlines for application filing and withdrawals. The same information is included in the Admittance Ticket bulletin. The bulletin, distributed four weeks before the exam, provides applicants with detailed information about the exam schedule and reminders of what is allowed/ not allowed at the exam, and general applicant expectations.

The Chapter 6 Rules for Conduct Violations were last amended in September 2019 to transfer the process of affirming Chapter 6 Notice of Violations to admissions staff and allow the committee to make determinations upon appeal for disputable violations.

## **EXAMINATION ATTENDANCE POLICIES**

In 2005, the committee adopted a policy that "During the administration of an examination, an applicant who does not attend a required, scheduled examination session will not be permitted to attend any remaining examination session or sessions." This policy aligns with the grading

policy that specifies that an applicant is only considered a “Taker” for an exam if they sit for all sessions of the examination and make a good faith effort.

In 2006, the committee updated that policy to provide that “exam candidates will be permitted to enter a session at a secure examination test center until one hour of examination time has lapsed and will not be permitted to enter the test center after the one-hour time period has expired.” The policy was created in part based on security of the exam materials to prevent materials being left unattended on the table for an applicant that hasn’t shown up for testing. After one hour, proctors can collect and secure all exam materials for those not in attendance. It also avoids the potential disruption to applicants if applicants continuously enter the facility at any given time throughout the session to start their testing. The late applicant would require extensive proctor interaction to be instructed on what is required to start the examination. The policy also allows the test center staff and proctors the ability to take attendance before the end of the session in an organized and accurate manner.

The working group discussed these examination attendance policies and determined that both policies did not require any revisions.

## **DISCUSSION**

### **EXAMINATION ALLOWED/NOT ALLOWED ITEMS POLICIES**

Over the years, the committee has approved various policies related to how the exam is administered and how applicants should conduct themselves at the test center. The application instructions and admittance ticket bulletin provided to examinees inform them of what are allowable/non-allowable items at the exam. The National Conference of Bar Examiners (NCBE) dictates what items are permissible during the Multistate Bar Exam (MBE), but California can set its own requirements for the written portion. To gain insight as to whether California’s list of permissible and impermissible items is too restrictive or too broad, staff reviewed policies and practices from Texas, Florida, New York, Massachusetts, Pennsylvania, and the District of Columbia. All these states are states that administer the Unified Bar Examination (UBE) that is provided by the NCBE. From this review staff determined that California is less restrictive in certain respects, allowing things such as bookstands and analog clocks that not all these other states permit.

However, it was identified that some states permit applicants to bring their own water if it in in a clear bottle with a lid with no writing or labels on it. After discussion with the working group, it was recommended that California allow applicants to bring their own water bottle following the same guidelines with the added requirement that these containers be placed on the floor next to the applicant. Water bottles would not be allowed on the table due to risk of spilling on exam materials. As a result, the State Bar would no longer provide water at test centers. (Applicants will be appropriately noticed of this change if the committee moves to approve).

The working group also discussed the current prohibition on headwear in the exam room. Under the policy adopted by the committee in March 2014, no headwear is allowed in the exam room, including but not limited to, baseball caps, beanies, hoodies, etc. Religious headwear is allowed in the exam room, but applicants are required to file a petition for approval to wear it prior to the exam. If an applicant fails to submit a petition prior to the exam, they are permitted to submit the petition onsite at the test center but are issued a Chapter 6 Notice of Violation for not petitioning prior to the exam. During the pandemic, exams were administered online, and vendors were unable to support our policy of allowing religious headwear without flagging applicants for a violation which made it difficult to enforce the policy. This required State Bar staff to explore the rationale for needing to petition for religious headwear.

Currently, the State Bar is using a live proctoring system and proctors can properly discern between religious headwear and non-religious headwear, but the vendor's policy is to allow religious headwear. As a result, staff recommends repealing the policy requiring applicants to petition for religious headwear. This would also eliminate the issuance of a Chapter 6 Notice of Violation. Applicants wearing religious headwear would still be subjected to inspection of the headwear, if necessary. All other headwear would remain on the list of items not allowed in the exam room.

#### **CBX AND FYLSX ATTENDANCE AND REFUND OF APPLICATION**

In June 2017, the committee considered charging a fee for applicants who withdrew from an exam after the deadline or failed to attend without withdrawing—otherwise referred to as “no-shows”. Although such individuals are not entitled to refunds of their application fee, staff articulated additional burdens or challenges attributable to no shows (averaging between 300 and 600 applicants for each administration), including the allocation of proctors and security. Although the committee discussed the fee, there was no motion to move the fee forward. In revisiting this issue, the working group decided that a no-show fee was not necessary, but thought the issue was worthy of further discussion by the committee.

#### **WITHDRAWAL OF EXAM APPLICATIONS**

Withdrawal deadlines are established by committee policy and based on current application deadlines. When applicants withdraw, the committee's policy provides that they are entitled to a 60 percent or 30 percent refund depending on how close it is to the exam date. Historically, withdrawals have provided a refund of the designated percentage of the exam fees plus any late fees that were paid in association with the application. The refund does not include a refund of the credit card processing fee, as those are bank fees for processing the payment by credit card. Staff discussed with the working group and is interested in committee input on whether the late fees should continue to be a part of the withdrawal refunds given that they are not exam fees. Statute is silent on this issue. As discussed below, section 6060.3 directs refunds for the death or serious illness of the applicant or an immediate family member. The

statute authorizes, but does not require, refunds in other instances, leaving it to the committee to determine what is appropriate.

## **REFUND OF FEES POLICY**

Section 6060.3(c) specifies that “[a]pplication fees for the California bar examination, including fees for late filing, shall be refunded if the applicant does not take the California bar examination because of the death of an immediate family member or the serious illness or disabling injury of the applicant or a member of his or her immediate family. A deduction may be made from the refund for administrative costs.” There is no corresponding State Bar Rule, however, the committee has adopted a Refund of Fees policies for bar exam fees and revised it on several occasions. The current version of the Refund of Fees policy was adopted in September 2010. (Attachment D) The policy does not, by its terms, extend to the FYLSX, but staff believed that applying the same standards from the CBX allows consistency and prepares the FYLSX applicants to eventually sit for the bar exam, and thus applied the same refund policy to the FYLSX.

The working group is proposing the following changes to the Refund of Fee Policy, including updating language to be clearer and more concise.

- **ACH (e-check) Payments**

When the Admissions Information Management System (AIMS) was deployed, the system began allowing ACH as a payment option. This new payment method necessitates the refund policy to be updated accordingly to reflect ACH.

- **90 Day Deadline to Submit Refund Request**

Requests for a refund due to the death of an immediate family member/medical emergency/calamitous occurrence are normally received after the examination has concluded. However, it is not uncommon to receive requests for a refund one, two or even five years after an exam is over. Setting a deadline of 90 days after each exam would prevent staff from doing research on an exam long after it is over and allows for our financial reports to reflect correctly when it comes to revenue, as well as the number of refunds that are processed by our staff. The statute allows for the board to adopt regulations for the administration of this subdivision.

- **95 Percent Family Member/Medical Emergency/Calamitous Occurrence Refund**

A request for a 95 percent refund of fees results in financial loss for the Office of Admissions. There is the cost of staff time to process an exam application from receipt until it is approved. Test center expenses, such as facility rental, printing of exam materials, and the ordering and packing of supplies sent to test centers are sunk costs. Once the exam has started, there are costs associated with onsite staff and proctor time, the shipping of exam materials to each test center, electrical and other costs. Once

a 95 percent refund request is received, there is also the cost associated with staff processing that refund request until it is approved and paid. However, staff and the committee recognize that the circumstances that necessitate someone needing to apply for a refund due to medical/physical incapacity/calamitous occurrence are outside of an applicant's control. For this reason, the working group would like to have this conversation with the committee to determine whether providing a 95 percent refund is still appropriate given the Admissions budget, and that overall costs have continued to increase.

Exam fees should fully cover the cost of providing the exam and these fees currently, do not cover the cost of the bar exam. A 95 percent refund has historically been provided based on the statute and for many years 5 percent was considered appropriate to cover administrative costs. Considering the financial deficit and the costs expended in preparation for an applicant's attendance at the exam, it is recommended to explore a reduction in the percentage being refunded. For example, under the current 95 percent refund, a general bar exam application fee of \$677 would result in a refund of \$643.15 and an administrative fee of \$33.85.

Staff researched how fee refunds are handled in other jurisdictions and learned that most do not allow a refund of exam fees under any circumstances. The exception was one jurisdiction that reported that extenuating circumstances would be considered for a refund. None of the other jurisdictions referenced specific medical/death refunds on their website. After discussion, the working group proposed considering a change to reduce the 95 percent refund to a 20 percent refund, given the resources that have already been exhausted. The working group seeks feedback from the committee regarding this proposal to determine what is appropriate for administrative costs. During the June 2017 meeting, the committee was also presented with an option to allow only a 50 percent refund in the case of death or a serious illness to the applicant or immediate family member and only if the death or illness occurred once the applicant was onsite for the exam and the testing has already begun. Applicant answers would not be subject to grading. For example, an applicant arrives at the test center, and sits for the AM session on Tuesday, and the applicant returns for the Tuesday PM session and starts testing, but experiences a medical emergency onsite during the exam, such as a seizure, the applicant could receive a medical refund, once the proper documentation was received.

This proposal was never put to motion in 2017. Feedback is requested from the committee on this refund option. Currently, no refund is offered if the exam has started, and the applicant has started testing. It is also not part of the current statute and might not be permissible.

- Definition of Immediate Family Members

In order to provide clarity on what is considered an “immediate family member”, research was done and information from The California Family Rights Act (<https://calfamilrights.ca.gov/employment/family-care-medical-leave-guide/>) was used in establishing the categories. The following categories were presented, and the working group recommends updating the policy with the following:

Immediate family member includes the following:

- Spouse (includes common law, same or opposite gender partners),
- Child (includes / step / grand / great grand),
- Parent (includes step / grand / great grand / in-law),
- Son or daughter (includes step / in-law),
- Brother, sister (includes step / half / in-law),
- Legal guardian and spouse of legal guardian (with proof of court order),
- All the above include in-laws of a same or opposite gender partner

## **REJECTED PAYMENTS FOR EXAM APPLICATIONS**

There are times that payments are rejected due to returned checks, declined ACH payments, or even credit card chargebacks requested by the credit card holder. This results in an incomplete application because it requires that an applicant resubmit payment and pay for an insufficient payment service charge assessed in the amount of \$20. Applicants who have not fully paid still reserve a seat at a test center as protocol has not included abandoning the application and allows the applicant to sit for the exam (continued efforts are made to collect the money). The fees will continue to be pursued if they apply for a future examination, or at the time of clearing applicants to be placed on the motion. However, this protocol presents a challenge when test centers have reached their maximum capacity. It poses a disadvantage for someone who wants to apply and pay their fees to take the exam at a popular test center, but that site is at max capacity.

The working group proposes adopting a new payment policy that requires an applicant to resolve the payment issues within 14 days from notification of insufficient payment. If acceptable payment is not received, the application will be deemed abandoned. An applicant who still wishes to sit for that exam would be required to submit a new application, and pay any then applicable late fees; however, application filing deadlines might prohibit re-filing for the same exam.<sup>2</sup> This policy would free up seats at the test center for others who have paid and wish to sit for the exam. Committee input is sought regarding this proposed policy. If the committee wishes to go forward, language of the policy will be brought forward at the June meeting for consideration.

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<sup>2</sup> If an applicant submitted their application right before the final filing deadline, they would be allowed the same 14-day grace period to resolve payment issues.



## **CHAPTER 6 CONDUCT VIOLATIONS**

Since the last revision, staff has identified areas of the Chapter 6 Conduct Violations that require language clean-up, changes to expand further on what constitutes an electronic device that is not allowed to be brought into the testing rooms, as well as updates due to pandemic-related changes and technology updates. There is no statute addressing these issues that the committee needs to take into consideration in revising these rules.

### **Rule 4.70 Conduct required at examinations**

This rule focuses on how applicants are expected to conduct themselves at an examination test center, specifically about the professionalism expectation and respect exhibited toward staff and proctors. Conduct that violates the security or administration of an examination may be reported to the State Bar as a Chapter 6 Notice or, in extreme cases, may require dismissal from the examination test center. The rule also describes unacceptable conduct as having unauthorized items, writing, or typing after time has been called, looking at another applicant's answers, talking when silence is required, or abusive behavior.

The working group reviewed exam violations, such as writing/typing after time called, and determined that most of the violations were still applicable, except for the Religious Headwear policy discussed in this document.

The working group concluded that it was necessary to provide updated language to reflect additional guidance on what type of items are considered an electronic device to avoid confusion. Abusive behavior was also defined. Therefore, the working group proposes the revisions to the Chapter 6 Conduct Required at the Examinations in Attachment B.

To provide a list of Chapter 6 conduct violations that would assist with Chapter 6 Notice determination, a Chapter 6 Administrative Hearing Outcomes Decision Matrix (Attachment F) was created and approved by the CBE in 2020. The matrix is used to provide a list of violations for both in-person and online exams that identifies sanctions attached to that specific violation, as well as whether the violation is disputable or indisputable. This matrix is used as a guide for staff when determining conduct violations sanctions. The working group reviewed the list of violations and determined that the list was still applicable in its current version but would be interested in the committee's input.

### **Rule 4.71 Reports of conduct violations**

Rule 4.71 describes the process for how conduct violations are reported and specifies that the State Bar considers reports of the Chapter 6 Notices that have been issued to applicants during or following an administration of an examination as soon as practicable and no later than the first committee meeting following the examination. Following the issuance of the notice, staff review all Chapter 6 Notices issued at each test center, any corresponding reports by staff or

proctors at the test center, and any statement provided by the applicant. After review, a determination is made whether the Chapter 6 Notice should be affirmed, and if so, determine a correlating sanction. The working group proposes to revise the language to reflect that the notices will be considered prior to the release of results.

The rule currently provides that an examination score may be held in abeyance while the consideration of a conduct violation is ongoing during the administrative hearing process. By holding a score in abeyance, the applicant does not know whether they have passed or failed the exam, and they cannot apply to sit for the next exam. The rule was intended to provide a report of the Chapter 6 Notices issued during the exam so the committee could determine if the notices should be affirmed. However, because of the online exam during the pandemic, the State Bar elected not to hold applicant's results in abeyance so that applicants could have their results, even if sanctions were applied. Regardless of the return to an in-person modality, the working group recommends amending the rule to discontinue holding results in abeyance. The working group feels this change will allow applicants the opportunity to have a better understanding of their results (with sanction applied) prior to the next exam, while awaiting the outcome of their administrative hearing.

Additional suggestions for changes to this rule include reducing the number of days from thirty (30) to fifteen (15) days for an applicant to be notified of a sanction after the Chapter 6 Notice has been affirmed, and for additional language clean-up— including changing “undisputed” conduct violations to “indisputable” conduct violations.

#### **Rule 4.72 Request for an administrative hearing on conduct violation**

Rule 4.72 was reviewed, and the working group proposes no amendments to the language.

#### **Rule 4.73 Procedure for an administrative hearing on conduct violation**

Rule 4.73 covers the procedure for conducting administrative hearings on conduct violations. This includes how the hearing will be recorded, the right of applicants to have counsel present and the role of counsel in the proceedings, the burden of proof, and the timeline for issuing Findings and Recommendations. Given technological advancements over the years, the working group recommends that the language be updated from “tape” to “audio” recordings, in addition to the existing language that also allows for video or other recording. In addition, the working group notes that the use of remote hearings via Zoom during the pandemic has allowed applicants to attend a hearing from any location. It also provides a cost and time saving for staff without travel between State Bar offices. The working group proposes to amend the rule to allow remote unless there is a compelling reason that it should be held in-person.

The working group also reviewed the procedures adopted by the committee in 2019 for how the administrative hearings would be conducted. The working group did not identify any needed changes to those procedures. (See Attachment H)

## **Rule 4.74 Review of State Bar's Findings and Recommendations by Committee**

Rule 4.74 was reviewed by the working group and there were no recommendations for changes.

## **FISCAL/PERSONNEL IMPACT**

Conducting administrative hearings remotely will lead to a cost and time savings as staff will not be required to travel between State Bar offices to administer the administrative hearings. Changes to the refund policy will not only provide clarity and consistency in staff processing refunds but would have a revenue impact as well.

## **RECOMMENDATION**

It is recommended that the Committee of Bar Examiners request the Board of Trustees circulate for a 60-day public comment period the rule changes reflected in Attachments B and C to revise the Chapter 6 Admissions Rules relevant to Conduct Violations.

It is further recommended that the Committee approve the proposed revisions to the Refund of Fees Policy pertaining to examinations in Attachment D, approve the repeal of the Religious Headwear Policy, approve the addition of water bottles on the list of allowable items during an examination, and approve the creation of a new policy concerning withdrawal of applications to sit for an exam based on insufficient payments to be brought back to the Committee for review at the June meeting.

## **PROPOSED MOTION**

**Should the Committee of Bar Examiners agree with the staff recommendation, the following motion should be made:**

**MOVE**, that the Committee of Bar Examiners recommends to the Board of Trustees to circulate the proposed rules set forth in Attachment B and C for a 60-day public comment period.

**FURTHER MOVE**, that the Committee of Bar Examiners approves the proposed revisions to the Refund of Fees Policy set forth in Attachment D,

And

**Move** that the Committee of Bar Examiners repeals the religious headwear petition policy,

And

**Move** that the Committee of Bar Examiners approve the addition of water bottles on the list of allowable items during an examination,

And

**Move** that the Committee of Bar Examiners approves the creation of a new policy regarding withdrawal of applications for insufficient payment, consistent with the committee's discussion, to be returned to the committee for review at the June meeting.

## **ATTACHMENT(S) LIST**

- A.** Title 4, Chapter 5 of the Rules of the State Bar Relevant to Examinations
- B.** Proposed Amendments to Title 4, Chapter 6 of the Rules of the State Bar Relevant to Conduct Violations (Redline)
- C.** Proposed Amendments to Title 4, Chapter 6 of the Rules of the State Bar Relevant to Conduct Violations (Clean)
- D.** Proposed Amendments to Exam Administration Refund of Fees Policy (Redline)
- E.** Proposed Amendments to Exam Administration Refund of Fees Policy (Clean)
- F.** Chapter 6 Administrative Hearing Outcomes Decisional Matrix
- G.** Guidelines Governing the Interpretation and Application of Chapter 6 of the Admissions Rules
- H.** Committee of Bar Examiners Procedures for Chapter 6 Administrative Hearings Conducted by State Bar Staff
- I.** Policy to Permit Headwear to be Worn in a Secure Examination Test Center Due to Religious Beliefs
- J.** February 2023 California Bar Examination Admittance Ticket Bulletin