



The State Bar *of California*

OPEN SESSION

AGENDA ITEM III. A

OCTOBER 2023

DATE: **October 13, 2023**

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

FROM: **Dr. Michael Cao, Chair, Committee of Bar Examiners**
 Judge Robert Brody, Member, Committee of Bar Examiners
 Christina Doell, Program Manager

SUBJECT: **Action on Revisions to the Testing Accommodation Rules: Recommendation to Adopt Following Return from Public Comment**

EXECUTIVE SUMMARY

Beginning with its October 2022 meeting, the Committee of Bar Examiners (committee) reviewed proposed changes to the testing accommodations rules. These changes aimed to clarify and streamline the application and review process based on feedback from stakeholders and legal requirements, including the Consent Decree arising out of the Department of Fair Employment and Housing v. Law School Admission Council litigation (LSAC Consent Decree) and the Department of Justice guidelines. The proposed revisions to the testing accommodation rules have been circulated for three separate public comment periods. After careful evaluation of the first round of comments, the committee recommended substantial modifications to the initial draft of the proposed rules, incorporating helpful suggestions from stakeholders and language from disability rights organizations. A few adjustments were made following the second round of public comments that necessitated an additional public comment period under Rule 1.10 of the Rules of the State Bar.

The third public comment period closed on October 7, 2023. The committee received 33 public comments. The comment chart, as set forth in Attachment A, identifies each commenter, whether the person is an attorney or a public member, their affiliated organization (if any), and their position on three issues addressed by the most recent modified changes within the rule proposal. The comments, in full, are included as Attachment B. After evaluating the comments, the working group recommends no further changes to the proposed rules, and recommends the committee request the Board of Trustees (Board) approve the proposed rules and submit the rules to the Supreme Court for adoption.

BACKGROUND

In response to feedback from applicants and the public during two testing accommodation forums, the State Bar developed a framework to streamline the testing accommodations process. The framework aimed to minimize the need for additional documentation, detailed a simplified process for approving the same accommodations as previously approved for one or more identified high stakes exams, simplify terminology, add clear definitions, and reduce the number of required forms. The committee revised and reorganized the rules to align with this framework, but left the timelines for requesting accommodations unchanged until further assessment.

In October 2022, the committee recommended the Board circulate the rule changes for public comment. The Board initiated a 60-day public comment period, during which over 100 comments were received, the vast majority expressing disagreement with various sections of the proposal. In response, the committee recommended significant modifications to the proposal. In May 2023, the Board approved circulating the proposal for a second public comment period. Forty-two comments were received, which the committee evaluated at its August 2023 meeting. As a result of its analysis of the comments, the committee expanded the scope of the automatic approval process to include requests for up to 100 percent additional time (double time) if previously approved for another high stakes exam, increased the length of time provided to request review in certain instances, and added clarifying language related to subsequent requests for the same accommodations previously granted by the State Bar. The committee then circulated the amendments for a third public comment period, which closed on October 7, 2023.

Listed below is a summary of the evolution of the testing accommodations rules and processes following the committee's evaluation of the helpful feedback received from stakeholders. The list below outlines the proposed modifications to streamline the process while maintaining fairness and equal access for all applicants. The State Bar remains committed to achieving diversity and equity in the legal profession and ensuring the accessibility of exams administered by the State Bar for individuals with disabilities. The rule and process revisions can be categorized as follows:

- **Incorporating Framework Elements:** Key elements from the framework were incorporated into the proposed rules, and the framework eliminated.
- **Eliminating 5-Year Limitation:** The original proposal limited the automatic approval process to those accommodations received within the last five years. However, the working group was persuaded that a 5-year limit places an undue burden on applicants who have previously demonstrated their need for testing accommodations in similar high-stakes testing scenarios and, therefore, eliminated the 5-year limitation for any permanent physical or mental impairment.
- **Automatic Approval of Accommodations Previously Granted for High Stakes Exams:** The proposed rules provide that testing accommodations previously granted for high stakes exams will be approved with evidence of the prior accommodations and certification that the applicant has the same functional limitations as when the accommodations were previously granted. Automatic approvals apply to all accommodations for which

the State Bar provides the same or equivalent accommodations so long as the prior grant was not for more than 100 percent extra time (i.e., more than double time) or for a private room. For those accommodations, the applicant must submit the required forms and relevant documentation.

- **Weight of Past Accommodations:** The modified proposal will give considerable weight to past testing accommodations approved for college or law school timed exams.
- **Deference to Applicant's Qualified Professional:** The State Bar shall defer to documentation from a qualified professional who has made an individualized assessment of the applicant that supports the need for the requested testing accommodations as compared to the opinions of a disability accommodations expert who has not assessed the applicant for diagnosis and treatment.
- **Timelines:** The timeline to request review by the committee, following a denial or partial approval of requested accommodations, was extended through a tiered approach to allow applicants additional time to request review. The timeline was extended to 30 days for applicants who requested review by the timely filing deadline. Those requesting review after the timely filing deadline but before the final filing deadline have 14 days to request review unless the exam necessitates a shorter period.
- **Review by the committee:** A request for review is limited to once per exam cycle due to the volume of requests and resource constraints.
- **The State Bar is dedicated to enhancing diversity, equity, and inclusion in the legal profession.** It has expanded its pool of consultants to ensure fair evaluation of testing accommodation requests.

A working group consisting of two committee member volunteers and State Bar staff have provided guidance and direction for the proposed modifications to the testing accommodation rules and process. The working group thanks the commenters for participating during both public forums and each public comment period.

DISCUSSION

In August 2023, the revised testing accommodations rules proposal was posted for a 45-day public comment period, concluding on October 7. In addition to individuals who had signed up through the State Bar website requesting notification of public comment opportunities, an email was sent to over 2,500 applicants, attorneys, law school staff, and disability rights organizations requesting comments on the new proposal. The committee received 33 public comments.

To help in the review of the comments, staff invited the public to comment on the three specific changes that were made to the rules following the second round of public comment. Commenters were also afforded the opportunity to comment on any other testing accommodations issues they wished. A summary of the three topics and the commenter's position on those topics is outlined below.

APPROVAL OF ACCOMMODATIONS PREVIOUSLY GRANTED

The proposed rules now include provisions for the automatic approval of testing accommodations for applicants with a permanent physical or mental disability who have previously been granted similar accommodations for high stakes exams. High stakes exams encompass a range of assessments, such as the California Bar Exam, First-Year Law Students' Exam, a bar exam in other U.S. jurisdictions, MPRE, LSAT, GRE, GMAT, MCAT, DAT, SAT I, SAT II, ACT, or GED.

In an effort to streamline the process and expedite decisions, the most recent amendments expand the automatic approval process to cover requests for up to 100 percent additional time (double time) based on the applicant's prior accommodations. The prior version authorized the automatic approval process for requests for extended time of up to time and one-half, or 50 percent extra time. As a reminder, applicants are only required to provide evidence of their previous accommodations and certify that they are still experiencing the same functional limitations as when the prior accommodations were granted. If an applicant's accommodations request extends beyond 100 percent extra time and/or is for a private room, the applicant will need to submit the Qualified Professional form required of all other applicants. The applicant's qualified professional will need to include a statement explaining why accommodations providing for double time or a reduced-distraction environment would be insufficient to provide the applicant equal access to the exam.

Commenters: 6 disagree with the proposal applying automatic approvals to requests for double time, 7 agree, 14 agree if modified, and 8 did not identify a position.

Despite the fact that no changes were made following the second round of public comments to the treatment of testing accommodations granted in college or law school, the working group continued to engage in an extensive discussion in response to feedback received. The working group continues to believe that there are concerns about the consistency and rigor applied by all law schools when evaluating accommodation requests, and the challenge for the State Bar to ensure uniformity in how every college, university, or law school evaluates testing accommodation requests and whether these accommodations are provided solely as required by law.

The working group felt that the changes made to simplify the required documentation that an applicant needs to provide when not eligible for the automatic approval process make the process less onerous, and further strengthens their recommendation not to include law school or college accommodations in the automatic approval process. The revised forms for requesting testing accommodations ask specific questions that are designed to determine the applicant's disability-related functional limitations, their specific access needs, and how those needs relate to the accommodations requested. The revised form clarifies that comprehensive evaluation reports are not mandatory. However, applicants may submit such reports if they have them and choose to do so, but the process is not designed to demand repeated testing.

If an applicant qualifies for automatic approval, no additional documentation beyond proof of past accommodations will be necessary. The State Bar will automatically approve the same or equivalent testing accommodations based on the applicant's prior accommodations on other high stakes exams. Accommodations not typically offered by the State Bar, such as "stop-the-

clock” breaks, are translated into the equivalent time by granting additional time, with the clock continuing to run. The extra time may be used to take breaks periodically, stand and stretch, use the restroom, refocus, and so on.

The working group does not recommend any changes to the proposal as a result of these comments.

REQUEST REVIEW / APPEAL PROCESS DEADLINES

Requests for testing accommodations can be submitted to the State Bar prior to a particular bar exam application being available. Accordingly, the working group decided to modify the request for review deadlines to include a tiered approach. In the rules proposal most recently circulated for public comments, applicants who submit their testing accommodation requests by the timely filing deadline for the bar exam or the First-Year Law Students’ Exam will have a 30-day window from the date of denial or modified approval to submit a request for review. For all other review requests, a 14-day timeframe from the date of denial or modified approval applies unless the examination schedule necessitates a shorter committee review period. The prior version applied the 14-day timeframe for all applicants.

To accommodate applicants, the State Bar will continue the practice of offering additional time upon request for the submission of supporting documentation. It’s important to note that no extensions beyond the appeal deadline on the first business day of the examination month will be authorized. Each applicant is allowed one request for review per exam cycle, but may request a review in future exam cycles.

Commenters: 10 disagree with the proposal extending the time frame from 14 to 30 days for those who submit testing accommodation requests by the timely filing deadline, 3 agree, 8 agree if modified, and 14 did not identify a position.

Commenters continue to suggest that the State Bar should commit to reviewing and responding to testing accommodation requests within two weeks of receipt. The State Bar commits to rendering determinations on complete requests received by the final filing deadline, striving to complete evaluations well in advance of the exam. The working group believes that committing to a two-week review timeframe is premature. The State Bar has already witnessed a significant decrease in processing time of requests for accommodations by following the automatic approval process set forth in these rules. As the website, forms, and other procedures are implemented upon adoption of the rules, we expect further reduction in the time needed to process requests and will revisit the language of the rule. The committee has committed to revisiting the timeline for response after the revised process has been fully implemented for two exam cycles.

The working group does not recommend any changes to the proposal as a result of these comments.

SUBSEQUENT REQUESTS FOR THE SAME TESTING ACCOMMODATIONS

An important clarification was added to the proposal following the second round of public comment, ensuring that applicants who seek the same testing accommodations previously granted by the State Bar for a permanent disability will have those accommodations automatically approved for subsequent exams. This applies as long as the applicant certifies that they continue to experience the same disability-related functional limitations that initially qualified them for the accommodations.

Applicants with temporary disabilities must submit a new request for testing accommodations, along with the necessary supporting documentation, before each exam application deadline.

Commenters: 5 disagree with the proposal or parts of it, 9 agree, 6 agree if modified, and 15 did not identify a position.

Many of the comments suggested that the same accommodations granted previously by the State Bar should not expire. The State Bar agrees, and wrote revised Rule 4.89 stating that requests “will be automatically granted if the prior accommodations were approved for a permanent disability, the applicant requests the same testing accommodations previously granted by the State Bar, and the applicant certifies that they have the same disability-related functional limitations that qualified them for the same accommodations for a prior exam.” The working group does not recommend any changes to the proposal as a result of these comments.

ADDITIONAL PUBLIC COMMENTS

Additional areas within the rules proposal that received public comments are summarized below. The staff has endeavored to respond to the primary concerns brought up by the commenters on these matters.

Definition of Disability

The State Bar’s use of terms such as “general population” and “unable to access” aligns with the language used in the Americans with Disabilities Act (ADA) and its implementing regulations, as required by law.

Training and Supervision

The disability accommodations expert will ensure that any medical professionals contracted by the State Bar are appropriately trained in the process. The working group agrees that training and quality control measures are crucial to handling requests for testing accommodations and reviews promptly, fairly, and without bias. These measures aim to uphold the rules established for equal access to the bar exam. The State Bar remains committed to enhancing diversity, equity, and inclusion in the legal profession.

AMENDMENTS TO RULES OF THE STATE BAR OF CALIFORNIA

Repeal and add Title 4, Division 1, Chapter 7 (commencing with Rule 4.80).

FISCAL/PERSONNEL IMPACT

Staff anticipates an increase in the number of accommodations granted, particularly accommodations requiring additional resources to implement, such as extended time, extra days, private rooms, and a reduced proctor-to-applicant ratio. As a result, any exam administered in person is anticipated to see a rise in exam administration costs. However, these costs may be partially mitigated by the implementation of the automatic approval process and reduced reliance on disability accommodation experts to review applicants' requests.

Staff believes that the adoption of the automatic approval process, in conjunction with the introduction of new forms and improved information provided to applicants and qualified professionals, will lead to more efficient request processing. This streamlined approach should result in having final determinations well in advance of the exam administration. Moreover, if the reliance on prior testing accommodations is substantial, there may be a decrease in the staff resources required to process these requests. It is, however, challenging to estimate the precise impact on the number of accommodations granted and the resources needed for their implementation at this time. Staff will keep the committee informed as we gain more experience in handling testing accommodation requests under these new rules.

We anticipate that the rule proposal will have a positive effect on staff resources for two primary reasons: 1) the clearer rules may lead to a reduction in applicant inquiries, and 2) the establishment of an automatic approval pathway with shorter decision timelines should expedite the process for applicants.

The State Bar will continue to explore cost-saving measures to enhance the efficiency of exam administration.

RECOMMENDATIONS

It is recommended that the Committee of Bar Examiners request the Board of Trustees adopt the rules as circulated for the third public comment and set forth in Attachment C, and request approval of the rules by the Supreme Court.

PROPOSED MOTION

Should the Committee of Bar Examiners agree with the working group recommendation, the following motion would be appropriate:

MOVE that the Committee of Bar Examiners recommends that the Board of Trustees adopt the rule revisions set forth in Attachment C, and request approval of the rules change by the Supreme Court.

ATTACHMENTS LIST

- A. Public Comment Summary Chart
- B. Public Comments
- C. Modified Rules Proposal for Testing Accommodations

ATTACHMENT A

#	Name	Attorney	Comment Previously?	Organization	Position ¹ on Automatic Approvals	Position on Appeal/Review Process	Position on Same Testing Accommodations	Position on the Proposed Rules
1	Julian Sarkar	Yes	Yes		D	D	D	NP
2	Brieanna Delaney	No	No		A	NP	A	NP
3	Charles Keller	Yes	No		A	NP	NP	NP
4	Anonymous	Decline to state	No		A	NP	NP	NP
5	Anonymous	Yes	No		A	NP	NP	NP
6	Sana Alam	No	No		AM	NP	NP	NP
7	Anonymous	Decline to state	Yes		AM	D	A	AM
7	Anonymous (cont)	Decline to state	Yes		AM	D	A	AM
8	Alexandra Menninger	No	No		A	A	A	NP
9	Linda Ravano	Yes	No		D	D	D	D
10	Anonymous	No	No		AM	NP	NP	AM
11	steven UNGER	No	No		NP	NP	A	NP
12	Vanessa Johnson	No	No		A	AM	AM	NP
13	Susan Lea	Yes	No		AM	AM	NP	NP
14	Sandra L Mock Jundt	Decline to state	Yes		NP	NP	NP	A
15	Michaela Posner	Yes	No		NP	NP	NP	A
16	Julian Oscar Alvarez	Yes	No		A	A	A	NP
17	Susan Basko	Yes	Yes		NP	NP	NP	AM
18	Commenter	No	No		NP	NP	NP	D
19	Andy Murphy	No	No		NP	NP	NP	AM
20	PETER N MADURO	Yes	Yes		AM	D	A	AM
21	Caleb Logan	Yes	No		AM	AM	AM	NP
22	Zach Newman	Yes	Yes	The Legal Aid Association of California	D	D	D	NP

¹ A = Agree with proposal; AM = Agree if modified; D = Disagree with proposal; NP = No position on proposal/Blank

ATTACHMENT A

#	Name	Attorney	Comment Previously?	Organization	Position ² on Automatic Approvals	Position on Appeal/Review Process	Position on Same Testing Accommodations	Position on the Proposed Rules
23	Rafail Veli, Esq.	Yes	No		NP	AM	AM	AM
24	Sharon Baumgold	Yes	Yes		AM	NP	NP	NP
25	Leigh E Ferrin	Yes	Yes	OneJustice	AM	AM	AM	NP
26	Chelsea Yuan	Yes	Yes	UC Berkeley School of Law	AM	AM	AM	NP
27	Joan Graff	Yes	No	Legal Aid at Work	AM	AM	NP	AM
28	Shirleen Claiche	No	Yes		D	D	D	D
28	Shirleen Claiche	No	Yes		D	D	D	NP
29	Sophia Hanif	No	Yes		AM	A	A	NP
30	Benjamin Kohn	Yes	Yes		AM	D	A	AM
31	Kendra J. Muller	Yes	Yes	Disability Rights California	AM	AM	AM	AM
32	Claudia Center	Yes	Yes	Disability Rights Education and Defense Fund and Disability Rights Advocates	D	D	NP	D
33	Marc Berman	Yes	No		NP	NP	NP	AM

² A = Agree with proposal; AM = Agree if modified; D = Disagree with proposal; NP = No position on proposal/Blank

Comment 1

Commitment to diversity in legal profession and eliminating access barriers

The State Bar of California is reminded that our Legislature has recently defined public protection to include “greater access to, and inclusion in, the legal system, [which] shall be the highest priority for the State Bar of California and the board of trustees in exercising their licensing, regulatory, and disciplinary functions.” (Bus. & Prof. Code § 6001.1.) A diverse bar with lawyers of all backgrounds and statuses facilitates access to justice, improves legal services, offers role models, and promotes public confidence. A legal profession that includes, welcomes, and licenses qualified lawyers with disabilities including disabled people of color is better equipped to serve the varied people and communities who live and work in California, including indigent people.

Barriers continue to exclude disabled people from the legal profession

Despite the critical importance of a diverse and inclusive legal profession, unnecessary barriers continue to exclude disabled people from becoming licensed California attorneys. As the State Bar itself has reported, only five percent of California attorneys report having a disability, a fraction of the proportion of disabled people in the state population (about one in five). This mismatch ultimately leads to disparities in the California judiciary: only 18 state court judges (two percent of all California judges) identify as having a disability.

Testing accommodations are a necessary and accepted means for including people with disabilities in the legal profession

Many people with disabilities require reasonable accommodations, such as extended time, to take high-stakes exams. Testing accommodations allow the individual to demonstrate the knowledge and abilities measured by the exam. Without such accommodations, the resulting scores reflect the effects of disability and are not a valid reflection of aptitude, knowledge, or abilities. Testing accommodations do not confer an unfair advantage but instead provide an equal opportunity. Today, decades after the enactment of the Americans with Disabilities Act and other disability rights laws, testing accommodations are a regular, recognized, and accepted part of our educational and professional systems, including in K-12 education through IEPs and Section 504 plans, college, the LSAT, and law school. The ready provision of testing accommodations on the LSAT, achieved through the protracted DFEH v. LSAC litigation, systemically reformed the pipeline for the legal profession nationwide and opened the doors to law school for disabled people. Testing accommodations are an effective and necessary means for including people with disabilities including disabled people of color in the legal profession.

The State Bar regularly denies requests for testing accommodations on the bar exam

Despite this accepted understanding of the role of testing accommodations, many law graduates with

disabilities report that their requests for testing accommodations on the bar exam are denied in whole or in part without a legitimate basis. Denials occur even when candidates submit proof that they have received similar testing accommodations in the past, such as in high school, on the SAT, in college, on the LSAT, in law school, on the MPRE, and in other similar settings. Denials occur even when candidates submit detailed and expensive neuropsychological, psychoeducational, and other medical testing and assessment required by the State Bar. Denials often occur shortly before the scheduled exam, with no opportunity for reconsideration, even when a candidate timely submits an accommodation request with complete supporting documentation. These unnecessary denials upend the plans and expectations of law school graduates who access educational and professional programs with testing accommodations. The resulting exclusion of qualified candidates is harmful not only to the affected individuals but also to the legal profession and communities served by the profession across the state.

The current proposal is a step backward

According to State Bar staff, the proposal to be considered by the Board of Trustees is intended to reform and streamline State Bar testing accommodations rules and procedures and is “guided heavily” by the standards for testing accommodations set out by the U.S. Department of Justice (DOJ) and the DFEH v. LSAC litigation. Despite this stated intent, the proposal not only fails to meet these minimum standards, but also embeds eligibility criteria for testing accommodations that would screen out many qualified candidates. If implemented, the proposal would cause the State Bar to exclude even more qualified disabled candidates from accessing testing accommodations. It would hinder the goals of elimination of bias, professional diversity, and access to justice.

The proposal should be REJECTED, and the Board of Trustees should adopt an alternative proposal that includes the following:

The rules should require timely responses to accommodation requests

The rules should commit the State Bar to respond to requests for testing accommodations in a timely manner, such that test takers can register with their nondisabled fellow applicants, respond to any request for any additional information requested, and complete any review procedures needed, in time to take the test in the same testing cycle. With about seven weeks between the registration deadline and the bar exam, a response from State Bar staff within two weeks of receipt is necessary. A two-week response window leaves five weeks before the bar exam, a period which is necessary for the candidate to complete further steps, such as communications with State Bar staff, collection of any additional information, and the filing and processing of any appeal.

A two-week response window also allows applicants who request their accommodations early (weeks or months before the registration deadline) an opportunity to exhaust all review options and know their final approved testing accommodations prior to embarking on test preparation, typically an eight to ten-

weak endeavor. This knowledge allows candidates to make informed plans about test preparation, which might include taking time off from work, hiring a tutor, enrolling in a preparation class, and taking timed practice exams.

The existing and proposed rules make no such commitment to timeliness. Instead, the proposed rules eliminate and extend existing deadlines for State Bar responses. Rule 4.84 & Proposed Rule 4.84 (six-month ahead recommendation); Rule 4.88(A) (60 days, longer than time between registration deadline and exam); Proposed Rule 4.88(B) (60 days with later start event), (B) (eliminating timing commitment for six-month ahead candidates).

The rules should retain an option for an independent review of accommodation denials

The rules should retain the option for candidates to seek an independent review of denials of accommodations request with the Committee of Bar Examiners. This right is critical given the long history of accommodation denials by the State Bar staff. The proposed rules eliminate this procedural right. Proposed Rule 4.90(E).

The rules should allow a candidate an appropriate period of time to seek review

The rules should allow the candidate up to 30 days to seek an independent review of denial of testing accommodations. The current and proposed rule require that the candidate file an appeal within ten days. Rule 4.90(A) & Proposed Rule 4.89(A). Many candidates secure additional supporting documentation to include with their request for review, and ten days is too short a period to meet with qualified professionals to obtain such documentation.

The rules should make clear that candidates may seek more than one review

The rules should also make clear that any candidate may seek more than one review of the denial of a request for testing accommodations. Such review is appropriate and necessary in various contexts, such as when the candidate obtains additional documentation, there is a back and forth with State Bar staff that results in a partial grant of accommodations, or there is another subsequent development. Further, each new test cycle should also include the option of a new request(s) for review of any accommodation denials. The language of the proposed rule suggests that any additional or subsequent review is precluded, even if the applicant has additional information to provide or circumstances have changed. See Proposed Rule 4.90(C).

The proposal should commit the State Bar to more and more diverse consultants

The proposal should commit the State Bar to increasing in number and diversify in expertise its pool of expert consultants that review and evaluate requests for testing accommodations. Leadership and personnel matter as much as written rules and procedures. For many years, the State Bar has relied upon a small group of longtime reviewers who have developed and applied a grudging and skeptical approach to testing accommodations. These reviewers are poorly situated to implement the substantial reforms needed here. The Consent Decree in the DFEH v. LSAC litigation included such a requirement, but there is no such provision in the State Bar's proposal.

The proposal should commit the State Bar to training and retraining

Staff and consultant reviewers should be trained and directed to approach the process with the presumption that the testing accommodation request is justified. DFEH v. LSAC, Best Practices Report, <https://calcivilrights.ca.gov/LegalRecords/final-report-of-the-best-practices-panel/>; 2015 U.S. Dist. LEXIS 104751, at *45 (N.D. Cal. Aug. 7, 2015). Our profession has many vacancies, particularly in the legal services sector. We need more qualified lawyers. Preventing candidates from becoming licensed by denying them necessary and accepted testing accommodations is unlawful and harmful. The State Bar should end its "zero sum game" mindset and commit to the swift and ready grant of all requests for commonly used testing accommodations that are supported by reasonable documentation.

The rules should require that the State Bar automatically grant candidates the same testing accommodations that they previously received on standardized tests

The rules should require that the State Bar automatically grant candidates the same testing accommodations that they have previously received on (or been approved for) prior standardized tests such as the SAT, LSAT, MPRE, and other states' bar exams. The rules should state that, in such cases, the candidate is only required to submit proof of the prior approval, and a certification that they continue to experience the same limitations and need the same accommodations. If the person is seeking additional accommodations than they previously received, then staff should automatically grant the prior accommodations, and review the additional accommodations under the below-described standards.

The proposed rules contain no such provisions. A "high-level framework" that is not part of the formal rules proposal (and thus subject to staff amendment at any time) purports to adopt an automatic grant approach, but it is riddled with extensive, complex, and unworkable exceptions, including:

- no grant if prior approval is more than five years ago;
- no grant if prior approval is within five years but based on an automatic grant outside the five years;
- no grant of more than 50 percent extra time (unless severe visual impairment);
- no grant of a private room;
- no grant if the prior approval is not the "most recently approved" of a category of standardized tests (in other words, no grant if there was previously a grant but then a denial);

- no grant if the prior approval was for a list of standardized tests such as the LSAT, GMAT, or SAT, but the candidate subsequently takes or has been denied accommodations on the First-Year Law Students' Exam, the Legal Specializations Exam, the MPRE, or the California State Bar; and
- additional unnecessary and harmful exceptions.

“High-Level Framework” at Section I(A)(1)(a), (b), (d), (2), (B)(1)(a)(2), (b), (c)(ii), (e), (D). These convoluted exclusions do not match the U.S. Department of Justice or LSAC standards and will continue to exclude many test takers with longstanding accommodations for standardized tests. The overlapping restrictions inaccurately characterize double time as “exceptional” and improperly presume that people grow out of their disabilities.

The rules should also require that the State Bar automatically grant candidates the same testing accommodations that they previously received in college or law school

The rules should also require that the State Bar automatically grant candidates the same testing accommodations that they previously received in college or law school. DFEH v. LSAC, Best Practices Report; 2015 U.S. Dist. LEXIS 104751, at *53. This will provide equal opportunity for disabled candidates who were diagnosed later in life or who did not have access to educational assessments, such as older candidates and candidates without personal or family resources, and/or who attended colleges and law schools that did not require or rely heavily on standardized testing. The proposed rules include no provision on how the State Bar should treat such prior accommodations. The “high-level framework,” not part of the formal rules proposal, states only that the State Bar will “consider” such prior accommodations, with no commitment as to how it will do so. “High-Level Framework” at Section II(A)(6). This is inadequate.

The rules should require that the State Bar give deference or more weight to the documentation of a qualified professional who has individually assessed the applicant compared to the opinion of a consultant

The rules should require that the State Bar give more weight to the documentation of a qualified professional who has individually assessed the candidate as compared to the opinions of a consultant who has not personally assessed the candidate but has only done a paper review. The proposed rules include no provision on the weight to be given such documentation. The “high-level framework” states that the State Bar “shall give great weight to documentation provided by a qualified professional who has made an individualized assessment of the candidate.” Section II(A)(5). This statement is appropriate but does not say how much relative weight the State Bar should give such documentation. The rules should commit to giving deference or more weight to the documentation provided by the qualified professional who has individually assessed the candidate as compared to the opinions of a reviewing consultant. U.S. DOJ, Testing Accommodations (2014), https://www.ada.gov/regs2014/testing_accommodations.html; DFEH v. LSAC, Best Practices Report; 2015 U.S. Dist. LEXIS 104751, at *46.

The rules should limit required supporting documentation to that which is “reasonable, limited, and narrowly tailored to the information needed”

The rules should limit any supporting documentation required to that which is “reasonable, limited, and narrowly tailored to the information needed.” The “high-level framework” appropriately states that required supporting documentation should be “reasonable, limited, and narrowly tailored to the information needed,” and that applicants and qualified professional(s) should have “flexibility in the type and source of the supporting documentation.” Section II(A)(1), (3). However, that standard is not contained in the proposed rules, and the framework and proposed forms are not at all clear as to whether the State Bar will continue to require “comprehensive evaluation reports” as it does now for certain disabilities. These comprehensive reports cost thousands of dollars and are not covered by insurance. The rules should clearly state that the State Bar is no longer requiring comprehensive evaluation reports with underlying test results.

The proposal should include an assessment of leadership.

The State Bar should assess its leadership and chain of command for reviewing and evaluating requests for testing accommodations. Any implementation of new standards for reviewing and deciding requests for testing accommodations requires leaders who are wholeheartedly committed to disability equality, and who embrace testing accommodations as a core component of equal opportunity. This is a key lesson from the LSAC litigation. While many changes were adopted on paper at the time of the Consent Decree, and more through the Best Practices Report and related litigation, these changes were not truly implemented until the LSAC was subject to a motion for contempt and the LSAC leadership transitioned.

Comment 2

As a person with permanent learning disabilities, from a logical standpoint, it makes sense to grant the same accommodations for the bar exam that were granted previously for a high-stake exam. For instance, earning a passing score on the MPRE, a requirement in obtaining a license to practice law in the US, is an integral stepping stone in becoming a qualified lawyer in the US. If accommodations were granted for an exam such as this but not the bar exam, it renders the original accommodations given for the MPRE useless. The passing of MPRE exam is futile without the passing of the bar exam, they go hand-in-hand and the MPRE only exists for the bar exam. Notably, this places a substantial financial burden on the applicant whom was granted accommodations on the MPRE, passed it, and then can't pass the bar exam because they are not given the same opportunities given in the MPRE. I also note a passing MPRE score does expire, thus the applicant who is caught in this trap of passing the MPRE and not passing the bar exam will keep having to spend the time and money to retake the MPRE once it expires until they can pass the bar exam. As a member of a person with disabilities community, I can say I know first-hand other applicants with disabilities who have experienced this substantial injustice.

The practice of not automatically approving previously granted accommodations does not give respect to the MPRE and is discriminatory to the person with recognized disabilities when the bar exam views its exam to be exempt from providing the same opportunities to the test-taker with disabilities as the MPRE exam, an exam that is on the same path to achieving a license to practice law in the US. Arguably, all of these listed "high-stake" exams are stepping stones to getting to the bar exam and for those previously granted accommodations to be retracted at the finish-line is senseless and quite frankly DATED.

Comment 3

I agree with this proposed rule. However, I think it is more important to consider the bar's need of transparency throughout the process. For example, it is an egregious violation of personal privacy that the bar has an outside individual review the applicants medical records, however, does not provide any opportunity for the applicant to receive or review the report from the outside party. In what other circumstance does this occur? What other organization is allowed to have an outside party review someone's medical records and provide a report where the report in its full nature is not provided to the patient. This does not occur, so why in this instance would it apply? I think this ideology is unethical and should be remedied as well.

Comment 4

The State Bar should expand their scope of documentation to assessments made by staff at approved law schools. The assertions could provide further support to the recent revisions of “considerable weight” given to “accommodations approved in college or law school for timed examinations.”

Timothy Casey repeatedly falsified assignments and interfered with academic opportunities by promoting sanctions after finding insufficient “attitude.” This led to David Blake’s accosting on multiple occasions regarding “posture (that was not accompanied by problematic speech or conduct)” and the “need to seek help off-campus,” when submitted work or sources for academic policies were requested.

These nonconsensual assessments made by law school staff may provide further support for requested testing accommodations, at little to no cost for the examinee.

Comment 5

Test takers with disabilities face unnecessary hurdles when applying for accommodations when those without disabilities do not.

Comment 6

The automatic approval should consider the previously granted accommodation for the high stake exam i.e., MPRE or LSAT. If the accommodation included a private testing room, the state Bar should not request additional documents because that will be seen as asking the applicant to re-establish their disability. In addition, the state Bar must include mental and psychological disabilities as well for automatic approval.

Comment 7

See prior submission (submitting twice to provide two attachments).

Attached are the comments that the State Bar purports to have received for the July 2023 comment period, excluding any it lost. Donna Hershkowitz's explanation to Paul Kramer of the lost comments was misleading; while Ms. Hershkowitz said that all comments by all commenters confirmed to have submitted had been located, and not as submitted in the TA Rules Revision portal, she omitted that the commenter whose comments were located as having been emailed to the State Bar (Deborah Meyer-Morris) indicated in the email and during live comments at the meeting (as well as in emails to Donna Hershkowitz) that she'd submitted those comments BOTH in the portal and via email, but Ms. Hershkowitz only found them via email. Therefore, it follows that sense they were NOT, by Ms. Hershkowitz's own admission, recorded in the portal (which caused them to be missed for a CPRA request by Benjamin Kohn, who was aware Ms. Meyer-Morris had submitted and that Senator Josh Becker and Courtney Bergan were planning to submit, which is how their loss was discovered), that ANY COMMENTS SUBMITTED BY PORTAL ONLY AND NOT BY EMAIL BY PEOPLE WHO'D NOT TOLD MR. KOHN THEY'D SUBMITTED, COULD HAVE BEEN AFFECTED BY THE SAME GLITCH AS MS. MEYER-MORRIS AND NOT BEEN LOCATED ANYWHERE, MIMICKING THE "NO EVIDENCE" OF SUBMISSION OUTCOME MS. HERSHKOWITZ ALLEGED WAS CONCLUSIVE.

Comment 7 pt. 2

Re: Timelines for Processing Petitions/Initial Accommodation Requests:

I strongly oppose the State Bar's position that this component of reforms (the most critical and necessary for the feasibility of several other critical reforms) be tabled for years to study the burden sparing effect at existing headcount of the other reforms, because even if that proposed experiment were to produce a finding that more staff capacity is required, that finding would not change the legal or policy necessity for a two-week maximum turnaround time for initial decisions on testing accommodation requests as nearly unanimously requested in both this last comment period and the preceding one. The importance of that specific timeframe to providing disabled applicants equal opportunity to register and prepare for the exam and to have a meaningful opportunity to be heard in administrative and judicial remedies stemming from denials was carefully calculated, and the State Bar has failed to rebut any of these premises. Any longer timeframe would ordinarily produce unlawful and unjust effects, and disabled applicants should not have to wait years to collect data that would not be capable of moving the needle on that conclusion. The State Bar must either find a way to fund hiring enough staff to feasibly implement such a timeline, or it must disclose to the California Supreme Court and Legislature that the bar exam as presently designed is structurally not sustainably cost-feasible without discriminating against disabled applicants, and allow them to choose between a subsidy, fee increase, or alternative pathways to licensure. Accordingly, the CBE should reject the position of the Working Group on this issue, and instead amend the proposal to comply with the parameters outlined in the vast majority of the public comments it has received.

Re: Documentation Requirements:

I oppose the omission of any further reforms in this area, because, among other things:

1. The newest changes made to Proposed Rule 4.83(A)(7) (adding those accommodations to summary-matched grant eligibility) should receive corresponding correction under Proposed Rule 4.85(C), where for the ordinary petition process applicants seeking what had been those same accommodations have to supply more expansive and detailed explanations from their treating experts than with other accommodations;

2. The failure to correct the evaluator form's unlawful and improper requirement that treating experts attest "exceptional need" for certain accommodations in order to recommend them on the form and allow a procedurally complete petition for those requests to be even considered, when treating experts need only establish their recommendations are what best ensures a level playing field to nondisabled applicants under governing law. This evaluator form language is also illogical where even the Proposed

Rule it implements, Proposed Rule 4.85(C), requires no such showing, but rather just more detailed explanation of the reasons for the recommendation;

3. The State Bar's burden of proof standard for applicants in Proposed Rule 4.81(B)(3) should be amended to substitute "to the satisfaction of the State Bar" with the more appropriate preponderance of the evidence legal standard.

Re: Reviewing "Disability Accommodations Expert" Recommendation Required to Deny Requests
Procedural Requirement:

I disagree with the omissions of additional clarifications regarding the definition of a "disability accommodations expert" in Proposed Rule 4.80(B), as mere "knowledge of ADA requirements [for testing accommodations] is too vague, and more concrete credentials should be specified; and I further oppose the insinuation that, consistent with the State Bar's current practices, any reviewing expert opinion disagreeing with the treating expert(s)' recommendations is per se sufficient to rebut , and always summarily adopted, which flouts 28 C.F.R. Pt. 36 App. A at 795-96 and even the State Bar's own recognition of the weight owed to treating experts in Proposed Rule 4.82(C). Treating expert recommendations create a weighty presumption of reasonableness for the requested accommodations, as a matter of law, and a far greater showing than mere disagreement (e.g. expert support that no reasonable expert in the field could have reached those recommendations) is required to rebut the threshold premises (the State Bar may also rebut reasonableness by demonstrating fundamental alteration or undue burden and having done the maximum extent possible absent such). Proposed Rule 4.82(G) should be amended to more clearly enumerate the degree of showing from reviewing expert(s) required to rebut treating expert(s) given this legal framework, to avoid staff and applicant confusion. Further, wherever the State Bar does rely on any reviewing expert(s) over treating expert(s) in its decisions, a detailed explanation from the Director of Admissions (and not just the reviewing expert(s)) should be required for why the State Bar credited the reviewing expert(s) over the treating expert(s).

Attached are the comments on the rules revision proposal December 2022-January 2023

Comment 8

I have dysgraphia, it is a neurological disability that does not go away with age. I applied for accommodations after receiving an IEP, accommodations for the LSAT, as well as receiving accommodations for the SAT and throughout my whole education. The California bar told me to get retested, I searched far and wide to find someone that tests for dysgraphia in adults and there are no specialists that would be willing to retest, as dysgraphia is diagnosed when you are a minor and is extremely hard to get retested. The California bar due to me not having an updated diagnosis did not grant my accommodations for my learning disability. It is appalling that my disability was thrown to the side and was not acknowledged all because they required new testing. The California bar exam loves to state that they care about inclusivity and want to reduce the barriers of entry however they do not practice what they preach. I eventually found someone who would test me for ADHD, even though I was already diagnosed and have been regularly seeing a psychiatrist for my ADHD and the bar exam STILL did not accept my doctor's notes and I had four, on top of that the bar exam told me to get retested, the cost to get retested was 5k. It is very frustrating after paying for law school paying the cost of the bar exam to have to PAY AGAIN, after being diagnosed, it is really invalidating and frustrating and not inclusive.

Comment 9

HI

I think the testing accommodations AS A WHOLE are not equitable. I was able to pay \$5600 to get 1/4 extra time. I passed the bar after taking it more than one time.

I know people who could not afford to get the testing done to even apply for accommodations. People who have learning differences or in my case and MANY OTHERS ADD or ADHD are at a disadvantage. I know a few people who are WONDERFUL people and would be GREAT lawyers who still have not passed.

I know complete JERKS who I WOULD NEVER TRUST who passed on the first time. Everyone who applies should get accommodations

Comment 10

Applicants who received accommodations for private rooms or for >100% extra time, either on the LSAT or in law school, should NOT be required to submit additional documentation beyond proof of their having received those accommodations in law school or on prior high-stakes exams. They should be treated the same as other applicants whose accommodations are automatically approved based on their accommodation history.

BLANK

Comment 12

This sounds good to me. Although I do have a learning disability and I get easily confused, what I read and understand sounds like a major improvement and a great decision to help those who are in need of Accommodations. When I applied for my accommodations, it was tedious, and a difficult process in the previous way of going about it. It concerned me because it seemed easier to get my accommodations through my previous college than my current law school and when applying to sit for the CA FYLSX. This alleviates my concerns of when I will apply after I graduate to sit for the California bar exam in two years. I also remember being given wrong information which really discouraged me. It shouldn't have to be so hard for those who qualify, especially since laws were put into place, so why do Colleges or community colleges support people with disabilities versus law schools and Law exams such as the California bar exam ...it doesn't make sense. So I'm happy that these changes will be implemented. I also hope this applies for when I will go to apply for my professional responsibility Exam, that should transfer over and it shouldn't be difficult for me to acquire my accommodations for that exam too. So, I hope that gets implemented as well. These improvements are welcome and I'm happy to see them, in this day and age, they should be the norm.

Comment 13

In January 2020, I was severely beaten by a meth fueled, dangerous repeat offender allowed to loiter on the sidewalk in front of the Sacramento courthouse. The beating resulted in my left eye being kicked out, 5 teeth kicked out, both of my femurs broke off from the pelvis which was also broken, my legs bent and my right knee broken. I have new respect for what the disabled have to deal with. Handicap parking is very hard to find, and at most courthouses, the handicap parking is anywhere from one to 4 blocks from the courthouse entrance. At most courthouses, the entrance is up stairs and not suitable for any really disabled person. I have been pushed down repeatedly by people racing to get around me and get somewhere before I can. I have had to use my cane to protect myself from blows. I have seen little if any accommodation for the disabled. Please do not make the process difficult. It takes me weeks to get public accommodations to make any effort to do what they need to do so I can access the offices or buildings. Make it easy. Be respectful of the disabled. You really would not want to be disabled!

Comment 14

The revised requirements of the Testing Accommodations and its process seem reasonable. Modifications after going through the process may be required, however these revised rules shall need a testing time frame after implementation which is considered a normal standard of practice. I might note that the State of Arizona Bar should have received my objection preliminary to the concept that the Practice of law is conferred by the JD, it is not in my opinion. not until the Bar Exam has been taken, and although information received from the educational process may or might be construed as a legal opinion, that opinion is reserved to the educational process as a doctorate in law as is a writing or review but not confer the ability to practice until the practice portion of Bar exam is completed and affirmed. This question is not moot for the State of California.. Nor is the question of " who has the right to assign the passing level of the Bar Exams? which should require a Judicial Review by the US Supreme Court since all Bars are conflicting bias, prejudice, or exception.

I opine that the Questions of the Supremacy Clause the Commerce Clause, the Tenth Amendment Dormancy Clauses should apply since the National Bar administration of the UBE etc are under a private outcome in part of whole inclusive of the MPRE..... while the State Bar should definitely consider the adages of exemplary to standard... on their own roster.. The transitions of computer administration, the burden of the grading, the computer security, technical capacity etc can only be in part a mechanism of the pass level. One only has to request to review my taking an exam in Phoenix for the MPRE in which the computer specificity and readability were not sufficient and compromised in part to the administrators of the exam who were known to me with a conflict of interest. Commerce across state lines.

Therefore the writing that should have been done and the writings that could have been done were not due to restrictions on the JD as a right to Practice when staying information in the State of Arizona, when living in that state regardless of the Bar status in another state.

Comment 15

The definition of "physical impairment" is missing chronic condition subject to flares that when they flare, impair one or more major life activities. This was a sticking point in my request for accommodations back in 2021 and I had to remind the State Bar of the current state of the law as to what qualifies as a disability under state and federal law. This is a simple amendment that should be included in the definition to prevent similar unnecessary problems in the future.

As part of the deference to the qualified healthcare professional, the Bar should not be permitted to request additional medical information that is not pertinent to the claimed disability that requires accommodation. For instance, if an applicant claims a need for accommodation for a digestive disease and the qualified healthcare provider does not submit blood tests, that deference should be honored and the Bar should not hold the request for accommodation hostage and demand blood tests or a full medical file containing information extraneous to the disability. A request for accommodation opens the door to a valid request for limited medical information related to the disability. A request for accommodation is not a complete waiver to any and all medical privacy rights, and the past conduct of the Bar raises serious questions of compliance with the State Constitutional right to privacy. The current "deference" language does not prevent the Bar from denying requests if a full medical file is not submitted, which is above and beyond what the Bar actually needs in order to make determinations.

Comment 16

I support the proposed rules on automatic approval of accommodations previously granted for high-stakes exams. The pass rate for the California Bar Exam ("CBX") is already among the lowest in the nation. The proposed rules will go a long way to making the CBX more accessible to candidates who have required testing accommodations in past similar circumstances to succeed on it. In very many cases, candidates have acquired testing accommodations on previous exams via lengthy applications and rigorous review processes of said applications. It is time for the CBX to take those seriously.

Comment 17

I think the Accommodations Rules need to address other accommodations besides being given extra time. Several decades ago, I needed the simple medical accommodation of having a bottle of water with me during the test. I had to engage in a time-consuming fight to give this simple accommodation, even though I had a doctor's letter and a history of this accommodation. When the accommodation was finally granted, the person in charge of accommodations asked if I needed extra time. I told the person I did not need any extra time and in fact, I do tests very quickly. The person insisted on allowing me extra time that I assured her I would not need. On the days of the test, I finished each section of the test very quickly, as I expected to do. I always felt like my accomplishment and high test score were somehow undervalued or miscategorized because I had been granted extra time that I did not request, did not need, and did not use. So I would suggest two things to this accommodations rule: 1) Discuss and make rules about simple accommodations, such as needing a bottle of water; 2) Only give extra time if it is requested.

Comment 18

To have the testing accommodation persons to test in the same space as regular persons on the Bar. This is unfair and possibly violates HIPPA b/c people with accommodation do not necessarily want others to know about their difficulties.

Comment 19

The State Bar should defer to medical professionals about a disability. And should also recognize that disability can strike at any time and have no time limit to apply for accommodations.

Blank

Blank

Comment 22

Blank

Comment 23

Only if the appeal process is doubled to 60 days.

Only if the request is automatic and does not have a 5yr limit. It should be available until the applicant passes the Bar.

Only if requests for additional lighting in the room is made available to the writer as needed. I shouldn't have to argue about insufficient lighting in the room. A reasonable accommodation allows for the applicant to decide what is sufficient not the other way around.

Comment 24

September 27, 2023

Submitted Via Online Portal,
<https://fs22.formsite.com/sbcta/5iy5pxjva9/index>

Board of Trustees
State Bar of California
180 Howard Street
San Francisco, CA 94105

CC:Devan.McFarland@calbar.ca.gov
Louisa.Ayrapetyan@calbar.ca.gov

RE:Revised Proposed Amendments to the Rules of the State Bar Pertaining to Testing Accommodations
– OPPOSE

Dear Chair Duran, Vice-Chair Stallings, and Trustees Broughton, Chen, Cisneros, De La Cruz, Knoll, Shelby, Sowell, and Toney:

I am a California lawyer, and the issue of accommodations for the disabled is one that is close to my heart.

I oppose -- unless modified -- the further revised proposed amendments to the State Bar rules regarding testing accommodations. While the further revised proposal is a good step from prior iterations, it still is not enough – it fails to include the necessary components of a lawful, effective, and inclusive testing accommodations program.

Problems with Definition of Disability

The proposed rules state that a “disability” is “a physical or mental impairment that limits one or more of an applicant’s major life activities as compared to most people in the general population.” Proposed Rule 4.80(a). The first half of the definition is similar to the existing rule, Rule 4.82(A), and appropriately tracks California law, see Cal. Gov. Code 12926(j), (m). But the last phrase – “as compared to most people in the general population” – is new language which diverges sharply from California law.

A requirement that a person seeking accommodations be compared to “most people in the general population” can function to unfairly exclude high achievers with disabilities. People who have graduated law school, with and without disabilities, typically perform certain academic tasks better than the average person in society. This comparison is not permitted under California’s definition of disability, which includes anyone with a physical or mental condition that makes the achievement of a major life activity difficult. Cal. Gov. Code 12926(j)(1)(A), (m)(1)(B)(ii); see also Cal. Gov. Code 12926.1(a), (c). This definition easily includes law school graduates with learning disabilities, ADHD, and other disabilities that require testing accommodations.

Even under federal law, an assessment of disability must follow the provisions of the ADA Amendments Act of 2008, 42 U.S.C. § 12102, such as those regarding major life activities, major bodily functions, mitigating measures, and episodic conditions. These provisions are not reflected in the proposed rules.

The new and inapposite language will encourage the continuation of the State Bar's existing pattern of unfair denials: A large proportion of denial letters received by candidates include boilerplate text opining that the candidate does not have a disability because they can read or write or perform specific academic tasks as well as or better than most people in the general population. The approach reflected in these denial letters is not only offensively simple-minded but also contrary to governing law. State and federal lawmakers did not intend to exclude all or virtually all law students from coverage. The new language requiring a comparison to "most people in the general population" should be deleted.

Problems with Automatic Approval Process

The proposed rules create a process for the "automatic" approvals of certain accommodations that the candidate has previously received on timed, high-stakes test. Proposed Rule 4.83. Such streamlined and automatic grants are appropriate and consistent with the standards established through the DFEH v. LSAC litigation. They also meet the settled needs and expectations of disabled law school graduates who have completed law school with testing accommodations. But the proposed rules then substantially undermine this principle, making opposition necessary.

First, the proposal excludes timed law school exams from the definition of high-stakes tests. Proposed Rule 4.80(C). This is illogical as timed law school exams are closely analogous to the bar exam. Moreover, many disabled candidates, and particularly people of color with disabilities, first receive testing accommodations in law school. This group includes candidates who are older, who lack personal or family resources and instead faced adversity, who grew up and were educated in other countries, and/or who attended colleges and law schools that did not require or rely heavily on standardized testing for admissions.

For example, UC Law SF's Legal Education Opportunity Program (LEOP) program is dedicated to making law school accessible to students from adverse backgrounds. Participants in programs like LEOP – people who are critical to the decades-long effort to diversify California's legal community – may not have previously had the resources to receive disability supports such as testing accommodations. The exclusion of timed, law school exams from the definition of "high-stakes" exams unnecessarily burdens the very candidates that the State Bar should be supporting.

Further, the proposal imposes arbitrary limitations on what accommodations will be automatically granted. For example, it excludes the accommodation of a private room. Proposed Rule 4.83(A)(7). There is no basis for excluding private rooms from the automatic approval process. A private room for test taking is common testing accommodations needed by some candidates. They are included in the LSAT consent decree. DFEH v. LSAC Consent Decree, ¶ 5(A) & Exhibit 1. The automatic process should include the accommodation of a private room.

Problems with Timelines

The proposed rules do not resolve chronic problems with the timelines associated with the State Bar's responses to accommodation requests and processing of appeals of denials. The proposal explicitly states that people who seek accommodations on the last day to register for a particular sitting of the bar

exam may not have time to have their request processed and participate in a full review of any denials before the exam. Proposed Rule 4.84(E). Instead, under the proposed rules, candidates with disabilities who wish to have the opportunity to respond to requests for more documentation and to appeal an accommodation denial must submit their requests several months earlier than the registration deadline for their nondisabled peers. See Proposed Rules 4.84(B) (registration deadlines for all test takers), 4.86(A) (30 days for State Bar to state whether request is complete or requires more documentation for request to be “deemed complete”), (B) (once request is “deemed complete” by State Bar, it then has 60 days to say whether the request is granted, denied, or “pending.”), 4.88(B) (last day to submit request for review is first business day of month of exam).

Under these proposed rules, as under the existing rules, the process can extend for months, with the request not fully decided in time for the scheduled exam. Candidates must then take the exam without completing the process that might secure the accommodations they need or delay the exam by six months and endure considerable harm to their professional plans.

The proposed timelines violate U.S. Department of Justice guidelines on testing accommodations that require that a testing entity respond in a timely manner to requests for testing accommodations to ensure equal opportunity for individuals with disabilities. This means that all candidates with disabilities should be able to register and apply for accommodations using the same deadlines that their nondisabled peers use to register for the exam.

The State Bar should adopt new timelines that comply with the Department of Justice guidelines. Based on the current calendar, which includes about seven weeks between the registration deadline and the bar exam, a response from State Bar staff within two weeks of a request for accommodations is necessary to reach this standard. A two-week response window leaves five weeks before the bar exam, a period necessary for the candidate to complete further steps, such as communications with State Bar staff, collection of any additional information, and the filing and processing of any appeal.

Implementing a lawful timeline will require that the State Bar streamline responses to requests – including by automatically granting law school accommodations – so that any remaining requests can be processed promptly.

Additional Problems with the Rules

The proposed rules do not change the State Bar’s position that it does not offer certain accommodations, such as stop-the-clock breaks, across the board. The State Bar should not exclude common or even uncommon testing accommodations without an individualized assessment. Stop-the-clock breaks are a common testing accommodation which is included in the LSAT consent decree. DFEH v. LSAC Consent Decree, ¶ 5(A) & Exhibit 1.

The proposed rules require that candidates seek a review within 14 days of receiving the State Bar’s response, even if there is more than two weeks between the denial and the first day of the month of the scheduled exam. Proposed Rule 4.88(A), (B). The only exception is for “[a]pplicants requesting review by the timely filing deadline for the exam” who are given “30 days from the date of the denial or modified grant to submit their request.” The language of this 30-day pathway is hard to parse, as it suggests that the applicant must submit their initial request so early as to have received a denial and still have 30 days left before the “timely filing deadline for the exam.” But the application is made available fewer than 30 days before the “timely filing deadline for the exam,” so this cannot be the meaning. It may be that the

State Bar means to give 30 days to those who file their initial request for accommodations by the timely filing deadline for the exam (about four months and three weeks before the exam), but this is not clear.

Preparing an appeal can require a revised personal statement as well as the collection of additional documentation from busy qualified professionals. Candidates should be granted up to 30 days to submit a request for a review, so long as the review is submitted by the first day of the month of the scheduled exam.

Problems with Implementation

The proposal includes no plan for the training, supervision, and personnel changes necessary to reform the existing accommodations system. For example, the State Bar relies upon a small group of longtime reviewers who have developed and applied a stringent, stingy, and skeptical approach to testing accommodations. These reviewers are poorly situated to implement the substantial reforms needed here. The State Bar must increase in number and diversify in expertise its pool of expert consultants that it uses to review and evaluate requests for testing accommodations. This was a core provision of the LSAC consent decree, *DFEH v. LSAC Consent Decree*, at Injunctive Relief, ¶ 6, but there is no such provision in the State Bar proposal. Instead, the proposal imposes new seniority requirements – a minimum of five years' experience in reviewing requests for testing accommodations for certification or licensure – for disability consultants. Proposed Rule 4.80(B).

The State Bar should delete the new experience requirement and instead commit itself to diversifying or replacing the longtime State Bar disability consultants who have contributed to the unlawful system for many years. Moreover, the State Bar should train and direct its staff and disability consultants to approach the process with the presumption that the testing accommodation request is justified. See Best Practices Report; 2015 U.S. Dist. LEXIS 104751, at *45 (N.D. Cal. Aug. 7, 2015).

Finally, the State Bar should assess its leadership and chain of command for reviewing and evaluating requests for testing accommodations. Any implementation of new standards for reviewing and deciding requests for testing accommodations requires leaders who are wholeheartedly committed to disability equality, and who embrace testing accommodations as a core component of equal opportunity. This is a key lesson from the LSAC litigation. While many changes were adopted on paper at the time of the Consent Decree, and more through the Best Practices Report and related litigation, these changes were not truly implemented until the LSAC was subject to a motion for contempt and the LSAC leadership transitioned.

For the above-stated reasons, the Revised Proposed Amendments to the Rules of the State Bar Pertaining to Testing Accommodations should be rejected unless amended.

Sincerely,

Sharon Baumgold
California State Bar 75787

October 4, 2023

Board of Trustees
State Bar of California
180 Howard Street
San Francisco, CA 94105
Submitted Via Online Portal, <https://fs22.formsite.com/sbcta/5iy5pxjva9/index>

RE: Revised Proposed Amendments to the Rules of the State Bar pertaining to Testing Accommodations – OPPOSE

Dear Trustees of the State Bar of California:

OneJustice writes again to oppose the further revised proposed amendments to the State Bar rules regarding testing accommodation. While the most recent amendments slightly improve the proposed rules, as we said before, it still fails to include the necessary components of a lawful, effective, and inclusive testing accommodations program.

OneJustice works to ensure a thriving, effective legal services sector that advances a just and equitable society. We advance justice and equity by equipping the sector with skills and tools to maximize impact, championing robust and reliable legal service resources, convening the sector to harness its wisdom and power; and sharing analyses and insights about systemic trends and challenges. OneJustice aims to nurture a diverse pipeline of leaders in the legal services sector. OneJustice works with legal services organizations across California that employ lawyers with disabilities, as well as serve individuals with disabilities by providing them with access to free legal assistance. Ensuring that Californians living with disabilities have access to appropriate and effective accommodations is essential to the functioning of our legal system.

We largely repeat our comments and concerns from our last comment on July 27, 2023, but also include specific comments related to the most recent amendments.

Problems with Definition of Disability

The proposed rules state that a “disability” is “a physical or mental impairment that limits one or more of an applicant’s major life activities as compared to most people in the general population.” Proposed Rule 4.80(a). The first half of the definition is similar to the existing rule, Rule 4.82(A), and appropriately tracks California law, *see* Cal. Gov. Code 12926(j), (m). But the last phrase – “as compared to most people in the general population” – is new language which diverges sharply from California law.

A requirement that a person seeking accommodations be compared to “most people in the general population” can function to unfairly exclude high achievers with disabilities. People who have graduated law school, with and without disabilities, typically perform certain academic tasks better than the average person in society. This comparison is not permitted under California’s definition of disability, which includes anyone with a physical or mental condition

that makes the achievement of a major life activity difficult. Cal. Gov. Code 12926(j)(1)(A), (m)(1)(B)(ii); see also Cal. Gov. Code 12926.1(a), (c). This definition easily includes law school graduates with learning disabilities, ADHD, and other disabilities that require testing accommodations.

Moreover, even under federal law, an assessment of disability must follow the myriad principles of the ADA Amendments Act of 2008, 42 U.S.C. § 12102, such as those regarding major life activities, major bodily functions, mitigating measures, and episodic conditions. These principles do not appear in the proposed rules.

The new and inapposite language will encourage the continuation of the State Bar's existing pattern of unfair denials: A large proportion of denial letters received by candidates include boilerplate text opining that the candidate does not have a disability because they can read or write or perform specific academic tasks as well as or better than most people in the general population. The approach reflected in these denial letters is not only offensively simple-minded but also contrary to governing law. State and federal lawmakers did not intend to exclude all or virtually all law students from coverage. The language requiring a comparison to "most people in the general population" should be deleted.

Problems with Automatic Approval Process

The proposed rules create a process for the "automatic" approvals of certain accommodations that the candidate has previously received on timed, high-stakes test. Proposed Rule 4.83. Such streamlined and automatic grants are appropriate and consistent with the standards established through the *DFEH v. LSAC* litigation. They also meet the settled needs and expectations of disabled law school graduates who have completed law school with testing accommodations. But the proposed rules then substantially undermine this principle, making opposition necessary.

First, the proposal excludes timed law school exams from the definition of high-stakes tests. Proposed Rule 4.80(C). This is illogical as timed law school exams are closely analogous to the bar exam. Moreover, many disabled candidates, and particularly people of color with disabilities, first receive testing accommodations in law school. This group includes candidates who are older, who lack personal or family resources and instead faced adversity, who grew up and were educated in other countries, and/or who attended colleges and law schools that did not require or rely heavily on standardized testing for admissions.

For example, UC Law SF's Legal Education Opportunity Program (LEOP) program is dedicated to making law school accessible to students from adverse backgrounds. Participants in programs like LEOP – people who are critical to the decades-long effort to diversify California's legal community – may not have previously had the resources to receive disability supports such as testing accommodations. The exclusion of timed, law school exams from the definition of "high-stakes" exams unnecessarily burdens the very candidates that the State Bar should be supporting.

While we appreciate the inclusion of double time as an "automatic" accommodation, the proposal still imposes arbitrary limitations on what accommodations will be automatically granted. It also excludes the accommodation of a private room. Proposed Rule 4.83(A)(7). There

is no basis for excluding private rooms from the automatic approval process. Private rooms are common testing accommodations needed by some candidates. They are included in the LSAT consent decree. *DFEH v. LSAC* Consent Decree, ¶ 5(A) & Exhibit 1. The automatic process should include these modifications.

Problems with Timelines

The proposed rules do not resolve chronic problems with the timelines associated with the State Bar's responses to accommodation requests and processing of appeals of denials. The proposal explicitly states that people who seek accommodations on the last day to register for a particular sitting of the bar exam may not have time to have their request processed and participate in a full review of any denials. Proposed Rule 4.84(E). Instead, under the proposed rules, candidates with disabilities who wish to have the opportunity to respond to requests for more documentation and to appeal an accommodation denial must submit their requests *several months earlier* than the registration deadline for their nondisabled peers. See Proposed Rules 4.84(B) (registration deadlines for all test takers), 4.86(A) (30 days for State Bar to state whether request is complete or requires more documentation for request to be "deemed complete"), (B) (once request is "deemed complete" by State Bar, it then has 60 days to say whether the request is granted, denied, or "pending."), 4.88(B) (last day to submit request for review is first business day of month of exam).

Under these proposed rules, as under the existing rules, the process can extend for months, with the request not fully decided in time for the scheduled exam. Candidates must then take the exam without completing the process that might secure the accommodation(s) they need or delay the exam by six months and endure considerable harm to their professional plans.

The proposed timelines violate U.S. Department of Justice guidelines on testing accommodations that require that a testing entity respond in a timely manner to requests for testing accommodations to ensure equal opportunity for individuals with disabilities. This means that all candidates with disabilities should be able to register and apply for accommodations using the same deadlines that their nondisabled peers use to register for the exam.

The State Bar should adopt new timelines that comply with the Department of Justice guidelines. Based on the current calendar, which includes about seven weeks between the registration deadline and the bar exam, a response from State Bar staff within two weeks of a request for accommodations is necessary to reach this standard. A two-week response window leaves five weeks before the bar exam, a period necessary for the candidate to complete further steps, such as communications with State Bar staff, collection of any additional information, and the filing and processing of any appeal.

Implementing a lawful timeline will require that the State Bar streamline responses to requests – including by automatically granting law school accommodations – so that any remaining requests can be processed promptly.

Additional Problems with the Rules

The proposed rules do not change the State Bar's position that it does not offer certain accommodations, such as stop-the-clock breaks, across the board. The State Bar should not exclude common or even uncommon testing accommodations without an individualized assessment. Stop-the-clock breaks are a common testing accommodation which is included in the LSAT consent decree. *DFEH v. LSAC Consent Decree*, ¶ 5(A) & Exhibit 1.

The proposed rules require that candidates seek a review within 14 days of receiving the State Bar's response, even if there is more than two weeks between the denial and the first day of the month of the scheduled exam. Proposed Rule 4.88(A), (B). There is confusing language providing an exception for "[a]pplicants requesting review by the timely filing deadline for the exam." We appreciate the inclusion of an exception, but it is not clear as to how this will be implemented because the application is not available 30 days prior to the "timely filing deadline for the exam." We encourage the State Bar to clarify this "exception" so that we can properly comment and understand the intent of this exception.

Preparing an appeal can require a revised personal statement as well as the collection of additional documentation from busy qualified professionals. Candidates should be granted up to 30 days to submit a request for a review, so long as the review is submitted by the first day of the month of the scheduled exam.

Problems with Implementation

The proposal includes no plan for the training, supervision, and personnel changes necessary to reform the existing accommodations system. For example, the State Bar relies upon a small group of longtime reviewers who have developed and applied a stringent, stingy, and skeptical approach to testing accommodations. These reviewers are poorly situated to implement the substantial reforms needed here. The State Bar must increase in number and diversify in expertise its pool of expert consultants that it uses to review and evaluate requests for testing accommodations. This was a core provision of the LSAC consent decree, *DFEH v. LSAC Consent Decree*, at Injunctive Relief, ¶ 6, but there is no such provision in the State Bar proposal. Instead, the proposal imposes new seniority requirements – a minimum of five years' experience in reviewing requests for testing accommodations for certification or licensure – for disability consultants. Proposed Rule 4.80(B).

The State Bar should delete the new experience requirement and instead commit itself to diversifying or replacing the longtime State Bar disability consultants who have contributed to the unlawful system for many years. Moreover, the State Bar should train and direct its staff and disability consultants to approach the process with the presumption that the testing accommodation request is justified. See Best Practices Report; 2015 U.S. Dist. LEXIS 104751, at *45 (N.D. Cal. Aug. 7, 2015).

Finally, the State Bar should assess its leadership and chain of command for reviewing and evaluating requests for testing accommodations. Any implementation of new standards for reviewing and deciding requests for testing accommodations requires leaders who are

wholeheartedly committed to disability equality, and who embrace testing accommodations as a core component of equal opportunity. This is a key lesson from the LSAC litigation. While many changes were adopted on paper at the time of the Consent Decree, and more through the Best Practices Report and related litigation, these changes were not truly implemented until the LSAC was subject to a motion for contempt and the LSAC leadership transitioned.

For the above-stated reasons, the Revised Proposed Amendments to the Rules of the State Bar Pertaining to Testing Accommodations should be rejected unless amended.

Sincerely,
ONEJUSTICE

Dana Richardson
Dana Marquez Richardson
Senior Staff Attorney

Leigh E. Ferrin
Leigh E. Ferrin
Program Director

October 5, 2023

Submitted Via Online Portal,
<https://fs22.formsite.com/sbcta/5iy5pxjva9/index>

Board of Trustees
State Bar of California
180 Howard Street
San Francisco, CA 94105

RE: Revised Proposed Amendments to the Rules of the State Bar Pertaining to Testing
Accommodations – OPPOSE

Dear Chair Duran, Vice-Chair Stallings, and Trustees Broughton, Chen, Cisneros, De La Cruz, Knoll, Shelby, Sowell, and Toney:

I am writing on behalf of the UC Berkeley School of Law to share comments on the Revised Proposed Amendments to the Rules of the State Bar pertaining to testing accommodations for the California Bar Exam.

I am writing to ***oppose unless amended*** the further revised proposed amendments to the State Bar rules regarding testing accommodations. While the further revised proposal is an improvement from prior iterations, it still fails to include the necessary components of a lawful, effective, and inclusive testing accommodations program.

Further, the topic of these rules has been considered by the State Bar Board of Trustees, committees, subcommittees, and staff for several years with numerous comment cycles. Stakeholders may not have the bandwidth to participate in every comment cycle. Fluctuations in the total count of comments is not a reliable indicator of stakeholder views.

Problems with Definition of Disability

The proposed rules state that a “disability” is “a physical or mental impairment that limits one or more of an applicant’s major life activities as compared to most people in the general population.” Proposed Rule 4.80(a). The first half of the definition is similar to the existing rule, Rule 4.82(A), and appropriately tracks California law, see Cal. Gov. Code 12926(j), (m). But the last phrase – “as compared to most people in the general population” – is new language which diverges sharply from California law.

A requirement that a person seeking accommodations be compared to “most people in the general population” can function to unfairly exclude high achievers with disabilities. People who have graduated law school, with and without disabilities, typically perform certain academic tasks better than the average person in society. This comparison is not permitted under California’s definition of disability, which includes anyone with a physical or mental condition that makes the achievement of a major life activity difficult. Cal. Gov. Code 12926(j)(1)(A), (m)(1)(B)(ii); see also Cal. Gov. Code 12926.1(a), (c). This definition easily includes law school graduates with learning disabilities, ADHD, and other disabilities that require testing accommodations.

Moreover, even under federal law, an assessment of disability must follow the myriad principles of the ADA Amendments Act of 2008, 42 U.S.C. § 12102, such as those regarding major life activities, major bodily functions, mitigating measures, and episodic conditions. These principles do not appear in the proposed rules.

The new and inapposite language will encourage the continuation of the State Bar's existing pattern of unfair denials: A large proportion of denial letters received by candidates include boilerplate text opining that the candidate does not have a disability because they can read or write or perform specific academic tasks as well as or better than most people in the general population. The approach reflected in these denial letters is not only offensively simple-minded but also contrary to governing law. State and federal lawmakers did not intend to exclude all or virtually all law students from coverage. The new language requiring a comparison to "most people in the general population" should be deleted.

Problems with Automatic Approval Process

The proposed rules create a process for the "automatic" approvals of certain accommodations that the candidate has previously received on timed, high-stakes test. Proposed Rule 4.83. Such streamlined and automatic grants are appropriate and consistent with the standards established through the *DFEH v. LSAC* litigation. They also meet the settled needs and expectations of disabled law school graduates who have completed law school with testing accommodations. But the proposed rules then substantially undermine this principle, making opposition necessary.

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Further, the proposal imposes arbitrary limitations on what accommodations will be automatically granted. For example, it excludes the accommodation of a private room. Proposed Rule 4.83(A)(7). There is no basis for excluding private rooms from the automatic approval process. A private room for test taking is common testing accommodations needed by some candidates. They are included in the LSAT consent decree. *DFEH v. LSAC* Consent Decree, ¶ 5(A) & Exhibit 1. The automatic process should include the accommodation of a private room.

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states that people who seek accommodations on the last day to register for a particular sitting of the bar exam may not have time to have their request processed and participate in a full review of any denials before the exam. Proposed Rule 4.84(E). Instead, under the proposed rules, candidates with disabilities who wish to have the opportunity to respond to requests for more documentation and to appeal an accommodation denial must submit their requests *several months earlier* than the registration deadline for their nondisabled peers. See Proposed Rules 4.84(B) (registration deadlines for all test takers), 4.86(A) (30 days for State Bar to state whether request is complete or requires more documentation for request to be “deemed complete”), (B) (once request is “deemed complete” by State Bar, it then has 60 days to say whether the request is granted, denied, or “pending.”), 4.88(B) (last day to submit request for review is first business day of month of exam).

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days before the “timely filing deadline for the exam,” so this cannot be the meaning. It may be that the State Bar means to give 30 days to those who file their initial request for accommodations by the timely filing deadline for the exam (about four months and three weeks before the exam), but this is not clear.

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The State Bar should delete the new experience requirement and instead commit itself to diversifying or replacing the longtime State Bar disability consultants who have contributed to the unlawful system for many years. Moreover, the State Bar should train and direct its staff and disability consultants to approach the process with the presumption that the testing accommodation request is justified. See Best Practices Report; 2015 U.S. Dist. LEXIS 104751, at *45 (N.D. Cal. Aug. 7, 2015).

Finally, the State Bar should assess its leadership and chain of command for reviewing and evaluating requests for testing accommodations. Any implementation of new standards for reviewing and deciding requests for testing accommodations requires leaders who are wholeheartedly committed to disability equality, and who embrace testing accommodations as a core component of equal opportunity. This is a key lesson from the LSAC litigation. While many changes were adopted on paper at the time of the Consent Decree, and more through the Best Practices Report and related litigation, these changes were not truly implemented until the LSAC was subject to a motion for contempt and the LSAC leadership transitioned.

For the above-stated reasons, the Revised Proposed Amendments to the Rules of the State Bar Pertaining to Testing Accommodations should be rejected unless amended.

Sincerely,



Chelsea D. Yuan
Director of Student Services, Accessible Education
UC Berkeley School of Law

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PRESIDENT

Joan M. Graff

October 6, 2023

Submitted Via Online Portal,
<https://fs22.formsite.com/sbcta/5iy5pxjva9/index>

Board of Trustees
State Bar of California
180 Howard Street
San Francisco, CA 94105

CC: Devan.McFarland@calbar.ca.gov
Louisa.Ayrapetyan@calbar.ca.gov

**RE: Revised Proposed Amendments to the Rules of the State Bar
Pertaining to Testing Accommodations – OPPOSE UNLESS AMENDED**

Dear Chair Duran, Vice-Chair Stallings, and Trustees Broughton, Chen,
Cisneros, De La Cruz, Knoll, Shelby, Sowell, and Toney:

Legal Aid at Work (LAAW) is a non-profit public interest law firm whose mission is to partner with people to help them understand and assert their workplace rights, and advocate for employment laws and systems that empower low-paid workers and marginalized communities. LAAW has represented plaintiffs in cases of special import to communities of color, women, recent immigrants, individuals with disabilities, the LGBT community, and the working poor. LAAW's interest in preserving the protections by this country's antidiscrimination laws is longstanding.

I am writing to ***oppose unless amended*** the further revised proposed amendments to the State Bar rules regarding testing accommodations. While the further revised proposal is an improvement from prior iterations, it still fails to include the necessary components of a lawful, effective, and inclusive testing accommodations program.

Further, the topic of these rules has been considered by the State Bar Board of Trustees, committees, subcommittees, and staff for several years with numerous comment cycles. Stakeholders may not have the bandwidth to participate in every comment cycle. Fluctuations in the total count of comments is not a reliable indicator of stakeholder views.

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A requirement that a person seeking accommodations be compared to “most people in the general population” can function to unfairly exclude high achievers with disabilities. People who have graduated law school, with and without disabilities, typically perform certain academic tasks better than the average person in society. This comparison is not permitted under California’s definition of disability, which includes anyone with a physical or mental condition that makes the achievement of a major life activity difficult. Cal. Gov. Code 12926(j)(1)(A), (m)(1)(B)(ii); *see also* Cal. Gov. Code 12926.1(a), (c). This definition easily includes law school graduates with learning disabilities, ADHD, and other disabilities that require testing accommodations.

Moreover, even under federal law, an assessment of disability must follow the myriad principles of the ADA Amendments Act of 2008, 42 U.S.C. § 12102, such as those regarding major life activities, major bodily functions, mitigating measures, and episodic conditions. These principles do not appear in the proposed rules.

The new and inapposite language will encourage the continuation of the State Bar’s existing pattern of unfair denials: A large proportion of denial letters received by candidates include boilerplate text opining that the candidate does not have a disability because they can read or write or perform specific academic tasks as well as or better than most people in the general population. The approach reflected in these denial letters is not only offensively simple-minded but also contrary to governing law. State and federal lawmakers did not intend to exclude all or virtually all law students from coverage. The new language requiring a comparison to “most people in the general population” should be deleted.

Problems with Automatic Approval Process

The proposed rules create a process for the “automatic” approvals of certain accommodations that the candidate has previously received on timed, high-stakes test. Proposed Rule 4.83. Such streamlined and automatic grants are appropriate and consistent

with the standards established through the *DFEH v. LSAC* litigation. They also meet the settled needs and expectations of disabled law school graduates who have completed law school with testing accommodations. But the proposed rules then substantially undermine this principle, making opposition necessary.

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For example, UC Law SF's [Legal Education Opportunity Program](#) (LEOP) program is dedicated to making law school accessible to students from adverse backgrounds. Participants in programs like LEOP – people who are critical to the decades-long effort to diversify California's legal community – may not have previously had the resources to receive disability supports such as testing accommodations. The exclusion of timed, law school exams from the definition of “high-stakes” exams unnecessarily burdens the very candidates that the State Bar should be supporting.

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registration deadline for their nondisabled peers. *See* Proposed Rules 4.84(B) (registration deadlines for all test takers), 4.86(A) (30 days for State Bar to state whether request is complete or requires more documentation for request to be “deemed complete”), (B) (once request is “deemed complete” by State Bar, it then has 60 days to say whether the request is granted, denied, or “pending.”), 4.88(B) (last day to submit request for review is first business day of month of exam).

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For the above-stated reasons, the Revised Proposed Amendments to the Rules of the State Bar Pertaining to Testing Accommodations should be rejected unless amended.

Sincerely,

A handwritten signature in blue ink that reads "Joan Graff". The signature is fluid and cursive, with the first name "Joan" and last name "Graff" clearly distinguishable.

Joan Graff
President
Legal Aid at Work

I think automatic approval of accommodations should be granted and not limited to those who are less disabled. It should not matter if someone is asking for double time, a private testing room, or semi private testing space. If they have reasonable documentation that supports this need and especially if they have permanent disabilities, then they should be granted immediately on all subsequent exams.

I strongly encourage the state bar to create a separate page on their website for everything to do with testing accommodations, given guidance on how to complete a request for TA. Put notices on the TA page about proposed rule changes, how students, law school graduates or others can get involved to advocate for a better process for making testing accommodations requests. Ensure that the decision makers actually read the comments provided before a meeting and to provide ample reasoning why they are making the recommended rule or policy changes and why those who approve them are doing so in detail. Allow for greater public comment and allow people to speak on various aspects of it throughout the meeting, not just before the start of the meeting. Hold the meetings in the evenings as well so those who can't get out of work can participate too.

There needs to be a clear, and fair process for appealing and reviewing applications. If there is an error on the application, the state should call the applicant, speak to their doctor or therapist and verify the information. Several times the person who provided documentation for me tried to call the state testing accommodations staff and nobody would allow her to follow up. It is an insane and unnecessarily difficult process to go through and very disheartening.

All subsequent requests for testing accommodations, for permanent disabilities should be approved. Those with the most severe disabilities should not be forced to unreasonable amounts of documentation and medical testing for subsequent bar exams. TA should not expire.

Please give more time, have workshops where those not even out of law school yet can participate in the process. Work with experts in the field, work with us, those with disabilities who have actually taken the test, who have gone through the application process. Talk to us, let us help make the system better for everyone, staff included.

I strongly encourage the state bar to create a separate page on their website for everything to do with testing accommodations, given guidance on how to complete a request for TA. Put notices on the TA page about proposed rule changes, how students, law school graduates or others can get involved to advocate for a better process for making testing accommodations requests. Ensure that the decision makers actually read the comments provided before a meeting and to provide ample reasoning why they are making the recommended rule or policy changes and why those who approve them are doing so in detail. Allow for greater public comment and allow people to speak on various aspects of it throughout the meeting, not just before the start of the meeting. Hold the meetings in the evenings as well so those who can't get out of work can participate too.

October 7, 2023

RE: Proposed Rule 4.83(A)(6)

Dear Members of the Committee of Bar Examiners the Board of Trustees, and the staff of the California Bar Admissions:

I implore you to continue to revise the Testing Accommodations proposed rule 4.83 (A) (6). Do not require those with the most need to be required to provide additional documentation after the state approved their testing accommodations for any subsequent bar exam. If an exam applicant's testing accommodations for additional time in any amount and or a private or semi-private testing room were approved, and based on permanent disabilities, they should never expire.

For every public comment received, there are hundreds of other members of the disabled community that are intimidated to speak up, are unaware of the proposed changes, are currently in law school or have yet to apply to law school. Please do not make it nearly impossible for those seeking testing accommodations by adopting, approving, or recommending the testing accommodations voted on in August 2023. Not everyone is able to easily navigate the lengthy list of meetings, agendas and confusing public comment policies.

I strongly encourage the staff, committee members and trustees reach out to undergraduate disabled students who intend to go to law school, current law school students, the Dean's of law schools within the state of California and Special Education teachers from the high schools. I believe you will come to an understanding that if you change the rules now, you will be impacting the next several generation of law school applicants who have testing accommodations in their under graduate or high school programs. Why would they be willing to apply to law school if they are told in advance that the State of California will make it extremely difficult for them to receive the same or similar type of testing accommodations when they take the Bar Exam.

To date there has been little to no justification that fully explains why the Bar Admissions Staff want to require those asking for double time and or a private testing room to be subjected to more rigorous requirements than less disabled test applicants. The state Bar Admissions should be transparent in why they believe additional documentation or requirements should be required for exam applicants for subsequent bar exams if they do not pass the exam the first attempt.

If an exam applicant requesting testing accommodations, regardless of the amount of time or need of a private or semi-private room has been approved by the State of California Bar Admissions Testing Accommodations staff, there should be no need to require substantial procedures for any subsequent exam. Testing Accommodations for permanent disabilities should NEVER expire. There is no logical, rational or fundamental foundation that has been

given to justify why those with the most need are going to be held to such an unreasonable standard.

If there is a vote on this issue, then all the reasoning for supporting this proposal should be publicly discussed with experts in the field as well as allowing for ample public comment and not limiting speakers to 3-5 minutes and only one opportunity per meeting to speak. Please, let's have a conversation about the issues and do not hide behind artificial time constraints of a public meeting.

Please delay the vote, or modify the rules for requesting testing accommodations allowing those who have been approved for double-time or a private or semi-private room by the State of California Bar Admissions staff to NOT be required to provide additional documentation, medical testing, records or proof that they are disabled when their original request for testing accommodations was founded on them having PERMANENT DISABILITIES, EITHER PHYSICAL OR LEARNING DISABILITIES.

The damage that will be done to our society by limiting those with disabilities from entering the legal profession will be far greater than any exam applications getting extra time in error. It is unfair to require subsequent exam applicants with state approved testing accommodations to do anything more than any of the other exam applicants.

There also should be a better timeline for appealing decisions, providing documentation and understanding the process for those applying for testing accommodations the first time. It is a nightmare process.

Thank you for your time and consideration in this matter.

Please do the right thing and error on the side of caution and do not approve the proposed recommendations as presented.

Best,

Shirleen Claiche
SLCLAICHE@gmail.com
707-349-3486

I take my exam in a private room not because of distraction-reduction but because of my physical conditions which requires use of dictation software and adjustable desk. Not having an automatic approval because I require a private room is distractive to focus on the exam preparation.

10/7/2023 TARR 3rd Comment Period
Benjamin Kohn (SBN No. 335723) – AGREE ONLY IF MODIFIED

10/7/2023

To Be Submitted via Portal: <https://fs22.formsite.com/sbcta/5iy5pxjva9/index>

Dear State Bar of California admissions staff, Committee of Bar Examiners, and Board of Trustees:

With the sole exception of Part 1, Conclusion point 3, the revised proposal approved for circulation at the August 18, 2023 meeting was, in my view, insufficiently responsive to my and others' suggestions and concerns (see my July 2023 TARR comments appended below).

Accordingly, and also based on the below responses to the points adduced during the CBE's deliberations at the 8/18/2023 CBE meeting, I strongly OPPOSE advancing the current proposal without amendment upon return from public comment, and further OPPOSE making only incremental, incomplete corrections each iteration to any further revised proposal that is circulated for more public comment, as failing to correct known flaws already flagged for action before circulating puts the State Bar in the position of having to endlessly delay these reforms to keep circulating them for public comment as it sees how much of what the public – but not admissions staff – wants it can get away with excluding. I instead respectfully urge the State Bar to make the following additional amendments to the proposal, and then circulate it for what will hopefully be a final round of public comment (barring unforeseen deficiencies raised thereupon) before adequate reforms can finally be advanced:

10/7/2023 TARR 3rd Comment Period

Benjamin Kohn (SBN No. 335723) – AGREE ONLY IF MODIFIED

Part 1: “Automatic Approval of Accommodations Previously Granted for High-Stakes Exams” – AGREE ONLY IF MODIFIED:

1. The policy to “not offer” individualized consideration of certain accommodations that have not been established to constitute fundamental alteration or impose undue burden is unlawful, 28 C.F.R. 35.160(b), 35.164, and is against public policy even if it were lawful. The Rules Revision should make clear that all accommodation requests will receive individualized consideration on their merits, absent demonstrated fundamental alteration or undue burden.
2. Proposed Rule 4.83(A)(6) should be stricken, or at least replaced with an alternative exclusion from the Summary-Matched Grant Policy for accommodations that the State Bar demonstrates – at least in the context of the bar exam’s differing conditions from the prior high-stakes exam – constitute fundamental alteration or impose undue burden.

Part 2: “Considering Accommodations Granted in Law School or College – AGREE ONLY IF MODIFIED:

The State Bar should amend Proposed Rule 4.82 to permit automatic grants of accommodations the applicant documents having received in college or law school, provided that those accommodations:

- (1) were approved for a permanent disability, to ameliorate functional limitations of such disability that the applicant certifies they are still experiencing;
- (2) were requested on a Request for Testing Accommodations form submitted with the relevant sections complete;
- (3) are evidenced by documentation of the prior approval of accommodations granted by the school and are among the testing accommodations granted by the school;

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Benjamin Kohn (SBN No. 335723) – AGREE ONLY IF MODIFIED

(4) were approved by the school after considering medical documentation from one or more qualified treating professional(s), which documentation the applicant submits with their request;

(5) are not accommodations that the State Bar demonstrates to constitute fundamental alteration or impose undue burden in the context of the California bar examination.

If the school itself considered and premised its accommodations approvals on medical documentation from qualified treating professional(s), and the applicant submits that documentation (even if not written for the bar exam nor on the State Bar’s forms) with their documentation of prior approval, that would weed out most approvals generated by the schools which actually rubber stamp every testing accommodation request a student alleges to be premised on disability needs, and limits the burden of producing more exacting documentation on those who have never had to bear it before, while still sparing the vast majority of disabled applicants the substantial burden of repeatedly reinventing the wheel.

Part 3: “Documentation Standards” – AGREE ONLY IF MODIFIED:

1. If the requirements of Proposed Rule 4.85(C) are maintained, they should be narrowed to only accommodations that cannot be administered over [ideally six, and no less than four] days.
2. The mandatory evaluator forms’ reference to “exceptional need” should be rephrased to conform to the better – and more likely to be lawful – phrased wording of Proposed Rule 4.85(C), if a distinction between such accommodations and any others is retained in the rules at all.
3. The State Bar’s definition of “disability accommodations expert,” Proposed Rule 4.80(B), should be further defined as someone trained and certified in

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Benjamin Kohn (SBN No. 335723) – AGREE ONLY IF MODIFIED

the substantive legal standards they will be applying when making recommendations, preferably by the Disability Rights Education & Defense Fund (DREDF); “knowledge” of ADA requirements relating to testing accommodations is too vague.

4. The State Bar’s burden of proof standard for applicants in Proposed Rule 4.81(B)(3) should be amended to substitute “to the satisfaction of the State Bar” with the more appropriate “preponderance of the evidence” standard.

Part 4: “Timelines for Processing Initial Requests” – DISAGREE:

1. Initial decisions by State Bar staff should be provided within two weeks of complete receipt of the applicant’s requests, and this revision should be made to Proposed Rule 4.86(A)-(B) (and striking Proposed Rule 4.84(E)) as part of this rules revision, rather than waiting for a subsequent one to perform an irrelevant experiment about the burden-sparing effect of other revisions.
2. Applicants who petition at least two months before the start of an exam should be provided at least 30 days to appeal adverse decisions.
3. The State Bar should recommend amendment to Cal. Rules Ct. 9.13(d) to make decisions on judicial review of TA decisions practicable in time for the next scheduled administration of the exam given the timelines for exhausting administrative review, and to provide that in TA cases the California Supreme Court will offer mandatory instead of discretionary judicial review.

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Benjamin Kohn (SBN No. 335723) – AGREE ONLY IF MODIFIED
Part 5: “Review by Disability Accommodation Expert Procedural Requirement to Deny Requests” – AGREE ONLY IF MODIFIED:

The State Bar’s definition of “disability accommodations expert,” Proposed Rule 4.80(B), should further require said reviewing expert be someone in the particular specialty of the disability they are reviewing (or a panel of disability accommodations experts from each such medical specialty if there are multiple disabilities across multiple medical specialties), trained and certified in the substantive legal standards they will be applying when making recommendations, preferably by the Disability Rights Education & Defense Fund (DREDF); “knowledge” of ADA requirements relating to testing accommodations is too vague.

Proposed Rule 4.82(G) should be amended to clarify that recommendations for denial by a “disability accommodation [reviewing] expert” cannot by itself satisfy the State Bar’s duties under Proposed Rule 4.82(C) or 28 C.F.R. Pt. 36 App. A at 795-96, and to provide guidance to executing staff that rejecting treating expert recommendations on the credibility of their premises, rather than by demonstrating fundamental alteration or undue burden, should only happen in exceptional cases where multiple reviewing experts in the same specialty don’t just disagree, but credibly articulate based on substantive clinical analysis that no reasonable expert in the field could reach the findings of the applicant’s expert, with detailed findings by the State Bar justifying its reasons for crediting those reviewing experts over the treating expert(s).

10/7/2023 TARR 3rd Comment Period
Benjamin Kohn (SBN No. 335723) – AGREE ONLY IF MODIFIED
Part 6: “Appeals/Review Process” – DISAGREE:

1. Proposed Rule 4.84(E) should be stricken;
2. Proposed Rule 4.88(A) should be amended to provide for thirty days from the decision instead of fourteen days; or alternatively to specify that a notice of appeal must be submitted within fourteen days, but that appeal statements and new evidence may be submitted up until thirty days from the decision or the cutoff in Proposed Rule 4.88(B), whichever comes first. Either way, it should further provide that applicants who submit their petitions at least two months before the start of the exam must receive at least thirty days to submit their completed appeal and still receive a decision thereon before the next administration of the exam.
3. Proposed Rules 4.84(B) and 4.88(B) should both be amended to provide for tolling of the deadlines therein where the State Bar changes the standard conditions of the bar exam less than two months before the Proposed Rule 4.84(B) deadline (or after that deadline).
4. The unduly vague phrase “as soon as is practicable” in Proposed Rule 4.88(D) should be amended to adduce it to: “...as soon as is practicable, and no longer than ten days from the determination by the Director of Admissions, unless an examination schedule requires a sooner timeframe.”
5. Proposed Rule 4.88(E) should be amended to provide applicants whose appeals cannot be fully granted by the Director of Admissions according to Proposed Rule 4.88(C)-(D) with a teleconference hearing by the Examinations Subcommittee similar to that provided to applicants at risk of being denied a positive moral character determination by the Moral Character Subcommittee; in which hearing the applicant, their treating expert(s) if available, their legal counsel if applicable, all “disability

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accommodations [reviewing] experts” relied on by the State Bar, and the
Director of Admissions participate collaboratively.

6. Proposed Rule 4.88(F) should ideally be stricken, but alternatively should be narrowed to apply only to the CBE/Subcommittee review portion of the appellate remedy, and otherwise allow subsequent reconsideration by the Director of Admissions within the same exam cycle to the extent applicants submit those subsequent reconsideration requests by the deadline in Proposed Rule 4.88(B).
7. The State Bar should move the California Supreme Court to simultaneously amend Cal. Rules of Court, rule 9.13(d) to, at least in testing accommodations cases: (a) streamline and expedite the briefing schedule provisions enough to make that judicial review procedure compatible with the timelines for exhaustion of administrative review on a given exam cycle specified within the State Bar Admission Rules, to the extent that applicants who petition the California Supreme Court within two weeks of the Subcommittee’s decision on their administrative appeal will receive a ruling from the Court in time for the next scheduled administration of the exam; and (b) provide for a commitment from the California Supreme Court to review and decide appeals thereto from the CBE on their merits (e.g. mandatory review, not the present discretionary review), on a *de novo* standard of review, and with no greater deference to administrative findings than would be given in a Federal lawsuit.

The appendix below contains responses to deliberations at the 8/18/2023 CBE meeting in support of the above amendments, and following that, reproduces my full comments submitted for the second public comment period on the TA Rule Revision closing 7/31/2023.

1. 59:15 to 59:30; Paul Kramer: “I don’t think there’s anything that prevents somebody from making their [accommodations] request much earlier than the last day we allow them to.”

Response:

You (Paul Kramer) later in the deliberations go even further than this premise and expressly opine that there *should* be an earlier registration deadline for applicants “wanting anything other than standard seats.” As applied to applicants seeking “nonstandard seats” by reason of disability, such a policy is expressly prohibited by the ADA, and such policy opinions should be directed to Congress, not codified into the State Bar admission rules. Even if the ADA allowed for its other procedural requirements to be conditioned on voluntarily requesting accommodations sooner than the deadline for nondisabled applicants to register (which, per DOJ guidelines setting forth *Auer*-deference-entitled interpretations of 28 C.F.R. 35.130(b), 36.309(b)(1), it does not), even on strictly factual and policy points this premise is largely incorrect (and reflects a troubling pattern of Paul Kramer instinctively jumping to the conclusion that any problems with the application of a standing policy are coming from cases where lenience to applicants on disciplined enforcement of other policies is having unforeseen consequences, as was also seen during CBE deliberations on Examsoft glitches with the incorrect assumption that primarily applicants allowed to proceed without meeting posted system requirements were the sole or primary victims of the issue, and with State Bar IT-caused failures to deliver or record responses to waiver forms sent out to applicants causing involuntary withdrawal of exam registrations, which implicit bias I urge be monitored and checked better going forward).

To the extent that it may (or may not) be possible for *some* disabled applicants exercising extreme diligence to submit their requests *marginally* earlier than the final filing deadline for their targeted exam, the fact remains that for no *immediate repeater* applicant would it even be *possible* (let alone manifesting equal opportunity) to do so *enough earlier* for the timelines the Staff and Working Group have been insisting should remain in place (at least for the next few years) to not produce the prejudicial effects commenters have been complaining of (i.e. inability to obtain even the initial decision in time to have at least 30 days to appeal and before they would have to either do less than competitive bar prep or do unsustainably expensive competitive bar prep at risk of those resources being wasted and thus not available to adequately prepare for a retake of the exam if and when the accommodations disputes can be adequately resolved). Importantly, the latter produces considerable prejudice even where the State Bar grants all requested accommodations, if it's done so too late for that applicant to then prepare competitively for the exam itself that cycle without the personal, financial, employment, and long-term career consequences of deferring the exam.

Moreover, the staff proposal to allow 30 days for appeals that are submitted by the timely filing deadline for the exam is not something that immediate repeaters could ever opt for, because under the operative current timelines proposed, to obtain a decision 30+ days before the timely filing deadline those applicants would have to petition well in advance of the immediately prior administration of the exam to that they request accommodations upon. Staff have taken the position with me that an applicant cannot have multiple TA petitions pending at the same time, so attempting to petition that early for a future exam would just lead to the petition being administratively withdrawn. And, even if multiple petitions

were allowed to proceed in parallel for potential future retakes, there rapidly becomes a point at which applying that early risks the disability functional limitations and corresponding accommodation needs becoming outdated (due to new or worsened medical impairment) by the time the accommodations would actually be implemented on an exam.

Lastly, exam results from the previous exam come very close to the final filing deadline, and the documentation required to petition requires cooperation and lead times required by third parties, including busy medical professionals. An immediate repeater already would struggle to submit by even the final registration deadline if they waited for exam results to begin expending significant time, effort, and expense on the compilation of a petition for the next exam that they may or may not even need to retake, if they passed their last attempt. It is fundamentally impossible to submit any earlier than on or around that deadline (at best) for immediate repeaters who wait to work on their petitions until exam results from the previous cycle are posted. Sometimes that proximity prevents applicants from being able to request expanded accommodations on a retake at all, even if their disability limitations have worsened. While immediate repeaters could (as I did) choose to begin such work at risk and not wait for pending exam results, if they passed their last taken exam this means they would have unfairly wasted considerable time, effort, and financial resources. And, again, **even if they begin as soon as they do finish the prior bar exam, that is not soon enough under the proposed timelines to receive an initial decision at least 30 days before the “timely” filing deadline for the next exam, and thus have 30 days to appeal instead of 14 days under the Staff “tiered” deadline plan.**

2. 59:35 to 1:03:10; Paul Kramer: “Christina, you spoke to most of the questions I wanted you to address, but the one I didn’t hear a response to was what happened with regards to the comments that were said to have been lost in the commenting portal?”

Response from Donna Hershkowitz: [“No evidence” portal malfunctioned because all comments confirmed by maker to have been submitted were found either via email (Deborah Meyer-Morris) or in another public comment portal (Shirleen Claiche), and no comments found anywhere from anyone who was indicated as only having been confirmed to have planned to submit (not produced for the CPRA request, or reflected in the portal)”].

Response:

Ms. Hershkowitz’s response was misleading. The evidence of a portal malfunction is derived from the fact that Deborah Meyer-Morris confirmed she had submitted **both** to the TA Rules Revision portal and by email (as she confirmed to Ms. Hershkowitz by email and then in her comments at the meeting, and in the email itself that was found), yet Ms. Hershkowitz by her own admission only found the email and not the portal submission. This was only discovered by Ms. Meyer-Morris because her comment was not produced to me in my CPRA request for the comments received, I’d known Ms. Meyer-Morris had commented, and I informed her of the discrepancy. It then follows that anyone who (unlike Ms. Meyer-Morris) submitted comments **only** via portal, and ran into the same glitch, but did not also send via email, would have had their comments lost as neither they nor the State Bar would have known the portal did not record their response if I had not known about their comment and been able to check it against the CPRA production. They then would incorrectly assume their comment was received and considered by the State Bar. As we know Ms. Meyer-Morris submitted both ways and only the email version was retained, this plausibly occurred.

I also attach hereto emails between Lisa Cummins and Audrey Ching, produced to me under the CPRA, where for a different initiative on a different occasion, there is an explicit and gleeful confession that “unflattering” comments from their critics had not been publicly posted or included in the record, despite Ms. Cummins’s (correct) speculation that the State Bar likely had been required to do so. Despite the clear violation, instead of calling for remedial action, Ms. Cummins applauded Ms. Ching’s mistake by crowing “great for me!” and “I’m not complaining!”

From: Cummins, Lisa <Lisa.Cummins@calbar.ca.gov>
Sent: Wednesday, April 19, 2023 9:30 PM EDT
To: Ching, Audrey <Audrey.Ching@calbar.ca.gov>

I'm not complaining! I was just under the assumption that Daniel D's unflattering comments would be posted for all to see - great for me if they're not! Did Sarkar say anything of note other than his usual rantings about how the State Bar is stealing applicant fees and lining their own pockets?

From: Cummins, Lisa <Lisa.Cummins@calbar.ca.gov>
Sent: Wednesday, April 19, 2023 9:07 PM EDT
To: Ching, Audrey <Audrey.Ching@calbar.ca.gov>

I don't see Daniel de la Cruz's comments posted (only one line). I also don't see Julian Sarkar's comments (but reference to an attachment, if any). Are there attachments? Power BI is interesting, but not too intuitive to use. Hoping that you weren't required to post the entirety of the "beyond scope" comments.

1. 32:33 to 33:30; Robert Brody:

“About the [comments complaining about] the late submission of materials: only 8 pages was prepared by the State Bar; the other 242 pages was [reproductions of] public comment, and many of those pages [are duplicative submissions of the same template comment by multiple me-too commenters].”

Response:

I think the criticism commenters made was not that the State Bar had made the agenda attachment too lengthy (either overall or with respect to the portions generated by the State Bar itself), but that it was posted so close to the meeting (and even closer to the State Bar’s deadline for written public comment for the meeting) as to greatly burden the capacity of prospective public commenters from responding to the Working Group’s updated recommendations as further informed by the comments submitted on the proposal, and do so in time to be meaningfully heard by the CBE for and/or at the 8/18/23 meeting before a decision was made on how to proceed on the Working Group recommendations. The length of the materials went to how burdensome (at best) and impracticable (at worst) that degree of temporal proximity to public comment deadlines had been for them, but the real issue was the timing. Had the Working Group materials been posted 7-10 days before the meeting, instead of ~41 hours before the meeting and ~17 hours before the written comment deadline, I don’t think this criticism would have been raised, notwithstanding their length. I’ll grant you that the mere 18 days spacing between the public comment deadline of 7/31 and meeting date of 8/18 placed a high burden on the Working Group that would have made it more burdensome on you to make those materials available within 8-11 days after public comment closed, but the lesson to be learned from that should be that if a public comment period on a proposal closes that close to the next

CBE meeting, it might be better to agendize the return from public comment at a later meeting, special or normal depending on the urgency of the proposal and the next availability of Board action.

Unfortunately, given that this present (third) iteration of public comment closes even closer to the meeting it will be addressed at, I anticipate this issue of the Working Group materials posted only once the meeting itself is imminent will recur, and that public comment on the meeting may struggle to conform to the most recent positions taken thereby.

2. 33:30 to 35:20; Robert Brody: “The thorniest issue for the Bar are these timeline issues. I believe the best way to address that is that all applicants, not just applicants requesting accommodations, apply sooner than is currently provided by statute, and that would require a statutory change to require [deadlines “with more of a time lag” more in line with his review of other States’ bar exam registration deadlines].

Response:

I agree that such a statutory change may be both merited and helpful, but even if the Legislature adopted it I don’t think it would by itself solve the timeline problems, because both the five month timespan between the February and July bar exams and the realistically achievable degree of compression in turnaround time for grading of the exam constrain how much the final registration deadline for immediate repeater applicants could be moved forward. And, because disabled immediate repeater applicants are equally entitled as first-timer disabled applicants to timelines that allow the same meaningful opportunity to appeal adverse decisions and initial decisions in time to base financial/time commitments upon for competitive bar preparation – both essential to equal opportunity to register and prepare for the exam it is the final registration deadline, – it is the time between the

final registration deadline for immediate repeater applicants and the corresponding administration of the bar exam that is operative for purposes of what timelines meet the DOJ's guidance, which are *Auer*-deference-entitled interpretations of ADA regulations.

In light of this fact, the Legislature could conceivably move the operative deadline forward by at most 1-2 weeks, which extends the turnaround time the rules could lawfully afford staff to make initial decisions from 2 weeks to 3-4 weeks (and with even that depending on the Legislature making such a statutory amendment).

Ideally, disabled applicants would be able to petition for accommodations on the next scheduled bar exam up to 30 days after the results are released for the last offered bar exam, and still receive an initial decision in time to submit an appeal within 30 days of that decision, and receive a final decision at least ten weeks before the start of the next scheduled bar exam to allow for equal opportunity to prepare for the exam (e.g., making decisions on resources to expend in bar prep such as tutoring for that cycle, and whether to arrange other employment to allow study full-time in the leadup to the exam) and to obtain judicial review prior to the exam if needed. Anything less does deprive disabled applicants of equal opportunity even if all accommodations are ultimately granted, as the requested accommodations can only level the playing field if they were granted in a manner that allowed the applicant to do competitive bar prep without unequal financial risks of that magnitude.

That timeline is admittedly not possible to implement alongside twice per year administration of the exam, but with two weeks max turnaround of initial decisions it is possible to allow disabled applicants their choice of an early start (while results of the last exam are still pending) being enough to

provide equal opportunity to make exam prep investments for competitive arrangements – or that if they sacrifice the opportunity to equally prepare for the exam without arranging to do so at risk with respect to financial and time commitments, they are still assured that initial petition submission can be required no earlier than the final deadline for nondisabled immediate repeater applicants to register for an exam, without depriving them of a meaningful opportunity to administratively appeal adverse decisions in time for the next administration of the exam, if not in time to equally prepare.

Anything longer than two weeks turnaround per iteration from State Bar staff – under the present statutory deadlines for exam registration – fails to provide disabled immediate repeaters even one of those two benefits to which the ADA entitles them “to the maximum extent possible,” let alone both. And even if your (Robert Brody) suggestion of getting the Legislature to make the registration deadlines earlier for all applicants – disabled and nondisabled – is accomplished, as explained above there are clear constraints on how much that deadline can be shortened (and the leeway available to State Bar staff without producing discriminatory results proportionately lengthened) given the need to provide a meaningful opportunity for immediate repeaters to register for the exam after receiving notice that they had failed their last taken one, and the degree to which that deadline amendment could be paired with a realistically achievable compression of the grading turnaround time for all applicants. And even if the grading turnaround were not considered a binding constraint, even the inherent five-month timespan between the February and July bar exams does not leave sufficient time (without a registration deadline for an exam that elapses prior to the administration of the preceding exam) for the 60-day turnaround timelines demanded by staff to not have the unlawful prejudicial effects on

disabled applicants at issue. Thus, the type of legislative action you proposed may be a good idea and help facilitate timeline reform at the edges, it would at best allow 3-4 weeks turnaround instead of a two-week turnaround, not a 60-day turnaround.

Accordingly, unless and until the California Legislature commits to making such a change, and admissions staff are prepared to confirm the new auto-approval policy for high-stakes exam and streamlined documentation standards are alone sufficient to commit to an initial decision turnaround no longer than the amount the Legislature shortens the immediate repeater final registration deadline by plus two weeks, the State Bar's ADA-compliant choices as to timelines are: (1) to either expand staff capacity – either by (a) hiring more staff, or (b) by requiring existing overtime pay-exempt high-salaried admissions staff (some of whom, like the examinations program manager, assistant director of admissions, and director of admissions, are paid comparably to associates of large law firms that expect them to work 100+ hour weeks) to work longer hours during the seasonal periods between the final registration deadline and administration of a bar exam –; or (2) make (and disclose to the California Supreme Court and Legislature) a finding that, considering the properly-construed requirements of federal law, the bar exam is not a feasible method of verifying minimum competency for certification decisions to the California Supreme Court on attorney admissions, and that its administration cannot be sustained by the State Bar without subsidization from the State, and let those authorities provide guidance on the correct premises as to how attorney admissions will be handled in Californian going forward (e.g., whether the public interest in the exam, if any, is weighty enough to justify a sufficient subsidy, or whether it should be replaced by cheaper alternative pathways to licensure).

As stated in prior comments, the inability of admissions staff – under existing headcount and hours – to achieve the above turnaround reforms even with the other changes made as part of this rule revision, does not abrogate the State Bar’s duty to provide disabled applicants with timely decisions that do not cause the prejudice inflicted by current rules. As such, any information that could be obtained by bifurcating such reforms off the present proposal (and waiting until the latter has been in effect for two exam cycles to start on a new rules revision that could take effect no sooner than 2027), not only fails to justify that delay and its impact on several classes of disabled law graduates, but is wholly irrelevant to the merits of the timeline reforms proposed essentially unanimously by commenters in all iterations of this rule revision. Public commenters are not unaware of the State Bar’s position in this regard when they press for the timeline concerns, but rather by continuing to press for such reforms in this iteration of the rule revision are communicating that they have considered and rejected that position on the merits.

3. 35:40 to 38:25; Robert Brody: “[The reason] why [Robert Brody disagrees with commenters’ opinions that the automatic grant framework added for “high-stakes exams” should be extended to law school and college exams, and that the Working Group made a distinction between considering extending automatic approvals to accommodations granted in law school and considering extending automatic approvals (for “high-stakes exams”) through double time accommodations] is... we do know there is a wide variety of methods deployed at the law school level, there is no standard, and what our goal here is to level the playing field for all applicants. And I can’t say that we’re doing that when we accept blindly, or without question, whatever was provided in the hundred or so law schools that will be presenting applicants to us to sit for the bar. There’s no standard that the Bar requires and each law school has its own methods for granting accommodations [in various academic contexts]. There’s no consistency, so [Robert Brody] believes law schools rely and wish for the Bar to do its own

check and make sure that the playing field is being leveled with accommodated applicants... Our rules say we give great deference to what law schools have done, but it is not automatic... The best way to streamline this a bit by granting – automatically granting – up to and including double time when it has previously been granted on a high-stakes exam – I’d agree. I think that’s a step in the right direction, it’s the staff recommendation, and its going to be mine: that we take that step, in terms of an automatic grant, and then [Robert Brody believes that is significantly going to cut down on the Bar’s review time for other applicants who may not be eligible for an automatic grant].”

Response:

At this point, and in the spirit of compromise, I do want to clarify upfront that my primary holdups with the “auto-approval” portion of the operative proposal is that: (1) the implementing evaluator forms for the exceptions to auto-approval (not even the rule itself now) require for both ordinary review and review of those exceptions that treating doctors to attest “exceptional need” to recommend private rooms or extra time beyond a specified amount, which is not the correct legal standard for those requests and so allows the State Bar to deny for lack of a treating expert recommendation support what requests the applicants’ treating experts might have recommended had they been asked to apply the correct “best ensures level playing field” standard; and (2) that the “auto-approval” exceptions in the Proposed Rules references and enumerates a policy for both those exceptions and ordinary request review that certain accommodations are to be denied the individualized consideration on the merits and categorically never offered, in defiance of ADA regulation 28 C.F.R. 35.160(b). With those concerns addressed, I personally would be open to compromising away extending the auto-approvals to law school or college grants, even

though I remain unpersuaded that such an extension of the policy would lack merit.

That said, I do disagree that these concerns defeat the extension of auto-approvals to law school and/or college grants, and so I'll explain why.

The written comments received thoroughly addressed this concern, and in my comment I proposed to alleviate it, while still preserving the burden-sparing effect intended by an automatic approval policy for applicants who have in fact endured the burden of producing medical documentation with their law school or college, by only providing automatic approvals where the school had granted the accommodation upon considering medical documentation by qualified treating professionals and that documentation (if not rewritten on the State Bar's forms and addressing the bar exam specifically) is provided to the State Bar. The goal should be to limit the substantial burden of producing this documentation to applicants who have never had to bear it before, while weeding out for greater scrutiny approvals from schools that rubber stamp every request without documentation. There is not a sufficiently greater inconsistency in "rigor" by schools than standardized testing providers to justify requiring *all* disabled applicants and the State Bar to bear the mutual burden of ordinary procedures (including having the doctors rewrite letters they'd written for all entities on the State Bar's forms and addressing the bar exam singly) just to second guess schools' credibility assessments into the medical documentation if they did, in fact, require it to be produced. However, if the schools' policies resulted in approvals without considering medical documentation, those accommodations need not be auto-approved, and those applicants can be fairly subjected to the burden of the State Bar's (new) ordinary procedures for requests for accommodations in the first instance, in

part because they did not have to shoulder that burden previously with their school as the auto-approval-eligible applicants did and in part because of what the absence of that requirement at the school level signifies about the “rigor” accorded to the school’s decision.

4. 38:30 to 41:30; Robert Brody: [Having been on the Committee for 6-7 years, Robert Brody has been impressed by the State Bar’s handling of testing accommodations requests over that time and perceives it to have been done very well and with many improvements over that time, including through the hiring of an “independent expert,” and perceives that the “overwhelming majority of requests from applicants are granted,” which trends in substantive outcomes Robert Brody feels vindicates the procedures the State Bar has been using and thus limits the scope of amendment justified; and also rebuts the perception of some of the commenters that the State Bar’s consultants are “stingy” and “skeptical”].

Response:

While it’s gratifying to hear that the State Bar has improved the process over time and that non-public statistics purportedly indicate that the State Bar often grants applicants’ requests, even presuming the truth of those premises, the conclusions you (Robert Brody) seem to derive from these observations are flawed for at least two reasons.

First, the prejudice of the procedural flaws that commenters have complained of is not limited to the extent that they tend to produce errors in substantive outcomes upon requests that applicants nonetheless manage to make, but rather further extends to: (a) whether they are deterred or outright prevented by the procedural requirements and burdens resulting therefrom from submitting the requests and obtaining a timely “complete” determination from the State Bar in the first place, and improperly coerced to not seeking admission to practice or at least to attempting the exam

without seeking due accommodations; and/or (b) whether they are put to the choice of not taking the next administration of the bar exam, required to commit their financial resources to bar prep at risk of waste and inability to do so again if it takes more iterations to convince the State Bar to grant their request on a future exam; and/or (c) whether the measures they have to go to, and resources they have to expend, to persuade the State Bar to grant their accommodation request places substantially greater burden on disabled applicants than nondisabled applicants to access the exam on a level playing field as to testing conditions themselves. None of the above harms are reflected in statistics of what proportion of accommodation requests considered by the State Bar are granted versus denied.

Second, even on the issue of substantive outcomes, the percentage of requests granted does not directly identify the rate of error in those outcomes (e.g., what portion of the denials that are being made happening on adequately noticed lawful bases that correctly reflect the correct legal standards applied to facts found through an objectively reasonable weighing of the evidence). To the extent that most disabled applicants' particular disability needs and requests are easy to accommodate and thus typically granted, that provides limited comfort if the rare applicants whose disabilities can only be accommodated by more unusual, complex, or burdensome means, are being denied accommodations just because their disability impairments are unusual and difficult to accommodate and not because that is the legally merited result.

1. 47:20 to 48:55; Ashley Silva-Guzman: [Questioned Staff on if they've looked into the cost of increasing staff capacity to the extent that would allow for adoption of the timelines proposed by the public comments; Christina Doell answered that they have not done so, but a consideration would be that to accomplish those timelines admissions staff would only need that surge capacity during very specific and seasonal times in the 30-60 days leadup to each bar exam within a test cycle, and also noted the plan for staff to evaluate after the rules revision has been in effect for two exam cycles how much the automatic approval process reduces processing times overall even with current staff capacity].

Response:

This question is well-taken, and I hope Ms. Doell takes it to heart and comes back to the 10/13/2023 CBE meeting with research on this topic and a concrete fiscal analysis of all options for proceeding in this direction. I do wish you had pressed her on, rather than appeared to accept, her responsive repetition of the Staff line on waiting to tackle the timeline reforms until after the current rules revision has been in effect for two exam cycles, than starting over on a new rules revision that could take effect no sooner than 2027.

That position should be rejected by the CBE, because the inability of admissions staff – under existing headcount and hours – to achieve the above turnaround reforms even with the other changes made as part of this rule revision, does not abrogate the State Bar's duty to provide disabled applicants with timely decisions that provide them equal opportunity and do not cause the prejudice inflicted by current rules. As such, any information that could be obtained by bifurcating such reforms off the present proposal (and waiting until the latter has been in effect for two exam cycles to start on a new rules revision that could take effect no sooner than 2027), not only fails to justify that delay and its impact on several classes of disabled law

graduates, but is wholly irrelevant to the merits of the timeline reforms proposed essentially unanimously by commenters in all iterations of this rule revision. Public commenters are not unaware of the State Bar's position in this regard when they press for the timeline concerns, but rather by continuing to press for such reforms in this iteration of the rule revision are communicating that they have considered and rejected that position on the merits.

2. 49:00 to 49:35; Ashley Silva-Guzman: [Questioned Staff on the qualifications of the staff members who make initial review of files prior to referral to professional consultant; Christina Doell answered that unless the requests can all be automatically approved, they are always referred to professional consultant and no decision is made without their recommendation].

Response:

While I can see how Ms. Doell's response may have seemed reassuring, it nonetheless illustrates how, even if a recommendation to deny from a reviewing expert consultant is properly a *necessary* requirement to deny an applicant's requested accommodation, the proposed rules and implied practice seems to suggest it is also viewed as a *summarily sufficient* one to do so. Particularly where the applicant's request is supported by recommendations from their treating expert(s), the ADA requires that testing agencies such as the State Bar resolve ordinary credibility contests in favor of the treating expert even where it has a reviewing expert who disagrees. Accordingly, the revised rules should neither provide nor imply that the State Bar Staff's or CBE's analysis end at obtaining and applying a reviewing expert's recommendations to deny a request, and they should instead require a detailed analysis and written explanation of why the

reviewing expert's view was credited over the treating expert even applying the required treating expert deference.

1. 52:55 to 54:00; Alex Chan: [Endorses the Working Group recommendation against adopting public comment recommendations for automatic grant of accommodations granted for permanent disabilities on law school exams, because of the diversity of California law schools and their capacity to evaluate requests, and observations made on accreditation decisions].

Response:

The written comments received thoroughly addressed this concern, and in my comment I proposed to alleviate it, while still preserving the burden-sparing effect intended by an automatic approval policy for applicants who have in fact endured the burden of producing medical documentation with their law school or college, by only providing automatic approvals where the school had granted the accommodation upon considering medical documentation by qualified treating professionals and that documentation (if not rewritten on the State Bar's forms and addressing the bar exam specifically) is provided to the State Bar. The goal should be to limit the substantial burden of producing this documentation to applicants who have never had to bear it before, while weeding out for greater scrutiny approvals from schools that rubber stamp every request without documentation. There is not a sufficiently greater inconsistency in "rigor" by schools than standardized testing providers to justify requiring *all* disabled applicants and the State Bar to bear the mutual burden of ordinary procedures (including having the doctors rewrite letters they'd written for all entities on the State Bar's forms and addressing the bar exam singly) just to second guess schools' credibility assessments into the medical documentation if they did, in fact, require it to be produced. However, if the schools' policies resulted in approvals without considering medical documentation, those accommodations need not be auto-approved, and those

applicants can be fairly subjected to the burden of the State Bar's (new) ordinary procedures for requests for accommodations in the first instance, in part because they did not have to shoulder that burden previously with their school as the auto-approval-eligible applicants did and in part because of what the absence of that requirement at the school level signifies about the "rigor" accorded to the school's decision.

2. 54:00 to 54:30; Alex Chan: [Expresses sympathy to the views of the commenters that otherwise seek reform to the TA procedures, while also expressing the view that the CBE's intentions have been good and that CBE member Robert Brody has generously spent a lot of time working on this issue that as a volunteer requires significant personal sacrifice].

Response:

This point was made by several CBE members (Dr. Michael Cao, Robert Brody, Alex Chan, and Paul Kramer included), so I'll clarify that CBE members' collective volunteer status is not lost on me, and for that very reason I have made significant efforts to distinguish my criticism of the bad faith conduct of certain office of admissions staff members from my critique of the CBE and Board volunteers, especially as I have repeatedly observed some staff members exploit that very volunteer dynamic – where CBE and Board members are not full-time employees and most have other full-time "day jobs," that make them less easily able to independently familiarize themselves with relevant background facts, and particularly reliant on staff for the information on which to premise their policy conclusions – to manipulate the information that is presented to the CBE, Board, and similar bodies in the pursuit of particular policy outcomes and directives as, in the apt words of the late Trustee Knoll, *fait accompli*.

As an observer that has attended or watched nearly every meeting of both the CBE and Board and their subcommittees for years, and sometimes also that of the BRC and COAF; reviewed thousands of pages of the staff emails which sometimes explicitly reveal such conspiracies to appear speciously neutral, but in fact be highly partisan and calculated in which options are presented and when and how they are presented, and as to at least Lisa Cummins, also which “unflattering” public comments to suppress from public view. Consequently, I can’t sincerely agree that *no* staff member involved on the State Bar’s side has acted in bad faith, having observed Ms. Cummins clearly do so many times and Ms. Hershkowitz use dubious tactics that, while unexplained, also convey the appearance of improper animus. However, I also can’t fairly impugn *everyone* on the State Bar’s side with bad intentions, and nonetheless recognize and appreciate the volunteer public service of those CBE and Board members that are acting in good faith. I do consider you (Alex Chan) to be among those I credit with good intentions. Neither the existence, substance, or tone of my legal and policy criticisms of the State Bar’s policies, practices, and particular conduct and/or positions, has ever been conveyed with the intent to attack the personal character of those whose policy decisions and conduct I disagree with, and in some cases find to be unlawful.

Like all public service volunteers, CBE members are owed a significant gratitude for the threshold generosity exhibited by accepting and performing the office. That said, all CBE members have chosen to assume a position in which state law designates them as the body that would generally need to approve initiation of the process to propose to the California Supreme Court corrections to any unlawful and/or unjust flaws with the State Bar’s admission rules that would otherwise violate applicants’ rights

and stymie access to the legal profession for law students and graduates, and by extension access to essential legal services for California's general public. The CBE's functions carry typically controlling influence over how the State exercises governmental authority to restrict the Constitutionally-protected liberty interest of individuals by imposing occupational restrictions to practice a chosen profession. I would still have to object to any proposition that, after accepting their office, the performance of every duty of that office by such volunteers can be considered an optional and discretionary further gift to the public that the subjects of the power exerted by the office should feel no entitlement to being exercised in a way that requires substantial amounts of personal time for the volunteer and then should be expected to express further gratitude for the volunteer whenever they opt to do so.

With great power comes proportionately great responsibility, and so by accepting an exclusive position that carries the delegation of such a weighty governmental power over aspiring attorneys' liberty and livelihood at a point of entry following a years-long and massive upfront financial investment, the CBE and Board volunteers should not frame particular expenditures of their volunteer time invested in adequately reviewing public comment, researching legitimate issues within the function of the office that have been raised, and resolving them in a timeframe and degree that preserves the rights impacted by the body's governmental decisions, as optional and discretionary gifts – with all the social expectations of non-entitlement and refrain from criticism to the gift-giver that might come with that framing – as opposed to assumed fiduciary duty, nor should they criticize those expressing rational or reasoned dissatisfaction with their decisions as out of line for expecting highly burdensome undertakings of unpaid volunteers in this context. Accordingly, personal boundaries on the

time commitment of this service should go to the threshold decision each of you make about whether to serve on the body, and not to whether you completely and diligently perform all functions of the office held, and expectations of gratitude on the public should fall likewise.

Finally, I'd like to point out that each and every one of the public commenters criticizing the State Bar in this regard are also reciprocally sacrificing their "personal" and/or "leisure" time as a similar form of volunteer service for the public good. Many of us have each expended hundreds of hours on political activism, research, deliberation, and drafting, on this issue, and I personally have expended far over 1,000 hours of personal time **excluding** all time spent on litigation against the State Bar striving for similar reforms (which litigation I have repeatedly offered to settle for no monetary recovery to myself for a negotiated degree of the reforms I've proposed, and not even necessarily all of them, but which the State Bar has refused to even discuss with me in good faith). The bulk of this time I spent **after** acquiring my California law license, despite that I no longer needed to sit for further administrations of the California bar exam or seek accommodations thereon, in pro bono service to *other* disabled applicants who had yet to do so. In order to do so, and manage the logistics of the public comment deadlines and dubious CPRA responses I have contended with from the State Bar, I have had to at times postpone medical care to serious personal consequences, strain personal relationships due to logistical overcapacity, pull many all-nighters, and forego participation in many personally meaningful activities and opportunities. As such, the State Bar should recognize that these kinds of sacrifices are mutual, not unilateral, for this initiative.

3. 54:30 to 57:20; Alex Chan: “On the issue of extending the 30-day deadline to 60 days, I firmly believe it warrants serious consideration, and I really ask Staff and Mr. Brody to give the applicants more time to submit the requests and submit their application. It is very stressful – extremely stressful if you only give them 45 days, you know, setting aside the fact that they have to prepare for the exam, they also have to prepare their personal statement; have to get their doctors and all their colleges’ letter of support, just a lot of work involved. Also, I just want to mention one more thing; as I’m looking through all the commenters and I remember the one that I read really sort of mentioned the point about the deadline they have to file an appeal – the two-week request for review; really, Christina, let me know if I’m not correct, but I think currently we only give them 14 days, is that correct? [Christina Doell responds that current rules give applicants 10 days and that the current proposal based on public comments had increased that to 14 days proposed, and notes policy to allow extensions if time remains to the first day of the month of the exam]. Personally, I think that’s too short, I appreciate the timeline that we have, but the public has spoken! It’s just too short of a period for them to get together all the necessary documentation and I certainly understand that they can request an extension, but again that’s just sort of another hurdle that we put in front of them to jump through the hoops to get to the place to request review, and so I want us to consider granting or extending the deadline from 14 days to something further out, maybe 30 days. Again, I think we’re just going to have to play around with all the deadlines between submitting applications, getting a response from us, and also moving for a request for review. [Christa Doell responds at 57:35 to 59:05 by “highlighting that there was a recommendation in the agenda item on how we could perhaps extend the appeal deadline to 30 days, and that was based on a tiered system: essentially, if you applied by the timely deadline you would have thirty days, and if you were among the people to apply right on the final deadline, you would get the 14 days [and asking for feedback]. Alex Chan at 58:09 to [] replies that the tiered system is in the right direction, but wants to be cognizant of the good cause they might be later in applying, and wants more guidance from public commenters on if that proposal does enough yet, but for him it’s in the right direction and we should do more if we could”].

Response:

I'd like to thank CBE member Alex Chan for his recognition of the merit of the commenters' pleas for reform on the appeal deadlines, and he is entirely correct that neither 10 days (current rules) nor 14 days (current proposal for applicants whose appeals are not filed by the exam "timely exam registration deadline," the first business day of April for July and November for February) is adequate time to permit applicants to compile an effective appeal.

Staffs' "tiered deadline" proposal is also inadequate to provide a meaningful opportunity to be heard, or to have equal opportunity to prepare for the exam, because it effectively conditions 30 days from the decision to appeal on the initial TA petition being received complete at least six months prior to the targeted administration of the exam. Where the "timely" exam registration deadline (the deadline to appeal where 15-30 days have elapsed between the initial decision and the complete appeal submission) for July is the first business day of April, and for February it is the first business day of November, to obtain a predicate decision to appeal at least 30 days in advance of that date would require initial TA petitions in January for July, and the start of August for February. Particularly given the staff policy expressed to me without prior notice (when the standard conditions of the exam, and resulting need for accommodations, were constantly in flux in March-July 2020) that applicants cannot have multiple petitions pending simultaneously without subsequently submitted ones being "administratively withdrawn," on its face the policy leaves immediate repeaters seeking expanded accommodations with only 14 days appeal turnaround time instead of 30, no matter how diligent they are, and even assuming that they work on

their petition right after their last taken exam while results are months away with the assumption they will need to retake, and risk resources being wasted to do so.

For applicants so situated, this is not just a strict deadline that effectively imposes an earlier registration deadline on disabled applicants compared to nondisabled applicants – itself a policy facially prohibited by the DOJ’s *Auer*-deference-entitled read of ADA implementing regulations. Nor is the deadline merely – as a matter of policy, not compliance concern – flawed by leaving unreasonable inflexibility for personal life circumstances providing good cause for less than the required diligence on applicants’ part, but that would nevertheless ordinarily be achievable for diligent applicants. Rather, the timeline demanded by State Bar admissions staff to have a meaningful time period to turnaround an appeal – let alone to exhaust administrative remedies sufficiently in advance of the next scheduled exam to prepare with equal opportunity relying upon a sufficient grant, or have a meaningful opportunity to seek judicial review, – is facially impossible for immediate repeater applicants to comply with at all (and impermissibly burdensome on even non-immediate-repeater disabled applicants, especially as it risks a deadline so early that medical needs are likely to evolve and alter the accommodations required in the time required for State Bar adjudication between that far-in-advance deadline and the bar exam).

Ideally, disabled applicants would be able to petition for accommodations on the next scheduled bar exam up to 30 days after the results are released for the last offered bar exam, and still receive an initial decision in time to submit an appeal within 30 days of that decision, and receive a final decision at least ten weeks before the start of the next scheduled bar exam to allow for equal opportunity to prepare for the exam

(e.g., making decisions on resources to expend in bar prep such as tutoring for that cycle, and whether to arrange other employment to allow study full-time in the leadup to the exam) and to obtain judicial review prior to the exam if needed. Anything less does deprive disabled applicants of equal opportunity even if all accommodations are ultimately granted, as the requested accommodations can only level the playing field if they were granted in a manner that allowed the applicant to do competitive bar prep without unequal financial risks of that magnitude.

That timeline is admittedly not possible to implement alongside twice per year administration of the exam, but with two weeks max turnaround of initial decisions it is possible to allow disabled applicants their choice of an early start (while results of the last exam are still pending) being enough to provide equal opportunity to make exam prep investments for competitive arrangements – or that if they sacrifice the opportunity to equally prepare for the exam without arranging to do so at risk with respect to financial and time commitments, they are still assured that initial petition submission can be required no earlier than the final deadline for nondisabled immediate repeater applicants to register for an exam, without depriving them of a meaningful opportunity to administratively appeal adverse decisions in time for the next administration of the exam, if not in time to equally prepare.

Anything longer than two weeks turnaround per iteration from State Bar staff – under the present statutory deadlines for exam registration – fails to provide disabled immediate repeaters even one of those two benefits to which the ADA entitles them “to the maximum extent possible,” let alone both. And even if CBE member Robert Brody’s suggestion of getting the Legislature to make the registration deadlines earlier for all applicants – disabled and nondisabled – is accomplished, there are clear constraints on

how much that deadline can be shortened (and the leeway available to State Bar staff without producing discriminatory results proportionately lengthened) given the need to provide a meaningful opportunity for immediate repeaters to register for the exam after receiving notice that they had failed their last taken one, and the degree to which that deadline amendment could be paired with a realistically achievable compression of the grading turnaround time for all applicants. And even if the grading turnaround were not considered a binding constraint, even the inherent five-month timespan between the February and July bar exams does not leave sufficient time (without a registration deadline for an exam that elapses prior to the administration of the preceding exam) for the 60-day turnaround timelines demanded by staff to not have the unlawful prejudicial effects on disabled applicants at issue. Thus, the type of legislative action Mr. Brody proposes may be a good idea and help facilitate timeline reform at the edges, but even if accomplished its effect on the degree of staff turnaround shortening required for disability nondiscrimination compliance is marginal, and thus – even if adopted by the California Legislature – would allow at most 3-4 weeks turnaround instead of a two-week turnaround, not a 60-day turnaround. Accordingly, unless the California Legislature commits to making such a change, and admissions staff are prepared to confirm the new auto-approval policy for high-stakes exam and streamlined documentation standards are alone sufficient to commit to an initial decision turnaround no longer than the amount the Legislature shortens the immediate repeater final registration deadline by plus two weeks, the State Bar's ADA-compliant choices as to timelines are: (1) to either expand staff capacity – either by (a) hiring more staff, or (b) by requiring existing overtime pay-exempt high-salaried admissions staff (some of whom are paid comparably to associates

of large law firms that expect them to work 100+ hour weeks) to work longer hours during the seasonal periods between the final registration deadline and administration of a bar exam –; or (2) make (and disclose to the California Supreme Court and Legislature) a finding that, considering the properly-construed requirements of federal law, the bar exam is not a feasible method of verifying minimum competency for certification decisions to the California Supreme Court on attorney admissions, and that its administration cannot be sustained by the State Bar without subsidization from the State, and let those authorities provide guidance on the correct premises as to how attorney admissions will be handled in Californian going forward (e.g., whether the public interest in the exam, if any, is weighty enough to justify a sufficient subsidy, or whether it should be replaced by cheaper alternative pathways to licensure).

The CBE and Board should reject the admissions staff demand that the timelines be “solved” by speculation of future legislative amendments to deadlines that would not by themselves solve the timeline problem even if someday accomplished, and a future rules revision that would take effect no sooner than 2027 to obtain information that is non-dispositive to whether or not the timelines should be shortened, presented in a futile and impermissible effort to shift the burdens of attaining the results protected by the ADA onto disabled applicants instead of the workloads and/or headcount needs that staff resist so strongly. Even were it to be discovered that two weeks turnaround would require expanded headcount and not just the auto-approval policy for prior high stakes exams, the State Bar would still be required to implement it to comply with ADA regulations – and so the information expected to be adduced from a two-exam-cycles study of this

rules revision to start over on another rules revision does not determine the outcome and urgent reforms should not be delayed for that reason.

Finally, you (Alex Chan) supported the proposition of another (the present) circulation for public comment in part with the statement that doing so would inform the CBE on “have we done enough yet?” Respectfully, many of us feel exasperated at the perception that any ambiguity remained as to the public’s views on that question so closely following our comments (written and oral) for the meeting itself – after the Working Group’s most recent amendment recommended was identified – unequivocally expressing that the Working Group’s amendments failed to resolve most of our concerns with the proposal expressed in the second round of public comment.

And, as Claudia Center explicitly explained in her oral comment at the meeting, given the number of iterations of public comment that have already occurred on this, many disability rights advocates may be feeling worn down by needing to continuously renew and reconfirm their positions after each incremental tweak the State Bar makes, and for that reason their current or future silence should not be interpreted as those commenters’ satisfaction with the operative proposal as soon as they stop making comment following a tweak. Your suggestion that further public comment is needed to determine (implicitly through a decline in opposition) what a mutually satisfactory compromise would be alarmed many of us in light of this dynamic; especially with the remark coming from you (Alex Chan), as someone who has consistently been among the most receptive of all CBE members to our concerns.

41:50 to 42:50; Dr. Michael Cao: [Dr. Cao wishes the public to know that he serves on the Committee as a volunteer, and in that capacity as a non-attorney volunteer, has the intention to “protect the public while making sure that students who need accommodations receive accommodations,” while generally endorsing Robert Brody’s positions as what Dr. Cao believes as the best way to accomplish this stated intent and improve the procedures, because of the time and effort that he observed Robert Brody put into considering them].

Response:

Particularly given your (Dr. Cao’s) perspective as a non-attorney member, I feel compelled to first specifically clarify that “need [for accommodations” is not the governing legal standard that the CBE is required to apply when deciding which applicants should “get accommodations,” nor for what degree of accommodations they should get. Under the ADA, an applicant does not have to demonstrate that they could not attempt the exam without their requested accommodations, nor that they could not surmount the residual handicap either without accommodations or with lesser accommodations. Rather, the threshold standard remains as what accommodations “best ensure a level playing field to the nondisabled.”

The primary point about CBE members’ good intentions and volunteer service was made by several CBE members (Dr. Michael Cao, Robert Brody, Alex Chan, and Paul Kramer included), so I’ll clarify that CBE members’ collective volunteer status is not lost on me, and for that very reason I have made significant efforts to distinguish my criticism of the bad faith conduct of certain office of admissions staff members from my critique of the CBE and Board volunteers, especially as I have repeatedly observed some staff members exploit that very volunteer dynamic – where CBE and Board members are not full-time employees and most have other full-time “day jobs,” that make them less easily able to independently familiarize

themselves with relevant background facts, and particularly reliant on staff for the information on which to premise their policy conclusions – to manipulate the information that is presented to the CBE, Board, and similar bodies in the pursuit of particular policy outcomes and directives as, in the apt words of the late Trustee Knoll, *fait accompli*.

As an observer that has attended or watched nearly every meeting of both the CBE and Board and their subcommittees for years, and sometimes also that of the BRC and COAF; reviewed thousands of pages of the staff emails which sometimes explicitly reveal such conspiracies to appear speciously neutral, but in fact be highly partisan and calculated in which options are presented and when and how they are presented, and as to at least Lisa Cummins, also which “unflattering” public comments to suppress from public view. Consequently, I can’t sincerely agree that *no* staff member involved on the State Bar’s side has acted in bad faith, having observed Ms. Cummins clearly do so many times and Ms. Hershkowitz use dubious tactics that, while unexplained, also convey the appearance of improper animus. However, I also can’t fairly impugn *everyone* on the State Bar’s side with bad intentions, and nonetheless recognize and appreciate the volunteer public service of those CBE and Board members that are acting in good faith. To be clear, you (Dr. Cao) individually have not to date given me any reason to accuse you of bad intentions. Neither the existence, substance, or tone of my legal and policy criticisms of the State Bar’s policies, practices, and particular conduct and/or positions, has ever been conveyed with the intent to attack the personal character of those whose policy decisions and conduct I disagree with, and in some cases find to be unlawful.

Like all public service volunteers, CBE members are owed a significant gratitude for the threshold generosity exhibited by accepting and

performing the office. That said, all CBE members have chosen to assume a position in which state law designates them as the body that would generally need to approve initiation of the process to propose to the California Supreme Court corrections to any unlawful and/or unjust flaws with the State Bar's admission rules that would otherwise violate applicants' rights and stymie access to the legal profession for law students and graduates, and by extension access to essential legal services for California's general public. The CBE's functions carry typically controlling influence over how the State exercises governmental authority to restrict the Constitutionally-protected liberty interest of individuals by imposing occupational restrictions to practice a chosen profession. I would still have to object to any proposition that, after accepting their office, the performance of every duty of that office by such volunteers can be considered an optional and discretionary further gift to the public that the subjects of the power exerted by the office should feel no entitlement to being exercised in a way that requires substantial amounts of personal time for the volunteer and then should be expected to express further gratitude for the volunteer whenever they opt to do so.

With great power comes proportionately great responsibility, and so by accepting an exclusive position that carries the delegation of such a weighty governmental power over aspiring attorneys' liberty and livelihood at a point of entry following a years-long and massive upfront financial investment, the CBE and Board volunteers should not frame particular expenditures of their volunteer time invested in adequately reviewing public comment, researching legitimate issues within the function of the office that have been raised, and resolving them in a timeframe and degree that preserves the rights impacted by the body's governmental decisions, as optional and discretionary gifts – with all the social expectations of non-

entitlement and refrain from criticism to the gift-giver that might come with that framing – as opposed to assumed fiduciary duty, nor should they criticize those expressing rational or reasoned dissatisfaction with their decisions as out of line for expecting highly burdensome undertakings of unpaid volunteers in this context. Accordingly, personal boundaries on the time commitment of this service should go to the threshold decision each of you make about whether to serve on the body, and not to whether you completely and diligently perform all functions of the office held, and expectations of gratitude on the public should fall likewise.

Finally, I'd like to point out that each and every one of the public commenters criticizing the State Bar in this regard are also reciprocally sacrificing their “personal” and/or “leisure” time as a similar form of volunteer service for the public good. Many of us have each expended hundreds of hours on political activism, research, deliberation, and drafting, on this issue, and I personally have expended far over 1,000 hours of personal time **excluding** all time spent on litigation against the State Bar striving for similar reforms (which litigation I have repeatedly offered to settle for no monetary recovery to myself for a negotiated degree of the reforms I've proposed, and not even necessarily all of them, but which the State Bar has refused to even discuss with me in good faith). The bulk of this time I spent **after** acquiring my California law license, despite that I no longer needed to sit for further administrations of the California bar exam or seek accommodations thereon, in pro bono service to *other* disabled applicants who had yet to do so. In order to do so, and manage the logistics of the public comment deadlines and dubious CPRA responses I have contended with from the State Bar, I have had to at times postpone medical care to serious personal consequences, strain personal relationships due to

logistical overcapacity, pull many all-nighters, and forego participation in many personally meaningful activities and opportunities. As such, the State Bar should recognize that these kinds of sacrifices are mutual, not unilateral, for this initiative.

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Introduction:

While the State Bar should amend the Admission Rules to deem approvals on other high-stakes exams for same requested accommodations, predicated on permanent disabilities – coupled with an applicant’s certification that the functional limitation(s) that the accommodation was intended to ameliorate remains present – as sufficient evidence to summarily grant those requests without further scrutiny, 28 C.F.R. 36.309(b)(1)(v), the present Proposed Rule 4.83(A) subsections (6)-(7) still would impose improper exclusions upon applicants seeking the benefit of this amendment. Worse still, while pertaining directly only to the Summary-Matched Grant Policy, Proposed Rule 4.83(A)(6) is inseparably intertwined with and predicated on (and thus indirectly enumerates into the Rules) an egregiously unlawful policy (*see* 28 C.F.R. 35.160(b), 35.164) – generally applicable to all accommodation requests, even those complying with the ordinary petition documentation requirements rather than a matched grant to prior exams – to never provide individualized consideration of certain disfavored accommodation requests and deem those accommodations as “not offered by the State Bar,” without the required boundary that such accommodations had been demonstrated by the State Bar to constitute fundamental alteration or impose undue burden. The Rules Revision should clarify that the State Bar must provide individualized consideration on the merits to all accommodation requests by the applicant that it has not demonstrated would cause such fundamental alteration or undue burden.

While the State Bar’s elimination of the redundant and prejudicial originally proposed Summary-Matched Grant Policy requirements that the approvals had been decided within the last 5 years and been unanimously made by all prior testing agencies from which the applicant had ever taken a high stakes examination (responsive to the first iteration of public comment on the previous Rules Revision

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proposal) was appropriate and appreciated, the State Bar should still strike subsections (6)-(7), or at a minimum replace them with a sixth requirement that the accommodations granted on the previous high-stakes exam(s) eligible for a summary-matched grant not constitute any fundamental alteration or impose any undue burden in the context of the bar exam.

The language of Proposed Rule 4.85(B) conforms to Proposed Rule 4.83, so the corrective amendments thereto recommended herein would also address Proposed Rule 4.85(B). In contrast, while Proposed Rule 4.85(C) is largely reasonable other than the scope of accommodations for which it raises the detail of explanation by the applicant and their experts to provide the State Bar requires for the applicant to seek those accommodations – because Proposed Rule 4.85(C) properly does not mandate or use the “exceptional need” language on the evaluator forms that implement it, which goes beyond the text of the Proposed Rule – due to that improper language of the forms, rephrasing those forms to match Proposed Rule 4.85(C) and remove the attestation of “exceptional need” for accommodations requiring more detailed explanation of bases is necessary for that requirement to be consistent with the governing “best ensures level playing field to nondisabled applicants” ADA legal standard.

Further, the State Bar should amend its proposal to narrow the set of accommodations that trigger the requirements of Proposed Rule 4.85(C) (for ordinary petition process) and fall into the exclusion from the summary-matched grant policy for approvals on prior high-stakes exam(s) provided under Proposed Rule 4.83(A)(7) (to the extent that exclusion is retained at all, which it should not be). To the extent that Proposed Rules 4.83(A)(7) and 4.85(C) are retained, only accommodations that require the bar exam to be administered over more than six days (or at minimum, more than four days) should require more detailed

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explanations of the predicate disability basis from the applicant and ineligibility for the summary-matched grant policy. Requests for a private room and/or accommodations requiring testing over four days (and ideally also accommodations requiring testing over five to six days) should fall under the same procedures as any other accommodation requests.

Only if such further modifications were made would this component of the proposal be ready to advance for adoption.

Proposed Rule 4.83(A)(6)

Proposed Rule 4.83(A)(6) provides that, to be eligible for the summary-matched grant policy, the accommodations granted on prior high-stakes exams must be among those for which “[t]he State Bar offers the same or equivalent testing accommodations,” which conversely suggests there are accommodations that the State Bar has chosen to never offer, whether through this policy or the regular petition process, even if previously granted on (an)other high-stakes exam(s). This exclusion – and particularly the underlying, more broadly applicable policy on which it is predicated and would codify into the Admission Rules seemingly beyond the Summary-Matched Grant Policy exclusion – are improper because, as discussed below, the State Bar cannot and should not deem any particular accommodation as categorically “not offered” for individualized consideration in at least the regular petition process that subsection (6) expressly incorporates the exclusion from, and effectively codifies into the Admission Rules for, – absent fundamental alteration or undue burden – and the proposed rule not only enumerates no such boundary on that exclusion, but both it and the predicate limitations on accommodations available to request through any procedure must be read in the context that the State Bar has designated stop-the-clock breaks and remote testing as examples of

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accommodations categorically “not offered” when neither of those examples would constitute such fundamental alteration or undue burden. Accordingly, Proposed Rule 4.83(A)(6) should either be stricken or narrowed to require only that the accommodations previously approved not be ones that the State Bar demonstrates to constitute fundamental alteration or impose undue burden, and the “not offered” policy on which the exclusion is based should be similarly constrained by express provision within the Amended Rules.

1. Neither Stop-the-Clock Breaks nor Remote Testing Constitute Fundamental Alteration or Impose Undue Burden:

In response to the first public comment submissions, the Working Group addressed its refusal to ever consider stop-the-clock breaks or remote testing accommodation requests as follows: “While the State Bar does not offer ‘stop the clock’ breaks, the State Bar offers the equivalent by granting additional time but the clock continues to run. Additionally, the multiple-choice exam (MBE) owned and scored by the National Conference of Bar Examiners is not offered as a remote exam.”

This response fails to explain why substituting extra time is a necessarily equivalent accommodation to stop-the-clock breaks, nor how the NCBE’s alleged refusal to offer the MBE as a remote exam generally makes such an accommodation constitute a fundamental alteration or impose undue burden when 28 C.F.R. 35.130(b) clarifies that Title II’s requirements extend to refraining from contracting with other entities or entering licensing agreements that would prevent it from otherwise reasonably accommodating disabled applicants – or else somehow otherwise permits the State Bar to contract on terms that deny applicants

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individualized consideration of their requests on the merits as required by 28 C.F.R. 35.160(b).

For granting additional time to effectively substitute for stop-the-clock breaks, the amount of extra time equivalent to the duration of the on-clock breaks used as a substitute must be considered additive to extra time requested and approved to address a different disability functional limitation from the requested breaks. The Working Group neither confirmed that the Rules do so nor amended the proposal to the effect that they will do so, nor did they explain why – as a blanket policy with no individualized analysis – the State Bar may reject a requested accommodation that is not demonstrated to be a fundamental alteration or undue burden merely because it granted equal or greater extra time to ameliorate some other disability need.

Moreover, even additive equivalent extra time to the duration of any additional stop-the-clock breaks requested would only equivalently address certain disability needs to the extent that the distribution of that extra time was fixed to the same unit of time (i.e., test day) as the breaks were requested for, rather than uniformly divided and apportioned to specific test session subparts, so that timing and distribution of usage of the extra time as a break could be equally flexible around symptoms and effects of disability, and so be effective at ameliorating those predicate functional limitations – and also that the applicant would be at liberty to do everything during their exam time (i.e. use the restroom freely, eat or drink, take medicine, etc.) that they would have been allowed to do during break time when they lack access to test materials. The LSAC consent decree on which the Rules Revision purports to be based treats stop-the-clock breaks as common and reasonable accommodations that should be summarily approved for a large variety of disabilities, and most other testing entities routinely approve them, and so while

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Admissions Staff might find them operationally inconvenient to administer, any suggestion that they constitute fundamental alteration or undue burden would be meritless.

Similarly, to the extent that, as alleged in exam FAQs for the February 2022, July 2022, February 2023, and July 2023 exams, the NCBE is conditioning its license of the MBE on the State Bar refusing to individually consider accommodation requests for remote testing (which the NCBE has denied requiring, and the State Bar has claimed no records of such a contract exist in response to CPRA requests for records reflecting such agreements), such a fact would not bring the State Bar’s stated policy into compliance with 28 C.F.R. sections 35.130(b) and 35.160(b)(2), the former of which expressly prohibits such contractual or licensing agreements and the latter of which mandates individualized consideration of every accommodation request rather than blanket policies about which types of accommodations that are not established to constitute fundamental alteration or undue burden are or are not “offered by the State Bar.”

Nonetheless, for its part the NCBE has posited that it does *not* necessarily oppose the State Bar granting Remote MBE testing to individual applicants as a disability-based testing accommodation. What it has declined to do is offer the State Bar a license to *blanketly administer the MBE as a remote exam under the standard testing conditions of the California Bar Exam* “in the current environment,” based on a strong *policy preference* for “uniformity” and “security.”

The State Bar has already proven beyond peradventure that remote testing is *not* a fundamental alteration or undue burden by administering three bar exams in that modality as a standard condition, and by maintaining its preparedness to do so again prospectively – but only should circumstances be deemed to justify its return for nondisabled applicants too and not just disabled applicants. These facts expose

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that the State Bar’s (and NCBE’s, even if the State Bar’s allegations are credited) true objection to this accommodation is not its feasibility to implement or the capability of the State Bar to assess through the exam what it purports the exam to test. Rather, where the availability of remote testing turns determinatively on the needs of nondisabled applicants and cannot be considered on an individualized basis, the primary objection seems to be to the proposition that there would be substantial “deviations in testing conditions” between nondisabled and disabled applicants if circumstances were found to warrant remote testing for some disabled applicants, but not the majority of all applicants, rather than the State Bar’s and NCBE’s mutual policy preference for “uniformity” in such conditions. Yet, a fundamental purpose of the ADA and related laws is to mandate the degree of modifications to standard conditions that, for each individual disabled applicant, best ameliorates the handicapping effects of their disabilities, to the maximum extent possible. Framing an inability to maintain a desired level of uniformity in conditions between all applicants and/or perceived fairness to nondisabled applicants by doing otherwise as itself a basis for fundamental alteration or undue burden is nothing less than impermissibly substituting the policy judgments of Congress for those of the State Bar. Congress properly weighed the equity considerations in disabled persons’ interest in equal access to public life participation generally and governmental services and programs particularly against the need to sometimes impose disparate treatment between disabled and nondisabled individuals to do so and all ancillary fairness concerns therewith, along with the significant economic resources public entities would be required to expend in order to comply, and enacted appropriate disability rights legislation, which it has strengthened over time (in part, to clarify that standardized testing entities were not doing enough to make exams equally accessible). Congress further authorized the

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DOJ to promulgate standards and regulations that further expand the requirements of the ADA beyond that enumerated in the statutory text – and it has. The California Legislature, too, has weighed these policy considerations, and generally has concluded that even the Federal law provisions do not go far enough in securing the rights of disabled persons, and thus provided even more expansive standards and remedies under California law. Mere political disagreements with the policy wisdom of the statutory and regulatory schemes’ fundamental requirements and purpose in this regard, at least in the context of licensing exams – whether held by the State Bar staff, CBE, Board, and/or one or more of its preferred vendors – cannot form the basis of a fundamental alteration or undue burden claim. State Bar staff and officials need to learn to better recognize where their administrative decision-making duties involve impartially applying the laws and judgment calls handed down from the elected branches of the federal and state governments to the individual facts of each applicant’s situation – and find those facts based on objective weight of the evidence analysis rather than whether a staff member or consultant identified an omission they perceive to render the applicant’s showing imperfect – not to weigh in and apply personal political views and/or the agency’s logistical and budgetary preferences on whether and how a particular medical situation should be addressed.

In an environment where the State Bar could no longer claim sovereign immunity, blustering a summary demurrer (devoid of citations or legal analysis) that the proposal complies with “all applicable laws and regulations,” is unlikely to be persuasive to most judges when an aggrieved February 2022 and after applicant with disability-based elevated COVID risk – who had requested and been refused remote testing as an accommodation – subsequently brings a judicial challenge, nor will assertions that compliance with the NCBE’s alleged preferences was the reason

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for doing so. Notably, Ninth Circuit Judge Callahan has already expressed her disagreement at oral argument in App. No. 20-17316 with the State Bar’s position that its handling of disability accommodations is complying with “all applicable laws and regulations.”

2. Absent such Fundamental Alteration or Undue Burden, the State Bar Cannot Lawfully Refuse Individualized Consideration of an Applicant’s Requested Testing Accommodations:

ADA regulation 28 C.F.R. 35.160(b) requires that all accommodation requests be given individualized consideration with primacy to the accommodations requested by the disabled individual. As a threshold matter, such individualized consideration must take the form of a good-faith and collaborative inquiry into what “best ensures a level playing field” to nondisabled applicants, which where met creates a presumption of reasonableness for the requested accommodation(s) rebuttable only by fundamental alteration or undue burden. 28 C.F.R. 36.309(b); *Enyart v. Nat’l Conf. of Bar Examiners, Inc.*, 630 F.3d 1153, 1163 (9th Cir. 2011); *see also* 28 C.F.R. Pt. 35 App. A (approving the application of Title III testing standards to Title II testing situations); *K.M. ex rel. Bright v. Tustin Unified Sch. Dist.*, 725 F.3d 1088, 1096-97 (9th Cir. 2013). The State Bar can only assert fundamental alteration or undue burden to rebut such a presumption and thus excuse the denial of otherwise reasonable accommodations if it does so in writing at the time of denial, in the procedural manner (and with the detailed written justification) prescribed by 28 C.F.R. 35.164 and *K.M.*, 725 F.3d at 1096-97; and, for undue burden, must further satisfy the heightened Title II standard set forth in 28 C.F.R. Pt. 35 App. B at p.707 (explaining that undue burdens under Title II requires a far greater showing than under Title III’s “not readily achievable” standard).

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While the applicant faces the initial burden to establish that they have one or more disability and to articulate and substantiate how and why the accommodations they request meets the best ensures level playing field standard, which threshold burden submission of proof that the request(s) had been granted on (a) previous high-stakes exam(s) accomplishes, 28 C.F.R. 36.309(b)(1)(v), once they have done so the applicant’s requested accommodations are thus rebuttably presumed reasonable, and to lawfully deny such request(s) the burden shifts to the State Bar to rebut that presumption. As the State Bar must perform an individualized, fact-intensive inquiry to accomplish this and permissibly deny such requests, *Wong v. Regents of Univ. of Cal.*, 192 F.3d 807, 818 (9th Cir. 1999), it cannot categorically designate certain accommodations as “not offered” as proposed in subsection (6) of Proposed Rule 4.83(A).

Accordingly, any categorical exclusions of particular accommodations that do not inherently constitute fundamental alteration or impose undue burden facially violates these authorities, at least as applied to accommodation requests under ordinary petition procedures. While Proposed Rule 4.83(A)(6) concerns the summary-matched grant policy, not ordinary petition review, correction of the policy under ordinary petition review nonetheless deprives Proposed Rule 4.83(A)(6) of any purpose or operational effect, as it only excludes accommodations that would be ineligible for consideration under the ordinary petition procedures too. Further, amending Proposed Rule 4.83(A)(6) to enumerate specific accommodations as ineligible for the summary match procedure, but still offered under the regular procedures, would render Proposed Rule 4.83(A)(7) (doing just that) either superfluous or expanded to a degree that would unduly undermine the burden sparing effect of the Summary-Matched Grant Policy, and so

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would lack merit for the same reasons that Proposed Rule 4.83(A)(7) should be stricken (see below)).

Proposed Rules 4.83(A)(7), 4.85(B)-(C):

Proposed Rule 4.83(A)(7), as implemented by Proposed Rule 4.85(B)-(C), excludes from the summary-matched grant policy (if not individualized merits consideration through the ordinary petition procedures) private room accommodations and any accommodations that would require the exam to be administered over more than three days, though unlike the accommodations “not offered” by the State Bar would still allow consideration of such requests under the regular petition procedures, which for this set of accommodations require applicants to both provide greater detail in their explanations of the bases for such requests, Proposed Rule 4.85(C), and submit treating expert recommendations that, under the new mandatory evaluator forms, impermissibly require treating experts to attest the applicant has “exceptional need” for these accommodations to recommend them. In fact, even applicants seeking such accommodations under the regular petition procedures would, under the revised forms, need their treating expert(s) to attest to exceptional need in order to recommend those accommodations in a manner that is required for the applicant to have their petition deemed as “complete” and thus be considered by the State Bar at all.

As discussed above, the governing threshold legal standard the State Bar must use is what best ensures a level playing field to nondisabled applicants. Neither absolute nor exceptional degrees of necessity can be required to satisfy that standard, which would suggest such accommodations may only be granted if the handicap would be clearly insurmountable for the disabled applicant, as opposed to whether an unnecessary disability-based handicap remains without the sought

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accommodations. At most, the State Bar could condition granting an accommodation which it demonstrates to be fundamental alteration or impose undue burden, and thus has no legal obligation to provide, on such a showing, but such exceptions do not apply to private rooms (among the most frequently provided testing accommodations under LSAC guidelines) nor (per LSAC guidelines) to extra time greater than 50% without a severe visual impairment and 100% with one. As the State Bar cannot otherwise substantively require that degree of necessity to grant the accommodation, it cannot run around the substantive legal standard by procedurally requiring its attestation to consider the petition at all. In addition to amending Proposed Rules 4.83(A)(7) and 4.85(C), the new evaluator forms will require corrective amendments so that treating experts may recommend what accommodations they see fit without indicating any “exceptional need” or other form of “necessity.”

Moreover, where the applicant has met their threshold burden through the attestations and recommendations of qualified treating expert(s) – as opposed to, for example, their own self-reporting and/or evidence of prior approvals on other exams, a showing that would be *prima facie* sufficient to form a rebuttable presumption of reasonableness, 28 C.F.R. 36.309(b)(1)(v), but potentially be far more easily negated by a disagreeing reviewing expert opinion than the support of qualified treating expert(s) – the State Bar is required to defer to the opinions and recommendations of treating experts over reviewing experts and resolve ordinary credibility contests in favor of treating expert(s) in making its threshold findings on the diagnoses proffered and what best ensures a level playing field, as it is the treating experts who have had the opportunity to meet with and directly evaluate the applicant. 28 C.F.R. Pt. 36 App. A at 795-96. While theoretically the State Bar could still negate the threshold premises that the applicant has qualifying disability and/or

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that the requested accommodations best ensure a level playing field even with treating expert support, doing so requires far more than a reviewing expert recommendation to that effect – especially one that is summarily adopted by the State Bar without analysis or scrutiny, as is present practice. Ordinarily, most requests of a qualified disabled individual supported by treating expert recommendations should be granted without further scrutiny, and when they are not, almost all such denials should be predicated on a demonstration of fundamental alteration or undue burden.

Rejecting a treating expert’s recommendations on the credibility of their premises, rather than fundamental alteration or undue burden, should only happen in exceptional cases where multiple reviewing experts in the same specialty don’t just disagree, but credibly articulate based on substantive clinical analysis that no reasonable expert in the field could reach the findings of the applicant’s expert, with detailed findings by the State Bar justifying its reasons for crediting those reviewing experts over the treating expert(s). The reviewing expert(s) especially cannot sufficiently rebut any treating expert(s) merely by identifying perceived omissions of specific circumstantial details not expressly asked on the evaluator forms or determinative on the material facts – that they would have preferred to analyze before accepting the recommendation – in the treating expert’s otherwise reasoned explanations, without any substantive clinical analysis of what the weight of the information that *was* provided would support.

For all of these reasons, the State Bar cannot require attestation of exceptional need for any accommodations it has not demonstrated to constitute fundamental alteration or impose undue burden on its evaluator forms or as a substantive standard in evaluating requests under the ordinary petition procedures. It admittedly is permitted to set higher requirements for the summary-matched grant

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policy, where unlike subsection (6), subsection (7) does not incorporate by reference impermissible general standards from regular petition review, but subsection (7) should nonetheless be stricken; both because the same policy justifications (eliminating unnecessary burdens on disabled applicants when they present what should already be sufficiently probative evidence) apply to private rooms and greater than 50% extra time as to other accommodations, and especially where the LSAC consent decree best practice guidelines set the criteria for accommodations that should be eligible for summary-matched grants on prior high-stakes exams more expansively than Proposed Rule 4.83(A)(7). The LSAC/DOJ panel included private rooms, additional breaks, up to 50% extra time for applicants with only one (non-visual) disability impairment, and up to double time for applicants with multiple distinct disability impairments or a visual impairment, in its summary matched grant requirements. Not only would even 50% extra time potentially require more than three days to administer for the bar exam if the applicant also needed shorter than standard test days and/or extra breaks – both accommodations eligible for simultaneous summary match if previously approved on any high-stakes exam under the LSAC guidelines, – but the LSAC guidelines prescribe summarily matched grants of as much extra time as double time for applicants with multiple distinct disability impairments and/or a visual impairment, which is more expansive eligibility for extra time of between 51% and 100% additional time than proposed by the State Bar here. Equally important, while the LSAC guidelines do not mandate a summary-match grant of more extra time than double time, they explicitly state that accommodations of 150% to 200% (triple time) extra time should generally be considered reasonable and ordinary accommodations for applicants with both visual and non-visual disability impairments.

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Accordingly, even if the State Bar does limit the summary match policy-eligible accommodations to an extent greater than accommodations it has not demonstrated to constitute fundamental alteration or impose undue burden, the number of days that triggers the exclusion should be higher than three and a private room should be eligible for a summary-match grant if it had been an approved accommodation (rather than a standard condition or operational policy for implementing other accommodations) on any of the prior high-stakes exam(s) documented.

CONCLUSION:

1. The policy to “not offer” individualized consideration of certain accommodations that have not been established to constitute fundamental alteration or impose undue burden is unlawful, and is against public policy even if it were lawful. The Rules Revision should make clear that all accommodation requests will receive individualized consideration on their merits, absent demonstrated fundamental alteration or undue burden.
2. Proposed Rule 4.83(A)(6) should be stricken, or at least replaced with an alternative exclusion from the Summary-Matched Grant Policy for accommodations that the State Bar demonstrates – at least in the context of the bar exam’s differing conditions from the prior high-stakes exam – constitute fundamental alteration or impose undue burden.
3. Proposed Rules 4.83(A)(7) and 4.85(C) should either be stricken or at least narrowed to only apply to accommodations that cannot be administered over a particular number of days that is greater than the presently proposed litmus of three days.

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4. The new treating expert evaluator forms should be revised to rephrase the term “exceptional need” that applicants’ experts must attest to recommend certain accommodations on those forms to – at most – ask for more specific details on why those accommodations better ensure a level playing field for the applicant than lesser accommodations that could be administered over fewer days.

“Position on Proposed Rules Re: Considering Accommodations Granted in Law School or College” – AGREE ONLY IF MODIFIED:

Contrary to Proposed Rule 4.82, the State Bar should not distinguish between timed law school or college exams and other types of prior “high-stakes examinations” an applicant may have received testing accommodations upon for purposes of whether to summarily grant any accommodation previously approved for school exams based on a permanent disability where the applicant certifies they continue to suffer the same functional limitation(s) the accommodation(s) at issue had been approved for – at least if the school itself considered and premised its approval of the predicate accommodation(s) on medical documentation from one or more qualified treating professional(s), rather than self-reporting, and the applicant submits that documentation (even if not written for the bar exam nor on the State Bar’s forms) with their documentation of prior approval. Such an added condition would weed out most approvals generated by the schools which actually rubber stamp every testing accommodation request a student alleges to be premised on disability needs, and limits the burden of producing more exacting documentation on those who have never had to bear it before, while still sparing the vast majority of disabled applicants the substantial burden of repeatedly reinventing the wheel.

The primary purpose of a summary-grant match policy is to better balance the State Bar’s interest in verifying the legitimacy of the disability functional limitations and vetting the propriety of the requested accommodations thereto against the myriad burdens – financial, time and lead time, logistical, etc. – additively imposed on disabled applicants by requiring them to obtain detailed, lengthy written reports from their doctors in each field of specialization at issue for their conditions, or duplicate those their doctors have already written to address all other schools and testing entities once without reinventing the wheel for each one on the State Bar’s forms, at a time when they are typically already facing grueling

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demands – either from the competing responsibilities of law school or of traditional post-graduation bar exam preparation – especially when often facing those exacting baseline conditions at the structural handicap disabilities impose across all life contexts. See Prof. Katherine Macfarlane, *Accommodation Discrimination*, 72 American University Law Review (Aug. 20, 2022), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4190587.

Nonetheless, secondary purposes exist, not the least of which is the spared staff time, consultant time, and general administrative resources associated with processing requests for accommodations through more searching review procedures. By excluding law school and college exam approvals from the summary procedures, the State Bar is adding considerable volume to its roster of petitions and appeals to closely scrutinize, refer to reviewing experts, and then adjudicate. The size of this additive volume is significant – many disabled applicants received and then seek on the bar exam accommodations they received in law school, but had not even requested on their last taken standardized exams, because law school exams are typically more recent for the average bar applicant than past “high-stakes” standardized tests, and that recency means that law school accommodations are comparatively more likely to reflect new or worsened disability impairments that were not at issue for standardized “high-stakes” college or law school admissions exams.

The CBE’s rejection of the Working Group recommendation – to not distinguish between school exam approvals and “high-stakes” exam approvals for the summary-match grant policy, – in favor of Staff’s recommendation to apply that policy only to the latter, was articulated to be because of how “challenging” the CBE found “ensuring consistency and rigor across all institutions evaluating testing accommodations requests.” This concern is misplaced for at least two reasons:

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(1) Uniformity of assessments into what testing accommodation requests best ensure a level playing field is not attainable under either version of the policy: not only are disability accommodations an inherently individualized analysis to the particular impairments of each applicant, regardless of who makes the determination, but the field of treating doctors (whose evaluations 28 C.F.R. Pt. 36 App. A at 795-96 provides must be entitled to controlling weight in the review that would occur without an automatic grant, absent exceptional circumstances) is even more diverse than that of school-designated evaluators, and likely no more consistent in rigor (if still much more accurate than reviewing expert consultants can generally be, due to their opportunities to meet with and personally assess their patients and their holistic situation).

Nor is the particular assumption the CBE makes here (that the consistency and rigor of the various standardized testing vendors who offer what has been labeled “high-stakes exams” is any more reliable than that employed by schools) founded on more than speculation. The proposition that colleges and law schools do not reliably take seriously the integrity of their exams or thoroughly scrutinize disability accommodation requests is belied by the experiences of most disabled students in higher education. In fact, law school exams in particular are similarly “high-stakes”: like other standardized tests (and the bar exam), they’re graded on a curve (increasing the need to ensure a disabled student faces neither an unfair handicap nor gets an unfair advantage through overaccommodation); they typically constitute the grade for the entire course without any other coursework/homework, attendance, participation, or other performance metrics counting; and law school grades have more impact on legal employment opportunities than grades alone do in other professions. In any event, the State Bar must necessarily tolerate some degree of inevitable inconsistency in the scrutiny applied to claims of disability.

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(2) Even assuming *arguendo* that there is a material difference in “consistency and rigor” applied by schools, compared to other types of evaluators in general and standardized testing organizations in particular – that is redressable by carving prior school accommodations out of the summary-matched grants policy – such uniformity is only one value criterion to be balanced against a plethora of others, most notably the *accessibility* of the exam. If achieving the CBE’s preferred degree of uniformity comes at the cost of the exam not being readily accessible to disabled applicants; makes the exam far more costly to attempt for disabled applicants than nondisabled applicants through documentation burdens, even when all requested accommodations are granted as a result; and ultimately produces a degree of error in meting out appropriate accommodations through deterrence and outright procedural inaccessibility greater than the amount of error summarily crediting decisions produced with purported inconsistency and lack of rigor introduces, then that cost is too great.

While the State Bar may have concerns that some applicants who received an accommodation in school did so under false pretenses and may not actually have the claimed disability functional limitations, and/or may believe some schools routinely rubber-stamp or unduly acquiesce to requested accommodations that put those applicants at an undue advantage rather than on equal footing, the probability that an applicant would attest such qualifying disability needs fraudulently to the State Bar *and* have succeeded in persuading a school to grant egregiously unreasonable accommodations is low enough that the degree of duplicative burden the State Bar can equitably require of *all* disabled applicants who already met that burden at least once (with their school) is substantially lower than the boundaries on how much burden the State Bar’s documentation requirements can fairly impose where an applicant asks the State Bar to grant a testing accommodation in the first instance. If overaccommodation compromises the integrity of the exam,

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then so too does underaccommodation, and the latter is likely to result from the State Bar’s Proposed Rules far more often than the former.

Requiring exhaustive medical documentation: treating experts’ completion of the State Bar’s forms; collection and compilation of the other third-party certifications (regarding whether and what accommodations were granted from the applicant’s law school, other testing agencies, other jurisdictions where a bar exam was attempted, etc.); detailed briefing from the applicant, etc., all to be completed many months ahead of the targeted exam dates – twice per exam cycle if the applicant needs to appeal, and up to four times per year if they need to retake and opt to repursue denied accommodations or pursue expanded ones – places extraordinary burdens on disabled applicants, which burdens likely affirmatively prevents – or at least deters – far more disabled applicants from pursuing legitimate disability claims and thus suffering undue handicaps therefrom than sparing those burdens by extending the summary-match grant policy to accommodations received for school exams would likely enable to cheat the system. Moreover, said burdens may deprive even the most undeterred and compliance-capable disabled applicants of their right to equal opportunity even when they receive all requested accommodations and are afforded a level playing field on the exam itself, because of the costs incurred to persuade the State Bar to do so.

Finally, the State Bar should also consider the reasonable reliance applicants placed on access to at least the accommodations they received in law school continuing on the bar exam, as applicants may have only chosen to expend the years of study and typically hundreds of thousands of dollars in educational expenses to seek a career in law because their schools provided them an accessible experience that they reasonably anticipated the mandatory entrance exam to the profession to mirror.

“Position on Proposed Rules Re: Considering Accommodations Granted in Law School or College” – AGREE ONLY IF MODIFIED:

Conclusion:

For the above reasons, the State Bar should amend Proposed Rule 4.82 to permit automatic grants of accommodations the applicant documents having received in college or law school, provided that those accommodations:

- (1) were approved for a permanent disability;
- (2) were requested on a Request for Testing Accommodations form submitted with the relevant sections complete;
- (3) are evidenced by documentation of the prior approval of accommodations granted by the school;
- (4) are among the testing accommodations granted by the school;
- (5) had been approved to ameliorate functional limitations of a permanent disability that the applicant certifies they are still experiencing;
- (6) were approved by the school after considering medical documentation from one or more qualified treating professional(s), which documentation the applicant submits with their request;
- (7) are not accommodations that the State Bar demonstrates to constitute fundamental alteration or impose undue burden in the context of the California bar examination.

**“Position on Proposed Rules Re: Documentation Standards” –
AGREE ONLY IF MODIFIED**

The State Bar has, to its credit, made a number of significant and appreciated positive reforms to the Proposed Rules in this iteration of the Rules Revision, responsive to the overwhelming public comments received on the original proposal. *E.g.*, Proposed Rules 4.81(A); 4.82(C), (E), (F); 4.83(A)(1)-(5), (B)-(D); 4.85(B); 4.86(C). The bulk of these favorable amendments have been in the area of documentation standards.

Nonetheless, fatal flaws remain that prevent even this domain of the proposal from achieving readiness to advance for adoption.

First, Proposed Rule 4.85(C) improperly heightens the detail of explanation required to make a procedurally complete request for accommodations that require administration over more than three days (and of a private room). The substance of the additional explanations the State Bar requires within the rules does – for requests that actually would be outside the norms of what adequately ameliorates most disability impairments – seem acceptable, if not optimal due to the likelihood the increased time and complexity it adds to the treating doctors’ task (relative to the kind of doctor’s letters they’re used to writing in an insurance-accepting clinical, not expert opinion witness practice) causes more applicants to have difficulties persuading their doctors to provide documentation that would satisfy the State Bar even if they do in fact have functional limitations justifying that degree of accommodation.

Unfortunately, the State Bar has not drawn the line at the appropriate boundary with its choice of three days as the boundary past which accommodations would trigger these additional requirements, even accepting the addition of such a boundary, nor by including private rooms as among those that do so. The Rules Revision purports to be guided by the LSAC/DOJ consent decree panel’s best practices report, which expressly defines accommodations up to

**“Position on Proposed Rules Re: Documentation Standards” –
AGREE ONLY IF MODIFIED**

double time as routine (even if only 50% is eligible for summary match absent multiple disability functional limitations or a visual impairment), and up to triple time as reasonable in certain contexts (e.g., both visual impairment and non-visual disability impairment). Extra time may also require more than the proportionate number of additional days (and thus more than three days even with as little as 50% extra time) if the applicant needs to test fewer hours per test day due to their disability and/or needs additional breaks for unrelated functional impairments than those on which they request extra time. The LSAC report also designates such breaks as common accommodations that must be presumed reasonable. Therefore, if the requirements of Proposed Rule 4.85(C) are maintained, they should be narrowed to only accommodations that cannot be administered over (ideally six, and no less than four) days.

Second, the new mandatory evaluator forms impermissibly require treating experts to attest the applicant has “exceptional need” for these accommodations to recommend them. Otherwise, the State Bar will designate the applicant’s entire petition as not “complete” and refuse to consider it. ADA regulation 28 C.F.R. 35.160(b) requires that all accommodation requests be given individualized consideration with primacy to the accommodations requested by the disabled individual. As a threshold matter, such individualized consideration must take the form of a good-faith and collaborative inquiry into what “best ensures a level playing field” to nondisabled applicants, which – where met – creates a presumption of reasonableness for the requested accommodation(s) rebuttable only by fundamental alteration or undue burden. 28 C.F.R. 36.309(b); *Enyart v. Nat’l Conf. of Bar Examiners, Inc.*, 630 F.3d 1153, 1163 (9th Cir. 2011); *see also* 28 C.F.R. Pt. 35 App. A (approving the application of Title III testing standards to Title II testing situations); *K.M. ex rel. Bright v. Tustin Unified Sch. Dist.*, 725 F.3d 1088, 1096-97 (9th Cir. 2013). Designating accommodations that have not been

**“Position on Proposed Rules Re: Documentation Standards” –
AGREE ONLY IF MODIFIED**

demonstrated to constitute fundamental alteration or impose undue burden as requiring “exceptional need” to be individually considered facially conflicts with the above standard.

Neither absolute nor exceptional degrees of necessity can be required to satisfy that standard, which would suggest such accommodations may only be granted if the handicap would be clearly *insurmountable* for the disabled applicant, as opposed to whether an unnecessary *residual* disability-based handicap remains without the sought accommodations. At most, the State Bar could condition granting an accommodation which it demonstrates to be fundamental alteration or impose undue burden, and thus has no legal obligation to provide, on such a showing, but such exceptions do not apply to private rooms (among the most frequently provided testing accommodations under LSAC guidelines) nor – per LSAC guidelines – to extra time greater than 50% without a severe visual impairment and 100% with one. As the State Bar cannot otherwise substantively require that degree of necessity to grant the accommodation, it cannot run around the substantive legal standard by procedurally requiring its attestation to consider the petition at all.

Moreover, the State Bar can only assert fundamental alteration or undue burden to rebut such a presumption and thus excuse the denial of otherwise reasonable accommodations if it does so in writing at the time of denial, in the procedural manner (and with the detailed written justification) prescribed by 28 C.F.R. 35.164 and *K.M.*, 725 F.3d at 1096-97; and, for undue burden, must further satisfy the heightened Title II standard set forth in 28 C.F.R. Pt. 35 App. B at p.707 (explaining that undue burdens under Title II requires a far greater showing than under Title III’s “not readily achievable” standard).

While the applicant faces the initial burden to establish that they have one or more disability and to articulate and substantiate how and why the accommodations

**“Position on Proposed Rules Re: Documentation Standards” –
AGREE ONLY IF MODIFIED**

they request meets the best ensures level playing field standard, once they have done so the applicant’s requested accommodations are thus rebuttably presumed reasonable, and to lawfully deny such request(s) the burden shifts to the State Bar to rebut that presumption. As the State Bar must perform an individualized, fact-intensive inquiry to accomplish this and permissibly deny such requests, *Wong v. Regents of Univ. of Cal.*, 192 F.3d 807, 818 (9th Cir. 1999), it cannot categorically designate certain accommodations as requiring attestation of “exceptional need” as on the new evaluator forms. Those forms should be rephrased to conform to the better phrased wording of Proposed Rule 4.85(C), if a distinction between such accommodations and any others is retained in the rules at all.

Third, where the applicant has met their threshold burden through the attestations and recommendations of qualified treating expert(s) – as opposed to, for example, their own self-reporting and/or evidence of prior approvals on other exams, a showing that would be *prima facie* sufficient to form a rebuttable presumption of reasonableness, 28 C.F.R. 36.309(b)(1)(v), but potentially be far more easily negated by a disagreeing reviewing expert opinion than the support of qualified treating expert(s) – the State Bar is required to defer to the opinions and recommendations of treating experts over reviewing experts and resolve ordinary credibility contests in favor of treating expert(s) in making its threshold findings on the diagnoses proffered and what best ensures a level playing field, as it is the treating experts who have had the opportunity to meet with and directly evaluate the applicant. 28 C.F.R. Pt. 36 App. A at 795-96. The State Bar has now done a better job of recognizing this in the present version of the proposal, Proposed Rule 4.82(C), but the proposal should enumerate more clarity for the staff that will be executing it and applicants as to how this applies in practice: while theoretically the State Bar could still negate the threshold premises that the applicant has qualifying disability and/or that the requested accommodations best ensure a level playing

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field even with treating expert support, doing so requires far more than a reviewing expert recommendation to that effect – especially one that is summarily adopted by the State Bar without analysis or scrutiny, as is present practice. Ordinarily, most requests of a qualified disabled individual supported by treating expert recommendations should be granted without further scrutiny, and when they are not, almost all such denials should be predicated on a demonstration of fundamental alteration or undue burden.

Rejecting a treating expert’s recommendations on the credibility of their premises, rather than fundamental alteration or undue burden, should only happen in exceptional cases where multiple reviewing experts in the same specialty don’t just disagree, but credibly articulate based on substantive clinical analysis that no reasonable expert in the field could reach the findings of the applicant’s expert, with detailed findings by the State Bar justifying its reasons for crediting those reviewing experts over the treating expert(s). The reviewing expert(s) especially cannot sufficiently rebut any treating expert(s) merely by identifying perceived omissions of specific circumstantial details not expressly asked on the evaluator forms or determinative on the material facts – that they would have preferred to analyze before accepting the recommendation – in the treating expert’s otherwise reasoned explanations, without any substantive clinical analysis of what the weight of the information that *was* provided would support. For this reason, the proposal should be amended to clarify the limited circumstances where “disability accommodations experts” disagreeing with a treating expert can form a basis for denial by the State Bar, and should require that the State Bar’s definition of “disability accommodations expert,” Proposed Rule 4.80(B), be further defined as someone trained and certified in the substantive legal standards they will be applying when making recommendations, preferably by the Disability Rights

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AGREE ONLY IF MODIFIED**

Education & Defense Fund (DREDF); “knowledge” of ADA requirements relating to testing accommodations is too vague.

Fourth and finally, Proposed Rule 4.81(B)(3) improperly sets the applicant’s burden of proof at “to the satisfaction of the State Bar” rather than a more proper preponderance of the evidence standard.

CONCLUSION:

1. If the requirements of Proposed Rule 4.85(C) are maintained, they should be narrowed to only accommodations that cannot be administered over [ideally six, and no less than four] days.
2. The mandatory evaluator forms’ reference to “exceptional need” should be rephrased to conform to the better – and more likely to be lawful – phrased wording of Proposed Rule 4.85(C), if a distinction between such accommodations and any others is retained in the rules at all.
3. The proposal should be amended to clarify the limited circumstances where a “disability accommodations expert” disagreeing with (a) treating expert(s) can form a basis for denial by the State Bar, to the effect of requiring that a disability accommodations expert – or panel thereof, if the would-be-denied accommodation(s) relies on disabilities in multiple specialties – in the specialty of each disability has certified that no reasonable expert in their field could have reached the same material findings and conclusions as the applicant’s expert(s), absent demonstrated fundamental alteration or undue burden. Alternatively, at a minimum the proposal should be amended to clarify that recommendations for denial by a “disability accommodations expert” who disagrees with the recommendations of the applicant’s treating expert(s) cannot be treated as conclusively warranting a denial, or as determinatively satisfying either Proposed Rule 4.82(C) or 28 C.F.R. Pt. 36

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App. A at 795-96, and require specific explanations beyond that recommendation by the Director of Admissions where a denial is made.

4. The State Bar’s definition of “disability accommodations expert,” Proposed Rule 4.80(B), should be further defined as someone trained and certified in the substantive legal standards they will be applying when making recommendations, preferably by the Disability Rights Education & Defense Fund (DREDF); “knowledge” of ADA requirements relating to testing accommodations is too vague.
5. The State Bar’s burden of proof standard for applicants in Proposed Rule 4.81(B)(3) should be amended to substitute “to the satisfaction of the State Bar” with the more appropriate “preponderance of the evidence” standard.

**“Position on Proposed Rules Re: Timelines for Processing Initial Requests” –
STRONGLY DISAGREE AND TOP PRIORITY FOR URGENT REFORM**

**THE URGENT NEED FOR ADMISSION RULES TO CAP
REVIEW/PROCESSING TIMES OF INITIAL REQUESTS
TO NO MORE THAN TWO WEEKS:**

Proposed Rule 4.86(A)-(B) – especially coupled with Proposed Rule 4.84(E), which codifies what, in practical effect, the former necessitates – unacceptably maintains the facially discriminatory and unlawful status quo: up to 30 days to confirm threshold eligibility for consideration (“completeness”), Proposed Rule 4.86(A), followed by an aspirational¹ target period of sixty days of non-collaborative review to resolve the petition to an initial decision, Proposed Rule 4.86(B).

This timeline – self-servingly created and consistently insisted upon by admissions staff to maintain their desired workload and margin for slippage – consumes nearly all of the available time between administrations of the bar exam, and in so doing imposes extraordinary burdens on disabled applicants at best and procedural inaccessibility of due testing accommodations at worst in order to achieve this maximization of convenience and leeway for staff to the opposite effect for disabled applicants. Not only do the prejudicial effects of such a timeline facially violate DOJ guidelines interpreting the requirements of various binding ADA regulations, such as 28 C.F.R. 35.130(b) and 28 C.F.R. 36.309(b)(1)(vi), and unduly burden and disparately impact disabled applicants in violation of the ADA,²

¹ This timeline, consistent with current rules, is aspirational, as although State Bar examinations program manager Christina Doell suggested to the Board that sixty days represents the “outer limits” of processing time to reach an initial decision on testing accommodations petitions, that allegation is belied by the experiences of many disabled applicants, who often receive their initial decisions considerably after sixty days from complete submission and rarely receive them significantly sooner than sixty days. In practice, sixty days is closer to a floor than a ceiling.

² See *McGary v. City of Portland*, 386 F.3d 1259, 1261-65 (9th Cir. 2004); *Townsend v. Quasim*, 328 F.3d 511, 518 n.2 (9th Cir. 2003); *Payan v. L.A. Cmty. Coll. Dist.*, 11 F.4th 729 (9th Cir. 2021); *Guckenberger v. Boston Univ.*, 974 F. Supp. 106 (D. Mass. 1997) at 121, 135-144; *Wong v. Regents of the Univ. of Cal.*, 192 F.3d 807 (9th Cir. 1999).

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but they present such an unfair mismatch between the interests of admissions staff versus those of disabled applicants as to effect grave miscarriages of justice.

This mismatch is exacerbated by the considerably asymmetric capacities of admissions staff to absorb such logistical burdens compared to disabled applicants, who face the laborious task of drafting and seeking from third-parties extensive documentation and assembling those materials into a “complete” petition (and then, for many, an appeal) on their own time and coordinated around all other life responsibilities and typically substantial health care needs. In contrast, State Bar staff in turn process the petitions as part of their full-time job duties. As such, apportioning admissions staff nearly all of the available time between exam cycles for their side of the process while simultaneously requiring disabled applicants to, at best, scramble in order to assemble in days what admissions staff insist requires months to evaluate, represents grave miscarriages of justice.

Examples of the prejudicial effects of this timeline on disabled applicants include, but are not limited to:

- (1) Improperly requiring (in effect) even disabled applicants who are not immediate repeaters to petition at least six months before the exam to expect any opportunity to appeal denials, which at best effectively imposes an earlier registration deadline for disabled applicants than for nondisabled applicants;
- (2) Leaving even the most diligent disabled immediate repeater applicants (e.g., those who begin expeditious work on their petition to repursue denied accommodations or pursue expanded accommodations for worsened impairment as soon as their previous taken exam ends) inherently insufficient time to have equal opportunity to competitively prepare for the exam without bearing undue and disproportionate financial risks, or to seek judicial review (by the California Supreme Court or otherwise) after

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exhausting administrative remedies, even to the extent they receive an administrative appeal remedy within the State Bar (if one subject to at most 14 days turnaround for completed submission, Proposed Rule 4.88(A), and without the benefit of a hearing);

- (3) Leaving those immediate repeater disabled applicants who wait for confirmation of failure on their last taken exam, yet still petition timely (or even slightly – if not months – early), without even the opportunity to administratively appeal denials under Proposed Rule 4.88(B); *e.g., see also* Proposed Rule 4.84(E); let alone sufficient time to prepare for the exam with equal opportunity, which is destroyed by the Hobbesian Choice of either unequal financial risks or insufficient lead time to participate in competitive exam preparation, even in instances where all requested accommodations are eventually granted by the State Bar.

DOJ guidelines require that testing entities respond to requests for testing accommodations in a timely manner, such that examinees can register with their nondisabled peers, respond to any request for any additional information requested, and complete any review procedures needed, in time to take the test in the same testing cycle with equal opportunity to prepare for the exam. With about seven weeks between the registration deadline and the bar exam, an initial decision from State Bar staff within two weeks of receipt is necessary to accomplish this.

A two-week response window leaves five weeks between the initial decision and the bar exam for applicants who petition on or around the State Bar’s deadline, a period which is necessary for the applicant to complete further steps, such as communications with State Bar staff, collection of any additional information, and the filing and processing of any appeal. Such an amendment – combined with the effect of Proposed Rule 4.88(B) – would facilitate the feasibility of amending Proposed Rule 4.88(A) to provide for 30 days instead of the insufficient 14 days,

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and would thus enable the State Bar to permit at least those disabled applicants who submit their petition at least two months before the start of the bar exam to receive at least 30 days from the decision to appeal, a difference critical to obtaining responsive medical documentation from treating doctors and allowing applicants a *meaningful* opportunity to be heard in their appeal.

A two-week response window also would allow applicants who request their accommodations early (weeks or months before the registration deadline) an opportunity to exhaust all administrative review options and know their final approved testing accommodations prior to embarking on test preparation, typically an eight-to-ten-week endeavor (as well as have a meaningful opportunity for judicial review, if needed), and to do so even if they are an immediate repeater seeking expanded accommodations on the next exam cycle as long as they begin working on their petition as soon as their last taken bar exam has been administered. This knowledge allows candidates to make informed plans about test preparation, which might include taking time off from work, hiring a tutor, enrolling in a preparation class, and taking timed practice exams.

For an exam that most applicants (disabled or not) fail despite most graduates studying full-time for months and spending many thousands of dollars on preparation that does not remain fresh until the following exam cycle, applicants with disabilities cannot be fairly expected to commit this degree of resources prior to confirmation that the attempt those resources go towards will be meaningful and provide them equal footing, at risk of waste most disabled applicants cannot financially afford and that would likely deprive them of the financial resources to repeat those arrangements if and when they do secure sufficient testing accommodations for a meaningful retake. For that reason, a later final administrative decision (e.g., a decision on appeal) than eight weeks before the next exam – in theory even one granting all requested accommodations – has

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already inherently deprived the applicant of equal opportunity to their nondisabled peers.

Moreover, exhaustion of all administrative remedies with the State Bar later than 120 days before the exam renders any purported opportunity for judicial review in the form of a petition for discretionary review to the California Supreme Court pursuant to Cal. Rules of Ct. rule 9.13(d) under the timeline therein (at least 65 days not counting the time to draft the petition after the decision or the turnaround time needed by the Court following completed briefing either for threshold decision to review or deciding the merits) as not a meaningful means to be heard by that Court.

**ADDRESSING THIS ISSUE SHOULD NOT BE TABLED FOR YEARS
UNTIL A SUBSEQUENT RULES REVISION TO BE INITIATED AFTER
THE PRESENT RULES REVISION HAS BEEN IN EFFECT
FOR TWO BAR EXAM CYCLES:**

The Working Group’s reasoning for rejecting the opinions of most commenters on the original proposal requesting this two-week processing time limit – that the merits of that proposal turn on the results from an experiment that would be years away – had been premised on State Bar Staff’s expectations that this rules revision and its other reforms (like summarily granting accommodations granted on certain prior exams) would increase their capacity at present headcount to process accommodations requests faster, if by an unknown degree. They therefore propose leaving the status quo intact until they have been able to experiment with the degree of staff resource-sparing effect the rest of the rules-revision accomplishes, and then revisit a new rules revision after the amended rules have been in effect for two exam cycles.

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Even if the present Rules Revision did not result in other much-needed amendments on return from the second public comment period, it would realistically take effect no sooner than for the July 2024 exam, as it would need to be approved at the CBE’s August 2023 meeting and the Board’s November 2023 meeting before it could go on motion to the California Supreme Court, which Court would likely then take until 2024 to approve it – too late to govern petitions made for the February 2024 exam. The soonest Staff’s timeline on a new rules-revision could allow for it to be initiated, then, would be at the August 2025 CBE meeting. Even if public comment was authorized for late 2025-early 2026, and was reapproved as-is by the CBE and Board on return therefrom, this would delay reforming processing timelines at least until the February 2027 exam, an unacceptably long delay to remedy a defect that facially deprives disabled applicants of equal opportunity. And of course, as both this rules revision and that one could plausibly be sent out for more public comment periods, each one needing to be separately authorized by both the CBE and Board, the wait could be far longer than February 2027.

More importantly, the information State Bar Staff hope to gain from this proposed experiment not only fails to justify the delay, but is irrelevant to the merits of the two-weeks processing time cap. Taking action to shorten the present months of non-collaborative processing time to two weeks should not be tabled for years merely to collect data on the extent to which the currently proposed reforms would allow such changes without expanding staff capacity, when even a finding that more staff capacity would be required would not absolve the necessity of implementing such a two-week processing time limit to providing disabled applicants with equal opportunity, and so change the policy outcome.

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STRONGLY DISAGREE AND TOP PRIORITY FOR URGENT REFORM**

CONCLUSION:

For the above reasons, and as even a finding that – alongside the other proposed reforms – more staff capacity would still be required to process testing accommodations requests to an initial decision within two weeks, such a finding would not absolve the necessity of implementing that time limit to providing disabled applicants with equal opportunity, and so change the policy outcome: Proposed Rule 4.84(E) should be stricken and Proposed Rule 4.86(A)-(B) should be replaced by a requirement that complete testing accommodations requests be decided in two weeks or less from receipt. These amendments should be made as part of *this* rules-revision, and not delayed until a future one.

**“Position on Proposed Rules Re: Review by Disability Accommodation Expert
Procedural Requirement to Deny Requests for Testing Accommodations” –
AGREE ONLY IF MODIFIED**

While speciously framed as adding a new safeguard against improper denials of testing accommodations requests, the provisions within Proposed Rule 4.82(G) merely continues an existing component of the State Bar’s testing accommodation request review practices and procedures. The recommendation of a reviewing expert cannot and should not – as implied by this framework and reflected in current State Bar practices – in and of itself form a sufficient basis or explanation for the denial and/or modification of the applicant’s requested accommodation(s), particularly if those requests are supported by the recommendations of an applicant’s treating expert(s). Accordingly, greater specificity as to whether and where the State Bar can rebut the presumption of reasonableness treating expert recommendations confers upon an applicant’s requests should be enumerated into the rules revision to provide State Bar Staff implementing these rules clarity that they may not rely determinatively solely on a *reviewing* expert’s *mere disagreement* with the *treating* expert recommendations.

Rather, where the applicant has met their threshold burden through the attestations and recommendations of qualified treating expert(s) – as opposed to, for example, their own self-reporting and/or evidence of prior approvals on other exams, a showing that would be *prima facie* sufficient to form a rebuttable presumption of reasonableness, 28 C.F.R. 36.309(b)(1)(v), but potentially be far more easily negated by a disagreeing reviewing expert opinion than the support of qualified treating expert(s) – the State Bar is required to defer to the opinions and recommendations of treating experts over reviewing experts and resolve ordinary credibility contests in favor of treating expert(s) in making its threshold findings on the diagnoses proffered and what best ensures a level playing field, as it is the treating experts who have had the opportunity to meet with and directly evaluate the applicant. 28 C.F.R. Pt. 36 App. A at 795-96. The State Bar has now done a better

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job of recognizing this in the present version of the proposal, Proposed Rule 4.82(C), but the proposal should enumerate more clarity for the staff that will be executing it and applicants as to how this applies in practice: while theoretically the State Bar could still negate the threshold premises that the applicant has qualifying disability and/or that the requested accommodations best ensure a level playing field even with treating expert support, doing so requires far more than a reviewing expert recommendation to that effect – especially one that is summarily adopted by the State Bar without analysis or scrutiny, as is present practice. Ordinarily, most requests of a qualified disabled individual supported by treating expert recommendations should be granted without further scrutiny, and when they are not, almost all such denials should be predicated on a demonstration of fundamental alteration or undue burden.

Rejecting a treating expert’s recommendations on the credibility of their premises, rather than fundamental alteration or undue burden, should only happen in exceptional cases where multiple reviewing experts in the same specialty don’t just disagree, but credibly articulate based on substantive clinical analysis that no reasonable expert in the field could reach the findings of the applicant’s expert, with detailed findings by the State Bar justifying its reasons for crediting those reviewing experts over the treating expert(s). The reviewing expert(s) especially cannot sufficiently rebut any treating expert(s) merely by identifying perceived omissions of specific circumstantial details not expressly asked on the evaluator forms or determinative on the material facts – that they would have preferred to analyze before accepting the recommendation – in the treating expert’s otherwise reasoned explanations, without any substantive clinical analysis of what the weight of the information that *was* provided would support. For this reason, the proposal should be amended to expand Proposed Rule 4.82(G) consistent with the above in

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order to clarify the limited circumstances where “disability accommodations experts” disagreeing with a treating expert can form a basis for denial by the State Bar, and should require that the State Bar’s definition of “disability accommodations expert,” Proposed Rule 4.80(B), be further defined as someone in the particular specialty of the disability they are reviewing (or a panel with disability accommodations experts from each such medical specialty if there are multiple disabilities across multiple medical specialties), trained and certified in the substantive legal standards they will be applying when making recommendations, preferably by the Disability Rights Education & Defense Fund (DREDF); “knowledge” of ADA requirements relating to testing accommodations is too vague.

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Deadlines to Appeal:

Like current rules, Proposed Rule 4.88 sets forth two deadlines that operate on an earlier-of relationship (once either one lapses, the applicant’s appeal would be untimely). Proposed Rule 4.88(A) requires the appeal to be submitted within 14 days of the initial decision, a slight extension from the 10 days under current rules, while Proposed Rule 4.88(B) requires the appeal to be submitted by the first business day of the month of the exam. If an initial decision comes after that date – as Admissions Staff are expressly, yet improperly authorized to do by Proposed Rule 4.84(E) even for timely petitions – the State Bar does not afford the applicant any opportunity to appeal for that exam cycle.

While Proposed Rule 4.88(B)’s deadline of the first business day of the exam month could be reasonable under normal circumstances if appropriate other reforms were implemented to facilitate the feasibility of that deadline for applicants,¹ applicants who petition early enough that the initial decision is rendered more than two weeks before the Proposed Rule 4.88(B) deadline should not have to nevertheless turnaround complete appellate briefing and responsive treating expert documentation within the mere 14-day time limit that Proposed Rule 4.88(A) independently imposes from the date of decision. They should instead get until the sooner-of the 4.88(B) deadline or thirty days from decision.

¹ E.g.: (1) imposition of the two-week cap on initial decision turnaround time from complete petition submission; (2) the elimination of Proposed Rule 4.84(E); and (3) provisions to toll deadlines for initial petition submission and that in Proposed Rule 4.88(B) where – as with the October 2020 exam – the State Bar fails to disclose the standard conditions of the exam at least two months in advance of the final petition deadline. Without these safeguards, the amount of time Proposed Rule 4.88(A) provides from the initial decision holds little relevance even if extended to 30 days or more, as staff may withhold initial decisions until just before the Proposed Rule 4.88(B) cutoff at best and just after it at worst to evade review of unwarranted denials they wish to make or the added work of processing an appeal, or otherwise create situations where through no fault of the disabled applicant, they are unable to petition timely to receive their decision in time to have the opportunity to appeal.

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Such amendments to Proposed Rule 4.88(A) and the other interacting rules discussed in footnote 1, *supra*, would ensure that disabled applicants who submit their petitions at least two months before the exam starts should receive at least thirty days from the initial decision to complete their appeal submission. The difference between fourteen and thirty days is profound in effect upon the availability of obtaining medical documentation from treating doctors that is responsive to any explanations of the State Bar’s reasoning for denials or substitutions, access to legal advice, and the fundamental effectiveness of the appeal submissions made. Just as importantly, thirty days is necessary to avoid timely completing the extremely time-consuming logistical requirements of compiling an effective appeal from unduly burdening the applicant, such as by requiring them to pull all-nighters and/or to reschedule and/or sacrifice other important medical, professional, and personal commitments on short notice to clear their schedules once the accommodations decision is communicated. Particularly where admissions staff have routinely dropped initial decisions for the February exam on the decision-making staff members’ way out the doors to their own December holidays – and consequently put disabled applicants in a position of canceling their own participation in their own annual holiday gatherings with their friends and families to work around the clock to turnaround their appeals within the requisite ten days from the decision – that ten day period must be extended to at least thirty days rather than fourteen days as now proposed by staff for the incremental extension to meaningfully alleviate the undue burden this deadline has imposed on disabled applicants. See *McGary v. City of Portland*, 386 F.3d 1259, 1261-65 (9th Cir. 2004) (concerning Title II’s prohibition on policies and procedures that unduly burden disabled applicants, even when consistently enforced to all similarly situated applicants); *Payan v. L.A. Cmty. Coll.*

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Dist., 11 F.4th 729 (9th Cir. 2021) (policies and procedures that systemically cause adverse disparate impact among the disabled not allowed under Title II); *Guckenberger v. Boston Univ.*, 974 F. Supp. 106 (D. Mass. 1997) at 121, 135-144 (discussing the degree of burden imposed on disabled applicants by a subject entity in their procedural requirements to seek accommodations that would or would not be permissible under the ADA).

The Working Group remarked in its responses to the first round of public comment on the original proposal that – even assuming the proposal were amended to require initial decisions within two weeks – allowing an extension of the appeal deadline in Proposed Rule 4.88(A) to thirty days instead of fourteen days from the present ten days would not be feasible, because if the petition was submitted on the petition final filing deadline it could allow appeals to be submitted as late as a few days before the exam would start. That hypothetical is foreclosed by Proposed Rule 4.88(B)’s provision that all appeals must be received by the first business day of the month of the exam. While its true that applicants could not both wait all the way to the deadline and receive the full thirty days to complete their appeal, applicants who petition even a couple of weeks before the deadline would be able to with this amendment, while deciding initial petitions within two weeks of receipt would still ensure those who submit on the deadline will receive their decision in time to submit an appeal if they can turn it around in roughly sixteen days.

Notwithstanding the above, the State Bar could fairly impose an earlier deadline – such as fourteen days from the decision – for the applicant to provide notice that they intend to appeal, as long as the proposal is amended to clarify that deadline as only for such notice, and to provide that any additional materials to be considered in deciding the appeal are expressly considered as a matter of right up

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until thirty days from the decision or the Proposed Rule 4.88(B) cutoff of the first business day of the month of the exam, whichever comes first.

Examinations program manager Christina Doell represented to Trustee Mark Toney at the May 2023 Board of Trustees meeting that the fourteen days deadline in Proposed Rule 4.88(A) was already only intended to be for a notice of appeal, and not for a completed appeal submission. Yet, her statement is not only absent from – and in considerable tension with – the text of the operative proposal that has been circulated for public comment, but would irreconcilably contradict the boilerplate admonitions and instructions regarding appeal contained in the decision letters sent to disabled applicants, which expressly mandate all materials to be considered as of right be received by the sooner deadline. Such a policy as Ms. Doell identified – if clearly enumerated into the Rules by amendment to the proposal – could in any event be an acceptable resolution to the defects of Proposed Rule 4.88(A) if implemented alongside the other reforms described at footnote 1 above.

Processing Time of Appeals:

Credit should be given where it’s due, and here, the Working Group’s amendments to the proposal following the first public comment period largely *do* accomplish an appropriate processing time for appeals. *See* Proposed Rule 4.88(C) (requiring the Director of Admissions to complete their initial review of the appeal by the sooner of fourteen days or what the exam schedule would require given the potential need for CBE consideration). Still, the “as soon as is practicable” language in Proposed Rule 4.88(D) for consideration by the Subcommittee on Examinations is unduly vague and that lack of a concrete timeframe has in the past been abused to permit months of delay, which prevents disabled applicants from

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obtaining adequate lead time to prepare for the exam with equal opportunity and without bearing unequal financial risks to arrange such preparation aids (i.e., classes and tutoring regime) adequately in advance of the exam. The rule should adduce that applicants receive the Examinations Subcommittee’s decision on the appeal “as soon as is practicable, and no longer than ten days from the determination by the Director of Admissions, unless an examination schedule requires a sooner timeframe.” (Emphasis added).

The Rules Should Provide the Right to a Hearing:

The CBE offers all applicants whom staff consider at risk of being denied a positive moral character determination a hearing by the Moral Character Subcommittee before any such denial can be made, but does not offer any such similar hearing by the Examinations Subcommittee to applicants to whom staff recommend partly or wholly denying requested testing accommodations. This distinction is illogical: would-be testing accommodation denials – for applicants with disabilities – implicate the same liberty interest in a meaningful opportunity to practice a chosen profession and therefore deserve similar protections – even if only upon an appeal that cannot be granted on the papers. Consideration of written submissions by the Subcommittee does not substitute for a live, interactive dialogue where the applicant and their supporting professionals (e.g., treating experts and/or legal counsel) can respond to the State Bar’s various concerns in real-time and clear up far more areas of confusion than can be done by 1-2 exchanges of written correspondence within the time constraints of the process. Even public comment does not compare, both due to the three-minute time limit per speaker and the one-sided monologue nature of the format.

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Cap on Number of Administrative Appeals:

The cap on number of appeals an applicant can make, Proposed Rule 4.88(F), seems largely a solution in search of a problem, because an applicant receiving a decision on a first appeal in time to complete and submit a subsequent appeal by the first business day of the exam month, as required by Proposed Rule 4.88(B), would be exceptionally rare and require an applicant to petition extremely early. Under the excessive timelines as currently provided by the operative proposal, an applicant would have to petition several months earlier than the petition deadline to plausibly have time for even two appeals, which inherently would only be an option for applicants who are not immediate repeaters and start their petition during an exam cycle prior to the one on which they seek accommodations. In that instance, of course, the staff time expended on that applicant in reviewing a petition followed by multiple appeals would be spread over at least two exam cycles, just as with applicants who need to retake and are permitted a new petition and appeal for the next exam cycle (in terms of staff time expended; the latter, unlike the former, requires the applicant to endure unnecessary and costly retake(s), and its resulting adverse collateral effects on the applicant’s lifelong employment opportunities).

Even assuming the absence of a cap was implemented with the two-weeks petition processing time limit requested, given that unsuccessful appeals capable of forming the subject of another appeal would need to be reviewed by the Subcommittee following the Director decision, applicants would still need to at a minimum petition over a month early to have the opportunity to assert two appeals, and several months early to submit three appeals, which is the maximum number that could conceivably fit into a single exam cycle in any event.

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If anything, allowing more than one appeal subject to the deadlines provided would encourage applicants to petition as early as possible, and allow for the most interactive process possible. Like with offering applicants two-weeks processing time, if the demands on staff capacity would prejudice other applicants and create an “unfair situation,” that means the Office of Admissions is improperly understaffed to fulfill its duty to provide equal opportunity, not that disabled applicants’ needs should be played against each other in a zero-sum game for the State Bar’s preferred, yet insufficient level of staffing. Rather, the State Bar is obligated to provide staff resources dynamically to the extent needed to ensure disabled applicants receive equal opportunity to nondisabled applicants, including an interactive process to resolving testing accommodation requests that – time allowing – ideally would include more than two iterations if there was a dispute that would require months of adjudication to resolve. If multiple reviews by the Subcommittee is genuinely impracticable, applicants should still be permitted to submit subsequent requests for reconsideration of denial to the Director of Admissions only, up until the first business day of the month of the exam as provided under Proposed Rule 4.88(B).

California Supreme Court Review:

To the extent that the State Bar prefers the California Supreme Court to Federal Court as the forum for applicants wishing to exercise their right to judicial review of the State Bar’s administrative determinations on their disability-related rights secured by federal and state laws, it should add to the rules revision initiative a recommendation to the California Supreme Court for amendments to the California Rules of Court, rule 9.13(d) to: (1) make that judicial review procedure more compatible with the timelines for exhaustion of administrative review on a

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given exam cycle specified within the State Bar Admission Rules; and (2) provide for a commitment from the California Supreme Court to review and decide appeals thereto from the CBE on their merits (e.g. mandatory review) in stark contrast to the present treatment of discretionary review granted only to extraordinary cases, and it should do so on a *de novo* standard of review with no greater deference to administrative findings than would be given in a Federal lawsuit.

California Rules of Court, rule 9.13(d) presently provides for a briefing schedule that would require at least 65 days from the filing of the petition to completed briefing, plus any backend adjudication time for the Court to decide whether to grant review on the merits. This would also not include the time from the Subcommittee’s decision on administrative appeal required by the applicant to obtain counsel and allow said counsel (or the applicant, if representing themselves) a meaningful opportunity to draft an effective petition, nor the additional time required by the California Supreme Court to decide the merits of the applicant’s petition once merits briefing is complete.

Accordingly, absent amendment to Cal. Rules Ct. 9.13(d), realistically an applicant would need to obtain the Subcommittee’s decision on appeal at least 120 days before the start of the exam in order to have a meaningful opportunity to be heard by the California Supreme Court. This means that, under the State Bar’s presently operative proposal, the applicant would need to first petition the State Bar nearly a full year in advance of the bar exam they intend to take, and hope that subsequent medical developments or changes in State Bar standard conditions does not require any updates between then and the exam. This is too early to provide equal opportunity and satisfy Federal law under DOJ guidelines.

Even if the State Bar amended the proposal so that the Admission Rules would reflect the reforms to the procedural timeline requested in these comments,

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the applicant would still have to petition at least six months in advance of the exam to have a meaningful opportunity to be heard by the California Supreme Court under the present textual provisions of Cal. Rules Ct. 9.13(d) – and thus amendment to that rule too is still necessary to both comply with DOJ guidelines on equal opportunity requirements under federal law and allow the California Supreme Court, rather than Federal Court, to be a forum where applicants will receive a meaningful opportunity to be heard. Yet, the California Supreme Court has the authority to amend the California Rules of Court just as readily as it can amend the State Bar’s Rules. The State Bar may thus simultaneously move that Court for both kinds of amendments. For these reasons, the State Bar should recommend that the briefing schedule be streamlined so that applicants who petition the Court within two weeks of the Subcommittee’s decision can be provided a decision from the California Supreme Court in time for the next administration of the bar exam.

The State Bar should further recommend that the California Supreme Court amend Cal. Rules of Ct. 9.13(d) to provide for mandatory – not discretionary – review on the merits, at least where the CBE decision the petitioner seeks review of is a denial or substitution of requested testing accommodations, for at least two reasons.

First, eliminating the initial round of briefing on whether the case at hand is a worthy candidate for the Supreme Court’s time/judicial economy, so that the applicant and State Bar may focus only on briefing the merits of whether the CBE’s decision should or should not be overturned by the Court, would streamline the adjudication timeframe and in so doing improve the feasibility of fitting both administrative review by the State Bar and judicial review by the California Supreme Court into one exam cycle.

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Second, the review by the California Supreme Court in this context being mandatory is further warranted by the fundamental tradition that parties with redressable legal claims in judicial forums receive at least two opportunities to have their disputes addressed on their merits under mandatory review by the tribunal: the court of original jurisdiction, and for at least one appeal as of right, typically to an intermediate appellate court. Discretionary review is typically justified only for where a court of last resort would be hearing a second round of appeal from an intermediate appellate court, and the parties afforded at least that much prior process, or for where a party seeks to appeal a preliminary determination early (e.g., interlocutory appeals) before the lower court has made a final determination that would then be subject to appeal as of right.

In contrast, applicants who petition the California Supreme Court have not received any prior judicial review, and by even *petitioning* for such discretionary review – that they can expect to rarely be granted, no less – they must forfeit any future opportunities for mandatory judicial review they may otherwise have had for even Federal law claims arising out of the challenged testing accommodations decision. This is because, under the U.S. Supreme Court’s Feldman-Rooker Doctrine,² only the U.S. Supreme Court has subject matter jurisdiction to review state court decisions, and that Court too would offer only discretionary review. That jurisdictional bar to adjudication in lower Federal Courts attaches upon the petition to the California Supreme Court, even if the petition for review is denied and the merits never reached.

Accordingly, as by seeking discretionary review to the California Supreme Court would require applicants to sacrifice all rights to have their disability law

² See, e.g., *Dist. of Columbia Ct. of Appeals v. Feldman*, 460 U.S. 462 (1983); see also *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280 (2005).

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claims considered on their legal and factual merits by any other Court even if discretionary review is denied; and even if granted, would also limit any *first* judicial appeal to similarly discretionary review by the U.S. Supreme Court, in order to uphold fundamental fairness and due process of law principles, Rule 9.13(d) should be amended to change the type of review from discretionary to mandatory. Even putting the fairness dimension aside, this is precisely what applicants who bring their challenges in Federal Court forum are entitled, and thus what the California Supreme Court must compete with if it and the State Bar wish it to be the forum in which this kind of challenge is heard.

Conclusion:

Wherefore, for the above reasons:

1. Proposed Rule 4.84(E) should be stricken;
2. Proposed Rule 4.88(A) should be amended to provide for thirty days from the decision instead of fourteen days; or alternatively to specify that a notice of appeal must be submitted within fourteen days, but that appeal statements and new evidence may be submitted up until thirty days from the decision or the cutoff in Proposed Rule 4.88(B), whichever comes first. Either way, it should further provide that applicants who submit their petitions at least two months before the start of the exam must receive at least thirty days to submit their completed appeal and still receive a decision thereon before the next administration of the exam.
3. Proposed Rules 4.84(B) and 4.88(B) should both be amended to provide for tolling of the deadlines therein where the State Bar changes the standard conditions of the bar exam less than two months before the Proposed Rule 4.84(B) deadline (or after that deadline).

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4. The unduly vague phrase “as soon as is practicable” in Proposed Rule 4.88(D) should be amended to adduce it to: “...as soon as is practicable, and no longer than ten days from the determination by the Director of Admissions, unless an examination schedule requires a sooner timeframe.”
5. Proposed Rule 4.88(E) should be amended to provide applicants whose appeals cannot be fully granted by the Director of Admissions according to Proposed Rule 4.88(C)-(D) with a teleconference hearing by the Examinations Subcommittee similar to that provided to applicants at risk of being denied a positive moral character determination by the Moral Character Subcommittee; in which hearing the applicant, their treating expert(s) if available, their legal counsel if applicable, all “disability accommodations [reviewing] experts” relied on by the State Bar, and the Director of Admissions participate collaboratively.
6. Proposed Rule 4.88(F) should ideally be stricken, but alternatively should be narrowed to apply only to the CBE/Subcommittee review portion of the appellate remedy, and otherwise allow subsequent reconsideration by the Director of Admissions within the same exam cycle to the extent applicants submit those subsequent reconsideration requests by the deadline in Proposed Rule 4.88(B).
7. The State Bar should move the California Supreme Court to simultaneously amend Cal. Rules of Court, rule 9.13(d) to, at least in testing accommodations cases: (a) streamline and expedite the briefing schedule provisions enough to make that judicial review procedure compatible with the timelines for exhaustion of administrative review on a given exam cycle specified within the State Bar Admission Rules, to the extent that applicants who petition the California Supreme Court within two weeks of the

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Subcommittee’s decision on their administrative appeal will receive a ruling from the Court in time for the next scheduled administration of the exam; and (b) provide for a commitment from the California Supreme Court to review and decide appeals thereto from the CBE on their merits (e.g. mandatory review, not the present discretionary review), on a *de novo* standard of review, and with no greater deference to administrative findings than would be given in a Federal lawsuit.



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October 7, 2023

Via Portal and Staff Email

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RE: Proposed Amendments to the Rules of the State Bar, Pertaining to Testing Accommodations—OPPOSE UNLESS AMENDED

Dear Chair Duran, Vice-Chair Stallings, and Trustees Broughton, Chen, Cisneros, De La Cruz, Knoll, Shelby, Sowell, and Toney:

OPPOSE UNLESS AMENDED: We respectfully oppose these proposed amendments and request they be amended after engaging in the public comment below and other public commentary which has established concrete and feasible solutions which will provide equal access to testing through the 2022-present project to revise Chapter 7, rules 4.80-4.92.

SHORT LIST OF FEASIBLE EDITS FOR IMPLEMENTATION:

1. **Rule 4.80(A):** Revise “disability” definition to modeled directly from California law.
2. **Rule 4.80(B):** Revise “disability accommodations expert” to ensure a competent third party non-biased expert.
3. **Rule 4.80(C):** Revise to include law school high stakes testing.
4. **Rule 4.81(B)(3):** Revise language to defer to qualified healthcare professional that has the knowledge to determine a disability.
5. **Rule 4.83(A)(5):** Revise and create a definition for “certify” or remove entirely.
6. **Rule 4.83(A)(7):** should be stricken. Certain accommodations arbitrarily excluded from the approval process is inappropriate.
7. **Rule 4.84(B):** Dates for submission/appeal should be changed to ensure appeal process can be offered to all applicants.
8. **Rule 4.85(A):** revise and ensure forms A-H and the “Online Petition” are updated and extended for public comment.
9. **Rule 4.86(B):** Revise to ensure that an applicant submitting on deadline will be able to receive a notification of acceptance or denial in a timely manner.
10. **Rule 4.88(A)-(G):** Revise to ensure nonbiased entities with expertise review the appeals process, strike the Director of Admission and Committee.
11. **Rule 4.88(B):** Revise to ensure that all requests for review or appeal can occur within the current examination period, in connections with 4.86.
12. **Rule 4.89(A):** Revise to either clarify language that an applicant who meets the three standards for the Bar need not resubmit all documentation, but simply request through the Bar to review the “Request” submitted in the past.
13. **Effective Communication and Interactive Process:** The Rules must contain feasible and accessible communication pathways.
14. **Training and Education:** Adding training and education for Bar employees.

I. Disability Rights California Responsibility and Jurisdiction

We write to you on behalf of Disability Rights California (DRC), the largest disability rights group in California. DRC holds a unique position as the agency designated by both federal and state

governments as California's Protection and Advocacy Agency (P&A), (designated pursuant to the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. § 15001, PL 106-402; Welfare and Institutions Code §§ 4900 *et seq.*). As the designated P&A, DRC collaborates with people with all types of disabilities to provide public information, education, coordination of collaborative disability groups and organizations, resources, and referrals, as well as litigation, regulatory, and advocacy projects under federal and state grants to redress individual and systemic disability discrimination. DRC has had this authority for over 40 years and has a long history of working on issues of accessibility for people with disabilities, including ensuring equal access to education. DRC serves tens of thousands of individuals with disabilities annually throughout the state. In our role, DRC can provide detailed technical assistance and discussion for rule language and implementation to aid the State Bar of California in its progress to amend its rules in accordance with California state anti-discrimination law.

II. Prior Public Comment Contains Helpful Guidance

The comments made here are not conjecture—instead, the public comment and recommendations we provide are backed by empirical evidence on feasible solutions for testing accommodations. DRC has provided empirical evidence, scientific studies, a thorough discussion of anti-discrimination law, as well as personal experiences of disabled applicants in prior commentary on January 31, 2023 and July 31, 2023, as well as public comment on the Blue Ribbon Commission addressing the Bar Exam itself on April 10, 2023 and October 13, 2022.

III. Legal Premise: Re-Framing Proposed Rules to Comply with Well-Settled Anti-Discrimination Law

The proposed rules 4.80-4.92 still lack compliance with well settled federal and California disability law. 42 U.S.C. §§ 12132, 28 C.F.R. § 35.130, 28 C.F.R. § 36.309, Cal. Gov. Code §12926 *et seq.* In order for the State Bar of California (*hereafter* the “Bar”) to provide due diligence in following the legal standards it upholds as a legal institution, the Bar must ensure its rules and regulations are not

an exception to the widely available statutes,¹ case law,² best practices,³ and technical assistance.⁴ As the licensure body for all attorneys in the State of California, the Bar should seek to be an exemplar of understanding and following the rules of the jurisdiction in which it sits. The Bar has a responsibility to ensure it does not create rules which may be “in violation of any law, rule, or ruling of a tribunal.” (Ca. Rules of Prof. Responsibility Rule 1.2.1).

a. Medical Premise: The Bar’s Qualifications Do Not Extend to “Healthcare Expert”

The Bar does not have the medical qualifications, training, knowledge, or practice to engage in substantive analysis of whether someone is “disabled enough” to be provided a reasonable accommodation. Further, nowhere in the law does a reasonable accommodation process state this analysis is necessary. While the Bar does not have a medical license, it can use the legal framework of reviewing reasonable modification, which only requires the Bar to determine that the accommodation has a nexus to the disability.

The Bar does have the qualifications and responsibility to ensure that attorneys are competent in their practice of law, which includes having sufficient “learning and skill. If not yet competent, “associating with or . . . professionally consulting another lawyer,” “acquiring sufficient learning and skill before performance is required,” or “referring the matter to another lawyer” can provide competency. (Ca. Rules of Prof. Responsibility Rule 1.1). These same rules can be used as a framework for the Bar’s rules regarding reasonable accommodation. The Bar should “professionally consult” with disability rights organizations, as well as members of the disability community who will be most

¹ 42 U.S.C. §§ 12132, 28 C.F.R. § 35.130, 28 C.F.R. § 36.309, Cal. Gov. Code §12926 et seq.

² *Dep’t of Fair Emp’t & Hous. v. Law Sch. Admission Council Inc.*, No. 12-CV-01830-JCS (N.D. Cal.), Consent Decree (May 29, 2014), at Injunctive Relief, ¶ 5(a), (c), (d)(ii).

³ *DFEH v. LSAC Best Practices Report*, 2015 U.S. Dist. LEXIS 104751, at **45, 53, (also found at <https://calcivilrights.ca.gov/LegalRecords/final-report-of-the-best-practicespanel/>).

⁴ *ADA Technical Assistance Document: Testing Accommodations, ADA Requirements*, U.S. DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION, https://archive.ada.gov/regs2014/testing_accommodations.pdf (last visited July 30, 2023.).

affected by the Bar’s review of reasonable accommodation requests. The Bar can also continue to research and gain evidence-based knowledge through “sufficient learning and skill” *before* reviewing requests. (Ca. Rules of Prof. Responsibility Rule 1.1). Lastly, the Bar can also “refer” the reasonable accommodations request to a non-biased third party who is knowledgeable in state and federal reasonable accommodation requirements and disability cultural competency. (Ca. Rules of Prof. Responsibility Rule 1.1). The Bar will be able to properly review a reasonable accommodation when this framework is achieved.

b. Empirical Premise: Appealing to Empirical Data Regarding the Pipeline to the Legal Profession

The pipeline to the legal profession for students with disabilities is fraught with barriers, as shown in part by statistical data. The Center for Disease Control approximates 7,623,839 or 25% of adults in California have disabilities.⁵ Although any one of these persons has the right to enter the path down towards the legal field, most individuals enter through first obtaining a college degree through a higher education institution. Thus, data can be further broken down by the variables of disability and college. Data shows fewer students identify themselves as disabled to post-secondary institutions.⁶ These institutions have a history of systemic ableism, racism, xenophobia, homophobia, and transphobia that discourage and prevents students from seeking services they need for equal access. Within the higher education institutions of California, there are three main systems that contain the majority of

⁵ *Disability Impacts California*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/ncbddd/disabilityandhealth/impacts/california.html> (last visited July 30, 2023).

⁶ *Accommodated Test-Taker Trends and Performance for the June 2012 Through February 2017 LSAT Administrations (TR 17-03)*, *LSAT Technical Reports*, LSAC, <https://www.lsac.org/data-research/research/accommodated-test-taker-trends-and-performance-june-2012-through-february#:~:text=The%20proportion%20of%20those%20who%20received%20an%20approved,between%2065%25%20and%2077%25%20across%20the%20study%20years> (last visited July 30, 2023); ‘I Felt Afraid to Ask’: Law Students With Disabilities Are Often Torn Between Trying to Fit In and Seeking Accommodations, ALM LAW. COM, <https://www.law.com/2022/04/26/i-felt-afraid-to-ask-law-students-with-disabilities-are-often-torn-between-trying-fit-in-and-seeking-accommodations/> (last visited July 30, 2023); *A Majority of College Students with Disabilities Do Not Inform School*, *New NCES Data Show*, NATIONAL CENTER FOR EDUCATION STATISTICS, (April 26, 2022), https://nces.ed.gov/whatsnew/press_releases/4_26_2022.asp.

students: The California Community College system, California State University system, and the University of California system. Out of 1.8 million students, 121,560 disabled students (6.8%) are estimated within the California Community College (CCC) system.⁷ In the California State University (CSU) system of 460,000 students, 20,318 (4.4%) have identified as disabled.⁸ In the University of California (UC) system of 280,000 students, around 19,000 (6.8%) students have been identified as disabled.⁹ These California post-secondary statistics are much lower than the national average of around 19% of the undergraduate population.¹⁰ This may be because many students do not learn they have a disability until later in life, may not have resources to get properly diagnosed, or may feel there will be repercussions for identifying to the institution that they are disabled.¹¹

Once students obtain a post-secondary degree, they must pass the LSAT to proceed to law school. Only 1.2% of LSAT applicants receive accommodations for the exam.¹² This percentage is much lower than the number of disabled individuals receiving accommodations in post-secondary schools. This shows how the legal profession immediately creates barriers to entry for those with disabilities through the lengthy accommodation process required by the LSAT.¹³

⁷ Disabled Student Programs and Services 2020 Report, CALIFORNIA COMMUNITY COLLEGES, https://www.cccco.edu/-/media/CCCCO-Website/Reports/CCCCO_Report_DSPS_Final.pdf?la=en&hash=AA90D22EFB7FACD7D20B8B6198DB71EE9B790D5A (last visited July 30, 2023).

⁸ *Disability Impacts California*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/ncbddd/disabilityandhealth/impacts/california.html> (last visited July 30, 2023).

⁹ *Supporting Students With Disabilities At The University Of California*, Office of The President, UNIVERSITY OF CALIFORNIA <https://regents.universityofcalifornia.edu/regmeet/nov20/a4.pdf> (last visited July 30, 2023).

¹⁰ Table 311.10, *Number, and percentage distribution of students enrolled in postsecondary institutions, by level, disability status, and selected student characteristics: 2015-16*, NATIONAL CENTER FOR EDUCATION STATISTICS, May 2018.

¹¹ *A Majority of College Students with Disabilities Do Not Inform School*, *New NCES Data Show*, NATIONAL CENTER FOR EDUCATION STATISTICS, (last visited July 30, 2023).

¹² Archive: 2017–2018 LSAT Takers by Race/Ethnicity & Sex, LSAT, <https://www.lsac.org/archive-2017-2018-lsat-takers-raceethnicity-sex> (last visited July 30, 2023).

¹³ *Requesting Accommodations for the LSAT*, AMERICAN BAR ASSOCIATION, https://www.americanbar.org/groups/diversity/disabilityrights/resources/lSAT_accom/

There is currently no reliable data concerning the percentage of law students with disabilities.¹⁴ Statistics show that 11.9% of graduate students are estimated to be disabled, however the data is not disaggregated by degree (i.e. master, Ph.D. degree) and the data does not show whether law degrees are included.¹⁵ This lack of data undermines nefarious claims that “too many” law students are receiving accommodations because no evidence exists to substantiate those statements.

Finally, at the end of the legal career pipeline, the Bar remains the last step to licensure. The Bar’s most recent statistics showed 6.5% of total applicants received accommodations on the California Bar in 2022.¹⁶ Overall, these statistics debunk the stigma that there is an overabundance of people requesting an accommodation. Further, this unfounded stigma is an improper reason to deny a reasonable accommodation under State law.

Nationwide, only 1.2% of attorneys are disabled, while 18.7-26%¹⁷ of the general U.S. population is estimated to have a disability. Large law firms have the most disparity in their office diversity.¹⁸ Firms reported 0.6% of their attorneys in 2019, and 1.2% of their attorneys in 2021 were disabled.¹⁹ California reports 6% of attorneys are disabled,²⁰ but does not disaggregate this data by firm

¹⁴ Chris Payne-Tsoupros, *A Starting Point for Disability Justice in Legal Education*, J. Committed to Social Change on Race and Ethnicity 164 (2020), <https://ssrn.com/abstract=3653578>

¹⁵ *Percentage distribution of students enrolled in postsecondary institutions, by level, disability status, and selected student characteristics: 2015–16*, NATIONAL CENTER FOR EDUCATION STATISTICS, <https://nces.ed.gov/fastfacts/display.asp?id=60>.

¹⁶ *Report to the Supreme Court on the July 2022 California Bar Examination*, Committee of Bar Examiners, THE STATE BAR OF CALIFORNIA (January 27, 2023), <https://board.calbar.ca.gov/Agenda.aspx?id=16728&tid=0&show=100033212>.

¹⁷ Matthew W. Brault, *Americans with Disabilities: 2010--Household Economic Studies*, U.S. CENSUS BUREAU, July 2012, <https://www2.census.gov/library/publications/2012/demo/p70-131.pdf> [<https://perma.cc/2UZ4-DRC2>]; *United States, DC & Territories Disability Estimates*, CENTER FOR DISEASE CONTROL, 2019, <https://dhds.cdc.gov/SP?LocationId=59&CategoryId=DISEST&ShowFootnotes=true&showMode=&IndicatorIds=STATTYPE,AGEIND,SEXIND,RACEIND,VETIND&pnl0=Chart,false,YR4,CAT1,BO1,,,AGEADJPREV&pnl1=Chart,false,YR4,DISSTAT,,,,PREV&pnl2=Chart,false,YR4,DISSTAT,,,,AGEADJPREV&pnl3=Chart,false,YR4,DISSTAT,,,,AGEADJPREV&pnl4=Chart,false,YR4,DISSTAT,,,,AGEADJPREV> [<https://perma.cc/RC9G-K2DC>].

¹⁸ *Employment Outcomes for Graduates with Disabilities, Research & Statistics*, NATIONAL ASSOCIATION FOR LAW PLACEMENT, <https://www.nalp.org/1222research>.

¹⁹ *NALP Report on Diversity, Research & Statistics*, NATIONAL ASSOCIATION FOR LAW PLACEMENT, <https://www.nalp.org/reportondiversity>; see also 2020 Vault/MCCA Law Firm Diversity Survey Report, (0.65% of total lawyers identify as disabled in 2020).

²⁰ *Diversity of 2022 California Licensed Attorneys*, THE STATE BAR OF CALIFORNIA, <https://publications.calbar.ca.gov/2022-diversity-report-card/diversity-2022-california-licensed-attorneys>.

or other employment. 1.4% of California judges are disabled.²¹

These statistics show that the systemic barriers to education, licensure, and employment result in a lack of diversity in the legal profession, including a lack of disabled people,²² LGBTQ+ individuals,²³ people of color,²⁴ women,²⁵ first generation attorneys²⁶ and individuals with multiple identities.

IV. PROPOSAL RECOMMENDED RULE CHANGES

A. Rule 4.80(A): “disability” definition should be modeled directly from California Law

Rule 4.80(A)'s definition of "disability" should be revised to be consistent with federal and California law. Cal. Gov. Code §12926(j)(1)(A), (m)(1)(B)(ii); see also Cal. Gov. Code §12926.1(a), (c); 42 U.S.C. §12102. “as compared to most people in the general population” is nonexistent in any other anti-discrimination law. *Id.* The creation of additional language to define disability is (1) unnecessary and (2) shows a disregard of the current law and the long legal history of the definition of disability. This definition is also contradictory to the rules' own language housed in 4.81 “Purpose of Testing Accommodations” which states an applicant should be “afforded an equal opportunity . . . as provided to *others*” (emphasis added). “Others” are other applicants, not members of the “general population.”

²¹ *Commission on Judicial Nominees Evaluation, 2021 Statewide Demographics Report, Report in Compliance with Government Code Section 12011.5(n)(B)*, THE STATE BAR OF CALIFORNIA, (March 1, 2022), <https://www.calbar.ca.gov/Portals/0/documents/reports/JNE-Demographics-Report-2021.pdf>.

²² *ABA Profile of the Legal Profession 2022*, AMERICAN BAR ASSOCIATION, <https://www.americanbar.org/content/dam/aba/administrative/news/2022/07/profile-report-2022.pdf>, (1.2% of attorneys are disabled).

²³ *Reporting of Openly LGBT Lawyers — NALP Directory of Legal Employers*, NATIONAL ASSOCIATION FOR LAW PLACEMENT, <https://www.nalp.org/0118research#table1> (2.64% of attorneys are LGBTQ+).

²⁴ *ABA Profile of the Legal Profession 2022*, AMERICAN BAR ASSOCIATION, <https://www.americanbar.org/content/dam/aba/administrative/news/2022/07/profile-report-2022.pdf>, (19% of attorneys are people of color, of this conglomerated statistic, 5.5% are Asian, 5.8% are Hispanic, and 4.5% are Black. The percentage of Black lawyers went down from 4.7% in 2012 to only 4.5% 2022).

²⁵ *ABA Profile of the Legal Profession 2022*, AMERICAN BAR ASSOCIATION, <https://www.americanbar.org/content/dam/aba/administrative/news/2022/07/profile-report-2022.pdf>, (38.3% of lawyers are women).

²⁶ *NALP Reports Employment Outcomes for First-Generation College Students Fall Below Those of Their Peers, and Disparities in Outcomes by Race/Ethnicity Persist*, NATIONAL ASSOCIATION FOR LAW PLACEMENT https://www.nalp.org/uploads/PressReleases/NALPPressReleaseJobsandJDs_20October2021.pdf.

B. Rule 4.80(B): “disability accommodations expert” should be revised to ensure a competent third party non-biased expert.

The proposed the expert qualifications, as defined by the proposed rule, are no different from the current qualifications the Bar’s contracted expert already has, meaning this rule will lead to no more additional analysis than if the Bar itself denied the accommodation. Client denials during the most recent July 2023 California Bar Exam (CBX), show the Bar’s expert retained by the Committee, continues to perpetuate denial reasons with no legal or factual basis.

For example, one “expert” denial letter stated that the decades of medical records the client submitted were “outdated.” However, in a hypocritical turn of events, other denial letters state there is “not enough” documentation given if historical medical records were not given. If the documentation spans several years, it will be labeled as “outdated.” But if an applicant instead gives only the most up-to-date documentation, it will be labeled “unsubstantiated.” This example shows that regardless of whether the applicant gives many years of documentation or just the most current documentation, the Bar’s expert can find a reason to deny.

Another example is a denial letter’s claim that the Bar cannot use any medical records when portions are redacted. In this fact pattern, the redacted records portions contained confidential medical information that did not affect the disability. All relevant information pertaining to the diagnosis and need for accommodation was provided. The “expert’s” written requirement that an applicant give all medical documentation is against federal and state disability and privacy laws. (Health Insurance Portability and Accountability Act of 1996. Pub. L. 104-191; Cal. Civil Code § 1798.198 et seq.). It is well within an applicant's right to redact after-visit physician summaries that often contain additional medical information irrelevant to the accommodation.

These attempts show that the goal of the Bar, through their expert agent, is to deny as many people their accommodation as possible, through whatever means necessary. This mindset must be

systematically addressed with the application of empirically based evidence on the validity of accommodations to provide the framework necessary to create additional proposals.

Finally, the failure of the current “expert” hired by the Bar shows that the definition within the proposed rules must be changed. For example, after the Bar received notification another high stakes testing entity approved the accommodations for an applicant, the “experts” denial findings were ignored, and the accommodations were granted. If, in fact, the Bar had hired a true expert on accommodation, their opinion would not have been at odds with that of other experts. Instead, the “experts” blatant attempts to deny at any cost was clear to even the Bar itself once it was provided the knowledge that the National Bar Examiners Office had approved.

Futile attempts to deny, without any medical or legal basis to do so, are so common that the California Bar is known for this within the medical and legal community.²⁷ This reputation can change for the better if the Bar decides to instead use knowledgeable experts within the disability community who are experienced in disability rights law and evidence-based cultural competency.

The language can be revised to “‘a disability rights service expert’ is an individual from a disability-rights organization which possesses knowledge of state and federal disability, knowledge of historical and current discrimination faced by the disability community, knowledge of respectful language to use when referring to the community, and understanding of data-proven inequities within the disability community.” Having certified experts from the disability community itself is vital to ensuring people with disabilities are understood and receive a fair chance during the accommodation reviewing process. This requirement to have community leaders has been implemented for other classes under California anti-discrimination law, such as for the LGBTQIA+ community under Health and

²⁷ Katherine A. Macfarlane, *Disability without Documentation*, FORDHAM L. REV. 90, 96 (2021); *DREDF and DRA Joint Civil Rights Complainants v. State Bar of California*, United States Department of Justice, (May 18, 2023); *Kara Gordon, et al., v. State Bar of California, et al.*, Case No. 20-cv-06442-LB, (N.D. Cal. Sep. 30, 2020).

Safety Code §1367.043(a)(2)(F). The code requires facilitation, oversight, and training by “TGI-serving organizations.”²⁸ Likewise, the Commission can use this language to ensure “disability-serving organizations” qualified in disability rights law and evidence-based cultural competency are making accommodation decisions.

In addition, a non-biased disability rights expert still must defer to the applicant and their qualified healthcare professional. There are hundreds of thousands of disabilities, and as currently defined, an “expert” need not have any medical expertise. Deference to the medical experts and healthcare providers is of vital need.

C. 4.80(C): “high stakes testing” definition must include law school high stakes exams.

4.80(C) “A “high stakes exam” refers to any of the following: California Bar Exam, First-Year Law Students’ Exam, Multistate Professional Responsibility Exam (MPRE), a bar exam in another U.S. jurisdiction, ABA and California accredited law school exams, LSAT, GRE, GMAT, MCAT, DAT, SAT I, SAT II, ACT, or GED.”

This is a reasonable change as the State Bar oversees ABA-accredited and California-accredited (by the State Bar's Committee of Bar Examiners (CALS)) law schools throughout California.²⁹ As the Bar itself oversees and regulates these law schools, it should also trust the institution to provide accurate accommodations. For further efficiency, the Bar can request documentation directly from the school. Requesting documentation from the institution would also decrease burdens upon applicants. Unless accommodations or disabilities have changed and the accommodations need to be updated, such

²⁸ SB 923; *Ca. Health and Saf. Code* §1367.043(a)(2)(F) (“TGI” means transgender, gender diverse, or intersex); *see also Ca. Health and Saf. Code* §1509002(a) (a TGI-serving organization is defined as a “public or nonprofit organization with a mission statement that centers around serving transgender, gender nonconforming, and intersex people, and where at least 65 percent of the clients of the organization are TGI.”)

²⁹ *Law Schools*, THE STATE BAR OF CALIFORNIA, <https://www.calbar.ca.gov/Admissions/Law-School-Regulation/Law-Schools>.

accommodations should be applied directly to the California Bar without further voluminous documentation to achieve the Bar's goal of "streamlining" the process.

D. 4.81(B)(3): This proposed rule must defer to the applicant and their qualified professional.

DRC firmly believes in deference to all individuals with disabilities, as they know their body best. However, we also recognize that a qualified healthcare professional that knows their patient's disability and needs is helpful because the Bar is not a qualified healthcare professional as defined in the proposed rules under 4.80(G). Deference to qualified professionals is undermined several times in the proposed rules, including in the language of 4.81, as the fact that an applicant "has a disability" and "needs the requested accommodation" is not substantiated and authenticated by a qualified healthcare professional, it is at the whim of the Bar. It is good sense to defer to a healthcare provider that has specific medical knowledge concerning the specific disability.

A healthcare professional can provide a thorough analysis of the nexus between the accommodation and the disability and why it is needed. Without the proposed deference, an applicant will provide an overinclusion of documentation that has no nexus to the accommodation because they are unsure what the Bar is looking for as an entity who is unqualified to review medical documentation.

It is vital for this Committee to address that applicants with disabilities may not receive accommodation or diagnoses until they are older. This can be attributed to a number of factors, including acquiring a disability later in life, lack of access to medical care, or having parents that are not knowledgeable of their child's right to have accommodations. Further, "a system that requires extensive medical documentation may eliminate applicants who cannot obtain the documentation for a myriad of practical reasons that bear no relation to disability."³⁰

The State Bar seeks to "advance diversity, equity, and inclusion (DEI) in the legal profession by

³⁰ Katherine A. Macfarlane, *Disability without Documentation*, FORDHAM L. REV. 90, 96 (2021).

focusing on key areas of influence, specifically the pipeline into the legal profession, retention and career advancement, and judicial diversity.” Because of systemic inequity, the Bar should endeavor to advance diversity, equity, and inclusion by conducting further research surrounding systemic discrimination that may cause an applicant to have certain types of documentation, as well as review their internal institution’s inequitable systems for changes that can be made to provide greater diversity for disabled and multi-marginalized applicants. One of *many* necessary procedures to ensure equity in the profession includes an evidence-based undertaking to the reasonable accommodations process.

E. 4.83: The rule as proposed needs definitional and substantive changes to be equitable.

We acknowledge and commend proposed rule 4.83 as it will provide a more efficient way to receive accommodations for the California Bar Exam by instituting prior approved accommodations received from the First Year Law Students’ Exam, Multistate Professional Responsibility Exam (MPRE), a bar exam in another U.S. jurisdiction, LSAT, GRE, GMAT, MCAT, DAT, SAT I, SAT II, ACT, or GED and allocating them to the Bar Exam. (*See proposed rule 4.80 Definitions*). Currently, the California Bar has a very elaborate process for requesting reasonable accommodation. As the Committee is aware, this process creates inequality for disabled applicants who must spend large portions of their time on the accommodation application process, time that could be spent studying and preparing for the Bar. However, the rule needs several changes to the text to be equitable for all applicants.

a. 4.83(A)(5) “Certify” remains vague and ambiguous.

We continue to be concerned about what the Bar is trying to indicate by using the word “certify.” Under proposed rule 4.83(A)(5), the word “certify” is not defined in section 4.80. As currently read, this word “certify” could include additional steps the Bar creates to limit accommodations. We request the process and procedure behind how an applicant would certify be clarified in the rule text, mainly that it

not be an overly burdensome system to certify oneself after providing documentation of prior accommodations.

b. 4.83(A)(7): Exclusion of certain accommodations is discriminatory and arbitrary.

We applaud the Bar's rule edits to allow for 100 percent extra time for applicants for automatic approval. However (A)(7) still singles out certain accommodations continues to be arbitrary and has no other purpose besides displaying the Bar believes these accommodations are either unnecessary, unneeded, or unwarranted and therefore must go through additional processes to prove if the accommodation is justified. These are also common accommodations that have been singled out. For instance, adjustments to the testing environments such as a private room come in as the second most common accommodation at 22%.³¹

Preventing certain accommodations also singles out certain types of disabilities, a problematic practice. Singling out a subset of disabilities as shown in (7) is unlawful under federal and state case law. *See Olmstead v. L.C.*, 527 U.S. at 598 n. 10.; *e.g.*, *C.O. v. Portland Public Schools*, 679 F.3d 1162, 1169 (9th Cir.2012); *Henrietta D. v. Bloomberg*, 331 F.3d 261, 274 (2d Cir.2003); *Johnson v. K Mart Corp.*, 273 F.3d 1035, 1053–54 (11th Cir. 2001). This is unduly burdensome to applicants with certain disabilities who need these accommodations. If the rules truly strive to approve prior accommodations when an applicant has already jumped through the hoops of another institution, this should apply to all accommodations.

F. Rule 4.84(B): Dates for submission should be changed to ensure appeal process can be offered to all applicants.

Deadlines for accommodation submission have not changed under 4.84(B). The deadline is the first day of the month before the exam (i.e., June 1 for the July CBX, and January 1 for the February

³¹ *Testing Companies Most Commonly Granted Extra Time to Accommodate Individuals with Disabilities*, **G, AO-22-104430**, U.S. GOVERNMENT ACCOUNTABILITY OFFICE, <https://www.gao.gov/products/gao-22-104430> (last visited July 30, 2023).

CBX). However, this date continues to be misleading, as an applicant may not receive the knowledge their application was incomplete, or could appeal, if they understand this to be the deadline for submission. Too many applicants may assume this deadline will afford them their rights when it will not under the current deadlines. The confusion of dates and deadlines needs to be resolved for both applicants and the Bar's efficiency.

G. Rule 4.85(A): Revise and ensure forms A-H and the “Online Petition” are updated and extended for public comment.

The required forms A-H and the online petition are overbroad. The Bar accommodation application insinuates that decades of documentation are required to ensure that an application is complete, asking for disability documentation from elementary school, middle school, and high school.³²

Further, the rules as proposed do not provide what the required “Online Petition” and Forms A-H on the Bar website and applicant portal will look like.³³ Without knowledge of whether the old forms will continue to be used in part, substantially, or in full, we cannot ascertain whether some of the concerning and excessive asks will be resolved.

In the *Presentation on Proposed Amendments* presented at the Bar's public meeting on May 18-19, 2023, it was inferred that new forms have already been created.³⁴ However, no forms are present in the public comment packages that have been presented to the public.³⁵ The current forms located on the

³² *Requesting Testing Accommodations*, THE STATE BAR OF CALIFORNIA, <https://www.calbar.ca.gov/Admissions/Examinations/Requesting-Testing-Accommodations>.

³³ *Requesting Testing Accommodations*, THE STATE BAR OF CALIFORNIA, <https://www.calbar.ca.gov/Admissions/Examinations/Requesting-Testing-Accommodations>.

³⁴ *Presentation on Proposed Amendments to Admissions Rules Related to Testing Accommodations*, THE STATE BAR OF CALIFORNIA, <https://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000030779.pdf>

³⁵ *Proposed Amendments to Admissions Rules Related to Testing Accommodations (Rules 4.80-4.92): Request to Circulate for Second Public Comment Period, Open Session Agenda Item 706 May 2023*, STATE BAR OF CALIFORNIA, <https://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000030745.pdf> (last visited July 30, 2023).

Bar website have overinclusive and invasive questions, requiring capture of every medical and disability-related item possible from each applicant. (*See* full analysis in January 31, 2023, DRC Public Comment). The proposed rule 4.85 states that an applicant must submit the required “State Bar’s form” as well as “supplemental documentation.” This proposed language is too vague on its face to understand what new forms will be instituted, and how they will or will not be changed. We propose the Bar provide rule revisions which specifically state the forms that will be used and provide redlined revisions to the current online forms and online petition for public comment as well.

H. 4.86(B): Timelines for Processing Initial Requests are confusing and nontransparent.

The proposed rules allow the Bar to have up to sixty (60) business days to respond to a request for accommodation. For the most recent July 2022 CBX, this equates to a March 4 submission deadline to provide the Bar with sixty business days to respond, about seven weeks before the exam. While we understand the importance of a thorough review of documentation, this extended timeframe is counterproductive to efficiency and leads to serious consequences for an applicant.

This is disparate treatment of disabled students and is on its face discriminatory. Disabled applicants must spend months preparing to submit an accommodations application before the March 4 deadline. Nondisabled applicants need not worry about any filing or applications until the April 1 timely filing of the Bar application. Thus, the current rules do not address the ADA’s provisions that testing entities “should not impose earlier registration deadlines on those seeking testing accommodations.”

We recommend providing a turnaround time of 20 days for the deadline for the Bar to provide an answer to an applicant. This is sufficient time to review documentation and give an applicant a decision. A 60-day review period means significant delay for an applicant’s progress in whether they will sit for the Bar exam they have applied for.

I. Rule 4.88(A)-(G): Revise to ensure nonbiased entities with expertise review the appeals process, strike the Director of Admission and Committee.

Much of the language within the proposed rules succeeds in perpetuating the denials we have seen, as the language surrounding *who* decides denial of requests continues to defer to “the Bar” as the final entity with the say in whether someone has a medical condition, which is simply inappropriate. This includes proposed Rule 4.88 which states that appeals processes will go through the Director of Admissions and then the Subcommittee on Examinations. Both bodies are biased entities which control admissions, rules, and their implementation, and do not have the expertise required to analyze such an appeal.

We propose “a disability rights service expert,” as discussed in 4.80(B) to review appeals. This definition can include disability rights organizations such as, but not limited to, Disability Rights Advocates (DRA), The Coelho Center for Disability Law Policy and Innovation, Mental Health Advocacy Services (MHAS), the California Federation of the Blind, or any of the twenty-eight Independent Living Centers in California. The Bar should also ensure that a different individual or organization must review the denial made by the first individual or organization decision to ensure a non-biased review system.

This is a needed change, as we have seen applicants who draft detailed personal statements, schedule and attend multiple appointments with their licensed professionals, provide previous testing and accommodation history, and provide all documentation currently required by the Bar exam, and still, the Bar does not defer to the copious amounts of evidence showing a disability. Indeed, through analyzing written denial letters from the Bar, the letter’s language betrays the Bar’s stance to deny accommodations at all costs, regardless of the information contained within an applicant’s request.³⁶ The Bar’s “reasonable accommodations expert” has the same mindset as the Bar, mainly “fear that

³⁶ See vendors for 2022 here: <https://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000029923.pdf>; see John Hosterman, PhD, <https://www.linkedin.com/in/johnhosterman/recent-activity/> “So many special snowflakes posing as people with disabilities.”

people are faking their disabilities” which results in “creating systems in which individuals who seek legal protection must go to great lengths to demonstrate that they are worthy of it.”³⁷ This is a “demonstration” that non-disabled applicants do not have to provide to be licensed.

We recommend the Commission conduct further analysis into how they employee, train, and consult. *See Best Practices Report*; 2015 U.S. Dist. LEXIS 104751, at *45 (N.D. Cal. Aug. 7, 2015). This section should also contain the documentation requirements regarding deference to the qualified healthcare professional that has the knowledge to determine a disability and the need for accommodation.

J. Rule 4.88(B): Revise deadlines to ensure that all requests for review or appeal can occur within the current examination period, in connection with 4.86.

Under the proposed rules, the Bar must ensure transparency and create a date that applicants will know they will receive their full rights to appeal or provide a complete application. The current 4.88 language is ambiguous on the exact timeframe of submission that would allow an applicant to receive 30 days to submit a denial. The “timely filing deadline” could be for the Bar exam itself, or the timely filing deadline for accommodations which is still a different date than non-disabled individuals. We recommend clarifying the language to the Bar’s true intent and ensure language is clear for applicants.

K. Rule 4.89(A): Revise to clarify language that an applicant who meets the three standards for the Bar need not resubmit all documentation, but simply request through the Bar to review the “Request” submitted in the past.

The proposed language of 4.89(A) is difficult to ascertain, and we propose it be better drafted to show what exactly an applicant would need to “submit” in order to be provided the accommodations again. The Bar states that requests for accommodation, even if already submitted in the past, must be re-submitted. The rule should ask applicants to only need to provide notice (not a full application) if they continue to have a disability for the next round of exams.

³⁷ Katherine A. Macfarlane, *Disability without Documentation*, FORDHAM L. REV. 90, 96 (2021).

As currently drafted, this seems to create unnecessary duplicate volumes of documentation for the Bar, if the accommodation has been granted prior, as stated in the rule, the Bar would already have all documentation, and would only need to be provided notice from the applicant that they are going to sit for the next upcoming exam. All the documentation should be saved by the Bar's servers and web platform for efficiency. Of course, a Bar applicant may wish to provide additional new documentation if needing different accommodation, but if the prior accommodations were approved, a truncated application should be created, with the option for the applicant to simply provide the Bar with an update there has been no change in their disability and all documentation currently on file is accurate.

L. The Bar should provide clarity and better access to communication to provide for an interactive process

As stated in our prior comment, the proposed edits lack an update to ensure feasible communication between the Bar and the applicant. DRC recommends a viable system of accessible ways to contact and participate in the accommodation process. Software solutions to the prior convoluted system will assist with effectively communicating with applicants and ensure both parties can engage in the interactive process under state and federal law. 2 Cal Code Regs. § 11065; 2 Cal. Code Regs. § 12177; 42 U.S.C.A. § 12112. DRC recommends the Bar engage with the interactive process, including creating feasible ways to provide updates on when the Bar is reviewing the application, when the application has been sent to an outside expert to review, and multiple ways to communicate back and forth with the applicant. The Bar should respond within three business days to messages from applicants to ensure the applicant is notified and informed of the process. The Bar can lower response times by implementing a helpdesk with live chat, SMS, or other live support channels, and building out a robust self-help webpage with common Q & A's. Lastly, the Bar also must implement a call-back number. It is

readily feasible that the Bar has dedicated lines to call specifically for reasonable accommodations as well as an email system that does not delete messages and is responded to in a timely manner.

M. The Proposed Rules Lack Training and Implementation Information

The proposed rules do not take into consideration the need to provide training and knowledge to all State Bar staff disabled applicants may encounter. First, employees must be better trained to understand each policy and procedure that will occur with the specific accommodation. Second, employees must also be trained for the day of testing implementation. Training can include an online course set up by a disability rights-serving organization, yearly refresher training required for staff, and written practical guidance that staff can reference to answer questions regarding implementation of accommodations on the day of the exam. The need for implementation documents is vital as currently no such document exists, giving each disabled student a different experience to that of their non-disabled peers. Third, practical guidance and Q & A document formats will also better assist applicants in determining the accommodations they should ask for in the first place. The current practical guidance for nondisabled and disabled bar applicants is not released until after the deadline to submit reasonable accommodations. This lack of transparency leads to a lack of knowledge concerning what the exam room looks like, what rules are instituted, and what items are prohibited. (*See* January 31, 2023, DRC Public Comment for further examples and discussion).³⁸ The specific procedural rules and practice guidance for the exam should be included on the Bar's public facing website at all times of the year.³⁹

II. CONCLUSION

³⁸ *July 2022 Bar Exam Admittance Ticket Bulletin*, THE STATE BAR OF CALIFORNIA, <https://www.calbar.ca.gov/Portals/0/documents/admissions/Examinations/July-2022-Bar-Exam-Admittance-Ticket-Bulletin.pdf>; *February 2023 Bar Exam Admittance Ticket Bulletin*, THE STATE BAR OF CALIFORNIA, <https://www.calbar.ca.gov/Portals/0/documents/admissions/Examinations/February-2023-Bar-Exam-Admittance-Ticket-Bulletin.pdf>

³⁹ *Requesting Testing Accommodations*, THE STATE BAR OF CALIFORNIA, <https://www.calbar.ca.gov/Admissions/Examinations/Requesting-Testing-Accommodations>.

For the forestated reasons stated in this letter, Disability Rights California opposes the rule unless feasible amendments are made.

Sincerely,

A handwritten signature in black ink, appearing to read 'KJ Muller', with a stylized flourish at the end.

Kendra J. Muller, Esq.
Staff Attorney
Civil Rights Practice Group
Disability Rights California
Kendra.muller@disabilityrightsca.org
(619) 814-8546



October 6, 2023

Submitted Via Online Portal,
<https://fs22.formsite.com/sbcta/5iy5pxjva9/index>

Board of Trustees
State Bar of California
180 Howard Street
San Francisco, CA 94105

CC: Devan.McFarland@calbar.ca.gov
Louisa.Ayrapetyan@calbar.ca.gov

RE: Revised Proposed Amendments to the Rules of the State Bar Pertaining
to Testing Accommodations – **OPPOSE UNLESS AMENDED**

Dear Chair Duran, Vice-Chair Stallings, and Trustees Broughton, Chen, Cisneros, De
La Cruz, Knoll, Shelby, Sowell, and Toney:

Disability Rights Education and Defense Fund (DREDF) and Disability Rights
Advocates (DRA) write to **OPPOSE UNLESS AMENDED** the Revised Proposed
Amendments to the rules of the State Bar pertaining to testing accommodations. The
revised proposal fails to comply with state and federal laws and will not support a fair
and effective testing accommodations program.

DREDF and DRA are nonprofit law and public policy organizations committed to
promoting diversity in the legal profession, and to eliminating unnecessary bias and
barriers that exclude qualified individuals with disabilities. We have extensive
experience representing disabled individuals who need accommodations to access the
legal profession, including disabled law graduates who need testing accommodations to
take the California bar exam on an equal basis as nondisabled graduates.

As DREDF and DRA have stated previously,¹ the minimum standards for a fair,
effective, and lawful approach to testing accommodations have been developed and
articulated by the U.S. Department of Justice (DOJ) and by the judicial process through

¹ Comments of DREDF, Legal Aid at Work, and DRA on Proposed Amendments (Jan. 31, 2023),
<https://dredf.org/wp-content/uploads/2023/01/2023.01.31-DREDF-LAAW-DRA-Comments-w-Exhs-A-and-B.pdf>.

litigation by California's Department of Fair Employment and Housing (DFEH, now Civil Rights Department) against the Law School Admissions Council (LSAC).²

The revised proposed amendments fail to meet these minimum standards in numerous respects and will not effectively further the goals of elimination of bias and professional diversity. As described below, the proposal:

- uses the wrong definition of disability;
- fails to automatically grant or defer to prior testing accommodations granted by law schools and colleges for timed, high-stakes exams
- imposes arbitrary limitations on testing accommodations that are automatically granted;
- fails to incorporate the “best ensure” standard;
- fails to ensure prompt responses to accommodation requests or a timely and effective appeals process to ensure that disabled candidates may seek accommodations, appeal, and then participate in the same exam cycle as their nondisabled peers;
- fails to discuss replacing or diversifying the disability consultants who have contributed to the unlawful system, and instead imposes new seniority requirements for these consultants; and
- fails to include a plan for the training, supervision, and leadership changes needed to achieve the cultural sea-change that appropriate new standards will require.

Further, the topic of these rules has been considered by the State Bar Board of Trustees, committees, subcommittees, and staff for several years with numerous comment cycles. Stakeholders may not have the bandwidth to participate in every comment cycle. Fluctuations in the total count of comments is not a reliable indicator of stakeholder views.

Importance of Disability Access to the Legal Profession

A diverse bar with lawyers of all backgrounds and statuses facilitates access to justice, improves legal services, offers role models, and promotes public confidence. A legal profession that includes, welcomes, and licenses qualified lawyers with disabilities

² See U.S. Dep't of Justice, ADA Requirements: Testing Accommodations (2014), https://www.ada.gov/regs2014/testing_accommodations.html; Consent Decree in *Dep't of Fair Emp't & Hous. v. Law Sch. Admission Council Inc.*, No. 12-CV-01830-JCS (N.D. Cal., May 29, 2014); <https://civillrights.ca.gov/legalrecords/consent-decree-in-dfeh-v-lsac/>, and <https://clearinghouse.net/doc/69024/>; Best Practices Panel Report, <https://civillrights.ca.gov/LegalRecords/final-report-of-the-best-practices-panel/>; *DFEH v. LSAC*, 2015 U.S. Dist. LEXIS 104751 (N.D. Cal. Aug. 7, 2015) (deciding challenges to Best Practices Report); see also 42 U.S.C. § 12189; 28 C.F.R. § 36.309; *Enyart v. Nat'l Conference of Bar Exam'rs, Inc.*, 630 F.3d 1153, 1162 (9th Cir. 2011); 28 C.F.R. Part 35, App. A, Other Issues (section 36.309 “is useful as a guide for determining what constitutes discriminatory conduct by a public entity in testing situations”).

including disabled people of color is better equipped to serve the varied people and communities who live and work in California, including indigent people.

Despite the critical importance of a diverse and inclusive legal profession, unnecessary barriers continue to exclude disabled people from becoming licensed California attorneys. As the State Bar itself has reported, only six percent of California attorneys report having a disability,³ a fraction of the proportion of disabled people in the state population (about one in five). This mismatch ultimately leads to disparities in the California judiciary: only 18 state court judges (two percent of all California judges) identify as having a disability.⁴

Disability representation throughout the profession promotes an equal and fair legal system and helps ensure that laws are enforced with an understanding of the experiences of disabled people – a group comprising millions of Californians. Lawyers with disabilities disproportionately serve in legal aid and government roles that support the fair treatment of diverse litigants and court users. Disabled lawyers and judges provide role models for children and young adults with disabilities. Judges with disabilities send the message that disabled people can serve in positions of authority at the highest levels.

Many people with disabilities require reasonable accommodations, such as extended time, to take high-stakes exams. Testing accommodations allow the individual to demonstrate the knowledge and abilities measured by the exam. Without such accommodations, the resulting scores reflect the effects of disability and are not a valid reflection of aptitude, knowledge, or abilities. Testing accommodations do not confer an unfair advantage but instead provide an equal opportunity. Today, decades after the enactment of the Americans with Disabilities Act and other disability rights laws, testing accommodations are a regular, recognized, and accepted part of our educational and professional systems, including in K-12 education through IEPs and Section 504 plans, college, the LSAT, and law school.

The ready provision of testing accommodations on the LSAT, achieved through the protracted *DFEH v. LSAC* litigation, systemically reformed the pipeline for the legal profession nationwide and opened the doors to law school for candidates who now need accommodations to take the California Bar Exam on an equal playing field.

Problems with the State Bar's Latest Proposal

³ State Bar of California, 2022 Report Card on the Diversity of California's Legal Profession, Diversity of 2022 California Licensed Attorneys, Fig. 7, <https://publications.calbar.ca.gov/2022-diversity-report-card/diversity-2022-california-licensed-attorneys>.

⁴ Demographic data on gender, race/ethnicity, sexual orientation, gender identity, and veteran and disability status of California State Justices and Judges (2022) at 14-18, <https://www.courts.ca.gov/documents/2022-JO-Demographic-Data.pdf>.

Law graduates with disabilities across the state routinely report that their requests for testing accommodations on the California bar exam are denied in whole or in part without a legitimate basis. Denials occur even when candidates submit proof that they have received similar testing accommodations in the past, such as on the LSAT, in college, in law school, on the MPRE, and in other similar settings. Denials occur even when candidates submit detailed and expensive neuropsychological, psychoeducational, and other medical testing and assessment required by the State Bar. Denials often occur shortly before the scheduled exam, with no opportunity for reconsideration.⁵ The denial letters are often inaccurate, incomplete, poorly reasoned, and offensive. The resulting exclusion and disrespect of qualified candidates is harmful not only to the affected individuals but also to the legal profession and communities served by the profession across the state.

It is in this historical and present context of extensive and embedded disability discrimination and exclusion that the State Bar makes its latest rules proposal, and DREDF and DRA register their opposition.

Wrong and Overly Narrow Definition of “Disability.”

The proposal states that, “A ‘disability’ is a physical or mental impairment that limits one or more of an applicant’s major life activities as compared to most people in the general population.” Proposed Rule 4.80(a). The first half of the definition is similar to the existing rule, Rule 4.82(A), and appropriately tracks California law, see Cal. Gov. Code 12926(j), (m). But the last phrase of the proposed rule – “as compared to most people in the general population” – diverges from California law and reflects a favorite form of reasoning used by the disability consultants employed by the State Bar. A large proportion of denial letters received by candidates include boilerplate text opining that the candidate does not have a disability because they can read or write or perform specific academic tasks as well as or better than most people in the general population.

A requirement that a person seeking accommodations be compared to “most people in the general population” can function to unfairly exclude high achievers with disabilities. People who have graduated law school, with and without disabilities, typically perform certain academic tasks better than the average person in society. This comparison is not permitted under California’s definition of disability, which includes anyone with a physical or mental condition that “makes the achievement of the major life activity difficult.” Cal. Gov. Code 12926(j)(1)(A), (m)(1)(B)(ii); see *also* Cal. Gov. Code 12926.1(a), (c). This definition easily includes law school graduates with learning disabilities, ADHD, and other disabilities that require testing accommodations.

⁵ Civil Rights Complaint Filed Against State Bar of California for Failing to Provide an Accessible Bar Exam (May 18, 2023), <https://dredf.org/2023/05/18/civil-rights-complaint-filed-against-state-bar-of-california-for-failing-to-provide-an-accessible-bar-exam/>; Chris Williams, “California’s Bar Exam Is Hard Enough Without Dealing With Its Accommodation Process Let people take the darn test,” Above the Law (June 13, 2023), <https://abovethelaw.com/2023/06/californias-bar-exam-is-hard-enough-without-dealing-with-its-accommodation-process/>.

Moreover, even under federal law, an assessment of disability must follow the myriad principles of the ADA Amendments Act of 2008, 42 U.S.C. § 12102, such as those regarding major life activities, major bodily functions, mitigating measures, and episodic conditions. These principles do not appear in the proposed rules. The new language requiring a comparison to “most people in the general population” should be deleted.

Further, California’s definition of disability includes anyone who previously received special education services. Cal. Gov. Code 12926(j)(2), (3), (m)(2), (3). This category of disability is particularly salient in the context of testing accommodations. Yet the proposed rules do not include people with a history of special education in the definition of disability.

Arbitrary Limitations in Automatic Approval Process.

If a candidate requests the same testing accommodations that they previously received on a similar standardized exam or high-stakes test, and documents their prior receipt, “then a testing entity should generally grant the same testing accommodations without requesting further documentation.” U.S. Dep’t of Justice, ADA Requirements: Testing Accommodations (Testing Accommodations Guidance);⁶ *accord Dep’t of Fair Emp’t & Hous. v. Law Sch. Admission Council Inc.*, No. 12-CV-01830-JCS (N.D. Cal.), Consent Decree (May 29, 2014), at Injunctive Relief, ¶ 5(a), (c), (d)(ii);⁷ *DFEH v. LSAC*, Best Practices Report;⁸ 28 C.F.R. § 36.309(b)(1)(v).

The proposed rules create a process for the “automatic” approvals of certain accommodations that the candidate has previously received on timed, high-stakes test. Proposed Rule 4.83. Such streamlined and automatic grants are appropriate and consistent with the standards established through the *DFEH v. LSAC* litigation. They also meet the settled needs and expectations of disabled law school graduates who have completed law school with testing accommodations. But the proposed rules then substantially undermine this principle, making opposition necessary.

- Exclusion of Timed Law School Exams From Definition of “High-Stakes Tests”

The proposal excludes timed law school exams from the definition of high-stakes tests. Proposed Rule 4.80(C). This is illogical as timed law school exams are closely analogous to the bar exam. Moreover, many disabled candidates, and particularly

⁶ Testing Accommodations Guidance, https://www.ada.gov/regs2014/testing_accommodations.html.

⁷ *DFEH v. LSAC* Consent Decree (N.D. Cal. May 29, 2014), <https://civillibrights.ca.gov/legalrecords/consent-decree-in-dfeh-v-lsac/>; <https://clearinghouse.net/doc/69024/>.

⁸ *DFEH v. LSAC* Best Practices Report, <https://civillibrights.ca.gov/LegalRecords/final-report-of-the-best-practices-panel/>, 2015 U.S. Dist. LEXIS 104751, at **45, 53 (N.D. Cal. Aug. 7, 2015, deciding challenges).

people of color with disabilities, first receive testing accommodations in law school. This group includes candidates who are older, who lack personal or family resources and instead faced adversity, who grew up and were educated in other countries, and/or who attended colleges and law schools that did not require or rely heavily on standardized testing for admissions.

For example, UC Law SF's [Legal Education Opportunity Program](#) (LEOP) program is dedicated to making law school accessible to students from adverse backgrounds. Participants in programs like LEOP – people who are critical to the decades-long effort to diversify California's legal community – may not have previously had the resources to receive disability supports such as testing accommodations. The exclusion of timed, law school exams from the definition of “high-stakes” exams unnecessarily burdens the very candidates that the State Bar should be supporting.

The proposed rules state that “considerable weight” will be given to documentation of past testing accommodations approved for timed exams administered in college or law school, but that these prior accommodations do not trigger an automatic approval on the bar exam. Proposed Rule 4.82(D). Given the need for systemic reform of standards, leadership, and personnel, a discretionary standard here is insufficient and must be rejected.

- Arbitrary Limitations on Accommodations Automatically Granted

Further, the proposal imposes arbitrary limitations on what accommodations will be automatically granted. For example, it excludes the accommodation of a private room. Proposed Rule 4.83(A)(7). There is no basis for excluding private rooms from the automatic approval process. A private room for test taking is common testing accommodations needed by some candidates. They are included in the LSAT consent decree. *DFEH v. LSAC* Consent Decree, ¶ 5(A) & Exhibit 1. The automatic process should include the accommodation of a private room.

No “Best Ensure” Standard.

The proposed rules state that “[t]esting accommodations are provided to ensure that an applicant who has a disability can access the examination and is afforded an equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others.” Proposed Rule 4.81(A).

While this is a step forward, the proposed rules should also state that the State Bar should be administered so as to “best ensure that ... the examination results accurately reflect the individual's aptitude or achievement level” rather than their disability. See 28 C.F.R. Part 35, App. A, Other Issues (the provisions of 28 C.F.R. § 36.309, implementing 42 U.S.C. § 12189, are “useful as a guide for determining what constitutes discriminatory conduct by a public entity in testing situations”); 28 C.F.R. § 36.309 (examinations must be “selected and administered so as to best ensure that

... the examination results accurately reflect the individual's aptitude or achievement level" rather than their disability. *See also Enyart v. Nat'l Conference of Bar Exam'rs, Inc.*, 630 F.3d 1153, 1162 (9th Cir. 2011) (upholding "best ensure" standard).

No Resolution of Chronic Timeline Problems.

The proposed rules do not resolve chronic problems with the timelines associated with the State Bar's responses to accommodation requests and processing of appeals of denials. The proposal explicitly states that people who seek accommodations on the last day to register for a particular sitting of the bar exam may not have time to have their request processed and participate in a full review of any denials before the exam. Proposed Rule 4.84(E). Instead, under the proposed rules, candidates with disabilities who wish to have the opportunity to respond to requests for more documentation and to appeal an accommodation denial must submit their requests several months earlier than the registration deadline for their nondisabled peers. *See* Proposed Rules 4.84(B) (registration deadlines for all test takers), 4.86(A) (30 days for State Bar to state whether request is complete or requires more documentation for request to be "deemed complete"), (B) (once request is "deemed complete" by State Bar, it then has 60 days to say whether the request is granted, denied, or "pending."), 4.88(B) (last day to submit request for review is first business day of month of exam).

Under these proposed rules, as under the existing rules, the process can extend for months, with the request not fully decided in time for the scheduled exam. Candidates must then take the exam without completing the process that might secure the accommodations they need or delay the exam by six months and endure considerable harm to their professional plans.

The proposed timelines violate U.S. Department of Justice [guidelines](#) on testing accommodations that require that a testing entity respond in a timely manner to requests for testing accommodations to ensure equal opportunity for individuals with disabilities. This means that all candidates with disabilities should be able to register and apply for accommodations using the same deadlines that their nondisabled peers use to register for the exam.

The State Bar should adopt new timelines that comply with the Department of Justice guidelines. Based on the current calendar, which includes about seven weeks between the registration deadline and the bar exam, a response from State Bar staff within two weeks of a request for accommodations is necessary to reach this standard. A two-week response window leaves five weeks before the bar exam, a period necessary for the candidate to complete further steps, such as communications with State Bar staff, collection of any additional information, and the filing and processing of any appeal.

Implementing a lawful timeline will require that the State Bar streamline responses to requests – including by automatically granting law school accommodations – so that any remaining requests can be processed promptly.

Additional Problems with the Rules.

The proposed rules do not change the State Bar's position that it does not offer certain accommodations, such as stop-the-clock breaks, across the board. The State Bar should not exclude common or even uncommon testing accommodations without an individualized assessment. Stop-the-clock breaks are a common testing accommodation which is included in the LSAT consent decree. *DFEH v. LSAC Consent Decree*, ¶ 5(A) & Exhibit 1.

The proposed rules require that candidates seek a review within 14 days of receiving the State Bar's response, even if there is more than two weeks between the denial and the first day of the month of the scheduled exam. Proposed Rule 4.88(A), (B). The only exception is for "[a]pplicants requesting review by the timely filing deadline for the exam" who are given "30 days from the date of the denial or modified grant to submit their request." The language of this 30-day pathway is hard to parse, as it suggests that the applicant must submit their initial request so early as to have received a denial and still have 30 days left before the "timely filing deadline for the exam." But the application is made available fewer than 30 days before the "timely filing deadline for the exam," so this cannot be the meaning. It may be that the State Bar means to give 30 days to those who file their initial request for accommodations by the timely filing deadline for the exam (about four months and three weeks before the exam), but this is not clear.

Preparing an appeal can require a revised personal statement as well as the collection of additional documentation from busy qualified professionals. Candidates should be granted up to 30 days to submit a request for a review, so long as the review is submitted by the first day of the month of the scheduled exam.

No Replacement or Diversification of Disability Consultants.

Leadership and personnel matter as much as written rules and procedures. For many years, the State Bar has relied upon a small group of longtime reviewers who have developed and applied a stringent, stingy, and skeptical approach to testing accommodations. These reviewers are poorly situated to implement the substantial reforms needed here.

Here, the State Bar must increase in number and diversify in expertise its pool of expert consultants that it uses to review and evaluate requests for testing accommodations. This was a core provision of the LSAC consent decree, *DFEH v. LSAC Consent Decree*, at Injunctive Relief, ¶ 6, but there is no such provision in the State Bar proposal. Instead, the proposal imposes new seniority requirements – a minimum of five years' experience in reviewing requests for testing accommodations for certification or licensure – for disability consultants. Proposed Rule 4.80(B).

The State Bar should delete the new experience requirement and instead commit itself to diversifying or replacing the longtime State Bar disability consultants who have contributed to the unlawful system for many years.

No Plan for the Training, Supervision, and Leadership Review Needed to Achieve Systemic Reform.

The proposed rules include some good standards, including one that limits required documentation to that which is reasonable, limited and narrowly tailored to the information needed, Proposed Rule 4.85(B), and a second that requires deference to the assessment of candidate's qualified professional over that of the disability consultant, Proposed Rule 4.82(C).

Other portions of the proposed rules – the definition of disability, the elements of the automatic approval process, timelines, and so on – could be amended to comply with applicable standards.

But whatever is written down on paper, the State Bar needs a comprehensive plan of training, supervision, and personnel change to achieve the cultural sea-change that is needed to reform its testing accommodation program.

For example, State Bar staff and consultant reviewers must be trained and directed to approach the process with the presumption that the testing accommodation request is justified. See Best Practices Report; 2015 U.S. Dist. LEXIS 104751, at *45 (N.D. Cal. Aug. 7, 2015).

The State Bar should assess its leadership and chain of command for reviewing and evaluating requests for testing accommodations. Any implementation of new standards for reviewing and deciding requests for testing accommodations requires leaders who are wholeheartedly committed to disability equality, and who embrace testing accommodations as a core component of equal opportunity. This is a key lesson from the LSAC litigation. While many changes were adopted on paper at the time of the Consent Decree, and more through the Best Practices Report and related litigation, these changes were not truly implemented until the LSAC was subject to a motion for contempt and the LSAC leadership transitioned.

Conclusion

Our profession has many vacancies, particularly in the legal services sector. We need more qualified lawyers. Preventing candidates from becoming licensed by denying them necessary and accepted testing accommodations is unlawful and harmful. The State Bar should end its “zero sum game” mindset and commit to the swift and ready grant of all requests for commonly used testing accommodations that are supported by reasonable documentation.

Board of Trustees
State Bar of California
October 6, 2023
Page 10

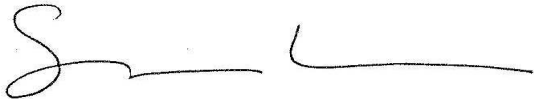
Sincerely,

DISABILITY RIGHTS EDUCATION AND DEFENSE FUND

A handwritten signature in cursive script, appearing to read "Claudia Center".

Claudia Center
Legal Director

DISABILITY RIGHTS ADVOCATES

A handwritten signature in cursive script, appearing to read "Jinny Kim".

Jinny Kim
Managing Attorney

Amelia Evard
Wolinsky Fellowship Attorney



October 3, 2023

Dear State Bar Admissions Staff, Committee of Bar Examiners, and Board of Trustees:

I write to urge you to consider and address the public comments on your latest proposal regarding testing accommodations.

I understand that feedback has come not only from a large coalition of disability rights organizations, attorneys, and applicants, but also from California's Access to Justice Commission and members of the California DFEH's testing accommodations best practices panel. My hope is that the State Bar will consider amending its proposal to address the following matters that have been brought to my attention:

1. The length of time for deciding requests for testing accommodations such that applicants are provide a timely initial decision, and thereby allowing applicants to know their accommodations before needing to commit financial resources into test preparation.
2. Ensuring that applicants who petition for testing accommodations receive a response in time to properly appeal an adverse decision.
3. Ensuring that accommodations are considered on their merits in light of the applicant's individual circumstances.
4. Ensuring that where remote testing is offered to standard applicants, it is equally offered to applicants whose accommodations may need modifications to the security methods.
5. Offering a hearing to applicants as part of the administrative appeal process for testing accommodation denials.

Thank you for your consideration of these matters and please do not hesitate to contact me if I can be of any assistance.

Sincerely,

A handwritten signature in blue ink, appearing to read "M. Berman", is written over a light blue horizontal line.

MARC BERMAN
Assemblymember, 23rd District

Chapter 7. Testing Accommodations

Current Rules 4.80 through 4.92 are repealed. New Rules 4.80 through 4.92 are adopted to read as follows:

4.80 Definitions

These definitions apply to the rules on and requests for testing accommodations.

- (A) A “disability” is a physical or mental impairment that limits one or more of an applicant’s major life activities as compared to most people in the general population.
- (B) A “disability accommodations expert” is a qualified professional designated by the State Bar to make recommendations regarding an applicant’s testing accommodations request. A disability accommodations expert shall have a doctoral degree or Ph.D., possess knowledge of testing accommodations practices and procedures in exam settings and the Americans with Disabilities Act requirements relating to testing accommodations, and have a minimum of five years of experience in reviewing requests for testing accommodations for certification or licensure.
- (C) A “high stakes exam” refers to any of the following: California Bar Exam, First-Year Law Students’ Exam, Multistate Professional Responsibility Exam (MPRE), a bar exam in another U.S. jurisdiction, LSAT, GRE, GMAT, MCAT, DAT, SAT I, SAT II, ACT, or GED.
- (D) A “mental impairment” is a mental or psychological disorder or condition or an anatomical loss affecting one or more of the body’s systems, such as intellectual disability, organic brain syndrome, emotional or mental illness, and specific learning disability.
- (E) A “permanent disability” is a disability that is long-lasting and non-temporary in nature.
- (F) A “physical impairment” is a physiological disorder or condition or an anatomical loss affecting one or more of the body’s systems, such as: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine. Physical or “mental impairment” includes, but is not limited to, contagious and noncontagious diseases and conditions such as the following: orthopedic, visual, speech and hearing impairments, and cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, intellectual disability, emotional illness, dyslexia and other specific learning disabilities, Attention Deficit Hyperactivity Disorder, Human Immunodeficiency Virus infection (whether symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism.
- (G) A “qualified professional” is a person who is licensed or otherwise properly credentialed and possesses expertise in the disability for which modifications or accommodations are sought.
- (H) An “individualized assessment” is an assessment by a qualified professional who has personal familiarity with the applicant.
- (I) A “reasonable testing accommodation” is an adjustment to or modification of standard testing conditions that addresses the functional limitations related to an applicant’s

disability by modifications to rules, policies, or practices; removal of architectural, communication, or transportation barriers; or provision of auxiliary aids and services, provided it does not:

- (1) compromise the security or validity of an examination or the integrity of the examination process;
- (2) impose an undue burden on the State Bar; or
- (3) fundamentally alter the nature of an examination or the Committee's ability to assess through the examination whether the applicant:
 - (a) possesses the knowledge, skills, and abilities tested on an examination; and
 - (b) meets the essential eligibility requirements for admission.

4.81 Purpose of Testing Accommodations

- (A) Testing accommodations are provided to ensure that an applicant who has a disability can access the examination and is afforded an equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others.
- (B) Applicants with disabilities are granted reasonable testing accommodations if they are otherwise eligible to take an examination and, in accordance with these rules, they:
 - (1) have an approved Application for Registration;
 - (2) submit a request for testing accommodations on the State Bar's forms with the required documentation; and
 - (3) establish to the satisfaction of the State Bar that the applicant has a disability and needs the requested testing accommodations in order to meet the purposes set forth in subsection (A).
- (C) Approval of testing accommodations does not entitle an applicant to sit for a particular exam. An applicant must separately apply for any examination for which they intend to sit.

4.82 Processing of Requests for Testing Accommodations – General Rules

- (A) Requests for Testing Accommodations are processed on a case-by-case basis consistent with these rules.
- (B) The State Bar will render a determination on any complete request received by the final filing deadline, and will endeavor to render the determination as far in advance of the exam as practicable.
- (C) The State Bar shall defer to documentation from a qualified professional who has made an individualized assessment of the applicant that supports the need for the requested testing accommodation(s) as compared to the opinions of a disability accommodations expert who has not assessed the applicant for diagnosis and treatment. The applicant and their qualified professional shall have flexibility in the type and source of supporting documentation that may be provided, in addition to the required forms, to demonstrate the applicant's disability-related functional limitations, their specific access needs, and how those needs relate to the testing accommodations requested.

- (D) Although not eligible under the automatic approval process described in Rule 4.83, considerable weight shall be given to documentation of past testing accommodations approved for timed exams administered in college or law school upon submission of proof of the accommodations approved.
- (E) The State Bar shall not deny an applicant's request for a particular testing accommodation solely because the applicant has no formal history of receiving that testing accommodation.
- (F) The State Bar shall not deny an applicant's request for testing accommodations solely based on the applicant's average or above average IQ score and/or history of academic success.
- (G) The State Bar shall neither deny a request for testing accommodations nor approve it with modifications without elevation to the State Bar's disability accommodations expect.
- (H) An examination application fee is not refunded if a request for testing accommodations is withdrawn, denied, or abandoned.

4.83 Automatic Approval Process: Approval of Previously Granted Testing Accommodations on High Stakes Exams

- (A) Prior accommodations approved for a high stakes exam, as defined, will be approved by the State Bar without the need for any further documentation if all of the following are satisfied:
 - (1) The prior accommodations were approved for a permanent disability;
 - (2) The applicant submits the Request for Testing Accommodations form with the relevant sections completed;
 - (3) The applicant submits proof of the prior approval of accommodations granted by the testing entity;
 - (4) The applicant is requesting the same testing accommodations granted on the high stakes exam;
 - (5) The applicant certifies they are still experiencing the same functional limitations caused by the permanent disability for which the prior accommodations were approved;
 - (6) The State Bar offers the same or equivalent testing accommodations; and
 - (7) The request does not include more than 100 percent extra time for applicants and/or a private room. If the requested testing accommodations are for more than 100 percent extra time and/or a private room, the request will be evaluated in the same manner as those requiring submission of certification by a qualified professional as set forth in Rule 4.85.
- (B) An applicant who meets the requirements of subsection (A) need not submit the report of a qualified professional who has made an individualized assessment of the applicant.
- (C) If an applicant requests greater testing accommodations than previously approved for a high stakes exam, the State Bar shall, using the automatic approval process outlined in subsection (A), approve the same accommodations as previously granted, and shall only require submission of certification by a qualified professional to support the greater accommodations requested.

4.84 Request for Testing Accommodations – Timing of Submission

- (A) Applicants are encouraged to submit a request for testing accommodations as far in advance as practicable. A Request for Testing Accommodations may be submitted before an application to sit for a particular exam is available.
- (B) A Request for Testing Accommodations must be complete and received no later than
 - (1) January 1 for the February California Bar Examination;
 - (2) June 1 for the July California Bar Examination;
 - (3) May 15 for the June First-Year Law Students' Examination; or
 - (4) September 15 for the October First-Year Law Students' Examination.

If a deadline falls on a non-business day, the deadline will be the next business day. Deadlines are not extended or waived for any reason except as permitted in Rule 4.87.

- (C) If a Request for Testing Accommodations is incomplete, and the request is submitted on the final application deadline for a particular examination, the applicant will not have the opportunity to remedy the lack of completeness.
- (D) A Request for Testing Accommodations that is incomplete as of the final filing deadline will be withdrawn.
- (E) If a Request for Testing Accommodations is submitted on the final application deadline for a particular exam, it is possible that there will be insufficient time for the applicant to request or for the State Bar to process a request for review pursuant to Rule 4.88 prior to the administration of the examination.
- (F) Notwithstanding subsection (A), if an applicant's request for testing accommodations is based on a temporary disability, the State Bar may require that the applicant submit a new request closer to the examination date or that a decision regarding the request be deferred until closer to the examination date.

4.85 Request for Testing Accommodations – Content of Submissions

- (A) An applicant with a disability seeking testing accommodations must submit a request for testing accommodations on the State Bar's form.
- (B) If a request does not qualify for the automatic approval process described in Rule 4.83, in addition to the Request for Testing Accommodations form, the applicant must also submit by the application filing deadline, on the State Bar's form, certification by a qualified professional, and submit any supplemental documentation needed to determine the applicant's disability-related functional limitations, their specific access needs, and how those needs relate to the testing accommodations requested. Supporting documentation shall be limited to that which is reasonable, limited and narrowly tailored to the information needed.
- (C) If an applicant is requesting the same testing accommodations as previously granted on another high stakes exam which includes more than 100 percent extra time for applicants

and/or a private room, the certification by a qualified professional described in subsection (B) shall include an explanation of why accommodations that allow for 100 percent extra time for applicants or testing in a semi-private or distraction-reduced room, are insufficient to meet the purposes set forth in Rule 4.81(A).

- (D) A request for testing accommodations is considered complete upon the State Bar's receipt of all required forms and any supporting documentation. A request may be deemed incomplete if the required forms are incomplete, or if the applicant or qualified professional does not respond in full to the required questions. A request that is incomplete by the final examination application deadline shall not be processed for that examination.

Rule 4.86 State Bar Response to Request for Testing Accommodations

- (A) An applicant who has submitted a request for testing accommodations in accordance with these rules shall be notified in writing within thirty (30) days of receipt of the request when additional information is required to complete the request. The request for testing accommodations is deemed incomplete if the applicant fails to provide the information requested by the deadlines set forth in Rule 4.84(B).
- (B) In addition to the provisions of Rule 4.82(B), within sixty (60) days of a request for testing accommodations having been deemed complete, the State Bar will notify the applicant in writing if the request is approved, approved with modifications, denied, or action is pending.
- (C) A notice of denial of a request for testing accommodations or a notice of approval with modifications shall state the basis or bases for the denial or modifications. The notice will include a report from a disability accommodations expert explaining why the requested testing accommodations were modified or denied, and advising the applicant of the right to request a review. The report will be sufficiently detailed to provide the applicant fair notice of the State Bar's reasoning.

Rule 4.87 Emergency Requests for Testing Accommodations

- (A) An applicant who becomes disabled after a final examination application filing deadline may submit a Request for Testing Accommodations, which must include the forms required by Rule 4.85, with a request that it be considered as an emergency request. Documentation explaining the nature, date, and circumstances of the emergency must be submitted with the request.
- (B) The State Bar must receive the request and supporting documentation at least ten (10) days before the first day of the examination through the Applicant Portal or by physical delivery to the State Bar during regular business hours. Emergency requests received later than this deadline will not be processed.

Rule 4.88 Request for Review of Denial or Approval with Modifications

- (A) An applicant notified that a Request for Testing Accommodations has been denied or granted with modifications may request a review by the Committee. Applicants requesting

review by the timely filing deadline for the exam have 30 days from the date of the denial or modified grant to submit their request. All other requests for review must be submitted within fourteen (14) days of the date of the denial or modified grant unless an examination schedule requires a shorter time for Committee review. The applicant may submit additional supporting documentation in support of their request for review.

- (B) Notwithstanding the deadlines described in subsection (A), requests for review filed in connection with a particular administration of an examination must be filed no later than the first business day of the month in which the examination is to be administered. Requests received after that date will be considered in connection with a future administration of the examination.
- (C) After reviewing the request for review and supporting documentation, the Director of Admissions may withdraw the prior decision and grant the accommodations requested. The Director must make a determination within fourteen (14) days unless an examination schedule requires a shorter time.
- (D) If the Director of Admissions does not grant the request, the Committee must consider it as soon as practicable. The review shall be based on the original request and supporting documentation and any supplemental documentation provided by the applicant in connection with the request for review.
- (E) To ensure the Committee is able to act timely, consideration of all requests for review under this section shall be delegated to a subcommittee. To assist the subcommittee, to the extent practicable, the subcommittee shall be presented with a recommendation from a disability accommodations expert to inform its decision. This shall be a different expert than the disability accommodations expert who recommended the initial denial or approval with modifications.
- (F) The decision on a request for review is final and shall not be subject to further review by the State Bar or the Committee during the same exam cycle. The applicant may submit a new request for testing accommodations for a different exam cycle.
- (G) After exhausting the review process described in this rule, an applicant may appeal a denial or approval with modifications of testing accommodations to the California Supreme Court in accordance with the California Rules of Court 9.13(d).

Rule 4.89 Subsequent Request for Testing Accommodations

- (A) Testing accommodations are not automatically applied to subsequent exams upon withdrawal from or failure of an examination. The applicant must submit a new Request for Testing Accommodations before the subsequent, applicable examination application deadline. The request will be automatically granted if the prior accommodations were approved for a permanent disability, the applicant requests the same testing accommodations previously granted by the State Bar, and the applicant certifies that they have the same disability-related functional limitations that qualified them for the same accommodations for a prior exam.

- (B) If an applicant is seeking different testing accommodations than previously approved by the State Bar, and the applicant has a permanent disability, they may incorporate prior supporting documentation into the new request.
- (C) An applicant with a temporary disability must submit a new Request for Testing Accommodations with all supporting documentation before the examination application deadline.

Rule 4.90 Confidentiality of Requests for Testing Accommodations

Requests for testing accommodations, documentation submitted in support, and evaluations of requests are confidential.

Rule 4.91 False or misleading information in requests for testing accommodations

False or misleading information in a request for testing accommodations is considered in determining an applicant's moral character and may result in a negative determination of moral character.

Rule 4.92 Committee of Bar Examiners Oversight

The Committee of Bar Examiners shall provide oversight to ensure consistent application of standards and processes and to monitor trends in testing accommodations requests, processing, and decisions.