



The State Bar of California

OPEN SESSION AGENDA ITEM V.A DECEMBER 2023 COMMITTEE OF BAR EXAMINERS

DATE: December 1, 2023

TO: Members, Committee of Bar Examiners

FROM: James Efting, Committee of Bar Examiners
Bethany Peak, Committee of Bar Examiners
Ashley Silva-Guzman, Committee of Bar Examiners
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SUBJECT: Action on Revisions to the Admissions Rules Pertaining to Conduct Violations:
Recommendation to Circulate for Public Comment

EXECUTIVE SUMMARY

The Office of Admissions is undertaking a comprehensive review of Admissions rules, policies, guidelines, and communications to ensure accuracy, clarity, and consistency, and to ensure they do not pose an unnecessary barrier for applicants to be admitted, while safeguarding public protection. After a thorough review of the rules related to conduct violations at the California Bar Exam and the First Year Law Students' Exam, the working group proposes significant revisions to streamline the processing of conduct violations, improve clarity of the rules and to ensure that applicants have appropriate notice of the types of conduct that are prohibited. The working group also recommends clean-up to the Chapter 6 matrix which sets out the sanctions for conduct violations.

This agenda item proposes that the Committee of Bar Examiners recommend the Board of Trustees circulate the rule amendments for Chapter 6 Conduct Violations, set forth in Attachment A, for a 60-day public comment period, update the Chapter 6 Matrix, and repeal the religious headwear policy as unnecessary.

BACKGROUND

Chapter 6 of Title 4, Division 1 the Rules of the State Bar (referred to as the Admissions Rules) addresses conduct violations during the First-Year Law Students' Examination (FYLSE) and the California Bar Examination (CBX). There is no corresponding statutory scheme or provisions in the California Rules of Court.

Applicants are issued a Chapter 6 Notice of Violation of Examination Rules or Policies during the exam, or shortly following an exam, when they have violated an examination rule or policy. They have ten days from the date the notice was issued to provide information to contest the assertions in the notice. Currently, staff review the Chapter 6 Notice, along with any reports written by staff and proctors regarding the circumstances surrounding the violation, and any response submitted by the applicant. Based on this review, staff determine whether the Chapter 6 Notice should be affirmed and inform the applicant of the determination. If the notice is affirmed, staff subsequently transmit to the applicant the sanction to be applied based on the Chapter 6 Administrative Hearing Decisional Matrix adopted by the committee in June 2020, and information as to whether the violation/sanction is disputable.

With the current process, a disputable violation allows the applicant to request an administrative hearing that is led by a team comprised of three Admissions staff who serve as hearing panelists. Upon conclusion of the hearing, the hearing panel will issue findings and recommendations. If the hearing panel upholds a sanction, applicants may request Committee review of the findings and recommendations. Any violation categorized as indisputable is not entitled to an administrative hearing or review by the committee. The timeline for an applicant to proceed through the administrative hearing process is lengthy; the current rules allow 90 days for the hearing to be held from the time the applicant requests a hearing. The new process will allow the hearing to be heard by the CBE at the next regularly scheduled meeting that would be within 30-45 days from receipt of the request therefore, reducing the timeline.

Committee members James Efting, Bethany Peak, Ashley Silver-Guzman, and former member David Torres, volunteered to work with staff on developing proposals to be brought back to the Committee. The proposals before the committee today are the result of that effort. References in this agenda item to the "working group" are to these committee members and the staff who worked with them. The working group evaluated the entire set of current rules, committee guidelines, and policies related to examinations and the Chapter 6 Notice process to identify where revisions were needed.

A review of the data show that the hearing panel conducting the administrative review rarely alters the staff determination to affirm the Chapter 6 Notice or modify the sanction. The committee review is only slightly more likely to result in a different outcome.

The instructions accompanying the application to sit for an examination include the Examination Administration Rules and Policies and important deadlines for application filing and withdrawals. The same information is included in the Admittance Ticket bulletin. The

bulletin, distributed four weeks before the exam, provides applicants with detailed information about the exam schedule, reminders about what is allowed/not allowed at the exam, and general expectations of applicant conduct.

The Chapter 6 Rules for Conduct Violations were last amended in September 2019 to transfer the process of affirming Chapter 6 Notice of Violations to Admissions staff and to create the administrative hearing process.

DISCUSSION

POLICIES REGARDING WHAT IS AND IS NOT PERMITTED IN AN EXAMINATION ROOM

The committee has periodically approved policies related to how the exam is administered and how applicants should conduct themselves at the test centers. The application instructions and admittance ticket bulletin provided to examinees inform them of what are allowable/non-allowable items at the exam. The National Conference of Bar Examiners (NCBE) dictates which items are permissible during the Multistate Bar Exam (MBE), but California sets its own requirements for the written portion of the exam. To gain insight as to whether California's list of permissible and impermissible items is too restrictive or too broad, staff reviewed policies and practices of some of the other larger bar examiners that included Texas, Florida, New York, Massachusetts, Pennsylvania, and the District of Columbia. However, all these states administer the Uniform Bar Examination (UBE) provided by the NCBE and follow the NCBE guidelines. From this review, staff determined that California is less restrictive in certain respects, allowing things such as bookstands and analog clocks that are not permitted in other states. Staff did not look at non-UBE states as the comparison was intended to look at states of similar size.

However, it was identified that some states permit applicants to bring their own water if it is contained in a clear bottle with a lid and without any writing or labels on it. After discussion with the working group, it was recommended that California allow applicants to bring their own water bottle following the same guidelines with the added requirement that these containers be placed off the table, such as on the floor, in or on a wheelchair or other approved assistive device, or similar accessible location next to the applicant during an in-person exam and allowed on the table next to the applicant during an online, remote exam. Water bottles would not be allowed on the table during an in-person exam due to the risk of spilling on exam materials. Since applicants will be authorized to bring their own water, the State Bar would no longer provide water at test centers unless water was provided at test sites at no cost to the State Bar. Should the committee agree with this policy, applicants would be appropriately noticed about this change and the changes would be reflected in the exam bulletins, website, and matrix.

The working group also discussed the current prohibition on headwear in the exam room. Under the policy adopted by the committee in March 2014, no headwear is allowed in the exam room, including but not limited to baseball caps, beanies, hoodies, etc. Religious headwear is allowed in the exam room, but applicants are required to file a petition for

approval to wear it prior to the exam. If an applicant fails to submit a petition prior to the exam, they are permitted to submit the petition onsite at the test center but are issued a Chapter 6 Notice of Violation for not petitioning prior to the exam. During the pandemic, exams were administered online, and vendors were unable to support our policy of allowing religious headwear without flagging applicants for a violation, which created administrative burdens during staff review of exam video files. This caused State Bar staff to explore the rationale for needing to petition for religious headwear at all.

Staff identified that requiring a petition in advance does not change the impact to exam security and does not serve public protection. As a result, staff recommends repealing the policy requiring applicants to petition for religious headwear. This would also eliminate the issuance of a Chapter 6 Notice of Violation. Applicants wearing religious headwear would still be subjected to inspection of the headwear, if necessary. All other headwear would remain on the list of items not allowed in the exam room, as such headwear can mask whether applicant is looking at another person's exam answers.

CHAPTER 6 CONDUCT AT EXAMINATIONS

The proposed rule changes are intended to address the following:

- Streamlining the process for review of Chapter 6 Notices to give applicants finality much sooner.
- Process difference when violations are discovered during the exam versus after the conclusion of the exam.
- Clarity and consistency of language.

Changes to the Decision Matrix include identifying violations for altering answer files after time is called, updating the list of unallowable electronic devices, and removing from the list of unallowable items the water and religious headwear.

Staff also reviewed the administrative hearing process for disputable violations to identify ways to streamline the procedures so that determinations can be issued earlier. As the hearing process is the most resource-intensive component that requires the longest amount of time in the current Chapter 6 process, it was determined that elimination of the staff hearings would create efficiencies in the timeline. In the past, administrative hearings were conducted by a subcommittee of the CBE. When Admissions went through changes with Appendix I in 2018-2019, the administrative hearings were transferred to staff to parallel testing accommodations decisions.

Rule 4.70 Conduct Required at Examinations

This rule focuses on how applicants are expected to conduct themselves during an examination and that conduct that violates the security or administration of an examination may be reported to the State Bar as a Chapter 6 Notice or, in extreme cases, may require dismissal from

an examination test center. The rule also describes unacceptable conduct as having unauthorized items, writing, or typing after time has been called, looking at another applicant's answers, talking when silence is required, or abusive behavior. The working group proposes amending the rule to provide greater clarity and transparency as to the type of conduct that violates the security, integrity, or administration of the exam which could subject an applicant to a Chapter 6 Notice and sanction. The proposed rule includes high level categories of the types of conduct that is impermissible and requires the State Bar to post more information about authorized and unauthorized items on its website.

In 2020, the committee adopted a Chapter 6 Administrative Hearing Decision Matrix which identifies violations for both in-person and online exams, the related sanction, and whether the violation is disputable or indisputable. Moving forward, this document will be referred to as the Chapter 6 Conduct Violation Decisional Matrix (Chapter 6 Matrix). This matrix guides staff when determining conduct violation sanctions. Having reviewed the matrix in its entirety, the working group proposes to update the matrix to remove religious headwear as an unauthorized item and to specify that water is now an allowable item in the exam room for the reasons specified above. The working group also proposes an addition to the Chapter 6 Matrix based on recent incidents of applicants found to have added content to their written answers after the end of the exam but before uploading the answer files. The working group has identified this as a significant violation of acceptable conduct and therefore recommends the issue be called out specifically as an indisputable violation with a sanction of a zero on the exam session for which this occurred.

Rule 4.71 Sanctions

The current rules are sparse when it comes to the discussion of sanctions. The working group proposes to add a rule focused on sanctions. The proposed new rule includes the difference between disputable and indisputable violations and the type of sanctions that may be imposed if the Chapter 6 Notice is affirmed. In addition to carrying over the language from the current rule that sanctions may include assigning a score of zero for a question, session, or the entire examination, the new rule provides that sanctions may include reducing a score for a question, session, or the entire examination, or warnings. In the interest of transparency, the rule also provides that conduct that leads to a sanction may be reported to the Moral Character unit.

Rule 4.72 Reports of Conduct Violations

The process for contesting a Chapter 6 Notice under the current rules is time consuming and not efficient. The current process includes all of the following:

- The Chapter 6 Notice is issued, either at the exam site or, in certain instances, following the exam.
- The applicant has an opportunity to submit a response. This must be done within 10 days of issuance of the Notice.
- Staff review the notice, other documentation, and the applicant's response, if any and decide whether to affirm or disaffirm the notice. By rule this must be done no later than

the first committee meeting following the examination. However, this language is a vestige of the old process, when the committee acted to affirm or disaffirm. This timeline may or may not be met currently.

- After issuing its determination, the State Bar has 30 days to notify the applicant of the sanction and whether it is disputable.
- Applicants may, within 20 days, request an administrative hearing on any decision to affirm the notice if the sanction is disputable.
- The State Bar must schedule an administrative hearing within 90 days.
- The administrative hearing consists of a panel of three staff. The applicant is expected to attend the hearing.
- The staff hearing panel issues findings and recommendations no later than 30 days after the hearing.
- If the staff hearing panel continues to affirm the notice, the applicant may request review by the committee. The applicant's request must be submitted within 10 days.
- The committee review occurs at the committee's next regularly scheduled meeting. Notice of the committee's determination is sent to the applicant within 10 days after the committee meeting.
- If the committee upholds a sanction, the applicant may request review by the California Supreme Court.

Based on the complexity of the above, along with the review of data that showed that the staff hearing panel rarely reaches a different decision than the staff determination to affirm the Chapter 6 Notice or modify the sanction, the working group proposes a significant streamlining of the process. Most significantly, the working group proposes eliminating the staff level administrative hearing. Instead, if staff affirms the Chapter 6 Notice, the applicant may request an administrative hearing before the committee. If the committee concurs with the staff determination, the applicant may request review by the Supreme Court. In addition to eliminating one level of staff review, the working group proposes tightening the timelines to conclude the process much more quickly than set forth in the current rules.

Without a staff administrative hearing requirement, the timelines were adjusted for an applicant to receive determination of the affirmed Chapter 6 Notice with imposed sanction no later than 35 days from the last day of the examination during which the Chapter 6 Notice was issued, or no later than 35 days after the State Bar becomes aware of the conduct violation. If the Chapter 6 Notice is affirmed, the notice of the decision will include the staff's findings and recommendations, the sanction, and a statement whether the conduct violation is disputable or indisputable.

If disputable, applicants will have 10 days from receipt of the written decision to request an administrative hearing by the committee and to provide any documentation in support thereof. Upon receipt of the request, the Director, or their designee, may rescind the State Bar's written decision to affirm the Chapter 6 Notice any time prior to the hearing. Otherwise, the hearing will be held at the next regularly scheduled committee meeting.

The current rule also provides that an examination score may be held in abeyance while the consideration of a disputable conduct violation is ongoing during the administrative hearing process. By holding a score in abeyance, the applicant does not know whether they have passed or failed the exam, and as a result, are unable to apply to sit for the next exam if needed. This can have the unintended consequence of preventing an applicant who would have failed the exam regardless of the sanction from applying and sitting for the next exam. The working group recommends amending the rule to discontinue holding results in abeyance. The working group feels this change will allow applicants the opportunity to have a better understanding of their results (with sanction applied) prior to the next exam, while awaiting the outcome of their hearing.

Other amendments were made to improve clarity in the process and timeline for affirming or disaffirming the Chapter 6 Notice.

Rule 4.73 Administrative Hearing by the Committee

This rule has been recast to focus on the process to request an administrative hearing by the committee and the conduct of the hearing. Since the current process has staff making the initial determination to affirm or disaffirm a Chapter 6 Notice and apply a sanction if warranted, the process of staff conducting the administrative hearings involved staff making a determination twice prior to CBE hearing the violation on appeal. The elimination of staff administering the hearings from the Chapter 6 process will reduce the timeline for applicants to resolve their Chapter 6 violation with the original intent being preserved. Staff will make the initial determination and the hearing will be handled by CBE. This preserves due process for applicants; they still have a right to appeal in person.

There is no statute addressing administrative hearings that the committee needs to take into consideration when revising these rules.

If a request for a hearing is received within 10 days of the findings and recommendations being issued, the administrative hearing will take place at the next regularly scheduled Committee meeting that is at least 30 days after the date of the receipt of the applicant's request for an administrative hearing and all documentation in support thereof. Following the hearing, the committee may choose to adopt some, all, or none of the State Bar's findings and recommendations or take any other action it deems appropriate. The committee will issue a determination no later than 10 days following the administrative hearing. The applicant may request a review of the committee's decision by submitting a request for review to the Supreme Court.

With the new rules, it will eliminate the current procedures and guidelines found in the Committee of Bar Examiners Procedures for Chapter 6 Administrative Hearings and the Guidelines Governing the Interpretation and Application of Chapter 6 Administrative Hearings. After the rule changes are adopted, those documents will be brought back to the committee to formally rescind as obsolete or revise accordingly.

FISCAL/PERSONNEL IMPACT

The elimination of administrative hearings will lead to time savings as staff will not be required to administer the administrative hearings. Allowing the applicants to bring their own water bottles to the exam will provide further cost savings from no longer ordering water at each test center unless it is provided at no cost.

RECOMMENDATION

It is recommended that the Committee of Bar Examiners request the Board of Trustees circulate for a 60-day public comment period the rule changes reflected in Attachments A and B to revise the Chapter 6 Admissions Rules relevant to Conduct Violations. It is further recommended that the Committee of Bar Examiners adopt the revised Chapter 6 Conduct Violations Matrix and rescinds the religious headwear policy.

PROPOSED MOTION

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

MOVE, that the Committee of Bar Examiners recommends that the Board of Trustees circulate the proposed rules set forth in Attachments A and B for a 60-day public comment period;

FURTHER MOVE, that the Committee of Bar Examiners rescinds the religious headwear petition policy; and

FURTHER MOVE that the Committee of Bar Examiners adopts the revisions to the Chapter 6 Conduct Violations Matrix.

ATTACHMENT(S) LIST

- A.** Proposed Amendments to Title 4, Chapter 6 of the Rules of the State Bar Relevant to Conduct Violations (Redline)
- B.** Proposed Amendments to Title 4, Chapter 6 of the Rules of the State Bar Relevant to Conduct Violations (Clean)
- C.** Chapter 6 Conduct Violation Decisional Matrix (Redline)
- D.** Chapter 6 Conduct Violation Decisional Matrix (Clean)
- E.** Policy to Permit Headwear to be Worn in a Secure Examination Test Center Due to Religious Beliefs