

AGENDA ITEM

JULY 121

DATE: June 24, 2011

TO: Members, Regulation, Admissions and Discipline Oversight
Members, Board of Governors

FROM: The Committee of Bar Examiners
Gayle Murphy, Senior Executive, Admissions

SUBJECT: Administrative Changes to *Admissions Rules*

EXECUTIVE SUMMARY

After a public comment period and consideration of the comments received, the Committee of Bar Examiners has adopted several amendments to the *Admissions Rules* (Rules of the State Bar of California, Title 4. Division 1.), subject to the approval of the Board of Governors. Many of the amendments memorialize the procedures and policies that are currently in place, others clarify language as needed. In addition, there are suggested changes to the process by which alleged examination rules violations are handled so that will be conducted more like moral character informal conferences or administrative hearings that, while preserving the applicant's right to due process, will make the process more efficient and consistent with how other similar types of meetings with applicants are conducted.

BACKGROUND

A major rewrite of the *Admissions Rules* (Rules of the State Bar of California, Title 4. Division 1.) took place in 2007 and several administrative amendments to those rules were approved over a year ago. As time has gone by, several additional amendments to the rules, which will reflect current policies, procedures and needs, appeared to be appropriate. Proposed amendments were prepared, which the Committee of Bar Examiners (Committee) approved in principle subject to a period of public comment. In response to the Committee's request, the Board Committee on Regulation, Admissions and Discipline authorized the circulation of the proposed rule amendments for public comment.

The Notice of Public Comment was posted on the State Bar's website the second week of January, shortly after the Board Committee authorized circulation of the proposed amendments. The published deadline for receipt of comments was February 21, 2011.

In early February, it was brought to staff's attention that the link to the proposed amendments posted on the State Bar's website was not working. Immediately following discovery of the problem, the link was fixed and the proposed amendments were accessible online beginning February 2, 2011. After discussing the matter with the Committee during its February 4 and 5, 2011 meeting, on February 8, 2011, a revised Notice was posted on the State Bar's website with an operational link to the original proposed amendments to the rules with a new public comment deadline of March 28, 2011. The Notice (Attachment A) and proposed amendments (Attachment B) were also circulated to all California law schools through an email sent on February 9, 2011.

Three comments were received. After review of the comments received and discussion of the issues, and after consultation with the State Bar's rules consultants with regard to the language, attached as Attachment C are the proposed amendments to the *Admissions Rules* for consideration by the Board of Governors. The Committee adopted the proposed amendments, subject to approval by the Board.

ISSUE

Whether the proposed amendments as adopted by the Committee of Bar Examiners should be approved.

DISCUSSION

Many of the proposed amendments are administrative in nature. The reasons for the more significant changes are discussed below:

- Several years ago, the Committee adopted a policy that defines what a year is as it pertains to calculating credit for law study towards qualifying to take the First-Year Law Students' Examination and the California Bar Examination. The policy was adopted in part to avoid any confusion by law students and law schools when determining eligibility, as some were calculating a year by the beginning and end of a particular year of law study, which in some cases extended a year of law study over several calendar years. In some situations, study was compressed so, in effect, students were being allowed to complete four calendar years of law study in less time. By incorporating the policy into the rules, everyone will have easy access to it (page 1 of Attachment B).
- The destruction of fingerprints is governed by statute and there is no need to repeat this particular administrative requirement in the *Admissions Rules*, as it is more a requirement for the Committee than helpful to admission applicants (page 1 of Attachment B).
- The revised language with regard to the legal education required for general applicants who wish to qualify to take the California Bar Examination restates what is contained in the statute, which specifies the requirement of a degree, not graduation from an ABA or California accredited law school. In addition, to ensure all statutory directives are encompassed in the *Admissions Rules*, even if they are not specifically

mentioned, it makes sense to refer to the statute when discussing how legal education is calculated (page 2 of Attachment B).

- The additional language added to the requirements associated with filing a moral character determination application clarifies the conditions under which a disciplined attorney is prevented from filing a moral character determination application (page 2 of Attachment B).

- To avoid confusion, the rules language was changed so that applicants who have their moral character determinations suspended are referred to the specific rule that governs how their applications will be processed (page 3 of Attachment B).

- While the amount of credit a law student receives after passing the First-Year Law Students' Examination is in the statute, it would be helpful to repeat it in the *Admissions Rules* so that applicants will have it easily accessible (pages 3 and 4 of Attachment B).

- Additional language has been added to the *Admissions Rules* that makes it clear what the Committee determines with regard to the First-Year Law Students' Examination, which includes the examination's format, scope, topics, content, questions, grading process and passing score.

- To avoid any confusion about what will happen with a passing MPRE score, the language in Rule 4.59 has been changed to advise applicants that they must ensure their scores are sent to the Committee in order to be considered as having passed the examination (page 4 of Attachment B).

- Additional language has been added to the *Admissions Rules* that makes it clear what the Committee determines with regard to the California Bar Examination, which includes the examination's format, scope, topics, content, questions, grading process and passing score (page 4 of Attachment B).

- The language in Chapter 6, which governs the processing of violations of examination rules and policies, has been changed to reflect the Committee's current actions and directions regarding Chapter 6 notices and the actions that will be taken. The proposed amendments change the process by which alleged examination rules violations are handled so that they are conducted more like moral character informal conferences or administrative hearings which, while preserving the applicant's right to due process, makes the process more efficient and consistent with how other similar types of meetings with applicants are conducted. The language also has been amended so it is specific with regard to the development of guidelines adopted by the Committee that detail the process for handling Chapter 6 violations (the Committee already has guidelines for conducting Chapter 6 hearings, which will need to be changed if the amended rules are approved). The language specifically authorizes the Committee to establish specific sanctions for undisputed violations, such as receiving zeros for a session if caught with a cell phone. In past versions of the rules, there were specific sanctions mentioned, such as five-point deductions for writing after time, but these were taken out to give the Committee more flexibility in determining the sanctions that should

be imposed. Since then, however, the Committee has had several more Chapter 6 hearings. As a result of those experiences, several Committee members believe that it is appropriate to have specific sanctions for certain violations spelled out, which would be included in the guidelines. In the amended language, the Senior Executive is given the authority to carry out the Committee's directives. The amended language returns to the Committee the right to review a hearing panel's recommendation (pages 4, 5 and 6 of Attachment B).

- The additional language regarding the processing of testing accommodations petitions clearly states that deadlines will not be extended for any reason, except in the case of an emergency, for filing testing accommodations petitions. Every examination cycle there are requests to submit petitions past the deadlines; it would be helpful to reinforce that there are no exceptions to the deadlines, except those of an emergency nature, in this section of the rules (Page 7 of Attachment B).
- The language in the rule that provides details required by the forms that an applicant must file in connection with a testing accommodations petition is deleted in the proposed rules amendments. The forms and guidelines are the appropriate place for this level of detail, especially since what is required fluctuates with changes in the law. The changes also make it clear that the forms must be submitted with the original petition, so petitions are not received piecemeal (Page 7 of Attachment B).
- Most testing accommodation petition decisions are made well within sixty days. Having to continue to give written status reports, which must be done manually, every thirty days after the initial sixty days takes away time that might better be spent completing the processing of the affected applicants' petitions. Applicants are welcome to, and do, call if they have questions about the status of their petitions (Page 8 of Attachment B).

Public Comments:

The three public comments received are attached as Attachment D and are summarized below:

1. Dean Patrick Piggot

Dean Piggot believes that the "...proposed changes are not helpful..." to the California-accredited law schools. He suggests changes be made to the *Admissions Rules* so that students will become eligible to take the First-Year Law Students' Examination (FYLSX) only after they have taken courses in the three subjects tested on the FYLSX, which three classes must be taken within two years. He does not agree that the current practice of giving credit for a year of law study, whether or not a student has completed courses in the subjects tested on the FYLSX, is appropriate. He further suggests that any accredited law school should be able to require a student to take the FYLSX upon completion of the subjects tested on the examination.

2. Dean Mitchel Winick

Dean Winick objected to language in the original summary contained in the Notice of Public Comment; he believes the Committee, the Board Committee and public were misled and seeks to have the proposed amendments withdrawn. [This matter was discussed by the Committee, and the Committee declined to grant his request.] He believes the proposed amendments regarding Chapter 6 hearings are significant and that they "...substantially modify an applicant's due process rights." He objects to the delegation of authority in Chapter 6 matters to the Senior Executive, Admissions and the changes proposed relative to how Chapter 6 hearings will be conducted.

3. Dean Robert Barth

Dean Barth believes there are conflicting definitions set forth in two sections of the rules with regard to what constitutes a year and its application for determining law study credit. He provided alternate language for consideration.

Response to Public Comments:

1. Rule amendments that would change the current process for determining eligibility to take the FYLSX were not part of the proposed amendments circulated for public comment. The language of the proposed amendments on page 3 of Attachment B is substantially the same as the language contained in Business and Professions Code Section 6060(h), which states: "...Those who pass the examination within its first three administrations upon becoming eligible to take the examination shall receive credit for all law studies completed to the time the examination is passed. Those who do not pass the examination within its first three administrations upon becoming eligible to take the examination, but who subsequently pass the examination, shall receive credit for one year of law study only." The statute also clearly states when the examination should be administered, which is "...after completion of his or her [the student's] first year of law study."

While California-accredited law school students may elect to take the examination, the statute clearly states that they are exempt from the FYLSX if they are advanced to their second year of law study at such a school. Under the Committee's current policies and procedures, if such students elect to take the examination, they must meet the same eligibility criteria established for unaccredited fixed-facility law school students. They must have successfully completed a minimum of 270 hours of study within one (calendar) year in order to qualify to take the examination; only the total units are counted, the subject matter of the courses is not considered. While Dean Piggot's suggestions may have merit for future discussion, they suggest additional changes to the rules that were not part of the package circulated for public comment.

2. The proposed amendments to Chapter 6 were meant to simplify and clarify the process for handling those instances where applicants are caught violating examination rules and policies. After conducting several Chapter 6 hearings for violations where the evidence was not disputed, i.e., a cell phone was confiscated from the applicant in the secure test area, the Committee expressed its desire to make the ramifications of bringing certain unauthorized items into the examination immediately known and

enforced; there should be no doubt with regard to the effects of violating certain rules. Committee members have indicated that they do not believe the Chapter 6 hearing process is fruitful in certain situations when there is no question that an applicant has violated the rules, such as bringing a cell phone into the secure test area. Generally, there is no question that he or she did it, which is unlike other alleged violations such as copying from another applicant's answers. In many jurisdictions outside of California, applicants found in an examination room with a cell phone would be dismissed from the examination immediately. In very few jurisdictions would an applicant even be entitled to a hearing, except in connection with his/her character and fitness eligibility. The guidelines, which have yet to be drafted and have to be approved by the Committee, will lay out the process for the initial handling Chapter 6 matters and will, most likely, clearly state the sanctions for certain violations.

In light of the public comment received, however, the Committee agreed that in order to make it clear that any sanction imposed is at the direction of the Committee, the language delegating "certain decisions to the Senior Executive" should be removed. It was never intended that the Senior Executive would be making decisions on the Committee's behalf that went beyond implementing sanctions the Committee might establish for certain violations. In many of its day-to-day operations, the Committee has delegated authority to staff to act on its behalf, and this was another instance where such delegation was thought to be reasonable. If by the language in the amended rule, however, there is a perception that the Committee has delegated its authority for decision-making in these important matters, it should be removed. The language has been deleted in the amended rules (Rule 4.71(C) on page 5 of Attachment C) that are being recommended for adoption.

Aside from those Chapter 6 hearings for applicants caught bringing unauthorized items into the examination room, each year there have been at least a couple of violations by applicants who have been suspected of violating the rules. These include such things as suspected copying from another applicant's answers, remaining in a laptop computer exam file after time has been called or bringing notes into the secure test area. In the past, Chapter 6 Hearings generally has been conducted as follows: 1) the evidence is introduced by a representative from General Counsel's office, which the applicant could refute; 2) the applicant is allowed to introduce his or her own evidence; 3) the applicant is questioned by the Panel Members and allowed to make a statement; and, 4) a decision is rendered. This same process, albeit in a slightly different manner, would remain in place under the amended rules. There have been only a few hearings that were conducted more formally.

After discussing the process with members of the Committee and counsel, it was thought that Chapter 6 hearings should be conducted similar to how moral character informal conferences are held. Under the proposed amendments, applicants will have the right to counsel and will have the opportunity to dispute the evidence supporting the Chapter 6 Notice that was given to them. If the Committee determines to give a sanction of zero, for instance, for a portion of the examination due to an applicant's violation of the examination rules, the applicant's next course of action would be to file a motion with the Supreme Court, which is consistent to the current process. If an

applicant's admission is denied on moral character grounds because of an examination rules violation, the applicant would have an opportunity for a formal proceeding if she/he elected to appeal the Committee's decision to the State Bar Court.

3. In response to Dean Barth's comments, additional language was added to Rule 4.28 of the amended rules (page 1 of Attachment C) with regard to what constitutes a year. The definition specified in Rule 4.3, however, should remain as there are instances beyond correspondence and distance learning law study where a year of law study needs definition.

Since the revisions to the proposed amended rules are not substantive, the proposed amendments do not have to be circulated for another period of public comment.

FISCAL / PERSONNEL IMPACT:

There would be minimal fiscal/personnel impact if these rules amendments are approved. If fewer Chapter 6 hearings are held, savings would be realized because there would be less travel for the volunteers, staff, witnesses and presenters and court reporters would not be hired (the hearings, however, would still be recorded).

RULE AMENDMENTS:

Proposed amendments to Rules 4.3, 4.28, 4.4., 4.5, 4.26, 4.40, 4.41, 4.5, 4.55, 4.56, 4.59, 4.60, 4.70, 4.71, 4.72, 4.73, 4.74, 4.85, 4.88 of the *Admissions Rules*.

BOARD BOOK IMPACT:

None

RECOMMENDATION

The Committee of Bar Examiners seeks the Board of Governors approval of the proposed amendments to the *Admissions Rules*, as attached as Attachment C.

PROPOSED BOARD COMMITTEE RESOLUTION:

Should the Regulation, Admissions and Discipline Oversight Committee agree with the above recommendation, the following resolution would be appropriate:

RESOLVED, that upon the recommendation of the Committee of Bar Examiners, the Regulation, Admissions and Discipline Oversight Committee recommends that the Board approve the proposed amendments to the *Admissions Rules* (Rules of the State Bar of California, Title 4. Division 1.) in the form attached hereto, effective the date action is taken by the Board.

PROPOSED BOARD RESOLUTION:

Should the Board concur with the Regulation, Admissions and Discipline Oversight Committee's recommendation, the following resolution would be in order:

RESOLVED, that upon the recommendation of the Regulation, Admissions and Discipline Oversight Committee, the Board hereby approves the proposed amendments to the *Admissions Rules* (Rules of the State Bar of California, Title 4. Division 1.) in the form attached hereto, effective the date of this action.