



The State Bar of California

OPEN SESSION

AGENDA ITEM

3.4 MAY 2025

COMMITTEE OF BAR EXAMINERS

DATE: May 5, 2025

TO: Members, Committee of Bar Examiners

FROM: Donna Hershkowitz, Chief of Admissions / Legislative Director
Cody Hounanian, Program Director, Office of Admissions

SUBJECT: Adoption of Criteria for Selection of Subject Matter Experts for Bar
Examination Multiple-Choice Question Content Validation Process

EXECUTIVE SUMMARY

To enhance the content validation process for the California Bar Examination multiple-choice question development, the State Bar of California plans to add an additional layer of review for legal accuracy by adding a slate of subject matter experts (SMEs). This report proposes a policy for SME recruitment and selection that is designed to prevent conflicts of interest, confirm that the SME's participation would not violate other agreements they may have relating to the use of intellectual property, ensure exam security and integrity, and ensure an appropriate level of involvement by the Committee of Bar Examiners in oversight of this policy. Staff recommend that the committee adopt the policy set forth in Attachment A.

RECOMMENDED ACTION

Adopt the proposed policy regarding recruitment and selection of subject matter experts as part of the content validation processes for the multiple-choice questions for the bar exam.

DISCUSSION

Multiple-choice questions drafted for the bar exam currently undergo review by law school faculty, recently admitted attorneys, supervising attorneys, and two subject matter experts (SMEs) to evaluate whether the questions (1) appropriately test for minimum competence to practice law; (2) exhibit any bias; (3) are clear; (4) are cohesive in style with other questions; and (5) accurately test the intended legal issue.

To further enhance the content validation process, the State Bar of California initiated a plan to retain law school faculty and retired members of the California judiciary to serve as additional SMEs and provide a further layer of review of the legal accuracy of the multiple-choice questions under development. Under this plan, 21 SMEs will be retained—three for each of the seven subjects tested on the multiple-choice section of the bar exam: civil procedure, constitutional law, contracts, criminal law and procedure, evidence, real property, and torts.

After the content validation panel assesses the drafted multiple-choice questions to ensure they are legally accurate, at the appropriate level of complexity to assess minimum competence for an entry-level attorney, and satisfy all other criteria, the SMEs will conduct an open-book review of the questions and answer choices for legal accuracy. Because we have a structured content validation process, facilitated by a psychometrician to guide panelists through the process of determining the appropriate content to test on an exam, the plan envisions that the role of SMEs will be limited to assessing the legal accuracy of the drafted question and the selected answer, citing the legal source supporting their determination, and if they believe that a question is incorrect, explaining what is incorrect. SMEs will not draft or revise questions or answers, in whole or in part. This limitation also allows for somewhat greater flexibility in the eligibility criteria, broadening the pool of available SMEs.

PROPOSED ELIGIBILITY CRITERIA FOR SMES

To prevent conflicts of interest, confirm that the SME's participation would not violate other agreements they may have relating to the use of intellectual property, and ensure exam security and integrity, staff recommend that the following criteria be adopted for the recruitment and selection of SMEs:

1. The SME must not have an immediate family member who will take the July 2025 California Bar Examination..¹

An "immediate family member" includes a spouse or domestic partner, children (including adoptive or stepchildren), siblings (including half- or stepsiblings), parents (including stepparents), grandparents, grandchildren, and in-laws.

2. The SME must not have a close personal relationship with someone who will take the July 2025 California Bar Examination.

A "close personal relationship" is a relationship other than an immediate family member that would or may be perceived to interfere with or influence the SME. This includes, but is not limited to, a significant other (boyfriend, girlfriend, or partner), close friends, roommates, co-participants in study groups, subordinate employees, and mentees.

3. The SME must not have been engaged in commercial activities related to bar exam preparation in the past two years (i.e., since May 2023).

¹ SMEs will be reviewing the entire bank of questions, including those not selected for any specific exam, so they will not know which exam, if any, the questions might be tested on. However, a reasonable limitation is necessary, so staff recommend precluding those who have an immediate family member who will take the July 2025 California Bar Examination.

This restriction is intended to prevent any real or perceived financial conflicts of interest. Prohibited commercial activity includes a broad set of compensated activities outside of regular academic employment including, but not limited to, publishing books or other bar preparation materials, paid lecture series, or selling course content. Work performed solely in a faculty capacity for an academic institution is not considered commercial activity for this purpose.

While the State Bar cannot impose forward-looking restrictions on future commercial activities due to California's prohibition on non-compete agreements, all SMEs will be subject to strict confidentiality obligations prohibiting them from sharing any exam materials they review.

4. The SME must not have performed work either directly or indirectly, including volunteer work, for or had an independent contractor relationship with the National Conference of Bar Examiners (NCBE) at any time in the last year (i.e., since May 2024), including work relating to the NextGen Bar Exam through AccessLex or any other entity.
5. The SME must be able to represent that participating in this review process would not violate any agreement the SME may have entered into with NCBE relating to the use of NCBE's intellectual property or with any bar preparation company relating to the use of its intellectual property.
6. The SME must be in good standing in any state in which they are licensed and. must not have any pending disciplinary charges before an attorney disciplinary board or committee. Any attorney disciplinary history shall be reviewed by staff in consultation with the Chair of the committee to determine if any such history is disqualifying.

Such complaint and discipline history checks are conducted, for example, for members of the State Bar Board of Trustees and its subentities.

7. The SME must agree to promptly disclose any change in circumstances that could create a real or perceived conflict of interest or otherwise impact their eligibility under the criteria above during the course of their engagement with the State Bar.

These criteria are set forth in the proposed policy, attached.

RECRUITMENT OF SMEs

The attached policy also describes the approach for soliciting law school faculty and retired California judges and justices to participate as SMEs as part of the content validation process. The policy also notes that SMEs shall be paid for this work. The current rate announced is \$100 per hour. The policy provides that the CBE shall periodically review the policy to determine if an update to that hourly rate is appropriate.

Staff will bring to the committee at its next meeting a policy related to the recruitment, eligibility criteria, and selection of participants in content and standard validation panels.

APPROVAL OF SELECTED SUBJECT MATTER EXPERTS WHO MEET THE ESTABLISHED CRITERIA

Staff have solicited applications and resumes from law school faculty and are soliciting applications from retired California judges and justices based on preliminary eligibility requirements that largely reflect the restrictions above, although some changes have been made following discussions with the committee chair. Because the multiple-choice questions on the bar exam do not test California-specific law, applicants can represent a broad cross-section of faculty from across the country, including those affiliated with ABA-approved, California-accredited, and registered, unaccredited law schools.

Because multiple-choice question development is currently underway, staff need to retain SMEs as soon as possible. This report seeks the committee's approval to delegate authority to approve selected SMEs to the Chair to facilitate approval as quickly after the May 5 committee meeting as possible. This approach is consistent with the committee's Policy Regarding Selection, Retention and Service as Members of the Examination Development and Grading (EDG) Team, adopted December 2, 2006, and most recently amended in October 2021, which provides that determinations as to whether to renew a term of an existing EDG team member are made by the Director of Admissions in consultation with the chair.

PREVIOUS ACTION

None

FISCAL/PERSONNEL IMPACT

Based on the rate of \$100 per hour for 21 SMEs, staff anticipates costs ranging from \$100,000 to \$150,000 (using a high estimate of 50 – 70 hours for each SME).

AMENDMENTS TO RULES

None

STRATEGIC PLAN GOALS & IMPLEMENTATION STEPS

None – core business operations

RESOLUTIONS

Should the Committee of Bar Examiners concur, it is:

RESOLVED, that the Committee of Bar Examiners approves the policy for recruitment and selection of subject matter experts for the bar examination multiple-choice question content validation process, as set forth in Attachment A; and it is

FURTHER RESOLVED, that the Committee of Bar Examiners delegate authority to the Committee Chair to approve which subject matter experts to retain.

ATTACHMENT LIST

- A. Policy Regarding Recruitment and Selection of Subject Matter Experts for Multiple-Choice Question Legal Accuracy Review