

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



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
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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



The State Bar *of California*

POLICY REGARDING RECRUITMENT AND SELECTION OF SUBJECT MATTER EXPERTS FOR MULTIPLE-CHOICE QUESTION LEGAL ACCURACY REVIEW

To ensure the accuracy of the multiple-choice questions developed for the California Bar Examination and instill confidence in the public about the quality of the questions, the Committee of Bar Examiners (committee) directs that an additional review be conducted by subject matter experts (SMEs) retained by the State Bar to review the questions for legal accuracy.

ROLE OF SUBJECT MATTER EXPERTS

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. SMEs will assess the legal accuracy of the drafted question and the answer choice that is keyed as correct, cite the legal source supporting their determination of the accuracy of the question and response, and if they believe that a question or correct answer choice is incorrect, explain what is incorrect. SMEs will not draft or revise questions or answers, in whole or in part.

Three SMEs will be retained 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) for a total of 21 SMEs. The SMEs will be selected on the basis of subject matter expertise, legal educational attainments, and experience, without regard to race, color, religion, sex (including gender identity or expression and sexual orientation), national origin, age, disability status, genetic information, or any other characteristic protected by law.

The committee's policies relating to the recruitment, selection, and retention of SMEs are as follows:

ELIGIBILITY CRITERIA FOR SUBJECT MATTER EXPERTS

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, the committee establishes the following eligibility criteria for SMEs:

1. The SME must not have an immediate family member scheduled to take the July 2025 California Bar Examination. 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 two years prior to being selected. 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.
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 year prior to being selected, 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 use of its intellectual property.
6. The SME must be in good standing in any state in which they are licensed. Specifically, a SME 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.

RECRUITMENT, SELECTION, AND RETENTION OF SUBJECT MATTER EXPERTS

Whenever necessary to ensure a sufficient number of SMEs are available to conduct reviews of multiple-choice questions for legal accuracy, the State Bar shall conduct a broad solicitation to law school faculty as well as retired California judges and justices.

Submitted applications will be reviewed by staff for compliance with eligibility criteria and staff will make initial recommendations to the Chair of the committee. The final selection of SMEs who meet the established criteria will be approved by the Chair.

The Chief of Admissions or their designee, in consultation with the committee Chair will determine whether to extend an offer to enter into an initial agreement with a SME.

If a SME no longer meets the eligibility criteria or otherwise becomes unable to fulfill their duties, this is grounds for the State Bar to terminate the agreement with the SME, following consultation between the Chair and the Chief of Admissions or their designee.

ADVERTISING/PUBLICITY

SMEs shall not advertise or engage in any publicity about their roles as having served as a SME with the State Bar of California or the committee or otherwise achieved some sort of expertise associated with the development of exam questions, without prior written consent from the State Bar.



The State Bar of California

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Donna Hershkowitz, Chief of Admissions / Legislative Director

Cody Hounanian, Program Director, Office of Admissions

Committee of Bar Examiners, May 5, 2025

Additional Review by Subject Matter Experts



Strengthen our internal content validation process by ensuring all necessary and appropriate types of review



Specialized expertise in each exam-tested subject area



Instill confidence in the public about the quality of the questions developed



Current Multiple-Choice Question Review



Appropriately tests for minimum competence



Legally accurate



Free from bias



Written clearly and cohesive in style



Additional Multiple-Choice Question Review

Focus of SME Review

- Plan to retain 21 SMEs
 - 3 for each subject tested
 - Law school faculty
 - Retired California judges and justices
- Open-book review of the questions and answers for legal accuracy
 - All questions in the bank
 - New questions as regular part of content validation process
- Will not draft or revise questions



Proposed Eligibility Criteria

SMEs must:

- Represent that participating in the review process would not violate any agreement the SME may have entered into with the National Conference of Bar Examiners (NCBE) or any other bar preparation company relating to the use of intellectual property.
- 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 in consultation with the Chair to determine if it is disqualifying.
- 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.



Proposed Eligibility Criteria

SMEs must not:

- Have an immediate family member who will take the July 2025 bar exam.
- Have a close personal relationship with someone who will take the July 2025 bar exam.
- Have been engaged in commercial activities related to bar exam preparation in the past two years.
- 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, including work relating to the NextGen Bar Exam through AccessLex or any other entity.





Proposed SME Recruitment and Selection Policy

- **Recruitment of SMEs**
 - Solicit law school faculty across the country and from all school types
 - Retired California judges and justices
- **Selection of SMEs**
 - Committee Chair, with recommendations from staff
 - Selected on the basis of subject matter expertise, legal education, and experience
 - Must meet eligibility criteria





Recommended Action and Next Steps

- Adopt the policy set forth in Attachment A
- Delegate authority to the Chair to approve selection of SMEs



Questions?

