



Commonwealth of Massachusetts
Office of the State Auditor
Suzanne M. Bump

Making government work better

Official Audit Report – Issued April 26, 2019

Board of Bar Examiners

For the period July 1, 2016 through June 30, 2018





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April 26, 2019

Robert L. Harris, Esq., Chair
Board of Bar Examiners
Edward W. Brooke Courthouse
24 New Chardon Street, First Floor
Boston, MA 02114

Dear Mr. Harris:

I am pleased to provide this performance audit of the Board of Bar Examiners. This report details the audit objectives, scope, and methodology for the audit period, July 1, 2016 through June 30, 2018. My audit staff discussed the contents of this report with management of the agency, whose comments are reflected in this report.

I would also like to express my appreciation to the Board of Bar Examiners for the cooperation and assistance provided to my staff during the audit.

Sincerely,

A handwritten signature in blue ink, appearing to read "SMBump".

Suzanne M. Bump
Auditor of the Commonwealth

cc: Marilyn Wellington, Executive Director, Board of Bar Examiners

TABLE OF CONTENTS

EXECUTIVE SUMMARY 1
OVERVIEW OF AUDITED ENTITY 2
AUDIT OBJECTIVES, SCOPE, AND METHODOLOGY 7

LIST OF ABBREVIATIONS

ADA	Americans with Disabilities Act of 1990
BBE	Board of Bar Examiners
NTA	nonstandard testing accommodation
SJC	Supreme Judicial Court
UBE	Uniform Bar Examination

EXECUTIVE SUMMARY

In accordance with Section 12 of Chapter 11 of the Massachusetts General Laws, the Office of the State Auditor has conducted a performance audit of the Board of Bar Examiners (BBE) for the period July 1, 2016 through June 30, 2018. In this performance audit, we determined whether BBE's evaluations of the character and fitness of all petitioners for admission to the Massachusetts bar were conducted in accordance with Section 7 of Supreme Judicial Court Rule 3:01 and whether BBE provided qualified applicants with testing accommodations in accordance with the Americans with Disabilities Act of 1990.

Our audit revealed no significant instances of noncompliance by BBE that must be reported under generally accepted government auditing standards.

OVERVIEW OF AUDITED ENTITY

The Board of Bar Examiners (BBE) was established by Sections 35 and 36 of Chapter 221 of the Massachusetts General Laws to evaluate the qualifications of people seeking admission to the Massachusetts bar. According to BBE's website,

The Board of Bar Examiners reviews all petitions for admission to the Massachusetts bar submitted by eligible candidates to ensure that all persons admitted to the bar are fully qualified by education, knowledge and character and fitness.

In accordance with Section 35 of Chapter 221 of the General Laws, the board is composed of five attorneys, at least four residing in different Massachusetts counties, who are appointed by the justices of the Supreme Judicial Court (SJC) for five-year terms. The board reviews issues related to the qualifications, character, and fitness of those interested in admission to the Massachusetts bar. Although board members are not compensated, they are reimbursed for expenses.

As of June 30, 2018, BBE employed eight staff members to support the activities of the five-member board. These staff members include a full-time executive director, one staff investigator, one staff attorney, and office support personnel. The duties of these staff members include assisting the board in reviewing the qualifications and acquirements of petitioners for admission to the Massachusetts bar and in planning, organizing, and conducting semiannual exams. These staff members also provide quarterly reports to the board about bar admissions and BBE's fiscal operations. BBE's appropriations for fiscal years 2017 and 2018 were \$1,330,271 and \$1,375,127, respectively.

Admission to the Massachusetts Bar

SJC Rule 3:01 discusses the three ways people may petition the SJC for admission to the Massachusetts bar: (1) petitioning by taking the written examination, (2) petitioning by motion when the petitioner is already practicing in another jurisdiction, or (3) petitioning by Uniform Bar Examination (UBE) score transfer when the petitioner has taken and passed a bar examination in another jurisdiction. Below is a summary of petition activity during our audit period.

Type of Petition	Petitions Filed	Total Examinees	Examinees Who Passed	Petitions Recommended for Admission	Petitions Pending Admission	Petitions Denied
Exam	3,961*	3,724 [†]	2,338 [†]	2,318	20	0
Motion	479	0	0	441	35	3
UBE Transfer	94	0	0	88	6	0
Total	<u>4,534</u>	<u>3,724</u>	<u>2,338</u>	<u>2,847</u>	<u>61</u>	<u>3</u>

* During the audit period, 237 petitioners withdrew their petitions or did not attend the exam.

† These figures only include test-takers for the Massachusetts bar, not for other states. During our audit period, 1,386 petitioners took the exam but did not pass.

Petitioners must file their petitions with the SJC Clerk’s Office for the County of Suffolk. Completed petitions are referred to BBE to determine the qualifications of the petitioner; this determination includes a review of the petitioner’s character and fitness (for all petition types). According to the SJC website, those petitioning by examination must sit for the UBE, which BBE administers twice each year (in February and July). This examination includes a three-part multistate examination and a Massachusetts law component. The three-part multistate exam consists of performance, essay, and bar sections. During our audit period, BBE administered four bar examinations to a total of 3,724 petitioners. Statistical information about the examinations taken in February and July of fiscal years 2017 and 2018 is shown below.

Examination Attempt	Exams Taken	Exams Passed	Percentage of Successful Exam Takers
First	2,601	1,994	77%
Second	478	207	43%
Third or Later	645	137	21%
Total	<u>3,724</u>	<u>2,338</u>	63%

An admission by motion for a practicing attorney from another jurisdiction requires proof that the petitioner has been practicing law in another state, district, or territory of the United States for a minimum of five of the seven years immediately preceding the filing of the petition.

Petitioners interested in admission by UBE score transfer must file their petitions within 36 months of successfully passing the UBE in a different jurisdiction with a score of 270 or higher.

Character and Fitness

According to BBE Rule V.1,

The Board of Bar Examiners considers good character to embody that degree of honesty, integrity and discretion that the public and members of the bench and the bar have the right to demand of a lawyer.

BBE has policies and procedures that outline its four-step process to evaluate character and fitness, which BBE staff members conduct before making a recommendation to the five-member board. The character and fitness assessment considers all available information pertinent to the past and current conduct of the petitioner. According to BBE Rule V.1,

The Board of Bar Examiners considers the following attributes to be essential for all petitioners seeking admission to the Massachusetts bar:

- *The ability to reason, recall complex factual information and integrate that information with complex legal theories;*
- *The ability to communicate with clients, attorneys, courts, and others with a high degree of organization and clarity;*
- *The ability to use good judgment on behalf of clients and in conducting one's professional business;*
- *The ability to conduct oneself with respect for and in accordance with the law;*
- *The ability to avoid acts which exhibit disregard for the rights or welfare of others;*
- *The ability to comply with the requirements of [SJC Rule 3:07], applicable state, local, and federal laws, regulations, statutes and any applicable order of a court or tribunal;*
- *The ability to act diligently and reliably in fulfilling one's obligations to clients, attorneys, courts, and others;*
- *The ability to use honesty and good judgment in financial dealings on behalf of oneself, clients, and others; and*
- *The ability to comply with deadlines and time constraints.*

If the character and fitness review reveals information that conflicts with these attributes, BBE conducts further inquiry before making a recommendation to the board. According to BBE Rule V.1.1, BBE will consider other factors, such as the following, when assessing infractions:

- *The candidate's age at the time of the conduct*
- *The amount of time since the conduct*

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- *The reliability of the information concerning the conduct*
 - *The seriousness of the conduct*
 - *The cumulative effect of conduct or information*
 - *The evidence of rehabilitation*
 - *The candidate's positive social contributions since the conduct*
 - *The candidate's candor in the admissions process*
 - *The materiality of any omissions or misrepresentations*

The board then decides whether the petitioner should be admitted to the bar; referred to a third-party (pro bono) legal firm for further investigation; deferred admission with a pending status until outstanding issues are addressed, at which time a decision will be rendered; or denied admission.

The names of petitioners who have passed the relevant examinations are published on the websites of BBE and the Massachusetts Judicial Branch for no fewer than seven days for public inspection. Ten days after the public posting of the names, if no objections have been made by the public, BBE must make admission recommendations to the SJC under Rule 3:01. Once the board makes an admission recommendation to the SJC, the qualified petitioner has one year in which to enroll in the Massachusetts bar and be sworn in as an attorney. The SJC conducts the official admission ceremonies twice annually, in November and June. For those who cannot attend the formal ceremony, alternate arrangements may be made upon request.

If a petitioner is denied admission, the board notifies them of the reason in writing and provides materials to support its decision. The board further informs them of the timeframe to appeal the decision by requesting a hearing if desired.

Nonstandard Testing Accommodations

BBE staff members process requests for accommodations from bar petitioners with disabilities in accordance with the Americans with Disabilities Act of 1990 (ADA) and subsequent amendments resulting in Title 42 of the United States Code. BBE adheres to Chapter 126, Subchapter II, Part A, Section 12132 of the ADA, which states,

No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

Petitioners who need nonstandard testing accommodations (NTAs) submit their petitions to take the UBE through the regular process, but also submit a separate application for NTAs directly to BBE. The NTA application and the process for the bar exam in Massachusetts are posted on the BBE website.

BBE must modify its examination practices, when necessary, to give people with disabilities the opportunity to have their aptitude, not their disability, measured. Section 36.309(b)(1)(i) of Title III of the Code of Federal Regulations states,

The examination is selected and administered so as to best ensure that, when the examination is administered to an individual with a disability that impairs sensory, manual, or speaking skills, the examination results accurately reflect the individual's aptitude or achievement level or whatever other factor the examination purports to measure, rather than reflecting the individual's impaired sensory, manual, or speaking skills (except where those skills are the factors that the examination purports to measure).

BBE's NTA application requires applicants to provide documentation of the need for accommodation. BBE considers documentation supporting past testing and/or formal public-school accommodations previously received. According to BBE, the documentation should be reasonable and limited to the need for the accommodation requested.

BBE works with petitioners to make every necessary accommodation so that a petitioner's aptitude is tested. In rare instances, accommodations have been denied for lack of supporting documentation.

The table below shows the NTA applications received by BBE during the audit period.

NTA Requests	Total
NTA Applications Received	194
Accommodations Received	180
Accommodations Denied	14
Percentage Approved	93%

The table below shows the NTA application count by disability type for the audit period.

Disability Type	Number of Applicants
Learning	44
Attention-Deficit/Hyperactivity Disorder	48
Psychological	36
Visual	8
Physical	58
Total	<u>194</u>

AUDIT OBJECTIVES, SCOPE, AND METHODOLOGY

In accordance with Section 12 of Chapter 11 of the Massachusetts General Laws, the Office of the State Auditor has conducted a performance audit of certain activities of the Board of Bar Examiners (BBE) for the period July 1, 2016 through June 30, 2018.

We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Below is a list of our audit objectives, indicating each question that the audit intended to answer and the conclusion we reached regarding each objective.

Objective	Conclusion
1. Does BBE evaluate the character and fitness of petitioners in accordance with the Rules of the Board of Bar Examiners as authorized by Section 7 of Supreme Judicial Court (SJC) Rule 3:01?	Yes
2. Does BBE provide applicants with testing accommodations in accordance with Americans with Disabilities Act of 1990 (ADA) requirements?	Yes

To achieve our objectives, we gained an understanding of the internal controls we deemed significant to our audit objectives through inquiries and observations. We evaluated the design of controls over BBE management's review of both nonstandard testing accommodation (NTA) and character and fitness evaluations. We also evaluated the effectiveness of controls over the character and fitness evaluation process. We assessed whether these controls operated as intended during the audit period.

We performed the following procedures to obtain sufficient, appropriate audit evidence to address the audit objectives.

- We obtained from BBE's FileNet file management system a list of the 4,534 petitions for admission to the Massachusetts bar from our audit period. We segregated them into two groups: (1) petition by examination and (2) petition by motion or Uniform Bar Examination (UBE) transfer.

- For petitions by examination, we selected a statistical random sample using a 90% confidence level and a tolerable error rate of 10%. We sampled 24 petitions from the 3,961 total petitions by examination from the audit period. To determine whether a petitioner's character and fitness were evaluated in accordance with Section 7 of SJC Rule 3:01, we inspected the following: copies of the petition, law school certification, letters of recommendation (a minimum of two), issues identified in the documentation and addressed by the petitioner, and actions taken by a staff investigator to resolve the issues.
- Using a nonstatistical sampling method, we selected a random sample of 30 petitions from the 573 total petitions by motion or UBE transfer from the audit period. We acquired the 30 petitions with the assistance of BBE's staff. To determine whether a petitioner's character and fitness were evaluated in accordance with Section 7 of SJC Rule 3:01, we inspected the following: copies of the petition, law school certification, letters of recommendation (minimum of three), bar certification and letter of good standing from another jurisdiction, grievance letters (if applicable), background reports, issues identified and addressed by the petitioner, and actions taken by a staff investigator to resolve the issues.

We inspected BBE's list of petitioners who applied for NTAs during the audit period; this list is generated and managed separately from the list of petitions to the bar. We selected a nonstatistical random sample of 35 out of 194 NTA applications from the audit period. We inspected original source documents for completeness, descriptions of the applicants' self-identified specific disabilities, accommodation histories, medical histories and supporting documentation, academic transcripts, and external medical/clinical consultation reports (if requested) to ensure that NTAs were provided in accordance with ADA requirements.

Whenever nonstatistical sampling was used, we could not project our result to the entire population.

Data Reliability

We determined the reliability of the FileNet data by performing interviews and testing information technology controls over user identification and authentication policies and procedures, account management, security training, and monitoring configuration. We ensured the completeness of our list of petitions by judgmentally selecting 15 petitions from a BBE file cabinet and verifying that they corresponded to the exam dates in FileNet. In addition, we judgmentally selected 25 petitions from the FileNet list and traced the bar petition numbers to the hardcopy petitions. Further, we analyzed the list for missing data, hidden data and columns, duplicate information, and active filters. We determined that the data from FileNet were sufficiently reliable for the purposes of this audit.

We determined the reliability of the NTA list by performing interviews with BBE management. We ensured the completeness and accuracy of the list by judgmentally selecting 10 applications from the file cabinet and verifying that they were included on the list of applications in FileNet. Further, we judgmentally selected 10 applications from the NTA list and traced the bar petition numbers to the NTA applications. We then analyzed the list of applications for missing data, hidden data and columns, duplicate information, and active filters. We determined that the data from the NTA list were sufficiently reliable for the purposes of this audit.