Essays on a Uniform Bar Examination

For this issue of the magazine, we have chosen to bring our readership a series of brief essays on the concept of the uniform bar examination (UBE). Three phrases sum things up about the UBE as that idea exists today: "This is an idea whose time has come," "The devil is in the details," and—most importantly, perhaps—"It's the right thing to do."

As various groups and constituencies have considered the wisdom of placing law with other professions in requiring a common examination experience, enthusiasm for the UBE has increased. The model under consideration rests on the foundation of existing test instruments with which jurisdictions are already familiar. The use of these instruments (the MBE, MEE, and MPT) as a common battery and the trade-offs in moving to a uniform testing protocol will be the subject of discussion over the next months and years.

The array of essay contributors is representative of the participants in the dialogue that has occurred to this point. Their voices are their own. Contributors include two Supreme Court justices, three deans (one current, two former), three chairs of state boards of bar examiners (one current, two former), one bar admissions administrator, one lawyer who was integral to the process of bringing a single licensing test to fruition in the medical context, and our two measurement experts. We thank them for their thoughtful comments and observations.

A Uniform Bar Examination: An Idea Whose Time Has Come

by Frederic White

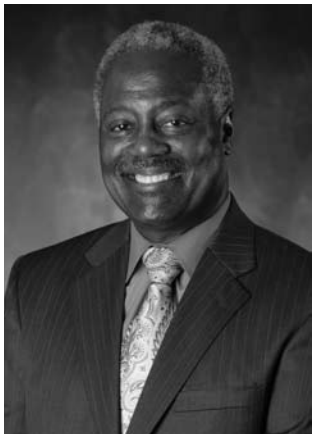
All of us agree that the practice of law has changed tremendously, particularly in the last 20 years. Venerable firms, some dating back to the nineteenth century, have folded or been swallowed up by newer, aggressive organizations. All across the country new firms have emerged; some of these have prospered, some have sputtered and died, and some have regrouped and become stronger. And they have spread out. Once confined to county, state, or sometimes regional lines, the practice of law has become nationwide and global. Today it is not unusual for some large law firms to staff multiple offices in different states but also to maintain, in effect, 24-hour operations with their affiliated offices throughout North and South America, Europe, Africa, and Asia. It's a new day.

Unfortunately, the licensing process for U.S. attorneys has not caught up with today's realities. Over the years the rise of mega-retail, banking, and industrial firms doing business across the country and beyond has, in some ways, made "local practice" a misnomer. Even given some local variations in practice or regional differences involving, for example, community property, a contract written in New York still involves virtually the same concepts as one written in Texas, Florida, or California. Consequently, other than for issues involving turf, territoriality, and protectionism—and a stubbornness thinly disguised as maintaining tradition—there is no rational justification for having each state administer its own bar examination.

Consider this: Virtually all jurisdictions now administer the Multistate Bar Examination. As of

July 2009, 23 jurisdictions will offer the Multistate Essay Examination, and only two of those jurisdictions do not use the Multistate Performance Test. In effect, a common licensing test is already in force. The ABA Bar Admissions Committee, realizing that the way law graduates enter into the profession is changing, has been looking at this issue for at least two years.

Furthermore, in the February 2008 issue of THE BAR EXAMINER, NCBE president Erica Moeser detailed how NCBE had recently hosted representatives from 21 jurisdictions who participated in a daylong discussion of the "feasibility and desirability of a common licensing test." The group included bar examiners, supreme court justices, and bar admissions administrators. General response following the session was positive. Of course, the devil is in the details and, as Ms. Moeser indicated, a UBE is not yet a fait accompli. Obvious issues that will have to be worked out include the following: selection of a proper pass/fail line, uniform weighting of test components, scaling of scores, and possible testing on local subject matter. These kinds of issues are not insurmountable and can be worked out by the stakeholders—the bar examiners, state courts, and bar administrators—to reach consensus.



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In today's global legal world, it has become easier for foreign-trained lawyers to achieve limited licensing rights to practice law in some states than it is for a U.S.-trained lawyer to do the same. The growth of cross-jurisdictional practice shows no signs of abatement. A common licensing examination is a reasonable response to today's practice realities. It is an idea whose time has come.

LIFE WITHOUT A LOCAL BAR EXAM

by Hon. Gerald W. VandeWalle

No local bar examination? We are losing our North Dakota identity! That was my first reaction in 1997 when the State Bar Board, now the Board of Law Examiners, informed the court that they were contemplating dropping the North Dakota essay portion of the bar examination in favor of the Multistate Essay Examination (MEE). I already thought that the 1976 adoption of the Multistate Bar Examination (MBE) to supplement what had previously consisted

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solely of local essay questions left us little enough of our North Dakota jurisprudence, and now there would be nothing remaining that was exclusively North Dakotan. After all, I preceded the MBE; the bar exam I had taken consisted of a three-day, 18-subject essay examination whose questions were all either written or solicited by the members of the Bar Board. Of course, that was so long ago that I do not recall whether the questions actually tested on North Dakota law and, if they did, whether I realized I was being tested on a point of law peculiar to this state. Personal recollection and reaction aside, I felt our state pride was at stake.

Those were my initial thoughts. My egocentric reaction was soon replaced by acknowledgment of what I had been learning over the years from the testing experts: The results of local examinations are often unreliable. Criticism of local exams has included allegations that the questions are not well written; the grading of the essay questions is not consistent; and the small number of people writing the exams may, in itself, cause a statistically unreliable result. I leave it to the testing experts in the other essays to explain these allegations, but I had heard enough to convince me that we needed to move forward and replace our local essay portion of the examination with a more dependable option.

My conclusion was reinforced by several cases that came before the court challenging the validity of the North Dakota bar examination. *See, e.g., Application of Lamb*, 539 N.W.2d 865 (N.D. 1995) (inclusion of evidentiary issue in bar examination question on practice and procedure was not improper), cert. denied, *Lamb v. North Dakota State Bar Board*, 518 U.S. 1008, 116 S.Ct. 2530, 135 L.Ed.2d 1054 (1996); *McGinn v. State Bar Board of the State of North Dakota*, 399 N.W.2d 864 (N.D. 1987) (applicant not denied due process or equal protection by procedure used to grade essay portion of bar examination); *Dinger v. State Bar Bd.*, 312 N.W.2d 15 (N.D. 1981) (essay-type bar examinations are not invalid per se despite the fact that they require subjective evaluation). Perhaps the most intriguing appeal from an adverse recommendation for admission involved the contention that a model answer for one of the essay questions was incorrect and therefore unreliable. The argument would have had this court establish what presumably would be legal precedent on the subject in North Dakota by issuing an opinion on the answer to a bar examination question! *Faulconbridge v. North Dakota State Bar Bd.*, 483 N.W.2d 780 (N.D. 1992). We held that the procedure employed by the Bar Board to test the applicant was not unreliable and that his essay was therefore not graded arbitrarily or unreasonably.

A uniform bar examination? I know my initial reaction to giving up our local footprint on the bar examination is not unique; it was shared by the justices and many members of the Bar in North Dakota. I expect most of the justices and judges of the nation's appellate courts who deal with the admissions process have a sense of pride and accomplishment in what they are doing to protect citizens and enhance the quality and credibility of the legal profession in their respective states. But the question that needs to be asked is whether there is a better way of doing what we already may be doing relatively well. I submit the answer is a strong "Yes, there is a better way." The UBE would provide a professional and statistically valid examination. Although it would not completely eliminate such challenges as those posed in the cases cited above, it would surely diminish their force, as the examination would be expertly constructed and proficiently graded. I would no

longer have lingering doubts that our bar examination may be flawed, statistically invalid, or unfair.

But what of the need to require lawyers entering practice in our state to have knowledge of some of the jurisprudence that is either not national jurisprudence or not tested by the UBE? Familiarity with unique local precedents is a real concern. However, there are means to ensure the applicant's knowledge of local jurisprudence other than by testing on a local bar examination. Because the applicant has presumably studied the local jurisprudence, why not, for instance, require the applicant to take a given number of hours of continuing legal education on those matters? Not only will that continue to expose the applicant to the subject, it will ensure a familiarity beyond that which ordinarily could be tested on a local bar examination. In addition to administering the UBE to its local applicants, a jurisdiction might also require a separate local examination, although that possibility may renew issues of reliability.

The ability of an applicant to practice law in North Dakota, and the quality and character of that applicant, remain my biggest concern. But as the pressure to recognize multijurisdictional practice and now practice in a global economy increases, so does the realization that a uniform bar examination makes good sense. Admission on motion, although not universally accepted, has surely increased in recent years. It would be reassuring to know that the applicants for admission from another jurisdiction have successfully passed the same bar examination as the local applicants.

A uniform bar examination? No testing on local precedents? The reply to the first question should be a resounding YES. The response to the second question should be decided locally and after considering and weighing the advantages and disadvantages of a local examination. It should not, however, be the justification for rejecting the concept of a uniform bar examination.

The Case for the Uniform Bar Exam

by Hon. Rebecca White Berch

Hon. Rebecca White Berch is Vice Chief Justice of the Arizona Supreme Court and a former longtime member of the Arizona Bar Examinations Committee.

Those who read The Bar Examiner need no introduction to the concept of a uniform bar examination (UBE)—a bar exam consisting of uniform content to be administered, as is the Multistate Bar Examination (MBE), in many states at the same time. The goal of those advocating the UBE is to provide a test that states can agree will function as the sole and common bar exam in those jurisdictions agreeing to sign on. Many of the issues surrounding the formulation, administration, and grading of such an exam were raised in Erica Moeser's February 2008 President's Page. It is not the purpose of this essay to rehash those issues; instead, I want to address the underlying question of why a jurisdiction might want to consider adopting a UBE. The answers are many.

People travel and move more than they used to. It's no longer common for a lawyer to live and practice entirely in one state. Many events may cause lawyers to move, such as a spouse's professional transfer to another state, a law firm's decision to send a lawyer to another state to work at a branch office, a wish to move closer to (or away from) relatives, or simply a desire to live in a different location. Even lawyers who do live in one state for their entire professional careers may have cases that cross state borders and require admission in another state.[1] Electronic communications and transfers of money already make it easy to effect multijurisdictional transactions on behalf of clients; the potential to join the bar in another state without taking that state's bar exam would further facilitate the practice of law.

A UBE would also eliminate a decision faced by law students who attend law school in a state other than their home state: namely, whether to take the bar exam in their home state or in the state where they attended law school—or, perhaps even more difficult, to try to determine where they might eventually practice and take the bar exam in that state. If all states were to honor the same examination, no matter where taken, such a decision would no longer be an issue.

Some worry that a test common to all jurisdictions would not fully protect each individual jurisdiction's special interests. But let's look at the basics. A bar exam is a test of minimum competence to practice law. On that point, we have already developed a high degree of national consensus on the content that should be tested. Almost every jurisdiction, for example, administers the MBE and uses the score on that test in assessing whether a bar applicant has sufficient knowledge of legal rules.[2] If your state uses the MBE, it already employs a significant component of the proposed UBE—and the tool that provides a statistical means for validating other parts of the bar exam and making scores comparable from year to year. In short, those 53 jurisdictions that use the MBE have already taken a significant step toward accepting the concept of a UBE.

The remainder of the UBE is likely to consist of multistate essay questions and perhaps a multistate practice question or two. This parallels the test given now in many jurisdictions.

Giving vetted questions such as those produced by NCBE for the Multistate Essay Examination relieves the pressure on states to develop or procure questions twice each year. Many states perform this task by contacting out-of-state law professors to write questions covering the state's tested subject matters. Occasionally the questions are quite good. Most often they are merely adequate. And every once in a while a question simply bombs. A test that controls the entry to a profession should not be subject to such vagaries.

States need not worry that a UBE would destroy their autonomy. States may give a short test on state-law issues peculiar to the home jurisdiction. Moreover, states would retain the ability to screen for character and fitness. States may assert autonomy in other ways as well: Under debate, for example, is whether the passing score should be set nationally or on a state-by-state basis. At least initially, states may wish to choose the score at which applicants would be deemed to have passed the exam. As happened with the MBE, however, over time, the UBE passing scores set by each state will likely migrate toward a consensus passing score.[3]

A UBE may resolve a number of other troublesome issues that plague bar examiners. It would ensure uniform content, uniform grading, a uniform passing score, uniform terms for evaluating special accommodations, and so much more. Let's focus for a moment on the special accommodations issue. As a bar examiner, I have read special accommodations requests from bar exam applicants and reviewed the accompanying files. I wondered whether our training as bar examiners was adequate to allow us to make judgments in these cases. Yet as a committee, we evaluated, discussed, and sent the requests and documentation out for professional evaluation. We received requests both meritorious and (in our opinion) dubious. Having experts available who specialize in evaluating accommodations requests and who would consistently apply uniform criteria to assess such requests—and then suggest appropriate accommodations that should be afforded—would help provide a level playing field for all test takers. It would also ensure that those taking the bar exam in Arizona (my home state) would receive the same accommodations that they would have received had they taken the bar exam in Iowa (or some other UBE state).[4] It would also provide support to bar exam committees on those occasions when they deny accommodations and the decision is subsequently challenged.

How to grade and whether grading should be done nationally are issues still under discussion. Perhaps each participating UBE state could send *x* graders for each *y* number of UBE examinees to a national training center. The graders could then either grade exams at the center or return to their home states to grade. Such national training would provide not only consensus regarding the answers but also support for the graders.

Many of these issues are still fluid, and many other issues exist. Indeed, nothing has been finalized yet. But a UBE has the potential to help remove concern that states are testing, grading, and granting accommodations according to different and perhaps illogical standards. It should help instill confidence, through the psychometric testing of the NCBE products likely to be used in the UBE, that the bar exam tests what it purports to test. I encourage you to contemplate the benefits to your jurisdiction that might flow from the implementation of a UBE.[5]

ENDNOTES

1. States now handle some of these situations through pro hac vice or admission on motion rules. *See, e.g.*, Ariz. R. Sup. Ct. R. 38(a) (pro hac vice admission).
2. Fifty-three jurisdictions currently use the MBE. Only Louisiana, Washington, and Puerto Rico do not. COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 2009, 17 (National Conference of Bar Examiners and American Bar Association Section of Legal Education and Admissions to the Bar).
3. Grading, too, may remain the province of the states. At this time, all issues are open for discussion.
4. Disclaimer: No state is yet a "UBE state." I have chosen Arizona and Iowa as examples of what might be.
5. I approach this issue as a former bar examiner, question procurer, grader, and floor monitor, and now as a member of the state supreme court, which is charged with oversight of bar admissions.

The Uniform Bar Exam: Change We Can Believe In

by Rebecca S. Thiem

Change was the mantra of the last seemingly unending election season. I must admit that, by nature, I like change. My typical response to a new challenge is, "Yes, I can." (Although I am usually willing to give most anything a whirl, I hope I am not as irrationally impulsive as Jim Carrey's Yes Man.)

I am also by nature not a patient person. So since I became convinced more than four years ago that a uniform bar exam would be a more reliable, valid, and fair final checkpoint in deciding who deserves a law license, it has been hard for me to understand why it's not already a done deal.

These qualities of mine, as well as my tendency to say what I think, may not be the best attributes for convincing you to believe in the positive change a uniform bar exam would bring. But if you are intrigued (and are still reading this), let me share how I arrived at this conclusion.

After graduating from law school over 28 years ago, I became a grader in the commercial law area for my state's Board of Law Examiners. There were no detailed subject matter outlines to guide the preparation of the essay exam, only general topics. There were no calibration sessions or model answers with cited legal authorities, alternative responses, and suggested grading allocations. Grading the exam often required my independent research of North Dakota statutes and case law, particularly whenever an examinee answered a question in an unexpected way.

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Eighteen years ago the North Dakota Supreme Court appointed me to the three-member Board of Law Examiners, and I became its chair five years later. Although board members did not grade exams, they continued to prepare, edit, and select essay questions for the exam; they also regraded exams whenever an applicant appealed the initial grading. If an examinee then challenged the final grade he or she received, the board was in the awkward position of having to defend a question and model answer it had drafted and approved. And because our graders were instructed to score exams by comparing one examinee's answer to another's, the regrading of a single exam became virtually impossible.

In the mid-1990s, the board took its first serious look at the MEE offered by NCBE. To me, it was a no-brainer. The questions and accompanying model answers were obviously higher-quality testing instruments. Although our court initially hesitated, concerned about the loss of local control over testing, we explained that the board did not regularly test unique state-substantive matters because requiring knowledge of intricate details is not a fair test of an examinee's general ability to practice law. A good lawyer checks out the local law for these details. And often the unintended effect of testing a unique state statute was failing the out-of-state applicant.

The court ultimately accepted our recommendation that using the MEE would better measure whether the law student met the threshold prerequisites for practicing law, which, in turn, would better protect the public.

In the 10-plus years since adopting the MEE and MPT, the board has not been disappointed either in the quality of the questions or in the resulting scores. Use of the MEE and MPT also afforded the benefit of NCBE-sponsored calibration sessions, which provided our graders with significantly more sophisticated grading skills. Later, as a member of NCBE's MEE Policy Committee, I was further reassured about our decision after learning more about the professionally driven process for drafting, reviewing, and revising the MEE questions and model answers.

North Dakota, as a state with a small number of examinees and limited resources, was one of the earlier states to adopt both the MEE and MPT as the essay portion of its licensing exam and has used the MBE since the 1970s. As of July 2009, 21 jurisdictions (18 states, the District of Columbia, and 2 territories) will use the MBE, MEE, and MPT. Although there are variations in the number of questions and topics chosen, these jurisdictions are already using a hybrid uniform bar exam.

I suspect the uniform bar exam has been the subject of backroom discussions for decades—primarily in the context of the dreaded national exam and the feared loss of testing on local law. Similar arguments were raised in the mid-1990s against approving a uniform physicians' exam. Ultimately, the state medical boards recognized that there are general skills and knowledge required of any competent physician, regardless of geographical location and expected patient characteristics.

Since at least 2002, the organized bar, bar examiners, courts, and legal educators have been questioning whether a uniform bar exam and its expected pooling of resources would improve the reliability and validity of state bar exams and better meet the needs of law schools with their national student bases and law school graduates with their multijurisdictional practices. In August of that year, the ABA Commission on Multijurisdictional Practice recognized that geography no longer dictated the substantive law a lawyer would practice, nor the location in which that practice would take place. Because of the global nature of our economy, a lawyer commonly faced conflict-of-law questions that required the analysis of the laws of other states and maybe even other countries. The ABA Commission recommended that while jurisdictions should maintain a state-based system of bar admissions, they should also adopt model rules allowing licensed attorneys to be admitted by motion or allowing lawyers to practice in more limited ways through motions to appear pro hac vice. However, the granting of such motions assumed the lawyer was qualified to practice law merely by holding a license in another state, regardless of the validity and reliability of the exam taken or even if no exam was taken.

In 2002, representatives from the ABA, AALS, NCBE, and CCJ formed the Joint Working Group on Legal Education and Bar Admission. The Joint Working Group held a conference in Chicago in October 2004 at which the participants engaged in a frank dialogue about the bar exam. A few participants wanted to eliminate the bar exam altogether, but most recognized the legitimate need for a final exam to protect the public. However, the legal educators frequently expressed frustration about the widely differing passing standards among the states and the lack of transparency about the exams

or cut scores in some jurisdictions. Most of the scoring differences could not be justified by the unique characteristics of state-substantive law, and with the MBE as the primary testing tool used in all but two states, it was hard to explain the wide variation in cut scores.

As a result of the Joint Working Group's activities, the Bar Admissions Committee of the ABA Section of Legal Education and Admissions to the Bar created a subcommittee to consider the potential use of a uniform bar exam. Very quickly the subcommittee transformed into a committee of the whole, which in short order reached a consensus that a uniform bar exam was a great idea—while acknowledging that, as they say, the devil is in the details.

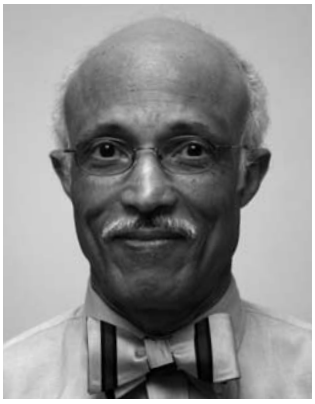
After NCBE's Long Range Planning Committee decided that NCBE had a role in analyzing the concept of a uniform bar exam, Chair Diane Bosse created NCBE's Special Committee on the Uniform Bar Exam, which I co-chair with Greg Murphy. Like the ABA Bar Admissions Committee, and regardless of the changing composition of the committee and its varied meeting places, the group reached the consensus that serious consideration should be given to the development of a uniform bar exam, using the MBE, MEE, and MPT, and applying a common testing, grading, scoring, and combining protocol. The Special Committee on the Uniform Bar Exam acknowledged, however, that the uniform bar exam could never be a mandate and that each jurisdiction would adopt its own cut score. In addition, each jurisdiction would also be free to educate and/or test its applicants on state-specific law.

To explore this proposal, the Special Committee on the Uniform Bar Exam sponsored a conference in January 2008 attended by representatives of 21 jurisdictions, including 10 Supreme Court Justices and 17 chairs and administrators from state examining boards. The invitees were either from jurisdictions using the MBE, MEE, and MPT, or from jurisdictions using the MBE and either the MPT or the MEE. Although questions and concrete concerns were openly voiced, the group generally favored the development of a uniform bar exam. The Committee presented a specific written proposal to the jurisdictions at a January 2009 meeting. The proposal was discussed and refined during the meeting and should be circulated to jurisdictions at about the time of this publication.

So where does this leave us? Although there are certainly valid concerns to be addressed, there is a growing consensus that uniform bar exam components, with uniform scoring and weighting, would provide a more reliable, fair, and credible method of determining which law school graduates are entitled to the privilege of a law license. The public deserves nothing less. This is a change we can believe in—and one we can accomplish.

Rethinking the Purpose of the Bar Examination

by Bedford T. Bentley, Jr.



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Many issues are likely to arise in the quest to foster the adoption of a uniform bar examination (UBE). Ultimately, presuming the quest is successful, a UBE will be a national instrument for determining whether a bar applicant is qualified to be licensed to practice law, and, perhaps sometime thereafter, a license issued by one state will be recognized by any other state. This article suggests that a re-examination of the purpose of the bar examination should be a part of the process of shaping a UBE.

The present form of the bar examination in its 51 manifestations across the United States has 51 histories and represents the cumulative product of more than 100 years of evolution. (For purposes of this discussion, I include the District of Columbia as a state.) A recent survey conducted by the National Conference of Bar Examiners reveals that there are 30 different subjects tested on bar examinations administered among the 51 states in the United States.[1] The fewest subjects tested in any one state is 12 (three states) and the greatest number of subjects tested is 19 (six states).[2]

Table 1 lists the subjects, grouped by most common and least common, and the number of states that test each subject.

The table is organized to rank the subjects in order of the number of states testing the subject. The numbers say a lot. There are 10 subjects that are tested nearly universally: Business Associations, Civil Procedure, Constitutional Law, Contracts, Criminal Law and Procedure, Evidence, Professional Responsibility, Real Property, Torts, and Trusts and Estates. Two subjects are just below the first rank: the Uniform Commercial Code (46 states test negotiable instruments and secured transactions and 40 states test other articles) and Family Law. After Conflict of Laws (32 states), there is a steep falloff, and the remaining 16 subjects are tested in a smattering of states.

It would be interesting to know the history behind each state's selection of bar examination subjects, but that would entail research far beyond the ambitions and scope of this essay. However, I would like to remark briefly on the discussions, in which I was personally involved, surrounding the decision to add Family Law to the subjects tested on Maryland's bar examination in 1993.[3]

The proponents of the decision were members of a bar task force investigating gender bias in Maryland. They argued that there was a need for greater familiarity with family law among Maryland lawyers in order to redress some of the effects of gender bias which their study had identified. In their view, adding Family Law as a subject to the bar examination would compel law students to take family law courses in law school and produce a legal community better able to deal with the legal problems of women. The law examiners argued that

TABLE 1: Subjects Tested on Bar Examinations in the United States

Most Common Subjects

Subject	Number of States
Business Associations	51
Civil Procedure	51
Constitutional Law	51
Contracts	51
Criminal Law and Procedure	51
Professional Responsibility	51
Real Property	51
Evidence	50
Torts	50
Trusts and Estates	49
UCC—Articles 3 & 9	46
Family Law	45
UCC—Other Articles	40
Conflict of Laws	32

Least Common Subjects

Subject	Number of States
Personal Property	20
Income Taxes	15
Administrative Law	14
Equity	14
Creditor/Debtor/Bankruptcy	8
Community Property	7
Remedies	7
Employment/ Workers' Compensation	5
Indian Law	3
Consumer Law	2
Insurance	2
Oil and Gas	2
Water Law	2
Zoning and Planning	2
Local Government Law	1
Trial Advocacy	1

Family Law was not a subject well suited for the bar examination because it is largely driven by statute and because it relies so fundamentally upon equitable considerations to arrive at legal conclusions.

This clash of perspectives on the question of whether Family Law is an appropriate bar examination subject illustrates what I think is a basic question about the purpose of the bar examination: Should the bar examination test content knowledge, or should the bar examination test legal skills (by which I mean that distinctive approach to analysis familiarly referred to as "thinking like a lawyer")?

It is clear that testing legal skills necessarily implicates some degree of knowledge of legal doctrine. One must have some mastery of the special vocabulary and legal context in order to demonstrate one's legal skills. The question that I pose is one of degree. To be minimally competent, what doctrinal knowledge must the aspiring lawyer possess? What subjects are fundamental? How deep and how perfect must the bar applicant's doctrinal knowledge be? There seems to be general agreement on the idea that the bar examination is designed to assess whether the examinee is minimally competent. However, the question is: minimally competent to do *what*?

To address these questions, I turn for help to a framework articulated in the 1992 American Bar Association report "Legal Education and Professional Development: An Educational Continuum," bet-

ter known as the "MacCrate Report" in recognition of Robert MacCrate, Esq., chair of the ABA's Task Force on Law Schools and the Profession.[4] One of the signal contributions of the MacCrate Report is the elaboration of a comprehensive description of the skills and values that an effective lawyer should possess. The report identifies 10 fundamental lawyering skills: (1) problem solving, (2) legal analysis and reasoning, (3) legal research, (4) factual investigation, (5) communication, (6) counseling, (7) negotiation, (8) litigation and alternative dispute resolution, (9) organization and management of legal work, and (10) professional self-development.[5] The report also identifies four fundamental values of the profession: (1) provision of competent representation, (2) striving to promote justice, fairness, and morality, (3) striving to improve the profession, and (4) professional self-development.[6] The report contains a thorough dissection of each of these skills and values, which I will forgo here for the sake of brevity. I focus for now on the first and fourth values as guideposts to address the question of what the purpose of the bar examination should be.

To provide competent representation, value 1 specifies that the lawyer must attain and maintain a level of competence in his or her field of practice. Value 4 specifies that the lawyer must seek out and take advantage of professional opportunities to increase his or her knowledge and improve his or her skills. In other words, the lawyer must strive to acquire and master knowledge of the legal doctrine pertinent to the specific nature of his or her practice. The MacCrate Report steers clear of any attempt to describe or define the body of doctrinal knowledge that a new lawyer must possess to be competent. However, the MacCrate Report recognizes that the lawyer's education in doctrinal law is a continuing enterprise, which begins before law school, intensifies during law school, and continues throughout the course of practice.[7]

To return to the central question of this article, I think the bar examination cannot and should not attempt to assess the depth of an applicant's doctrinal knowledge base, if by that we mean the knowledge necessary to handle a specific client's case. Rather, the bar examination should be focused on that limited body of doctrinal knowledge considered to be necessary for one to be able to *evaluate one's own competency* to handle a particular legal matter. To put it another way, one should have sufficient knowledge to be able to assess whether one is *not* competent to handle a particular matter—to know what one does not know. The newly licensed lawyer is going to have to deepen and broaden his or her doctrinal knowledge in the course of accepting and assisting clients and developing a career. As the MacCrate framework suggests, the lawyer must cultivate and nurture his or her competency and must regard professional self-development as a fundamental personal responsibility. The newly minted lawyer is not prepared to represent his or her first client until he or she adds significant doctrinal knowledge to the foundation laid in law school.

The bar examination cannot and does not test many of the skills identified by the MacCrate Report as fundamental to the successful practice of law. A principal reason for that limitation is practicality. It simply is too costly to attempt to assess bar applicants' oral communication, negotiation, and trial/appellate advocacy skills, for example. It may be that future developments in technology will make it possible to evaluate some of these skills. For now, bar examiners must rely on the capacity of law schools to teach those skills and take comfort in the idea that

demonstrated competence on written examinations seems to correlate well with actual performance in the real world, as apparently has been confirmed in the profession of medicine.[8]

While there may be a prevailing perception that the nature of the bar examination is well understood, it also is clear that there is substantial variation in the form and content of the bar examination among the states. The quest for a UBE inevitably must address those differences, by harmonizing them or by crafting some way to navigate around the differences. I maintain that this process of working toward commonality necessarily must entail a careful rethinking of the purpose of the bar examination.

I informally surveyed the offices that subscribe to the bar administrators' listserv to test my suspicion that bar admissions rules and policies which touch on the purpose of the bar examination do not go far beyond Standard 18 of the Recommended Standards for Bar Examiners. My suspicion was confirmed. Standard 18 reads as follows:

> The bar examination should test the ability of an applicant to identify legal issues in a statement of facts, such as may be encountered in the practice of law, to engage in a reasoned analysis of the issues and to arrive at a logical solution by the application of fundamental legal principles, in a manner which demonstrates a thorough understanding of these principles. The examination should not be designed primarily to test for information, memory or experience. Its purpose is to protect the public, not to limit the number of lawyers admitted to practice.[9]

Standard 18 provides a helpful starting point, but needs some updating and elaboration, I believe, to be helpful as guidance—as a mission statement—for the effort to shape a UBE. An updated statement of purpose should incorporate the following characteristics:

1. It should make clear what doctrinal content is to be covered on the bar examination, in terms of both breadth and depth of subject matter.
2. It should represent a consensus of legal educators, legal practitioners, and bar admissions authorities as to the specific doctrinal content to be examined.
3. It should articulate the skills that a properly prepared bar applicant should possess and explain the role of the bar examination in assessing those skills.
4. It should offer specificity about what constitutes "minimum competence" so that bar applicants preparing for the bar examination better understand what is expected of them.

A fundamental tenet of jurisprudence is that the court will not decide a question unless the question is properly put before the court and resolution of the question is necessary to decide the case. I would argue that as we approach implementation of the UBE, the question of what is the purpose of the bar examination will ripen. There is, in a general sense, tacit agreement about what knowledge and skills a new lawyer should possess. The explicit articulation of what comprises that body of knowledge and skills would require a meeting of the minds of the academy, the profession, and the bar examining community. I believe that the implementation of the UBE presents the perfect occasion for negotiating this meeting of the minds.

ENDNOTES

1. Laurie Elwell, "Subjects Tested—51 Jurisdictions" (Excel spreadsheet, National Conference of Bar Examiners, October 28, 2008).

2. Although one might arrive at a different count by defining the subjects differently, the numbers quoted are reasonably representative of bar examination subject coverage.
3. Family Law became a subject on the Maryland bar examination effective in July 1993.
4. American Bar Association Section of Legal Education and Admissions to the Bar, *Legal Education and Professional Development: An Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap* (July 1992).
5. *Id.* at 138.
6. *Id.* at 140.
7. *Id.* at 125.
8. Norman, Geoff, *So What Does Guessing the Right Answer out of Four Have to Do with Competence Anyway?* 77 THE BAR EXAMINER 4:18 (November 2008).
9. COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 2009, ix (National Conference of Bar Examiners and American Bar Association Section of Legal Education and Admissions to the Bar).

A UNIFORM BAR EXAM: ONE ACADEMIC'S PERSPECTIVE

by Mary Kay Kane

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For the past few years, the National Conference of Bar Examiners and the Bar Admissions Committee of the ABA Section of Legal Education and Admissions to the Bar have been discussing and studying the possibility of moving toward a law licensing system that includes as a main component a uniform bar examination (UBE). As a member of NCBE's Special Committee on the Uniform Bar Exam, I have been privileged to be part of a continuing conversation between all elements of the legal profession as to what adoption of the UBE might entail, what challenges and concerns might arise, and what benefits might flow from such a change. Although I am sure this dialogue will continue and new ideas and issues undoubtedly will surface, I offer this article as a snapshot of one academic's thoughts on the important future course of developing a UBE model and approach.

Defining What Is at Issue

Let me begin by making clear what I believe is embraced in the concept of the UBE as well as what is not intended, because that understanding best sets the stage for what issues truly are at stake. The concept of the UBE embraces three ideas. First, it relies on the notion that all states would agree to a certain set core of subjects and materials for which a common set of testing tools and instruments (pertaining to both scope and format) would be developed and used. Second, a common grading and scoring process would be developed, including a method for combining test scores from separate portions of the UBE to reach a total score for each examinee on this part of the exam. Third, a process would be developed to conduct a regular standard-setting exercise, resulting in a recommended uniform standard passing score for the UBE portion of any state's examination.

The development of a UBE does not mean the establishment of a national bar exam in which the decision as to the qualifications of all bar applicants,

wherever located, would be determined based on a single exam with nationally scaled results. Nor does it intrude on historic state independence to develop and apply supplemental testing in desirable areas, or seek to control decisions about the character and fitness of bar applicants in each state. In short, it does not presage a national license to practice but instead offers an economical and reliable way to ensure some baseline competencies no matter where applicants may want to practice. It also provides a means to foster some of the multijurisdictional practice that is an increasing reality in today's world, while giving states a reliable means of ensuring public protection in those circumstances.

What Are the Advantages?

There are several advantages to moving toward a UBE model. First, given the incredible mobility of the legal profession today, faculty members in most law schools recognize that many of their students neither plan to practice in the state of the school they attend nor necessarily intend to remain in one state for their entire practicing careers or represent clients whose needs are centered in only one state. Thus, today's law school curriculum is addressing these trends by focusing at its core on those skills, values, and doctrines that will be needed wherever graduates may ultimately practice. In contrast, however, students perceive state licensing exams and bar passage as covering a myriad of subject matters and differing passing standards with no clear understanding as to why those differences exist. Although I recognize that each state's intention, through its respective standards, is to ensure the protection of the public, the question is whether a more rational system could be developed that focuses on those core areas agreed to be uniformly important and on which lawyer applicants could be tested with an identical instrument, leaving to the individual states the ability to develop additional specialty testing devices for areas important to their respective jurisdictions and not otherwise covered by the uniform instrument. Acceptance of the UBE would recognize the portability of the applicant's performance scores on the uniform portion of the exam and in that way simplify the cross-border certification of lawyers whose practices depend upon interstate activities.

The benefit of a portable UBE score is obvious for bar applicants: It would reduce the time and money expended in seeking bar admission in multiple jurisdictions because the applicant would not need to retake, over several months, examinations covering the same material. (Presumably, it also would result in decreased costs in administering bar exams for non-primary jurisdictions, which might even reduce the cost of entry.) This is no small matter in light of the rising cost of legal education and resulting enormous student loan debt. Reducing costs by eliminating unnecessary or duplicate examinations would be an important way to help address what many fear is a looming crisis for the legal profession.

Implementation of a UBE model would also benefit the state licensing authorities because many, if not most, states lack the resources to devote to testing their exams for validity and reliability—important quality assessments that should underlie these exams on which applicants' opportunities to enter the profession depend. Combining state resources to create and support a UBE alleviates that concern by offering a product all can rely upon. Because of the number of students taking the exam, implementing a UBE would create an opportunity not only for serious study of the exam questions themselves but for development of standard-setting exercises to generate recommendations concerning

uniform standard passing scores or score bands that can be defended more readily against attacks from those who argue that the current scoring differences between states are not based on any scientific understanding of the exam but on other "political" judgments.

What Are the Challenges and Concerns?

In the many discussions that I have been part of about the possibility of moving to a UBE, numerous issues have been raised that involve important practical questions. Taken together, these questions can be summarized by the phrase "the devil is in the details," and these issues will need to be addressed to move forward responsibly on the UBE effort. But I'd like to mention two important policy concerns that go beyond the question of how to implement a UBE approach to examine whether the movement to a UBE itself ignores or jeopardizes other important historic policies and values.

The first and most obvious concern is whether the concept of a UBE ignores (or is the beginning of a trend to ignore) traditional state control of the licensure of attorneys serving their respective members of the public. The answer to this concern is a resounding "No." States agreeing to use the UBE would be accepting a nationally developed examination that would be the same in each state; common grading standards that are applied to the examination to generate each applicant's score; and, finally, portability of that score among jurisdictions. But this still allows significant state discretion as to how to use those scores to determine bar passage. For example, states could continue to develop specialized questions in areas of the law which they believe to be particularly important in their state and not otherwise tested on the UBE, or in which they determine that their state law departs from the usual approach or has some unique features with which it is important for lawyers to demonstrate their competence before being allowed to practice in their state. Further, although NCBE might be available to help such states develop a means of blending scores on those portions of their exams with the UBE scores to determine an ultimate passing score, the decision as to what that passing score would be would remain with the states. Finally, although an applicant would receive a single UBE score and NCBE would be in a position, after its studies validating the UBE exam, to suggest appropriate cut scores or score bands to determine passage on that part of the examination, states would not be bound by those suggestions and could decide for themselves what constitutes a passing score on that portion of the exam. Indeed, states would need to determine the length of time a score should remain portable and whether new or additional testing would be necessary after a certain length of time. The portability of the score thus would not entitle applicants to automatic licensing in all participating jurisdictions; applicants would simply avoid repetitive and costly reexamination, with its attendant delays, and the states would decide for themselves what is acceptable. Finally, agreement on the UBE would in no way affect the character and fitness inquiries tied to bar admission, which remain totally within each state's control.

Although I admit that in my perfect world, in order to increase the ease of multijurisdictional practice, states would exercise their discretion very narrowly to add additional subjects to their bar exams or to disregard the expert advice given by NCBE regarding scoring and even cut scores, states would have full discretion to make those decisions on their own. Indeed, I expect that it will be only after some experience with the UBE and a review of the information that can be gathered about its use

and effectiveness in generating reliable scores that states may be willing to move in that direction. But in the meantime, states would benefit from many efficiencies and economies, as well as increased quality control for bar exams across the nation.

The second major concern I have heard expressed is that moving to a UBE, and, in particular, to some agreement about a common cut score for determining passage of that portion of the exam, may have an adverse impact on minorities seeking entry to the profession. Were that to happen it certainly would be an unintended consequence. Thus, the question is, how do we ensure that it would not occur? This is a particularly acute issue for those states that currently have much lower cut scores and, therefore, higher overall bar passage rates than others. Thus, the concern is if, to foster national mobility, we were simply to find some common middle ground, thereby raising the cut scores for those states, the result easily could be the failure of minorities who currently succeed in those states. That is a very serious issue and one that NCBE in developing its product will need to address clearly and forcefully to ensure success of this project. It is beyond my expertise and the space allotted here for me to do much more than acknowledge the issue. However, I will reiterate that even in the case where a UBE was used in all 50 states, states would retain the discretion to accept the various recommendations that ultimately may be made about the weight and use of the scores generated. In doing so, states may determine how best to set their cut scores to ensure that minorities are not adversely affected and that we continue to foster a diverse profession.

Conclusion

The movement toward a UBE is a slow and cautious one, but one that offers many positive opportunities for improvement over the current system. Indeed, with so many jurisdictions already using many of NCBE's examination products, I believe it will no longer take a giant leap to move firmly in this direction.

The Uniform Bar Exam: Adding Local Color

by Diane F. Bosse

Our profession values precedent; it gives predictability and stability to legal relationships. The concepts of stare decisis and res judicata are deeply ingrained and faithfully honored traditions. Change is just not part of our collective DNA. As John Reed, a commentator well known to and revered by regular attendees of NCBE spring seminars, observed, "Lawyers defend the status quo long after the quo has lost its status."[1]

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But change is in the air. For good and compelling reasons presented in the accompanying essays, the Uniform Bar Exam (UBE) is at our doorstep. The benefits the UBE can bring to the lawyer-licensing

system are clear; what has been uncertain is whether, in adopting a common set of test instruments, we would need to abandon our long-standing position that a person seeking to become a member of the bar in our state should be required to demonstrate competence in our state-specific law.

We live in a federal union, but it is not the legacy of distrust of centralized authority that gives us pause in considering whether to adopt a more uniform measure of the readiness of aspiring lawyers to enter practice. Rather, it is the stubborn fact that our independent states have chosen different models of organizing their courts and other legal institutions and have adopted—by legislation, regulation, and court decision—legal principles that are unique. The law practiced by most lawyers most of the time is state law. And if the licensing system is to satisfy its obligation of protecting the public, it is critical that those who are licensed have an understanding of important aspects of state law and the traditions of local practice.

But we need not sacrifice the benefits of the UBE in order to accommodate the desire to require bar candidates to know state law. First, although our state laws are unique, the foundational principles and prevailing views in many areas of the law are common bonds and cross state borders. If this were not the case, we would have been unwilling over the last 35 years to rely on the Multistate Bar Examination (MBE) as a significant component of our state bar exams and, in most cases, as the yardstick to which our state essays are scaled. The MBE and the other proposed substantive component of the UBE, the Multistate Essay Examination (MEE), draw significantly on uniform laws and model codes promulgated by the National Conference of Commissioners on Uniform State Laws and Restatements of the Law published by the American Law Institute. The well-considered work of these respected bodies is the source material for many of our state statutes and court rulings.

Yet in a legal environment in which state legislatures routinely legislate on matters of common law, state courts regularly consider whether to apply settled law to unsettling new circumstances, local practice rules are idiosyncratic, and legal problems faced by a new lawyer may vary with geography, it is reasonable to consider whether the UBE, standing alone, would give adequate assurances to state bar examiners and the courts they serve that the candidates they license are competent to practice in their states.

The UBE, as presently envisioned, would include the MBE, the MEE, and the Multistate Performance Test (MPT). This combination of tests would assess the candidates' knowledge of the law in 12 substantive subjects. It would also assess skills critical to competence, including the ability to apply fundamental legal principles and legal reasoning to analyze a given fact pattern; to present a solution to a legal problem in a cogent and reasoned writing; and to sort facts, and, in the context of those sorted facts, to analyze cases, statutes, and other legal sources. In short, the UBE would afford a sound basis for a judgment to be made as to the competence of a candidate across a wide scope of the knowledge and skills expected of a new lawyer, regardless of where admission is sought. Yet some jurisdictions may determine that that is not enough.

Adoption of the UBE would not preclude such a jurisdiction from requiring that candidates both achieve a state-determined score on the UBE and satisfy the conditions of a state-specific component as a prerequisite to bar admission. But before

adding a state component to the UBE, certain threshold questions might be considered. Are there state distinctions in subjects tested on the UBE that entry-level lawyers should know in order to practice competently? What areas of law do we currently test that are not tested on the MBE or MEE? What are the rules and principles within these areas of law that are similarly important to entry-level practice, and what test formats could we use to test them? What other modalities could we use to ensure that a candidate admitted to practice has acquired that knowledge?

A brief comparison of the MBE and MEE subject matter specifications with my own state exam content outline discloses three specific areas of law tested on the New York section of the bar exam that are not tested on the MBE or MEE: New York Civil Practice and Procedure, New York Constitutional Law, and our state's unique Code of Professional Responsibility. Within common content areas there are also distinctions and refinements. For example, in the Torts area, New York tests statutory "no-fault" provisions, municipal tort liability, and our so-called "scaffold law" which alters general principles of landowner liability in certain construction settings. Our Matrimonial and Family Law test content includes abuse and neglect, durational residency requirements for matrimonial actions, and our state Child Support Standards Act. Under Wills and Estates, we test our specific statutory provisions regarding due execution, intestate succession, and elective shares.

Beyond the broad substantive knowledge of the law and fundamental lawyering skills required to pass the UBE, it is reasonable to expect new lawyers to have a basic understanding of our state statutory scheme and the structure and organization of the state judicial system. The UBE tests knowledge of common legal principles, but the new lawyer should know where to find our state statute of frauds, legislative limitations on joint and several liability, and provisions for equitable distribution of marital assets. A candidate seeking to practice law in New York should know that the New York State Supreme Court is a trial court, not the highest appellate court in our jurisdiction, and should know how to commence an action in that court.

Content of this type could be the subject of a state-specific add-on to the UBE. The state-specific component could take the form of a state-crafted bar exam. Free of the need to test fundamental legal principles or legal reasoning and writing skills, those having been assessed on the UBE, the test could consist of questions seeking only to determine if the candidate *knows* specific rules, not whether the candidate can analyze fact patterns and apply those rules. In order to promote learning of this important local content, a jurisdiction might create and publish a syllabus of important state-specific distinctions, rules, and matters of practice. Given the focus of the test on the rules and not on their application, a bank of questions based on that syllabus could be written and even published in advance of the exam.

Many such questions could be answered in a short period of testing time. That time could be added to the time required for the UBE with particular ease in those jurisdictions that currently test for more than two days. If a jurisdiction does not currently test beyond two days and lacks the resources or willingness to extend the number of test days, or to schedule a separate test administration, perhaps 45 minutes or an hour could be added to each six-hour day of UBE testing. Or, in acknowledgment of the modern world of testing, the state examination

could be administered by computer at a test center, as is done for medical licensing exams, at a time of the candidate's choosing.

Traditional multiple-choice questions or other short objective questions would make the most effective use of the added time, providing the opportunity to test more content than would be tested by the administration of a few state essay questions.

As an alternative to appending a state-specific test to the UBE, a jurisdiction could require that candidates take a bridge-the-gap continuing legal education course designed to highlight significant principles of state law and unique local procedural rules. With a nod to technology and its impact on so much of what we do, the course could conceivably be offered online, to accommodate the geographical diversity of applicant pools. A jurisdiction could determine whether or not to include an end-of-course test, and, if desired, test centers could provide a setting for the assessment.

A jurisdiction might choose other methods, as well, to complement the UBE on a state-specific level. A mentoring program could be adopted that would further other worthy goals in assimilating new lawyers into practice. Some have suggested that a candidate for admission be required to present a portfolio of work, consisting of legal memoranda and documents, demonstrating knowledge and skills even beyond those assessed on the traditional bar exam, and such a requirement could be adopted as an adjunct to the UBE.

In considering any of these proposals a jurisdiction would have to address scoring issues, such as whether the state-added component would be a stand-alone requirement or would be accorded some weight in determining an overall score and, if so, what weight, and whether the results on the state component would be scaled to an anchor component, presumably the MBE.

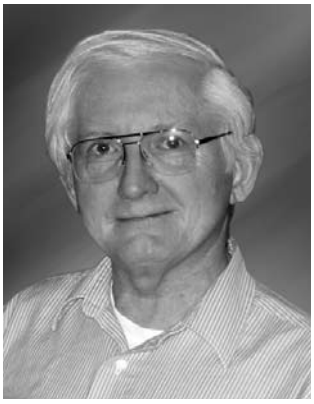
Our state bar exams are, for the most part, well crafted, and they have served us well. But perhaps we can do better. To borrow again from the wisdom of Professor Reed, "The absolute prerequisite to improvement is change."[2] Change to the UBE offers us the chance to improve how we assess the competence of our applicants for admission to the legal profession while better serving the profession and the public, without sacrificing the requirement that lawyers admitted to practice demonstrate competence in critical and unique components of state law.

ENDNOTES

1. John W. Reed, *The Challenge of Change*, 76 BAR EXAMINER 3:6, 8 (August 2007). John Reed is the Thomas M. Cooley Professor of Law Emeritus at the University of Michigan Law School. He served for many years as chair of the Evidence Drafting Committee for the Multistate Bar Examination.
2. *Id.*, at 6.

The Uniform Bar Exam and Jurisdiction-Specific Content

by Michael T. Kane, Ph.D.



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The proposed uniform bar exam (UBE) is designed to provide a uniform measure of a bar applicant's qualifications to practice law. It is to be used across jurisdictions and, therefore, would not include specific local content, or content that is of interest in a particular jurisdiction but is not a major issue in most jurisdictions. The UBE would provide a measure of basic lawyering skills and of skills in applying basic principles of common law, and it is expected that participating jurisdictions would rely on the UBE as the measure of these basic competencies. Like any licensure examination, the UBE would not cover all of the knowledge and skills needed in every area of practice, but would focus on skills that are critical for general, entry-level practice across a wide range of contexts.

The UBE is intended to provide a measure of basic competence across jurisdictions and, therefore, would not reflect unique aspects of practice in different jurisdictions. Laws and patterns of practice do vary to some extent across jurisdictions. Therefore, a question arises about how such variation is to be accommodated within a UBE framework. In particular, some jurisdictions adopting the UBE may want assurance that admitted candidates have mastered specific local content in addition to the basic skills tested in the UBE. One approach to addressing this concern would be to establish additional requirements for admission to practice in the form of an additional educational requirement, an additional test, or both.

Determining What Local Content Is to Be Addressed

Before examining the options for such a test and/or educational program, it is appropriate to identify what kinds of local content may need to be addressed. I suggest that the local content should meet at least three criteria before being adopted as an add-on.

First, the specific local content should be the kind of content included in licensure examinations. In general, the licensure examination for any profession is expected to measure the knowledge, skills, and judgment (KSJs) that are considered critical for entry-level practice across the profession. The examination evaluates the KSJs that are generally applicable but does not cover all of the KSJs that might be needed. It is recognized that additional KSJs may be needed in specific areas of practice, in specific contexts, or with particular populations, but the licensure examination does not try to cover all of these specifics. Licensure provides assurance that practitioners have mastered the KSJs that are generally required for entry-level practice but does not ensure that the practitioner is fully prepared for all of the situations that arise in practice within the particular jurisdiction. So licensure examinations focus on KSJs that apply to general practice and not on

specific requirements (such as, for instance, where and when documents have to be filed).

Second, the local content domain should be substantial enough and have enough coherence as a domain of KSJs to warrant the development of a test or an educational program. If the jurisdiction has adopted legislation in some major area of practice (e.g., Torts or Family Law) that makes the requirements of entry-level practice in that area unique, that area would be a good candidate for a separate test or educational program. However, if the local content consists mainly of specific procedures, rules, and regulations that are scattered across the system, it may not lend itself to the development of an educational component. If the number of specific procedures, rules, and regulations is fairly large, it might be appropriate to develop a separate test, which could in this case be all multiple-choice.

If the number of specific procedures, rules, and regulations is small, it could be sufficient to rely on the professional responsibility of practitioners to master them (perhaps offering a publication that lists the most important local variations). Even the most experienced practitioners will encounter situations that they are not prepared to handle on their own and will therefore need to supplement their KSJs in some way (e.g., by research). Licensed practitioners who are called upon to deal with issues requiring specialized KSJs are expected to either develop the needed KSJs or refer the client to a practitioner who already has the necessary KSJs. Again, it is neither necessary nor desirable to test for every specific KSJ that a practitioner might need in the conduct of his or her practice.

Third, the content should be deemed to be of sufficient importance that it justifies the expense to candidates and to the jurisdiction involved in developing a separate test or educational program, either of which is likely to be an expensive undertaking. As noted above, licensure systems necessarily rely on practitioners to exercise appropriate diligence in their work, which typically involves extra research in working in a new area of practice or a new venue. So the addition of any new element to a licensure program involves a judgment about whether the additional protection achieved is worth the cost—to candidates, the jurisdiction, and the public—or whether it is best to rely on candidates to develop the knowledge independently once they are licensed.

Assuming a jurisdiction decides it would be worthwhile to add a local component to its requirements for bar admission, this need can be met by adding an educational requirement and/or an additional assessment.

Additional Educational Requirement

A jurisdiction desiring assurance of basic competence in certain areas of local law and/or practice requirements not covered by the UBE could require all candidates to complete an educational program covering this content. If the additional local KSJs are limited in scope, the educational program could be relatively brief, lasting a few hours or a weekend. If the content to be covered is broader, a more extensive educational program (e.g., a particular law-school course) might be required. Such programs, whether long or short, could be provided by law schools or continuing education programs, and might also be provided in different formats (e.g., in-class instruction or distance learning via the Internet).

Such required courses would include assessments within the course and perhaps a final examination to ensure that candidates passing the course have mastered the required content, but the focus

would be on the instructional program, and presumably most candidates who take the course would pass the test.

This approach would be relatively easy to implement. It does not introduce any substantial psychometric issues, and it can be very flexible in the sense that educational programs can accommodate a wide range of variation in the amount and kinds of local content to be included. If the amount of local content to be addressed is fairly limited, the course might be relatively short and could be offered frequently (similar to the approach used for continuing education for lawyers). If the local content covers an extensive domain of content and skills, the course could be as long as necessary (e.g., a semester or more).

This kind of educational requirement could impose substantial costs on the candidates, however, in terms of the time required to take the course, the potential delay in starting practice, and the out-of-pocket costs. Candidates who attend law school in the jurisdiction, though, might be able to take the course while still in law school and therefore expedite the process.

Additional Assessments

Separate Stand-Alone Examination

As an alternative or in addition to an educational program, the jurisdiction could develop a separate test that covers local content. This could be either an objective multiple-choice test like the MPRE or a full-day essay test. The test could be administered at about the same time as the UBE or at a different time, and it would be scored separately from the UBE.

The main problem with this approach is that it requires the development of a separate local testing program, with continuous development of new test forms that are reliable enough, in themselves, to be used for licensure decisions. Because this stand-alone test would be used to make high-stakes decisions (i.e., admission to the practice of law), the test would need to be long enough to be fairly reliable, it would need to be updated regularly, and it would need to be secure. If the content domain to be assessed is small and/or disjoint, it could be quite difficult to develop an ongoing testing program that would satisfy these criteria.

In addition, this would be an expensive option and would probably not be feasible for small and midsize jurisdictions. For example, if the local testing program cost $100,000 per year, and the jurisdiction tested 1,000 candidates, it would add $100 in costs for each candidate; with 200 candidates, it would add $500 in costs for each candidate. These calculations assume that the test of local content would be a stand-alone test and would be long enough to have a fairly high reliability.

In the event a shorter test is chosen, there are several approaches that can be used to get around the problem of low reliability for short tests. One approach (generally adopted for the written tests for drivers' licenses) is to allow candidates who fail the test to retake the test quickly (e.g., within a few days) and often, thus lowering the stakes associated with the test and making reliability a less serious issue. This approach generally requires a large number of equivalent forms, and can therefore be very expensive if the number of candidates is not large.

Another approach is to make the test sufficiently easy or, equivalently, to choose a sufficiently low passing score so that almost all candidates who have prepared for the test pass it. In such cases, the reliability may not be very high, but measures of decision consistency (pass/fail reliability) will be adequate. If most people have achievement levels

that are fairly high on the content being tested, decisions can be made with high consistency even if the test is relatively short and, therefore, not very reliable. This approach is often used in conjunction with a required educational program that covers the content to be tested. If the candidates have just completed the course, and the test is not especially difficult, it may be that almost all of the candidates pass the test—that is, can demonstrate that they have mastered the content of the course. In this vein, driver's license tests can be viewed as an incentive to read the driver's handbook.

Separate Test Used in Conjunction with the Uniform Bar Exam

A third option would be to develop a short test (e.g., one or two essay questions) of local content, which would be administered at about the same time as the UBE and would be scaled to the UBE (or equivalently to the MBE). It could, for example, be administered right after the UBE. The score reported for the UBE would not include the score for the local test, so that part of the process would be uniform across jurisdictions.

The final score used to make the bar admission decision for the particular jurisdiction would be derived as a weighted average of the UBE score and the score on the local test. Even if the local test is relatively short and therefore not very reliable, the final score, including the score on the UBE, would be reliable enough to use in making the bar admission decision.

There are some serious difficulties in this approach, which depend in part on how it is implemented. If the test of local content is long enough to be reasonably reliable, the local test could stand on its own and, therefore, it would be unnecessary to adopt this more complicated system.

If the local test is short, this third approach might be acceptable. The relatively short test of local content would not be very reliable because short tests tend to be unreliable. Assuming that the weight assigned to the local test score is not large, the total score involving both the test of local content and the UBE could be reliable enough to support a bar admission decision and a UBE score could still be provided for each candidate. The weight assigned to the local content would not be great, but it could easily be proportional to the percentage of the total testing time devoted to the local test component.

For candidates who take the local test component at the same time that they take the UBE, the two scores would be combined to yield the final bar exam score for that jurisdiction. The results for these local candidates would be used to scale the local test to the UBE, and the total score including the UBE score and the local test score would be highly reliable, because the UBE score would be reliable. The local candidates would have a UBE score that they could use in applying for admission in other jurisdictions concurrently or at some point in the future.

For candidates who take the local test for the jurisdiction after they have taken the UBE (presumably in a different jurisdiction), the candidate's local test score could be combined with his or her original UBE score to make the admission decision. Again, the weighted average of the UBE score and the local test score would be reliable, because the UBE score would be reliable.

There would be a number of issues to work out in implementing this kind of program, including

the weights to be assigned to the UBE and the local test scores, the age of the UBE scores that would be accepted, and the scheduling of the local test component. The costs associated with the development, administration, and scoring of the local test (especially if the local test is an essay test) would also be substantial.

Probably the weakest aspect of this approach is that it would not necessarily achieve its purpose for many candidates. In particular, candidates who have a high score on the UBE could pass the total test, including the UBE and the local component, with a low score on the local component. This would not generally be a problem for the local candidates who would take all components of the bar exam at about the same time. They would generally prepare for all components of the exam, and the correlations across different exam components would tend to be high.

However, candidates who already have a high UBE score from a previous administration may not feel the need to prepare very extensively for the local component, thus potentially undermining the main purpose in requiring the local component in addition to the UBE. Nevertheless, these candidates would presumably need to do some preparation simply because the local test component would focus on local content. In these cases, the local test might function like the driver's license test in forcing candidates to read the handbook (which would be prepared by the jurisdiction or by a test-preparation program).

The choice of whether to establish specific requirements for testing of local content and, if so, how to do so will depend on local circumstances, including the extent and nature of the local content differences (e.g., general characteristics in the laws or patterns of practice unique to the jurisdiction vs. specific local details). However, to the extent that the goal is to make sure that practitioners are familiar with certain aspects of local law or practice, the best option might be to develop (perhaps in conjunction with law schools) required courses that focus on these critical local content areas.

A Uniform Licensure Examination: It Can Be Done

by Susan M. Case, Ph.D.

Susan M. Case, Ph.D., is the Director of Testing for the National Conference of Bar Examiners.

Twenty years ago, the then president of the National Board of Medical Examiners (NBME), Bob Volle, came into my office and asked me what my reaction would be to the idea of a single uniform examination in medicine. At the time, I worked on specialty board exams (e.g., Orthopaedic Surgery, Dermatology) but

not on the examinations used for the initial licensing of physicians. This conversation was way outside my area of expertise, but it was common for Bob to chat with staff members at all levels, and he stopped by to talk to me at least once a week. These kinds of conversations among folks both within and outside NBME began a process that within a very few years was to change medical licensure dramatically. I became part of the story as I moved to become director of Step 2, the exam that students typically take in their senior year of medical school. At that point, my involvement with a uniform examination in medicine moved from casual conversations with Bob and others to making part of that examination the central focus of my work. But even then, I was involved in implementing the change, rather than determining it, so my account is one from the trenches.

NBME is a nonprofit organization, analogous to NCBE, whose mission was to develop examinations of such high quality that they would be used for licensure. At the time of my association with NBME, it developed a series of tests; the particular tests you took depended at least in part on where you received your education and where you wished to practice medicine.

In early 1988, a task force began to study the concept of a single medical licensing examination. A year later (February 1989), this group endorsed a proposal for a single examination program to be used for licensure of all who wished to practice medicine in the United States.

The uniform examination in medicine, now known as the United States Medical Licensing Examination (USMLE), was in some respects a larger endeavor than what is currently envisioned for the uniform bar exam (UBE). The USMLE, which had three separate "steps" and over 1,500 questions, was designed from the ground up with a clear statement of the purpose of the examination and a complete overhaul of the examination content specifications, test length, question format, and style. There was also a decision to recommend a single passing standard for use across all jurisdictions, raising many concerns about passing rates, which were expected to vary across jurisdictions and across racial and ethnic groups. Finally, all jurisdictions agreed to implement the USMLE at the same time, ensuring that new physicians all took the same series of tests and met the same standards.

As noted above, the recommendation to move to a uniform examination in medicine occurred very quickly, and the recommendation was also approved quickly by the various parties (at least as viewed from the trenches). But we who were implementing the changes were faced with a daunting task of developing all new questions and exam forms. We began a huge effort of recruiting and training hundreds of new question writers whom we organized into task forces based on their areas of content expertise. Thousands of new questions were written, reviewed, and coded into the new item pool. Dozens of new exam forms were constructed, reviewed by external reviewers, and revised as necessary.

One of the biggest challenges was the development of an examination that was acceptable to all jurisdictions. Although there were some challenges regarding exam format, much of the discussion focused on exam content. The typical reaction within the legal community is that the content issue should have been minor for physicians because medicine is the same regardless of the jurisdiction. But nothing could be further from the truth.

Let me provide some examples to illustrate the issue. Differences in population demographics,

climate, disease prevalence, population density, and treatment options would have resulted in different content coverage if each jurisdiction were developing its own examination. The prevalence of disease varies, with some diseases varying by ethnic group (e.g., sickle-cell disease in African Americans, thallassemia in Greeks); some diseases varying by geographic region (e.g., Lyme disease, which began on the East Coast); some diseases varying by climate (e.g., hypothermia, heatstroke); and some diseases varying by population density (e.g., farmer's lung in the country, tuberculosis in the cities). Treatment availability also varies, with particular differences between more rural states and more urban states.

The challenge for question writers was to develop questions for which the best answer was uniformly the best answer. In some cases, it involved selecting appropriate distractors; in other cases, it involved modifying the clinical scenarios.

The most important change was to focus on the purpose of the exam: to assess the extent to which examinees demonstrate the requisite knowledge that is required of all physicians regardless of type of practice or geographic region of practice. This general purpose statement provided a useful criterion for evaluating each question. For example, when Lyme disease was first recognized, it was clear that this topic did not belong on the national exam. Some years later, as the disease spread to a number of states, it might have been allotted one slot (out of 1,500 questions or so); even later, it might have warranted two questions, either as a correct answer or as a distractor. Aside from the impact on the number of questions for each topic, concentrating on the purpose of the exam also helped to focus the questions away from the smaller details of each topic and toward the general and more broadly accepted principles.

Today, as I sit in a different office 20 years later, conversation has turned to a uniform examination for licensing lawyers. Based on my experience, the UBE is completely doable. The UBE plan involves implementation on a voluntary basis. We anticipate that the initial jurisdictions to adopt the UBE will primarily include some of the 21 jurisdictions that, as of July 2009, will use all three bar examination products (the MBE, MEE, and MPT); 36 jurisdictions use at least two of the three. The MEE and MPT scores will be scaled to the MBE (20 of the 21 jurisdictions are currently doing this). Written scores will be weighted 50 percent and the MBE will be weighted 50 percent (15 of the 21 jurisdictions are currently using this weighting). Several other jurisdictions are working with NCBE to change their procedures to bring them more in line with NCBE's recommended psychometric practices, which in turn brings them more in line with the practices that would be in place for the UBE.

There are several issues that were huge for the USMLE that are not currently contemplated as part of the UBE plan. First, the UBE plan does not involve changes in the content or question formats of the examination. Second, it is not likely to require that all jurisdictions use the same passing standard, something that was adopted by all jurisdictions for the USMLE. Third, it does not require the phase-out of existing alternative examination programs. Finally, it does not require that all jurisdictions adopt the UBE in order for it to be implemented. If the USMLE could be developed and achieved with such success despite the many obstacles it had to overcome, smooth implementation of the UBE seems more than likely.

I am convinced it can be done.

The Evolutionary, Not Revolutionary, Transition to a Single Medical Licensing Examination

by Janet Duffy Carson

Twenty years ago I had the privilege and pleasure of serving as the staff "resource person" (a euphemism for the person who compiles agenda materials and tries to discern and record emerging themes from the divergent perspectives of various participants) for the Task Force to Study Pathways to Licensure, an interorganizational task force created in 1988.[1] In February 1989, this task force submitted a successfully implemented proposal for a single examination for medical licensure in the United States. Approval by the governing bodies of the directly impacted organizations followed shortly thereafter. Given that experience, and my involvement for over 25 years in evaluations for purposes of medical licensure in the United States, I have been fascinated to hear and read about the deliberations of the National Conference of Bar Examiners' Special Committee on the Uniform Bar Exam over the past two years. A mentor of mine once advised me that there are very few new issues—just the same issues that arise in new contexts. Believing that observation to be valid in most instances, and also being a believer in never reinventing the wheel (assuming the wheel works), I would like to share with you some background and thoughts regarding the transition in medical licensure from the idiosyncratic development and administration of licensing examinations in individual jurisdictions to a single examination pathway accepted by all U.S. jurisdictions.

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Remote Background
(Skip this if you are not a history buff)

Once upon a time, during the early days of this country, an individual who provided health care was one who had been deemed competent to practice medicine by a qualified individual who had supervised the apprenticeship of the individual desiring to practice medicine.[2] In 1760, New York took the then-innovative approach of enacting legislation that prohibited anyone from practicing medicine or surgery in the City of New York (what about the rest of the state?) without first being examined and approved by a board, the members of which, interestingly, did not include any physicians.[3] New Jersey enacted legislation in 1772 to regulate the practice of medicine throughout its jurisdiction, requiring that anyone wishing to practice "physic and surgery" should be examined and approved by any two judges of the Supreme Court of New Jersey with the assistance of any persons the two judges thought fit to aid in the examination.[4] (Being well familiar with the quick wit of lawyers, I will leave it to others to comment upon the wisdom of leaving the examination of physicians to the judgment of those educated in the law.)

This concept of awarding licenses after examination by a legally constituted state board was not quickly or widely adopted and, as of the middle of the nineteenth century, the determination of

who could practice medicine was generally left to medical schools and medical societies. Interestingly, the creation of the American Medical Association (AMA) in 1847 grew out of a call by the New York State Medical Society that a national organization should be created to establish some control over the standards for medical education and the practice whereby professors licensed their own students.[5]

The call for reform in the licensing process was eventually heeded and, by 1895, most jurisdictions had adopted legal procedures for the examination and licensure of physicians by state boards.[6]

The collateral effect of this development was that a medical license, issued by a state board, was restricted to that jurisdiction's boundaries, impeding physician mobility. To address this problem, some states arranged reciprocity with one or more other states, recognizing the previously granted license without further examination. The effectiveness of this approach was limited, however, because of the lack of consensus between and among the states regarding minimum standards for licensure.

Less Remote Background

In 1902, an article in the PHILADELPHIA MEDICAL JOURNAL proposed that instead of pursuing greater reciprocity among the states, a national board of medical examiners should be formed: "There is, however, nothing to prevent, or seriously in the way of, the creation of a voluntary National Board of Medical Examiners whose examinations shall be of such a character and high standard as to command the respect of the several states and cause them to issue a license to any one who has successfully passed such an examination. To fail to do so . . . would make such state ridiculous . . . ."[7] In subsequent discussions of this topic, it was noted that "the acceptance of the examination of this agency by the particular state boards would be voluntary and, therefore, the survival of such a national board would depend upon its excellence."[8]

This concept became a reality in 1915 with the creation of the National Board of Medical Examiners (NBME), established to elevate the standards of qualification for the practice of medicine and to provide a means for recognition of qualified persons to practice in any state without further examination. Shortly thereafter, an editorial in the BULLETIN OF THE FEDERATION OF STATE MEDICAL BOARDS noted that this new organization "should not in any way supersede the state boards, but it would do what a group of boards could do: set a standard which all will accept."[9] The first examination of the NBME was administered in 1916, with 5 of the 10 examinees achieving passing scores.[10] Initially, eight states agreed to accept the NBME examination and to grant licenses by endorsement of the NBME certificate without further examination. Over the years, all state medical boards, at one time or another, accepted NBME certification, but at no point in time was it accepted by all jurisdictions. By the time of the NBME's twenty-fifth anniversary, 43 of the then 48 states accepted the certificate of the NBME.[11]

The licensing authorities in these states continued to develop and administer their own examinations for licensure in their jurisdictions. These state examinations were taken by applicants who chose not to take the NBME certifying examinations for a variety of reasons (e.g., no anticipated relocation to another state, general perception that the state examinations were less rigorous) or who were not successful on the NBME certifying examinations or did not meet NBME's educational requirements for eligibility. Although graduates of certain approved

foreign medical schools had previously been eligible to sit for NBME examinations, this eligibility category was discontinued in 1954. Accordingly, subsequent to 1954, all graduates of foreign medical schools took the licensing examinations prepared and administered by the various states.

Pivotal Movement: From Multiple to Dual Pathways

After years of study, in 1954, the NBME concluded that multiple-choice questions in Parts I and II of its three-part examination had greater reliability and validity than its historically used essay questions and changed the essay components to the multiple-choice format. This change had unanticipated and far-reaching effects.

Around the time of this transition to multiple-choice testing, several state medical boards began to consult with the NBME about the possibility of using its expertise and its examination materials for their own state board examinations. Connecticut was the first jurisdiction to request the NBME to provide multiple-choice examinations to be administered under state law in place of essay examinations prepared and graded by its own board of examiners.[12] Other states, recognizing the value and advantages of the NBME's collection of multiple-choice questions, which were calibrated against standards of U.S. medical education, soon followed suit. Some state boards used individual questions or sets of questions selected from the NBME's bank of test questions; others used intact, previous NBME Part I and Part II certifying examinations (which were imprinted with the name of the administering jurisdiction). Although these examinations were scored by the NBME, each state board set its own passing standard on its examination, with the benefit of external criteria derived from the performance of examinees who had taken the NBME certifying examinations. By 1967, the NBME was providing individual tests for licensure for 16 state medical boards.[13] Simultaneously, the Federation of State Medical Boards (FSMB) was seeking to achieve greater uniformity in standards for licensure among the jurisdictions.[14]

These two developments prompted discussions about the wisdom and cost-effectiveness of individual examinations provided separately for each requesting board, and led to the FSMB's decision in 1967 to collaborate with the NBME in the development and provision of one examination for medical licensure, which any state might elect to use. This examination, the Federation Licensing Examination (FLEX) was designed in consultation with test committees consisting of members of state medical boards, constructed using NBME test questions, administered by the state boards, and scored by the NBME. Although a passing score was recommended, each state retained the prerogative of deciding the passing score for its jurisdiction. The first FLEX was administered in 1968, with seven states electing to use the June 1968 FLEX in lieu of their own examinations.[15]

The acceptance of the FLEX was rapid: By 1975, it was accepted by all but two state boards, and by 1979 it was accepted by all state boards.[16] Although in a few instances a jurisdiction continued to administer an add-on examination on topics that its state board felt were not adequately addressed in the FLEX and that were deemed to be of particular importance in its jurisdiction, and although some states adopted passing scores different from the recommended FLEX passing standard, the introduction of the FLEX was highly successful in achieving the

goals of higher standards and greater uniformity in testing for medical licensure.

In the mid- to late 1970s, there was a growth in interest in and support for the position that the medical licensing system had a responsibility for ensuring the minimum level of competence of physicians assuming clinical responsibilities in the context of graduate medical training. This, in turn, led the FSMB to initiate discussions related to the design and development of the existing FLEX program. The result was the FSMB's endorsement in 1980 of the development of a new FLEX I–FLEX II examination sequence, with the proposed FLEX I being an examination designed to qualify medical graduates to practice under supervision in training programs and the proposed FLEX II being an examination designed to qualify medical graduates for unrestricted practice.[17] Although this was the concept for the new FLEX program, it was emphasized that the individual jurisdictions retained the prerogative of deciding whether to require successful completion of FLEX I prior to entry into graduate training in their jurisdictions and whether to administer the two components separately or sequentially in a single sitting. Throughout the design and development of this new FLEX program, representatives of a transition task force were in communication with the licensing jurisdictions, providing information and soliciting feedback. This new program, which, like its predecessor, involved collaboration between the FSMB and the NBME, was introduced in 1985 and was accepted by all U.S. medical licensing authorities.[18] With the introduction of this new FLEX program came even greater uniformity with respect to acceptance of the recommended passing score.

This transition, beginning in 1968, from individual licensing examinations developed and scored by each state medical board to universal acceptance of the FLEX was a pivotal development in the movement toward a single examination pathway for medical licensure. It occurred with the FSMB's encouragement and with the gradual recognition by the various state boards that an examination developed with involvement of the FSMB and its member boards, and with the measurement expertise and test question pool of the NBME, would be an evaluation instrument more valid, reliable, and fair than locally developed examinations. While reductions in cost and duplication of effort, as well as the improved mobility of physicians, were factors viewed favorably, the primary incentive for the acceptance of the FLEX appears to have been recognition that it was superior in quality to an examination prepared and scored by an individual board. It seems to have reflected a shared conviction on the part of the various state licensing authorities that "all of us together can do this better than any one of us can do it independently."

From Dual Pathways to a Single Pathway

In early 1988, a coalition of voluntary medical organizations came together as a task force to discuss the concept of a single examination for medical licensure. At that time, there were two existing examination pathways recognized by the state medical boards as high-quality evaluation instruments appropriate for use in the licensing process: the NBME certifying examinations, taken by approximately three-fourths of the graduates of accredited U.S. medical schools, and the FLEX, taken by approximately one-fourth of the graduates of accredited U.S. medical schools and by all graduates of foreign medical schools.[19] These discussions were not prompted by dissatisfaction with either of the existing examination routes. Rather, they were prompted by and pursued as a

result of questions regarding the very existence and use of two different examinations for the same purpose. The deliberations focused on the desirability of a single and common evaluation system that the licensing authorities could elect to use to measure all applicants for licensure.

It was recognized throughout the discussions that each licensing authority had the responsibility and prerogative to make determinations as to the examination(s) to be used as part of the medical licensing process. The discussions of the group focused primarily on the role of examinations in medical licensure and the appropriateness, quality, and fairness of examinations made available to state licensing authorities for that purpose, rather than on any vested interests of participating entities under the existing structure. Amazingly, by February 1989, a proposal for a single examination for medical licensure was endorsed by the task force.

The implementation of the United States Medical Licensing Examination (USMLE) and the phaseout of the NBME certifying examinations and the FLEX began in 1992, and as of 1995 the USMLE was the only examination offered to, and accepted by, all U.S. medical licensing jurisdictions.[20] Although there is some variation among the states with respect to eligibility criteria, number of permitted examination attempts, number of years for completion of the examination sequence, and so on, at the present time, all state medical boards use the USMLE as their examination for purposes of medical licensure, and all state medical boards apply the recommended passing score.

Although the state medical boards do not independently develop, administer, or score the examination used for licensure, they are involved in various USMLE processes. Representatives from the licensing community, as well as from the teaching and practicing communities across the United States, participate in test development and standard-setting activities and are involved in periodic reviews of examination content and format. The boards are kept regularly apprised of developments in the USMLE program, they retain the authority for setting their own passing standards, and they retain the prerogative of not accepting the examination if they determine that it is not of appropriate or acceptable quality for purposes of licensure in their jurisdictions. Oversight of the USMLE program is provided by a Composite Committee, consisting of representatives of the FSMB, the NBME, the Educational Commission for Foreign Medical Graduates, and the American public.

For more than a decade, the medical licensing authorities have demonstrated their satisfaction with the USMLE program and have been secure in the knowledge that their examination requirements for licensure are fair to all applicants, are consistent with universally accepted standards, and contribute to the fulfillment of their obligation to protect the public.

Conclusion

Since 1915, state medical boards in this country have accepted, for purposes of licensure, examinations developed and scored by entities other than themselves. Since 1979, no state medical board in this country has developed and scored its own medical licensing examination (other than jurisdiction-specific content supplements). Since 1994, all state medical boards in this country have accepted the USMLE for purposes of medical licensure, and all of them have applied the same recommended passing standard.

The transition to a single licensing examination did not reflect a lack of interest in licensing examinations on the part of the state medical boards; to the contrary, it reflected a gradual recognition of the importance of measurement, as well as content, expertise in the development of such high-stakes examinations, and a desire to use the best evaluation tools available for this important purpose. Neither did this transition reflect a lack of concern about issues of state sovereignty with respect to licensing. State medical boards guard this prerogative jealously and exercise it by choosing the examination and the passing score that they will accept for purposes of licensure. The fact that they have all chosen to accept the same examination is reflective of their independent conclusions about the reliability, validity, and defensibility of the USMLE. The current discussions regarding a uniform bar examination provide an incentive for the state boards of bar examiners to reassess their current licensing examination processes. Perhaps, in doing so, they, like their colleagues at the state boards of medicine, will achieve greater consensus about the evaluation instruments best suited to achieving their shared goal of protecting the public.

ENDNOTES

1. The members of the task force included representatives of the National Board of Medical Examiners, the Federation of State Medical Boards, the American Medical Association, the Accreditation Council for Graduate Medical Education, the Association of American Medical Colleges, the Department of Health and Human Services, the Educational Commission for Foreign Medical Graduates, and the National Board of Osteopathic Medical Examiners.
2. Hubbard, J.P., MEASURING MEDICAL EDUCATION: THE TESTS AND THE EXPERIENCE OF THE NATIONAL BOARD OF MEDICAL EXAMINERS, 2d ed. Philadelphia: Lea & Febiger, 1978, p. 1.
3. *Id.* at 2.
4. *Id.* at 2–3.
5. *Id.* at 4.
6. Hubbard, J.P. & E.J. Levit, THE NATIONAL BOARD OF MEDICAL EXAMINERS: THE FIRST SEVENTY YEARS. Philadelphia: National Board of Medical Examiners, 1985, p. 1.
7. Rodman, W.L., *Voluntary Board of National Examiners.* 9 PHILADELPHIA MEDICAL JOURNAL 837 (1902). This concept was also proposed in an editorial in the JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION (*Editorial.* 38 JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION 108 [1902]).
8. Dobson, J.M., *National Examining Boards.* 47 JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION 877 (1906).
9. *Editorial*. 1 BULLETIN OF THE FEDERATION OF STATE MEDICAL BOARDS 132 (1916).
10. *See* Hubbard & Levit, *supra* note 6, at 9.
11. *See* Hubbard, *supra* note 2, at 8.
12. *Id.* at 78.
13. *Id.* at 79.
14. In 1891, some state boards of medical examiners founded the Confederation of State Medical Examining and Licensing Boards; subsequently, in 1902, some state boards formed the Confederation of Reciprocating Boards. Those two entities merged in 1913 to form the Federation of State Medical Boards. The primary purpose of the Confederation of State Medical Examining and Licensing Boards was somewhat broader than the goal of the Confederation of Reciprocating Boards. *See* Hubbard & Levit, *supra* note 6, at 3–4.
15. *See* Hubbard & Levit, *supra* note 6, at 72.
16. Morton, J.H., *F Is for Florida.* 66 BULLETIN OF THE FEDERATION OF STATE MEDICAL BOARDS 205–206 (1979).
17. *See* Hubbard & Levit, *supra* note 6, at 120.
18. *Id.* at 129.
19. The examinations of the National Board of Osteopathic Medical Examiners were at that time, and continue to be, accepted for purposes of licensure of Doctors of Osteopathy. It is important to note that the focus of this essay is on the examinations used for purposes of licensure of those individuals who have received the M.D. degree from an accredited medical school in the United States or those who have graduated from international medical schools.
20. *See* note 19 above.

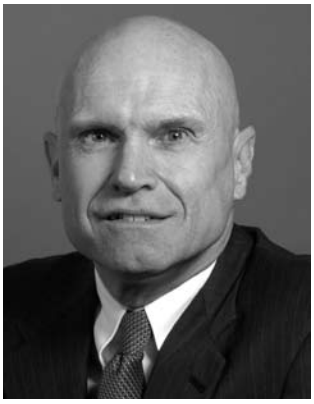
Implementing a Uniform Bar Exam: Fostering Cooperation among the States

by Richard J. Morgan

In the late nineteenth century, lawyers and public policy makers confronted a major question: How could an increasingly national economy deal with the disparate laws of the states in ways that would make the country more efficient and prosperous? One response to that question might have been to argue for an expansive reading of the Commerce Clause to provide the authority to federalize certain areas of differing state law, replacing them with one federal rule. Such an approach, if adopted, would have simplified the complex legal landscape, and it might have led to a more efficient and prosperous country, assuming that Congress would have acted wisely in adopting the federal rule.

However, that approach would have eroded the responsibility and sovereignty of the states, while expanding the power of the federal government in ways that might promote simplicity but not necessarily wisdom. Although one federal rule may be simpler than numerous state rules, it may not be as wise—in terms of addressing state and local interests—as the enactments of the various legislatures.

Those policy makers chose a different course, convening a conference of several states to discuss the possibility of interstate cooperation in developing and implementing uniform state laws. This uniform laws movement, now administered by the National Conference of Commissioners on Uniform State Laws (NCCUSL), has resulted in the adoption by the states of numerous uniform laws, the most notable of which is the Uniform Commercial Code.



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Fast-forwarding to the late twentieth century: Lawyers and public policy makers confronted another question: How could an increasingly national and international economy deal with the disparate state lawyer licensing rules in ways that might increase efficiency and prosperity? This led to a discussion of the costs and benefits of national licensing and to the conclusion that the costs outweighed the benefits. Thus, state regulation of lawyers remains the norm, which is a good thing for reasons of state sovereignty and local control of the legal profession.

However, there is no reason why the states cannot cooperate with one another in their local control of the legal profession. And, should they choose to do so, the uniform laws process provides an analogy for interstate cooperation in developing and recommending good policy for possible adoption by each state.

A modest starting place for state cooperation on lawyer licensing matters is the proposal to develop a uniform bar exam. Under this proposal, cooperating states would participate in developing a core bar examination with uniform content suitable for use in each state. In addition, there would be an effort

to agree on uniform model answers; uniform standards for selecting, training, and evaluating graders; and uniform recommended pass/fail standards. All of these matters, again, would come forth as recommendations to the states, with each state free to decide what to do with these proposals.

The NCCUSL has had success in having its recommendations adopted by the various states, mainly because it enlists expert volunteers in a collaborative process that produces excellent results. If a state is offered an excellent product—be it a statute or a bar exam—it has every reason to try to adopt it, particularly if it will promote interstate cooperation without sacrificing state sovereignty or interests.

To make sure that the uniform bar exam and the standards on model answers, graders, passing scores, and the like are of high quality, the developers of that exam should look to the process followed by the NCCUSL. That process is based on the appointment by each state of a representative or representatives to serve in the plenary conference that finally recommends the proposal to the states. These representatives, who are usually leaders of the bar or leading academics, also serve on committees that carefully consider and improve drafts of material to make sure that the work is excellent before it reaches the floor of the plenary conference. Only after the proposals have been thoroughly vetted and rewritten at the committee level do they emerge for final discussion by the entire conference.

Once the proposals have been approved by the conference, they serve as a recommendation to each state in the country. Because they have the force of the NCCUSL behind them, such recommendations are usually carefully considered at the state legislative level. And, because one or more leaders from each state participated in the developmental process, there are folks in each state who can lobby state leaders as to the quality of the product and the wisdom of the recommendation. For these reasons, recommendations of the NCCUSL have been well received. If the uniform bar exam developmental process follows this model, it too should have success in convincing the states that the uniform bar exam is, indeed, a better product—one that will improve lawyer licensing, enhance interstate cooperation and efficiency, and retain state sovereignty over the legal profession.

Because it is important to maintain state sovereignty and control, each state must decide what to do with whatever proposals come forth from the uniform bar exam effort. But in deciding to adopt these proposals, states may achieve a number of benefits, such as obtaining a professionally developed and pretested exam that will test its bar examinees in a demonstrably valid and reliable way; freeing its volunteer test developers from the arduous task of preparing two bar examinations each year; obtaining well-developed model answers; having access to training programs for bar exam graders that will bring together graders from several states to focus on best practices; participating in standard-setting discussions, led by experts, that will lead to best practices recommendations on standard setting in a neutral, multistate environment; and, should the states choose to do so, crediting similar test results from other states to facilitate the licensing of lawyers who move from state to state.

Because control will remain with each state, there is little downside in moving forward with this experiment, except the possibility that volunteer proponents of the idea will spend considerable time on a project that may not come to fruition. But that is a risk in any attempt to improve the status quo, and it is not a reason to delay this important project whose time has come.

A Uniform Bar Examination: Let's Give It a Try

by Gregory G. Murphy

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Twenty-nine years ago, between graduating from law school and beginning a law clerkship, I took my first bar examination. The examiners advised us that we would be tested on the common law. They were not kidding. One of the questions turned on the application of the Rule in Shelley's Case,[1] or at least I thought it did. The Rule did not even apply in that state, or indeed in the vast majority of states. It was abolished in England in 1925. I'll concede that perhaps I misread the question, but that question was the genesis of my interest in becoming involved in bar examinations.

A year later, at the end of my clerkship, my wife and I decided to move back to our native state. I sat for my second bar examination. While by then most states were using the Multistate Bar Examination (MBE), my state did not. So I endured three days of essay questions, and there was a plethora of them. Again, my memory may be faulty, but I remember 42 in all. However, we poor souls taking the examination were allowed to pass on questions in each session. The examiners thought they were giving us a break. But, of course, that practice meant that each of us was taking a different examination. Could the scores have been comparable? Most psychometricians would say, "No way!" After that examination, I wrote the chair of the board and offered to help with the examination. Things just had to improve.

Much water has flowed under the bridge of bar examining since I took those examinations. Thankfully, across the country, examinations have improved dramatically. Much of that improvement may be attributed to the leadership of the National Conference of Bar Examiners, and the wider adoption of the MBE, the Multistate Essay Examination (MEE), the Multistate Performance Test (MPT), and the Multistate Professional Responsibility Examination (MPRE). By nature, most bar examiners are conservatives when it comes to considering changes to the bar examination. I am one of those conservatives. But conservatives are not allergic to change, particularly if they can be shown a better way and the reasons for it. The time is now ripe to consider wider adoption of a uniform bar examination. I say "wider" because 21 jurisdictions (18 states, the District of Columbia, and 2 territories) will now administer essentially the same examination through combined use of the MBE, MEE, and MPT.

One overriding justification exists for the bar examination—to help ensure minimum competency in the ability to apply legal principles to problems so that the public may have some measure of protection against incompetency in the profession. A bar examination should always be constructed with that purpose in mind. The debate over how to ensure minimum competency will likely never end because we will likely never invent the perfect system. But I

submit that there are some principles that ought to be susceptible to general acceptance in the twenty-first century. One of these is that the bar examination should be designed to test whether applicants have learned fundamental and widely accepted rules and can apply them to problems using legal reasoning. It should not be necessary to test for knowledge of obscure, arcane, or idiosyncratic rules of law peculiar to a jurisdiction. This is not to say that such rules are not important; they can be very important, and those who argue that it is legitimate to test for knowledge of them are not being irrational. Rather, knowledge of those kinds of rules is not likely necessary to minimum competency. For example, all lawyers should know that there are such things as statutes of limitations, but minimum competency does not require that an applicant know that their state's statute of limitations on a fraud claim is two years rather than the state's typical three-year statute for torts. The wider adoption of uniform laws (e.g., the Uniform Commercial Code and the Uniform Probate Code) militates toward a uniform bar examination.

Our friends in medicine came to understand this long ago. The testing components for the process of licensing physicians are much more uniform than those for licensing lawyers. But those who are reluctant to move forward on a uniform bar examination say that medicine is a science, and diseases do not respect state borders, whereas there is no question that the law is not identical across all states, and there are significant and important cultural differences and traditions in the practice of law that can be every bit as important as the substantive law of the jurisdiction. Therefore, bar examiners sometimes argue, testing for minimum competency in applicants for medical licenses should be different from the testing for lawyers. Susan Case, NCBE's Director of Testing, disabused me of that notion some time ago. She was formerly with the medical licensing testing authority. She told me that many doctors had the same kinds of objections to uniform testing for physicians. As it happens, there are indeed differences among the diseases seen in different parts of the country. For example, we in Montana have Rocky Mountain Spotted Fever, which is not very common in Alabama.

Almost by definition, a uniform bar examination must be designed to test for knowledge of general principles and the legal method of reasoning. Of course, each state could test in that fashion, and many do. But a uniform bar examination offers the advantages of economy of scale. The resources devoted to a uniform examination would allow for the development of very high-quality questions. The economies of scale permitted by the MBE, MEE, MPT, and MPRE result in high-quality questions that are thoroughly researched, carefully edited, and pretested. Indeed, few if any jurisdictions are able to devote the resources and care employed in the crafting of those tests.

The wider adoption of a uniform bar examination would not necessarily foreclose a state from testing on some of its unique rules. We have a federal system and, by law, each jurisdiction has the power to adopt rational rules for the licensing of lawyers; therefore, a state could rationally decide that some of its legal rules are so important and so different that no person should be licensed without demonstrating some knowledge of them. But the universe of those rules in any particular state is likely to be fairly small, and the time and expense required for testing on them ought to be less than for the general examination. Perhaps the testing on them could be different in concept also. For example, it could be more like a driver's license test or an

open-book examination, in which the applicant is given ready access to the necessary information to answer any question asked on the test.

Grading the written component would remain the responsibility of each jurisdiction. Setting passing standards would also remain the responsibility of each jurisdiction. Such features would allow each jurisdiction to retain its own desired measure of control over the results. In my view, the fear of loss of control of the examination as a result of the adoption of a uniform bar examination is probably overblown. In any event, any jurisdiction could withdraw at any time from a uniform bar examination system if it were to become dissatisfied with the examination or the process.

The benefits of a uniform bar examination outweigh the risks. Higher-quality test items; better comparability of scores; better transparency in the development, administration, and scoring; and likely easier transferability of scores are all benefits likely to be achieved with a uniform bar examination. On the other hand, it is very unlikely that poorer admissions decisions would be made as a result of an experiment with a uniform examination. The prospect of change can be unsettling, but this one should not unsettle us. Let's give it a try.

ENDNOTE

1. The Rule in Shelley's Case provided that a conveyance attempting to give a person a life estate, with a remainder going to that person's heirs, would instead give both the life estate and the remainder to the person, and the person would have fee simple absolute. *Wolfe v. Shelley*, 1 Co. Rep. 93b, 76 Eng. Rep. 206 (C.P.) (1581). The rule was adopted to deal with a tax dodge people were using to avoid paying an inheritance tax, known as a relief tax, to the feudal lord. Those dodging the tax argued that the property had passed by conveyance rather than by inheritance. The reason for the genesis of the Rule in Shelley's Case, the relief tax, disappeared in 1660 when Parliament passed the Statute of Tenures (12 Ar. 2, ch. 24). Except for a relatively brief period from 1770 to 1772, the rule continued as a feature of the common law until Parliament finally eliminated the rule in 1925 in the Law of Property Act (15 & 16 Geo. 5, ch. 20, § 131). Those American states that adopted the English common law as the law of their jurisdictions also adopted the Rule in Shelley's Case, but over time the rule was abolished in all but a handful of states. (Future interests just aren't what they used to be!)