

**TASK FORCE ON THE
TEXAS BAR EXAMINATION**

RECOMMENDATIONS AND REPORT

**FINAL REPORT
TO THE
TEXAS SUPREME COURT**

May 14, 2018

Task Force on the Texas Bar Exam

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RECOMMENDATIONS AND REPORT OF THE TASK FORCE ON THE TEXAS BAR EXAMINATION

Introduction

The Texas Supreme Court ordered the creation of this Task Force on June 24, 2016, to study and make recommendations regarding the content and administration of the Texas bar exam. The Court appointed the following to serve on the Task Force: the deans of four Texas law schools, an appellate court chief justice, three members of the Texas Board of Law Examiners, a past chair of the board of the State Bar of Texas, and a past chair of the Texas Young Lawyers Association. The Court directed the Task Force to focus on these questions:

1. Should Texas use the Uniform Bar Examination, and if so, under what circumstances?
2. Should Texas continue to use the Multistate Bar Examination, and if so, under what circumstances?
3. Should Texas alter the Texas bar exam essay questions, and if so, how?
4. Should Texas alter the manner in which the examination is scored, and if so, how?
5. Should Texas alter the scoring policies by which an exam is determined to pass or to fail, and if these policies should be altered, to what?
6. Should Texas change the procedures and timing for grading and reporting exam results to reduce the amount of time that it takes, and if so, how?
7. Should Texas adopt a “diploma privilege” for graduates of accredited Texas law schools, and if so, what standards should Texas require such graduates to meet?

See Order Establishing Task Force (Misc. Dkt. No. 16-9104 –Appendix 1).

On October 21, 2016, the Court accepted the resignation of one of the law school deans who relocated outside of the state and appointed a law school professor and another law school dean as additional Task Force members. *See* Supplemental Appointments Order (Misc. Dkt. No. 16-9151 – Appendix 2).

The preliminary work, research, and public outreach conducted by the Task Force are described by a First Interim Report of the Chair submitted to the Court on May 31, 2017 (Appendix 3) and a Second Interim Report of the Chair submitted to the Court on January 5, 2018 (Appendix 4).

As requested in the First Interim Report, the Court extended the deadline for filing a final report to May 31, 2018. That report follows, organized by the recommendations of the Task Force to the Court in response to each of the seven questions set out in the Court’s original order.

Questions 1 and 2

Should Texas use the Uniform Bar Examination, and if so, under what circumstances?

Should Texas continue to use the Multistate Bar Examination, and if so, under what circumstances?

Recommendations

The Task Force recommends adoption of the Uniform Bar Exam, supplemented by a Texas-law component, in place of the current Texas bar exam. The Task Force recommends the continued use of the MBE, either as part of the UBE or as currently administered.

Report

Introduction

The Uniform Bar Exam (UBE) is an instrument created by the National Conference of Bar Examiners (NCBE). The substance of the UBE closely re-

sembles the substance of traditional bar exams (much of it is *identical* to the current Texas exam, which already includes two components of the UBE), but without testing on jurisdiction-specific material. States are free, however, to supplement the UBE with a separate state-law component if they wish. Examinees who score well enough on the UBE become eligible for admission by examination to the bar in every jurisdiction in which the UBE has been adopted.

Each state that uses the UBE determines its own passing score, both for those taking the state's bar exam and for those bringing a UBE score from another jurisdiction. Furthermore, each state continues to set its own standards for education, for character and fitness, and for all other issues apart from the bar exam itself. The UBE lessens the burden on new law graduates to spend time and money preparing for bar exams in every state in which they hope to practice. It would also reduce the volume of subject matter that an examinee must cover to prepare for the exam. The UBE thus would make it easier for Texas residents to seek employment elsewhere, easier for lawyers from elsewhere to come serve the needs of Texans, and easier for lawyers to handle matters that involve multiple jurisdictions.

The Task Force recommends that Texas adopt the Uniform Bar Exam, along with a supplemental test of certain features of Texas law. A majority of the Task Force members take this view without qualification. One or two members would condition their support of the UBE on other steps discussed elsewhere in this report. All agree that the efficiencies created by the UBE, in the aggregate, are compelling. At present, twenty-nine states plus the District of Columbia and the Virgin Islands have adopted the UBE. Other states are likely to follow soon; the UBE was recently endorsed by the American Bar Association, and the Conference of Chief Justices has adopted a resolution urging consideration of the test by bar-admission authorities. The multistate bar exam (MBE) is included in the UBE; so, the recommendation that Texas adopt the UBE is also a recommendation that Texas continue to use the MBE.

The UBE does have some possible drawbacks as well as advantages, and possible steps for addressing the drawbacks will be considered below. Most members of the Task Force are entirely comfortable with this recommendation. Two members have substantial reservations about it that will be discussed below.

Content of the Test

The UBE consists of three parts, the first two of which are already part of the Texas bar exam:

- The Multistate Bar Examination (MBE), which consists of 200 multiple-choice questions administered over six hours. The questions assess the extent to which an examinee can apply fundamental legal principles and legal reasoning to analyze given fact patterns in the following subject areas: Civil Procedure, Constitutional Law, Contracts, Criminal Law and Procedure, Evidence, Real Property, and Torts. *See* Sample MBE Questions (Appendix 5).
- The Multistate Performance Test (MPT), which requires examinees to analyze legal materials and use them to create a memorandum, motion, or other such document. The MPT is meant to evaluate fundamental lawyering skills rather than substantive knowledge. It consists of two ninety-minute problems. As with the MBE, the questions are written by the NCBE; but the MPT answers are read and scored by examiners and graders in each state, utilizing uniform guidelines prepared by the NCBE. *See* Sample MPT Questions (Appendix 6).
- The Multistate Essay Examination (MEE), which consists of six questions administered over three hours. The questions test the examinee's ability to identify legal issues raised by a hypothetical factual situation and to demonstrate an understanding of fundamental legal principles in the following fields: Business Associations, Civil Procedure, Conflict of Laws, Constitutional Law, Contracts, Criminal Law and Procedure, Evidence, Family Law, Real Property, Secured Transactions, Torts, Trust and Estates. As with the MBE and MTP, the MEE essay questions are created by the NCBE, but, as with the MPT, the MEE answers are read and scored by examiners and graders in each state, utilizing uniform guidelines prepared by the NCBE. *See* Sample MEE Questions (Appendix 7).

Here is a summary of the changes that would occur if Texas were to adopt the UBE in place of its current bar exam:

- As noted above, the Texas bar exam already uses the first two items above—the MBE and the MPT. The main change, if Texas adopts the UBE, would be the use of the MEE in place of the current Texas essay exam administered by the Board of Law Examiners (BLE). There would be six essay questions covering multistate issues instead of twelve essay questions on Texas law as with the current exam. Unlike the Texas essays, each of the MEE essay questions may cover more than one topic.
- The MEE would count for 30% of an examinee’s score. The current Texas essays count for 40% of an examinee’s score.
- The MBE (the multiple-choice test) currently counts for 40% of a Texas examinee’s total bar-exam score. If the UBE were adopted, that part of the test would count for 50% of an examinee’s score.
- Texas currently uses one ninety-minute MPT problem, whereas the UBE uses two of them. The two-part MPT would count for 20% of an examinee’s score. The current one-part MPT used on the Texas exam counts for 10%.
- In addition, Texas has a separate, two-part, civil and criminal “procedure and evidence” test (P&E) that counts for 10% of an examinee’s score. The UBE does not include such a component.
- As noted above, the UBE does not test Texas law. Thus, the Task Force recommends a supplemental exam of Texas law, as discussed below.

Passing Score – Timing of Implementation

As noted, states set their own passing scores for the UBE. Passing scores currently range from 260 (Alabama, Minnesota, Missouri, New Mexico, North Dakota) to 280 (Alaska).¹

A passing score of 270 would be roughly equivalent to the current passing score of 675 for the Texas bar exam. The Task Force recommends that, if the UBE is adopted, the passing score should initially be set at 270 and a standard

¹ For a list of the passing scores used by various states see <http://www.ncbex.org/exams/ube/score-portability/minimum-scores/>

setting study should be conducted after three years to evaluate whether the passing score has been appropriately set.

States also must determine how recently an applicant must have taken the UBE in order to be eligible for admission to the bar of that state. Most states use a three-year time limit, but a few have adopted windows of two years or five years. Generally, jurisdictions dovetail the length of time that a UBE score will be accepted with the minimum practice-time requirement for being admitted “on motion” without examination. In Texas, for example, an attorney from another jurisdiction becomes eligible under current rules for admission without examination if the attorney has practiced law for five of the seven years preceding application; so, accepting UBE scores that are up to five years old would correspond to this minimum five-year period.

If Texas adopts the UBE, a period of notice would be appropriate. There must be sufficient time for law schools to make such adjustments as they deem appropriate. Furthermore, the BLE would need sufficient time to develop the state-law component for applicants seeking admission in Texas. In addition, adopting the UBE may affect where an applicant decides to take the exam, so changing the exam after the registration period for that exam has opened would be inconvenient for those who have already applied for the exam. Thus, for example, if the Court issues an order adopting the UBE during the summer of 2018, implementation should not be expected until, at the earliest, the February 2020 exam.

Advantages of the Uniform Bar Exam

The UBE allows lawyers to move between states without spending the time and money needed to take multiple bar exams. This is advantageous for new law-school graduates who wish to look for employment in more than one state—including both Texans who wish to move to other states, and those from other states who wish to practice law here and serve the needs of our residents. The UBE is also beneficial for lawyers whose practice involves matters in more than one state, which is an increasingly common reality.

The UBE is generally considered a highly reliable test. “Reliable” in this context means that the test produces stable and consistent results, so that a theoretical examinee who took the test twice at about the same time would likely receive

the same score both times. The NCBE spends substantial time and resources creating a reliable instrument. It uses drafting committees that consist of leading practitioners, judges, and academics from around the country. All questions that appear on the UBE have been pre-tested before use. *See* Test Development and Production (Appendix 8).

The “validity” of a bar exam refers to how well it separates those who are qualified to practice law from those who are not—or, equivalently, how well it tests the knowledge and skills that a qualified, newly licensed attorney can be expected to have. The validity of the UBE can of course be questioned. Someone who is not ready to practice law might be able to pass the UBE with ardent study, and an examinee who struggles with the format of the UBE may not be able to pass despite having the potential to become a competent lawyer. These criticisms, however, can likewise be made of the current bar exam to the same extent. They may give cause to consider creating an alternative path to licensure outside the bar exam. They are not good cause to reject a move from the current Texas bar exam to the UBE. It should also be noted that the NCBE has appointed a Testing Task Force that is undertaking a three-year study to ensure that the bar examination continues to test the knowledge, skills, and abilities required for competent entry-level legal practice in the 21st century. The research will be conducted by independent professionals with relevant technical expertise. In addition to content validity, the Testing Task Force will study how core competencies should be assessed. The study is expected to be completed by the end of 2020.²

Disadvantages of the Uniform Bar Exam

The UBE does not test principles of law that are unique, or at least highly distinctive, to Texas. Every state that adopts the UBE encounters some form of this limitation. Many of them have addressed this by adding some sort of supplemental course or examination (or combination of the two) that covers the areas of local law considered most distinctive and important to the jurisdiction. The Task Force recommends that Texas do so as well, and advises an approach modeled on the one used by New York. This might result in an online course and examination that cover Texas-specific law deemed important enough to

² *See* <http://www.ncbex.org/statistics-and-research/testingtaskforce/>

test—e.g., principles of Texas legal ethics and distinctives of the Texas Constitution and Texas civil and criminal procedure, criminal law, oil and gas law, and matrimonial law.

The Task Force believes that this approach would serve the interests of the State in determining which examinees are qualified to practice law. It does not seem necessary to test knowledge of those areas with perfect rigor because many examinees will not use the law in every area tested. Even so, the Task Force does believe that anyone who seeks to practice law in Texas should be required to demonstrate familiarity with such jurisdiction-specific material. This issue will be discussed further below.

The Multistate Bar Exam

As already noted, adoption of the UBE would mean continued use of the Multistate Bar Exam and would include an increase in the weight it receives in calculating an examinee's total score. Most members of the Task Force have no concerns or only mild concerns about the MBE. The Task Force notes that the MBE has been used in Texas for many decades and is used in every state except Louisiana. The MBE is widely considered to be a reliable test. It is objective in nature and is the product of a great deal of work every year by distinguished drafting committees, as noted above.

Two members of the Task Force nevertheless have reservations about the MBE that they consider to be serious. First, they question the value of multiple-choice questions in testing an examinee's readiness to practice law, and they have expressed a concern that placing greater reliance on multiple-choice questions might work to the detriment of certain demographic groups who may perform better on other kinds of exams. (Though they agree that the research on this point is inconclusive.) They also are concerned that the substance of the MBE, in some cases, does not reflect the law of any jurisdiction, or that some of the subjects tested on the MBE will have limited relevance to the actual practice of law. The Task Force heard presentations by Professors Judith Welch Wegner (UNC) and Deborah Jones Merritt (Ohio State), who addressed the need to reduce unintended consequences of high stakes tests and to develop better direct measures of lawyer competence, including practice skills like client counseling and negotiation. More broadly, some members note that the studies confirming

the reliability of the MBE have been commissioned by the NCBE, and they desire more transparency in the basis for those conclusions.

In addition, the volatility of the bar pass rate in Texas is considered by some members of the Task Force to be very difficult to explain. For instance, the first-time pass rate of Texas law students on the July bar exam rose from 81% in 2004 to 89% in 2007 (a 10% rise in three years). It fell from 89% in 2009 to 77% in 2015 (a 13% fall in six years). When the nationwide average scores on the July 2014 MBE were reported as the lowest since the July 2004 exam, the NCBE pointed to a nationwide trend reflecting a decline in the credentials (i.e., GPA and LSAT scores) of entering law school classes that accompanied a sharp drop in law school applications beginning in 2011. Law schools throughout the country questioned the NCBE's suggestion that there was a direct correlation between the two trends.

The first-time pass rate of Texas law students on February exams is routinely lower than on July exams, a condition that is often ascribed to early takers of the exam and other factors of the academic cycle. But this does not account for the converse pattern of out-of-state attorneys taking the exam, who, since 2008, have consistently scored higher on February exams than on the July exams (with a yearly difference ranging from a low of 0.12 percentage points to a high of 11.24 percentage points). Although a higher performance on February exams by out-of-state attorneys who graduated within the past year (having successfully taken a bar exam in another state the previous July) may be one explanation for why out of state attorneys perform better on February exams while Texas law students perform better on July exams, there is no definitive explanation for either of these patterns that explains the overall volatility of bar exam passing rates over a cycle of years.

In response to these concerns about the MBE, the Task Force sought to pursue an independent study of Texas bar exam scores. The Task Force discussed the significant drop (in Texas and nationwide) of bar passage rates in recent years (particularly since 2014) and a perceived volatility of passing rates between February and July administrations of the exam. No consensus could be formed, however, regarding either the appropriate methodology or the scope of relevant data necessary to conduct a study that would be helpful to the work of the Task Force. Issues regarding the availability of relevant data from Texas law

schools, the NCBE, and the BLE also remained unresolved. As a result, the proposed independent study was not carried out.

The Task Force has been advised that the BLE is engaging an independent psychometrician, Dr. Roger Bolus, to analyze passing rates and document the statistical relationship among the exam sections over the past five years, and to evaluate the potential effects of changing the structure and weighting of the current Texas bar exam to the structure and weighting of the UBE. The BLE expects a report to be available in July 2018. Some members of the Task Force continue to express concerns that such a study is likely to be too narrow in scope to determine actual effects of the current scoring and scaling policies of the Texas bar exam on the resulting final scores.

The NCBE has recurrently stated that it is willing to work with state examiners and licensing authorities, as well as law schools, to improve and enhance the MBE. The Task Force recommends that Texas seek to continue working with the NCBE to improve the MBE, to assess the reliability of the test, and to increase transparency concerning the matters tested on the MBE. The Task Force further recommends that, if Texas adopts the UBE, the Court require thorough analysis and review of scoring of the UBE in Texas, including consideration of the weighting of the components and of the most appropriate passing score for licensure to practice in Texas.

Summary

Adoption of the UBE would not only be more efficient, it would also be of great benefit to Texas law graduates who wish to practice law elsewhere in addition to (or instead of) Texas. It would also better serve Texas residents who are in need of legal services, and who would therefore benefit from an easier path to practice in Texas for lawyers trained elsewhere. The Task Force thus favors adoption of the UBE, supplemented by a Texas-law component, in place of the current Texas bar exam.

Question 3

Should Texas alter the Texas Bar Exam essay questions, and if so, how?

Recommendations

If the UBE is adopted, the Texas essays will be replaced by the Multistate Essay Exam, largely ending the need for further consideration of this question. But the Task Force believes that the UBE should be supplemented by a separate Texas-law component, consisting of a Texas Law Exam, to be administered online following completion of, or in conjunction with, an online Texas Law Course. While such a supplemental component would probably not involve essays, this part of the Task Force report will be used to discuss the form it might take.

Alternatively, if the UBE is *not* adopted, the Task Force recommends that the current form of the Texas bar exam should be altered to reduce the number of Texas essays from twelve to six.

Report

Options for Testing Texas Law

If the Court adopts the UBE, the current Texas essay and P&E exams will be replaced by the UBE essay questions. The Texas civil and criminal P&E exams, in their current format, would be eliminated. The Task Force recommends that some of the subjects tested on those instruments be the subject of a separate and modest test of Texas legal knowledge, but probably not in essay format. Members of the Task Force did not always agree about which aspects of Texas law should be subject to supplemental testing. Importantly, one subject that did receive unanimous approval of the Task Force was Texas Legal Ethics. And the members also agreed that the format for such testing should be more abbreviated than is common on traditional bar exams. An online approach is reasonable and attractive for this purpose. Two forms of assessment tried elsewhere, which were

appealing to the Task Force, were first, the online New York Law Course combined with the online New York Law Exam; and second, the Online Course on Alabama Law.

New York Bar Course and New York Law Exam

Upon adopting the UBE, New York also established a supplemental “New York Law Course” and “New York Law Exam” in lieu of its prior essay exam.

The New York Law Course consists of fifteen hours of recorded lectures on twelve subjects. The subject areas include: Administrative Law, Business Relationships and Corporations Law, Civil Practice and Procedure, Conflict of Laws, Contracts, Criminal Law and Procedure, Evidence, Matrimonial and Family Law, Professional Responsibility, Real Property, Torts and Torts Damages, and Trust, Wills, and Estates. The course must be taken in its entirety prior to taking the on-line exam.

The exam is a fifty-item multiple choice exam offered on-line, four times a year. Any applicant who answers at least 60% (thirty of fifty questions) correct passes the New York Law Exam.

Online Course on Alabama Law

Alabama likewise established a state-law component upon adoption of the UBE. Unlike New York, however, the state-law component does not have a separate exam. The Online Course on Alabama Law consists of eight online learning modules covering the following subjects: Alabama Constitution; Alternative Dispute Resolution; Civil Litigation; Criminal Law; Family Law; Real Property; Torts; and Wills & Trusts/Probate. Rather than a separate exam, embedded within the online course modules are “hurdle questions” designed not to test but rather to assure that the viewer is paying attention and can accurately answer questions about the content of the given instruction.

The New York and Alabama approaches, in the view of the Task Force, reflect a reasonable range of approaches to ensuring that those who pass the UBE are also at least familiar with certain essential features of state law. Some members of the Task Force favor a less burdensome requirement to demonstrate knowledge of local law than the New York approach. Others believed that a rigorous assessment of Texas law remains appropriate. Some members also see

the potential to include assessment of professional values and skills. The Task Force, therefore, considered materials from a variety of jurisdictions and professions, notably the exams used for licensure of barristers and solicitors in Ontario, Canada, and the practical exams used by medical schools and medical boards.

The Task Force recommends that, if the Court adopts the UBE, the BLE (or other entity designated by the Court) develop an appropriate Texas Law Course and Texas Law Exam. The course and exam would presumably include the areas of Texas law that are distinctive enough, and important enough to all lawyers in Texas, to warrant inclusion on a supplemental course and test. It will also be necessary to determine what format will be most effective for carrying out such a course and test.

The Current Texas Bar Exam

If the UBE is not adopted, but the form of the Texas bar exam is modified to reduce the number of essays from twelve to six, a concern was expressed regarding whether the 40% weight currently allocated to the essays also should be retained, notwithstanding the reduction in the number of Texas essays.

If the current bar exam is retained, some Task Force members would favor efforts to provide greater transparency about the purpose and grading of the Texas essays. They believe it might be helpful to document the practice competencies tested on the essays and within each of the ten subject areas. It might also be useful to assess what percentage of the competencies tested by the essays are identical to those tested on the MBE and the UBE Essays. A related issue that might be explored going forward is how the current essays mirror current data regarding minimum competence to practice law.

Summary

The Task Force recommends that, if the UBE is adopted, Texas law should be assessed by a separate Texas-law component, consisting of a Texas Law Exam, to be administered online following completion of, or in conjunction with, an online Texas Law Course. Alternatively, if the UBE is not adopted, the Task Force recommends that the number of essays on the Texas bar exam be reduced from twelve to six.

Question 4

Should Texas alter the manner in which the examination is scored, and if so, how?

Recommendations

If the UBE is adopted, the scoring of the UBE should likewise be adopted.

Alternatively, if the UBE is *not* adopted, and the current Texas bar exam is retained without change, the current score weighting should also be retained.

Report

Introduction

The Task Force recognizes that the current scoring methodology is consistent with recognized psychometric standards. The Task Force explored an independent analysis of this methodology, but no analysis was performed. The Task Force recommends that, if the current exam format remains, the current scoring methodology be continued.

The Current Manner in Which the Exam Is Scored

Structure and Weighting

The current form of the bar exam consists of several components, which are weighted, administered, and scored as follows:

MPT	10%	Written	1.5 hours	6-point scale
P&E	10%	20 short-answer questions per section	1.5 hours	100-point scale for each section

MBE	40%	Multiple choice	6 hours	200-point scale
Texas Essays	40%	12 written essays	6 hours	25-point scale for each essay

The written sections (MPT, P&E, and Texas Essays) are graded by Texas attorneys who are supervised by Board members in accordance with grading guidelines. The MBE is scored by the NCBE.

Scaling

The written sections of the Texas bar exam have been scaled to the MBE since 1994, and the standard deviation method has been used since 2008. The standard deviations are calculated using the scores for all Texas bar examinees in a given administration, and the written sections are scaled to those Texas bar examinees' scores on the MBE.

Because the MBE is a multiple-choice exam that contains a set of “equating” questions, one administration of the MBE can be “equated” to prior administrations, so that a given score on one MBE is comparable to the same score on another MBE, even if the MBEs contain relatively harder or easier questions. Written exams cannot be equated in the same way, but scaling the converted raw scores of the essays and other written components of the bar exam to a score distribution that has the same mean and standard deviation as the Texas MBE scores affords the same benefits: a given score on one portion of a particular exam is comparable to the same score on another portion of the same exam—even if the questions are relatively harder or easier; and similar scaled scores of the written components are comparable over time across exam administrations.

Compensatory Method

A score is based on performance on one entire exam—partial scores from multiple exams cannot be combined to create a passing score. (Before 1994, the exam was divided into parts, and examinees who were unsuccessful on one part could retake that part without taking the whole exam. According to the “Psychometric Audit of the Texas Bar Examinations Administered in 2013,” the current “compensatory” rule is preferable to the old “conjunctive” approach.)

Psychometric Audits

The BLE engages independent psychometricians to develop the scoring formula and to audit the BLE's processes to make sure the formula is properly applied. According to the most recent "Psychometric Audit of the Texas Bar Examinations Administered in 2013" reported by Dr. Steven Klein and Dr. Roger Bolus on March 3, 2014: "The February and July 2013 total score reliability coefficients (.89 and .86, respectively), were among the highest we have seen for a bar exam."

Regrades

Currently, if an examinee's initial score is within six points of the passing score of 675, Board members will regrade the written sections of the exam. Board members can add points to an exam, but they do not subtract points. Most exams that are regraded end up with a passing score, so the regrade procedure effectively lowers the minimum passing score. As a result, psychometricians do not recommend this method of regrading. Instead, a best practice would involve a double-blind regrading by a second grader of selected answers on the margin of passing to check for accuracy and consistency. Nonetheless, regrading all answers within a preset band of scores at the conclusion of the initial grading period does offer examinees on the margin some assurance that they did not fall short because of any oversight by a grader.

Informal Reviews

If an examinee is unsuccessful on the Texas bar exam, the BLE provides the examinee with an Informal Review of the examinee's performance on the exam. The Informal Review includes the examinee's final scaled score on each component of the exam: the MBE, the MPT, the P&E, and the Texas essays. It also includes the examinee's percentile ranking on the criminal P&E questions, the civil P&E questions, and each of the individual Texas essays, as well as the examinee's national percentile ranking on each subject matter area of the MBE.

Formal Reviews

If an examinee is unsuccessful on more than one Texas bar exam, the examinee may request a one-time Formal Review. Currently, Formal Reviews allow the

examinee to meet individually with a Board member who has reviewed the examinee's written answers to the most recent exam as well as the examinee's scores and percentiles on all past exams.

Task Force Discussion

Two members of the Task Force suggested that the written sections of the exam should not be scaled to the MBE; that the scoring method should be driven first by overall competency assessment and then by psychometric concerns; that each component of the exam should have a score and a calibration separate from the overall score (presumably so that an examinee who "passes" one part of the exam can retake other parts without retaking the entire exam, as was the case prior to 1994); and that testing conditions should be improved by administering the Texas bar exam on demand at private secure test centers, or at least, in more cities.

The Task Force worked with Dr. Chris Zorn, a social scientist, to create a research project to explore the past seventeen years of Texas bar exam scores, and Dr. Zorn in turn worked with the BLE. Dr. Zorn and the BLE, however, were not able to agree to a mutually acceptable research plan.

As noted above in response to Questions 1 and 2, the BLE is engaging a psychometrician, Dr. Roger Bolus, to study the effects of changing the structure and weighting of the Texas bar exam to the structure and weighting of the UBE, but this study will not address all of the concerns expressed above by some members of the Task Force.

Summary

For many years, the BLE has employed the predominant method of scoring and weighting components of the bar exam. Though there are reasons some members of the Task Force find compelling to seek independent assessment of this method by an expert in a field other than psychometrics, at present there is no internal evidence that demonstrates that the exam is not performing as intended according to the rules adopted by the Court. If the current Texas bar exam is retained without change, the Task Force recommends that the current scoring methodology should also be continued.

Similarly, if the Court adopts the UBE, the scoring and weighting of the UBE should likewise be adopted.

Question 5

Should Texas alter the scoring policies by which an exam is determined to pass or to fail, and if these policies should be altered, to what?

Recommendations

If the UBE is adopted, the equivalent passing score should be required, which is 270.

Alternatively, if the UBE is *not* adopted, and the current Texas bar exam is retained without change, the minimum passing score should remain 675.

In either case, the Court should consider requiring a standard setting study to ascertain whether the passing score is set appropriately to ascertain a standard of minimum competence to practice law.

Report

The Current Scoring Policies

The current passing standard has been in place since 1994, when the Court set the minimum passing score at 675 out of 1,000.

Scoring Policies Under the UBE

If the Court adopts the UBE, a minimum passing score will need to be determined.

One scaled point on the UBE is roughly equal to 2.5 scaled points on the current Texas bar exam, so the current minimum passing score of 675 on the Texas bar exam roughly translates to a minimum passing score of 270 on the UBE.

Of the jurisdictions that have adopted the UBE, minimum passing scores range from 260 to 280. Nine jurisdictions have minimum passing scores of 270. Fourteen have minimum passing scores below 270, and six have minimum passing scores over 270.

Task Force Discussion

Some members of the Task Force have expressed concerns that if the UBE is adopted, the MBE will be weighted at 50% of an examinee's score, up from the 40% weight the MBE currently carries for a Texas bar exam score. These members propose that, if the UBE is adopted, an examinee who takes the UBE in Texas should receive two scores. One score, the "UBE score," would be calculated using the UBE weights and methods. This score would offer the examinee the portability benefit of the UBE—the examinee would be able to transfer this score to other UBE jurisdictions. The second score, the "Texas score," could be calculated by weighting each part of the exam in a manner different from the UBE standard.

Under this two-score method, a Texas examinee could potentially achieve a "UBE score" that would not allow the examinee to be licensed in Texas but achieve a "Texas score" that would allow the examinee to be licensed in Texas. Or vice-versa. The result admittedly would be paradoxical and would be subject to confusion and misunderstanding.

No other state has taken this dual-score approach. Furthermore, the BLE staff notes that such an approach would raise significant practical difficulties in development and implementation. Most members of the Task Force do not recommend it.

Summary

Determining the minimum passing score involves a balancing of policy considerations as well as substantive evaluation of examinee performance. The Task Force recommends that the BLE should periodically review the minimum passing score and regrade procedures, with assistance from independent experts and public input, and report its findings to the Court.

As an example of a recent standard setting study, in 2017 the California State Bar conducted a multi-day workshop during which panelists of licensed attorneys evaluated exemplars for each essay and performance component of the California bar exam to ascertain the appropriate score that best assesses a minimally competent candidate for admission to the bar. *See* Conducting a Standard Setting Study for the California Bar Exam, Final Report (2017).³ The Task Force suggests that such a review be conducted within the next three years, and then every 6 to 10 years after that. Until such a review is performed, the Task Force recommends that the minimum passing score remain at 675, and, if the UBE is adopted before such a review is performed, the Task Force recommends that the Court adopt 270 as the minimum passing score on the UBE.

Note: if the UBE is not adopted, other concerns raised in this report regarding the validity of the Texas bar exam might likewise be assessed with a separate content validity study similar to the one California also conducted in 2017. *See* Conducting a Content Validation Study for the California Bar Exam, Final Report (2017).⁴

³ *See* <http://apps.calbar.ca.gov/cbe/docs/agendaItem/Public/agendaitem1000001929.pdf>

⁴ *See* http://www.calbar.ca.gov/Portals/0/documents/admissions/Examinations/CBEStudy_Attachment_A.pdf

Question 6

Should Texas change the procedures and timing for grading and reporting exam results to reduce the amount of time that it takes, and if so, how?

Recommendations

If the UBE is adopted, the number of essays would be reduced from twelve to six by adoption of the MEE.

Alternatively, if the UBE is *not* adopted, the Task Force recommends that the number of essays should be reduced from twelve to six.

In either case, the grading period could be reduced by doubling the number of graders, though this would increase costs. The Task Force also recommends that the BLE release individual scores to examinees prior to publishing the cumulative results.

Report

Currently, the BLE takes about ten weeks to release results for a February exam and about fourteen weeks to release results for a July exam. Most of this time is spent grading the written sections of the exam—about six weeks for the February exam and eleven weeks for the July exam.

There are four steps to grading exams and delivering results:

- (1) Preparing exams for grading;
- (2) Grading exams;
- (3) Re-grading exams; and
- (4) Delivering results.

Preparing Exams for Grading

Preparing exams for grading involves scanning handwritten answers to create PDFs, retrieving electronic laptop answers from the software used by laptop examinees, and delivering the exams to individual devices used by graders.

Currently, about 85% of examinees use laptops for the written part of the exam, and 15% still handwrite their answers. Laptop examinees are required to purchase and install software on their laptops for the exam. (The current cost is \$70. This fee is paid to the software vendor, and the BLE does not receive any portion of this money.) The software locks down examinees' laptops so examinees cannot access any other files during the exam. It also allows them to securely upload their answers.

Recently, the BLE has taken steps to streamline the preparation of exams for grading. The P&E questions can now be answered on laptops, which greatly reduced the number of handwritten answers that had to be scanned. In February 2018, the BLE moved to a new exam software that is web-based, which has reduced the amount of time it takes to deliver exams to the grading devices. Further minor efficiencies in preparing exams for grading could be realized.

Encouraging All Examinees to Use Laptops

Because handwritten exams have to be scanned, any reduction in handwriters will save time in preparing exams for grading. One jurisdiction encourages examinees to use laptops by including the cost of the software in the bar exam application fee. Examinees are not required to use the software, but the fact that there is no additional cost to using a laptop encourages more would-be handwriters to use their laptops at the exam. This jurisdiction reports that only 10% of its examinees handwrite the exam.

Reducing the number of handwriters in Texas from 15% to 10% would not save much time for a February exam, but could save one-half day for a July exam. However, statutory fee caps make it impossible for the BLE to increase exam fees to include the cost of the software. Moreover, a requirement that all examinees use laptops would nevertheless be subject to reasonable requests for accommodation under the ADA. The Task Force does not recommend any change in policy restricting the option to submit handwritten answers.

Restrictions on Allowing Laptop Examinees to Change from Handwriting Back to Laptop During Testing Session

Sometimes laptop examinees encounter issues using the software during the exam. Technicians are on site at the exam to assist with these issues, and they are usually able to resolve the issues quickly. If an examinee encounters a laptop issue, they can continue working on the exam in a handwriter answer booklet. Once the issue is resolved, the examinee can then switch back to the laptop. After the exam, BLE staff will piece together the answers from the laptop and the handwriter book. This is a time-consuming manual process.

Requiring laptop examinees who switch to handwriting during an exam to continue handwriting the rest of that session would save an estimated half day for a February exam, and an estimated one day for a July exam. Some other jurisdictions have this requirement, but the BLE's policy is to allow the examinees to switch back and forth between laptop and handwriting as desired.

Reducing the Written Section of the Exam

If the UBE is adopted, or if the written part of the exam is otherwise reduced to six essays and two MPTs, there would be fewer handwritten answers to process, which would reduce the time it takes to prepare exams for grading.

Grading Exams

The BLE provided the Task Force with a "Proposal by the Board of Law Examiners for Improvements to the Texas Bar Exam," dated February 2018. The Proposal analyses how grading time might be reduced by doubling the number of graders.

As explained in that Proposal, the BLE currently engages sixteen graders for each exam. One grader is used for the civil P&E questions, the criminal P&E questions, and each of the twelve essays. Two graders are used for the MPT—one grader grades half of the MPTs, and another grades the other half.

Doubling the number of graders would reduce the amount of time it takes to grade exams. Doubling the number of graders, however, will not reduce the grading time by half. The amount of time it takes to train graders for each exam will remain about the same whether the BLE uses sixteen graders or thirty-two

graders. In addition, using multiple graders on a single question will require some additional time to insure inter-grader consistency throughout the grading process. The BLE estimates that increasing the number of graders would reduce the overall period of time from exam to grade release—from ten weeks to seven weeks for a February exam and from fourteen weeks to nine weeks for a July exam.

Options for Reducing Grading Time

If the UBE is adopted, or if the written part of the exam is otherwise reduced to six essays and two MPTs, the number of written parts on the bar exam would be reduced from fifteen to eight, and the number of graders needed would be reduced from thirty-two to twenty. Either way, if the number of graders is doubled, the overall periods from exam to grade release would be seven weeks for a February exam and nine weeks for a July exam.

The BLE's proposal notes that doubling the number of graders would incur additional costs. The absolute number of answers to be graded would not increase; however, additional grader and board member time would be required to perform calibration procedures to ensure as much consistency in grading as possible. The estimated annual cost for the extra calibration work would be about \$30,000 for thirty-two graders on the July exam. (If the UBE is adopted, or if the written part of the exam is otherwise reduced to six essays and two MPTs, the cost of extra calibration will be less.)

Doubling the number of graders would require the BLE to recruit and train new graders, and the current graders would need to be trained on additional calibration procedures. The BLE suggested that it would be preferable to conduct a grading workshop, perhaps on a biennial basis, to train all graders on calibration. The estimated cost for a grading workshop for thirty-two graders would be about \$22,000. (If the UBE is adopted, or if the written part of the exam is otherwise reduced to six essays and two MPTs, only twenty graders would be needed, and the cost of the workshop may be less.)

Regrading Exams

In its Proposal, the BLE discusses how the length of time between the exam and the release of results could be reduced by making adjustments to the regrade

procedures. Currently, if an examinee's initial score is within six points of the passing score of 675, Board members will regrade the written portion of the exam—the essays, MPT, and P&E will be regraded, but the MBE will not be regraded.

Currently, the BLE sets aside twelve days to regrade a February exam, and fifteen days to regrade a July exam. The Proposal sets out three ways to reduce the amount of time spent on regrades.

- Shrinking the regrade band from six points down to five, four, or three points would reduce the days needed to perform regrades. It would also likely lower the pass rate.
- Reducing the written parts of the exam to six essays and two MPTs would result in fewer answers to be regraded and would significantly decrease the amount of time needed to perform regrades.
- Most exams that are regraded end up with a passing score. Simply eliminating regrades altogether and lowering the passing score by five or six points would significantly reduce overall grading time while preserving the pass rate. Eliminating regrades would also be more psychometrically sound. However, eliminating regrades may frustrate examinees who fall a few points short and no longer have the added assurance of fairness that regrading by a Board member may provide.

Delivering Results – To Examinees and the Public

Once all exams are graded and all scores are calculated, BLE staff devotes several days to preparing statistics for publication. Because of the detail involved in the statistics, the BLE needs time to review them to ensure that each examinee has been properly categorized. Historically, bar exam results were not released to examinees until the statistics were finalized. At that point, results were released, and moments later, the “pass list” and the statistics were published. This procedure meant that examinees’ results were ready several days before they were released to examinees.

Recently, the BLE began phasing in a practice of releasing bar exam results to examinees and publishing the pass list at the same time, and then publishing

the detailed statistics several days later. Some law schools preferred the old way of publicly releasing the pass list and statistics together.

Another option is to release results to examinees, and then publicly release the pass list and detailed statistics a few days later. This would allow the examinees to receive their results a few days earlier than they do now, while preserving the practice of publicly releasing the pass list and statistics together. It would also give the examinees the added benefit of having a few days to privately review their results. Other larger jurisdictions use this procedure.

A Note About Creating a State-Law Component for the UBE

If the UBE is adopted and a state-law component is required, the timing and format of that component will impact grading time.

If BLE staff administers a state-law exam or presents a seminar the day after the UBE, grade release would probably be pushed back by a day.

If the state-law component includes an exam that needs to be graded, essays would take longer to grade than short-answers. A multiple-choice exam, however, would take significantly less time to grade. Confirming that an examinee has completed an online course and online exam would be the most efficient.

Summary

Absolute accuracy in fairly evaluating every answer, calculating scores, and delivering results to individual examinees is the highest priority. While the Task Force recommends that the Court reduce the written parts of the exam and that the BLE increase the number of graders and alter its grade release procedures in order to reduce the time between the exam and the release of results, it emphasizes that the BLE should take the necessary time to carefully implement these changes while preserving the integrity, fairness, and accuracy of the Texas Bar Exam.

	Estimated Time Saved on July Exam	Estimated Time Saved on February Exam	Recommendation
<i>Preparing Exams for Grading</i>			
Encouraging all examinees to use laptops by requiring them to pay for the software	½ day	--	Not recommended
Requiring laptop examinees who switch to handwriting to continue handwriting the rest of that session	1 day	½ day	Not recommended
Reducing the written portion to 6 essays and 2 MPTs	½ day	--	Recommended
<i>Grading Exams</i>			
Doubling the number of graders	4 weeks	2 weeks	Recommended
<i>Re-Grading Exams</i>			
Reducing the regrade band to 3, 4, or 5 points	Up to 5 days	Up to 3 days	Recommended Reduce to 3 points
Reducing the written portion to 6 essays and 2 MPTs	1 week	1 week	Recommended
Eliminating regrades and lowering the minimum passing score	15 days	12 days	Not recommended
<i>Delivering Results</i>			
Release results to examinees, and publish pass list and statistics 2 or 3 days later	2 - 3 days	2 - 3 days	Recommended

Question 7

Should Texas adopt a “diploma privilege” for graduates of accredited Texas law schools, and if so, what standards should Texas require such graduates to meet?

Recommendations

No, the Task Force does not endorse a traditional diploma privilege for Texas law schools.

The Task Force does, however, think there might be value in experimentation with alternative approaches to licensure.

Report

The Full Diploma Privilege

Wisconsin maintains a traditional diploma privilege, which allows the graduates of two law schools in that state, the University of Wisconsin and Marquette University, following a review of character and fitness, to take the oath of an attorney and enter the practice of law in Wisconsin. The Task Force has also reviewed the recent consideration of a diploma privilege by the Iowa Supreme Court, which resulted in a staff recommendation but ultimate rejection by the court.

The sense of the Task Force is that there are good reasons to maintain the tradition of admission by bar examination to validate the minimal competency of applicants seeking licensure in Texas.

Alternative Approaches to Licensure

The Task Force examined several programs that could establish paths to practice without passing a bar exam. The idea of such a program would be to establish rigorous preparation and competence to practice law through methods more integrated into the process of legal education within the same jurisdiction. Such alternative approaches would seek to effectively test an applicant’s knowledge, skills, and professionalism, while reducing barriers to entering the

profession that do not bear on those considerations. The Task Force examined a few such alternatives that are in place elsewhere.

The Task Force received materials documenting the Daniel Webster Scholar Honors Program of the University of New Hampshire Law School. (These materials were largely those that were also presented to the Texas Supreme Court, the Court of Criminal Appeals, and the Texas Board of Law Examiners at the 2017 Bar Admissions Forum and Luncheon.)

The Task Force considered presentations by the Texas Medical Board, which demonstrated the highly integrated process of instruction, examination, clinical work, examination, and residency required for a medical license. All of these examinations are maintained in such a manner that there is very little variation in passing rates from year to year, with consistent pass rates of over 90% for first-time takers.

The Task Force considered a presentation by the Law Society of Ontario, which demonstrated a successful, large-scale process of examination that includes tests of knowledge, skills, and values. This exam was administered in a manner that did not lead to significant volatility in the pass rate of over 1,000 applicants yearly.

The Task Force also considered the statutes and regulations from California, New York, Delaware, and other U.S. jurisdictions that employ some form of licensure examination in the program of legal education, forms of clinical or other curricular requirement prior to licensure, or some form of supervised practice before or after graduation or licensure.

Lastly, as part of a preliminary effort to create a state-wide survey, the Task Force considered the results of surveys of the profession conducted by the National Conference of Bar Examiners and the Institute for the Advancement of the American Legal System.

None of the programs just listed provide a model that the Task Force was prepared to recommend for Texas. But the Task Force did think that those programs included some interesting ideas for a potential alternative approach to the licensure of attorneys in Texas. For example, Texas could consider allowing licensure after an applicant has completed a clerkship that includes certain required experiences and assessments under the supervision of a qualified attorney.

Or Texas could consider it sufficient if a law-school graduate completes an intensive and appropriately supervised pro bono or clinical experience during law school. (The United States appears to be the only jurisdiction that does not require some sort of supervised work experience prior to licensure as an attorney.) Or Texas could consider it enough for an applicant to successfully pass an exam assessing a student's preparation taken after the first year in law school. This test might be a Texas-specific exam on the basic legal knowledge and the skills of research, analysis, judgment, writing, negotiating, counseling, and advocacy that should be expected of a competent law student after one year's study. The Task Force notes that such a test could help encourage swift attrition of students who are unlikely to qualify to practice law. Such a test can be used to qualify students for entry to other forms of assessment for licensure during the program of legal education, including supervised pro bono practice.

Summary

The Task Force unanimously recommends to the Texas Supreme Court that Texas should not adopt a full diploma privilege for any law school or the graduates of any law school. The Task Force believes, however, that Texas should find ways to encourage experimentation by Texas law schools to develop programs similar to those described in the examples above. The experiments could be carried out with the participation and partnership of the BLE, the State Bar of Texas, local bar associations, and associations of lawyers formed for the purpose of supporting such programs. The Court may wish to consider appointing an entity to recommend one of these alternatives as worthy of experimental development. Such an entity could solicit proposals from law schools or others, choose among them, establish standards for their regulation, and supervise them going forward.

Conclusion

The Task Force is grateful to the Court, as well as to the individuals, groups, and associations that provided their input and views on these issues of great importance to our profession. We acknowledge the assistance of many of these people following this conclusion.

The Task Force was impressed at the breadth of the current discussion in the United States about reform of professional licensure, particularly the licensure of attorneys. We note that there is pressure from many directions as people of good will seek to make a system that promotes access to the profession but that maintains high standards of professionalism and competence. There is respect for a venerable system of examination yet awareness that many skills that lawyers and their clients value highly are not assessed on such exams. There is wide recognition of the need for national efficiency but also deep concern for local knowledge. And there is a persistent need to develop techniques to assess the tests and to validate the methods of the tests and their passing scores against some real-world standards of attorney competence.

The three most significant movements of this discussion appear to be these: First, the drive for national efficiency, which is most evident in the trend toward adoption of the Uniform Bar Exam. Second, the broad consideration of greater integration of legal education with licensure, primarily to encourage assessment of essential skills and values as part and parcel of the licensing process, but also to diminish the reliance on a single high-stakes exam as the bellwether of licensure. Third, the nascent efforts to validate licensing exams according to external referents of professional competence.

The Task Force has felt many of the pressures playing out in national debates as it has grappled with these movements and how they might be embraced in Texas. We believe that we have arrived at a balanced agenda that would allow the Court to:

- Give Texas the national efficiencies in the Uniform Bar Examination.
- Ensure that lawyers entering practice in Texas are well informed on the substance and procedure of laws that are particular to Texas practice.

- Make it easier for law-school graduates from other states to practice law in Texas and serve the legal needs of our residents.
- Encourage improvements in the testing apparatus that is being adopted in the Uniform Bar Examination, both to make more likely data-driven validation of the exam and to incorporate skills and values that are essential to successful practice.
- Increase speed in the grading of exams and delivery of those grades to examinees.
- Encourage experimentation in Texas that would assess the utility and best practices of steps toward licensure, which could be integrated into legal education, primarily in Texas law schools but also, quite possibly, in incubators and other post-graduate systems of professional development integrated with licensure.

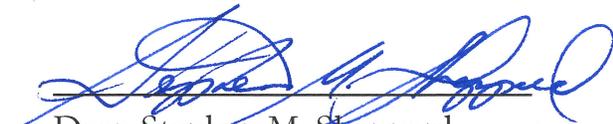
Acknowledgments

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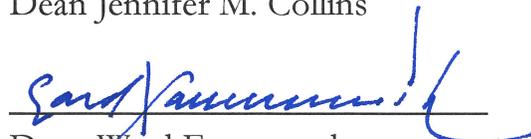
- Priya Bhatia, Executive Director of Professional Development & Competence, The Law Society of Ontario.
- Scott Freshour, Interim Executive Director, Texas Medical Board.
- John Burwell Garvey, Director, Daniel Webster Scholar Honors Program of the University of New Hampshire School of Law.
- Judith Gunderson, Executive Director, National Conference of Bar Examiners
- Susan Henricks, Executive Director, Texas Board of Law Examiners.
- Nahdiah Hoang, Director of Examination, Texas Board of Law Examiners.
- Deborah Jones Merritt, John Deaver Drinko/Baker & Hostetler Chair in Law, Ohio State University. Moritz College of Law.
- Greg Murphy, Immediate Past Chair, Council of the Section of Legal Education and Preparation for the Bar of the American Bar Association; Past Chair, National Conference of Bar Examiners; Co-Chair of the NCBE Uniform Bar Examination Committee.
- Judith Welsh Wegner, Dean Emerita, University of North Carolina Law School; Principal Investigator, Carnegie Report on Legal Education, *Educating Lawyers* (2007); Past President, Association of American Law Schools
- Dr. Christopher Zorn, Liberal Arts Research Professor of Political Science and Sociology, Penn State University; Co-Founder, Lawyer Metrics; Senior Researcher, American Bar Foundation.

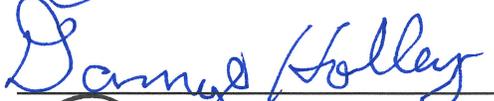
The Task Force is indebted to these experts who informed our views.

Endorsements

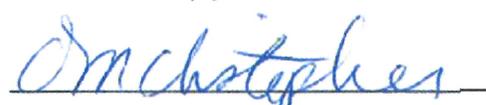

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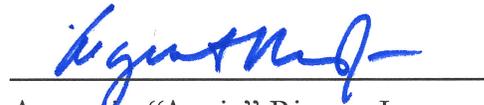

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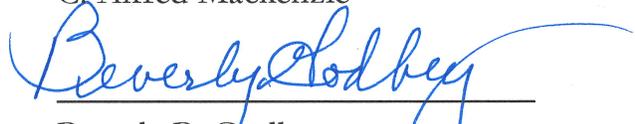

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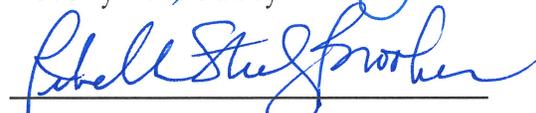

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