

RESOLUTION 4YL

**AMERICAN BAR ASSOCIATION
YOUNG LAWYERS DIVISION**

SPONSORED BY: ABA STANDING COMMITTEE ON ARMED FORCES LAW

RECOMMENDATION

RESOLVED, that the American Bar Association pass a resolution endorsing the “Model State Code of Military Justice,” and encouraging States and U.S. Territories to conduct a critical review of their currently enacted military justice legislation, with a view toward revision and uniformity based on the endorsed Model State Code.

REPORT

Introduction

The uniform bar exam is finally here, with two states committed to administering the exam in February 2011 and many other states considering whether to join them. It is an idea that is long overdue. Administering duplicative exams throughout the United States is wasteful and serves only to increase the expense of a test taken mostly by recent law school graduates saddled with considerable student loan debt. A uniform bar exam would better test legal proficiency and would still allow each state or territory to ensure that bar admission candidates have adequate knowledge of local law. In reality, though, as it exists in most states and territories, the bar exam is essentially a uniform exam, given that it tests the same general issues of law with little to no emphasis on local variation. Formally adopting a uniform exam is simply the next logical step.

The Bar Exam: A Brief History

Although many consider the written bar exam a sacred institution, its history is actually shorter than many realize and it has been in a state of flux for most of its existence. Massachusetts was the first state to institute a written bar exam in 1855.¹ At that time, most examinations for admission to bars were conducted orally, either before a judge of the court or by one or more other lawyers.² Interviews ranged from rigorous examinations of legal knowledge and character and fitness to perfunctory affairs.³ Massachusetts' first experiment with a written exam was rather short-lived, lasting until 1859, but it was later revived in 1876.⁴ New York introduced a written exam in 1877.⁵ Other states soon followed suit, but some kept an oral component to the exam well into the 20th Century. Early bar exams focused on rote learning and basic literary skills and therefore "failed to function as effective tests of competence."⁶

It was not until the late 19th Century that states began to establish boards of bar examiners to handle drafting and administering bar exams. New Hampshire was the first to do so in 1876, and other states followed its lead starting in 1890.⁷ In 1931, the National Conference of Bar Examiners (NCBE) was founded "to provide 'a national organization through which state boards

¹ Robert M. Jarvis, *An Anecdotal History of the Bar Exam*, 9 Geo. J. Legal Ethics 359, 374 (1996).

² *Id.*

³ *Id.* at 374 & 376.

⁴ *Id.* at 374.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 375.

of bar examiners could cooperate with each other, with the law school community, and with the organized bar.”⁸

In the late 1960s, the NCBE began a concerted effort to examine proposals to improve state bar examinations. The “Eckler Committee” (named after Ohio attorney John Eckler) was formed for that purpose. One of its first observations was that most states were doing about the same thing, so there was a great deal of duplication of effort.⁹ Although early proposals to address this problem included a “National Bar Examination,” those were rejected as they implied a loss of local control.¹⁰ Committee members therefore settled on a “Multistate Bar Examination” (MBE) – a voluntary, uniform, multiple-choice exam offered twice a year that state bar examiners could adopt. The first such exam was offered in February 1972.¹¹ It is now offered in 48 states, the District of Columbia, Guam, Saipan and the U.S. Virgin Islands.¹² The MBE has not only improved the scope and quality of bar exams, but it has solved immense logistical problems in administering bar exams throughout the country.¹³

Later, the NCBE developed the Multistate Professional Responsibility Examination (MPRE), which was first used in March 1980.¹⁴ All states and territories, except Maryland, Washington, Wisconsin and Puerto Rico, rely on this exam.¹⁵ Shortly after, the NCBE instituted the Multistate Essay Examination (MEE), which was first administered in six states in July 1988.¹⁶ This test consists of pretested essay questions developed by a staff of law professors. The essay questions raise issues from approximately 10 areas of the law.¹⁷ Presently, 26 states or territories use the MEE.¹⁸

⁸ *Id.* at 378 (quoting Arthur Karger, *The Role of the NCBE in the Bar Admission Process: Its First Fifty Years*, B. Examiner, Aug. 1981, at 7).

⁹ *Id.* at 378-79 (citing John Eckler, *The Multistate Bar Examination: Its Origins and Objectives*, B. Examiner, Aug. 1981, at 15, 15-19).

¹⁰ *Id.* at 379 (citing Eckler, *supra* note 9).

¹¹ *Id.* at 378.

¹² *Comprehensive Guide to Bar Admission Requirements 2010* at 17 (Erica Moeser & Claire Huisman, eds. 2010). Louisiana, Washington and Puerto Rico have not adopted the MBE.

¹³ Jarvis, *supra* note 1, at 380 (citing Eckler, *supra* note 9).

¹⁴ *Id.* at 384.

¹⁵ *Comprehensive Guide*, *supra* note 12, at 21.

¹⁶ Jane Smith, *Testing, Testing*, B. Examiner, Nov. 1998, at 24, 24.

¹⁷ *Id.*

¹⁸ *Comprehensive Guide*, *supra* note 12, at 21.

The last uniform test produced by the NCBE was the Multistate Performance Test (MPT), which was introduced in 1997.¹⁹ This portion of the bar exam grew out of a report by the ABA Task Force on Law Schools and the Profession in the early 1990s (the “MacCrate Report”).²⁰ This report called for a greater concentration on skills training for law students and “recommended that bar exams be modified to include the evaluation of fundamental lawyering skills.”²¹ The MPT is designed to test basic lawyering skills by “requiring the applicant to complete a task that a beginning lawyer should be able to carry out. The materials simulate materials a lawyer would use in practice to complete a legal task.”²² States “have embraced the MPT as a way of fully examining competence by testing the MacCrate skills.”²³ As of 2010, 34 states and territories are using the MPT in their bar examinations.²⁴

As one can readily tell from the history of the written bar exam, there has been steady progress toward a uniform bar exam. Given that nearly all states and territories use the MBE and the MPRE, and most utilize some portion of other NCBE uniform examinations, we are essentially using a uniform bar examination in many states and territories today.²⁵

Uniform Bar Exam: What It Means

The idea for a uniform bar exam has been in discussion for most of the past decade. In August 2002, 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.”²⁶ Also in 2002, representatives from the ABA, the Association of American Law Schools, NCBE, and the Conference of Chief Justices formed a working group on

¹⁹ Andrea A. Curcio, *A Better Bar: Why and How the Existing Bar Exam Should Change*, 81 Neb. L. Rev. 363, 378 (2002).

²⁰ Marcia Kuechenmeister, *Admission to the Bar: We've Come a Long Way*, B. Examiner, Feb. 1999, at 25, 30-31.

²¹ *Id.* at 31.

²² *Id.*

²³ Kristin Booth Glen, *Thinking Out of the Bar Exam Box: A Proposal to “MacCrate” Entry to the Profession*, 23 Pace L. Rev. 343, 412 (2003).

²⁴ Comprehensive Guide, *supra* note 12, at 21.

²⁵ Frederic White, *A Uniform Bar Examination: An Idea Whose Time Has Come*, B. Examiner, Feb. 2009, at 6, 6-7.

²⁶ Rebecca S. Thiem, *The Uniform Bar Exam: Change We Can Believe In*, B. Examiner, Feb. 2009, at 12, 13.

“Legal Education and Bar Admission.”²⁷ At the working group’s 2004 conference, members expressed frustration over the wide variation in passage rates of bar examinations and with the bar exam in general.²⁸ In response the Bar Admissions Committee of the ABA Section of Legal Education and Admissions created a subcommittee to consider the use of a uniform bar exam. Shortly after, the Bar Admissions Committee endorsed the uniform bar exam.²⁹ Throughout this time, the NCBE has been working through special committees to develop such an exam.³⁰

The NCBE has established the parameters of how this exam would work, though these parameters are, of course, subject to change based on how the initial uniform bar exam is received. The test would consist of a single exam administered at the same time in all states and territories that adopt it, much like the MBE.³¹ Cut-off scores for passage may vary based on individual state and territory standards, but each portion of the test would have the same weight and the MEE and MPT would be scaled to the MBE.³² States and territories would retain control over grading the essay portions, though grading will be based on uniform criteria established by the NCBE.³³ Jurisdictions will retain control over who may sit for tests, character and fitness determinations, ADA decisions, and educational requirements.³⁴ Scores would be transferable to any state that has adopted the uniform exam.

At this point, two states (Missouri and North Dakota) have signed on to administer the uniform exam in February 2011.³⁵ As many as 30 other states are reportedly considering adopting the uniform test.³⁶

States which desire to ensure that candidates have knowledge of local law can meet this need in various ways. For instance, states can still utilize a local exam and integrate it into the

²⁷ *Id.*

²⁸ *Id.* at 13-14.

²⁹ *Id.* at 14.

³⁰ *Id.*

³¹ Erica Moeser, *President’s Page*, B. Examiner, Feb. 2008, at 4, 4-5; Susan M. Case, Ph.D., *Coming Together: The UBE*, B. Examiner, Aug. 2009, at 28, 33.

³² Case, *supra* note 31, at 33.

³³ *Id.*

³⁴ *Id.*

³⁵ Press Release, Nat’l Conference of Bar Examiners (June 2010), *available at* <http://www.ncbex.org/single-news-item/article/49/27/>.

³⁶ Tiffany M. Williams, *Examining the Feasibility of a National Uniform Bar Exam*, Litig. News, Jan. 28, 2010.

uniform exam – either through extra time during the two days in which the uniform exam is administered or through a third day of testing.³⁷ States could also ensure a basic level of competency through “bridge the gap” CLE programs, which many states offer anyway. The reality is, though, that most states are not testing local law to any considerable degree on current bar examinations, and candidates can pass most bar examinations by studying a core set of subjects, paying little to no attention to local variation in the law.

The benefits of a uniform exam are numerous. First, such an exam would better reflect the reality that firms and practices have become multi-jurisdictional and global. Tests of legal competency should therefore emphasize cross-jurisdictional topics.³⁸ Furthermore, lawyers, like all professionals, are increasingly mobile, changing firms and locations more than ever.³⁹ A uniform exam would make it easier for lawyers to gain admission in multiple jurisdictions by being able to transfer scores from one to the other. Given the state of the legal job market, this need is particularly acute today. Law school graduates without jobs cannot know where their practices will ultimately land. This can force them to take multiple exams, adding thousands of dollars to their already-considerable debt load.⁴⁰ A uniform exam would offer some relief to this problem.

Moving toward a uniform bar exam would also align the legal field with other professions, including medicine, which utilize a uniform exam for board licensure.⁴¹ The common reaction to this statement is that medicine should be uniform. After all, a pancreas is a pancreas, whether it is in Missouri or New York. In reality, though, state medical board license examinations varied considerably to reflect the different diseases and medical conditions that afflict different regions and ethnic populations. Lyme Disease, for instance, may be common in Connecticut, but it is virtually nonexistent in Montana. Nevertheless, in the late 1980s, the National Board of Medical Examiners went through the same process that the NCBE is going through now and worked to establish a uniform exam. This exam ensured competency of

³⁷ Diane F. Bosse, *The Uniform Bar Exam: Adding Local Color*, B. Examiner, Feb. 2009, at 22, 24; Hon. Gerald W. VandeWalle, *Life Without a Local Bar Exam*, B. Examiner, Feb. 2009, at 7, 9;

³⁸ White, *supra* note 25, at 6.

³⁹ Hon. Rebecca White Berch, *The Case for the Uniform Bar Exam*, B. Examiner, Feb. 2009, at 9, 10; Mary Kay Kane, *A Uniform Bar Exam: One Academic's Perspective*, B. Examiner, Feb. 2009, at 19, 20.

⁴⁰ There are expenses not only in registering for exams, but also in preparing for them. Popular courses such as BARBRI can run in the thousands of dollars.

⁴¹ Accountants also use a uniform exam for certification. Leigh Jones, *Uniform Bar Exam Drawing Closer to Reality*, LAW.COM, Oct. 12, 2009, at <http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202434472731>.

medical professionals while at the same time easing the expense for state and territorial medical boards of administering separate exams across the country.⁴²

A uniform bar exam would also level the playing field and would reduce the wide disparities that currently exist in bar exam passage rates. The ultimate goal of bar exams is to protect the public by ensuring minimum levels of competency in the legal profession. The current regime fails to do so in the sense that no consumer can truly know what it means for a lawyer to have “passed the bar.” Passing a bar exam in one state is completely different than doing so in another, and no consumer could reasonably be able to decipher what test scores mean or how they compare from one lawyer to the next. A uniform exam would provide some level of transparency and consistency across the legal profession.⁴³

Finally, a uniform exam would relieve state boards of bar examiners of the tremendous burden of creating a test twice a year. Most states lack the resources to retain professional test writers. This can result in exam questions that are frequently unreliable tests of legal competency.⁴⁴ Using the expertise of the NCBE would result in a better quality test for most state bar examiners, as the NCBE has the resources to prescreen and heavily review and edit its tests, using a staff of law professors and professional test writers.

Responding To The Critics

The most common criticism of the uniform exam is that it does not allow states to test knowledge of local law. This criticism, however, is both incorrect and misguided.

A uniform examination would not prohibit state bar examiners from either testing or otherwise ensuring competency with respect to local law. Bar examiners could design tests of local law as an adjunct to the uniform exam. This would not detract from the benefits from a uniform exam noted above, as it would be far easier for a test-taker to study specific aspects of a state’s law than to study general variations in dozens of areas. State bars could also ensure competency through bridge-the-gap CLE programs required for candidates for admission to the bar. These are already mandated in many states.⁴⁵

⁴² Susan M. Case, Ph.D., *A Uniform Licensure Examination: It Can Be Done*, B. Examiner, Feb. 2009, at 30, 31-32.

⁴³ Susan M. Case, Ph.D., *A Uniform Bar Examination: What’s In It For Me?*, B. Examiner, Feb. 2010, at 50, 52.

⁴⁴ Society of American Law Teachers, *SALT Raises Questions For States Considering Adoption of a Uniform Exam* (Jan 2010), at 1, available at <http://www.saltlaw.org/userfiles/file/1-19-10SALTuniformbarexamfinal.pdf>.

⁴⁵ Georgia, for instance, requires that newly admitted members complete a “Transition Into Law Practice Program.” See 2004-2010 State Bar of Georgia Handbook Rule 8-194(b).

Moreover, the reality is that the current exam does not test local law in most jurisdictions, and for good reason. First, the purpose of a bar exam is to test legal reasoning skills to ensure that candidates for admission can “think like lawyers.” Rote memorization of rules is hardly a reliable test of such skills. Indeed, any lawyer would face both Rule 11 sanctions and malpractice suits if he or she relied solely on memory in drafting legal documents or formulating legal arguments. Second, the law is increasingly uniform throughout the states and territories. Whether through uniform laws or through the adoption of principles in the Restatements, laws do not vary considerably from one state to the next. This is not surprising, given that most states and territories (Louisiana being the most notable exception) derive their general legal principles from the same English Common Law source. Where laws do vary, it is typically in specialized areas or through minor nuances, none of which are or should be rigorously tested in an exam of basic competency.

Several jurisdictions rely on all three of the multistate components of the bar exam, in addition to the MPRE. For these jurisdictions, the uniform bar exam is a logical next step. For many other jurisdictions, although state boards of bar examiners are still drafting essay questions, the topics are largely the same as those that appear on the MEE. They involve the same general areas of law with little to no local nuances.⁴⁶ A uniform exam would simply reduce the substantial duplication of effort that is occurring throughout the country, freeing state resources to focus on other areas of importance in bar admissions – including character and fitness examinations and mandatory CLE programs.

Critics often point to certain areas that do, indeed, vary considerably from one state or territory to the next, such as probate, trusts and estates and family law. Although these areas of law vary more than most from one state or territory to the next, there are commonalities, such as through the Uniform Probate Code. Moreover, one could seriously question the validity of an examination that focused on specialties of the law. Most lawyers are not going to be family lawyers, criminal lawyers, corporate lawyers, patent prosecutors, etc. because the law has become specialized. A test of minimum competency should not be testing special areas of the law that vary from state to state.

ABA’s Historic Support Of Efforts To Unify Admission Standards

A uniform bar exam would be consistent with several ABA policies. For instance, the ABA, along with the NCBE and the Association of American Law Schools, has adopted a Code of Recommended Standards for Bar Examiners. The latest version of this code was adopted by the House of Delegates in August 1987. This code includes several provisions that tend to support a uniform exam. The code provides:

18. Purpose of Examination. 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

⁴⁶ White, *supra* note 25, at 6-7.

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.

19. Subjects of Examination. *In selection of subjects for bar examination questions, the emphasis should be upon the basic and fundamental subjects that are regularly taught in law schools.* However, subjects of substantial local importance may be included. Reasonable notice of the subject matter to be covered by the examination should be made available to the law schools and the applicants.

20. Questions and Format. The bar examination may include multiple-choice questions, such as those on the Multistate Bar Examination, and should include essay questions. *Questions should not be based on unusual or unique local case or statutory law, except in subjects with respect to which local variations are highly significant and applicants are informed that answers should be based upon local law.* An essay question should not be repeated except after a substantial lapse of time. Questions should not be labeled as to subject matter and should not be so worded as to be deceptive or misleading. Sufficient time should be allowed to permit the applicant to make a careful analysis of the questions and to prepare well-reasoned answers to essay questions.

21. Preparation of Questions. The bar examining authority may use the services of its members or staff or other qualified persons, including out-of-state law teachers, to prepare bar examination questions and it may also use the services of the National Conference of Bar Examiners. Before an essay question is accepted for use, every point of law in the question should be thoroughly briefed and the question should be analyzed and approved by the members of the bar examining authority.

Code of Recommended Standards for Bar Examiners §§ 18-21 (emphasis added). These standards are consistent with, if not supportive of, a uniform exam to test general subject matter taught in law school primarily for the purpose of testing legal reasoning and communication skills, not for the purpose of testing knowledge of specific local laws.

In 1972, the ABA endorsed a uniform system of admission to federal courts.

In 1994, the ABA adopted as policy the recommendations from a report of the Task Force on Law Schools and the Profession. Among other recommendations, the task force urged

“licensing authorities to consider modifying bar examinations which do not give appropriate weight to the acquisition of lawyering skills and professional values.” A uniform bar exam would appropriately weigh the acquisition of lawyering skills over rote memorization of local law.

Finally, the ABA has adopted policy encouraging diversity within the profession. In 2006, the ABA House of Delegates adopted a resolution concerning minorities in the pipeline to the profession. Among other policies within the resolution, it urged state and territorial bar examiners to address significant problems facing minorities within the pipeline to the profession. Certainly, erecting a barrier in the form of duplicative and expensive tests for each state and territory is just the type of significant problem that should be addressed.

Summary

The uniform bar exam is an idea whose time has come. Such an exam would better reflect the multijurisdictional practice of law today while at the same time ensuring a level of competency for all lawyers throughout the United States. Such an exam would greatly assist law school graduates facing tremendous challenges finding employment while at the same time reducing inefficiency and expense by eliminating the duplication of efforts among state bar examiners. Finally, because most states are already, in essence, administering a uniform bar exam, formally doing so is the obvious next logical step.

Respectfully submitted,

Ross A. Feldmann, Esq.
ABA YLD District Representative, District 1

**ABA YLD RECOMMENDATION
GENERAL INFORMATION FORM**

Submitting Entity:

Submitted By: Ross Feldmann
ABA YLD District Representative, District 1

1. Summary of Recommendations:

The ABA supports governing bodies of state and territorial bar examinations adopting a uniform bar exam.

2. Date of Approval by Submitting Entity:

3. Has this or a similar recommendation been submitted to the Assembly or ABA previously?

To my knowledge, no. [ETHAN – CAN THIS BE VERIFIED?]

4. Are there any Division or ABA policies that are relevant to this recommendation and, if so, would they be affected by its adoption?

In 1959, the ABA adopted a Code of Recommended Standards for Bar Examiners. In its current form, as amended in 1987, the code is consistent with, if not supportive of, a uniform bar exam. In 1972, the ABA adopted a policy recommending a uniform system of admission to federal courts. In 1994, the ABA adopted recommendations from a report of the Task Force on Law Schools and the Profession. Among other recommendations, the task force urged “licensing authorities to considering modifying bar examinations which do not give appropriate weight to the acquisition of lawyering skills and professional values.” A uniform bar exam would be consistent with this goal. Finally, in 2006, the ABA adopted a resolution concerning minorities in the pipeline to the profession. This resolution urged state and territorial bar examiners to address significant problems facing minorities within the pipeline to the profession. A uniform bar exam would be consistent with this goal.

None of the above policies, however, would be directly affected by this resolution.

5. Does this recommendation require immediate action at the next Assembly? If so, why?

Yes. Moving toward a uniform bar exam would greatly assist those recent law school graduates affected by the downturn in the economy. It would lower the costs of entry into the profession, particularly for those who, because of the lack of employment, may need

to gain admission into multiple jurisdictions. It is therefore important for the ABA YLD Assembly to take up this issue as soon as possible.

6. Status of Legislation (if applicable):

N/A.

7. Cost to the Association:

None.

8. Disclosure of Conflict of Interest (if applicable):

None.

9. Referrals:

10. Contact Person (Prior to the meeting):

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