

# Your Voice: Stakeholder Thoughts About the Bar Exam

PHASE 1 REPORT OF THE TESTING TASK FORCE



**TESTING TASK FORCE**

National Conference of Bar Examiners

## Testing Task Force Phase 1 Listening Sessions Executive Summary

August 2019

### Introduction

The National Conference of Bar Examiners' (NCBE's) Testing Task Force (TTF) is undertaking a comprehensive, future-focused study to ensure that the bar examination continues to test the knowledge, skills, and abilities required for competent entry-level legal practice in a changing legal profession. The collaborative study involves input from stakeholders at multiple phases and considers the content, format, timing, and delivery method for NCBE's current tests, which make up all or part of the bar examination in most U.S. jurisdictions: the Multistate Bar Examination (MBE), the Multistate Essay Examination (MEE), and the Multistate Performance Test (MPT). The study also includes the Multistate Professional Responsibility Examination (MPRE), which is administered by NCBE and required for admission in most U.S. jurisdictions.

This Executive Summary provides a synthesis of the stakeholder listening sessions conducted during Phase 1 of the study between November 2018 and June 2019. The purpose of these sessions was to solicit input from various stakeholder groups about characteristics and considerations for the next generation of the bar examination. The sessions were facilitated by ACS Ventures LLC (ACS), an independent psychometric consulting firm. Summaries of the stakeholder input from the sessions are appended to this Executive Summary.

### Participants

Most of the listening sessions were conducted in-person in conjunction with scheduled meetings or conferences of stakeholder groups. In addition, virtual sessions using Zoom, an online meeting platform, were held for two stakeholder groups. Multiple sessions were offered in each case to maximize opportunities for stakeholders to provide input. Comments were also received by email.

The stakeholders represented included bar administrators, bar examiners, and justices; law school deans and doctrinal, clinical, and academic support faculty; and lawyer members of the American Bar Association (ABA). The meetings or conferences at which in-person sessions were conducted and the virtual sessions are listed in the following table.

Event/Stakeholder Group	Location	Date
Council of Bar Admission Administrators Fall Meeting	Denver, CO	November 2018
Association of American Law Schools Annual Meeting	New Orleans, LA	January 2019
UBE Jurisdictions Forum	San Antonio, TX	January 2019
ABA Midyear Meeting	Las Vegas, NV	January 2019
LSAC/NCBE Legal Educators Conference	Albuquerque, NM	February 2019
NCBE Annual Bar Admissions Conference	San Francisco, CA	May 2019
ABA Diversity and Inclusion Center and Pipeline Council	Virtual	May 2019
Association of Academic Support Educators Conference	Seattle, WA	May 2019
ABA Deans Workshop	Denver, CO	June 2019
ABA Young Lawyers Division	Virtual	June 2019

It is estimated that a total of more than 400 stakeholders participated. An exact count of participants is not available because at some events the listening sessions were offered as part of the conference or meeting agenda and participants were not required to register or sign in to attend a session.

## Method

The purpose of the listening sessions was to *listen* to stakeholders' concerns, thoughts, and ideas related to the bar exam of the future. Members of the TTF or NCBE staff gave a welcome and introduction describing the TTF's research plan and then stayed in the sessions as observers. To avoid influencing or affecting what stakeholders said, the NCBE/TTF observers did not share their opinions or offer corrections during the sessions when, in a few instances, stakeholder comments reflected misperceptions or misinformation about the current bar exam. Such comments may be included in the individual summaries of the sessions, which are appended to this Executive Summary. These comments were appreciated as they served to reinforce the need for NCBE to strengthen communications with stakeholders and continue working to increase assessment literacy.

Following the welcome and introduction, ACS facilitators explained that the participants would be asked to provide input on the content, format, timing, and delivery method of the bar exam and the MPRE. Participants were invited to candidly provide their opinions and were informed that no comments would be attributable to specific participants in any written reports or materials.

ACS provided participants with the context for the research study by explaining that the purpose of the bar examination is to inform licensure decisions. Specifically, that the bar exam is designed and intended to measure the knowledge, skills, and abilities that newly licensed lawyers (NLLs) need for competent entry-level practice.

The questions listed below served as the guiding framework for the listening sessions.

- What aspects of the current bar exam and MPRE do you think should be kept? Why?
- What aspects of the current bar exam and MPRE do you think should be dropped or modified? Why?
- What do you think the next generation of the bar exam and MPRE should be?
- What cautions do you want to share regarding any potential changes to the bar exam and MPRE?
- What else would you like to discuss about the bar exam and MPRE?

Because each listening session included different stakeholders, the discussions reflected the interests of each respective group. This means, for example, that some groups focused more on content while others focused more on format or timing. The diversity of stakeholders and perspectives provided ample opportunities for rich discussion about each of the major topics.

## Key Points

In this section we highlight some of the key points that emerged from participants' input across all listening sessions. It is important to note that the purpose of the Phase 1 activities was not to draw conclusions about what the bar examination of the future should or will be. Rather, the sessions were intended to serve as a starting point by identifying possible options for redesign and to gather input on where greater emphasis might be placed. With this in mind, the key points set out in this Executive Summary should not be viewed as signaling any decisions regarding future changes, but simply as the main ideas voiced with some degree of

frequency by stakeholders; the appended session summaries provide greater detail and additional comments that emerged from each. The TTF will continue to consult with stakeholders during Phase 3 to build upon the valuable input received during Phase 1.

Very few, if any, opinions were universally shared by stakeholders. In fact, some suggestions for change were potentially in conflict with one another (e.g., add simulations or mock client interviews and do not increase costs of exams). Additionally, while the intended focus of the sessions was on changes that could be made, in most sessions there were comments supporting various aspects of the current exam program/model, but with suggested opportunities for continued evolution and improvement.

### Content

- **The MPT is a strength of the current bar exam.**
  - The MPT was widely viewed as the component that is most representative of the skills needed for NLLs at the point of entry to practice.
- **The MBE generally represents core content NLLs need to know but tests too deeply within the content.**
  - The subject areas measured on the MBE were generally viewed as representative of subjects that would be applicable to all NLLs. However, the target level for items on the MBE was viewed by many as going beyond the point of entry-level competency by testing nuanced issues and “exceptions to exceptions to rules.”
- **Lawyering skills should be emphasized over subject matter knowledge.**
  - Content that focuses on skills such as issue spotting, critical thinking, legal analysis, written and oral communication, and reasoning was considered more applicable to all NLLs. In contrast, content that focuses on subject matter knowledge was viewed by some as requiring memorization of legal rules that lawyers can look up in practice.
- **Consider adding legal research skills by providing access to an electronic database of legal resources.**
- **There are too many subjects covered on the bar examination when considering the MBE and the MEE in combination, and especially when considering the additional subjects tested in some jurisdictions that draft their own essay questions.**

### Format

- **Constructed-response items are preferred over multiple-choice items.**
  - The constructed-response format of the MEE and the MPT was viewed as more representative of what NLLs do in practice (i.e., written analysis of legal and factual issues) than the multiple-choice format of the MBE.
  - The MPRE content could be assessed using essays or MPT-like questions as opposed to, or in addition to, the current multiple-choice format.
  - Multiple-choice items are not reflective of the way law is practiced.
  - While multiple-choice items were not widely supported, many stakeholders recognized the benefits that the MBE contributes: objective scoring, reliability of scores, and scaled scores that have consistent meaning over time and across jurisdictions because the exam is equated.
- **Consider adding formats such as multimedia videos or mock clients/simulations to provide additional, and more realistic, assessment of important skills needed by NLLs.**
  - While using simulations was suggested by stakeholders, the associated downsides of greater subjectivity in grading, the potential for bias, and increased costs were also noted.

### Timing

- **Consider a “step testing” approach for the bar examination.**
  - The MBE could be the first step (test of legal knowledge) and could be completed while candidates are still in law school, when it would be more proximate to when they take core foundational courses.
  - The second step (test of legal skills), taken upon graduation, could be an enhanced MPT that is content-neutral and/or an essay exam that covers a limited range of content or for which legal resources are provided.
  - While the notion of step testing was frequently mentioned by stakeholders, the downsides of step testing were also discussed, such as taking time away from summer employment opportunities or semester coursework and potentially requiring candidates to incur associated costs of hotel, travel, and prep courses for each step. Further, some stakeholders commented that a step exam after the first year of law school would be too early in students’ training because many students would still be processing what they have learned.
- **Consider more frequent administrations of the bar examination.**
  - Additional administrations of the bar examination could permit candidates to sit for the exam when they are ready, permit failing candidates to retake the exam sooner, and reduce the time to employment after graduation, which would help graduates with student debt.
  - Reducing the time it takes to grade the constructed-response components (essays and performance tests) could also allow passing candidates to begin practicing sooner.
  - It was also acknowledged that more frequent administrations of the exam could require jurisdictions to need more staff and other resources, which could increase costs.

### Delivery and Administration

- **Mixed feedback on how the exam should be administered/delivered.**
  - There was varied support for paper-based testing, computer-based testing, or some combination of these delivery modes. However, it was mentioned that the delivery of the exam should align with law school, training, and practice environments.

### Other Comments/Topics

- **Support for the increased uniformity and score portability of the UBE.**
  - The consistency in subjects tested and the portability of scores are positive features of the Uniform Bar Exam (UBE) and should be maintained. [The UBE is composed of the MEE, MPT, and MBE and results in a score that can be transferred to other UBE jurisdictions.]
  - Increased consistency in grading of the MEE and MPT across UBE jurisdictions could be accomplished through different activities ranging from increased guidance by NCBE on grading practices to centralized grading for constructed-response/essay questions.
- **A common passing score across jurisdictions is supported, but not universally.**
  - There was support for greater consistency in passing score requirements to communicate a common standard for entry-level competency, particularly for the UBE, but support for maintaining each jurisdiction’s autonomy in setting its passing score was also voiced.
- **Consider conjunctive passing score decision rules.**
  - When discussing step testing, support was expressed for separate passing scores for different components, permitting the exam to be administered as stand-alone parts or modules that

would contribute to an overall pass/fail decision. This approach would be analogous to examinations for licensure used for Certified Public Accountants (CPA Examination) or physicians (United States Medical Licensure Examination [USMLE]).

- **Evaluate the impact of change on historically underrepresented populations of examinees.**
  - Ensuring that the bar examination is free from racial/ethnic/gender bias is a priority.
- **Consider development of a diagnostic or readiness test for delivery earlier in law school.**
  - Although not intended to be part of the bar examination, this test would provide information for law school students after the first year to help evaluate their readiness to continue. With increased costs of law school and associated student debt, this approach could provide information for students and schools to help decide whether students should continue working toward a J.D. and, if so, the areas in which they might benefit from additional instruction to prepare for the bar exam.
- **Avoid increased costs for candidates to take the exam and increased costs for jurisdictions to administer and grade the exam.**
- **NCBE's subject matter outlines on the scope of coverage of topics tested within each subject are not detailed enough. Further, the subject matter outlines should indicate the sources of law being tested.**
- **NCBE should offer more study aids as a low-cost alternative, or supplement, to commercial bar preparation programs.**
- **NCBE should share more detailed score information with law schools so they can better prepare students.**

## Next Steps

Results from Phase 1 will be used to inform discussions that are part of Phase 3 on the design of the next generation of the bar examination and the test(s) associated with it. In Phase 2 of the study, a nationwide practice analysis is being conducted to collect information about the importance and frequency of tasks performed by NLLs, as well as the importance of related knowledge, technologies, skills, abilities, and other characteristics necessary for competent entry-level practice. The TTF is committed to continuing to seek input from stakeholders during Phase 3 as it develops recommendations for the next generation of the bar examination and MPRE.

## Council of Bar Admission Administrators (CBAA) Listening Session Summary

November 2, 2018

ACS Ventures LLC (ACS), on behalf of the NCBE Testing Task Force, conducted a 75-minute listening session on November 2, 2018, with approximately 70 people from 40 jurisdictions who were attending the Council of Bar Admission Administrators (CBAA) Annual Meeting in Denver, Colorado. Participants from the following eighteen jurisdictions contributed to this discussion (jurisdictions are listed in alphabetical order and not in order of comments): Colorado, Connecticut, the District of Columbia, Florida, Idaho, Indiana, Kentucky, Maryland, Nevada, New Hampshire, New Mexico, New York, Pennsylvania, Texas, Virginia, West Virginia, Wisconsin, and Wyoming.

At the beginning of the session, Judith Gundersen, NCBE President and Testing Task Force member, gave an introduction describing the Task Force's research plan. Dr. Chad Buckendahl from ACS facilitated the session, with Dr. Andrew Wiley from ACS and Kellie Early from NCBE taking notes.

The following major themes were expressed by participants in the session.

### Content

- Like the MPT because it measures the skills that are essential aspects of practicing as a lawyer
- Keep testing legal knowledge and reasoning through the MBE and MEE
- The MEE is the least valuable component of the bar exam because it is not realistic: it requires answering short essays based upon memorization of the law, which is not consistent with how lawyers practice (e.g., with access to electronic databases like Westlaw or LexisNexis)
- Reduce topics covered on the MEE
- MPRE is either too easy or jurisdictions have cut scores set too low
- There are skills that could be tested on the bar exam (client counseling, negotiations, etc.); although such skills testing is more time consuming and expensive, it is still worth exploring
- CPAs are currently investigating the assessment of the technological capabilities of their candidates, which might be of interest for a future bar examination

### Format

- Disconcerting to observe that when some candidates score poorly on the MPT but score high on the MBE, they still pass the exam
- The MPT should carry more weight than the MEE and MBE
- The multiple-choice questions (MCQs) on the MBE are necessary for reliability and validity
- Develop components that could be scored more quickly with less subjectivity than MEEs and MPTs, such as questions (item sets) that call for short answer or multiple-choice responses
- The medical profession has processes like simulated patient interviews (e.g., Step 3 of the USMLE)
- Open-book examination; add electronic MPT with a library of legal resources so candidates perform more realistic legal research to answer the MPT items
- If knowledge, skills, and abilities (KSAs) and universal design principles can be matched, we could cut down on the number of ADA accommodations requests and level the playing field
- NCBE tells us that the MBE is not a speeded test, but since time management is a relevant skill, why not have a test of speed or efficiency

### Timing

- Use technology and computer-based delivery of the bar exam so that it could potentially be administered more than two times a year: candidates who do not pass on their first try experience difficulties because the time lag between administrations can be problematic—they are somewhat in limbo and unable to start practicing and earning a living
- Allow students to take the MBE while still in law school, leaving just the MPT and MEE to be administered after graduation from law school
- Give MBE after second year of law school so law schools can focus on skills development in last year of law school (law school is becoming more experiential) and students can begin to practice sooner

### Delivery and Administration

- Consider “remote” administration of the MBE, or the MEE and MPT, so that jurisdictions have to administer only one day of testing
- Provide more time for the MEE (currently only 30 minutes per question); provide unlimited time for the whole bar exam to eliminate ADA requests for extra time and unfair advantage
- The increased number of candidates receiving extra time as an ADA accommodation puts a strain on the test administration process
- Use technology more in the administration process and delivery of the exam
- Design bar exam that is less expensive to administer

### Other Comments/Topics

- Important to have equated scores so that cut scores have a consistent meaning across time and can be compared across jurisdictions
- Interest in the Task Force’s study generating a national model of what competency looks like so all jurisdictions might agree on a cut score
- NCBE should do a standard-setting study for the MPRE
- Important for candidates to have to prepare for the bar exam; the preparation process requires the discipline to study and pass the exam, which reflects qualities that we’re looking for in attorneys: managing time and stress
- The inconsistent passing scores implemented across states raise questions about the legitimacy of exam results; states need to agree on a definition of minimum competence
- The UBE is not uniform enough because each jurisdiction still sets its own cut score, creates its own jurisdiction-specific component, and sets its own maximum age of transferred scores it will accept; until there is more uniformity, some jurisdictions are not likely to adopt the UBE
- Against imposing too much uniformity on UBE jurisdictions; any requirements that states feel interfere with their autonomy will likely be met with significant pushback from the states
- The costs of bar prep courses are high; NCBE should develop more study aids and preparatory materials for candidates at lower costs
- The bar examination doesn’t have to do everything; law schools and the ABA could play roles in the process
- Important to be cognizant of student debt and keep costs down, but do not support diploma privilege because we need the bar exam as an independent check
- NCBE should not bow to pressure from jurisdictions in this current era of low pass rates; it is important that NCBE maintain the quality of the exam and not give in to the pressure created by the declining numbers and quality of students



- Any exam changes need to be fully communicated to all stakeholders so they understand the changes being introduced—otherwise, it could lead to misinformation being spread; board members and justices are not likely to get involved in the study, so the Task Force should keep in mind that administrators are the channel to reach the boards and courts; for some jurisdictions, the rules include a detailed description of the exam components, and the rule change process can take up to two years; if the Task Force is going to reach out directly to the boards and courts, it should let the administrators know in advance so that they can follow up
- The Task Force should involve and get input from law schools, bar associations, bar admission agencies, and the general public; use emails and newsletters, and maybe in-person meetings, to keep all stakeholders involved; administrators should receive advance warning when key reports or requests for input/participation are issued (allows administrators to encourage their boards, courts, and law schools to look for materials or block time for review as needed); law students are critical constituents and need to be fully informed about the process and possible changes that will be implemented—communication with law school students should not flow only through the law schools, because the information may be inconsistent, but directly to the students
- Change the score scale to make it clear that it is a new exam
- Board members should be given an opportunity to take sample tests or test items if any new content or new item types are introduced
- There are some concerns about the aging bar and access to justice; concerns about whether there are affordable attorneys; don't believe the access to justice problem is caused by a lack of lawyers—New York's pro bono requirement might make newly licensed lawyers do more pro bono work after they are licensed
- The Task Force should share the entire practice analysis report like NCBE did with the 2012 job analysis, which jurisdictions found very useful

## The Association of American Law Schools (AALS) 2019 Annual Meeting Listening Sessions Summary

January 3 and 4, 2019

ACS Ventures LLC (ACS), on behalf of the NCBE Testing Task Force, conducted six 90-minute listening sessions on January 3 and 4, 2019, with law school faculty and administrators who were attending the Association of American Law Schools (AALS) Annual Conference in New Orleans, Louisiana. In total, 76 individuals from more than 50 law schools, across 21 jurisdictions, participated in the six sessions. Of the 72 participants who registered in advance, 24 (34%) were academic support faculty, 17 (24%) were deans, 13 (18%) were doctrinal/podium faculty, 9 (13%) held administrative positions, 4 (6%) were clinical faculty, 3 (4%) were research/writing faculty, and 2 (3%) were other.

At the beginning of each listening session, Hulett (Bucky) Askew from the Testing Task Force or Kellie Early from NCBE gave a welcome and introduction describing the Task Force's research plan. Dr. Susan Davis-Becker and Dr. Andrew Wiley from ACS facilitated the sessions and took notes.

The following major themes were expressed by participants in the sessions.

### Content

- The MBE tests arcane, obscure, or trivial aspects of the law that new practitioners should not be expected to know and are not reflective of minimum competence; the MBE tests too deeply on subjects; memorizing black-letter law for the MBE to answer multiple-choice questions (MCQs) does not mimic real practice because lawyers would look up the law and not rely only on memory in representing clients; too much focus on memorization; the MBE tests only memorization and no skills; the MBE questions are full of red herrings and intentionally tricky
- Should test a fixed set of subjects but should be more narrowly focused on core knowledge within those subjects
- Focus more on measurement of skills; need to increase the assessment of skills over knowledge: ability to assess a situation, identify relevant information, and develop and present an argument
- Assessing research skills would be more consistent with the knowledge, skills, and abilities (KSAs) needed by newly licensed lawyers
- Exam should test three main areas: (1) research skills; (2) negotiation, counseling, and interviewing skills; and (3) professionalism
- Assess professional values and softer, non-cognitive skills
- Do not support the idea of a broad assessment of legal knowledge; entry-level lawyers are specializing rather than engaging in a broad general practice
- A general practice is common in rural areas and, in a tight job market, more new graduates go directly into solo practice, so the exam should test for general practice even though many grads specialize earlier than in the past
- Exam needs to be based upon an appropriately identified and defined set of competencies (Marjorie Shultz and Sheldon Zedeck, "Lawyering Effectiveness Factors")
- The MPT provides the highest fidelity to the practice of law and the way lawyers think and work
- Like the MPT and MEE because they measure skills

- The MEE relies too much on test takers' ability to memorize rules of law, and the writing completed on the MEE is not reflective of the type of writing required by newly licensed lawyers; include legal resources with the MEE questions

### **Format**

- The MBE MCQs are written in such a way that there is not a clearly correct answer choice
- MCQs are not realistic or an effective way to test what lawyers do; if retaining MCQs for the MBE, reduce the number of questions or increase the amount of time allowed
- Test takers should be able to select a set of content areas on which to be tested (based on their interests/professional goals); exam could be bifurcated to test different "tracks" such as civil versus criminal practice or litigation versus transactional practice
- Concerned about racial/ethnic and gender bias on the MBE/MCQs based on research, past exam content, and reports of performance gaps by test takers from historically underrepresented racial/ethnic groups
- Allow examinees to select MEE questions they want to answer based on subjects (5 out of 7)
- Fewer MEE questions
- Exam should be made up of 50% MBE questions and 50% MPT questions, with ethics issues woven into the substantive law scenarios
- Weave professional responsibility (PR) issues into MBE, MEE, and MPT to be more realistic
- MCQs are not an effective way to test PR

### **Timing**

- Why is the MPRE given separately from the bar exam and not at the same time after graduation?
- Like that the MPRE is administered separately from the bar exam so students can take it when ready
- Let students take the MBE earlier in law school (starting in the second year) like they do with the MPRE; testing all knowledge and skills at once creates unnecessary pressure; break up exam and use step testing (like medical licensing exam); let students take exam components whenever they feel ready; provide structured step testing where students have to take part of the exam after the first year of law school so law schools can intervene early with students who are struggling, or students will realize that law school is not for them and don't go further in debt
- Concerned that if part of the exam is given sooner, law schools would need to figure out what to do with students who don't pass and would need to adjust their curriculum to cover what is tested earlier
- Do not support a summative exam after law school because of student loans; administering the exam in steps would alleviate the financial pressure on students after they graduate because many are forced into unemployment when they are studying for the exam; those who have to work can't adequately prepare for a summative exam

### **Delivery and Administration**

- More time for the MBE, the MPT, and the MEE
- Allow failing examinees to retake parts of the exam instead of having to retake the whole thing and wait such a long time between administrations
- Administer the exam more frequently

- Do not favor computer-based testing (CBT) because it could make the exam more difficult: lawyers work with many documents and are accustomed to taking notes but would not be able to annotate exams that are delivered via CBT; need to consider ADA applicants if considering CBT at test centers
- Current administration model is unnecessarily burdensome and stressful for examinees (crammed into spaces that are inadequate, too noisy, too hot/cold, etc.)

### Other Comments/Topics

- The Task Force should be future focused when determining the content for the next exam, and should also review/consider the information coming from the research led by the American Bar Association (ABA) on the future of the legal profession
- The content outlines (specifications) provided by NCBE are too broad and do not adequately indicate what sources of law are being tested (e.g., should examinees answer according to the Restatement Second or Third of Torts); NCBE should be more transparent about what sources of law make up the “generally applicable principles of law” being tested on the MBE and the MEE
- NCBE should provide more information on bias in the current exam and assurances that any changes to the exam will be made in a way to alleviate these issues
- NCBE should provide more education and transparency with respect to scoring processes, especially the grading of the MEE and MPT (how graders are trained and calibrated to score the written components, how graders are monitored for consistency within and across states, how grades from the multiple sections of the exam are combined, the fairness of the current scaling/equating practices, how state-level performance on the MBE impacts the scaling of the written components)
- Concerned about the differences observed across states in terms of MBE performance and how this impacts the scaling of the written component scores
- NCBE should try to implement greater consistency in grading practices across the states, most notably on the UBE; understand that NCBE cannot force states to follow the exact same scoring practices, but NCBE should be more proactive in pushing states to be more consistent and transparent in their grading practices (there is an advantage to taking the UBE in one jurisdiction over another because of inconsistent grading practices)
- Believe that the recent decline in pass rates was directly related to the addition of Civil Procedure to the MBE and/or the increase in the number of pretest questions on the MBE
- Want NCBE to release subscores so law schools know how their students perform on the individual sections and subjects of the exam; the lack of benchmarks and robust information limits the ability of law schools to prepare students
- Concerned about the cost of the exam, especially bar prep courses; NCBE should create more study aids because NCBE has the expertise and authentic content, and NCBE’s materials are more reasonably priced than what for-profit organizations charge
- Urgent need for NCBE to do more research into issues of bias and the performance gap by test takers from historically underrepresented racial and ethnic groups
- NCBE should convince state supreme courts to collect demographic data on test takers

## NCBE UBE Forum Listening Sessions Summary

January 18, 2019

ACS Ventures LLC (ACS), on behalf of the NCBE Testing Task Force, conducted four 90-minute listening sessions on January 18, 2019, with Uniform Bar Examination (UBE) jurisdiction representatives who were attending the NCBE UBE Forum in San Antonio, Texas. In total, 36 individuals (14 bar administrators, 17 bar examiner/jurisdiction board members, and 5 justices) from 31 jurisdictions participated across the four sessions.

At the beginning of each listening session, a member of the Testing Task Force gave a welcome and introduction describing the Task Force's research plan. Dr. Susan Davis-Becker and Dr. Chad Buckendahl from ACS facilitated the sessions and took notes. Kellie Early from NCBE also took notes.

The following major themes were expressed by participants in the sessions.

### Content

- Support the current content of the UBE
- Focus on testing more skills: "information-gathering" to include research and interviewing skills
- Add a limited electronic database of legal resources (cases, statutes, regulations) to test on candidates' ability to identify relevant information and synthesize multiple sources of law
- Need direct evidence that shows the knowledge and skills tested (performance on the bar examination) to be important for minimum competency
- Like the MPT because it tests critical thinking; it provides the highest fidelity to the profession and the way lawyers think and work
- Support the MBE, but some of its content is not relevant to some jurisdictions, and it's focused too much on memorization; the MBE tests too precise or nuanced legal concepts
- Support the MEE subjects
- MEE subjects are too susceptible to state-specific variations in law

### Format

- Test professional responsibility on the MEE instead of in the MCQ format of the MPRE
- The bar exam should continue to include multiple ways in which candidates can demonstrate their knowledge and skills
- Include more MPTs
- Support the MBE multiple-choice question (MCQ) format;
- The MBE questions require layered analysis consistent with the thought process of a competent lawyer
- Consider increasing the weight of the MPT and MEE because of the skill-based/performance test nature of these assessments
- Test writing by having candidates draft memos or write summaries of legal research
- MEE questions might not be the best format for candidates to demonstrate the ability to apply the law to the facts and to communicate in writing, particularly given state-specific variations in the law

### Timing

- Assess professional responsibility as part of the bar exam
- Support a summative exam after graduation as a measure of candidates' knowledge, skills, and abilities (KSAs): the pressure created by the current exam mimics the type of environment lawyers face in practice to prepare and meet deadlines, work under pressure, and manage multiple tasks, which is comparable to preparing for multiple parts of the exam
- Do not break up administration of the exam--too challenging for jurisdictions to manage results from different testing times/occasions (e.g., tracking candidate progress), manage multiple schedules for more administrations--and question whether the MEE and MPT scaled scores could still be calculated by the current model for doing so
- Could move from February to May and July to October, but focus on ensuring that any change is beneficial to the majority of candidates and reduces grading time (hard for applicants who fail to have to wait so long to take it again); changes to the UBE should be made to decrease the scoring/reporting time and then possibly have options for students to retest earlier than six months

### Delivery and Administration

- Provide more time for the MPT to reflect how lawyers work in the real world
- Provide more time for the MEE
- Incorporate technology in administration to reduce paper handling and processing: integrating technology within the administration would not impact candidates' ability to demonstrate their knowledge and skills, as technology is part of most lawyers' daily work
- Jurisdictions like the fact that they have some control, but really encourage NCBE to clearly delineate what is similar/different across jurisdictions and the rationale for each area of control: there are some areas where requiring greater consistency would be of value (e.g., having a clock in the testing room)
- NCBE should set some policies regarding accommodations so candidates requesting accommodations have a consistent experience across jurisdictions and the meaning of the scores is consistent under the uniform model

### Other Comments /Topics

- Need more information on the weighting of the exam—how the various content areas are represented on the exam and how the weighting is determined
- Concerns over the presence (or perceived presence) of bias in the exam related to both the content (subjects tested) and the format (multiple-choice, standardized test): future versions of the UBE should address this concern—there is a need for diversity in the practice of law
- Concerns about possible differences across states in grading the MEE and MPT
- Concerns about differences in cut scores; but some jurisdictions expressed they would not have adopted the UBE if they could not continue to set their own cut score
- NCBE should provide more training and guidance on the scoring of the essays, including providing anchor papers and procedures by which states could train their graders in a consistent manner and validate their grading results against a national standard
- Concerns, and lack of understanding on the part of graders, about relative grading of the MEE and MPT (sorting of answers into different categories of performance) and regrading (review of scores where there was disagreement among graders or for candidates close to the cut score)

- With different cut scores across UBE jurisdictions, concerns that candidates “jurisdiction shop” for a lower cut score only to apply by transferred score back to their home state; NCBE should provide guidance to jurisdictions on standard setting, or even conduct a national standard setting exercise to establish a recommended cut score, which jurisdictions could decide whether to adopt or not
- NCBE should carefully consider how any changes would be accepted by the UBE jurisdictions, including how such changes may impact jurisdiction-level policies; NCBE should carefully communicate any changes in advance to respond to potential disruption to the system; need to balance local jurisdiction control with the goal of having a truly “uniform” bar exam
- Score portability is the hallmark of the UBE so caution against changes to the exam that would limit portability; equating is also very important and caution against changes to the examination that would negatively impact the ability to compare scores over time
- NCBE should share information in advance regarding the impact of any changes on the meaning of scores
- Wonder if there is any evidence to link poor performance on the exam with increased incidence of malpractice or disciplinary complaints, and whether jurisdictions with lower cut scores have more disciplinary complaints
- Support and appreciate NCBE studying the bar exam

## American Bar Association (ABA) Midyear Conference Listening Sessions Summary

January 26, 2019

ACS Ventures LLC (ACS), on behalf of the NCBE Testing Task Force, conducted three 90-minute listening sessions on January 26, 2019, with lawyers who were attending the American Bar Association (ABA) Midyear Conference in Las Vegas, Nevada. In total, 11 individuals from seven states (Florida, Idaho, Indiana, Iowa, Michigan, New Mexico, and New York) and one lawyer from the United Kingdom participated across the three sessions.

At the beginning of each listening session, Hulett (Bucky) Askew from the Testing Task Force gave a welcome and introduction describing the Task Force's research plan. Dr. Andrew Wiley from ACS facilitated the sessions, with Dr. Lori Olafson from ACS and Kellie Early from NCBE taking notes. Additionally, Andrea Sinner from the ABA Commission on the Future of Legal Education observed two of the sessions.

The following major themes were expressed by participants in the sessions.

### Content

- The bar exam, more specifically the MBE, covers content that is far more detailed than is necessary for newly licensed lawyers; the factual recall that is expected is too often focused on trivial/arcane knowledge within a given content area, rather than the true or correct knowledge that lawyers need to know in order to competently practice; the MBE content focuses on a candidate's ability to memorize extensive material and remember obscure rules; it is often difficult to determine the correct answer from the four choices
- The exam should test core knowledge that all lawyers need to know (constitutional law, evidence, civil and criminal procedure) and test only that, which would allow the MBE to be shortened and also allow the other components of the bar exam (the MPT and the MEE) to focus more on skills (e.g., client counseling, oral advocacy, management of clients)
- Test research skills and the ability to advocate for a client (especially the ability to identify innovative solutions to issues), cultural competency/the ability to understand the key contextual factors that are necessary to fully evaluate the issues for a given client, and the ability to complete a thorough legal analysis and present a compelling case on behalf of a client
- The MPT provides the highest fidelity to the practice of law
- Test writing skills because they are very important within the legal profession: the quality of writing with newly licensed lawyers is particularly problematic, and NCBE should push for more assessment of writing; the MEE does not provide such assessment (effective legal writing as opposed to simply writing); the MPT comes closer to assessing legal writing
- The MPT is more like what lawyers actually do in practice
- The number of subjects tested is problematic in some states that draft their own questions and test on additional subjects not tested in NCBE-drafted exams
- Test professional responsibility more heavily
- Test the "values of the profession" and social justice issues

### Format

- Fine with multiple-choice questions (MCQs) but should reduce the number of questions on the MBE



- Allow test takers to select from a menu of possible subjects so they are tested only on subjects related to the area of law in which they are interested in practicing
- Favor open book testing so less focus on memorization

### Timing

- Move toward a model where something akin to the current MBE is taken after the second year of law school: the exam should test fundamental/core subjects taught in the first year of law school with the timing closer to when students actually learn the materials
- Consider step testing, which would allow students to spread the cost of the exam over time so they can better handle the financial burden of the application fees, lodging, travel, etc.
- Tiered delivery of assessments like in the medical field, where the exam process begins after the second year and allows examinees to focus on more specific content when taking an exam, or the CPA exam process, which allows examinees to pass two of four sections and then come back and take only the sections they failed at a later time
- If some testing could be done earlier in law school, it might allow law schools to be more creative with students during their third year and introduce things like internships or practicums that could help foster some of the “softer” skills like communication, research, etc.

### Delivery and Administration

- Allow more time for the MPT: 90-minute time limit is shorter than the time a lawyer would spend on these types of tasks in real life
- Allow more time for the MBE or have fewer questions
- Allow examinees to retake only the part(s) of the exam they failed instead of having to retake the entire exam
- Exam is too long with 12 hours of testing over two days (shouldn't be an endurance test)

### Other Comments/Topics

- Concerns about implicit bias in exam questions due to the different cultural and socio-economic backgrounds of test takers and performance gaps between white test takers and test takers from historically underrepresented groups: for example, a question that focuses on property that “Sally” plans to will to her children is biased because many underrepresented groups do not have experience with property ownership—instead include scenarios like a person getting hurt while break dancing on the sidewalk and use more diverse names in the questions
- NCBE should conduct and publish more research on the performance gap among racial/ethnic groups
- Concern regarding the misuse of the exam as a measure of the effectiveness of law schools based upon bar passage rates when some schools are working with a greater percentage of students from traditionally underserved populations
- NCBE should be more proactive in their relationships with state supreme courts, advocating for certain activities and trying to encourage the states to move in directions that NCBE believes are most consistent with a fair and valid exam
- NCBE should release more details on student performance to law schools so they can help students better prepare for the exam
- NCBE should find ways to speed up the grading process: although states are responsible for the grading of the exams, NCBE should find ways to make the grading more efficient and get results out to examinees sooner

- Concerns about inconsistency of grading practices across jurisdictions and the lack of a common passing score; NCBE should do as much as possible to encourage adoption of a common passing score and make grading more consistent
- Support a national exam with a common cut score so there is one standard across the country for minimum competence
- There are indirect consequences of the inconsistent grading practices and the decreasing pass rates observed on the exam: if the exam is viewed as arbitrary and/or unfair, some students may elect to pursue a degree in other professions—law schools need to better educate their students about how and why the legal profession is critical for maintaining a just society and how lawyers make a difference in the world, and the bar exam should be a part of the process and reinforce content and skills that are necessary for practicing law

## Law School Admission Council (LSAC)-NCBE Conference Listening Session Summary

February 8, 2019

ACS Ventures LLC (ACS), on behalf of the NCBE Testing Task Force, conducted a 60-minute listening session on February 8, 2019, with legal educators who were attending the Best Practices in High-Stakes Testing Conference co-sponsored by NCBE and the Law School Admission Council (LSAC) in Albuquerque, New Mexico. The conference was attended by 149 legal educators from 126 law schools. The listening session was one of four breakout sessions held concurrently; attendees could choose which breakout session they wanted to attend and were not required to register for the session in advance. Therefore, there is no record of how many attendees participated in the listening session.

At the beginning of the listening session, NCBE Board of Trustees Chair and Testing Task Force member Michelle Gavagni gave a brief welcome and introduction describing the Task Force's research plan. Dr. Susan Davis-Becker from ACS facilitated the session, with Kellie Early from NCBE taking notes.

The following major themes were expressed by participants in the session.

### Content

- Like the MPT
- The exam tests too many subjects and tests too deeply (beyond basic concepts) within each subject, requiring extensive memorization that is less important than some of the skills that should be tested
- Test only federal subjects, like Constitutional Law, Evidence, Federal Civil Procedure, and Criminal Procedure, which are the core subjects/knowledge that all lawyers need to know
- Additional skills should be tested, including legal research, listening (i.e., obtaining verbal information from a client), and oral performance
- Focus more on skills and less on memorization
- Ask job-related questions to reduce stereotype threat; needs to be relevant to what new lawyers do
- For the MPT, keep only the two common formats (objective memo or a persuasive brief), avoid setting the task in areas of law not tested on the rest of the bar exam, and make it less difficult

### Format

- Explore open-book models where examinees could use reference materials to focus on their ability to apply law rather than memorize it; this could be a database of resources, reference book, etc.
- Provide open book resources only for subjects like Federal Civil Procedure, Evidence, and UCC that are rule-based, and make the exam closed book for other subjects—still require memorization of black letter law
- More competency-based measurement approaches such as portfolio assessment or standardized client simulations (like medical exams)

### Timing

- Break up the exam into different testing events, i.e., step testing: take the MBE closer in time to completion of the first or second year of law school and take other components after graduation

- Change the licensing process so the exam can be completed by the end of the second year and students can spend the third year doing skills training/externships/articling
- If the exam remains a summative exam after graduation, there should be less time between graduation and the exam administration
- Don't shorten time interval between graduation and the bar exam
- Administer an MBE-like test after the first year as a diagnostic for students to decide whether to continue in law school
- Administer the exam more frequently

### **Delivery and Administration**

- Reduce the time pressure for the MPT
- Allow more time per multiple-choice question
- Move to computer-based testing centers so examinees could test (and retest) with more flexibility
- Provide a break between the two MPT items; there's no good reason the two MPTs should be given in one 3-hour session rather than in two 90 minutes sessions
- Allow failing examinees to retake only the parts they failed; don't make them retake the entire exam

### **Other Comments/Topics**

- NCBE should provide more information on the skills and law being tested (i.e., more detail in the subject outlines and identify the source(s) for the law being tested) and host a discussion forum with legal educators to answer questions regarding what law is being tested and how the exam is graded
- NCBE should provide more study aids, including releasing more retired MBE questions
- NCBE should provide performance data to law schools so they can do a better job preparing students and figuring out what is effective and not effective bar preparation; if more cooperation, then law schools might provide SES data
- NCBE should be more transparent about the disparate impact of the bar exam on examinees from historically underrepresented groups
- Find a way to complete the grading process faster so examinees can get their results sooner

## NCBE Annual Bar Admissions Conference Listening Sessions Summary

May 3, 2019

ACS Ventures LLC (ACS), on behalf of the NCBE Testing Task Force, conducted six 75- to 90-minute listening sessions on May 3, 2019, with stakeholders (administrators, bar admissions staff, board members, justices, and conference speakers) who were attending the NCBE Annual Bar Admissions Conference in San Francisco, California. The listening sessions were held as concurrent sessions in the morning and the afternoon. Around twenty people attended each of the six sessions.

At the beginning of each listening session, a member of the Testing Task Force gave a welcome and introduction describing the Task Force's research plan. Dr. Susan Davis-Becker, Dr. Andrew Wiley, and Dr. Chad Buckendahl from ACS facilitated the sessions, with NCBE staff members Kellie Early, Danielle Moreau, and Dr. Joanne Kane taking notes.

The following major themes were expressed by participants in the sessions.

### Content

- Most of the subject areas on the MBE are reasonable because no matter what area you practice in, you need to know them, and they are the core/foundational knowledge that all law students learn in their first year, but subjects are tested too deeply or on issues that are too nuanced/obscure, which isn't minimum competence
- Administrative Law should be added; Conflicts of Law should be removed
- Remove content from the MEE that is also tested on the MBE; maybe the MEE isn't necessary; like that the MEE forces candidates to communicate in writing and to organize their thoughts
- Support increased weight or more focus on testing skills that are applicable across practice areas
- Too many subject areas across the bar exam; reducing topics is reasonable
- Retain aspects of the current exam that test logic, reasoning, analysis, and written communication; test communication in multiple forms (e.g., writing, speaking) and aligned with the right audience; test more writing and communication
- Test legal research, potentially through an open-book format (e.g., electronic database, Internet accessibility); the MPT doesn't test legal research skills because it provides a limited, closed-universe set of cases/statutes; like that the MPT tests what lawyers do--issue spotting, fact patterns, case law, etc.--and it has to be done in short time frame
- Include a technology component because the law is evolving to include more technology-based activities
- Test interviewing and negotiating skills
- Don't test interviewing skills because too subjective to grade
- There's too much content on the exam because law is becoming "hyperspecialized" and generalists only exist in rural areas; create specialty exams; create specific exams based on where people practice and what they do
- Testing for specialty areas is not appropriate at the point of entry into the profession

### Format

- MPT format is representative of what lawyers do with respect to applying skills to a given fact pattern

- Add simulations to test skills like interviewing clients or negotiating (digital and/or live actors)
- Like all three current exam formats: MCQs, short essays, performance tests
- Shouldn't be all MCQs; retain a writing component
- Reduce the length of the MBE and increase the number or weighting of the MEE and the MPT
- The MPT covers writing skills so the MEE may not be needed because same topics as MBE; more MPTs may be preferable
- Cluster content on the MBE by subjects with headers so it's clear what examinees need to focus on instead of having all the subjects mixed together across the questions
- The MBE provides value by equating/linking scores so it has to be kept—otherwise, how do you compare students over time
- The MBE could be shortened to permit additional testing time on the essay questions
- Do not like MCQ format: not at all how lawyers practice and don't see the point of MCQs;
- Change the MBE format; restructure MBE into case scenarios based on subjects, e.g., have a Torts scenario and several questions to spot issues and concepts, without going into nuances
- Add case scenarios that include technology used in practice
- Like that the MPRE is administered as a stand-alone examination as opposed to being integrated into other components of the bar exam because it could get lost among other topics if not called out separately
- Consider English-language learners in format (disadvantaged by a lot of writing)
- Look at open-book testing with resources available electronically

### Timing

- Step testing to include a readiness test that could be taken after the first year of law school (like the baby bar in California) to identify students earlier in the legal education and licensure process who may struggle
- Give the MBE after the first year so it's closer to when subjects are taught
- Spread out the exam so it's not a "got you" test in two days and is more relevant
- Keep as a summative exam
- Allow candidates to sit for the exam prior to graduation, which some jurisdictions have piloted with positive results but based on limited sample sizes
- Move to step testing as a strategy to reduce time pressures on candidates to prepare for a comprehensive two-day examination
- Do not administer part of the licensure exam after the first year of law school because it is too soon in their training, but getting to the end of law school with a heavy debt load and no chance of passing the bar is not desirable either
- Comfortable with the current two-day examination in February and July, but a third administration may be valuable given the time lag between sitting for the exam and receiving scores
- Don't have a third administration because it would just accommodate people who can't prepare for February or July, and it would be too much work for jurisdictions to add an administration

### Delivery and Administration

- Move to computer-based testing (CBT) so exam could be administered more frequently and give candidates more flexibility in the timing of when they sit

- Consider increase in requests for ADA accommodations that is making it more challenging to process the volume (securing space, proctoring, etc.): if the exam could be given at a testing center, that would be helpful
- Due to an increase in ADA accommodations requests, NCBE should provide additional guidance about appropriate/acceptable accommodations for the bar exam
- Allow additional time for the written portions of the examination to permit greater depth of analysis
- Allow failing candidates to retake only the parts of the exam they failed as opposed to the full examination, but require them to pass all the parts separately (i.e., no compensatory scoring)

### Other Comments/Topics

- Provide more study aids to make it more equitable for candidates who are not able to afford the prep courses or to take time off from work to prepare
- Provide more MBEs, MEEs, and MPTs to law schools so students can prepare for BE during school
- Keep cost in mind when making changes
- There is a disconnect between what is being taught in law schools and the practice of law; need greater communication/collaboration among the stakeholders in the process (e.g., bar examiners, legal faculty, accrediting bodies) to help students be successful and protect the public
- The bar exam of the future should reduce the need for candidates to rely on the bar prep industry
- Include an experiential component in the eligibility process like residency in medicine or internship in architecture; think outside of the box for future exam and look at what other professions are doing
- Consider the impact of any changes on all groups of candidates (e.g., gender, race, culture, socio-economic background, etc.); the bar exam has to be fair to everyone
- Evaluate the relationship between passage of the bar exam and competent, ethical practice
- Remove “minimum” from the standard for competence for licensure and toughen the ethical testing
- Be mindful of comments from all stakeholder groups, even if ideas don’t resonate immediately
- The broader system includes legal education (law schools), the ABA for program accreditation, and continuing education: maybe there’s too much focus on just the bar exam
- Reduce the time between when exam is administered and when grades come out
- Increase consistency in scoring across jurisdictions; NCBE should assume responsibility for scoring the MEE and MPT; use natural language processing/AI for scoring the MEE and MPT
- NCBE should set a common passing score, or a range within which jurisdictions would have some flexibility, especially for the UBE; would help with “jurisdiction shopping” that candidates may be engaging in because of the different passing scores (doesn’t make sense that an UBE score means failing in one jurisdiction but passing in another)
- Part of the appeal of the UBE for jurisdictions is the ability to retain local autonomy over setting their passing score and character and fitness standards; what happens to the UBE if BE is split (step testing): risks to consider with changes
- NCBE should develop a diagnostic test that can be administered in law schools as a good indicator of how students would perform on the bar exam
- Don’t take pass rates into account when creating the exam of future: should still be challenging and keep out those not fit to practice—need to protect the public; the exam is a process (submit paperwork, pay fees, study, etc.) and requires rigor: this is expected of lawyers and should not be changed

## American Bar Association (ABA) Pipeline Council and Diversity and Inclusion Center Listening Sessions Summary

May 7, 2019

ACS Ventures LLC (ACS), on behalf of the NCBE Testing Task Force, conducted two 90-minute virtual listening sessions on May 7, 2019, with stakeholders from the Pipeline Council and Diversity and Inclusion Center of the American Bar Association (ABA). The listening sessions were facilitated through Zoom, an online meeting platform. There were seven participants across the two sessions.

At the beginning of each listening session, Kellie Early from NCBE gave a welcome and introduction describing the Task Force's research plan. Dr. Chad Buckendahl from ACS facilitated the sessions, with Dr. Andrew Wiley and Dr. Susan Davis-Becker from ACS taking notes. Danielle Moreau from NCBE and Safaya Fawzi from the ABA Diversity and Inclusion Center participated as observers.

The following major themes were expressed by participants in the sessions.

### Content

- MPT is representative of what practicing lawyers do
- Good to have base knowledge of law, but it's more important to know how to apply it; less reliance on memorization; rules need to be understood and questions should mimic practice more; in practice, need enough training to identify issues and problem-solve, interacting with a potential client to identify the relevant areas of law and determine if you're competent to represent them—only then do you dive into legal research
- Test more processes such as problem-solving and legal research
- Test legal research and include an electronic database
- Measure interpersonal skills through client interviews
- Testing skills on the bar exam might be too subjective—better to assess them in law school
- Test fewer subjects but the subjects tested in the MBE seem about right: traditional first year courses
- Don't test subjects as deeply—seem to test on minute issues
- Test only on basics: analysis, writing, reading comprehension, and issue spotting

### Format

- Include simulated activities like client interviews
- Multiple-choice questions (MCQs) are not the best way to test attorney skills—performance tests (PTs) may not be either but are closer to what newly licensed lawyers do than MCQs are
- Studies show disparate impact of MBE on students of color, so have more MPTs
- All MPTs, no MCQs
- Don't move to all MCQs
- Increase the weight on the MPT and reduce the weight for the MBE
- Open-book testing with an electronic database of legal resources
- Grading for the written part of the exam is subjective but not sure how you could move away from including writing on the bar, especially with PTs



### **Timing**

- Move the MBE to just after the first year as a readiness test to help students determine whether to proceed or not with the time and expense of law school
- Move the MBE after the first year to test material closer to when it is given in school, but keep it as part of the licensing process, not as a diagnostic test
- Break up the exam so not administered all at once so prep wouldn't be so strenuous
- Comfortable with the timing of the licensure examination occurring after law school and twice a year

### **Delivery and Administration**

- Do not rush students; allow more time for the bar exam
- Consider ADA requests, because there's been a huge increase in the number of students requesting accommodations

### **Other Comments/Topics**

- Consider approaches that would help to control or reduce costs in response to equity concerns for candidates who are not able to afford some of the bar prep courses (materials, tutoring to prepare for the exam) and the bar exam (registration, hotel, travel)
- Include an experiential requirement in the eligibility process
- Concerned about the subjectivity in the grading process for essay and/or MPT questions; research using artificial intelligence (AI) to reduce subjectivity in grading
- Encourage the jurisdictions to adopt a common passing standard/score
- Ensure that any changes take into account the potential impact on disadvantaged groups
- Jurisdictions that aren't adopting the UBE are stifling the mobility of recent grads
- The MPRE study guides are very helpful and similar to the test itself
- Add a post-exam training component
- Need better communication between law schools and bar examiners

## Association of Academic Support Educators (AASE) Listening Sessions Summary

May 21–22, 2019

ACS Ventures LLC (ACS), on behalf of the NCBE Testing Task Force, conducted three 75- to 90-minute listening sessions on May 21–22, 2019, with academic support educators who were attending the Association of Academic Support Educators (AASE) conference at Seattle University School of Law in Seattle, Washington. A total of 89 people registered for a listening session, and 45 attended.

At the beginning of each listening session, Kellie Early from NCBE gave a welcome and introduction describing the Task Force’s research plan. Dr. Chad Buckendahl from ACS facilitated the sessions, with Danielle Moreau from NCBE taking notes.

The following major themes were expressed by participants in the sessions.

### Content

- The MPT should be retained as it is the most representative of what newly licensed lawyers (NLLs) do in practice; the MPT tests the critical skills needed in practice
- The MBE is a test of critical reading skills but there is a common problem with candidates reading quickly rather than carefully and picking an answer before they have read critically
- The MPT is a test of critical reading and writing skills; 90-minute time limit forces candidates to tighten analysis and be strategic in their answers
- Like that the MBE has been using shorter questions with direct options of “yes, because” and “no, because”
- Test more skills, such as problem-solving and legal research
- Legal research skills should be tested (asking what sources to consult, how to frame search, etc.)
- Too many subjects tested across the MEE and the MBE
- Content on the MBE is tested at a level of minutiae that is not consistent with practice and forces candidates to memorize it just for the exam
- Remove Secured Transactions and Conflicts of Law
- Reduce or eliminate the overlap of content on the MBE and the MEE
- Like that the MBE is objectively scored and that there is uniformity in subjects tested by all states—bar prep is more difficult when states test on subjects that are not tested by NCBE

### Format

- Increase the weight for the MPT and reduce weight for the MBE
- For the MPRE, use a format other than multiple-choice questions (MCQs), e.g., essay question, short answer; if the MPRE wasn’t MCQ, students would have to prepare more for it; too many pass the MPRE without studying for it; when students can pass the MPRE without studying, they think they are going to do well on the MBE; essay format would require more preparation for the MPRE
- The MPRE being multiple-choice gives candidates early exposure to format for the MBE
- Mixed views on idea of adding professional responsibility (PR) to the bar exam; if PR were tested on the bar exam, examinees could potentially pass the exam even though they failed the PR questions;

adding PR would add to the cognitive demands and prep time for the bar exam; like that candidates can decide when they are ready to take the MPRE

- Concerns that students don't take the MPRE seriously enough and PR should be more highly emphasized as part of the licensure exam process
- Integrate ethics issues into the MPT to make it more realistic and make candidates think about ethical issues in practice/substantive context
- Permit candidates to select which subjects they want to answer from the pool of subjects
- Administer an oral component because people process information differently; listening is an important skill and we could test it by delivering fact scenarios orally with candidates either providing answer orally or in writing

### Timing

- Administer the MBE after the first year of law school when it would be closer to when candidates would have taken the classes; noted that not all law schools have the same course requirements in the first year; would favor administering the MBE earlier if the post-graduation component of the bar exam were a skills test and not a test of substantive knowledge so students wouldn't have to relearn the subjects again for the post-graduation exam
- Allowing candidates to take the MBE after the first or second year could detract from coursework or employment opportunities; concerns about expense for hotel and prep course, but those could be addressed if the MBE were administered in more locations than the bar exam currently is, and it would spread cost over time rather than incurring all costs post-graduation
- Administer the MBE after the first year and have the ABA Standards address consequences for students who don't pass in terms of continuing to be enrolled in J.D. program
- Survey law students to ask what they think about taking the MBE earlier in law school
- The MBE should be administered as a stand-alone exam so that candidates could take it when they are ready and get results sooner (this might require the MBE to be administered at computer centers)
- Favor allowing candidates take the MBE separately (like the MPRE) even if it meant having separate passing score requirements for the MBE and the written components (the MEE and the MPT)
- A two-day exam is a test of endurance and not of minimum competence; practice of law can be a test of endurance and ability to prepare for a big case or deal can be stressful and all-consuming, so bar exam is good preparation for that

### Delivery and Administration

- Candidates need more time to respond to questions in all components of current exam
- Time limits are artificial; lawyers spend much more time in practice writing and editing documents than is allowed on the MPT or the MEE; should test time management and focus, not endurance
- Change the exam schedule so the two MPTs are not presented sequentially in one three-hour session
- Accommodations should be considered in any potential changes that are made; equity issue that some students can't afford to seek evaluation and diagnosis of learning disabilities or cope with documentation requirements to request accommodations; remove testing time constraints for all candidates to level the playing field
- Paper delivery of the examination questions preferred by some due to the difficulty in reading and taking notes when questions are delivered on computer; reading online isn't good for critical reading skills; concerns that older students would be disadvantaged against younger cohort if exam were

administered on computer; shorten exam or break it up in a way to shorten amount of screen time if exam is moved to computer-based delivery

- Bar prep is online, and technology is moving everything in that direction; if students are doing everything else online but have to take bar exam on paper, there's a technology gap
- Offer exam in both modes (i.e., paper-based and computer-based) so students can choose
- The MPT should not be delivered on computer because candidates need to be able to work with the question materials in paper format
- It would be awesome to deliver the MPT online with search options, highlighting, annotating, etc.
- Allow partial pass so failing candidates would not have to retake the full examination; endorse partial pass even if it required each component of the exam to have a separate passing score (i.e., no compensatory scoring)

### **Other Comments/Topics**

- Concerns about variability in the grading process across jurisdictions for essay and/or MPT questions; NCBE should exercise greater control of grading of the MEE and the MPT
- Support for a common passing score for the bar exam across jurisdictions
- Request for dissemination of more data by NCBE; want to receive MBE raw scores and subscores
- Reduce or eliminate unscored pretest questions on the MBE to provide more time for candidates to respond to the scored questions
- Law professors should not be writing the questions for the bar exam because they don't have much practice experience relevant to minimum competence
- NCBE's subject matter outlines for the exam content are not detailed enough, making it difficult for examinees to know where to focus their preparation or how much detail is expected/covered
- NCBE should provide more study aids and preparation materials (e.g., released questions)
- Be mindful not to increase costs for candidates
- NCBE should consider the ABA Standards requiring certain formative and summative assessments and experiential credits and coordinate more with the ABA

## American Bar Association (ABA) Deans Workshop Listening Session Summary

June 13, 2019

ACS Ventures LLC (ACS), on behalf of the NCBE Testing Task Force, conducted a 90-minute listening session on June 13, 2019, with deans of American Bar Association (ABA)-accredited law schools who were attending the Deans Workshop held by the ABA Section of Legal Education and Admissions to the Bar in Denver, Colorado. The listening session was held at the Westin Hotel, the site of the Deans Workshop. A total of 20 people registered for the listening session, and 10 attended.

At the beginning of the listening session, Hulett (Bucky) Askew from the Testing Task Force gave a welcome and introduction describing the Task Force's research plan. Dr. Chad Buckendahl from ACS facilitated the session, with Dr. Andrew Wiley from ACS and Kellie Early from NCBE taking notes.

The following major themes were expressed by participants in the session.

### Content

- MPT is most representative of the skills needed for practice
- Beef up the MPT to be a more integrated test of skills
- MPT is closer to what lawyers do, but it can emphasize form over substance, or possibly the instructions cause candidates to put too much emphasis on the format of the assigned task
- Too many subjects tested across components of the bar exam
- Some value in testing a quantum of legal knowledge, but need to show that we're adding something of value if we add subjects
- Lawyers eventually get to depth of knowledge in areas in which they practice, but it is not reasonable to test such depth of knowledge on the bar exam
- Memorizing subjects doesn't get at core skills lawyers should have; we should think in terms of skills, not subjects
- There should be an agreed-upon core of knowledge for the profession, and the bar exam plays a role in that; for example, testing Constitutional Law says something about the importance of the rule of law and the role of lawyers in our society; could argue that we should test International Law because we are increasingly living in a global society
- Core knowledge likely includes Civil Procedure, legal research, issue spotting, diagnosis of client problems and ability to explain possible resolutions, legal writing, lawyers' role as public citizens and defenders of the rule of law, factual analysis and ability to master a large body of factual information, how to gather facts and develop a factual record, and ability to acquire deep knowledge about a subject or area of law when necessary
- Explicit consideration of legal writing should be included
- Testing specialized knowledge of any area of law is becoming less important due to technology and the Internet; the ability to learn about and research areas of the law is more important

### Format

- Increase weight of the MPT relative to the MBE to emphasize skills over memorization of legal doctrine

- Incorporate the MPRE into the bar exam and make it more realistic by using mock clients or scenarios where candidates must identify issues or next steps; what's missing from the MPRE is how to interact with clients ethically
- Students are memorizing rules for the MPRE; integrate ethical issues within MPT questions to be more representative of the ethical dilemmas faced in practice
- Technology should allow us to use mock clients and simulations to more closely reflect practice settings; use videos instead of written fact because listening is an important skill
- Multiple-choice questions (MCQs) are biased because minorities do not do score as high as whites on standardized tests; studies show that when a test is relevant to the purpose for which it is required, stereotype threat is reduced, and MCQs are not relevant to practice
- Minimize essays and increase MPTs; lawyers need strong writing skills, but essay answers are not the type of writing that lawyers do
- If the purpose of essay exams is to test depth of knowledge and written communication of analysis, then reduce the number of subjects tested in the essays to 2-3 core subjects
- Essays do require use of legal rhetoric, issue spotting, and showing analysis
- Consider what might be expected in a clinical or capstone experience and develop exam that requires candidates to pull it all together; use a single longer fact pattern and build whole exam around it to cause candidates to work through client's problem

### **Timing**

- A two-day exam might not be in the public interest at a time when pass rates are so low; suggest developing a diagnostic or readiness test to be administered after the first year of law school to provide guidance on whether students should continue
- Give candidates the option of taking the MBE earlier in law school (e.g., after the first year) and closer to when candidates would have taken courses on subjects tested; if MBE is administered earlier in law school, it should be part of the licensure process and not just a diagnostic test—law schools could decide if students could continue law school if they don't pass the MBE
- Shift the exam cycle to administer in April or May so students have to "pull it all together" in last semester; risk that the last semester of law school would become largely test preparation activities, but if bar exam was more MPT-like, students wouldn't have to spend so much time cramming to prepare for it
- Allow candidates take the MBE separately from other components, even if this would mean having separate passing scores for the MBE and the constructed response components of the bar exam
- Consider something like the CPA exam where candidates could take subject matter components and test whenever they feel ready

### **Delivery and Administration**

- Not enough time allotted for any components of the bar exam; candidates need more time to respond to the MEE and MPT so that the writing is more like in practice of law

### **Other Comments/Topics**

- Support for the importance of reliability and portability of scores and pass/fail decisions
- Support for more uniformity in content through the UBE, more consistency in how jurisdictions grade, and a common passing score in all jurisdictions

- Consider circumstances of more vulnerable/at-risk populations of candidates who have no resources or support to help them prepare for the exam; exam is now seen as an intentional barrier to keep those students from becoming lawyers
- Consider the role/relationship that NCBE has with the test prep industry; prep companies are always adding to their materials and never removing any so the amount of material has become overwhelming for candidates; NCBE could put out “real” prep materials; NCBE should provide more study aids; students should be able to prepare for the exam without having to take costly bar prep programs
- Changes will likely have to be incremental because of the conservative nature of boards of bar examiners

## American Bar Association (ABA) Young Lawyers Division Listening Session Summary

June 27, 2019

ACS Ventures LLC (ACS), on behalf of the NCBE Testing Task Force, conducted a 90-minute virtual listening session on June 27, 2019, with the Young Lawyers Division of the American Bar Association (ABA). The listening session was facilitated through Zoom, an online meeting platform. There were five participants in the session.

At the beginning of the listening session, Kellie Early from NCBE gave a welcome and introduction describing the Task Force's research plan. Dr. Chad Buckendahl from ACS facilitated the session, with Dr. Susan Davis-Becker from ACS taking notes. Danielle Moreau from NCBE participated as an observer.

The following major themes were expressed by participants in the session.

### Content

- The bar exam is not testing what is necessary to be minimally competent as a lawyer: no one practices in all subjects
- Revamp so it is reflective of how lawyers practice; the MPT is closest to what attorneys do
- The exam focuses too much on memorization of the law and not enough on how law is actually practiced, which involves researching and applying the law to a fact pattern
- The MPT and MEE are more representative of the skills needed for practice
- Some subjects on the MBE are outside of the basics that all lawyers need to know
- Equitable remedies should be added
- All lawyers should be subjected to the same expectations for content and skills regardless of practice area; the content areas (e.g., Torts) currently tested are highly relevant
- MPRE content is perceived as being removed from what newly licensed lawyers experience in practice
- MPRE content should be integrated within the subject areas tested in the bar exam
- MBE is good

### Format

- Test professional responsibility (PR) in essays, not multiple-choice questions (MCQs), to allow candidates to demonstrate how they would reason through a situation (think like a lawyer) that has ethical implications; but testing PR in essays would make scoring more subjective
- The MPRE should be kept as a separate exam, adding PR to the bar exam would increase pressure of preparing for another subject
- Should emphasize the MPT more, but the MBE provides for a baseline of common knowledge; MCQs may not be reflective of practice but are an objective measure of basic competency

### Timing

- Administer the exam up to four times per year to provide more opportunity for candidates to get licensed and into the profession; particularly helpful to candidates who do not pass the exam the first time and have to wait to take the exam again while not working but facing student loans



- Current format of testing all knowledge and skills in two days creates a high-pressure situation; keep it as is because it is a rite of passage and should be required for all lawyers—practicing law is a high-pressure career
- Break up the bar exam into multiple components (i.e., step testing) where candidates can or must take part of the exam during school; taking part of the bar during school (e.g., the MBE) would reduce the stress of the July exam after graduation
- Law students are generally working during the summer, and studying for a high-stakes exam (with less education under your belt) would be more stressful than taking it all in July after graduation; taking an exam after the first year of school (like the California baby bar) would not help students as many of them are still processing the first year and the learning has not solidified—students would be better prepared after their second year to demonstrate their knowledge and skills on an exam
- Only give it once or twice a year to emphasize the importance of the bar exam and so that it is taken seriously: it's a huge incentive to pass the first time, and it sets the burden on the people who would like to practice—it's a serious profession with serious consequences
- If there were more chances to take the bar, administrations might be spread out which would make it easier on state bars to organize the administration (securing locations, less people taking it at once), but the July exam would likely always be the most crowded with May graduates who need some time to study but then would want to sit for the exam right away

### **Delivery and Administration**

- [No specific comments on this topic by this group]

### **Other Comments/Topics**

- Support more uniformity through the UBE, especially in scoring/grading, and adopt a common passing score to encourage consistency
- Need quicker grading/turnaround of scores as well as transparency around the score release; the current grading model makes candidates wait for months (potentially without being able to work or practice in the profession) and then there may be late fees to register for the next bar exam if they do not pass (this varies by jurisdiction)
- If any major changes are made to the exam, it will take a significant amount of time to determine the impact (i.e., are you still assessing in a way to ensure minimum competence); there is the risk of creating a generation of lawyers who do not possess the same knowledge and skills as the prior generation
- Careful consideration must be given to the timing of any changes, including when they are announced and when they will be implemented—specifically, candidates need to be aware regarding how they will be tested so that they can adequately prepare in law school
- Be sure to consider the candidates sitting for the exam and what their experience will be like—they are stakeholders
- Consider whether experience (e.g., internships, clerkships, apprenticeship) should also be part of the licensure process—either as a condition of eligibility or as a post-graduation requirement like residency in the medical profession
- Make sure to consider underrepresented populations: there should always be sufficient access for everyone

- Consider allowing students to waive part (e.g., Connecticut, New Jersey) or all (e.g., Wisconsin) of the exam if certain grades are achieved
- Focus more on structural changes to the exam rather than content