

***SALT RAISES QUESTIONS FOR STATES CONSIDERING ADOPTION
OF A UNIFORM BAR EXAM***

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The Society of American Law Teachers (SALT) offers the following analysis to help states identify and discuss some of the many questions engendered by the proposed Uniform Bar Exam. This analysis focuses on issues that implicate SALT's mission of enhancing the quality of legal education and promoting diversity within the profession. Other concerns, such as how to deal with state specific law, have been thoroughly addressed by others¹ and are not discussed here.

I. Test Validity and Reliability

A. Increasing Validity and Reliability of Essay Questions

All questions on a high stakes test like the bar exam should be both valid and reliable. (A valid test question measures the skills and knowledge it is intended to measure. A reliable test question is one that produces scores that vary according to students' performance and abilities rather than scores that are due significantly to chance.) Although many states use the Multi-State Essay Examination questions drafted by the National Council of Bar Examiners, many states' essay questions are drafted by practitioners untrained in the design of test questions or grading rubrics. Many states simply do not have the resources necessary to properly train these practitioners to ensure that they develop a wide range of valid and reliable test questions twice a year. Thus, despite good faith efforts to draft essay questions based upon state law, it is highly likely that at least some essay questions on various state bar exams are not valid and reliable measures of the skills sought to be tested.

A desire to ensure validity and reliability may be one reason to consider allowing the National Council of Bar Examiners to draft bar exam essay questions via a Uniform Bar Exam: professionals trained in drafting questions and developing reliable grading rubrics may be better suited to drafting essay questions and grading rubrics that are valid and reliable measures of the skills sought to be tested by this question format. In a high-stakes exam such as the bar exam, reliability and validity should be key considerations and states should discuss whether one way to better ensure this is to use questions drafted by the NCBE, either for the Multi-State Essay Examination or a Uniform Bar Exam.

¹ See THE BAR EXAMINER, Feb. 2009 (containing multiple essays that discuss various solutions to the desire to test state specific law).

B. Increasing Validity and Reliability of the Overall Exam

Although adoption of a Uniform Bar Exam may increase the validity and reliability of individual states' essay questions, SALT believes states should consider the bigger underlying question: whether the current bar exam format itself is a valid measure of who will be a competent new lawyer. SALT has long argued that the currently constructed paper and pencil bar exam is not a valid measure of a new lawyer's competence.² Even if one believes that the current bar exam validly and reliably measures legal knowledge, reasoning and analysis,³ those skills are only one small segment of skills new lawyers need.⁴ Moreover, measuring those skills via multiple choice questions, timed essay questions,⁵ or even time-pressured "performance" questions⁶ is not a good way to determine whether new licensees possess those skills in the way that lawyers actually use them. Thus, if states really want to ensure that they develop a valid and reliable way to license minimally competent new lawyers, SALT encourages states to explore pilot projects that seek to develop a licensing process that better measures whether new licensees truly will be minimally competent lawyers. Below, SALT lists a few ideas states may want to consider while debating whether to adopt a Uniform Bar Exam.

1. Bar Exam Credit for Well-Supervised Practical Experience

One option for states that want to ensure new licensees can do more than answer a multiple choice question or timed short essay question is to consider giving some credit, perhaps via additional points on a bar exam score, to licensees who perform satisfactorily in well-supervised clinic and externship experiences. Scholarly literature already provides some criteria that help define well-supervised clinical and externship learning experience.⁷ Building upon those criteria, bar examiners, practitioners, judges and law professors could develop guidelines that

² *Society of American Law Teachers Statement on the Bar Exam*, 52 J.LEG.ED. 446 (2002).

³ See e.g., Charles T. Beeching Jr., *A Bar Examiner's Perspective on Minimum Competence*, THE BAR EXAMINER, Nov. 1996 at 6 (noting that the bar exam cannot test a wide range of skills but it can realistically test knowledge of the law and application of legal reasoning); Suzanne Darrow-Kleinhaus, *A Response to the Society of American Law Teachers Statement on the Bar Exam*, 54 J. of Legal Ed. 442 (2004) (arguing that the bar exam does a good job testing reading comprehension, general legal knowledge, issue identification and legal analytical and writing ability).

⁴ Marjorie M. Schultz and Sheldon Zedeck, *Final Report: Identification and Development and Validation of Predictor for Successful Lawyering*, at 26-27, available at http://lawschool.about.com/gi/o.htm?zi=1/XJ&zTi=1&sdn=lawschool&cdn=education&tm=17&gps=504_340_127_6_576&f=00&su=p897.6.336.ip_&tt=2&bt=1&bts=1&zu=http%3A/www.law.berkeley.edu/files/LSACREPORTfinal-12.pdf (delineating a list of 26 lawyering effectiveness factors based upon extensive empirical research)

⁵ Professor William Henderson's extensive empirical study found that test-taking speed was an independent variable for both the LSAT and law school exams. See William D. Henderson, *The LSAT, Law School Exams and Meritocracy: The Surprising and Undertheorized Role of Test-Taking Speed*, 82 TEX. L. REV. 975 (2004). It is likely that this finding is equally applicable to timed bar exam questions. Whether test-taking speed is a valid variable in determining lawyer competency is a debatable question.

⁶ Questions on the Multi-State Performance Test require test-takers to quickly read and assimilate law and facts and produce a written product such as a legal memo, brief, client letter or pleadings. Again, measuring these skills via a time pressured test question may not be a valid measure of whether potential licensees possess the skills in the ways lawyers use them.

⁷ ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP 188-205(2007)

ensure that successful completion of an experiential learning course added sufficiently significant additional skills and professionalism dimensions to warrant adding some designated number of points to applicants' final bar exam scores. As discussed in more detail in Section II, below, this option may be particularly important if states also consider raising their passing cut-off score to some nationally agreed upon score.

2. New Hampshire "Client Ready" Model

States may also want to consider exploring the alternative licensing option currently in place in New Hampshire. Franklin Pierce Law School, in conjunction with the New Hampshire Supreme Court, New Hampshire State Bar and New Hampshire Board of Bar Examiners has developed an alternative bar licensing program that focuses upon building and assessing the ten fundamental skills and four fundamental values described in the *MacCrate Report*. Because students who successfully complete this program repeatedly demonstrate to New Hampshire Bar Examiners those core competencies required to practice law, they are deemed to have passed a variant of the New Hampshire Bar Exam, and are not required to take the traditional two day State Bar Examination in order to be admitted to the New Hampshire Bar.⁸

The various stakeholders in New Hampshire are willing to share their materials with other states and help others implement a similar model. Although the initial alternative licensing program began as a small pilot, it has expanded each year and currently is experimenting with a computer-adapted model that will allow many more students to participate. SALT is co-sponsoring a conference in April, 2010 for states interested in finding out more about how to develop and implement a similar alternative licensing model. The conference, which will be held at Franklin Pierce Law School, will provide participants with an overview of the New Hampshire program and will include sessions about how students are assessed and how the assessment process satisfies the New Hampshire licensing criteria. Conference participants will see students' work product and various assessments used to ensure student competency. State Supreme Court Justices, State Bar Examiners and law school deans will also have the opportunity to meet with each other and with their New Hampshire counterparts to discuss issues and concerns unique to these various stakeholders. For more information about this conference, contact Professor Tim Floyd at: Floyd_tw@mercer.edu.

3. Using Technology To Test Additional Skills

Computer simulations are part of the testing methodology in the medical profession and those models could be adapted to the law licensing process.⁹ States also should consider encouraging law schools and the National Council of Bar Examiners to develop pilot programs that explore

⁸ For more information about this program, see John Burwell Garvey & Anne F. Zinkin, *Making Law Students Client-Ready, A New Model in Legal Education*, 1 DUKE F. FOR L. & SOC. CHANGE 101 (2009) (explaining how the Daniel Webster Honors Program uses authentic assessments to help students become client-ready).

⁹ G. F. Dillon et al., *Simulations in the United States Medical Licensing Examination (USMLE)*, Qual Saf Health Care 2004;13:141-145 (discussing the use of computer based case simulations in the medical licensing exam).

ways to use technology to examine licensees' ability to perform legal research, factual investigation, and test their knowledge of a range of lawyering skills such as interviewing, counseling and negotiation. Technology could be used to develop simulations and even perhaps to measure potential licensees' ability to perform legal and factual research. States interested in better assessing a wide range of new lawyering skills should consider working with the NCBE to develop pilot projects to test the use of technology in the lawyer licensing process.

4. Other Options

The above options are only a starting point aimed at generating meaningful discussion and consideration of better ways to ensure that newly licensed lawyers are, in fact, minimally competent. Other options have been discussed in various journals and law review articles¹⁰ and states may consider exploring those, as well. Confining discussion to whether to adopt a Uniform Bar Exam without consideration of fundamental issues, such as the validity of the existing exam and ways to better measure new lawyers' competence, would be an unfortunate missed opportunity. Thus, SALT urges that any discussion about a Uniform Bar Exam also include conversations about ways to develop and implement licensing criteria that measure a wider range of skills and abilities to ensure that states have a truly valid measure of who will actually be a minimally competent new lawyer.

II. Portability of Scores and Potential Impact on Diversity

A Uniform Bar Exam raises the possibility of a uniform pass rate that would allow those taking the exam to transport their scores to other jurisdictions administering the same exam. In fact, one of the strongest arguments in favor of a Uniform Bar Exam is the transportability of bar exam scores.¹¹ Allowing applicants to be licensed in multiple jurisdictions after passing one bar exam certainly makes sense on a theoretical level since the skills that make one a competent lawyer are not state specific. It also makes sense on a practical level. In a tough economic market, it allows lawyers to look for jobs beyond their state's borders without worrying about having to spend the time and money involved in taking another bar exam.

Initial discussions of a Uniform Bar Exam have raised questions about whether a uniform pass rate score is viable and desirable. This issue merits close scrutiny because it has important implications for the profession. Currently, states have different methods of weighting the multiple choice versus essay questions, and have different passing rate cut-off scores. If there is a move to adopt a uniform passing cut-off score, states must be extremely cautious because

¹⁰ See Kristin Booth Glen, *Thinking Out of the Bar Exam Box: A Proposal to "MacCrate" Entry Into the Profession*, 23 PACE L. REV. 343 (2003); see also Andrea A. Curcio, *A Better Bar: Why and How the Existing Bar Exam Should Change*, 81 NEB. L. REV. 363 (2002); Steven Barkin, *Should Legal Research Be Included on the Bar Exam? An Exploration of the Question*, 99 Law Library Journal 403 (2007).

¹¹ The February 2009 edition of *The Bar Examiner* contains numerous essays discussing bar exam score portability issues. THE BAR EXAMINER., FEB. 2009.

raising cut-off scores has a potential serious negative impact on diversifying the profession without any underlying empirical justification for raising bar pass cut-off scores.¹²

Currently, no data supports the proposition that those scoring at or near the current pass rate cut-off are less competent lawyers than their higher scoring counterparts. On the other hand, data indicates that within existing cut-off score parameters there is a differential in bar exam pass rates between potential licensees of color and their white counterparts,¹³ although some of that differential is eliminated when the bar exam is re-taken.¹⁴ Studies indicate that the pass rate differential likely will increase if the bar exam cut-off score increases¹⁵ and likely will also increase the number of minority bar applicants who are forced to re-take the bar exam. Thus, raising the minimum score for bar exam passage may have a significant negative impact on the diversity of a state's bench and bar without any data justifying the need to raise the cut-off score. States need to thoroughly research and discuss this issue before even thinking about raising their cut-off score in order to participate in a Uniform Bar Exam that allows transportable scores but requires a higher passing score than is currently required by that state. This is especially true given the lack of data correlating bar pass scores to actual lawyer competence.¹⁶

One possible solution to this dilemma may rest with the idea proposed in Section I.B.1., above: states could consider adding bar exam passage points to those potential licensees who have successfully completed a well-supervised clinical or externship program. This would both ensure that the state's lawyers had a wider range of skills than is currently tested, and may counter the negative effects of requiring a higher pass rate score.

SALT urges states to discuss the option outlined above, as well as other potential options, to ensure that the adoption of a Uniform Bar Exam does not have a deleterious effect on the profession's diversity.

III. Impact on Law School Pedagogy and Assessment

In addition to the issues discussed above, states should realize that the current bar exam drives a host of decisions in law schools affecting admissions, curriculum, pedagogy and assessment; in

¹² See William C. Kidder, *The Bar Examination and the Dream Deferred: A Critical Analysis of the MBE, Social Closure and Racial and Ethnic Stratification*, 29 LAW & SOC. INQUIRY 547 (2004) (arguing that the psychometric research sponsored by the National Council of Bar Examiners minimizes and obscures the impact of raising bar exam pass rate cut scores on people of color); see also Deborah J. Merritt, et al., *A Social Science Critique of Recent Increases to Passing Scores on the Bar Exam*, 69 U. CIN. L. REV. 929 (2000) (discussing the flaws in the social science analysis of those arguing that higher passing cut scores improve the quality of new lawyers and discussing the implications of the higher cut scores on diversifying the profession).

¹³ Linda F. Wightman, LAW SCH. ADMISSIONS COUNCIL, LSAC NATIONAL LONGITUDINAL BAR PASSAGE STUDY 27 (1998).

¹⁴ *Id.* at 32.

¹⁵ See Merritt et al, *supra* note 13 at 965-66-; see also Kidder, *supra* note 13 at 550.

¹⁶ Some scholars argue that increasing bar pass rate scores may actually lead to less competent lawyers because students may feel compelled to take courses that will help them pass the bar exam rather than taking courses such as alternative dispute resolution that provide them with critical, but untested, lawyering skills. Merritt, et al, *supra* note 13 at 931.

effect, pressure about the bar performance often forces students and schools to make decisions not for sound educational reasons but to protect bar passage rates. Many schools' curriculum is geared toward courses students should take to pass the state's bar exam and many students forego courses that will help them develop a jurisprudential perspective or a wider range of lawyering skills in order to help ensure bar passage. Additionally, the most frequent law school assessment method in doctrinal courses focuses solely on students' grasp of legal doctrine and the ability to apply that doctrine, usually via a make-or-break timed test consisting of multiple choice or essay questions or some combination thereof. Thus, most law school assessments do not attempt to measure whether students can integrate doctrine, skills and values in ways that replicate how those issues arise in law practices. The current law school assessment methods predominate, in part, because they can be justified as necessary to "prepare students to take the bar exam". If states want to encourage law schools to engage in the work necessary to better integrate doctrine with skills and professionalism,¹⁷ states should discuss whether adopting a Uniform Bar Exam furthers that goal or more deeply entrenches the status quo.

Summary

There are many positive aspects to a Uniform Bar Exam, including its ability to ensure essay test questions are reliable, and the portability of bar exam scores so that lawyers can more easily move from state to state. There also are many questions that this proposal raises. Amongst those are the following. Is the adoption of such an exam only an interim measure toward developing a better licensing exam that tests a wider range of skills and qualities new lawyers need? Will this new exam have a negative impact on the diversity of the profession? Are there ways to ensure that this does not happen? Will the adoption of a Uniform Bar Exam as presently constructed justify law schools' decisions to retain the status quo rather than to engage in the development of innovative law school pedagogy, assessment and curricular changes that enhance the integration of doctrine, skills and professionalism? These are questions SALT urges states to consider if and when they discuss the potential adoption of a Uniform Bar Exam.

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Since 1973, the Society of American Law Teachers (SALT) has been an independent organization of law teachers, deans, law librarians, and legal education professionals working to make the profession more inclusive, to enhance the quality of legal education, and to extend the power of legal representation to under-served individuals and communities. Browse our website at www.saltlaw.org.

¹⁷ Recent seminal pedagogical literature argues that law schools need to better integrate legal knowledge, skills and professionalism. See Stuckey et al, *supra* note 7; WILLIAM M. SULLIVAN ET AL, EDUCATING LAWYERS, PREPARATION FOR THE PROFESSION OF LAW (2007).