

SOCIETY OF AMERICAN LAW TEACHERS

STATEMENT ON THE BAR EXAM

July, 2002

Bar examinations, as currently administered,

- fail to adequately measure professional competence to practice law,
- negatively impact law school curricular development and the law school admission process,
- and are a significant barrier to achieving a more diverse bench and bar.

Recent efforts in some states to raise the requisite passing scores only serve to aggravate these problems. In response to these and other concerns outlined below, the Society of American Law Teachers (SALT), the largest membership organization of law professors in the nation, strongly urges states to consider alternative ways to measure professional competence and license new attorneys.

The Current Bar Exam Inaccurately Measures Professional Competence to Practice Law

Although the history of the bar examination extends back to the mid-1800s, when law school attendance was not a prerequisite for a law license, the present bar examination format – a 200 question, multiple choice, multi-state exam (the MBE), combined with a set of essay questions on state law – dates only from the early 1970s. In creating the MBE, the National Conference of Bar Examiners was responding to states' desires to find a time- and cost-efficient alternative to administering their own comprehensive essay exams. More recently, some states have adopted a "written performance" test in addition to the MBE, state essay exam questions, and the multiple choice ethics exam (MPRE).¹

The stated purpose of the bar examination is to ensure that new lawyers are minimally competent to practice law. There are many reasons why the current bar examination fails to achieve its purpose. First, despite the inclusion of multiple sections, the exam only attempts to measure a few of the many skills new lawyers must possess in order to competently practice law. A blue ribbon commission of lawyers, judges and academics issued a report (The MacCrate Report) detailing the skills and values that competent lawyers should possess.² The bar examination does not even attempt to screen for many of the skills identified in the MacCrate Report, including key skills such as the ability to perform legal research, conduct factual investigations, communicate orally, counsel clients and negotiate. Nor does it attempt to measure other qualities important to the profession, such as empathy for the client, problem-solving skills, the bar applicant's commitment to public service work or the likelihood that the applicant will work with underserved communities.

Second, the examination overemphasizes the importance of memorizing legal doctrine. Memorizing legal rules in order to pass the bar examination does not guarantee that what is memorized will actually be retained for any length of time after the exam. Memorization of legal principles so that one can answer multiple-choice questions or spot issues on an essay exam does not mean that one actually understands the law, its intricacies and nuances. In fact, practicing lawyers who rely upon their memory of the law, rather than upon legal research, may be subjected to judicial sanctions and malpractice claims. Yet, a large part of successfully taking the bar examination depends upon the bar applicant's ability to memorize hundreds of legal rules. The ability to memorize the law in order to pass the bar examination is simply not a measure of one's ability to practice law.

Third, the exam assesses bar applicants' ability to apply the law in artificial ways that are unrelated to the practice of law. In most states, up to one half of the total bar examination score is based upon the Multi-State Bar Exam (MBE). This six-hour, 200-question, multiple-choice test covers the majority/minority rules in six complex, substantive legal areas. In answering the questions, the examinee must choose the "most correct", or in some cases, the "least wrong" of four answers. No practicing lawyer is faced with the need to apply a memorized legal principle to a set of facts she has never seen before and then choose, in 1.8 minutes, the "most correct" of four given answers. No lawyer can competently make decisions without more context for the case and without the opportunity to ask more questions or to clarify issues. Yet, if a bar applicant cannot successfully take multiple-choice tests, the applicant may never have the opportunity to practice law.

¹ In almost every state, law school graduates must pass a bar exam before they will be given a license to practice. Most states have at least three different sections to their bar exam: the MPRE, a multiple-choice ethics exam; the MBE, a 200-question, multiple-choice exam covering six substantive areas of the law; and essay questions, which are based upon either state law or majority/minority rules. Some states also have a fourth section, a written "performance" test. Although there is no national bar exam, each state's exam is so similar in terms of the method of testing and the kind of subjects tested that studies and commentaries usually refer to the "bar exam" as if it were a unitary test. In this Statement, we follow that format.

² American Bar Association Section of Legal Education and Admissions to the Bar, *Legal Education and Professional Development - An Educational Continuum: (Report of the Task Force on Law Schools and the Profession: Narrowing the Gap)* (July 1992).

Fourth, a substantial portion of the examination does not test the law of the administering state. The MBE questions are based upon the majority/minority rules of law that may, or may not, be the same as the law in the administering state. In addition, many states have now adopted the Multi-State Essay Exam (MEE), which is also based upon majority rules rather than the administering state's law. In all states, up to one-half of the examination is not based upon the administering state's own laws; in some states, the entire examination requires no knowledge of the particular administering state's governing law. Thus, even if one believes that memorizing the law equates to "knowing" the law, the existing examination does not test how well the applicant knows the law which he or she will actually use in practice.

Fifth, the examination covers a very wide range of substantive areas, thus failing to recognize that today's practitioners are, by and large, specialists not generalists. Although some basic knowledge of a broad range of fields is important, the current examination does not test for basic knowledge, but instead often tests relatively obscure rules of law. In the modern legal world, it is virtually impossible, even for the most diligent, skilled and experienced lawyer, to truly remain current in more than one or two related fields. The examination thus fails to test for competence as it is really reflected in today's market - a market in which lawyers need expertise in their specific area of practice, rather than a broad but shallow knowledge of a wide range of legal rules.

Sixth, most law students take a ten-week bar review course, and some take an additional course on essay writing or on how to take multiple-choice questions, in order to pass the bar examination. These review courses, which may cost as much as \$3,000, drill bar applicants on the black letter law and "tricks" to answering bar examination questions. They are not geared toward fostering an in-depth understanding of important legal concepts, nor do they focus on synthesizing rules from various substantive areas. The content of the review courses, and the necessity of taking the courses in order to pass, belie the argument that the bar examination is geared toward testing professional competence or aptitude in any meaningful way.

The Current Bar Exam has a Negative Impact on Law School Curricular Development and the Law School Admission Process

In addition to failing to measure professional competence in any meaningful way, the bar examination has a pernicious effect on both law school curricular development and on the law school admission process. From the moment they enter law school through graduation, law students realize that unless they pass the bar examination, their substantial financial commitment and their years of hard work will be wasted. As a result, many students concentrate on learning primarily what they need to know in order to pass the bar examination, which often translates into high student attendance in courses that address the substantive law tested on the bar examination and reduced participation in clinical courses – the courses designed to introduce students to the skills required for the actual practice of law – and in courses such as environmental law, poverty law, civil rights litigation, law and economics, and race and the law. As a result, the students fail to fully engage in a law school experience that will give them both the practical skills and the jurisprudential perspective that will make them better lawyers.

In addition to being a driving force in the law school curriculum, the bar examination inevitably

influences law school admission decisions. Schools want to admit students who will pass the bar examination. A high bar pass rate bodes well for alumni contributions, is perceived to play an important role in *U.S. News and World Report* rankings, brings a sense of satisfaction to the faculty, eases students' fears about their own ability to pass the examination, and makes it easier to attract new students. Since there is some correlation between LSAT scores and bar examination passing scores, law school admission officers may be overly reliant on LSAT scores in admitting students. As Dean Kristin Glen notes, "If you take students who know how to take a test almost exactly like the bar examination and know how to take it successfully, as the LSAC study tells us is the case with the LSAT, you don't actually have to do much with those students in law school to assure their success on the bar examination."³ Thus, many schools may over-emphasize the value of the LSAT, at the expense of admitting students who will bring a broader perspective into the student body, into law school classes, and ultimately, into practice.⁴

Finally, the bar examination has a negative impact on how law schools assess students. Like the bar examination, most law school grades are based upon a one-time "make it or break it" examination that focuses on only a very few of the many skills that competent lawyers need. If the bar examination assessed a broader range of skills, or assessed skills in various ways, law schools might also adjust their assessment modalities so that they were not all geared toward rewarding just one type of skill or intelligence. In sum, from the admission process, through curriculum choices and law school assessment modalities, the bar examination has a far-reaching negative pedagogical effect.

The Current Bar Exam Negatively Affects States' Ability to Create a More Diverse Bench and Bar

In the 1980s and 1990s, many states and federal circuits established commissions on racial and gender equality. After extensive study, many of these commissions concluded that people of color were under-represented in the legal profession on both a state and national level, that there is a perception of racial and ethnic bias in the court system, and that there is evidence that the perception is based upon reality.⁵ To begin to achieve a more racially and ethnically balanced justice system, many commissions recommended that states take affirmative steps to increase minority representation in the bench and bar.

There are many reasons for states to want a more diverse bench and bar. A diverse bench and bar improves public perceptions about the justice system. It also positively impacts the availability of legal services for underserved segments of our population. Additionally, a more diverse bar is likely to be a more publicly-minded bar. A University of Michigan study found that among graduates who enter private practice, "minority alumni tend to do more pro bono work, sit on the boards of more community organizations, and do more mentoring of younger attorneys than white alumni do."⁶

The failure of the current bench and bar to be as diverse as it could be is partly attributable to the existing bar examination. The current examination disproportionately delays entry of people of color into, or excludes them from, the practice of law. A six-year study commissioned by the Law School Admission Council (LSAC) indicates that first-time bar examination pass rates are 92% for whites, 61% for African Americans, 66% for Native Americans, 75% for Latino/Latina and 81% for Asian Americans.⁷ Although the disparity between pass rates narrowed when applicants re-took the bar examination, a substantial number of applicants who failed on the first attempt did not re-take the exam.⁸ And for those who

did re-take the examination, the psychological and financial cost of doing so was extremely high.

³ Kristin Booth Glen, *Thinking Out of the Bar Exam Box: A Challenge and Proposal for Change* (forthcoming)(draft at p. 10).

⁴ SALT believes that law schools' main goal should not be to admit and train students who will pass the bar examination, especially when serving that goal often comes at the expense of admitting students who will be more likely to serve underserved legal communities.

Despite the disparate impact that the bar examination has on people of color, numerous states have raised, or are considering raising, the passing scores on their bar examinations. Many states have hired Stephen Klein, Ph.D., the National Conference of Bar Examiners' chief psychometric consultant, to help them set a new passing score and to help them determine the effect of the higher score on minority passing rates. Klein has concluded that raising the passing score on the bar examination will not disproportionately affect minority bar applicants.⁹ Serious flaws appear to exist both in the methodology Klein uses to set new passing scores¹⁰ and in his contention that higher passing scores will not disproportionately impact people of color.¹¹ In fact, one commentator has found that not only will raising the passing score have a disparate impact on the bar passage rate for people of color, the decision to raise bar passing scores also correlates with admission officers putting more weight on the LSAT, rather than on undergraduate GPAs, thereby widening the law school admission gap between white students and students of color.¹²

Even if the bar examination were a valid screening device, one would have to ask whether its disproportionate impact on people of color could be justified. Given that the bar examination is not a good measure for determining professional competency, it is simply wrong to retain it without trying to find a better assessment tool.

Alternatives

We cannot hope to exhaust all the possible alternatives to the bar exam in this brief document. But preliminarily, SALT recommends that states begin to explore one or more of the following alternatives:

1. *The Diploma Privilege.* This method of licensure, currently used in Wisconsin, grants a law license to all graduates of the state's ABA accredited law schools.¹³
2. *A Practical Skills Teaching Term.* Using this method of licensure, states could require satisfactory completion of a ten-week teaching term, similar to one phase of the licensing requirements in some Canadian provinces. During the Canadian teaching term, bar applicants must pass two, three-hour tests which assess their knowledge of basic principles in ten substantive areas. They also receive training and must receive a passing grade on assessments in interviewing, advocacy, legal writing and legal drafting skills.¹⁴
3. *The Public Service Alternative to the Bar Exam (PSABE).* States could adopt the pilot project proposed by Dean Kristin Glen, in which bar applicants are given the option of either taking the existing bar exam or working for 350 hours over ten weeks within the court system and satisfactorily completing a variety of assignments in which competence on all of the MacCrate Report skills are evaluated by trained court personnel and law school clinical teachers.¹⁵
4. *Computer-Based Testing.* States also should begin exploring the use of computer based testing as

5 For an overview of the conclusions of many state commissions, see Suellyn Scarnecchia, *State Responses to Task Force Reports on Race and Ethnic Bias in the Courts*, 16 HAMLIN L. REV. 923 (1993).

6 David L. Chambers, et al, *Michigan's Minority Graduates in Practice: the River Runs through Law School*, 25 LAW AND SOCIAL INQUIRY 395, 401, Spring 2000.

7 Linda F. Wightman, LSAC National Longitudinal Bar Passage Study 27 (LSAC Study) (1998).

8 The study noted that 2% of white and Asian American examinees, 5% of Latino/Latina and 11% percent of African American examinees did not retake the exam. LSAC Study at 56. However, Rennard Strickland, chair of the LSAC, has pointed out correctly that these percentages are misleading because they compare those not re-taking the exam with the total number of examinees for that group (those who passed and those who failed). The calculation should compare those not re-taking the exam with the total number of examinees for that group who failed the first time. When computed in that way, the data reveals that 24% of white, 28% of African American, 21% of Latino/Latina and 12% of Asian Americans who failed on the first attempt did not try again. Rennard Strickland, *The Persistence Facts*, AALS Newsletter, Nov. 2000, page 5.

9 Stephen P. Klein, Ph.D., *Panelist and Reader Judgments Regarding the Passing Score on the Florida Bar Exam*, page 5 (Aug. 12, 1999) (arguing that any change in passing score would equally affect minority and non-minority pass rates).

another potential way to assess a broader range of skills and to measure the skills in ways that better reflect the practice of law.¹⁶

These alternatives, and others that might be developed,¹⁷ can provide states with options other than the current examination to measure the competence of nascent lawyers. SALT recommends that states begin to study and experiment with these and other alternatives to the existing bar exam so as to ameliorate the pernicious effects of the existing examination structure.¹⁸

Conclusion

The bar examination, by testing a narrow range of skills, and testing them in a way unrelated to the practice of law, fails to measure in any meaningful way whether those who pass the examination will be competent lawyers. In addition to not measuring what it purports to measure, the examination negatively impacts the law school admission process, as well as course curriculum and content, and impedes the attainment of a more diverse bench and bar. Raising the passing score on the bar examination exacerbates these negative effects. Thus, SALT strongly opposes the move to increase the passing score on the bar examination. Maintaining the status quo is not enough. SALT recommends that states make a concerted, systematic effort to explore better ways of measuring lawyer competency without perpetuating the negative effects elaborated above.

For those wishing to read more about the bar examination, its negative effects, and proposals for change, we include the following bibliography.

Andrea A. Curcio, *A Better Bar: Why and How the Existing Bar Exam Should Change*, (forthcoming), UNIV. NEB. L. REV, Fall 2002

Kristin Booth Glen, *Thinking Out of the Bar Exam Box: A Challenge and Proposal for Change* (forthcoming).

Daniel R. Hansen, Note, *Do We Need The Bar Examination? A Critical Evaluation of the Justifications for the Bar Examination and Proposed Alternatives*, 45 CASEWES. L. REV. 1191 (1995).

Joan Howarth, *Teaching in the Shadow of the Bar*, 31 UNIV. SAN. FRAN. L. REV. 927 (1997).

Cecil B. Hunt, *Guests in Another's House*, 23 Fla. St. U. L. Rev. 721 (1996).

William C. Kidder, *The Bar Examination and the Dream Deferred: A Critical Analysis of the MBE, Labor Market Control, and Racial and Ethnic Performance Disparities*, (forthcoming).

Deborah J. Merritt, et al, *Raising the Bar: A Social Science Critique of Recent Increases to Passing Scores on the Bar Exam*, 69 U. CINN. L. REV. 929 (2000).

Beverly Moran, *The Wisconsin Diploma Privilege*, 2000 WISC. L. REV. 645 (2000).

10 See Deborah J. Merritt, et al, *Raising the Bar: A Social Science Critique of Recent Increases to Passing Scores on the Bar Exam*, 69 U. CINN. L. REV. 929 (2001).

11 William C. Kidder, *The Bar Examination and the Dream Deferred: A Critical Analysis of the MBE, Labor Market Control, and Racial and Ethnic Performance Disparities*, (forthcoming).

12 Id. (draft at pages 29-32).

13 For more information about the diploma privilege, see Beverly Moran, *The Wisconsin Diploma Privilege*, 2000 WISC. L. REV. 645 (2000).

14 For more information about this proposal, see Andrea A. Curcio, *A Better Bar: Why and How the Existing Bar Exam Should Change*, forthcoming UNIV. NEB. L. REV. Vol. 81:1(Fall 2002).

15 For more information about this proposal, see Kristin Booth Glen, *Thinking Out of the Bar Exam Box: A Challenge and Proposal for Change* (forthcoming).

16 For more information about developing computer based testing for the bar examination, see Curcio, *supra* note 14.



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Founded in 1972, the Society of American Law Teachers has grown to become the largest membership organization of law professors in the nation. SALT has sustained an activist agenda to make the legal profession more inclusive, enhance the quality of legal education, and extend the power of law to underserved individuals and communities. SALT's programs, projects and activities are infused with the values of diversity, equality, justice and academic excellence.

17 Other significant efforts to re-think educational assessment in legal education and the bar examination are underway under the auspices of Professor Judith Wegner (and former dean) at the University of North Carolina, (judith_wegner@unc.edu) working with the Carnegie Foundation for the Advancement of Teaching (www.carnegiefoundation.org). Another example is a proposal that has come out of the University of Arizona for an "Americorps" alternative to the bar exam. (For information, contact sally.simpson@law.arizona.edu). Professor Curcio also suggests other alternatives and modifications to the existing bar exam in her essay at *supra* note 14. Other scholars, as well as the National Conference of Bar Examiners, may also be working on proposals for changing the existing examination.

18 The aforementioned alternatives will be discussed at a SALT conference on the bar examination, tentatively scheduled for Fall 2003.

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