

The Uniform Bar Exam: Whither Michigan?

By Otto Stockmeyer

Last October, the Michigan Board of Law Examiners posted the names of 451 law graduates who passed the July 2018 Michigan Bar Examination.¹ Most of them probably hoped never to have to endure a bar exam again. But according to an American Bar Foundation study, today's reality is that more than one-third will likely change jobs within three years of law school graduation.² And some of those would no doubt like to look for employment beyond Michigan's borders.

Wouldn't it be nice for bar passers and their potential employers if Michigan administered the Uniform Bar Examination (UBE)? The UBE allows new lawyers who pass the exam to transfer their scores when applying for admission to another jurisdiction.³ Thirty-six states and territories have adopted the UBE, including big-ticket states like New York, Illinois, Ohio (beginning in 2020), and Texas (beginning in 2021).⁴

Score portability maximizes job possibilities for graduating students. Instead of being limited to Michigan, bar passers could look for employment in 36 other jurisdictions without retaking the bar exam. And portability allows new lawyers to establish cross-jurisdictional practices more easily, benefiting both their employers and clients.

"Since 2011, when the UBE was first administered, roughly 12,000 UBE test-takers

have transferred their scores to a jurisdiction where they did not take the bar," said Judith A. Gunderson, president of the National Conference of Bar Examiners.⁵

Developed by the National Conference of Bar Examiners, the UBE consists of three components: the Multistate Bar Exam (a day of 200 multiple-choice questions on seven subjects), the Multistate Essay Exam (six 30-minute essay questions on any of ten listed subjects), and the Multistate Performance Test (two 90-minute writing assignments that test lawyering skills).⁶

Each essay question typically consists of four issues that must be answered using the common IRAC (issue, rule, application, and conclusion) organizational approach that law students begin learning in their first-year courses.

The performance exam is designed to test the ability to use fundamental lawyering skills in a realistic setting. For each of the two assignments, examinees are given a "file" of documents and a "library" of cases, statutes, and the like. A memorandum from a supervising attorney assigns examinees a specific task—drafting a letter to a client, a persuasive memo or brief, a contract provision or will, a discovery plan, a proposal for settlement, a closing argument, or something similar.⁷ For those taking the July 2018 UBE, for instance, the tasks were (1) drafting the argument section of a brief opposing

a motion for new trial in a criminal case alleging a *Brady* violation and admission of hearsay and (2) drafting sections of articles of association dealing with a membership association's governance and explaining how what they drafted comports with governing law and the client's wishes.⁸

Other benefits

The UBE has benefits in addition to score portability, including expert drafting and consistent grading. The essay questions are prepared by the National Conference of Bar Examiners Drafting Committee, pretested, analyzed by outside subject-matter experts, and reviewed by the boards of bar examiners in user jurisdictions. The National Conference of Bar Examiners provides a grading guide for every question and sponsors a grading workshop for bar examiners. The essay and performance parts of the UBE are independently graded and scored by each state. Importantly, states have the choice of grading answers according to general U.S. common law or the jurisdiction's own law.⁹

States that wish to add a state-specific component are free to do so. Currently, 21 jurisdictions require a separate test, course, or combination of the two on local law either before or after the exam.¹⁰ New York, for example, requires both an online course and an online exam on New York law.¹¹ The

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New York State Bar Association recently created a task force to study whether the UBE adequately prepares applicants to practice in New York courts.¹²

Every state sets its own passing score (passing and transferring scores around the country currently range from 260 to 280). States can also limit the amount of time that a UBE score is valid in their state.

Michigan's bar exam

The Michigan Bar Examination (MiBE) presently consists of the daylong, multiple-choice Multistate Bar Exam worth a maximum of 200 points and a day of fifteen 20-minute Michigan-specific essay questions worth up to 10 points each. Michigan's essay questions are drafted and graded by members of the Board of Law Examiners or by attorneys or out-of-state law professors selected by the Board. Each of the five Board members is responsible for three of the fifteen questions.¹³

The Board's Rule 3(A)(2) lists 16 subjects tested on the essay portion, but several cover more than one topic (criminal law and procedure, for example).¹⁴ As law students and practitioners know, criminal law and criminal procedure are separate topics and are taught as separate courses at most law schools. Another example: the rule lists the Sales, Negotiable Instruments, and Secured Transactions articles of the Uniform Commercial Code as one subject, whereas they generally are offered as separate law-school courses. In reality, the number of separate subjects that can be tested totals 26.¹⁵

MiBE essay questions and draft model answers are distributed to in-state law professors for comment after the exam is administered but before grading begins. Past essay questions and analyses going back 10 years are available on the Board's website.¹⁶

They provide evidence, if any is needed, that the MiBE is not testing graduates' abilities to perform lawyering tasks beyond answering legal questions from rote memory without any research. This is not a desirable outcome for Michigan practitioners looking to hire new graduates who are practice ready.

Endorsements

The American Bar Association Law Student Division has been an enthusiastic supporter of the UBE. Both the Conference of Chief Justices and the ABA Section of Legal Education and Admissions to the Bar have endorsed consideration of the UBE.¹⁷ On recommendation of the Law Student and Law Practice divisions, among other entities, the ABA House of Delegates endorsed the UBE at its 2016 midyear meeting. The report to the ABA House of Delegates concluded:

The time has come for widespread adoption of the UBE, which would better reflect today's multijurisdictional practice of law, while ensuring a standard level of competency for all lawyers throughout the United States. The exam greatly assists law school graduates who face tremendous challenges finding employment and managing student debt.¹⁸

The report also emphasized the particular advantage of the UBE for women and minorities. It cited a study finding that women are significantly more likely to move out of state in their first five years of practice than men, putting women at a greater disadvantage if their bar exam scores are not transferable. Their alternative: wait months for the next bar exam and months more for the results.¹⁹

Duplicative, expensive bar exams are also a significant chokepoint in the pipeline for

minorities seeking access to the profession. And, anecdotally, the pass rate for minority groups is said to have increased under the UBE.²⁰

Whither Michigan?

Will Michigan adopt the UBE? We were the fortieth state to adopt the Multistate Bar Exam.²¹ We still don't employ the Multistate Essay Exam (available since 1988 and adopted by 38 states and the District of Columbia) or the Multistate Performance Test (available since 1997 and adopted by all but seven states). In terms of modernizing the bar exam, Michigan is an outlier.

The Multistate Performance Test is the most innovative of the UBE's three components, as it tests lawyering skills instead of substantive law. Its adoption would reinforce the importance of experiential learning and provide an additional incentive to law schools to ensure that students receive training in practice skills. This in turn would not only serve the immediate purpose of helping graduates pass the bar exam, but also help increase their readiness to begin to practice law sooner rather than later after graduation.

Law students are rational actors. A sure-fire way to entice students to master a topic is to announce that it will be on the final exam. If practice skills are tested on the bar exam, students will take the courses necessary to best prepare themselves for it.

What would it take to get the ball rolling? In most states that have adopted the UBE, the process started with formation of a task force appointed by the state supreme court. (Indiana's Supreme Court just created such a body last December.²²) Task forces often spend one or two years studying the matter; implementation usually takes another two years.

Even if the Michigan Supreme Court were to appoint a task force tomorrow, and the process led to adoption of the UBE, no student currently enrolled in law school would likely be around to enjoy the benefits. "Reform," to paraphrase former New Jersey Supreme Court Chief Justice Arthur T. Vanderbilt, "is no sport for the short-winded."²³ ■

(Continued on the following page)

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