

THE Bar Examiner

Volume 83 | Number 4 | December 2014

A publication of the National Conference of Bar Examiners

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LETTER FROM THE CHAIR

I have been involved in the bar examining process for more than 20 years. One of the first things that I tell people when they ask me how one becomes a bar examiner is that there is no real road map. Certainly, while growing up in Indianapolis and dreaming of becoming a lawyer, I thought of many things that I might possibly do with my law degree, but bar examining was never one of those things.

What I have learned since becoming involved with NCBE is that not only does the process for becoming a bar examiner differ greatly from state to state, but the responsibilities of bar examiners also differ greatly—these differences occurring in a climate where the lawyer licensing process itself is in constant change. (This issue of the *Bar Examiner* deals with one of these changing areas, the admission of foreign-trained lawyers.)

In New York, as in many states, bar examiners are appointed by the state's highest court. Unlike in many states, however, in New York bar examiners are actually responsible for drafting the questions for the state-specific part of the exam, grading the questions, and establishing policy for the exam. For bar examiners in New York, this is a year-round endeavor that includes at least monthly meetings and physical attendance at the bar exam two times per year. One of the things that I believe has helped me the most in my role as a member of the NCBE Board of Trustees, as well as in my role as a member of various NCBE committees, is the fact that I have actually written and graded bar exam questions. Question writing, both essay and multiple-choice, as well as essay grading, are skills that I believe a person can only hone over time. Additionally, like the road to becoming a bar examiner, there is no "normal" path to learning the art of writing and grading bar exam questions. That is one reason why attendance at NCBE workshops on question drafting and grading can be so beneficial for bar examiners.

The other area where bar examiners play a major role is that of policy-making. In most states, while the highest court in the state has the ultimate responsibility for bar admissions, the courts rely on the bar examiners to recommend policy that will shape the bar examining process. Accordingly, issues such as setting or changing the passing score on a state's examination, granting or denying test accommodations for applicants with disabilities, determining educational requirements for foreign-educated candidates in

those states where such candidates are allowed to sit for the bar exam, making determinations on cheating or other misconduct, and evaluating character and fitness are all issues that may be decided by a state's board of bar examiners.

While my role as a bar examiner has always included the drafting and grading of questions, I have never been involved with character and fitness determinations, which is the major, and perhaps only, role of bar examiners in a number of states. In many states bar examiners are charged with the responsibility of not only reviewing bar candidates' credentials but also conducting hearings and interviews for potential bar applicants, while the drafting of questions and grading of the exam are placed in the hands of law professors.

During my years in bar examining, I have seen significant changes in the bar examining process itself, all to the betterment of the exam. From how exam questions are drafted, to what subject areas are tested, to the types of questions that are used, to the method by which the exam is taken, the bar exam has undergone significant change.

A review of current MBE and MEE questions will show that questions are much more straightforward than when I first became a bar examiner. Fact patterns no longer include distracting fact situations and confusing names. The questions are drafted with the intent and goal to test in a straightforward manner those principles of law that a lawyer just entering the profession needs to know in order to practice competently.


In addition to the standard multiple-choice and essay questions provided by the MBE and MEE, the Multistate Performance Test now allows for the testing of legal skills in a manner that was not available 20 years ago. NCBE continues to explore how to test for other skills needed in practice, such as legal research and writing.

The mechanism for taking the test has also greatly changed through the use of computer testing. I can vividly remember sitting in a room in 2002 and discussing



with my colleagues the possible use of a laptop computer to take the bar exam. I can also remember thinking that candidates would never be comfortable taking a bar exam on a computer. Following those discussions, New York started a pilot program limiting the number of computer users to about 250. Now, roughly 10 years after computer testing started in New York, approximately 90% of the nearly 16,000 annual candidates in New York take the bar exam on computers.

Finally, in addition to changes to the exam itself, admission requirements continue to change as many states implement additional requirements for licensure. A number of states require certain courses, activities, or skills training before or soon after admission. New York, for instance, has its new pro bono service requirement where in order to be admitted to practice, applicants must perform 50 hours of pro bono work in addition to passing the bar exam and meeting character and fitness standards.

The road to becoming a bar examiner differs depending on that bar examiner's particular circumstances. Similarly, the role of a bar examiner encompasses different responsibilities depending on the state in which that bar examiner is located. Certainly bar examiners need to be knowledgeable about all issues surrounding bar examining, especially those cutting-edge issues that lead to change in the process. I encourage bar examiners to stay knowledgeable on the changes in bar examining and to keep an open mind to change. 

Best regards to all.

Sincerely,

A handwritten signature in dark ink that reads "Bryan R. Williams". The signature is fluid and cursive, with a large, sweeping "B" and a long, horizontal flourish at the end.

Bryan R. Williams

PRESIDENT'S PAGE

by Erica Moeser

The results of the July 2014 bar examinations have trickled out over the past three months as jurisdictions completed their grading, and this time the ripple of reaction that normally attends such releases turned into a wave. The reason for this is that average scores on the Multistate Bar Examination (MBE) fell to the lowest level since the July 2004 MBE administration. (February results are characteristically lower.)

It was therefore inevitable that bar exam passing percentages would dip in many jurisdictions, because most jurisdictions follow the best practice of setting their written scores on the MBE scale. The technical reasons for this have been set forth in our Testing Columns (including the column on page 50 of this issue). Essay questions, particularly those that involve judgments about performance of the very different test populations in February and July, challenge the ability of graders to maintain consistent standards. And graders change. The MBE score overcomes that. It is stable over time in terms of measuring the performance of each group that takes the test.

To the extent that individual law schools had large numbers of their graduates test in a given jurisdiction, the summer bar results were particularly troubling for them. Given the increased transparency that has occurred through efforts to promote disclosure of law school bar passage results to those who are contemplating the investment of time and money in a legal education, and given the sway that na-



tional rankings hold over law schools, it was perhaps preordained that the first thought to spring to many minds in legal education was Blame the Test.

The MBE, like other high-stakes instruments, is an equated test; raw scores are subjected to a mathematical procedure by psychometricians (experienced professionals, all with Ph.D.s) to adjust the final—or scaled—score to account for changes in difficulty over time. The result is that a scaled score on the MBE this past summer—say 135—is equivalent to a score of 135 on any MBE in the past or in the future.

Equating is done by embedding a set of test questions that have appeared on previous test forms into the current test form and then comparing the performance of the new group of test takers—here the July 2014 cohort—on those questions with the performance of prior test takers on those questions. The embedded items are carefully selected to mirror the content of the overall test and to effectively represent a mini-test within a test. The selection of questions for equating purposes is done with extreme precision involving professional judgments about both the content and the statistical properties of each question.

Through our customary quality-control procedures for scoring our standardized tests, we had early notice of the drop in the average scaled score—long before results were released to jurisdictions. Because we realized the implications of such a drop, we pursued a process of replicating and reconfirm-

ing the mathematical results by having several psychometricians work independently to re-equate the test. We also reexamined the decision-making process by which the equating items had been selected in the first place to confirm that there had been no changes that would have contributed to the change in the mean MBE score. It was essential that we undertake this for the sake of the test takers. They deserve a fair test competently scored. All of our efforts to date have confirmed the correctness of the scaled scores as calculated and reported.

I then looked to two areas for further corroboration. The first was internal to NCBE. Among the things I learned was that whereas the scores of those we know to be *retaking* the MBE dropped by 1.7 points, the score drop for those we believe to be first-time takers dropped by 2.7 points. (19% of July 2014 test takers were repeaters, and 65% were believed to be first-time takers. The remaining 16% could not be tracked because they tested in jurisdictions that collect inadequate data on the MBE answer sheets.) The decline for retakers was not atypical; however, the decline for first-time takers was *without precedent* during the previous 10 years.

Also telling is the fact that performance by all July 2014 takers on the equating items drawn from previous July test administrations was 1.63 percentage points lower than performance associated with the previous use of those items, as against a 0.57 percentage point *increase* in July 2013.

I also looked at what the results from the Multistate Professional Responsibility Examination (MPRE), separately administered three times each year, might tell me. The decline in MPRE performance supports what we saw in the July 2014 MBE numbers. In 2012, 66,499 candidates generated a mean score of 97.57 (on a 50–150 scale). In 2013, 62,674 candidates generated a mean score of 95.65. In 2014, a total of 60,546 candi-

dates generated a mean score of 93.57. Because many MPRE test takers are still enrolled in law school when they test, these scores can be seen as presaging MBE performance in 2014 and 2015.

My second set of observations went beyond NCBE. I understand that the number of law schools reporting a median LSAT score below 150 for their entering classes has escalated over the past few years. To the extent that LSAT scores correlate with MBE scores, this cannot bode well for law schools with a median LSAT score below the 150 threshold.

Specifically, I looked at what happened to the overall mean LSAT score as reported by the Law School Admission Council for the first-year matriculants between 2010 (the class of 2013) and 2011 (the class of 2014). The reported mean dropped a modest amount for those completing the first year (from 157.7 to 157.4). What is unknown is the extent to which the effect of a change to reporting LSAT scores (from the average of all scores to the highest score earned) has offset what would otherwise have been a greater drop. (LSAC Research Reports indicate that roughly 30% of LSAT takers are repeaters and that this number has increased in recent years.)

For the future, and further complicating matters, effective with the fall 2012 entering class LSAC began reporting scores by whole numbers; therefore, the reported mean of 157 for fall 2012 (the class that will graduate in 2015) may represent anywhere from 156.5 to 157.4. For those matriculating in 2013 (the class of 2016), the LSAT mean lowered to a reported 156. Figures for the 2014 entering class are not available.

Beyond the national means lie the data that are specific to individual law schools, many of which have been struggling for several years with declining applications and shrinking enrollment figures. In some instances, law schools have been able to

maintain their level of admission predictors—the undergraduate grade point average (UGPA) and the LSAT score. Some have reduced class sizes in order to accomplish this. To make judgments about changes in the cohort attending law school, it is useful to drill down to the 25th percentile of UGPA and LSAT scores for the years in question. There we see evidence of slippage at some schools, in some cases notwithstanding reductions in class size. And for matriculants *below* the 25th percentile, we know nothing; the tail of the curve leaves a lot of mystery, as the credentials of candidates so situated (presumably those last admitted) and the degree of change are unknown.

Another factor that bears consideration is the rising popularity of taking transfer students out of Law School A's first-year class to bolster enrollment at Law School B, where Law School B is perceived by the transfer student to be the stronger of the two schools by reason of reputation. This mystic switch permits a law school to add to its enrollment without having to report the LSAT scores of the transferees, since the reported LSAT is a function of first-year matriculation, thus thwarting the all-important law school rankings. This process may weaken the overall quality of the student body of Law School B even as it weakens Law School A by poaching the cream of its crop. At the very least, it reduces the validity of comparisons of the mean LSAT scores and the mean MBE scores for Law Schools A and B because the cohort taking the bar exam from either school may be markedly different from the cohort of matriculants for whom an LSAT mean was calculated. Of course, this phenomenon does not account for the drop in the national MBE mean. It does, however, affect the statistics by which the performance of the two schools' graduates is measured. (Note that the LSAT median, as reported in the rankings, is not the same thing as the LSAT mean.)

A brief list of other factors to consider could include the following:

- The rise of experiential learning—a laudable objective—has also ushered in the greater use at some schools of pass/fail grading that may mask the needs of students at risk. Without grades for feedback, students may not realize they are at risk. In addition, the rise of experiential learning may have crowded out time for students to take additional “black-letter” courses that would have strengthened their knowledge of the law and their synthesis of what they learned during the first year.
- There may be a trend in the direction of fewer required courses, or of fewer hours in a given required course, thereby permitting students to miss (or avoid) core subjects that will appear on the bar exam, or diminishing the amount of content coverage in a given course.
- Bar prep courses now offered within law schools are being outsourced to bar review companies, defeating a more reasonable relationship between such courses and sound, semester-long pedagogy with more deeply embedded understandings of the application of law.
- The decline in LSAT scores reported at the 25th percentile may have already called for increased attention to the need for academic support efforts that begin during the first year of law school, and this support may not have been delivered. Lack of academic support increases the chances that those in the bottom quartile of the class will struggle on the bar exam. In school after school, it is the law school grade-point average that is the most consistent predictor of bar passage success; therefore, close attention to those in the bottom ranks of the class is essential—and the earlier, the better—because they deserve the resources to put them on firmer footing as they move through law school and beyond.

Because it is an equated test, the MBE is a constant against which the performance of graduates can be gauged. It is a witness. It also serves as a sen-

tinel. The July 2014 results communicated news with which law schools would rather not contend. So long as law school entrance predictors (the UGPA and the LSAT) continue to fall, and law schools do not adjust through pedagogy or by attrition, the news is not going to be encouraging.

In the September 2013 issue of this magazine, I included a chart showing the change in the number of matriculants from 2010 to 2012 as provided

by the American Bar Association's Section of Legal Education and Admissions to the Bar. Because of the relationship between enrollment changes and bar passage, the chart, updated to show an additional year of data and reworked to show how enrollment and the LSAT 25th percentile may contribute to the downward trend at a given school, follows. 2014 data is not yet available. 📊

Change in First-Year Enrollment from 2010 to 2013 and Reported Changes to the LSAT Score at the 25th Percentile

	Total First-Year Enrollment				% Change, 2010 to 2013	25% LSAT Score			
	2010	2011	2012	2013		2010	2011	2012	2013
LAW SCHOOL									
AKRON, UNIVERSITY OF	177	175	165	147	-17%	152	151	151	150
ALABAMA, UNIVERSITY OF	161	160	149	145	-10%	159	158	158	157
ALBANY LAW SCHOOL OF UNION UNIVERSITY	236	235	196	182	-23%	152	151	149	150
AMERICAN UNIVERSITY	502	475	491	473	-6%	158	159	156	153
APPALACHIAN SCHOOL OF LAW	127	146	75	56	-56%	146	142	143	143
ARIZONA STATE UNIVERSITY	191	168	151	128	-33%	158	160	161	158
ARIZONA SUMMIT LAW SCHOOL	392	450	447	310	-21%	148	146	141	141
ARIZONA, UNIVERSITY OF	157	137	109	105	-33%	161	158	159	155
ARKANSAS, FAYETTEVILLE, UNIVERSITY OF	138	136	133	112	-19%	153	153	153	152
ARKANSAS, LITTLE ROCK, UNIVERSITY OF	157	139	150	139	-11%	151	151	149	147
ATLANTA'S JOHN MARSHALL LAW SCHOOL	265	264	181	235	-11%	148	148	148	146
AVE MARIA SCHOOL OF LAW	203	151	113	117	-42%	147	146	144	141
BALTIMORE, UNIVERSITY OF	363	328	364	287	-21%	151	151	149	150
BARRY UNIVERSITY	254	267	293	283	11%	149	147	145	145
BAYLOR UNIVERSITY	183	142	143	163	-11%	162	159	158	156
BELMONT UNIVERSITY	—	—	103	82	—	—	—	—	152
BOSTON COLLEGE	261	268	245	236	-10%	163	162	161	160
BOSTON UNIVERSITY	268	242	210	220	-18%	164	163	162	161
BRIGHAM YOUNG UNIVERSITY	150	145	140	139	-7%	161	160	158	158
BROOKLYN LAW SCHOOL	486	390	365	368	-24%	162	160	158	157
BUFFALO-SUNY, UNIVERSITY OF	219	175	203	198	-10%	155	154	152	150
CALIFORNIA WESTERN SCHOOL OF LAW	382	283	309	260	-32%	151	150	148	148
CALIFORNIA-BERKELEY, UNIVERSITY OF	286	254	263	284	-1%	162	164	163	163
CALIFORNIA-DAVIS, UNIVERSITY OF	196	192	189	142	-28%	160	161	160	159
CALIFORNIA-HASTINGS, UNIVERSITY OF	383	414	317	333	-13%	160	157	157	155
CALIFORNIA-IRVINE, UNIVERSITY OF	—	89	119	126	—	—	163	162	162
CALIFORNIA-LOS ANGELES, UNIVERSITY OF	308	319	304	293	-5%	165	164	164	162
CAMPBELL UNIVERSITY	162	191	160	125	-23%	154	153	152	151
CAPITAL UNIVERSITY	246	206	182	158	-36%	150	148	147	145
CARDOZO SCHOOL OF LAW	382	379	374	336	-12%	160	158	158	156
CASE WESTERN RESERVE UNIVERSITY	236	192	154	100	-58%	157	153	156	155
CATHOLIC UNIVERSITY OF AMERICA	274	232	141	161	-41%	156	151	153	151
CHAPMAN UNIVERSITY	212	160	166	157	-26%	155	154	154	155

(continued)

**Change in First-Year Enrollment from 2010 to 2013
and Reported Changes to the LSAT Score at the 25th Percentile (*continued*)**

	Total First-Year Enrollment				% Change, 2010 to 2013	25% LSAT Score			
	2010	2011	2012	2013		2010	2011	2012	2013
LAW SCHOOL									
CHARLESTON SCHOOL OF LAW	295	224	174	181	-39%	151	148	149	146
CHARLOTTE SCHOOL OF LAW	468	529	626	522	12%	148	145	142	141
CHICAGO, UNIVERSITY OF	205	191	184	196	-4%	168	167	167	166
CHICAGO-KENT COLLEGE OF LAW-IIT	310	308	286	286	-8%	155	155	154	153
CINCINNATI, UNIVERSITY OF	144	119	103	100	-31%	157	155	156	155
CITY UNIVERSITY OF NEW YORK	163	171	120	104	-36%	152	153	154	153
CLEVELAND STATE UNIVERSITY	195	167	140	135	-31%	153	152	151	150
COLORADO, UNIVERSITY OF	180	163	152	184	2%	161	158	159	158
COLUMBIA UNIVERSITY	404	406	366	352	-13%	170	170	170	169
CONNECTICUT, UNIVERSITY OF	186	181	150	151	-19%	158	157	157	154
CORNELL UNIVERSITY	205	204	191	193	-6%	166	166	166	165
CREIGHTON UNIVERSITY	144	135	130	138	-4%	151	150	150	149
DAYTON, UNIVERSITY OF	414	177	133	100	-76%	150	148	146	145
DENVER, UNIVERSITY OF	301	297	291	290	-4%	156	155	155	154
DEPAUL UNIVERSITY	312	298	273	276	-12%	156	154	153	151
DETROIT MERCY, UNIVERSITY OF	257	223	189	182	-29%	146	147	146	147
DISTRICT OF COLUMBIA, UNIVERSITY OF THE	131	131	125	99	-24%	149	151	148	147
DRAKE UNIVERSITY	155	142	128	115	-26%	153	153	152	149
DREXEL UNIVERSITY	146	147	140	143	-2%	156	157	154	152
DUKE UNIVERSITY	238	211	209	209	-12%	168	167	166	165
DUQUESNE UNIVERSITY	212	191	139	138	-35%	151	151	150	150
ELON UNIVERSITY	132	130	99	107	-19%	153	150	150	146
EMORY UNIVERSITY	293	246	253	231	-21%	166	159	161	157
FAULKNER UNIVERSITY	145	124	127	104	-28%	148	146	145	142
FLORIDA A&M UNIVERSITY	288	281	217	147	-49%	144	145	144	144
FLORIDA COASTAL SCHOOL OF LAW	808	671	580	441	-45%	146	145	143	141
FLORIDA INTERNATIONAL UNIVERSITY	161	151	155	158	-2%	152	152	151	151
FLORIDA STATE UNIVERSITY	199	200	187	170	-15%	161	160	157	157
FLORIDA, UNIVERSITY OF	310	295	284	314	1%	160	160	160	156
FORDHAM UNIVERSITY	477	479	433	398	-17%	163	163	162	161
GEORGE MASON UNIVERSITY	303	186	147	149	-51%	158	157	158	157
GEORGE WASHINGTON UNIVERSITY	523	474	398	481	-8%	162	161	161	159
GEORGETOWN UNIVERSITY	591	579	575	544	-8%	168	167	165	163
GEORGIA STATE UNIVERSITY	224	223	191	181	-19%	159	158	156	157
GEORGIA, UNIVERSITY OF	248	225	188	199	-20%	162	162	158	158
GOLDEN GATE UNIVERSITY	320	229	227	150	-53%	151	150	148	147
GONZAGA UNIVERSITY	183	176	132	108	-41%	154	153	152	152
HAMLIN UNIVERSITY	227	205	124	88	-61%	149	148	148	149
HARVARD UNIVERSITY	561	559	555	568	1%	171	171	170	170
HAWAII, UNIVERSITY OF	113	116	102	66	-42%	153	153	154	155
HOFSTRA UNIVERSITY	365	370	320	213	-42%	156	155	153	151
HOUSTON, UNIVERSITY OF	266	252	212	213	-20%	159	157	159	157
HOWARD UNIVERSITY	156	137	130	151	-3%	151	150	150	148
IDAHO, UNIVERSITY OF	130	130	102	111	-15%	151	149	149	148
ILLINOIS, UNIVERSITY OF	228	184	198	170	-25%	163	156	158	157
INDIANA UNIVERSITY - BLOOMINGTON	250	240	201	205	-18%	156	158	156	154
INDIANA UNIVERSITY - INDIANAPOLIS	282	314	259	227	-20%	151	152	149	150
INTER AMERICAN UNIVERSITY OF PUERTO RICO	869	246	129	212	-76%	135	135	135	135
IOWA, UNIVERSITY OF	203	180	155	93	-54%	158	158	158	158

**Change in First-Year Enrollment from 2010 to 2013
and Reported Changes to the LSAT Score at the 25th Percentile (continued)**

	Total First-Year Enrollment				% Change, 2010 to 2013	25% LSAT Score			
	2010	2011	2012	2013		2010	2011	2012	2013
LAW SCHOOL									
JOHN MARSHALL LAW SCHOOL	539	512	498	404	-25%	151	149	148	146
KANSAS, UNIVERSITY OF	165	134	140	106	-36%	155	154	154	153
KENTUCKY, UNIVERSITY OF	135	130	136	149	10%	157	155	155	154
LA VERNE, UNIVERSITY OF	166	55	44	50	-70%	150	150	147	146
LEWIS AND CLARK COLLEGE	247	226	214	172	-30%	157	157	156	154
LIBERTY UNIVERSITY	135	99	83	68	-50%	148	148	148	148
LOUISIANA STATE UNIVERSITY	222	236	199	178	-20%	155	155	153	153
LOUISVILLE, UNIVERSITY OF	143	132	140	129	-10%	155	152	155	152
LOYOLA MARYMOUNT UNIVERSITY-LOS ANGELES	403	391	376	358	-11%	158	158	157	156
LOYOLA UNIVERSITY-CHICAGO	292	274	287	213	-27%	157	156	156	155
LOYOLA UNIVERSITY-NEW ORLEANS	246	242	237	240	-2%	150	151	150	147
MAINE, UNIVERSITY OF	95	91	87	86	-9%	153	153	152	152
MARQUETTE UNIVERSITY	247	213	224	209	-15%	154	154	153	151
MARYLAND, UNIVERSITY OF	296	276	264	206	-30%	157	156	151	154
MASSACHUSETTS-DARTMOUTH, UNIVERSITY OF	—	—	71	78	—	—	142	143	145
MCGEORGE SCHOOL OF LAW	346	225	249	157	-55%	155	155	152	151
MEMPHIS, UNIVERSITY OF	158	144	112	111	-30%	153	153	152	151
MERCER UNIVERSITY	166	149	129	186	12%	153	151	149	148
MIAMI, UNIVERSITY OF	489	447	426	308	-37%	156	156	155	155
MICHIGAN STATE UNIVERSITY	299	307	295	270	-10%	152	152	152	152
MICHIGAN, UNIVERSITY OF	376	359	344	315	-16%	168	167	166	165
MINNESOTA, UNIVERSITY OF	260	246	205	221	-15%	159	157	158	156
MISSISSIPPI COLLEGE	212	214	151	159	-25%	147	147	146	145
MISSISSIPPI, UNIVERSITY OF	199	180	157	117	-41%	151	151	151	152
MISSOURI UNIVERSITY OF	148	133	133	118	-20%	157	156	152	155
MISSOURI-KANSAS CITY, UNIVERSITY OF	156	149	153	172	10%	154	153	149	150
MONTANA, UNIVERSITY OF	85	85	80	83	-2%	153	152	152	151
NEBRASKA, UNIVERSITY OF	145	128	134	127	-12%	153	153	155	152
NEVADA - LAS VEGAS, UNIVERSITY OF	145	140	139	113	-22%	156	157	156	154
NEW ENGLAND SCHOOL OF LAW	393	385	450	238	-39%	151	149	145	145
NEW HAMPSHIRE, UNIVERSITY OF	132	146	74	77	-42%	150	151	151	153
NEW MEXICO, UNIVERSITY OF	116	113	114	119	3%	153	152	152	151
NEW YORK LAW SCHOOL	641	488	443	322	-50%	153	151	149	149
NEW YORK UNIVERSITY	476	450	451	437	-8%	169	170	169	168
NORTH CAROLINA CENTRAL UNIVERSITY	206	166	248	251	22%	143	145	143	142
NORTH CAROLINA, UNIVERSITY OF	254	248	238	237	-7%	159	161	160	159
NORTH DAKOTA, UNIVERSITY OF	83	83	83	83	0%	148	148	145	145
NORTHEASTERN UNIVERSITY	220	217	168	185	-16%	155	154	154	153
NORTHERN ILLINOIS UNIVERSITY	135	103	109	101	-25%	150	150	147	146
NORTHERN KENTUCKY UNIVERSITY	199	178	174	150	-25%	152	151	149	149
NORTHWESTERN UNIVERSITY	274	264	259	229	-16%	166	165	164	161
NOTRE DAME, UNIVERSITY OF	172	183	177	162	-6%	162	162	161	160
NOVA SOUTHEASTERN UNIVERSITY	386	354	369	305	-21%	148	148	147	146
OHIO NORTHERN UNIVERSITY	120	112	79	79	-34%	149	149	145	145
OHIO STATE UNIVERSITY	230	211	173	178	-23%	160	159	158	157
OKLAHOMA CITY UNIVERSITY	224	201	172	162	-28%	149	149	147	145
OKLAHOMA, UNIVERSITY OF	174	153	155	143	-18%	157	155	155	155
OREGON, UNIVERSITY OF	177	183	147	120	-32%	157	157	155	156
PACE UNIVERSITY	299	242	178	207	-31%	152	151	150	147

(continued)

**Change in First-Year Enrollment from 2010 to 2013
and Reported Changes to the LSAT Score at the 25th Percentile (continued)**

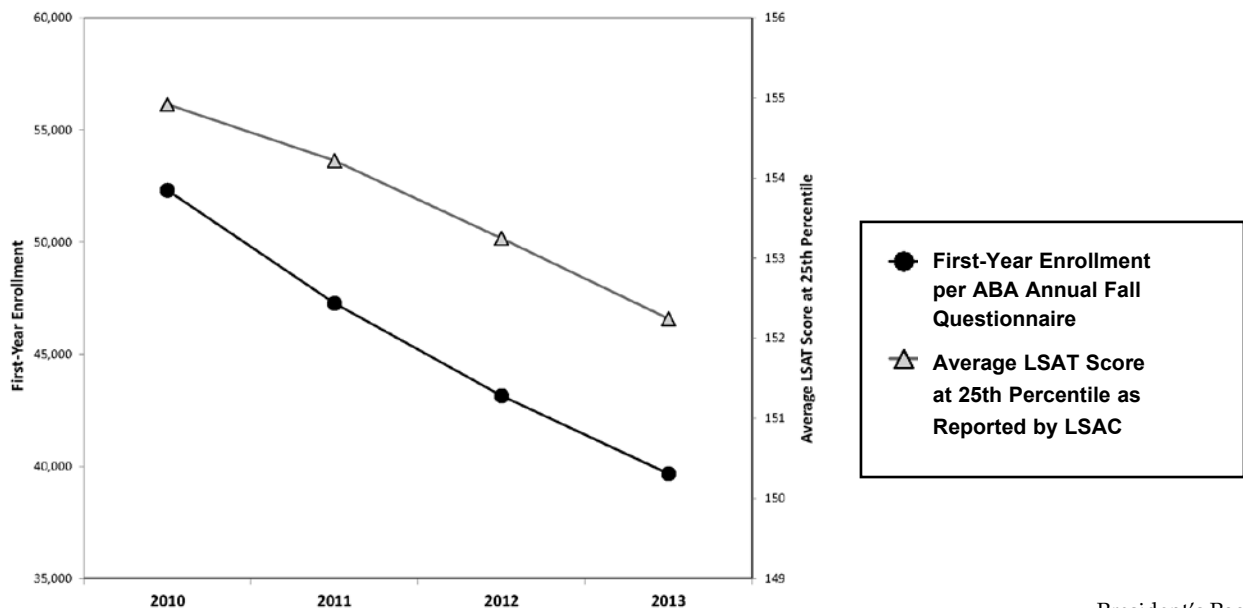
	Total First-Year Enrollment				% Change, 2010 to 2013	25% LSAT Score			
	2010	2011	2012	2013		2010	2011	2012	2013
LAW SCHOOL									
PENN STATE UNIVERSITY	228	185	162	132	-42%	157	156	156	154
PENNSYLVANIA, UNIVERSITY OF	250	266	243	251	0%	166	166	164	165
PEPPERDINE UNIVERSITY	222	202	208	201	-9%	159	158	156	154
PITTSBURGH, UNIVERSITY OF	259	230	210	174	-33%	158	157	155	154
PONTIFICAL CATHOLIC UNIVERSITY OF P.R.	289	304	244	194	-33%	132	132	132	132
PUERTO RICO, UNIVERSITY OF	197	194	196	206	5%	142	143	140	142
QUINNIPIAC UNIVERSITY	163	123	127	84	-48%	154	154	153	151
REGENT UNIVERSITY	168	154	142	106	-37%	150	150	151	150
RICHMOND, UNIVERSITY OF	146	154	153	133	-9%	159	158	158	157
ROGER WILLIAMS UNIVERSITY	198	194	151	111	-44%	149	149	147	146
RUTGERS UNIVERSITY-CAMDEN	269	282	116	140	-48%	157	156	153	154
RUTGERS UNIVERSITY-NEWARK	283	224	225	193	-32%	155	155	155	154
SAINT LOUIS UNIVERSITY	334	295	205	145	-57%	153	151	151	151
SAMFORD UNIVERSITY	166	152	121	173	4%	153	152	151	148
SAN DIEGO, UNIVERSITY OF	330	300	246	241	-27%	159	158	157	156
SAN FRANCISCO, UNIVERSITY OF	281	246	220	159	-43%	155	155	153	151
SANTA CLARA UNIVERSITY	371	287	237	246	-34%	158	157	156	155
SEATTLE UNIVERSITY	324	322	284	228	-30%	155	154	154	153
SETON HALL UNIVERSITY	358	266	196	165	-54%	155	155	154	152
SOUTH CAROLINA, UNIVERSITY OF	239	213	213	206	-14%	156	155	154	153
SOUTH DAKOTA, UNIVERSITY OF	75	90	62	69	-8%	149	152	146	144
SOUTH TEXAS COLLEGE OF LAW	461	424	404	402	-13%	151	152	151	148
SOUTHERN CALIFORNIA, UNIVERSITY OF	220	199	188	175	-20%	166	165	165	163
SOUTHERN ILLINOIS UNIVERSITY-CARBONDALE	144	120	112	133	-8%	151	151	149	147
SOUTHERN METHODIST UNIVERSITY	254	232	218	212	-17%	156	157	157	157
SOUTHERN UNIVERSITY	320	258	268	224	-30%	143	142	143	142
SOUTHWESTERN UNIVERSITY	410	404	351	367	-10%	152	152	151	150
ST. JOHN'S UNIVERSITY	341	293	264	253	-26%	156	154	153	153
ST. MARY'S UNIVERSITY	301	255	248	311	3%	151	151	151	148
ST. THOMAS UNIVERSITY (FLORIDA)	275	251	216	261	-5%	148	148	146	145
ST. THOMAS, UNIVERSITY OF (MINNESOTA)	168	171	143	114	-32%	154	153	152	150
STANFORD UNIVERSITY	180	180	180	179	-1%	167	167	168	169
STETSON UNIVERSITY	360	344	296	267	-26%	154	153	152	152
SUFFOLK UNIVERSITY	563	538	528	450	-20%	152	151	147	145
SYRACUSE UNIVERSITY	252	255	243	194	-23%	153	153	152	152
TEMPLE UNIVERSITY	326	270	253	225	-31%	159	158	158	156
TENNESSEE, UNIVERSITY OF	169	160	120	158	-7%	156	156	156	153
TEXAS A & M UNIVERSITY	253	236	258	244	-4%	151	151	149	150
TEXAS AT AUSTIN, UNIVERSITY OF	389	370	308	319	-18%	164	165	163	163
TEXAS SOUTHERN UNIVERSITY	212	219	185	196	-8%	145	144	143	141
TEXAS TECH UNIVERSITY	244	236	227	214	-12%	153	152	152	152
THOMAS JEFFERSON SCHOOL OF LAW	422	440	387	323	-23%	149	148	146	144
THOMAS M. COOLEY LAW SCHOOL	1583	1161	897	582	-63%	144	143	142	141
TOLEDO, UNIVERSITY OF	157	136	123	108	-31%	150	150	149	148
TOURO COLLEGE	280	260	242	205	-27%	149	148	146	145
TULANE UNIVERSITY	258	259	249	216	-16%	160	158	156	156
TULSA, UNIVERSITY OF	146	108	110	83	-43%	152	152	153	152
UTAH, UNIVERSITY OF	122	114	97	107	-12%	157	157	156	155
VALPARAISO UNIVERSITY	207	218	163	208	0%	147	147	145	141
VANDERBILT UNIVERSITY	193	193	173	174	-10%	165	165	163	163

**Change in First-Year Enrollment from 2010 to 2013
and Reported Changes to the LSAT Score at the 25th Percentile (continued)**

	Total First-Year Enrollment				% Change, 2010 to 2013	25% LSAT Score			
	2010	2011	2012	2013		2010	2011	2012	2013
LAW SCHOOL									
VERMONT LAW SCHOOL	212	151	171	129	-39%	153	151	149	147
VILLANOVA UNIVERSITY	251	218	220	162	-35%	159	157	155	153
VIRGINIA, UNIVERSITY OF	368	357	356	330	-10%	166	165	164	164
WAKE FOREST UNIVERSITY	165	185	125	179	8%	160	160	159	157
WASHBURN UNIVERSITY	169	124	130	117	-31%	153	152	150	149
WASHINGTON AND LEE UNIVERSITY	144	121	187	111	-23%	161	159	159	160
WASHINGTON UNIVERSITY	276	243	201	189	-32%	162	162	160	160
WASHINGTON, UNIVERSITY OF	186	182	176	143	-23%	160	161	162	161
WAYNE STATE UNIVERSITY	197	181	148	139	-29%	153	155	153	153
WEST VIRGINIA UNIVERSITY	137	141	140	118	-14%	151	152	152	151
WESTERN NEW ENGLAND UNIVERSITY	168	106	108	120	-29%	151	151	147	145
WESTERN STATE SCHOOL OF LAW	242	237	144	120	-50%	148	149	149	148
WHITTIER COLLEGE	303	274	227	221	-27%	150	149	148	145
WIDENER UNIVERSITY-DELAWARE	389	313	221	239	-39%	150	149	148	147
WIDENER UNIVERSITY-HARRISBURG	178	155	106	74	-58%	148	148	147	145
WILLAMETTE UNIVERSITY	158	141	133	123	-22%	154	152	151	148
WILLIAM AND MARY SCHOOL OF LAW	217	217	196	226	4%	160	161	161	161
WILLIAM MITCHELL COLLEGE OF LAW	357	309	258	236	-34%	152	150	150	149
WISCONSIN, UNIVERSITY OF	246	242	215	186	-24%	158	158	157	156
WYOMING, UNIVERSITY OF	82	69	77	71	-13%	151	150	149	149
YALE UNIVERSITY	205	205	203	199	-3%	171	170	170	170
TOTALS:	52,313	47,276	43,155	39,674	-24.16%				

Sources: Data for total first-year enrollment, 2010–2013, are from the American Bar Association Section of Legal Education and Admissions to the Bar, which obtains enrollment statistics from its annual questionnaire to law schools and makes the statistics available on its website at http://www.americanbar.org/groups/legal_education/resources/statistics.html. Data for 25% LSAT score, 2010–2012, are from the Law School Admission Council, *LSAC Official Guide to ABA-Approved Law Schools*, available at <http://www.lsac.org/lisacresources/publications/official-guide-archives>. Data for 25% LSAT score, 2013, are from the American Bar Association Section of Legal Education and Admissions to the Bar, Standard 509 Information Reports, <http://www.abarequireddisclosures.org/>.

**Changes in First-Year Enrollment
and Average LSAT Score at the 25th Percentile, 2010–2013**



THE REPORT AND RECOMMENDATIONS OF THE ABA TASK FORCE ON THE FUTURE OF LEGAL EDUCATION: ITS SIGNIFICANCE FOR BAR ADMISSIONS AND REGULATION OF ENTRY INTO THE LEGAL PROFESSION

by Jay Conison

The American Bar Association created the Task Force on the Future of Legal Education in the summer of 2012 in response to multiple, severe stresses on law schools and a growing loss of public confidence in the legal education system. The Task Force was chaired by former Chief Justice Randall T. Shepard of the Supreme Court of Indiana and composed of representatives from the judiciary, the organized bar, legal education, and legal practice. The Task Force was charged with clarifying the problems in legal education and developing means by which participants in the legal education system could remediate those problems and restore general public confidence. The central problems the Task Force addressed were rising law school tuition; increasing student debt; declining law school applications; rapid, substantial changes in the market for delivery of legal services; and uncertain job prospects for law school graduates. The Task Force addressed other problems as well, including misdistribution of legal services, weaknesses in law schools' preparing students for practice, and impediments to innovation throughout the legal education system.

HOW THE TASK FORCE CONDUCTED ITS WORK

To prepare its Report and Recommendations (hereinafter the "Report"), the Task Force reviewed lit-

erature on problems and solutions; met throughout its term both in subcommittees and as a whole; and solicited views from a wide array of interested parties via written comments, two public hearings, and an invitational mini-conference. The Task Force Chair and I (in my role as Reporter) also met with the ABA Board of Governors and the Council of the ABA Section of Legal Education and Admissions to the Bar (hereinafter the "Section of Legal Education"), and with the leadership of the Association of American Law Schools. Various members of the Task Force also made presentations to, or participated in forums directed toward, stakeholder groups and interested organizations.

The Task Force worked with a short timeline because of the pressing nature of the challenges. It issued a draft report for public comment in September 2013. In January 2014, the Task Force issued its final Report and Recommendations¹, which the ABA Board of Governors accepted and endorsed at the ABA House of Delegates' Midyear Meeting in February 2014.

HOW THE REPORT MAY BE USED

Some recommendations in the Report have already been implemented; other recommendations and points of guidance have been relied on for improvements or proposed improvements in the system

of legal education. In this article, I will discuss the findings, themes, and recommendations of the Task Force Report with particular reference to bar admissions and the regulation of entry into the legal profession.

The Report provides general guidance and several concrete recommendations on those topics but does not treat them extensively. Nonetheless, individuals and organizations responsible for bar admissions and the regulation of entry into the legal profession can build on the Report's framework and findings to advance shared goals for improving the system of legal education. To aid in this use of the Report, I will first provide an overview of key aspects of the Report and then offer seven principles derived from the Report that may be helpful. These principles range from "Anticipate Criticism" to "Innovation Is Possible."

THE FRAMEWORK OF THE REPORT AND RECOMMENDATIONS

Although the Report makes recommendations for concrete action by particular actors and groups, its greatest value lies in the overall framework for improvement that it crafts. There are three aspects of the Report's framework most relevant to the subject of this article.

The Report Emphasizes the Need for Broad-Based Participation in Addressing Problems and Crafting New Solutions

The Task Force recognized that the system of legal education in the United States is "complex and decentralized."² Although most of the criticism that prompted creation of the Task Force was directed toward law schools, their faculties, and the Section of Legal Education, there are many other entities and groups deeply involved in legal education.

The Task Force listed a panoply of additional participants, including universities and other institutions of higher education, state supreme courts, bar admission authorities, the federal government, law firms, media, and prelaw advisors.³

The Task Force further emphasized that each of these entities or groups has a significant interest or role in legal education, although typically one focused on a specialized or limited aspect of the legal education system. And because of the high degree of decentralization in legal education, "[n]o one person, organization, or group can alone direct change or assume sole (or even principal) responsibility for it."⁴

The Report Identifies a Fundamental Tension

The Task Force identified a fundamental tension, underlying all the discussion, argument, and criticism, which participants in the system were ultimately trying to resolve. The Task Force described the tension as follows:

On the one hand, *the training of lawyers provides public value*. Society has a deep interest in the competence of lawyers, in their availability to serve society and clients, in the broad public role they can play, and in their professional values. This concern reflects the centrality of lawyers in the effective functioning of ordered society. Because of this centrality, society also has a deep interest in the system that trains lawyers: it directly affects the competence, availability, and professionalism of lawyers. From this public-value perspective, law schools may have obligations to deliver programs with certain characteristics, irrespective of the preferences of those within the law school. For example, the requirement that law schools teach professional responsibility was long ago imposed on schools under pressure by the larger profession because

of public concern with the ethics of lawyers. The fact that the training of lawyers provides public value is a reason there is much more concern today with problems in law schools and legal education than with problems in education in other disciplines, like business schools and business education.

But the training *also provides private value*. Legal education provides those who pursue it with skills, knowledge, and credentials that will enable them to earn a livelihood. For this reason, the training of lawyers is part of our market economy and law schools are subject to market conditions and market forces in serving students and shaping programs. From this private value perspective, law schools may have to respond to consumer preferences, irrespective of the preferences of those within the law school, at least in order to ensure the continued financial sustainability of their programs.

The fact that the training of lawyers delivers both public and private value creates a constant, never fully resolvable tension regarding the character of the education of lawyers.⁵

Appreciating this fundamental tension was central to the analysis and recommendations contained in the Task Force Report.

The Report Adopts a “Field Manual” Structure Centering on Nine Guiding Themes

The Report is structured as a “field manual for people of good faith who wish to improve legal education in both its public and private respects. It is designed to guide the activities of these participants within the scope of their respective responsibilities and areas of influence.”⁶ The heart of the field manual consists of nine themes that should guide the action of the various participants in legal education as they work

to meet challenges and improve the system within their respective domains. These nine themes are the following:⁷

- A. *The financing of law-related education should be reengineered.* The current system of financing legal education has many deficiencies. Among others, the system promotes constant tuition increases, high student debt, and subsidization of more strongly credentialed students by less strongly credentialed students.
- B. *There should be greater heterogeneity in law schools.* Law schools have adhered to substantially the same model for decades. Uncritical adherence to this model has inhibited innovation, limited educational choice, and made it difficult for law schools to adapt to changing market conditions.
- C. *There should be greater heterogeneity in programs that deliver legal education.* The system of legal education has long centered on the J.D. as the form of law-related education. The J.D. is an expensive degree. This narrow focus has impeded development of other educational programs that could equip individuals to provide limited or specialized law-related services at lower cost, and to provide law-related services to persons who otherwise might not have access to them.
- D. *Delivery of value to students in law schools and in programs of legal education should be emphasized.* Law schools are in the business of delivering legal education services. No business can succeed in the long run unless it pays close attention to the value it is promising and holds itself accountable for delivering that value. Closer attention to value and its delivery by law schools would promote sustainability and better accommodate the goals of delivering quality education while restraining price.

- E. *There should be clear recognition that law schools exist to develop competencies relating to the delivery of legal and related services.* Law schools have a basic societal role: to prepare individuals to provide legal and related services. Many if not most law schools today do not sufficiently develop core competencies that make one an effective lawyer, particularly those relating to representation of and service to clients.
- F. *There should be greater innovation in law schools and in programs that deliver legal education.* Legal education is conservative. What is needed for sustainable progress is (1) a greater willingness of law schools and other entities that deliver legal education services to experiment and take thoughtful risks, and (2) support for the experiments and risk-taking by other participants in the legal education system. Innovation must come from a change in attitude and outlook, and from openness to learning, including from other fields.
- G. *There should be constructive change in faculty culture and faculty work.* The prevailing culture and structure of a faculty in a law school reflect the model of a law school as primarily an academic enterprise. The entrenched culture and structure have promoted declining classroom teaching load and a high level of focus on traditional legal scholarship. They also promote risk-aversion and inhibit the ability of law schools to innovate and adapt to changing market conditions.
- H. *The regulation and licensing should support mobility and diversity of legal and related services.* The primary purpose of legal education today is to prepare individuals to become lawyers admitted to practice in a state and thus subject to state licensing and regulation. The nature of this licensing and regulation can strongly influence the char-

acter and cost of the education of lawyers, and it can promote or impede goals for improving law schools and legal education. Support for mobility and diversity, in particular, can promote or enable improvements in the overall system of legal education.

- I. *The process of change and improvement initiated by the Task Force should be institutionalized.* The Task Force concluded that many of the forces and factors giving rise to the current conditions are either permanent or recurring. Legal education must be able to continually deal with them in a systematic fashion. Thus, it is prudent for the system of legal education to institutionalize the process of managing change and facilitating improvement.

THE IMMEDIATE IMPACT OF THE TASK FORCE REPORT ON REGULATORS OF LAWYERS AND LAW PRACTICE

Although the Report is written for all participants in the system of legal education, greatest attention is given to law schools and their accreditor, the Section of Legal Education. The Task Force had limited time to gather information, develop an analysis, and frame recommendations. Triage required focus on the parts of legal education that are under the greatest stress and that are at the heart of the educational enterprise.

Nonetheless, as is reflected above, one of the core principles of the Report relates directly to bar examiners and other regulators. In addition, the Report contains concrete recommendations directed to “[s]tate and territorial high courts, state bar associations, and other regulators of lawyers and law practice.”⁸ These concrete recommendations were largely intended to complement other

recommendations directed to law schools and the Section of Legal Education.

The first two complement recommendations directed toward promoting experimentation in educational programs, particularly where it could reduce the overall cost of a legal education. These two recommendations are that regulators of lawyers and law practice should proceed as follows:

1. Undertake to develop and evaluate concrete proposals for reducing the amount of law study required for eligibility to sit for a bar examination or be admitted to practice, in order to be able to determine whether such a change in requirements for admission to the bar should be adopted.
2. Undertake to develop and evaluate concrete proposals for reducing the amount of undergraduate study required for eligibility to sit for a bar examination or be admitted to practice, in order to be able to determine whether such a change in requirements for admission to the bar should be adopted.⁹

The third recommendation to regulators also supports ones addressed to other parties. It seeks to remediate problems concerning access to justice, in part by reducing the time and cost for some persons to gain knowledge and certification to deliver legal services:

3. As a means of expanding access to justice, undertake to develop and evaluate concrete proposals to: (a) authorize persons other than lawyers with J.D.s to provide limited legal services without the oversight of a lawyer; (b) provide for educational programs that train individuals to provide those limited legal services; and (c) license or otherwise regulate the delivery of services by those

individuals, to ensure quality, affordability, and accountability.¹⁰

The fourth recommendation stands most alone. It is largely guided by the aim of addressing the high cost of gaining entry into practice by supporting greater mobility:

4. Establish uniform national standards for admission to practice as a lawyer, including adoption of the Uniform Bar Examination.¹¹

The final two recommendations support other recommendations that promote reduction of the cost of gaining entry into practice and promote the ability of law schools to deliver more practice competencies:

5. Reduce the number of doctrinal subjects tested on bar examinations and increase testing of competencies and skills.
6. Avoid imposing more stringent educational or academic requirements for admission to practice than those required under the ABA Standards for Approval of Law Schools.¹²

SUGGESTIONS FOR HOW REGULATORS OF LAWYERS AND LAW PRACTICE CAN FURTHER LEARN FROM THE TASK FORCE REPORT

It would not be difficult to supplement the six specific recommendations directed to “[s]tate and territorial high courts, state bar associations, and other regulators of lawyers and law practice” with other specific recommendations that promote the same goals and themes. For instance, the goal of reducing the cost to individuals seeking admission to practice and employment in the legal services field could be advanced through changes such as shortening the time associated with grading and reporting the results of bar examinations, or eliminating the bar

examination entirely in favor of a diploma privilege. But rather than exploring these possibilities, it will be more useful to provide general assistance to bar examiners and other regulators by helping them better understand how to use the tools in the Report for strategic actions and initiatives.

To that end, I will offer my thoughts about some implications of the Report. Although the observations below are grounded in the Task Force Report, the Task Force did not specifically address all of them, so they should be understood as my recommendations, rather than an official part of the Report itself.

There are, I believe, seven general principles that can guide work by bar examiners and other regulators to improve the system of legal education. Some are obvious; some are not. Some would be widely endorsed; some would not. The principles are as follows:

1. Anticipate Criticism

Legal education has been experiencing intense change in the past five years, and this change has created enormous stress and discomfort. The legal services field has been experiencing transformation for at least that long, and these stresses and discomforts are at least as great as those affecting legal education. As a general matter, discomforts from dramatic change can prompt a climate of blame, in which persons or groups are singled out as causing woe; this can be followed by calls to “do something” about the perpetrators. Several years ago, law schools, faculty members, deans, and the Section of Legal Education were the targets of blame and of demands to “do something” about them; it was in part this climate that led to the creation of the Task Force.

The transformations in legal education and legal services not only continue but in some respects are accelerating. There is no reason to assume that bar

examiners and regulators will escape criticism. The Task Force was created late and had limited time to act. It would be highly beneficial for bar examiners and regulators to launch a process to anticipate potential criticism and blame directed at them—blame for too many lawyers, too few lawyers, too costly legal services, too costly legal education, or anything else—and preempt it, rather than wait to respond.

2. Cost and Efficiency Are Very, Very Important

There is deep and widespread concern with the cost—to individuals and society—of moving individuals through the pipeline from high school into the legal services field. The cost of law school is only one element, albeit a large one, of this more comprehensive concern. The total cost of moving through the pipeline affects access to careers in law, availability of lawyers and legal services, financial commitments of the federal government, the national economy, and more. Yet the pipeline is not an integrated system, so there is little prospect of an integrated solution.

Still, each segment of the pipeline has the potential for process improvement, efficiency increases, and cost containment, which can be brought about by the persons or groups with influence over the relevant section of the pipeline. There are well known, tested tools for achieving such improvements. Law schools are slowly moving to use them; regulators, who are more intimately connected with the business world, are likely in an even better position to use these tools to improve their part of the system for producing new lawyers.

3. The J.D. Education Increasingly Focuses on Developing Practice Competencies

The long-prevailing model of a law school was that of a graduate program in a university, instilling knowledge in a field (law) and a narrow range of

competencies centering on discovering, analyzing, and reasoning about law. The ticket to entry into law school—the LSAT—centered on academic competencies, and the ticket into law practice—the bar examination—likewise centered on knowledge and ability to reason and argue. Years of pressure on law schools have begun to shift the educational model. There is greater recognition that the ultimate purpose of law schools is to prepare individuals to do things, rather than just to know things, and this has led to an increased emphasis on law schools delivering practice-related competencies.

The shift in focus is far from complete but is probably irreversible. Bar examiners and regulators have also begun to shift but have not moved in synchrony with law schools and the Section of Legal Education. As law schools continue to evolve toward a competency-oriented model, the potential arises for frictions and incompatibilities between law schools (and their accreditation system) and bar examiners and regulators. The transition in legal education will be smoother through stronger coordination to manage the evolution.

4. Passing the Bar Examination Is Yet Another Competency

It is easy to yearn for a golden age when a J.D. program by itself was enough to prepare graduates for the bar examination. Those days are long gone. Today, preparing students to pass the bar examination is not just a matter of strengthening classroom-based knowledge of torts and other subjects; it is also a matter of developing distinctive test-taking competencies that involve discrete skills (such as answering MBE-style questions) and test-taking strategy.

As a new and distinctive competency, bar preparation constitutes yet one more addition to the

overall program of educating persons for practice. In this, it is like other competencies that have been added to the program of J.D. education over the past 30 or 40 years, such as writing skills, litigation skills, and career development skills. The nature of the bar examination thus affects more than just the substantive legal topics law schools must teach. As a result, the nature of the bar examination can increase the cost of providing a full law school education and place an additional stress on law schools regarding the allocation of time and resources to the many competencies deemed essential. It can thus have an impact on both the cost of entering the profession and the depth and breadth of knowledge and skills a student can obtain within the three years of law school.

5. First-Time Bar Passage Rates Are High-Value Outcomes for Law Schools

As the Task Force Report explained, law school education (like higher education generally) has increasingly been influenced by the view of higher education as primarily a path to a career, rather than a means to personal growth and fulfillment. This reorientation toward career outcomes reflects the growing view that the relationship between law schools and students is, in essential ways, a consumer relationship. This, in turn, has increased the importance of consumer information, which includes key outcomes, especially first-time bar passage and employment rates. Thus, changes in bar admission requirements or other regulation of admission to the profession in a jurisdiction, which could have an impact on first-time bar passage results, can have a substantial impact on the ability of schools in the jurisdiction to compete for students. The impact on schools is very different today than in an earlier, less market-driven era.

6. Culture Matters

A key point made in the Task Force Report is that culture has a profound influence on change in law schools and law school education. The Report described the prevailing culture in law schools and noted that it evolved in very different times and is not well adapted to economic and other conditions today. This old and entrenched culture fosters resistance to change. The Task Force Report emphasized that many recommendations for improvement will have no impact without a change in law school culture, and thus cultural change is essential.

The world of bar examiners and regulators may be less self-contained than that of law schools and may be less thoroughly pervaded by a distinctive culture. But to the extent that there exists such a culture, it needs to be understood, and any plan for the improvement of legal education should seek to remove any cultural impediments to endorsement and implementation of needed change.

7. Innovation Is Possible


Innovation is rooted in a willingness to support and engage in experimentation and thoughtful risks. The system of legal education is in great need of improvement, and it is difficult to see how improvement will be achieved without some degree of experimentation and risk. Law schools and the Section of Legal Education are conservative and risk-averse, yet both are moving modestly toward an outlook that accepts innovation and its preconditions of experimentation and risk.

It is equally possible for bar examiners and regulators to move down this path of accepting, if not promoting, innovation, to help ensure that the system of legal education as a whole adapts to, and

even anticipates, changes in the economic, social, and educational environment. On the other hand, because of the interconnections between admission to the profession and law school education and other components of the system of legal education, if bar examiners and regulators are resistant to change, then opportunities for significant innovation elsewhere could be impeded.

CONCLUSION

The Report of the Task Force on the Future of Legal Education details the stresses on and weaknesses of the current system of legal education. It also provides guidance and tools for those with influence in the various parts of the system to act to cure weaknesses and improve parts of the system within their domains. The Report provides concrete guidance for bar admission officials and regulators, mainly to ensure that they support necessary changes and improvements by law schools and by their accreditor.

But there is far more that bar examiners and regulators can achieve within their areas of influence and responsibility, by acting on principles both explicit and implicit in the Task Force Report. By acting on these principles, they can work to remediate problems such as cost of education and caliber of training of lawyers, and strengthen the character of legal education as a systematic, integrated, and continuously improving enterprise. 

ACKNOWLEDGMENTS

I am grateful for helpful comments on earlier drafts from Hon. Randall Shepard, Hulett Askew, Catherine Carpenter, and Nancy Conison.

NOTES

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LEGAL EDUCATION REFORM: NEW REGULATIONS, MARKETS, AND COMPETING MODELS OF SUPPOSED DEREGULATION

by Bryant G. Garth

“**T**he law school model is broken” is a refrain that we hear from many fronts, referring to already-high tuitions increasing at a rate that outpaces inflation by a substantial margin, the use of these expensive tuitions to pay professors who teach relatively few courses, and unsustainable levels of student debt. This diagnosis was evidently behind the mandate given to the American Bar Association (ABA) Task Force on the Future of Legal Education,¹ which was created in 2012 to investigate problems in the U.S. model of legal education and to identify possible solutions. The Task Force was convened notably by the ABA itself and not by the ABA Section of Legal Education and Admissions to the Bar—the ABA Section was no doubt deemed part of the problem.

This diagnosis has also given license to state bar associations to push new reforms. One or two of the approaches to reform in the Task Force Report and in state bar proposals and programs take on major legal education issues—such as two years of law school instead of three, and faculty scholarship versus increased teaching loads. This view of legal education is also giving rise to alternative programs such as Washington’s Limited License Legal Technician program, which, with reduced educational requirements, authorizes limited practice by this new type of legal service provider.²

Others in legal education are clearly using the timeworn strategy of “not wasting a crisis” to imple-

ment projects desired on other grounds—such as requiring pro bono service for admission (as was implemented in New York beginning in 2013³) or considering practical skills training requirements for admission (as was recently recommended in California⁴). And still others are simply using the opportunity to bolster the employment prospects of law graduates through early bar exams (an experiment under way in Arizona⁵) or even considering a diploma privilege (whereby graduates of a jurisdiction’s in-state law schools do not have to take the bar exam to become licensed in that jurisdiction—a proposal recently explored but rejected in Iowa⁶).

I want to use this article to describe some of the ideas and projects that are in the air today, but my larger goal is to relate these proposals to issues of regulation and markets. The discussion necessarily goes beyond requirements for admission to the bar. Education generally—including legal education—has moved from a highly regulated market characterized by muted competition to a much less regulated market with vigorous competition. The question is whether we can expect more positive change today—fixing the so-called broken model—from the reform proposals now circulating or from the workings of the law school market that we have created over the past two or three decades. At this point, I will contend, the commitment to competition is too far advanced to make a return to the full regulation model effective.

More fundamentally, we face two different deregulatory alternatives, and there are consequences in the choice between them. One is a new kind of what can be called “regulation in the guise of deregulation.” I identify this as one possible outcome of the ABA Task Force Report, and it is consistent with the prescriptions of legal scholar Brian Z. Tamanaha, who in his book *Failing Law Schools* argues for an emphasis on lower-cost practical training, possibly in a reduced number of years, geared toward improving access to law degrees.⁷ The other is deregulation that continues the path we have been on, which seems to have gotten us into so much trouble. I will argue, perhaps paradoxically, that the latter path is better for the legal profession and will accomplish in a more positive fashion what the ABA Task Force and many commentators favor—which is more product differentiation among law schools.

A LOOK BACK AT THE OLD MODEL OF LEGAL EDUCATION

I have been dean of two different law schools during two dramatically different eras in legal education—Indiana University Bloomington School of Law in 1986–90 and Southwestern Law School in 2005–12. I speak therefore from experience, and I also believe that my account is consistent with what research shows. In the late 1980s, all accredited law schools were nonprofit. Most professors were full-time and on the tenure track. The great majority of public law schools kept in-state tuitions low. The concept of formal rankings was just beginning to take hold. Students, professors, and law firms certainly knew there was a hierarchy,⁸ but many students—lacking detailed information on the hierarchy of reputation and sensitive to transportation costs—did not commit to the hierarchy in their law school choice. There was not a truly national competition for students, and the general opinion was that changes in law

school programs, facilities, and faculty would not change student credentials or reputation appreciably. (One axiom I was taught, for example, was that every Big Ten law school was better than any Big Eight law school.)

Still, competition was beginning, and each year, I had to explain to the University’s vice president how the law school was getting better and how we might measure it—applications were up, credentials were up, and so on. There were already complaints about costs and debt by such notables as David Chambers (a leading commentator on the legal profession and initiator of the well-known study of Michigan law graduate careers⁹) and Jack Kramer (iconoclastic dean of Tulane University Law School in the late 1980s),¹⁰ and I remember that we competed for prestige partly in the number of volumes in the library. Competition was increasing, but the model of legal education was pretty uniform—a model developed under the leadership of the ABA and the Association of American Law Schools (AALS) in part to put pressure on the urban law schools that served immigrants and the relatively less well-off.¹¹ The ABA Section of Legal Education and Admissions to the Bar helped keep the system in place. It would have been unusual in that era for any faculty to adopt a reform proposal because it offered the promise of attracting more applications from more highly credentialed students.

FACTORS LEADING TO THE CURRENT MODEL

As Stanford economist Catherine Hoxby has shown, the intense competition at the undergraduate and graduate levels that we have today came from increased transparency about law school hierarchies and from the reduced transportation costs that allowed applicants to consider a much greater

geographical range of schools.¹² The courts and the era of deregulation helped, as courts struck down some of the regulations that had kept the system in place—for instance, banning nonprofit accreditations by the ABA and mandating shared salary information. And deans influenced by law and economics and the general rise of neoliberalism in the U.S. economy attacked other seemingly restrictive regulations.

The market for students and professors heated up tremendously. Accelerated tuition increases went to new programs, including clinics and enhanced legal writing instruction; scholarship assistance to “buy” highly credentialed students; new facilities; new services, including greatly enhanced academic support and bar assistance programs; and general support for faculty scholarship to build the reputation of the faculty. At a relatively few schools, in addition, tuition increases went toward attracting academic “stars,” which also led to reduced teaching loads at certain law schools.

Hoxby demonstrates clearly that the tuition increases were the result of more competition, not more regulation. This competitive system meant that students tended to follow the hierarchies of the rankings, and when comparing similarly ranked schools, they looked at facilities and programs, prompting schools to focus on adding facilities and developing new programs to attract students. Confident in the value of law school, even with rising tuitions, students did not shop on the basis of price—also because the large price gap between public and private schools had largely disappeared. In addition, in order to expand services and programs without shattering budgets, law schools (and universities generally) began hiring more and more professors off the tenure track.

Deans in the era of competition have very different assignments. They are supposed to articulate and improve the law school’s ranking by attracting better students and faculty. The faculty is much more likely to follow that vision today than in the past, because most law schools intensely feel the competitive pressures that *U.S. News & World Report* fuels and channels—but did not create—through its ranking system. Deans today are paid substantially more than faculty members. That was not true when I was dean 25 years ago.

My argument is that because of the market and competition, we evolved the “broken” model we have today. We can now look at the proposals in circulation to see what, if anything, they do to fix it. I believe that most of the proposals are part of the competitive model or are consistent with more competition. Indeed, the most notable task forces—the ABA Task Force and the New York City Bar Association Task Force on New Lawyers in a Changing Profession¹³—recognize that competition has fueled change and embrace this competition and the product differentiation it encourages.

A LOOK AT THE CURRENT REFORMS

Before discussing some of the ideas for reform, I should mention the ABA Task Force’s curious take on competition. The Task Force Report states that “[l]aw schools have long escaped pressure to adapt programs or practices to customer demands or to the pressures of business competition. . . . [C]urriculum, culture, and services have developed with little relation to market considerations.”¹⁴ It calls for a “reorientation of attitudes toward change, including market-driven change.”¹⁵ It sees the culture of law schools as conservative and “entrenched.”¹⁶ The reason, according to the Task Force, is that faculty members insist on seeing scholarship as “an essential

aspect of a faculty's role,"¹⁷ implying quite strongly that scholarship is done mainly for "status."¹⁸ In fact, I will insist, the competition for status in and through scholarship is absolutely essential to understanding the intense competition in the law school world today. I will explain this aspect of the market later in this article. First, I will take a look at the main set of reforms circulating today—focusing especially on those that change admission to the bar.

Additional Admission Requirements

The State Bar of California's Task Force on Admissions Regulation Reform recently proposed to mandate competency training, including 15 units of pre-admission competency skills training and 50 hours of pro bono service to poor or modest-means clients.¹⁹ The California Task Force insisted that the mandate would not have any impact on law school tuitions, since most law schools already could satisfy the conditions through externships if not through clinics. The proposed new regulation to some extent impedes the development of multiple models of education in the name of practical skills, and it affirms what happened before that helped to increase tuitions to the level we have today—competition in programs and services. Most law schools expanded clinical offerings (as well as less expensive externships) in order to attract students. In terms of competition, we can say that California's proposal advantages the schools that have already built these requirements into their tuition.

The New York State Board of Law Examiners has mandated 50 hours of pro bono service before a law graduate is sworn in to the New York Bar.²⁰ Other states, including Connecticut²¹ and New Jersey,²² have been considering similar reforms. Here, too, the impact will be to reinforce a trend that emerged through law school competition—adding new programs to attract students. And the trend also has

cost impacts that are generally not discussed, since the pro bono opportunities do not necessarily appear spontaneously—although the requirement can be satisfied by internal means such as qualifying work performed during participation in law school clinics or through law-school-sponsored projects, helping students connect with external pro bono opportunities and verifying the pro bono service will presumably require internal resources.

Early Admission Options

New York's Chief Judge Jonathan Lippman recently announced as well that there will be a Pro Bono Scholars Program (PBSP) available to certain students who will spend their last semester of law school doing pro bono service—and who will then be able to sit for the bar exam during that last semester and then potentially be admitted upon graduation.²³ The pro bono requirement, again, can be seen as reinforcing competition by forcing schools that have not built pro bono into their programs to do so.

Another set of reforms, interestingly, provide the same student benefit that the New York PBSP program would offer—admission to the bar upon graduation. Iowa recently considered (although eventually rejected) the diploma privilege for law graduates in the state,²⁴ and Arizona has enacted an experimental program that allows students to spend their last semester first prepping for the February bar examination and then taking practical courses.²⁵ These kinds of early admission programs clearly advantage the graduates of law schools in particular states. In a tough job market, when corporate law firms are not hiring as much as in the past, many of the available positions require the applicant to already be a member of the bar. Those who graduate with bar membership have a notable advantage over those who must wait up to four months for their bar results.

What is surprising about these reforms and proposals is that they are not very numerous and they only reinforce what the market has produced—rewarding those law schools that have already moved in the desired direction and forcing those who have not to ante up. There is no effort to fix a so-called broken model.

Alternatives to the Three-Year Law Degree

There are more fundamental reform proposals and programs coming out of some states, however. One is the creation in Washington of a new kind of quasi-lawyer meant to be analogous to a nurse practitioner—the Limited License Legal Technician, trained through a combination of 45 law school credit hours and 3,000 hours of law-related work experience.²⁶ The initial area of law to which the rule applies is family law, but there are plans to expand into other areas where there are strong unmet legal needs. This new type of legal service provider provides an alternative career for those who want to serve individuals in a potentially rewarding occupation without gaining the status of a fully licensed lawyer. The ABA Task Force also suggested more innovation along these lines.

Another more radical innovation, proposed by such notables as Daniel Rodriguez, currently president of the AALS, and Samuel Estreicher, a well-known professor at New York University,²⁷ is to allow individuals to stop law school after two years and simply take the bar examination. In some respects, this innovation is also aligned with market trends, since two-year law schools (e.g., Southwestern, Dayton, Northwestern) are now increasing in number, even though traditionally costing the same as three-year programs. Given that the third year consists increasingly of practical skills courses partly in response to various new regulations, it may make sense for individuals to graduate

after two years, take the bar exam, and then use CLE and similar programs to acquire practical skills less expensively.

We know from the After the J.D. project,²⁸ however, that elite law graduates are more likely to say that the third year is unnecessary than are non-elite graduates,²⁹ who presumably feel that the third year helps in bar exam and practice preparation and in the acquisition of essential contacts through externships in particular. But the market may produce substitutes, as noted above. The New York City Bar Association Task Force’s thoughtful report, interestingly, favors the continuation of the third year as a way to make lawyers more practice ready and competent.

THE ABA TASK FORCE’S POSITION

Finally, the ABA Task Force has weighed in on these proposals and debates. Its Report did not call for major changes through new regulations, despite the sense of crisis that provoked the creation of the Task Force. The Report in fact expressly embraced the deregulation trend that has characterized legal education in the past two decades—calling for the ABA to deregulate further in the interests of more differentiation among law schools. In particular, the Report supported the idea of more low-cost law schools characterized by faculty who do not produce scholarship and have increased teaching loads, and with part-time professors playing a larger role. The Report also suggested more experimentation with quasi-lawyer degrees such as the one created in Washington.

As noted above, the Report has great difficulty with faculty scholarship, suggesting that it may help to promote “public value” and “improv[e] law as a system of legal ordering” but generally characterizing scholarship as the product of an “entrenched

culture” and a seemingly unproductive and overly expensive search for “status.”³⁰ The general embrace of faculty scholarship within law schools led the Task Force to state that law faculties are conservative and too insulated from the market, which presumably would favor lower tuitions at the expense of scholarship. Insulation from the market, according to the Task Force, led to the general faculty emphasis on scholarship and prestige.

SUPPOSED DEREGULATION: DISADVANTAGES TO THE LAW SCHOOL MARKET

The ABA Task Force Report’s deregulatory message, in my opinion, comes with a potential regulatory bite—what I referred to earlier as “regulation in the guise of deregulation.” I can imagine, for instance, ABA accreditation site evaluation teams strongly suggesting to lower-ranked law schools that they should back off their efforts to promote scholars and scholarship. The message of the ABA Task Force Report—and of many commentators, particularly Brian Tamanaha—is that the key to fixing the broken model is to severely cut down the number of law schools competing in the scholarly marketplace.

This approach goes hand in hand with the idea that two years of legal education is enough for legal service providers who serve individuals, possibly with the support of new quasi-lawyers. These careers would be more affordable and accessible than careers that pass through the elite three-year law schools and culminate in employment at corporate law firms. The no-frills education, according to this approach, is plenty good enough for most jobs serving individuals. The result of this somehow institutionalized division of labor would be reminis-

cent of the “two hemispheres” depiction of the bar originally posited by John P. Heinz and Edward O. Laumann in *Chicago Lawyers: The Social Structure of the Bar*, published in 1982.³¹ At that time—and from at least the turn of the 19th century—corporate lawyers came from different religious and ethnic groups (primarily WASPs—White Anglo-Saxon Protestants) than lawyers who served individuals, and they went to different law schools (Ivy League schools, Michigan, Northwestern, and University of Chicago producing corporate lawyers, versus mainly Chicago Kent, John Marshall, DePaul, and Loyola producing lawyers who served individuals). The current proposals for regulated deregulation would tend to divide the law school market in the same way. The relatively privileged would be taught by scholars in elite three-year law schools and would gain jobs in corporate law firms. The less privileged would attend the lower-ranked law schools with fewer scholars and perhaps a two-year degree leading to employment in solo and small-firm practices serving individuals.

The rankings hierarchy would also be frozen in certain ways since the ambition of rising through faculty prestige would be severely circumscribed. As a recent dean at Southwestern, I naturally react to this proposal—promoted as deregulation but meant to impose a model on schools not high in the existing hierarchy—as one that unduly limits those who today come from relative disadvantage and tend disproportionately to attend the schools that are not highly rated. The progress since the publication of *Chicago Lawyers* in fact means that top students from the urban law schools have had the opportunity to cross the divide and become partners in corporate law firms.³²

ALLOWING THE CURRENT COMPETITION TO CONTINUE

More fundamentally, I want to contrast the kind of deregulation advocated by the ABA Task Force Report with allowing the current competition to continue. There are two elements to the argument for allowing the current competition to continue. First, I believe we need to recognize that scholarly competition is an essential feature of the role of law in our society. Second, I suggest that, based on Hoxby's economic analyses of undergraduate education presented above, the deregulation that is already in place is likely to further fuel the differentiation between elite and non-elite law schools. The attack on faculty scholarship will not help much and may do considerable damage. These points are largely missing from the debate.

An Argument for Faculty Scholarship

The first point requires some sociology. The legal field in the United States comprises a set of related practices that, we can posit based on established sociological theory or even economics, work together for the prosperity of the field. Law and economics scholars have made careers out of finding the economic efficiency justification for social and organizational practices, arguing perhaps too simply that there must be a justification or the practices would not continue.

Sociological or organizational theory is a little more complex. It posits that the practices of a field may not be the very best or most rational way to operate, but they do serve the interests of the field or they would not have survived and become relatively entrenched—sustained by incentives and hierarchies within the field.³³ Following this line of analysis, it is not difficult to see what the legal profession gains

from this far-ranging competition for professors and scholarship throughout the hierarchy of law schools.

We take for granted that lawyers should be social engineers and leaders in solving social problems, but it takes sustained scholarly effort to provide potentially credible solutions in the normative language of law. Credibility does not come from the formal law, but from the link of the formal law to the most credible science, including social science. Scholars compete in part by importing work from elsewhere on the campus into the law, and that importation has become central to the credibility of law—hence the demand for J.D.-Ph.D.s. The Legal Realists in the 1930s imported from the social sciences to help serve the New Deal. Activists in the 1960s imported from criminology and sociology especially. Sometimes the importation is irrelevant to current concerns or very poorly done, but the mass of articles produced out of scholarly competition sustains the role of law. More recently, the rise of law and economics gave lawyers a key role in the economist-led deregulation, and the invention of Originalism—the claim that the original intent of the framers of the Constitution dictates today's conservative interpretations—provided a legal doctrine that judges could use to help enact the agenda of the conservatives. In each case new doctrines in the law reviews provided avenues for lawyers to play a central political role as political agendas changed.

There are countless examples of innovative legal doctrines providing the basis for law-based solutions to social and economic problems. They include the invention of sexual harassment as a legal wrong and the invention of much of the architecture of globalization, including trade law and corporate governance. The incentives that produce this scholarship are such that professors at virtually all law schools wish to gain recognition as scholars, and—whether

U.S. News rankings existed or not—peer respect is central to the reputation of law school quality and the position of law schools in the hierarchy. The competitive market in scholarship, in short, builds individual careers and the reputation of law schools while it leads to the production of legal scholarship that makes law and lawyers central to the solution of social and economic problems.

It is true that productive scholars—because of the structure of the market—cost more, and incentives to retain top scholars, such as reduced teaching loads and research support, also are potentially costly. My own educated guess is that even in the recent era of high tuitions, however, most of the increase in revenue was going to academic support and other new expanded programs and services, with a relatively few law schools going to the extreme of paying diva salaries to the most prestigious scholars.

How the Market Differentiates Law Schools without New Regulation

What happens with academic markets, Hoxby contends, is that the top of the hierarchy can keep raising tuition and put the revenues—augmented by alumni contributions—back into programs, facilities, faculty, and scholarships. Law schools without the same reputation and resources, however, will have to hold down relative tuition increases at some point, and apparently that time came with the current economic crisis (even if masked by tuition discounting).

Because of the questioning of the value of the law degree that came with the Great Recession, price has become an issue for consumers. Law schools such as Brooklyn recognize this change and are now—as part of the regular competition—marketing through lower (but still pretty expensive) tuition. We can predict that those law schools that cannot keep up the

revenues in the future will be hiring relatively fewer tenure-track professors, devoting fewer resources to bid for potential academic “stars,” and relying on more part-time faculty as well. The differentiation between elite and less-elite liberal arts colleges foreshadows what is happening in law schools.

CONCLUSION

What will the result be? One hypothesis is that we will end up in a world not too dissimilar to what the ABA Task Force Report posits—increasing differentiation among law schools and a vast gulf between those law schools with seemingly unlimited resources, top scholars, top students, and top opportunities and those law schools with severe resource constraints, no ability to keep raising tuition more than the cost of living, perhaps a few scholars, and much weaker students in terms of credentials. We might have been better off if the era of intense competition had never started, but there is no turning back now.

The advantage of this recognition and support of the real competition—not the one that many want to impose on law schools—is that those law schools that are able to compete—perhaps with exceptional good luck in alumni support or alumni self-help and networking or innovative programs—may continue to do so. And the neglected but crucial competitive market for legal scholarship will continue to operate at all levels, with innovation often coming from those who are hungriest. Even though the gap between the haves and the have-nots in legal education will grow, the line between those who serve individuals and those who serve business—which defines the lawyer hierarchy—will not be rigid and impermeable.

This potential future suggests a much greater spread in tuition, and some law schools may become

as affordable as the California law schools that do not have ABA accreditation. Mainly students who cannot get into more prestigious schools will attend the bottom of the hierarchy, because they will want to have some shot at the brass ring of a corporate law job. But the process will continue (whether schools remain smaller in response to less demand or expand again). Competition helped to produce a market with steep tuition increases for a time, but competition will also make relative adjustments even as the intensity of the competition remains very high. ■

NOTES

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33. E.g., PIERRE BOURDIEU & LOÏC J. D. WACQUANT, AN INVITATION TO REFLEXIVE SOCIOLOGY (University of Chicago Press, 1992); WALTER W. POWELL & PAUL J. DiMAGGIO, eds., THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS (University of Chicago Press, 1991).



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Editor's Note: The following two articles are based on Diane F. Bosse's and Laurel S. Terry's presentations at their joint session "Admitting Foreign-Trained Lawyers: Understanding the Issues" at the 2014 NCBE Annual Bar Admissions Conference held on May 1–4, 2014, in Seattle, Washington. The articles are intended to complement each other by providing a snapshot of the foreign-educated applicant pool taking the New York Bar Examination and the rules by which these applicants may qualify to take the exam, and exploring the broader range of methods by which foreign-educated applicants may be permitted to practice in U.S. jurisdictions, including a discussion of the reasons why jurisdictions should consider rules regarding these methods.

TESTING FOREIGN-TRAINED APPLICANTS IN A NEW YORK STATE OF MIND

by Diane F. Bosse

The United States recognizes 195 independent states in the world.¹ In 2013, candidates from 111 of them came to New York to take our bar exam. From every continent, from Azerbaijan to Zimbabwe, and from Eritrea to Ecuador, they came, 4,602 in number. Where did they come from? Why did they come? How did they qualify to take our exam? And how did they fare on the test? This article offers answers to those questions. First, some history.

In the August 1998 edition of this publication, an article appeared describing the New York Court of Appeals' recently revised rules regarding the educational eligibility requirements to sit for the New York Bar Exam, including those for foreign-educated attorneys.² The article, co-authored by then Court of Appeals Associate Judge Howard A. Levine and Court Attorney for Professional Matters Hope B. Engel, offered the following premise for New York's approach to the eligibility of foreign lawyers:

New York State is a center for international trade and commerce. Recognizing that lawyers play an important role in the global economy and that the international markets demand competent

attorneys able to oversee cross-border issues, the Court reviewed its Rules authorizing foreign-trained attorneys to sit for the New York State bar examination. Consistent with the General Agreement on Trade in Services (GATS), negotiated by the United States Trade Representative, the Court sought to update its rules to allow for transnational legal service without diminishing the quality of legal representation to be provided or the qualifications of New York admitted attorneys.³

In 1997, the year before the new rules were enacted, New York tested 1,701 foreign-educated candidates, 15% of our candidate pool of 11,205.⁴ In 2013, the 4,602 foreign-educated candidates we tested comprised 29% of our candidate pool of 15,846. Between 1997 and 2013, the number of graduates of ABA-approved law schools we tested increased by 18%; the number of our foreign-educated candidates grew in that period by 170%. The percentage of foreign-educated candidates in our test population will likely increase in the coming years, given the decline in enrollment in J.D. programs at ABA-approved law schools⁵ and the burgeoning number

of LL.M. programs in those institutions,⁶ designed to prepare foreign-educated lawyers for bar admission in the United States.

WHERE DO THEY COME FROM?

Of the 111 foreign countries represented in our 2013 candidate pool, most had fewer than 10 candidates sitting for our bar exam. However, more than 100 candidates hailed from each of the 10 countries indicated in Table 1.

Our Chinese candidate pool is our largest contingent and has seen the most dramatic increase. The number of candidates coming to New York for our bar exam from China was 115 in 2000 and 500 in 2008. That number increased to 1,148 in 2013.⁷ In addition to China, Brazil, Korea, and Russia also saw significant increases in the number of candidates. Over the last few years, Brazil has replaced Australia on the 100+ candidate list. In addition to Australia, Canada, Germany, Israel, the Philippines, and Spain have seen their numbers decline.

WHY DO THEY COME?

Foreign-educated law graduates seek admission to practice in New York for reasons likely as varied

Table 1: Countries with More than 100 Candidates Taking the New York Bar Exam in 2013

COUNTRY	NUMBER
China	1,148*
United Kingdom	566
Japan	365
Korea	301
France	202
India	172
Canada	156
Nigeria	129
Brazil	122
Ireland	104

* This number includes 52 candidates from Hong Kong and 174 candidates from Taiwan.

as the lands from which they travel to take the test. First, there are significant immigrant populations in New York, and many foreign-educated lawyers are engaged in practices that serve their needs.

Second, admission to the New York Bar is a valuable employment credential for many foreign-educated law graduates. There are a few different reasons for this. New York is the jurisdiction selected in the choice of law provision in many international contracts, thereby making New York law the one agreed to by all parties in interpreting the agreement. Thus, admission to the New York Bar, and presumed competence in New York law, is an asset to a lawyer seeking employment in an international law firm, in New York or elsewhere around the world.

Strong American influence on global corporate, insurance, intellectual property, banking, securities, and antitrust law make the combination of an LL.M. degree from an American law school and bar admission in the United States a valuable employment credential. New York is most frequently the forum of choice to take the bar exam in the United States for foreign-educated candidates hoping to gain that credential because of its less stringent eligibility requirements, the number of international law firms having offices in New York, and New York's perceived position in global financial affairs. In 2013, 5,928 foreign-educated candidates sat for a bar examination in the United States. They sat in 28 separate jurisdictions, with 4,602 of them sitting in New York.⁸

In some countries, admission to practice is quite restricted, by quotas and/or low passing rates on the licensing exams. Law graduates from those countries may take the New York Bar Exam in order to become employed in international law firms in their home countries, practicing international law, despite being unable to gain admission to practice local law.

Then there are candidates who are able to gain admission in their home countries more readily as a member of the New York Bar. Take the example of the law graduate seeking to become a solicitor in England. Following completion of the academic requirements and a Legal Practice Course, the potential solicitor must complete practice-based training, through a training contract. If unable to secure a training contract, the candidate can come to New York and take our bar exam, without further education or training, and, on passing our exam and being admitted to practice in our state, take the tests comprising the Qualified Lawyers Transfer Scheme.⁹ Upon passing those tests, the candidate will then qualify for admission as a solicitor in England, without having completed a training contract.

Similarly, a French law graduate who obtains an LL.M. degree, and who takes and passes the New York Bar Exam and is admitted to practice in New York, can be admitted to practice in France under special procedures available to non-European Union attorneys.¹⁰ Specifically, such candidates are exempt from the required 18 months of training in an *École des Avocats* (EDA), a regional school in charge of the professional training of lawyers, and they take an exam to assess their knowledge of French law instead of the *Certificat d'Aptitude à la Profession d'Avocat* (CAPA), which is the French bar exam.

For these reasons and others, with each passing year, more and more foreign-educated candidates apply for a determination of eligibility to take the New York Bar Exam.

HOW DO THEY QUALIFY?

Foreign-educated law graduates can qualify to take the New York Bar Exam by following one of three routes.¹¹ The first route is available to law graduates educated in common law countries. A candidate who received a law degree from an accredited institution

in a common law country, satisfying the educational requirements for admission to practice in that country, may qualify to take the New York Bar Exam without further education, provided that the candidate's program of legal education was durationally and substantively equivalent to an ABA-approved law school J.D. program.¹² A candidate can "cure" a substantive or durational deficiency, but not both, by taking an LL.M. program meeting the requirements of our rule at an ABA-approved law school in the United States.¹³

Candidates from non-common law countries can also qualify, but they are generally required to meet an additional educational component. A candidate who received a law degree from an accredited institution in a non-common law country, satisfying the educational requirements for admission to practice in that country, whose program of legal education was either substantively or durationally equivalent to an ABA-approved law school J.D. program, can cure a substantive or durational deficiency, but not both, by taking an LL.M. program meeting the requirements of our rule at an ABA-approved law school in the United States.¹⁴ Essentially, if a candidate has had three years of full-time or four years of part-time legal education satisfying the educational requirements for admission in the country where the education was completed, by obtaining an LL.M. degree in the United States in conformity with New York's specific curricular requirements, the candidate can qualify to take our bar exam.

The final path for foreign-educated candidates to establish eligibility to sit for our bar exam is the only route that requires admission to practice. A candidate admitted to practice in a common law country, with an education that was both durationally and substantively deficient as compared to the education provided in an ABA-approved law school J.D. program, can, in some cases, cure the

deficiency by taking an LL.M. program meeting the requirements of our rule at an ABA-approved law school in the United States.¹⁵ The candidates who qualify under this track are generally solicitors in the United Kingdom whose undergraduate degree was not a qualifying law degree, as defined by the Solicitors Regulation Authority, but who qualified for and were admitted to practice through a separate process, involving further academic and vocational training, following their undergraduate degree.¹⁶

In essence, there are six components to determining if a foreign-educated candidate can qualify to sit for the bar exam in New York:

- Does the applicant have a *qualifying* degree in *law*?
- Is the degree from an *accredited* institution?
- Was the degree obtained in a *common law* country?
- Was the education received *substantially equivalent in substance* to that of an ABA-approved law school J.D. program?
- Was the period of law study *substantially equivalent in duration* to that of an ABA-approved law school J.D. program?
- Is a *cure* available and appropriately completed?

“Substantial equivalence” is not “substantial compliance” with the ABA Standards for accreditation. Based on our staff’s knowledge and experience in examining educational programs and educational requirements for admission to practice in common law countries, as well as student transcripts, a degree in law that qualifies a candidate for admission in his or her home country is often a proxy for substantial equivalence in substance.¹⁷ Substantial equivalence in duration is typically confirmed by review of the candidate’s transcript, requiring proof of attendance for three academic years (full-time) or four academic years (part-time), review of courses taken (with an expectation of six to eight courses per academic year

for full-time equivalence), and a written statement from the degree-conferring institution providing proof of durationally equivalent legal education.

No statistics are kept on the number of foreign applicants denied eligibility to take the New York Bar Exam, but common causes of denial are that the degree obtained in the foreign country was not a degree in law, that the degree was obtained through distance education, and/or that the period of law study in a non-common law country was not durationally sufficient.

New York’s Recent Amendments to its LL.M. Program Requirements

In 2011, the New York Court of Appeals amended its rule regarding the specific requirements for an LL.M. program sufficient to qualify as a “cure” for the substantive or durational deficiency in the legal education of a foreign-educated candidate.¹⁸ This amendment came after the Court observed over a number of years that many LL.M. programs were focused on international finance and similar disciplines with little emphasis on United States or New York law. Some programs did not require students to attend any classes in the United States; others were of brief duration and uncertain pedagogical value. Coupled with the comparatively low passing rate of many of the candidates qualifying to take the New York Bar Exam based on these programs and their high cost, the Court felt that some additional prescription for these programs was in order. A qualifying LL.M. program must now meet these requirements:

- 24 credit hours;
- at least two semesters;
- no more than four credit hours taken in the summer;
- all coursework completed at the campus of an ABA-approved law school in the United States;

- program completed within 24 months of matriculation;
- no credit for distance education courses;
- at least two credit hours each in professional responsibility, legal research and writing, and American legal studies;
- at least six hours in other courses tested on the New York Bar Exam;
- a maximum of four hours in clinical courses; and
- a maximum of six hours in other courses related to legal training taught in the United States by faculty of the law school or its affiliated university or by faculty of an institution with which the law school offers a joint degree.

The American legal studies requirement can be fulfilled by a course “in American legal studies . . . or a similar course designed to introduce students to distinctive aspects and/or fundamental principles of United States law,” such as a course in United States constitutional law or federal or state civil procedure.¹⁹

The Court wanted to encourage foreign students to engage with their fellow students and professors, to their common benefit, enriching the law school community and the experience of all its constituents. The requirements that the program not be completed in the summer, that it be completed on the United States campus of the law school, and that it not include distance education courses reflected the Court’s intent that the students seeking a degree to satisfy the educational requirements to become a New York lawyer should be exposed to the maximum extent possible to the academic life of an American law school with the rich opportunities for acculturation and professional development presented by that experience.

The limit on credit hours in “other courses related to legal training” was designed to ensure that

the course of study followed by the student was primarily in law courses, while permitting some courses to be taken outside of the law school.

Approximately 75% of our foreign-educated candidates qualify to take the New York Bar Exam based upon having completed an LL.M. degree, with approximately 25% qualifying based on their foreign education alone. An emerging trend is for candidates with a common law education sufficient to qualify them to sit for the bar exam to nonetheless seek an LL.M. degree because of the employment opportunities such a degree offers.

AND HOW DO THEY DO?

A candidate who survives the scrutiny of the qualification process can then take the test. The passing rates vary significantly and are consistently substantially below the passing rates for J.D. graduates of ABA-approved law schools. The passing rates of the 10 countries that had more than 100 candidates sitting for the New York Bar Exam in 2013 are shown in Table 2.

There were seven countries that had between 50 and 100 candidates sitting for the New York Bar

Table 2: Passing Rates of the 10 Countries with More than 100 Candidates Taking the New York Bar Exam in 2013

COUNTRY/NUMBER OF CANDIDATES	PASSING RATE
Canada (156)	64.1%
France (202)	48.5%
Japan (365)	43.3%
Ireland (104)	35.6%
Brazil (122)	34.4%
China (1,148)	33.3%
United Kingdom (566)	30.4%
Korea (301)	30.2%
India (172)	22.7%
Nigeria (129)	10.1%

Table 3: Passing Rates of the Seven Countries with 50–100 Candidates Taking the New York Bar Exam in 2013

COUNTRY/NUMBER OF CANDIDATES	PASSING RATE
Australia (83)	60.2%
Germany (56)	55.4%
Israel (64)	45.3%
Mexico (67)	43.3%
Italy (77)	39.0%
Russia (78)	35.9%
Colombia (61)	23.0%

Exam in 2013. Those countries and their passing rates are shown in Table 3.

Three countries in the world had a 100% passing rate on the New York Bar Exam in 2013: Malaysia, Malta, and Togo each had one candidate sit for our bar exam, and in each case, the candidate passed.

The passing rates for foreign-educated candidates have been fairly consistent over the last five years, with first-time takers of the exam passing at a rate on average of 44%, and with all foreign-educated candidates (including first-time takers and those repeating the test) achieving a passing rate averaging 34%. That contrasts with an average passing rate for first-time takers who graduated with a J.D. degree from an ABA-approved law school of 85% and for all ABA graduates of 76%.


CONCLUSION

The New York Court of Appeals made the policy choices it did in crafting rules for the admission of foreign-trained lawyers with an eye toward New York's unique position in international trade and commerce. But New York is not alone in the engagement of its citizens with foreign nationals and the need for lawyers trained to deal with legal issues that cross international borders.

Jurisdictions considering adopting rules relating to the eligibility of foreign-educated candidates to sit for their bar exams might consider whether to require that the foreign-educated candidate

- have been educated in a common law country;
- have a law degree, as opposed to a degree in another discipline;
- be admitted to practice in his or her home country;
- have practice experience in his or her home country;
- have an LL.M. degree meeting defined curricular requirements; and
- have taken courses such as civil procedure, legal research and writing, and professional responsibility.

Of course, aside from full admission, there are other mechanisms by which foreign-trained lawyers can practice on a limited scale in the United States, including pro hac vice admission, temporary practice rules, registration as in-house counsel, and admission as a foreign legal consultant. Rules permitting such limited practice merit consideration, whether or not full admission is available to the candidate educated outside the United States.

New York's central position in the global economy was the impetus for the establishment of rules that permit foreign-educated law graduates to sit for the bar exam in New York. The result has been explosive growth in the numbers of such candidates and the number of places in the world from which they come. Indeed, the New York Bar Exam itself has become an instrument of international commerce! 

NOTES

1. Independent States in the World, Fact Sheet (Sept. 12, 2014), U.S. Department of State, Bureau of Intelligence and Research, <http://www.state.gov/s/inr/rls/4250.htm> (last visited Oct. 2, 2014).

2. Howard A. Levine & Hope B. Engel, *New York's Revised Attorney Admission Rules: Still Rigorous but More "User-Friendly,"* 67(3) THE BAR EXAMINER 39–44 (August 1998).
3. *Id.* at 41.
4. All statistics regarding the New York Bar Exam in this article were obtained from a review of the statistics on candidate pools and performance maintained by the New York State Board of Law Examiners.
5. Enrollment in J.D. programs at ABA-approved law schools declined by 24% from fall 2010 to fall 2013. American Bar Association, ABA Section of Legal Education reports 2013 law school enrollment data, http://www.americanbar.org/news/abanews/aba-news-archives/2013/12/aba_section_of_legal.html (last visited Oct. 30, 2014).
6. There are over 400 non-J.D. programs currently offered by ABA-approved law schools. See American Bar Association, Programs by Category, http://www.americanbar.org/groups/legal_education/resources/llm-degrees_post_j_d_non_j_d/programs_by_category.html (last visited Oct. 30, 2014).
7. This number includes 52 candidates from Hong Kong and 174 candidates from Taiwan.
8. 2013 Statistics, 83(1) THE BAR EXAMINER 6 (March 2014), at 10–11.
9. The Qualified Lawyers Transfer Scheme provides a route by which foreign-licensed attorneys can be admitted to practice as solicitors in England and Wales. See Solicitors Regulation Authority, Qualified Lawyers Transfer Scheme, <http://www.sra.org.uk/solicitors/qlts.page> (last visited Oct. 21, 2014). [Editor's Note: For a description of the Qualified Lawyers Transfer Scheme, see Susan M. Case, Ph.D., *The Testing Column: Testing Foreign-Trained Lawyers: A New Exam in England and Wales*, 80(3) THE BAR EXAMINER 34–37 (September 2011).]
10. Conseil National des Barreaux, *The Legal Profession in France, Being a Lawyer in France: Accessing the Legal Profession*, http://cnb.avocat.fr/Being-a-Lawyer-in-France-Accessing-the-Legal-Profession_a1735.html (last visited Oct. 27, 2014). See also RUSSELL W. DOMBROW & NANCY A. MATOS, *THE ABA GUIDE TO INTERNATIONAL BAR ADMISSIONS* 149–160 (ABA Publishing 2012).
11. Rules of the Court of Appeals [22 N.Y.C.R.R.] § 520.6.
12. *Id.* § 520.6(b)(1).
13. *Id.* § 520.6(b)(1)(ii).
14. *Id.* § 520.6(b)(1)(ii).
15. *Id.* § 520.6(b)(2).
16. These candidates qualify for admission as a solicitor generally through the completion of a one- or two-year Common Professional Examination course of study (also referred to as a Graduate Diploma in Law) following their undergraduate degree, satisfying the academic stage of education, plus a Legal Practice Course and a period of recognized training,

satisfying the requirements for the vocational stage of training required for admission. Solicitors Regulation Authority, SRA Training Regulations 2014—Qualification and Provider Regulations, <http://www.sra.org.uk/solicitors/handbook/trainingregs2014/content.page> (last visited Oct. 29, 2014).

17. For example, in England and Wales, students are required to take and pass seven courses in the Foundations of Legal Knowledge, identified as Public Law, including Constitutional Law, Administrative Law, and Human Rights; Law of the European Union; Criminal Law; Obligations, including Contracts, Restitution, and Torts; Property Law; and Equity and the Law of Trusts. See Bar Standards Board & Solicitors Regulation Authority, *Academic Stage Handbook, Schedule Two* (July 2014), available at <http://www.sra.org.uk/students/academic-stage.page>. In Nigeria, required courses for a law degree are Legal Methods, Nigerian Legal System, Contracts, Constitutional Law, Company Law, Commercial Law, Criminal Law, Equity and Trusts, Evidence, Land Law, Torts, and Jurisprudence. See International Bar Association, *How to qualify as a lawyer in Nigeria*, http://www.ibanet.org/PPID/Constituent/Student_Committee/qualify_lawyer_Nigeria.aspx (last visited Nov. 1, 2014). In Australia, law students are required to take the "Priestley Eleven," which are Criminal Law and Procedure, Torts, Contracts, Property, Equity (including Trusts), Company Law, Administrative Law, Federal and State Constitutional Law, Civil Procedure, Evidence, and Ethics and Professional Responsibility. See, e.g., Supreme Court of Victoria Council of Legal Education Board of Examiners, http://www.lawadmissions.vic.gov.au/admission_requirements (last visited Nov. 1, 2014).
18. Rules of the Court of Appeals, *supra* note 11, § 520.6(b)(3).
19. *Id.* § 520.6(b)(3)(vi)(c).



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ADMITTING FOREIGN-TRAINED LAWYERS IN STATES OTHER THAN NEW YORK: WHY IT MATTERS

by Laurel S. Terry

Each year, New York has more foreign-educated applicants sit for its bar examination than all of the other states put together.¹ Indeed, New York has more foreign applicants in a year than most states have ever had! As explained elsewhere in this issue, New York's central position in the global economy was the impetus for its policy decision to allow foreign-educated applicants to sit for its bar exam.² The New York Bar Exam has become a global credential and an instrument of international commerce.

Given New York City's unique role in the United States as a global financial center, it might be tempting for other states to conclude that they do not need to concern themselves with issues regarding foreign applicants. These issues may seem complicated, and in a world of finite resources, a jurisdiction might decide that, unlike New York, it has too few foreign applicants to justify spending energy on these issues.

While this reasoning is understandable, there are a number of reasons why it is prudent for *all* jurisdictions to develop admission policies for foreign applicants. These reasons include 1) the needs of clients and citizens in each state, 2) the accountability that comes from having a system of foreign lawyer regulation, and 3) federal interest in these issues as a result of trade negotiations.

In my view, these three reasons are among the reasons why, in January 2014, the Conference of Chief Justices (CCJ) adopted a resolution that encourages states "to consider the 'International Trade in Legal Services and Professional Regulation:

A Framework for State Bars Based on the Georgia Experience' [what the CCJ refers to as a "tool kit"] . . . as a worthy guide for their own state endeavors to meet the challenges of ever-changing legal markets and increasing cross-border law practices."³

This article explains what that "Toolkit" is, how your state can use the Toolkit to address issues related to foreign lawyers, and why you might conclude—as other states have done—that it would be desirable to adopt regulations that govern the means by which foreign lawyers can assist clients in your state.

THE ABA TOOLKIT: A VALUABLE RESOURCE FOR JURISDICTIONS

The CCJ's January 2014 Resolution encourages states to use the Toolkit developed by the American Bar Association Task Force on International Trade in Legal Services (ITILS).⁴ This Toolkit is modeled on the approach to foreign lawyer practice used in Georgia, which has assumed a leadership position in adopting rules to address and regulate the ways in which foreign lawyers may practice in that state. It is available on the ITILS Task Force web page and was designed to help states develop a regulatory regime to proactively confront issues arising from globalization, cross-border legal practice, and lawyer mobility.

In addition to setting forth background information about the globalization includes that prompted Georgia to act and discussing how such issues are experienced in *every* state, the Toolkit includes

recommendations for addressing the impact of globalization and issues related to foreign lawyer regulation. These recommendations, derived from the process followed in Georgia, are set forth in six steps, the first of which is to establish a supervisory committee tasked with reviewing and evaluating a state's existing regulatory system for foreign lawyers. The Toolkit also includes an appendix with basic reference materials and helpful resources.

Most importantly, the Toolkit encourages states to consider the “foreign lawyer cluster” of rules—that is, rules regarding the five ways by which foreign lawyers might physically practice in a state. These five methods of practice are

1. temporary transactional practice (including appearing as counsel in a mediation session or international arbitration held in the United States);
2. practice as foreign-licensed in-house counsel;
3. permanent practice as a foreign legal consultant;
4. temporary in-court appearance—i.e., *pro hac vice* admission; and
5. full licensure as a U.S. lawyer.

The Toolkit provides various examples of these practice methods and reasons why a state might consider rules regarding each method of practice.

FEW STATES HAVE ADOPTED—OR EVEN CONSIDERED—ALL FIVE OF THE “FOREIGN LAWYER CLUSTER”

The map and accompanying summary of state foreign lawyer practice rules on pages 40–41 show how each state stands with respect to adoption of the foreign lawyer cluster of rules.⁵

As this map shows, only four states—Colorado, Georgia, Pennsylvania, and Virginia—have policies

that address all five of the methods by which foreign lawyers might actively practice in a state—the full cluster. Although a few states have considered and rejected such rules, most states that do not have the full cluster have not publicly rejected these rules—they just seem not to have considered them.⁶

Because few states have publicly rejected the foreign lawyer practice rules and fewer than 20 states have three or more of these rules, it is logical to assume that in some states, consideration of the full cluster of such rules has simply “fallen through the cracks.” The ABA has model policies that address the first four methods by which foreign lawyers might actively practice in a jurisdiction.⁷ (The ABA does not have a policy regarding full admission of foreign lawyers.)⁸ But until the ABA Commission on Ethics 20/20 completed its work in February 2013 (its charge being to perform a thorough review of the ABA Model Rules of Professional Conduct and the U.S. system of lawyer regulation in the context of advances in technology and global legal practice developments), none of these four policies appeared in a rule of professional conduct. Even now, only one of the policies (regarding foreign in-house counsel) appears in such a rule. As a result, the committees charged with reviewing the ethics rules may not have come across *any* of these policies. Similarly, committees that deal with policies regarding lawyer admission may not have been aware of, or paid particular attention to, the foreign lawyer cluster of model rules, since these model policies do not address the “full admission” issues that occupy most of the time of bar admissions committees. In my view, this may explain why the foreign lawyer cluster may simply have fallen through the cracks.

While the failure to address these issues is understandable, as the CCJ recognized, the time has come for each jurisdiction to consider them. The sections that follow explain some of the factors that

Summary of State Foreign Lawyer Practice Rules (11/14/14)

(This document is sometimes referred to as the “Quick Guide” regarding ABA MJP Recommendations 8 & 9, although it also includes information about ABA 20/20 Commission Resolutions #107A–C. It is available at <http://tinyurl.com/foreignlawyermap>.)

There are five methods by which foreign lawyers might *actively* practice in the United States: 1) through a license that permits only limited practice, known as a foreign legal consultant rule [addressed in MJP Report 201H]; 2) through a rule that permits temporary transactional work by foreign lawyers [addressed in MJP Report 201J]; 3) through a rule that permits foreign lawyers to apply for pro hac vice admission [ABA Resolution #107C (Feb. 2013)]; 4) through a rule that permits foreign lawyers to serve as in-house counsel [ABA Resolutions #107A&B (Feb. 2013)]; and 5) through full admission as a regularly licensed lawyer in a U.S. jurisdiction. (The ABA does not have a policy on Method #5 although there are a number of foreign lawyers admitted annually; information about state full admission rules is available in NCBE’s annual *Comprehensive Guide to Bar Admission Requirements*. See also NCBE Statistics.)

States that are considering whether to adopt rules regarding these five methods of foreign lawyer admission might want to consider the model provided in *International Trade in Legal Services and Professional Regulation: A Framework for State Bars Based on the Georgia Experience* (updated January 8, 2014), available at <http://tinyurl.com/GAtoolkit>. The Conference of Chief Justices endorsed this “Toolkit” in Resolution 11 adopted January 2014.

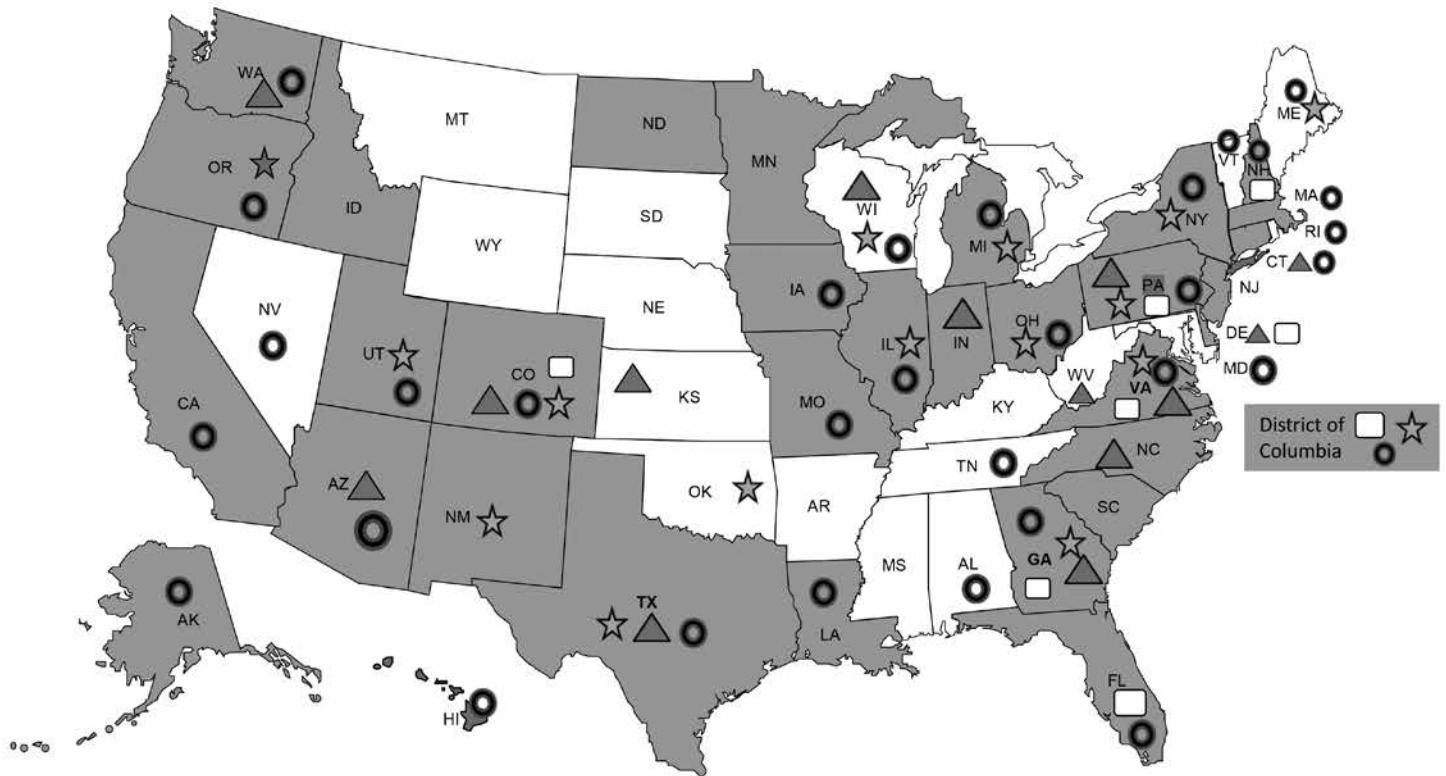
Jurisdictions with FLC Rules	Jurisdictions that Explicitly Permit Foreign Lawyer Temporary Practice	Jurisdictions that Permit Foreign Lawyer Pro Hac Vice Admission	Jurisdictions that Permit Foreign In-House Counsel	Since 2010 has had a foreign-educated full-admission applicant
33	8	16	14	32
AK, AZ, CA, CO, CT, DE (Rule 55.2), DC, FL, GA, HI, ID, IL, IN, IA, LA, MA, MI, MN, MO, NH, NJ, NM, NY, NC, ND, OH, OR, PA, SC, TX, UT, VA, WA	CO, DC (Rule 49(e)(13)), DE (RPC 5.5(d)), FL, GA, NH, PA, VA	CO, DC (Rule 49), GA (Rule 4.4), IL, ME (Rule 14), MI, NM, NY, OH (Rule XII), OK (Art. II(5)), OR, PA, TX, UT, VA, WI	AZ, CO (204.2(1)(e)), CT, DE (Rule 55.1), GA, IN, KS, NC, PA, TX, VA (Part 1A), WA, WI, WV	AL, AK, AZ, CA, CO, CT, DC, FL, GA, HI, IL, IA, LA, ME, MD, MA, MI, MO, NV, NH, NY, OH, OR, PA, RI, TN, TX, UT, VT, VA, WA, WI
ABA Model FLC Rule (2006)	ABA Model Rule for Temporary Practice by Foreign Lawyers	ABA Model Pro Hac Vice Rule	ABA Model Rule re Foreign In-House Counsel and Registration Rule	No ABA policy; Council did not act on Committee Proposal; see state rules
Useful Resource: ABA Commission on Multijurisdictional Practice web page	Useful Resource: State Rules—Temporary Practice by Foreign Lawyers (ABA chart)	Comparison of ABA Model Rule for Pro Hac Vice Admission with State Versions and Amendments since August 2002 (ABA chart)	In-House Corporate Counsel Registration Rules (ABA chart); Comparison of ABA Model Rule for Registration of In-House Counsel with State Versions (ABA chart); State-by-State Adoption of Selected Ethics 20/20 Commission Policies (ABA chart)	Useful Resource: NCBE <i>Comprehensive Guide to Bar Admission Requirements</i>

Note: As the map on p. 41 shows, four states—Colorado, Georgia, Pennsylvania, and Virginia—have rules for all 5 methods; two jurisdictions have rules on 4 methods (DC and TX); and 13 jurisdictions have rules on 3 methods (AZ, CT, DE, FL, IL, MI, NH, NY, OH, OR, UT, WA, and WI).

(Prepared by Professor Laurel Terry based on implementation information contained in charts prepared by the ABA Center for Professional Responsibility dated 10/7/2014 and 11/14/14, available at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/recommendations.authcheckdam.pdf and http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/state_implementation_selected_e20_20_rules.authcheckdam.pdf.)

Editor’s Note: The online version of this Summary of State Foreign Lawyer Practice Rules contains links to the relevant state foreign lawyer practice rules, ABA model rules, and other resources. The online version is available on the ABA website at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mjp_8_9_status_chart.authcheckdam.pdf and on the author’s personal website at http://www.personal.psu.edu/faculty/l/s/lst3/Laurel_Terry_map_foreign_Lawyer_policies.pdf.

Jurisdictions with Rules Regarding Foreign Lawyer Practice (11/14/14)



Legend

Shading = has a foreign legal consultant rule

☐ = rule permits temporary practice by foreign lawyers (also known as FIFO or fly-in, fly-out)

★ = rule permits foreign pro hac vice admission

▲ = rule permits foreign in-house counsel

● = has had at least one foreign-educated applicant sit for a bar exam between 2010 and 2013

(Prepared by Professor Laurel Terry on November 14, 2014, based on data from the ABA Center for Professional Responsibility and NCBE.)

your jurisdiction might want to take into account as it considers foreign lawyer admission issues.

FOREIGN LAWYER ADMISSION: FACTORS TO CONSIDER

Foreign Lawyers Are Relevant to Client and Public Interest

Before a regulator delves into the details of any proposed new rule or policy, it is useful to take a step back and identify the goals that the regulator wants to achieve.⁹ In my view, the appropriate goals for admissions regulators include client protection, public interest, and access to justice and legal services.¹⁰ I believe that a policy that focuses exclusively on the first two of these goals, but excludes the third goal, is incomplete and exposes the entire system to criticism. Thus, a jurisdiction's consideration of the foreign lawyer cluster should include an analysis of whether its rules have struck the right balance in providing clients and the public with access to legal services.

Your State Likely Has Global Economic Transactions That Involve Foreign Lawyers

It is indisputable that residents of every state live in a world of global commerce. Moreover, the economy of every state in the country would be seriously affected if its citizens were suddenly prohibited from interacting with international buyers, sellers, or tradespeople. For example, every U.S. state except Hawaii exported more than one billion dollars of goods in 2013, and most had 11-figure exports.¹¹ And this is just goods—not services! While probably a number of these billion dollars of sales took place without the assistance of lawyers, there undoubtedly were a number of deals that *did* require the assistance of both U.S. and foreign lawyers.

If your jurisdiction's rules prohibit a foreign lawyer from flying to the United States to conduct

negotiations or to close a deal, your jurisdiction has just added significant expense to this international transaction and—depending on the sophistication and wealth of the client—may have made it less likely that the deal will happen at all or that it will happen in your state, as opposed to a neighboring state. Thus, the ambiguity that arises from the failure to have the foreign lawyer cluster of rules can have a negative impact not only on clients in your state, but on the public, because the state's economy may suffer.

Individuals Benefit from Access to Foreign Lawyers

Our history as a nation of immigrants combined with the fact that we live in an era of global travel and the Internet means that individuals, as well as businesses, may need access to foreign lawyers. There undoubtedly are residents of your state who will have interactions with another country that have legal implications, such as an inheritance matter, a family law matter, or a business matter.

Consider a few more statistics. According to the U.S. Census Bureau, more than 20% of married-couple households in the United States have at least one non-native spouse.¹² In 1960, approximately two-thirds of U.S. states had a foreign-born population of less than 5%, but by 2010, the numbers were reversed and approximately two-thirds of U.S. states had a foreign-born population *greater* than 5%.¹³ Moreover, the jurisdictions that have seen the greatest percentage increase in their foreign-born population are not the ones that you might immediately think of. For example, in Alabama, the District of Columbia, Indiana, Iowa, Kentucky, Louisiana, Mississippi, North Dakota, South Carolina, South Dakota, Tennessee, West Virginia, and Wyoming, more than 25% of their foreign-born population entered the United States between 2005 and 2010.¹⁴ Another statistic that shows the interaction between U.S. residents and the rest of the world is the fact that

there have been approximately 250,000 foreign-born children adopted by U.S. families between 1999 and 2013.¹⁵ Thus, it is likely that individuals within your state, as well as businesses, may need the services of foreign lawyers, as well as U.S. lawyers, at some point in their lives.

U.S. Lawyers Already Engage in Foreign Legal Transactions

What about the U.S. lawyers involved in these foreign transactions? Is this just a “large firm” issue? The data suggest not. Consider, for example, the findings of *After the JD II*, the second installment of a longitudinal study tracking the careers of a broad cross-section of approximately 4,000 lawyers who graduated from law school in 2000. This second part of the study, conducted in 2007–2008, found that 44% of the surveyed lawyers had done at least some work that involved clients from outside the United States or in cross-border matters. This included two-thirds of lawyers in the largest law firms and 65% of inside counsel. What is even more interesting, however, is that 61% of the surveyed legal services and public defense lawyers had done work that involved non-U.S. clients or non-U.S. law.¹⁶ This may be why it is increasingly common for U.S. law firms to engage in practice in a foreign jurisdiction and to include foreign lawyers.

U.S. Law Firms Already Have a Strong Global Presence

In October 2014, in its annual “Global 100” issue, the *American Lawyer* reported that more than 25,000 lawyers from the AmLaw 200, which are law firms that the *American Lawyer* has rated among the top 200 according to variables such as size and profits per partner, work in foreign offices in more than 70 countries.¹⁷ And in its 2013 Report on the State of the Legal Market, Georgetown Law’s Center for the Study of the Legal Profession reported that 96 global

cross-border law firm mergers were announced in 2012 and 56 U.S. law firms opened a new foreign office in 2012.¹⁸ If a Global 100 law firm (i.e., one among the top-grossing law firms in the world) has an office in your state, there is a very strong likelihood that one of “your firms” has an overseas office, since 93 of the 100 largest global law firms have offices in more than one country.¹⁹

In short, clients in every state are involved in situations in which they might find it useful to have available the services of foreign lawyers. It is in the public interest for these clients to have access to such lawyers in an appropriate, accountable manner.

The Foreign Lawyer Cluster Can Provide Accountability

The Toolkit that the CCJ has endorsed provides a jurisdiction with the opportunity to thoughtfully consider the conditions under which it might want to allow certain kinds of foreign lawyer practice. Given the trade statistics cited above, it seems inevitable that foreign lawyers are interacting with the residents of every state, regardless of whether the state has adopted any of the rules in the foreign lawyer cluster. If a jurisdiction has adopted a policy regarding each of these methods of practice, however, it will be clearer what is—and is not—acceptable behavior. In addition, rules can set forth the consequences of their violation and thus create a system of accountability.

For example, only eight jurisdictions have expressly recognized the right of foreign lawyers to engage in temporary transactional practice in the United States.²⁰ I am sure, however, that there are many more than eight jurisdictions in which foreign lawyers have flown into the United States to negotiate or close a deal. Isn’t it better for a state to have a rule that explicitly addresses this situation and

makes it clear, for example, that such practice must be temporary and that the lawyer must not have a systematic and continuous presence in the state? In my view, this kind of temporary transactional practice, which is also known as “fly-in, fly-out” or “FIFO” practice, presents significantly fewer client protection issues than full admission, because the types of clients who use foreign lawyer FIFO services are not likely to be among the most vulnerable U.S. clients. This is because business clients engaged in multinational transactions are more likely to need FIFO legal services than are individual clients. Thus, I find it illogical that in 2013, 28 states permitted a foreign-educated applicant to sit for a bar exam,²¹ which provides full admission and arguably raises greater client protection concerns, but only 8 jurisdictions currently have a rule regarding temporary FIFO practice by foreign lawyers, and only 14 states currently have a rule that permits foreign in-house counsel.²²

As noted below, this issue of temporary practice by foreign lawyers has come up in the context of the ongoing United States–European Union (US-EU) trade negotiations. While temporary practice is not an issue that bar examiners have traditionally considered, it is one of several methods by which foreign lawyers might practice in a jurisdiction and is thus an admission issue. Accordingly, I believe it would make sense for the admissions community to make sure that its jurisdiction addresses the entire foreign lawyer cluster. The Toolkit can provide guidance on how a jurisdiction might convene and structure these discussions.

Some of the Foreign Lawyer Cluster Is Under Discussion in the US-EU “T-TIP” Trade Negotiations

As I mentioned above, the concept of foreign lawyer temporary practice has been the subject of discussion in the ongoing US-EU trade negotiations. The formal

name of these negotiations, which were launched in 2013, is the Transatlantic Trade and Investment Partnership, but they are usually referred to as T-TIP.

The T-TIP negotiations were featured at one of the education program sessions at the January 2014 CCJ meeting. The U.S. position was presented by Thomas Fine, who is Director of Services and Investment at the Office of the United States Trade Representative. The European position was presented by Jonathan Goldsmith, who is Secretary General of the Council of Bars and Law Societies of Europe, which is known as the CCBE.²³ Chief Judge Jonathan Lippman from New York moderated this panel, on which I also participated.

This session provided U.S. and EU lawyer regulators with the opportunity to speak directly to one another. Jonathan Goldsmith began by noting that T-TIP is potentially the biggest bilateral trade deal in the world, that it aims to remove trade barriers between the European Union and the United States in a wide range of sectors, and that independent research has shown that it could boost the European Union’s economy by €120 billion, the U.S. economy by €90 billion, and the economy of the rest of the world by €100 billion. He discussed the importance of collaboration between the CCBE and the CCJ (and between the CCBE and the ABA). He emphasized that if those who regulate U.S. and EU lawyers can come to an understanding amongst themselves, then it makes it much less likely that their respective governments will enter into trade agreements that the legal profession or its regulators would find problematic.

The CCBE’s T-TIP “Requests” Are Consistent with ABA Policy

The CCBE has developed T-TIP “requests” that it has presented to the CCJ and to the ABA.²⁴ In the context of trade negotiations, a country’s “offer”

indicates the changes that it is prepared to make, and its “requests” state the changes that a country would like its trading partner to implement. Although governments are the only entities that have the official power to issue requests or offers, the CCBE developed a set of requests in order to stimulate discussion among the U.S. and EU legal professions and their regulators. The CCBE’s requests to the CCJ and the ABA are as follows:

A Lawyer with a title from any EU member state must be able to undertake the following activities in all U.S. states, without running the risk of illegal practice of law:

- Temporary provision of services under home title in home law, EU law, international law, and third country law in which they are qualified, without a local presence;
- Establishment (i.e. with local presence) under home title to provide services in home law, EU law, international law, and third country law in which they are qualified;
- International Arbitration (as counsel or arbitrator);
- International Mediation (as counsel or mediator);
- Partnership under home title with US lawyers (with local presence);
- Employment of US lawyers (with local presence) (i.e. no restrictions on structures for establishment, for instance requirements to have a local lawyer as partner, or preventing a local lawyer being an employee).²⁵

All of the CCBE’s requests are consistent with existing ABA policy, with the exception of the CCBE requests regarding lawyers who serve as “neutrals” (i.e., as arbitrators and mediators). The ABA does not have a policy on this topic because, in the United States, nonlawyers are allowed to serve as mediators and arbitrators. The CCBE’s requests address two of

the five methods in the foreign lawyer cluster—temporary practice (which the ABA, in its Model Rule for Temporary Practice by Foreign Lawyers, defines to include both transactional work and representing clients in mediation and arbitration) and practice as a foreign legal consultant. Although the CCBE’s last two requests might have been worded more clearly, based on my knowledge of the field and statements that I have heard from CCBE representatives, I believe that the last two requests address what is often referred to as “association” rights—that is, the right of a foreign law firm to open a law firm office in a U.S. state and to have that law firm office staffed by a state-licensed lawyer who is an employee of the law firm, rather than a partner. (Some countries require the locally licensed lawyer to be a partner.) The CCBE requests also ask for the ability of a foreign lawyer who is either located outside of the United States or properly practicing within the United States to have as a partner a U.S. lawyer who practices in a U.S. state in which he or she is licensed. (Not all countries permit this type of international law firm partnership.) If I am correct regarding the meaning of the CCBE’s last two requests, then ABA policy is consistent with the CCBE’s requests that a foreign lawyer or law firm should be able to have a U.S. lawyer as a partner or as an employee, provided that the U.S. lawyer and the foreign lawyer are properly licensed in the jurisdiction in which each one practices.²⁶

The Nature of the Discussions About the CCBE’s T-TIP Requests

There are several noteworthy aspects of the CCBE’s requests to the U.S. legal profession. First, the requests seek a U.S. commitment that covers “all US states.” During a US-EU Summit held in August 2014 during the ABA Annual Meeting, CCBE officials acknowledged the state-based nature of U.S. lawyer regulation and the U.S. constitutional structure but

expressed frustration with the piecemeal state of U.S. lawyer regulation. They emphasized that they have sought a commitment from “all US states.” My impression of the Summit was that the Europeans expressed a higher level of frustration with the U.S. federalism situation than I have heard in recent years.

Second, with the exception of lawyers who serve as neutrals, the subjects addressed in the CCBE’s requests are also covered in the foreign lawyer cluster presented in the Toolkit, which the CCJ has commended to states’ attention.

Third, the CCBE has presented data to the ABA regarding perceived deficits in the foreign lawyer rules in a number of U.S. jurisdictions. The map in this article was inspired by a chart that the CCBE presented to the ABA in 2013 that listed every U.S. jurisdiction and rated each U.S. state as “green” (yes) or “red” (no) on nine issues related to a foreign lawyer’s ability to practice in the United States or the ability of a foreign law firm to hire a properly licensed U.S. lawyer. The CCBE’s green-red chart was based on preliminary data from an International Bar Association (IBA) survey that recently was publicly released.²⁷ The survey, designed to evaluate ease of international trade in legal services, covers jurisdictions from around the world, including all 50 U.S. states, and addresses a number of issues related to the ability of foreign lawyers or firms to assist their clients. The IBA survey is likely to be influential in the T-TIP negotiations and elsewhere. Governments and negotiators around the world already have begun to examine its data.²⁸

How U.S. Jurisdictions Might Proceed in the Context of the T-TIP Negotiations

In my view, neither the T-TIP negotiations nor the CCBE’s requests should drive U.S. policy.²⁹

Instead, U.S. states should consider their regulatory objectives and then adopt rules and policies that advance those objectives. The T-TIP negotiations do, however, highlight important issues that I believe regulators have an independent obligation to consider. Given the impact of globalization on every U.S. jurisdiction, regulators are doing clients and the public a disservice if they fail to consider the entire foreign lawyer cluster of rules. The underlying data on which the map on page 41 is based suggest that many jurisdictions have not yet taken the opportunity to consider the entire foreign lawyer cluster of rules. Perhaps the T-TIP negotiations will provide jurisdictions with the “nudge” they need in order to consider these issues. As they do so, the Toolkit can provide them with useful resources and advice.


It is important for each jurisdiction to consider these issues. If I were asked for my advice about the optimal outcome, I would recommend that states adopt a rule for each of the five methods by which lawyers might actively practice in a jurisdiction. I would also recommend that jurisdictions consider the “association” rights of U.S. lawyers. I believe that 1) globalization is here to stay; 2) foreign lawyers are present in all U.S. jurisdictions, regardless of whether a jurisdiction has adopted any rules regarding their practice; and 3) it is important for the regulatory systems in jurisdictions to consider client needs and public interest, as well as client protection. I would also state my belief that the client protection and public interest concerns are fewer and different when one considers limited practice by foreign lawyers rather than full admission.

While the T-TIP negotiations do not and should not *require* that a jurisdiction take action, I do not believe that jurisdictions should *refuse* to act simply because they wish that legal services were not the subject of trade negotiations. Jurisdictions should

instead recognize the reality of globalization that the T-TIP negotiations represent and consider whether and how they should adopt rules that regulate the ways in which foreign lawyers can practice in their jurisdiction.

CONCLUSION

New York, despite its high concentration of foreign applicants, is not the only state whose citizens engage with foreign nationals and need lawyers trained to deal with legal issues that cross international borders. Because each state (except Hawaii) exports over one billion dollars of goods annually,³⁰ and because of the other globalization attributes cited earlier in this article,³¹ the citizens and businesses in each state undoubtedly will need to have available on at least some occasions the services of foreign lawyers.

It is in the interests of clients and the public for jurisdictions to consider the foreign lawyer cluster, which includes not only full admission, but other mechanisms by which foreign-trained lawyers can practice on a limited scale in the United States, including pro hac vice admission, temporary practice, serving as in-house counsel (which requires registration in some states), and admission as a foreign legal consultant. Rules permitting such limited practice merit consideration, whether or not full admission is available to the candidate educated outside the United States. And even though it may not have been traditional for the admissions community to consider the foreign lawyer cluster, I would urge this community and state Supreme Courts to make sure that some entity is examining these issues and that these issues do not fall through the cracks. Isn't it better for states to consider thoughtfully and reflexively, rather than reflexively in the middle of a crisis, the conditions under which they want to permit foreign lawyers to practice within their borders? 

NOTES

1. See Laurel Terry, *Summary of Statistics of Bar Exam Applicants Educated Outside the US: 1992–2013 (It's Not Just About New York and California)* (updated April 4, 2014), available at http://www.personal.psu.edu/faculty/1/s/lst3/Summary_%20of_Applicants_%20educated_%20Outside_US_1992-2013.pdf.
2. Diane F. Bosse, *Testing Foreign-Trained Applicants in a New York State of Mind*, 83(4) THE BAR EXAMINER 31–37 (December 2014).
3. Conference of Chief Justices, Resolution 11: In Support of the Framework Created by the State Bar of Georgia and the Georgia Supreme Court to Address Issues Arising from Legal Market Globalization and Cross-Border Legal Practice (Jan. 29, 2014), available at <http://ccj.ncsc.org/~media/Microsites/Files/CCJ/Resolutions/01292014-Support-Framework-Created-State-Bar-Georgia.ashx>.
4. American Bar Association Task Force on International Trade in Legal Services, *International Trade in Legal Services and Professional Regulation: A Framework for State Bars Based on the Georgia Experience* (updated Jan. 8, 2014), available at <http://www.americanbar.org/content/dam/aba/uncategorized/GAO/ITILS%20Toolkit.authcheckdam.pdf>.
5. I prepared the original version of this map, dated January 6, 2014, for the January 2014 meeting of the Conference of Chief Justices. I have since updated the map several times, and the most recent version, along with the one-page summary document that includes links to the relevant state foreign lawyer practice rules, ABA model rules, and other resources, is available on the ABA website at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mjp_8_9_status_chart.authcheckdam.pdf and on my personal website at http://www.personal.psu.edu/faculty/1/s/lst3/Laurel_Terry_map_foreign_Lawyer_policies.pdf.
6. See American Bar Association, *State Implementation of ABA MJP Policies* (Oct. 7, 2014), available at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/recommendations.authcheckdam.pdf; American Bar Association Center for Professional Responsibility Policy Implementation Committee, *State by State Adoption of Selected Ethics 20/20 Commission Policies and Guidelines for an International Regulatory Information Exchange* (Nov. 17, 2014), available at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/state_implementation_selected_e20_20_rules.authcheckdam.pdf.
7. These four ABA policies are 1) the Model Rule for the Licensing and Practice of Foreign Legal Consultants, available at <http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/FLC.authcheckdam.pdf>; 2) the Model Rule for Temporary Practice by Foreign Lawyers, available at <http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/201j.authcheckdam.pdf>; 3) the Model

- Rule on Pro Hac Vice Admission, *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2013_hod_midyear_meeting_107c_redline_with_floor_amendment.authcheckdam.pdf; and 4) the Model Rule of Professional Conduct 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice of Law) and the Model Rule for Registration of In-House Counsel, *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20130201_revised_resolution_107a_resolution_only_redline.authcheckdam.pdf and http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20130201_revised_resolution_107b_resolution_only_redline.authcheckdam.pdf.
8. In 2011, the Special Committee on International Issues of the ABA Section of Legal Education and Admissions to the Bar developed a recommendation for full admission of foreign lawyers who, *inter alia*, completed a proposed LL.M. degree, but the Council did not take any further action. *See* Laurel S. Terry, *Transnational Legal Practice (United States) [2010–2012]*, 47 INT'L LAW. 499, at 504–506 (2013) (discussing the 2011 report recommending to the Council a Proposed Model Rule on Admission of Foreign Educated Lawyers and Proposed Criteria for ABA Certification of an LL.M. Degree for the Practice of Law in the United States). As the article explains, the Council took no action on this recommendation. (The report is *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/20110420_model_rule_and_criteria_foreign_lawyers.authcheckdam.pdf.)
 9. *See* Laurel S. Terry, *Why Your Jurisdiction Should Consider Jumping on the Regulatory Objectives Bandwagon*, 22(1) PROF. LAW. 28 (Dec. 2013). This is a short version of an article I cowrote with Australian regulators Steve Mark and Tahlia Gordon.
 10. *Id.* at 5.
 11. *See* U.S. Department of Commerce International Trade Administration, 2013 NAICS Total All Merchandise Exports to World, <http://tse.export.gov/TSE/TSEHome.aspx>. (Select “State Export Data,” then “State-by-State Exports to a Selected Market,” with “World” in the drop-down menu.)
 12. *See* U.S. Census Bureau, *Census Bureau Reports 21 Percent of Married-Couple Households Have at Least One Foreign-Born Spouse*, Release Number: CB13-157 (Sept. 5, 2013), <https://www.census.gov/newsroom/press-releases/2013/cb13-157.html#> (last visited Nov. 1, 2014).
 13. *See* U.S. Census Bureau, *America’s Foreign Born in the Last 50 Years at 3*, *available at* <http://www.census.gov/how/pdf/Foreign-Born--50-Years-Growth.pdf>.
 14. *See* U.S. Census Bureau, *American Community Survey Briefs, The Newly Arrived Foreign-Born Population of the United States: 2010 at 6*, *available at* <http://www.census.gov/prod/2011pubs/acsbr10-16.pdf>.
 15. U.S. Department of State, Bureau of Consular Affairs, *Intercountry Adoption, Statistics*, <http://travel.state.gov/content/adoptionsabroad/en/about-us/statistics.html> (showing 249,694 adoptions between 1999 and 2013) (last visited Nov. 1, 2014). I would like to thank Theresa Kaiser for calling my attention to this statistic. *See* Theresa Kaiser, *Globalization and the Transformation of Legal Practice: Implications for JD Legal Education*, American University Washington College of Law, Office of Global Opportunities, Global Presentations Paper 1 (2014), *available at* http://digitalcommons.wcl.american.edu/go_global/1.
 16. American Bar Foundation & NALP Foundation for Law Career Research and Education, *After the JD II: Second Results from a National Study of Legal Careers* 35 (2009). The nationally representative sample of lawyers consisted of new lawyers from 18 legal markets, including the 4 largest markets (New York City, the District of Columbia, Chicago, and Los Angeles) and 14 other areas consisting of smaller metropolitan areas or entire states.
 17. *See Outward Bound*, AMERICAN LAWYER 67 (Oct. 2014, the Global 100 issue).
 18. Georgetown Law, Center for the Study of the Legal Profession, 2013 Report of the State of the Legal Market at 8, *available at* <http://www.law.georgetown.edu/continuing-legal-education/executive-education/upload/2013-report.pdf>. (The 2014 Report did not contain similar information about globalization. *See generally* Georgetown Law, Center for the Study of the Legal Profession, 2014 Report of the State of the Legal Market, *available at* https://peermonitor.thomsonreuters.com/wp-content/uploads/2014/01/2014_PM_GT_Report.pdf.)
 19. *See Outward Bound*, *supra* note 17, at 108–110.
 20. *Supra* note 5.
 21. *Supra* note 1.
 22. *Supra* note 5.
 23. The CCBE represents the bars and law societies of 32 member countries and 13 further associate and observer countries, and through them more than one million European lawyers. Most of these bars and law societies serve as regulators within their jurisdictions. Founded in 1960, the CCBE is recognized as the voice of the European legal profession by the EU institutions and acts as the liaison between the EU and Europe’s national bars and law societies. *See generally* CCBE, *About Us*, <http://www.ccbe.eu/index.php?id=375&L=0> (last visited Nov. 3, 2014).
 24. The author has personal knowledge of the following facts: The CCBE has transmitted its requests in writing to the ABA President. They were also discussed at the US-EU Summit held in August 2014 during the ABA Annual Meeting. The ABA has responded to the CCBE’s requests by noting that changes must be made on a state-by-state basis, in light of the U.S. system of state-based judicial regulation, which the ABA supports. It also noted that the only topic addressed in the CCBE requests for which the ABA does not have a policy position is the issue of lawyers who serve as neutrals in mediation or arbitration, as opposed to representing clients. The CCBE presented a draft of its requests to the CCJ in January 2014. After the CCBE formally adopted its requests, it subsequently transmitted them to the CCJ.

25. Council of Bars and Law Societies of Europe, “CCBE request to the United States in the context of the Transatlantic Trade and Investment Partnership (TTIP) negotiations,” available at http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/European_Legal_Prof1_1415787235.pdf.
26. See *supra* note 7 for links to the ABA’s policies addressing the methods by which foreign lawyers might actively practice in a jurisdiction. The ABA has not adopted any policy about lawyers who serve as neutrals because, in the United States, serving as a neutral is not an activity that is “reserved” to lawyers, and therefore it is not covered by Unauthorized Practice of Law provisions. The CCBE has stated that it wants “off the [negotiating] table” the issues of foreign in-house counsel, foreign pro hac vice, and full admission of foreign lawyers (the other three of the five methods in the foreign lawyer cluster). The CCBE also stated that it wants off the table “[a]ccess to the EU laws on free movement of lawyers (Services Directive 77/249/EEC and Establishment Directive 98/5/EC),” both of which limit the EU’s lawyer mobility rules to European lawyers who are citizens of an EU member state. Thus, a U.S. citizen who is a properly licensed EU lawyer cannot take advantage of the EU lawyer mobility directives that allow a lawyer in one EU member state to practice on a temporary or permanent basis in another EU member state. Citizenship requirements can be controversial, and many governments raise these types of barriers in trade discussions. In 1973 the U.S. Supreme Court struck down as unconstitutional a citizenship requirement for lawyers. See *In Re Griffiths*, 413 U.S. 717 (1973) (a Connecticut rule that prohibited an otherwise qualified Netherlands citizen from taking its bar exam was held to unconstitutionally discriminate against a resident alien). The ABA has not formally adopted a position regarding the citizenship requirements found in the EU Directives.
27. The CCBE green-red chart was based on data found in a draft of the IBA survey, the final version of which has now been released. See International Bar Association, International Trade in Legal Services, http://www.ibanet.org/PPID/Constituent/Bar_Issues_Commission/BIC_ITILS_Map.aspx (last visited Nov. 8, 2014). Results for U.S. jurisdictions can be accessed by selecting “Americas” under “Regions,” with the option of selecting a specific “Ease of Trade” category. Clicking on a specific jurisdiction will reveal the list of survey questions and the jurisdiction’s responses. Because this data is likely to be influential, I recommend that jurisdictions review their information on this web page for accuracy and contact the ABA Task Force on International Trade in Legal Services (or me) to report any inaccuracies so that this information can be conveyed to the IBA. It is not clear, however, whether or when the data will be updated. (If jurisdictions would prefer to review the data in pdf format, they can access the entire 700+ page report, IBA Global Regulation and Trade in Legal Services Report 2014, at <http://www.ibanet.org/Document/Default.aspx?DocumentUid=1D3D3E81-472A-40E5-9D9D-68EB5F71A702>. The U.S. data begins on page 493. A jurisdiction that would like a pdf excerpt of its own state’s data may e-mail the author at LTerry@psu.edu.)
28. E-mail from Thomas Fine, Director of Services and Investment, Office of the U.S. Trade Representative, to the author (Nov. 12, 2014) (“The IBA survey has been circulated to all governments participating in the Trade in Services Agreement negotiations in Geneva, including the US and the EU. It provides a sound factual basis for further discussion of legal services.”)
29. It is worth noting, however, that if U.S. states fail to take action that acknowledges and responds to the global situation in which U.S. citizens find themselves, there may be increasing pressure from numerous sources to nationalize U.S. lawyer regulation—which is the implicit threat that underlies the CCBE’s requests.
30. *Supra* note 11.
31. *Supra* notes 11–16.



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THE TESTING COLUMN

SCALING: IT'S NOT JUST FOR FISH OR MOUNTAINS

by Mark A. Albanese, Ph.D.

If you set out to scale something, most people think of fish or mountains. In the somewhat warped world of psychometricians, however, we immediately think of examination scores and putting them on a scale that has meaning to the people who use the scores. Scaling is something that NCBE does for all of its examinations. There is one type of scaling we recommend, however, that has created some challenges for jurisdictions to understand why and how it is done and what effect it has on the scores: scaling the written portion of the bar examination to the MBE. We not only recommend that jurisdictions scale their written scores to the MBE, but we will do it for them if they wish.

The purpose of this article is to describe why and how we scale the written scores and then what effect scaling has on the scores that result. (In this article I use the terms “written scores” and “essay scores” interchangeably; the term “essay questions” should be interpreted to include performance tests, including the MPT.)

WHY SCALE THE WRITTEN SCORES TO THE MBE

Scaling the written scores to the MBE takes advantage of the equating done to MBE scores so that MBE scores have a constant interpretation across test administrations. If NCBE did not equate MBE scores, the percentage of examinees below any



given score would vary unpredictably with the particular items used on the examination and with the proficiency of the examinees who take the test at a given administration. This could give jurisdictions problems in setting their passing scores. The percentage of examinees who fail at any given score could vary by a significant amount in unpredictable ways, or scores could remain constant at each administration, even though there might be known differences in proficiency in the candidate population.

Scaling to the MBE does not mean that the failure rate at a given passing score will be the same at all administrations. What it does mean is that the percentage passing at a given time is attributable to the performance on the examination, not to the relative ability of the group taking the test or to the particular test items used at that administration. Where this becomes especially important is in comparing results from the February and July administrations. The February administration generally has much lower scaled scores than the July administration. This is a pattern that has been found since the MBE was first administered in 1972 and is not unexpected. The July administration is in sync with law school graduation and examinees who are taking the MBE for the first time. February examinees, however, disproportionately tend to be those who failed the examination in July and those who are off-cycle because of academic challenges, among other reasons. The fact that the

scaled scores are lower in February than in July is then something that would be expected in the natural order of things.

HOW WE SCALE THE WRITTEN SCORES TO THE MBE

Former NCBE Director of Testing Susan M. Case, Ph.D., describes how scores are scaled to the MBE in her 2005 *Bar Examiner* article, “Demystifying Scaling to the MBE: How’d You Do That?”¹ I am going to take a different approach by continuing with the house-hunting analogy that I used in my September 2014 column in which I described how to interpret the mean and standard deviation.²

As I said in that article, when buying a house, the adage goes: the three most important things are location, location, location. When talking about test scores, the *mean score* is the most common index of the location of a group of scores.

After location, the other important factor relates to the spread or layout of the property—such as the lot size, interior square footage of finished space, number of bathrooms, and so on. The *standard deviation* (SD) is the most commonly used index of the spread of scores and can be thought of as representing the typical deviation of scores from the mean.

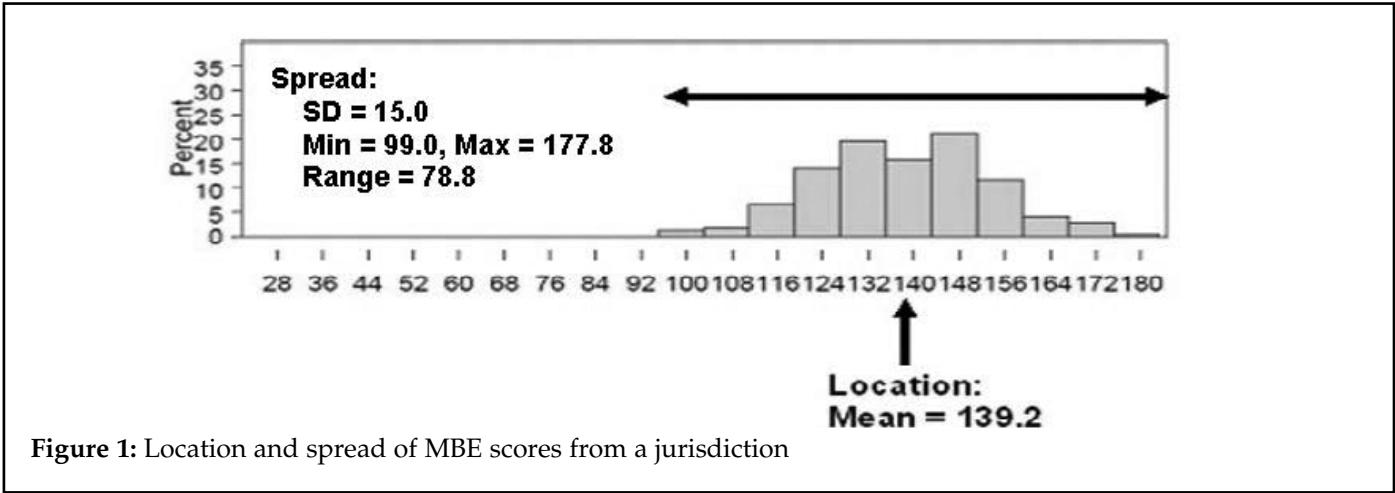
Because location and spread are critical elements in any score distribution, the scaling of the written scores to the MBE must have these two elements addressed. The formula below shows how scaled essay scores are produced and how the parts relate to location and spread.

$$Scaled\ Essay = \underbrace{Mean_{MBE}}_{Location} + \underbrace{\left[\left(\frac{Essay - Mean_{Essay}}{SD_{Essay}} \right) SD_{MBE} \right]}_{Spread}$$

The location component of the formula gives the mean score of the written portion the same mean as the MBE scores in that jurisdiction. The spread component of the formula gives the written portion the same SD as the MBE. So, scaling essay scores to the MBE gives them the same location and spread as the MBE. The range of scores (the difference between the high and low values) will be approximately the same as that of the MBE, but not exactly the same.

Start with MBE Scores

To provide a visual depiction of how the two parts of the formula work, Figure 1 begins by showing a bar graph of data from the MBE for a jurisdiction. This is the same figure that I used in my previous article, so you may already be familiar with it. The scores along the horizontal axis are the scaled MBE scores. Each bar covers 8 scaled score points (e.g., the first bar on



the left covers the scaled score range from 96 to 104). The height of the bar indicates the percentage of examinees who had scores in the MBE scaled score range along the bottom of the bar. So, going to the fourth bar from the left, the MBE scaled scores covered by that bar are centered at 124 but range from 120 to 128 and were achieved by approximately 15% of the examinees.

At the bottom of the figure, location is indicated, and it points to the mean of the distribution at 139.2. At the top of the figure, spread of scores is indicated by the double-headed arrow delimiting the high and low values (approximately 178 and 99, respectively) and the SD value of 15.0. The range of scores representing the high and low values, and the SD, which represents the average deviation from the mean, are both ways of characterizing the spread of scores across the scale. Unless there are extreme scores, ± 3 SD will cover the range of scores. ($139.2 - (3 \times 15 = 45) = 94.2$ and $139.2 + (3 \times 15 = 45) = 184.2$, values that cover the entire range of scores in the distribution.) The fact that ± 3 SD will usually cover the

range of scores is sometimes referred to as *6 sigma*, since sigma is an alternative term used for the SD.³

Add the Written Scores

The next step is to add the written scores to the graph showing the distribution of MBE scores. Figure 2 adds the distribution of the raw essay scores on the bottom left along with the MBE scores included on the upper right. Because there will be overlap in the distributions as we go through the scaling process, they are shown in separate boxes but with the same values on the horizontal axis. The MBE score distribution is identical to that shown in Figure 1. The raw essay scores range from 43.0 to 90.5, and the MBE scores range from 99.0 to 177.8, so there is no overlap in the distributions.

The first thing the scaling formula does is to give the raw essay scores the same SD as the MBE scores. Figure 3 shows the original raw essay score distribution with SD = 9.0 on the top while the bottom shows what it looks like after giving it the MBE SD = 15.0. Note that the distribution of essay scores has been expanded: the minimum value decreased from 43.0

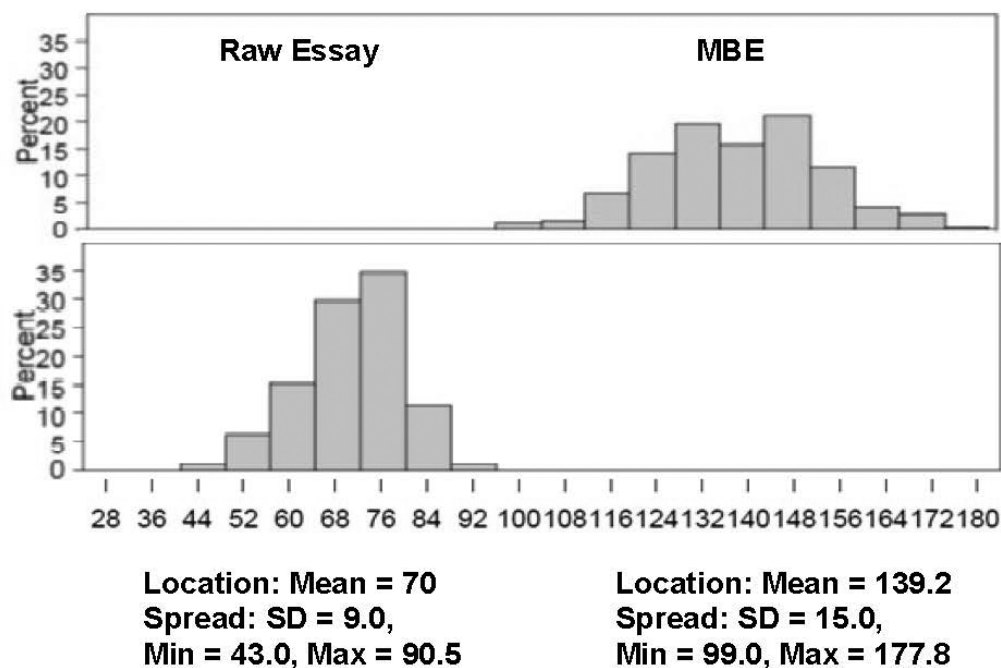


Figure 2: MBE + raw essay scores

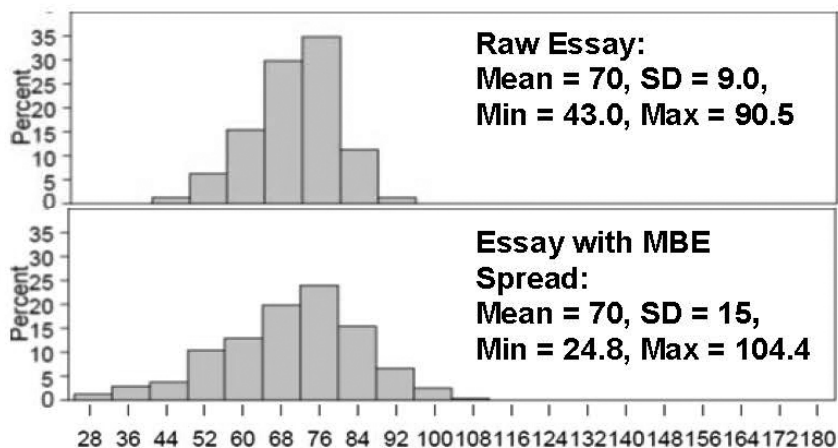


Figure 3: Making the spread of the raw essay scores and MBE scores the same (SD = 15)

to 24.8, and the maximum value increased from 90.5 to 104.4. In spite of the increase in the range of scores from the original 47.5 (90.5 – 43.0) to 79.6 (104.4 – 24.8), the mean has remained unchanged at 70.

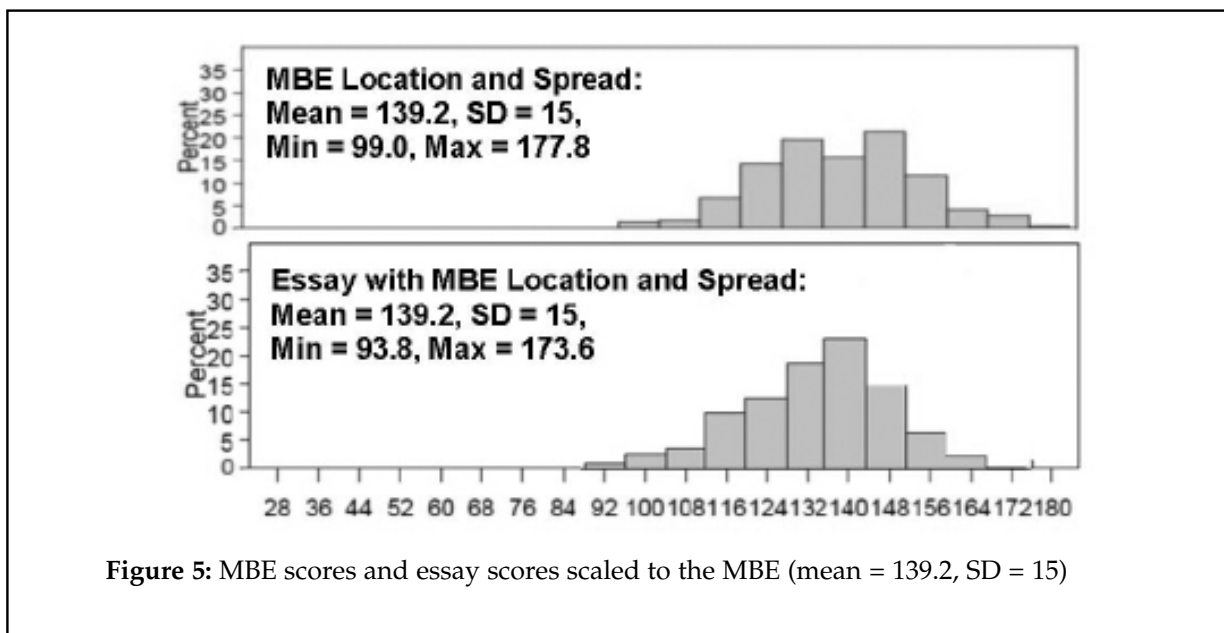
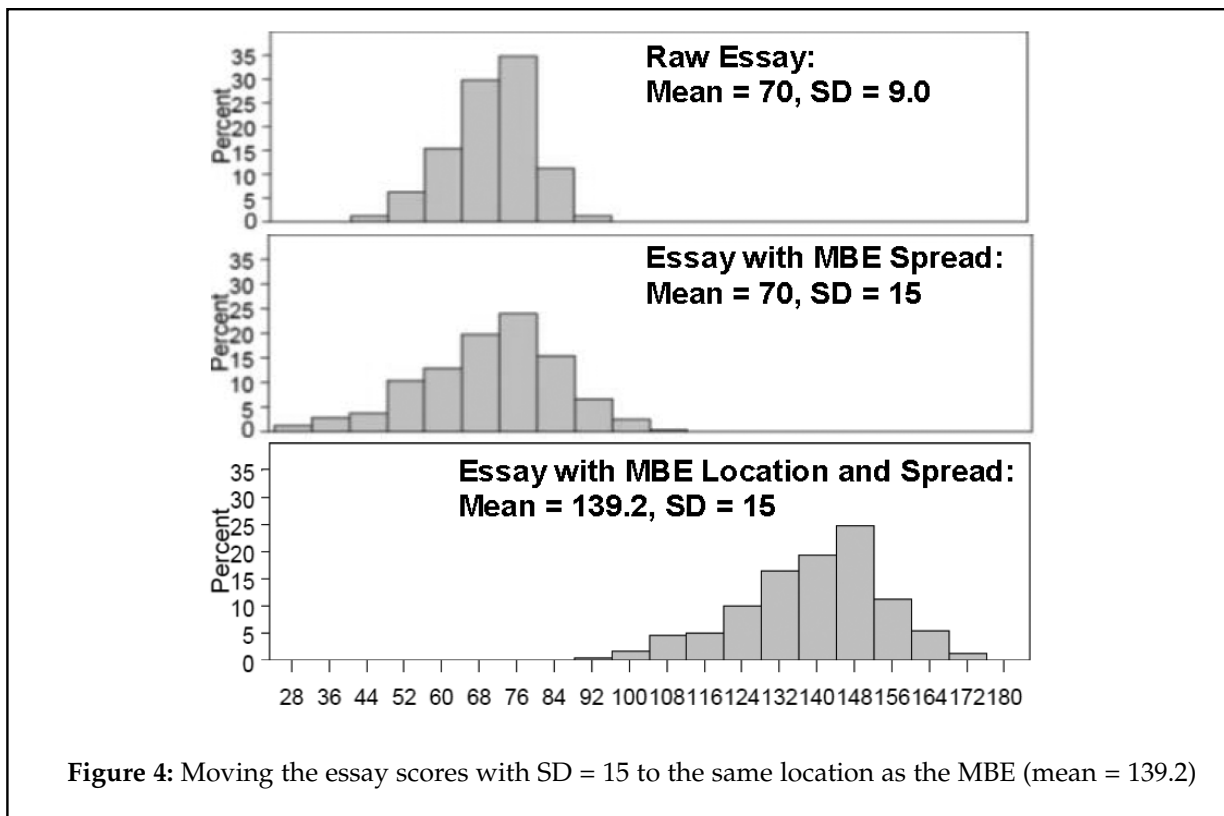
Figure 4 shows a composite of the three steps the essay scores go through to become scaled to the MBE. The upper panel shows the original distribution of the essay scores, the middle panel shows the essay scores after they are given the same SD as the MBE scores, and, finally, the bottom panel shows the final product where essay scores are scaled to the MBE. So, that is how we scale the written portion of the bar examination to the MBE.

THE EFFECT OF SCALING ON THE WRITTEN SCORES THAT RESULT

To assist with the discussion of what scaling the written scores to the MBE does to the scores that result, Figure 5 juxtaposes the original MBE score distribution (upper panel) and the essay scores scaled to the MBE (bottom panel). You can see from Figure 5 that the MBE score distribution and the essay scores

scaled to the MBE have the same mean and SD, but not the same shape. The essay scores retain the shape of their original distribution after they are scaled to the MBE, although the shape may appear to be elongated or stretched out along the horizontal axis after being given the larger SD of the MBE. If the SD of the MBE had been smaller than that of the essay scores, the distribution would look more crowded but still have the same basic shape.

In addition to having a mean and an SD identical to those of the MBE, the scaled essay scores' minimum and maximum values and their difference, the range, are more similar, but not identical, to those of the MBE. Unlike the SD, scaling to the MBE does not make the minimum and maximum values of the scaled essay scores identical to those of the MBE. But the examinee who received the lowest score on the raw essay score distribution will have the lowest score on the scaled essay score distribution. The same is true for the examinee who received the highest score. Scaling to the MBE leaves the relative ordering of the examinees intact from what it is on the raw essay score distribution.



Stability of Scores

Because MBE scores are equated, whereby they have comparable meaning across different administrations, scaling the essay scores to the MBE gives the essay scores the same stability. Thus, if the essay

questions given at one administration are substantially more difficult than those administered at another time, it will not affect the mean and SD of the scaled essay scores. While the intrinsic difficulty of different essay questions may affect which exam-

inees perform better than others, scaling to the MBE will not. The average scaled essay score will have the mean of the MBE scores in the jurisdiction no matter how intrinsically difficult the essay questions may be in comparison with past administrations. If Joe has the lowest raw essay score, he will have the lowest scaled essay score. If there are 50 examinees who had lower scores than Joe on the raw essay score distribution, the same 50 examinees will have lower scores than Joe on the scaled essay score distribution. At the individual score level in comparison to nearest neighbors, scaling to the MBE moves all examinees to the same new neighborhood (mean score) and then modifies how far apart they are. The relative position of each examinee is not changed.

Passing Rates

The stabilizing effect of scaling essay scores to the MBE will have the most impact on passing rates. Assuming equal weighting of the MBE and written scores, the percentage of examinees who pass the written portion will generally be no less than the percentage who would pass the MBE if it were used alone. (For example, suppose a jurisdiction used the sum of the scaled written score and the scaled MBE score with a total passing score of 270. If 90% of the examinees had MBE scores higher than 135, at least 90% of the examinees would be expected to have the sum of their MBE and scaled written scores to be above 270.) While combining the scaled essay scores with the MBE scores will not have an impact on the percentage of examinees who fail, the particular examinees who fail will be different from those who would fail strictly from the MBE alone. The written score will have an impact on who passes proportionate to its weight, which varies between jurisdictions. (For jurisdictions that have adopted the Uniform Bar Examination, the weight given to the MBE and the written portion is set at 50–50.)

SUMMARY


I will close by summarizing what scaling essay scores to the MBE will and will not do.

Scaling essay scores to the MBE will

- give the scaled essay scores the same mean and SD as the MBE in the jurisdiction;
- give the scaled essay scores the same approximate high and low values as well as scores in between, enabling familiarity with the MBE score scale to carry over for setting passing scores and other purposes;
- stabilize passing rates even though the intrinsic difficulty of essay questions may vary;
- control for differences in examinee proficiency across administrations, most notably between July and February administrations; and
- maintain a constant standard in the event examinee proficiency should either increase or decrease from historical levels.⁴

Scaling essay scores to the MBE will NOT

- change the order in which examinees are ranked from that on the raw essay score distribution;
- make up for graders who are poorly trained or who do not apply the grading guidelines adequately; or
- make up for essay questions that are confusing or are otherwise poorly written.

If the jurisdictions do their job of maintaining high-quality test administration and essay grading procedures, we will do our job of helping them ensure that their standards are maintained. 

NOTES

1. Susan M. Case, Ph.D., *The Testing Column: Demystifying Scaling to the MBE: How'd You Do That?* 74(2) THE BAR EXAMINER 45–46 (May 2005).
2. Mark A. Albanese, Ph.D., *What Does the Mean Mean and How Standard Is That Deviation?* 83(3) THE BAR EXAMINER 37–45 (September 2014).
3. Note that the width of the bars is an arbitrary choice; usually, a statistical program will choose the width of the bars such that there are 10 or 11 bars. The tick marks on the bottom and left side of the graph are also set at arbitrary distances by statistical programs to cover the range of scores, with maximum and minimum values being covered and with the 0 value also included, unless the minimum score is too far from 0 to be included without major scale distortion.
4. We have seen the first signs of the decline in applicants to law school in the July 2014 results, where the mean scaled MBE scores declined by 2.8 points nationally. The vast majority of newly graduating examinees taking the bar examination in 2014 were those who entered law school three years earlier in 2011. The applicant pool in 2011 was

78,500, compared to 87,900 in 2010, a drop of 10.7%. In 2012 and 2013, there were further declines to 67,900 (13.5% drop from 2011) and 59,400 (12.5% drop from 2012), respectively. To the extent that a decline in the applicant pool translates to bar examinees who are less proficient, the reduction in MBE scores is likely to continue. The counter to this trend is that the first-year law school enrollment also declined by 8.7% and 10.8% in 2012 and 2013, respectively, so law schools have cut their enrollment in response to having too few applicants who meet their standards. The success of these counter-efforts may be reflected in the fact that the mean LSAT scores of first-year law school enrollees have remained relatively constant, declining by less than 2 points over this period. (Sources: LSAC, Applicants by Ethnic and Gender group, <http://www.lsac.org/lisacresources/data/ethnic-gender-applicants> [last visited Oct. 15, 2014]; ABA Section of Legal Education and Admissions to the Bar, Statistics, http://www.americanbar.org/groups/legal_education/resources/statistics.html [last visited Oct. 14, 2014].)

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LITIGATION UPDATE

by Fred P. Parker III and Jessica Glad

CASES REPORTED

CHARACTER AND FITNESS

Failure to disclose; unauthorized practice of law

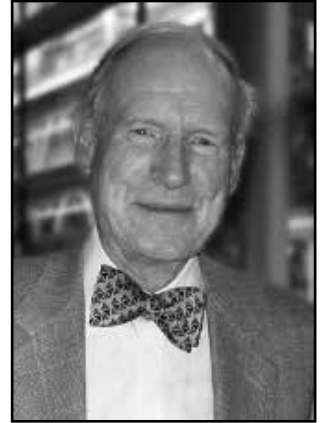
In re Application of Webber, 137 Ohio St. 3d 67, 997 N.E.2d 528 (OH 2013)

Failure to timely update bar application

Florida Board of Bar Examiners re Daniel Mark Zavadil, 123 So. 3d 550 (FL 2013)

Financial irresponsibility; false answers on bar application; rehabilitation

Florida Board of Bar Examiners re B.U.U., 124 So. 3d 172 (FL 2013)



CHARACTER AND FITNESS

Failure to disclose; unauthorized practice of law

In re Application of Webber, 137 Ohio St. 3d 67, 997 N.E.2d 528 (OH 2013)

Christopher Stanley Christman Webber was licensed in Michigan in 2002. He later applied for admission without examination to the Ohio Bar. In his bar application, he failed to disclose two DUI convictions from the early 1990s in response to the question on the application asking about alcohol- or drug-related traffic charges and convictions. The two DUIs were discovered during the application-verification process.

At his interview with a local bar association admissions committee, Webber said that he had answered “no” because he had furnished that information to NCBE in conjunction with his Michigan application and because his sister, who is licensed in Ohio, had told him to answer “no.”

In his application, Webber had also submitted an affidavit averring that he served as corporate counsel

for an Ohio corporation located in Ohio beginning in 2009. This job included counseling the company in all litigation, reviewing contracts, and other matters. At a panel hearing on Webber's application, the panel thought that Webber could have been engaged in the unauthorized practice of law, so it inquired about this employment. Webber said that while he had accepted the position as corporate counsel, he had taken a job in operations with the same company until he could be admitted in Ohio.

The panel questioned him about the undisclosed DUIs and his possible unauthorized practice of law and presented him with the affidavit he had previ-

ously submitted. Webber then admitted that he had acted as corporate counsel for some period of time. The panel found it was more than a year since his employer had reported to NCBE in 2010 that he was serving as corporate counsel. The panel recommended that Webber's application not be approved, and the Board affirmed this decision.

The Ohio Supreme Court denied Webber's application for admission and ordered that "[u]ntil he is duly admitted to the Ohio bar, he shall not seek admission pro hac vice, register for corporate status, or otherwise practice law in this state."

Failure to timely update bar application

Florida Board of Bar Examiners re Daniel Mark Zavakil, 123 So. 3d 550 (FL 2013)

Daniel Zavakil filed an application for admission to the Florida Bar in July 2007 and acknowledged the obligation to keep his responses to the application questions current and correct by timely filing amendments to the application. The application states that "an Amendment to Application is timely when filed within 30 days of any occurrence that would change or render incomplete any answer to any question on the application."

Zavakil passed the Florida bar exam, but the investigation by the Florida Board of Bar Examiners revealed information that reflected adversely on his character and he was asked to appear for an investigative hearing. Following the March 2009 hearing, action was deferred on his application and he was asked to submit a 25-page brief on legal ethics. Zavakil submitted the brief, and on May 4, 2009, he took the oath of admission. Then on April 26, 2010, he was given notice to appear for an additional

investigative hearing to determine if a "material misstatement or material omission" had occurred in the application process. Following the July 2010 hearing, the board determined that five specifications should be filed. Zavakil filed an answer, and a formal hearing to revoke his admission was held in July 2011.

Specification 1 dealt with Zavakil's response to the question as to whether any grievances, charges, or complaints had been filed against him resulting from his practice of any profession, occupation, or engagement in any business. If the answer is "yes," an explanation must be given. In 2007 Zavakil answered "no." The board alleged that on November 18, 2008, while Zavakil was working as a police officer in Fort Lauderdale, Florida, he received a letter from the Chief of Police notifying him that he would be suspended for three days in January 2009 because of deficiencies in his performance including discrepancies, omissions, and misinformation

in his reports and a pattern of attempting to shift responsibility for his identified deficiencies. The board alleged that Zavadil had committed a material omission in the application process because he failed to timely amend his answer on that question. The board also alleged that Zavadil had filed a complaint in the circuit court challenging the suspension, that the suspension was rescinded by the city of Fort Lauderdale, and that Zavadil had failed to amend his answer to the question to disclose the final disposition of the complaint or charge. Zavadil answered that he had received the November 2008 letter and that he had filed the complaint, but denied that he was required to disclose these events. The board determined that the allegations in specification 1 were proven and disqualified Zavadil for admission to the bar.

Specification 2 concerned the question on the bar application asking whether an applicant had been involved in any court proceedings. The board alleged that Zavadil had filed a complaint for injunctive relief to enjoin the city of Fort Lauderdale from taking disciplinary action against him and made a material omission by not disclosing this proceeding. The board found that these allegations were proven and were disqualifying.

Specification 3 concerned Zavadil's appearance at an investigative hearing on March 13, 2009, where he failed to amend his answers on the bar application and did not disclose the November 2008 letter or the complaint for injunctive relief. The board found that these allegations were proven and were disqualifying.

Specification 4 dealt with the question on the bar application asking whether the applicant had been discharged or suspended from employment. The board alleged that on March 30, 2009, when Zavadil was working as a police officer, he received

a memo from the police chief notifying him that he was relieved from patrol duty with pay, effective immediately, and that he was not permitted to take any official police action, work, wear a uniform, be armed, or operate a police vehicle. The board alleged that he had committed a material omission by not amending his application to disclose the suspension. Zavadil argued that a "relief of duty" is not considered a disciplinary action. After considering the evidence, the board found that the allegations were proven and were disqualifying.

Specification 5 dealt with Zavadil's application amendment of May 5, 2010, after the board initiated these proceedings. The board alleged that the term in his amendment "of my own volition" was false, misleading, or lacking in candor in that he filed the amendment in response to the board's notice of the hearing to revoke his admission. Zavadil denied this, but the board determined that the allegations in specification 5 were proven and disqualifying.

Zavadil's answer to the specifications was to plead the affirmative defense of rehabilitation, and he presented evidence to this and also character witnesses.

The board concluded, based on the evidence presented, that the allegations in the specifications were proven and were grounds for recommending the revocation of Zavadil's license to practice law in Florida. The board further recommended that Zavadil be disqualified from applying for readmission for a period of 18 months from the date of its findings. Zavadil filed a petition for review.

On review, the Florida Supreme Court noted that the board is charged with the obligation to investigate applicants for admission to the bar and determine whether each applicant has the required character and fitness. The rules outline certain types

of conduct that may be cause for further inquiry, including evidence relating to an applicant's misconduct in employment and neglect of professional obligations. The Court added that if the board had been aware of the November 2008 letter of Zavadil's supervisor, it is likely these matters would have been investigated prior to making a recommendation regarding Zavadil's admission. The Court said that "the crucial point is that Zavadil had an obligation to disclose this information to the [b]oard." Applicants must be candid, and here the applicant failed to inform the board of material information and events. "We have consistently held that 'no moral character qualification for Bar membership is more important than truthfulness and candor,'" the Court stated.

The Florida Supreme Court approved the board's findings and recommendations and revoked Daniel Mark Zavadil's admission to the bar. The revocation is to be effective 30 days from the date the opinion is filed so that he can close his practice. If Zavadil notifies the Court in writing that he is not practicing and does not need 30 days, the Court will enter an order making the revocation effective immediately. Zavadil will be disqualified from reapplying for admission for a period of 18 months from the date of his revocation. In addition, the Court said that Zavadil shall accept no new clients from the date of the opinion until he is readmitted.

Financial irresponsibility; false answers on bar application; rehabilitation

Florida Board of Bar Examiners re B.U.U., 124 So. 3d 172 (FL 2013)

B.U.U. received a J.D. degree in 1998, filed an application to take the Florida bar exam in 2010, and passed the exam in 2011. The investigation by the Florida Board of Bar Examiners revealed information that reflected adversely on her character and fitness. Following an investigative hearing, the board determined that specifications should be filed. Specifications were served, and B.U.U. filed an answer. A hearing was held in November 2012.

Specification 1 involved financial irresponsibility. For the past 12 years B.U.U. had been delinquent in her payments to 12 creditors despite having sufficient income to meet her financial obligations. She had been delinquent in repaying her federal and private student loans used to obtain her legal education. She had also failed to timely file federal tax returns for 2003 and 2007; failed to timely pay federal income taxes owed for 2002, 2004, 2005, and 2006; failed to timely file state income tax returns for 2005

and 2007; and failed to timely pay state income taxes for 2004, 2005, 2006, and 2007. B.U.U. and her spouse filed a petition for Chapter 13 bankruptcy, and a confirmation order with an approved payment plan was entered on May 1, 2007. B.U.U. then voluntarily resigned from her employment, and she and her spouse moved abroad. B.U.U. and her spouse failed and refused to make the scheduled payments set out in the payment plan. The bankruptcy trustee filed six motions to dismiss the bankruptcy case, and the court dismissed the case in March 2010. The board found that B.U.U. and her spouse had sufficient income to make the scheduled payments.

Specification 2 involved providing responses on the Florida bar application that were false, misleading, or lacking in candor; the responses were to questions dealing with delinquency in the payment of any tax or credit obligations. The board found that B.U.U. and her spouse had sufficient income to pay

the creditors, but that she chose to spend her earnings on other purchases and to pay for the construction of a residence abroad. This specification also dealt with her explanation for leaving her employment. She stated that she had resigned because of her spouse's employment transfer to California. The board found that she had left her employment because she claimed that her employer was sexually harassing her and that he was a difficult person to work for.


Specification 3 dealt with B.U.U.'s false testimony that her spouse's unemployment prevented her from being able to pay her creditors. The board found that B.U.U. had ample income to pay her creditors but willfully chose not to make those payments.

Specification 4 dealt with B.U.U.'s major depressive disorder since 2003, because of which she had been hospitalized on at least two occasions and attempted suicide more than once. She had not complied with her prescribed medication, and her psychiatric medications were being managed by her primary care doctor; she had not been referred to a psychiatrist and was not being treated by a mental health professional. In addition, B.U.U. had not amended her bar application to disclose treatment for her major depressive disorder.

Following the hearing, the board found that the first three specifications, all of which seriously impacted B.U.U.'s character and fitness, had been

proved. B.U.U. presented mitigation evidence but failed to establish rehabilitation. The board found that specifications 1–3, while proven, were not disqualifying and recommended her for conditional admission for one year.

The Florida Supreme Court disapproved the recommendation for conditional admission, stating that "the Bar must not become a haven for those who have clearly violated the law repeatedly and, in addition and further aggravation, provided information that is totally false, misleading, and lacking in candor." In regard to B.U.U.'s failure to repay her financial obligations and to comply with state and federal law on paying income taxes, the Court added, "Furthermore, we have held on multiple occasions that the failure to timely file or pay income taxes, in particular, merits disbarment or a denial of re-admission to the Bar, and we will not provide an exception here."

The Court disapproved the board's recommendation that B.U.U. be admitted or conditionally admitted and stated that any further consideration of this applicant may not occur until after three years from the date of this decision, adding that no rehearing will be entertained by this Court. 

FRED P. PARKER III is Executive Director Emeritus of the Board of Law Examiners of the State of North Carolina.

JESSICA GLAD is Staff Attorney for the National Conference of Bar Examiners.