

Passing the Bar: A Brief History of Bar Exam Standards

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Most graduates of the University of Wisconsin Law School are spared one of the major rites of passage in the legal profession—the bar exam. As we all know, graduates of the two law schools located in Wisconsin—The University of Wisconsin Law School and Marquette University Law School—are not required to pass a bar exam to practice in Wisconsin. They are admitted on the basis of what is known as the diploma privilege, i.e., graduation from law school, without the necessity of taking a bar exam. The Wisconsin diploma privilege dates back to 1870 when the legislature authorized automatic admission to the bar by virtue of graduation from the law department of the University of Wisconsin. At that time, the only requirement for admission to practice law was that persons demonstrate their ability and learning before a circuit judge. There were no guidelines for the judges and the requirement of graduation from the law department of the University was an upgrading of the educational standards. In 1931, the diploma privilege was extended to include graduates of the Marquette University Law School.

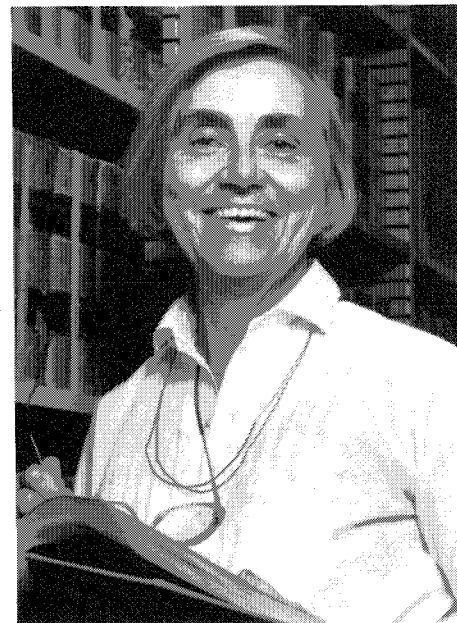
But, Wisconsin is the only American jurisdiction to have such a program. In all other states, as a significant number of alumni know, entry into the legal profession requires the aspiring lawyer to pass a bar examination. In fact, in Wisconsin, graduates of non-Wisconsin law schools are required to take a bar exam to qualify for admission. In 1989, of the 920 lawyers admitted to practice in Wisconsin, 176 were admitted on the basis of passing the bar exam. Four-hundred thirty-nine were admitted by diploma privilege and 205 on motion based on admission in another state followed by the necessary period of practice there.

Because of its almost universal acceptance as the main determinant of competence to practice law, the bar examination is a significant fact of professional life for lawyers. Preparing for, taking, and eventually passing the bar examination is perhaps one of the most important events in the life of a prospective lawyer.

New lawyers invest substantial amounts of time and money studying for them. It is not surprising, therefore, that the legal profession has devoted considerable thought and energy to studying, reviewing, and improving the process.

This article describes briefly the development of bar exam standards from a set of oral questions, administered and determined by a local court, to professionally developed tests on a national level and discusses the history of efforts to improve the bar admission process with particular reference to the work of the National Conference of Bar Examiners. I am serving as Chair of the National Conference of Bar Examiners this year. I was elected to the Board of Managers when I was serving as a member of the Wisconsin Board of Professional Competence, the state agency that oversees bar admission for the Supreme Court in Wisconsin. The Conference is the principal national organization concerned about the quality of bar exams and standards for admission to the bar.

In the 19th Century, bar admission standards were minimal. In fact, in the wake of Jacksonian Democracy, there was a movement in many states to open the bar to all “decent citizens”—regardless of training or ability. However, the norm was an oral exam, administered under the jurisdiction of the local court without any guidelines. Probably the best known description of such an exam—and one that clearly illustrated its shortcomings—was that conducted of a Jonathan Birch by a bar examiner named Abraham Lincoln and described in Beveridge’s *Life of Lincoln*. Birch wanted to be admitted to the bar, but his examining district required at least two years apprenticeship in the office of a practicing lawyer. Abraham Lincoln heard about Birch’s interest and called him in, explaining that there was no such rule in the Springfield District. Lincoln then proceeded to ask Birch some questions, such as what books he had read lately (which the examinee later said bore but a faint relation to the practice of law), told some stories, and wrote a certificate to the court



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recommending that Birch be admitted.

Beginning in 1880 with New Hampshire, states began to create central boards of bar examiners with state-wide jurisdiction. Wisconsin established such a board in 1885. By 1898, state-wide boards had been established in 12 states and by 1931 all states, except Indiana, had such a board. Gradually, these state-wide boards began conducting written examinations, although oral exams were not unheard of in less populous jurisdictions well into the 20th Century.

Early in the 20th Century, the American Bar Association began working to improve and strengthen the bar admission process. Its Section on Legal Education was concerned about the fact that bar admission standards were often at an extremely low level and varied greatly from state to state. The ABA Section had been instrumental in the founding of the Association of American Law Schools in 1900 and it was interested in a similar national organization for bar examiners. In 1931 the chairman of the Council of the Section appointed a committee of bar examiners from several jurisdictions to investigate the idea of a national organization of bar examiners. The National Conference of Bar Examiners (NCBE) was founded that year.

In the early years, the Conference concentrated on helping the states to upgrade their approach to the development of a bar exam. State bar examiners were discouraged from using questions such as "What is evidence? List the kinds" (nine minutes were allotted for answering the question); or "Define the term substantial compliance" (to be answered in six minutes); or "Give any two principles or rules used by the courts in the interpretation and construction of

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In 1958 the NCBE, along with the ABA Section on Legal Education and Admission to the Bar and the Association of American Law Schools, developed a Code of Recommended Standards for Bar Examiners. Those Standards stressed the need to give a written examination and emphasized that the exam questions should be hypothetical fact situations requiring essay answers. Standard 16 on "Purpose of Examination" recommended that: "The bar examination should test the applicant's ability to reason logically, to analyze accurately the problems presented to him, and to demonstrate a thorough knowledge of the fundamental principles of law and their application. The examination should not be designed primarily for the purpose of testing information, memory, or experience."

But it was not until the 1970s that the modern type bar exam began to take form. At that time, the Conference revolutionized bar examining by taking an entirely new approach. With a grant from the American Bar Foundation, it developed a six hour, multiple-choice exam that could be given by all examining jurisdictions and could be machine graded. It is known as the Multistate Bar Exam or MBE.

The development of such a test was brought about by several discrete factors. In the first place, the idea of a uniform test given to applicants in all jurisdictions had been discussed as far back as the 1940's as a means of upgrading bar admission standards. It was recognized that most other professions require their members to meet minimum national standards. The possibility of a national bar exam had been explored intermittently for about 30 years without being implemented, even though it was endorsed by the National Conference of Bar Examiners and the Section on Legal Education and Admission to the Bar of the American Bar Association, mainly because it raised fears that such a national exam would take the control of the admission process away from state boards of bar examiners. The Multistate Bar Exam provided a uniform test but left the control up to the jurisdictions, who administered the exam as part of their examination process, and set their own passing grade.

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Second, increases in the numbers of applicants taking the bar exam had overburdened the resources of many states and had led to what they considered unacceptable delays in completing the grading process. Jurisdictions were looking for help with the increased number of applicants. In just two decades, the number of applicants to the legal profession almost quadrupled, from 16,000 in 1960 to over 58,000 in 1980.

Finally, a uniform test seemed possible because advances in testing research and construction had shown that it was possible to use a multiple choice exam to test mastering of legal concepts. A multiple choice exam made the grading of a large number of tests in a short amount of time feasible because the tests could be machine graded. Several of the larger states had pioneered the idea with satisfactory results. In addition, most other professions—medicine, pharmacy, accounting, veterinary medicine, nursing, engineering and architecture—used multiple choice exams for their uniform tests.

The Multistate Bar Examination covers six basic subject matter areas: constitutional law, contracts, criminal law and procedure, evidence, real property and torts with a total of 200 multiple-choice questions. It provides the state examining authorities with the ability to cover a much wider range of topics than an essay exam can include, thus improving the validity of the exam. It offers them the reliability of an objective test in contrast to the subjectivity associated with the grading of an essay. Fifty American jurisdictions, including 46 states, the District

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of Columbia, and three territories use the MBE for one full day of their bar exam.

In 1980, the National Conference of Bar Examiners made another contribution to the bar exam process by introducing the Multistate Professional Responsibility Exam or MPRE. This is a 50 question two-hour multiple-choice exam that is intended to measure both an applicant's awareness of the professional responsibility considerations in a given fact situation and the applicant's knowledge of the ethical rules applicable to that situation. The questions are designed so that the correct answer is the same under both the American Bar Association Code of Professional Responsibility and the American Bar Association Model Rules of Professional Conduct. A small number of the questions also test knowledge of the American Bar Association Code of Judicial Conduct.

The MPRE was a response to interest by state bar examining boards in testing applicants broadly on knowledge of ethics. Although many jurisdictions include ethics issues in their essay examinations, the essay format limits the coverage narrowly. The 50 question MPRE allows much wider coverage. Unlike the MBE, the MPRE is administered by the National Conference and is not a part of any state's bar examination. Thirty-eight American jurisdictions, including 35 states, the District of Columbia and two

territories, require that applicants to their bar have passed the MPRE.

Because the MPRE tests only one subject matter, ethics, it requires the examinee to master and attain a passing score in that area. It does not allow the examinee the opportunity that the MBE or an essay exam gives with their multiple subject matter coverage to have a better knowledge in other substantive areas make up for lack of knowledge of the ethics rules of the profession.

The most recent effort of the National Conference of Bar Examiners in the area of test development is the Multistate Essay Exam or MEE. Like the MBE and MPRE, the MEE is designed to improve the quality of the bar examination process. But, unlike those two tests, which brought a new testing concept, the multiple-choice question, to the bar examination, the MEE is an attempt to improve the quality of what has become, in the latter part of the 20th Century, a traditional staple of the bar examination, the essay question.

The Conference has a long history of concern with the difficult task of drafting good essay questions. Since its inception, the Conference has published articles in the Bar Examiner discussing the problems connected with drafting essay questions and has sponsored panel discussions and seminars on the subject. In 1952, the Conference began the Question Library, a clearinghouse of bar exam questions. That has served as a source of ideas for bar examiners drafting questions for their own exam. Then in July 1988, the Conference began offering the Multistate Essay Exam or MEE that made available to states a complete half day of testing in nine subject matter areas: civil procedure, constitutional law, contracts, corporations, criminal law and procedure, evidence, real property, torts and wills, estates and trusts.

This exam offers the states the advan-

tage of essay questions that have been reviewed by two groups of experts with a specialty in the areas covered by the questions and pretested under conditions similar to an actual bar exam. The Conference hopes the jurisdictions will find this exam as helpful as the others have been.

Several Wisconsin faculty members have been involved in the efforts of the National Conference of Bar Examiners to upgrade bar examinations by participating in that organization's bar examination development process. Walter Raushenbush serves as a member of the Real Property Drafting Committee for the MBE. Dan Bernstine serves as a member of the Torts Drafting Committee for the MBE. Gordon Baldwin has served as a member of the Constitutional Law Drafting Committee for the MBE and as a member of the Drafting Committee for the Multistate Essay Exam; I have served as chair of that Drafting Committee.

This brief review of the development of bar exams illustrates the vast changes that have occurred in the process in the last century. I can only speculate about what the next 100 years will bring, although there seems to be no interest in the Wisconsin "diploma privilege" approach. However, there are changes in the legal profession that will probably affect state based bar exams: the increasing practice of large law firms to become national institutions with offices in several major cities and the mobility of young lawyers who may practice in two or three states in their first five years of practice. These changes will give impetus to the nationalization of bar examining and to interest in national standards. Today, for example, 31 of the 50 jurisdictions that give the Multistate Bar Exam will accept a transfer of an MBE score from an exam taken in conjunction with another state bar exam.