

# The Bar Exam: An Ineffective Measure of Lawyer Competency

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## INTRODUCTION

A competent lawyer needs a certain skill set. The bar exam determines whether an individual possesses that skill set. However, over the last twenty years, the bar exam has been criticized for failing to test such skills accurately. This note explores the bar exam from its inception to its modern-day implementation and considers whether the bar exam accurately tests lawyering skills. This note further examines alternative means of admission to state bars, offering a look into the future of bar admissions.

## HISTORY OF THE BAR EXAM

Passing the bar exam was not always a prerequisite to practicing law. Before the mid-1800s, potential lawyers were evaluated by their performance.<sup>1</sup> Rather than taking the bar exam, future lawyers completed apprenticeships, and their competency was determined by their performance in the apprenticeship.<sup>2</sup>

Diploma privilege was also a common means of admission into the legal profession. Diploma privilege allowed law school graduates to be admitted to the state bar in the state they graduated in without taking the bar exam. In the 1840s, Virginia briefly implemented diploma privilege.<sup>3</sup> Following Virginia's lead, 17 states adopted diploma privilege.<sup>4</sup> However, during the late 1800s, the practice faded because established attorneys believed that the legal profession was oversaturated with "unworthy" candidates.<sup>5</sup> The abolishment of diploma privilege led to the first iteration of the modern-day bar exam.

In 1885, Massachusetts was the first state to implement a written version of

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<sup>1</sup> Mehran Ebadolahi, *The Bar Exam: A Brief History*, BARMAX, <https://testmaxprep.com/blog/bar-exam/the-bar-exam-a-brief-history?v=#2> (last visited Nov. 27, 2023).

<sup>2</sup> *Id.*; see Tim Zubizarreta, *The Diploma Privilege Manifesto*, JURIST NEWS (July 9, 2020, 6:00 PM), <https://www.jurist.org/commentary/2020/07/jurist-eboard-diploma-privilege-manifesto/>.

<sup>3</sup> Zubizarreta, *supra* note 2.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

the bar exam.<sup>6</sup> By 1920, most other states followed Massachusetts's lead, adopting written versions of the bar exam.<sup>7</sup> Lawyers also started practicing law in different jurisdictions than they passed the bar exam, which created a need for a standardized bar exam.<sup>8</sup> Thus, in 1972, the Multistate Bar Examination (MBE) was created and introduced.<sup>9</sup>

### *Standardized Testing*

The MBE was the first standardized version of the bar exam.<sup>10</sup> The MBE consists of two hundred multiple-choice questions and originally covered five foundational legal topics: (1) criminal law, (2) contracts, (3) evidence, (4) real property, and (5) torts.<sup>11</sup> Since 1972, constitutional law and civil procedure have also been added to the test.<sup>12</sup>

To supplement the MBE, many jurisdictions have adopted the Multistate Performance Test (MPT) and Multistate Essay Examination (MEE).<sup>13</sup> The MPT was created in 1997 and is designed to test skills in legal analysis, factual analysis, problem-solving, resolution of ethical dilemmas, and other lawyering tasks.<sup>14</sup> It consists of two, ninety-minute essays addressing the above topics.<sup>15</sup>

The MEE is also administered in essay format. It consists of six, thirty-minute essay sessions.<sup>16</sup> The essay questions can cover several topics, including business associations, civil procedure, conflict of laws, constitutional law, contracts, criminal law, criminal procedure, evidence, family law, real

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<sup>6</sup> Ebadolahi, *supra* note 1.

<sup>7</sup> *Id.*

<sup>8</sup> *A Brief History of the Bar Exam*, UWORLD, <https://legal.uworld.com/bar-exam/history/> (last visited Dec. 11, 2024).

<sup>9</sup> *Celebrating 50 Years of the MBE: A Brief History of the Landmark Examination*, THE BAR EXAM'R (2022), <https://thebarexaminer.ncbex.org/article/fall-2022/celebrating-50-years-mbe/>.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *A Brief History of the Bar Exam*, *supra* note 9.

<sup>14</sup> *National Conference of Bar Examiners: MBE, MEE, MPRE, MPT Multistate Tests*, A.B.A. (June 26, 2018), [https://www.americanbar.org/groups/legal\\_education/resources/bar\\_admissions/bartests/?login](https://www.americanbar.org/groups/legal_education/resources/bar_admissions/bartests/?login); see Kaitlin Kiefer, *The History of the U.S. Bar Exam, Part I – The Law's Gatekeeper*, LIBR. OF CONG. (Feb. 13, 2024), <https://blogs.loc.gov/law/2024/02/the-history-of-the-u-s-bar-exam-part-i-the-laws-gatekeeper/>.

<sup>15</sup> *Id.*

<sup>16</sup> *Multistate Essay Examination*, NAT'L CONF. OF BAR EXAM'R, <https://www.ncbex.org/exams/mee> (last visited Nov. 28, 2023).

property, torts, trusts and estates, and secured transactions.<sup>17</sup> However, the MEE is specific to the testing jurisdiction.<sup>18</sup>

The continued need for standardization across jurisdictions led the National Conference of Bar Examiners (NCBE) to create the Uniform Bar Examination (UBE).<sup>19</sup> The UBE was first administered in 2011 and was designed to be a minimum competency test, purporting to test the fundamental knowledge and skills that lawyers should have to receive a law license.<sup>20</sup> The UBE consists of the MBE, MEE, and MPT.<sup>21</sup> It is uniformly administered, and its scores are transferable between participating jurisdictions.<sup>22</sup> The UBE is the most current iteration of the bar exam and has been adopted by forty-one U.S. jurisdictions.<sup>23</sup>

#### IS THE BAR EXAM AN EFFECTIVE MEASURE OF LAWYERING SKILLS?

High bar exam scores do not equate to competent lawyering. In fact, a study of Federal Trade Commission Lawyers found no correlation between performance on the bar exam and a lawyer's accomplishments.<sup>24</sup> Additionally, state-bar disciplinary actions are often derived from "poor attorney-client relations, poor communication skills, and neglect of clients' matters or lack of diligence," skills that are not necessarily tested on the bar.<sup>25</sup> Furthermore, more than 85% of legal malpractice claims are based on incompetent "soft" lawyering skills, like communication and diligence.<sup>26</sup> As such, a statistical analysis found no evidence to suggest that higher bar scores produce fewer complaints or disciplinary actions.<sup>27</sup> Rather, a statistical analysis found that disciplinary actions and complaints were more likely to exist with higher bar exam scores.<sup>28</sup> This suggests that the bar exam does not adequately test the minimum skills required for competent lawyering.

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *A Brief History of the Bar Exam*, *supra* note 9.

<sup>20</sup> *Multistate Essay Examination*, *supra* note 16.

<sup>21</sup> *Id.*

<sup>22</sup> *A Brief History of the Bar Exam*, *supra* note 9.

<sup>23</sup> *UBE Jurisdictions*, NAT'L CONF. OF BAR EXAM'RS, <https://www.ncbex.org/exams/ube/list-ube-jurisdictions> (last visited July 10, 2024).

<sup>24</sup> Andrea A. Curcio, *A Better Bar: Why and How the Existing Bar Exam Should Change*, 81 NEB. L. REV. 363, 371 (2002).

<sup>25</sup> Michael B. Frisby et al., *Safeguard or Barrier: An Empirical Examination of Bar Exam Cut Scores*, 70 J. LEGAL EDUC. 125, 131 (2020).

<sup>26</sup> *Id.* at 149.

<sup>27</sup> *Id.* at 148.

<sup>28</sup> *Id.* at 146.

Additionally, the bar exam does not test enough of the skills needed to be a competent lawyer.<sup>29</sup> The 1992 ABA MacCrate Report identified ten skills that are necessary for competent lawyering: “problem-solving, legal analysis and reasoning; legal research; factual investigation; communication; counseling; negotiation; litigation and alternative dispute resolution procedures; organization and management of legal work; and recognizing and resolving ethical dilemmas.”<sup>30</sup> The UBE only tests four identified skills: problem-solving, legal analysis and reasoning, communication, and factual investigation.<sup>31</sup>

Consequently, the bar exam tests test-taking skills more than lawyering skills.<sup>32</sup> One does not necessarily need to possess good lawyering skills to do well on the bar exam; they need good memorization and test-taking skills.<sup>33</sup> This is evidenced by a longitudinal bar study conducted by the Law School Admission Counsel (LSAC), which found that students who do well on the Law School Admission Test (LSAT) tend to do well on the bar exam, not because of what they learned in law school, but because they already had the necessary test-taking skills required to be successful on the bar exam.<sup>34</sup>

Similarly, the MBE portion of the bar exam is a memory test because it evaluates the test-taker's ability to recall legal rules.<sup>35</sup> The tested legal rules are general majority rules and, therefore, require the test-taker to memorize rules that may not be relevant to their jurisdiction.<sup>36</sup> Most lawyers report that they quickly forget the rules that they studied for the bar exam because the rules are irrelevant to their jurisdiction.<sup>37</sup> Thus, after the bar exam, the test-taker is often required to disregard what they learned for the MBE and memorize their jurisdiction's rules.<sup>38</sup> If the individual does not do so and relies solely on what they memorized for the MBE, they risk committing legal malpractice.<sup>39</sup>

Although the NCBE argued that the MPT and MEE portions of the bar exam

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<sup>29</sup> Kristin Booth Glen, *Thinking out of the Bar Exam: A Proposal to “MacCrate” Entry to the Profession*, 23 PACE L. REV. 343, 375 (2003).

<sup>30</sup> *Id.*

<sup>31</sup> *A Brief History of the Bar Exam*, *supra* note 9.

<sup>32</sup> Glen, *supra* note 31, at 368.

<sup>33</sup> Carol L. Chomsky et al., *A Merritt-orious Path for Lawyer Licensing*, 82 OHIO ST. L.J. 883, 886-87 (2021).

<sup>34</sup> Glen, *supra* note 31, at 357.

<sup>35</sup> *Id.* at 365-66.

<sup>36</sup> *Id.*

<sup>37</sup> Curcio, *supra* note 26, at 370.

<sup>38</sup> Glen, *supra* note 31, at 366.

<sup>39</sup> *Id.* at 366-67.

test legal reasoning and analysis skills, balancing out the memorization skills that the MBE tests, the existence of the MPT and MEE does not make up for the fact that the exam tests potential lawyers unrealistically.<sup>40</sup> The questions proffered by the bar exam do not reflect how clients present their problems to lawyers nor how lawyers solve them.<sup>41</sup> For example, practicing lawyers are not asked to pick the most correct out of four answers in less than two minutes.<sup>42</sup> If a lawyer were to quickly provide an answer to an unfamiliar set of facts based solely on memory, without researching the issue, they could risk a legal malpractice claim for failing to perform due diligence.<sup>43</sup> The MPT and MEE pose similar problems as they require test-takers to analyze and write about a situation based mostly on their memory and knowledge.<sup>44</sup> The MPT comes with case files that have relevant case law and statutory law—the test-taker is not required or able to research the issue.<sup>45</sup> On the other hand, the MEE presents the test-taker with a fact pattern, and they must write a legal analysis without the aid of materials.<sup>46</sup>

These testing methods are completely unrepresentative of a practicing lawyer. Lawyers research the relevant law of an issue and analyze the issue according to that research; they do not immediately formulate analyses and answers to problems.<sup>47</sup> On the contrary, lawyers take time to think through and reflect on the issue, anything less could lead to a potential legal malpractice claim.<sup>48</sup> The MPT and MEE are designed where the test-taker must read and understand the presented law and fact pattern and draft a legal document within a stringent time frame.<sup>49</sup> As a result, many first-time test-takers report being unable to finish the MPT in the allotted time.<sup>50</sup> Practicing lawyers, however, typically take the time to research, analyze, write, reflect, and edit their documents before submitting them.<sup>51</sup> The MPT and MEE do not accurately simulate how a lawyer solves a problem.

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<sup>40</sup> Curcio, *supra* note 26, at 374.

<sup>41</sup> *Id.* at 376.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 377.

<sup>45</sup> *Id.* at 378.

<sup>46</sup> *Multistate Essay Examination*, *supra* note 16.

<sup>47</sup> Curcio, *supra* note 26, at 377.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 378-79.

<sup>50</sup> *Id.* at 379.

<sup>51</sup> *Id.* at 377.

## ALTERNATIVES TO THE BAR EXAM

The legal community, and even the NCBE, is aware that the bar exam is lacking. As such, many alternatives to the exam have been proposed, and some states have adopted such alternatives.

*The NCBE's NextGen Bar Exam*

In response to overwhelming criticism of the bar exam, the NCBE developed the Testing Task Force to research the skills and knowledge new attorneys are expected to have within the first three years of practice.<sup>52</sup> The task force set out to determine how and when those skills should be tested on the bar exam.<sup>53</sup> The three-year study successfully identified those skills.

The UBE is designed to be a competency exam, establishing the minimum requirements for an individual to practice law. However, after its study, the NCBE determined that the purpose of the bar exam is “to protect the public by helping to ensure that those who are newly licensed possess the minimum knowledge and skills to perform activities typically required of an entry-level lawyer.”<sup>54</sup> Thus, the NCBE designed a new bar exam—NextGen—that is modeled after this philosophy.

NextGen will test doctrinal knowledge of the law and lawyering skills based on the results of the task force’s study. The task force identified ten knowledge areas that were most important for new lawyers. These areas include “rules of professional responsibility and ethical obligations, civil procedure, contract law, rules of evidence, legal research methodology, statutes of limitations, local court rules, statutory interpretation principles, decisions of law, and tort law.”<sup>55</sup> The task force also identified seven skills needed for competent lawyering. The seven skills are “legal research, legal writing and drafting, client counseling and advising, issue spotting and evaluation, investigation and analysis, negotiation and dispute resolution, and client relationship and management.”<sup>56</sup>

NextGen is still in the developmental stages. So, information about its format has not been fully released. However, the NCBE has shared with the public

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<sup>52</sup> Testing Task Force, *Final Report of the Testing Task Force*, NEXTGEN (Apr. 2021), <https://nextgenbarexam.ncbex.org/reports/final-report-of-the-ttf/#ftoc-heading-36>.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

that the test will be administered over two days.<sup>57</sup> The first day will consist of two, three-hour sections; and day two will be one, three-hour section.<sup>58</sup> The NCBE has not released what each section will test. In October 2023, the NCBE did, however, release test samples.<sup>59</sup> The samples presented two types of questions: “integrated question sets” and multiple-choice questions.<sup>60</sup> The integrated question sets consist of multiple choice and short answer questions based on a fact pattern.<sup>61</sup> They are accompanied by legal resources or supplemental documents.<sup>62</sup> Both the “integrated question sets” and the multiple-choice questions will be used to test doctrinal knowledge and the lawyering skills identified by the task force’s research.<sup>63</sup>

### *Diploma Privilege*

Although diploma privilege was mostly abolished in the late 1800s, it was revived during the COVID-19 pandemic. The pandemic made mass test-taking unsafe and nearly impossible. Therefore, Utah, Washington, Oregon, Louisiana, and the District of Columbia enacted a modified diploma privilege.<sup>64</sup>

Utah and Oregon required individuals who applied to sit for the 2020 bar exam to graduate from an ABA-accredited law school with a bar passage rate of at least 86%.<sup>65</sup> Washington required individuals who have registered for the July 2020 bar exam to graduate from an ABA-accredited law school but did not require the school to have a certain bar passage rate.<sup>66</sup>

However, Louisiana and the District of Columbia were much more strict. Louisiana required individuals to graduate from an ABA-accredited law school in 2020 and to complete at least twenty-five hours of continuing legal

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<sup>57</sup> *FAQs About Recommendations*, NEXTGEN, <https://nextgenbarexam.ncbex.org/faqs> (last visited Nov. 28, 2023).

<sup>58</sup> *Id.*

<sup>59</sup> *NCBE Publishes First Sample Questions for NextGen Bar Exam*, NEXTGEN, <https://nextgenbarexam.ncbex.org/ncbe-publishes-first-sample-questions-for-nextgen-bar-exam/> (last visited Nov. 28, 2023).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> Curcio, *supra* note 26 at 378.

<sup>63</sup> *Id.*

<sup>64</sup> Natalie Runyon, *Exploring Diploma Privilege and Alternative for Attorney Licensure*, THOMSON REUTERS (Apr. 13, 2021), <https://www.thomsonreuters.com/enus/posts/legal/diploma-privilege/>.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

education by the end of 2021.<sup>67</sup> Similarly, the District of Columbia required aspiring attorneys who were registered for the 2020 or 2021 bar exam to graduate from an ABA-accredited law school in 2019 or 2020, to never be denied from sitting for the bar exam, to pass the Multistate Professional Responsibility Exam (MPRE), and to be supervised by a qualified attorney for their first three years of practice.<sup>68</sup>

By February 2021, all but two states, New Hampshire and Wisconsin, returned to the bar exam as the means for entry into the legal profession.<sup>69</sup> New Hampshire has a modified version of the practice called the Daniel Webster Scholar Honors Program (DWS), which is only offered through the University of New Hampshire.<sup>70</sup> The program allows up to twenty-four students who complete the program to be admitted to the New Hampshire bar without taking the bar exam.<sup>71</sup> The students' admission is based on a portfolio of "key competencies" as well as their completion of six simulation-based substantive law courses.<sup>72</sup> Wisconsin, on the other hand, utilizes the traditional diploma privilege method and does not require graduates from ABA-accredited law schools in the state to sit for the exam.<sup>73</sup>

### *Public Service and Apprenticeships*

Legal scholars have proposed alternative models based on public service and apprenticeships.<sup>74</sup> The COVID-19 pandemic may have accelerated interest in these alternatives as some states are exploring the possibility of implementing such programs.

On November 7, 2023, Oregon announced that it would offer in-state law graduates an alternative entry method to the state bar.<sup>75</sup> The new method allows graduates of an Oregon ABA-accredited law school to bypass the bar exam if they complete 675 hours of legal work under the supervision of an

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<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> Dan Kittay, *States Mull Diploma Privilege as Option for Pandemic-Affected Bar Exams*, A.B.A. (Sept. 2020), [https://www.americanbar.org/groups/barleadership/publications/bar\\_leader/2020\\_21/september-october/states-mull-diploma-privilege-as-option-for-pandemic-affected-bar-exams/](https://www.americanbar.org/groups/barleadership/publications/bar_leader/2020_21/september-october/states-mull-diploma-privilege-as-option-for-pandemic-affected-bar-exams/).

<sup>74</sup> Glen, *supra* note 31.

<sup>75</sup> Karen Sloan, *No Bar Exam Required to Practice Law in Oregon Starting Next Year*, REUTERS (Nov. 7, 2023, 6:05 PM EST), <https://www.reuters.com/legal/government/no-bar-exam-required-practice-law-oregon-starting-next-year-2023-11-07/>.



attorney.<sup>76</sup> During those hours, the graduate will create a law portfolio with at least eight samples of legal writing that state bar officials will evaluate for admission to the state bar.<sup>77</sup> Additionally, graduates are required to lead two client interviews or counseling sessions and two negotiations.<sup>78</sup> The Oregon State Board of Bar Examiners also plans to implement an option for admission that would allow law students in the state to spend their last two years in law school completing practice-based coursework rather than sitting for the bar exam.<sup>79</sup>

Following Oregon's lead, California is considering implementing a similar admissions model. The program would require graduates to work under the supervision of a licensed attorney for four to six months.<sup>80</sup> During that time, the graduate would build a law portfolio, which would be graded by the California State Bar.<sup>81</sup> If the portfolio meets the passing grade, the graduate will be admitted to the California Bar.<sup>82</sup> The proposal is currently awaiting approval from the California Supreme Court.<sup>83</sup>

### *The Nevada Method*

Nevada adopted a model that has received little exploration or attention. During the pandemic, rather than implementing diploma privilege as the states discussed above, Nevada opted to make their bar exam a remote, open-book exam.<sup>84</sup> Unlike other states whose alternatives were temporary, Nevada has continued this method of examination. The first day of the Nevada bar exam consists of six essays, and test-takers are allowed to bring any books, paper outlines, or paper notes that they would like to use.<sup>85</sup> They are not, however, permitted to access the internet.<sup>86</sup>

Whether it is diploma privilege, public service, apprenticeships, or an open-book exam, states are exploring alternative methods of evaluating lawyer competency. Oregon's adoption of an alternative entry method and

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<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> Richard Trachok, *Nevada Bar Exam, the Way Forward*, ST. BAR OF NEV. (June 2022), [https://nvbar.org/wp-content/uploads/NevadaLawyer\\_June2022\\_Nevada-Bar-Exam.pdf](https://nvbar.org/wp-content/uploads/NevadaLawyer_June2022_Nevada-Bar-Exam.pdf).

<sup>85</sup> *Permitted Exam Materials*, ST. BAR OF NEV., <https://nvbar.org/licensing-compliance/admissions/bar-exam/permitted-exam-materials/> (last visited Nov. 28, 2023).

<sup>86</sup> *Id.*

California's similarly proposed method may be what rallies other states to ditch the bar exam.

#### THE WAY FORWARD

There will never be a perfect way to test admission to a state bar. All methods of testing lawyer competency have their pros and cons, but the current bar exam is outright ineffective. It is a test of memorization and speed, not of doctrinal knowledge or lawyering skills. In the interest of the legal profession's future, it is time to adopt alternatives.

#### *Apprenticeships*

What better way to evaluate a prospective legal professional's competency than to observe their performance? An apprenticeship does just that because it's an effective way to test a prospective legal professional's ability to practice law. Unlike the bar exam, apprenticeships do not require the formulation of fictitious questions or fact patterns or put future lawyers in unrealistic scenarios. Further, apprenticeships adequately test a prospective lawyer's ability to practice law because aspiring lawyers become immersed in the actual nuances of the law.

Thus, the newly announced Oregon model is the future of bar admission. The recency of Oregon's implementation coupled with California's likely adoption, shows that this is a method that states are willing to pursue. This is further evidenced by the ABA mandate that accredited law schools require their students to complete at least one experiential course which is defined as a simulation course, clinical, or field placement.<sup>87</sup> The ABA recognizes the value and necessity of a future lawyer having practical experience.

As such, Oregon's second alternative proposal—which allows students to bypass the bar exam by spending their last two years of law school completing practice-based coursework—is perhaps the most likely alternative to be adopted by states and the ABA. This method prioritizes practical, clinical experience and would ensure that law students are taught the proper skills. Law schools would be able to design a curriculum that would spend the first-year teaching students doctrinal law while the next two years could be centered around applying those concepts while building the seven fundamental lawyering skills identified by the NCBE. Certain lawyering skills, such as interviewing, counseling, negotiation, and client

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<sup>87</sup> AMERICAN BAR ASSOCIATION, STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS ch. 3, 18 (2023).

management, are incapable of being measured by a standardized written test. Taking a more hands-on approach, as Oregon is suggesting, would allow for the above skills to be developed and adequately evaluated.

This model, however, can present certain challenges. The biggest obstacle to this type of admission is a lack of resources. Real-life experience requires students and graduates to be placed at sites under the supervision of licensed attorneys. If this method were to completely replace the bar exam, it would require placement for every law student seeking admission to the state bar. This may not be feasible for smaller jurisdictions with fewer practicing attorneys. Additionally, it is not entirely clear how a model like this one would be scored and how a passing score would be determined. Without a clear line between pass and fail, the legal profession could be subject to claims of unfairness and inequity.

### *Diploma Privilege*

Another potential alternative to the bar exam is to return to diploma privilege. Even though it is currently only implemented by two states, it appears to have positive results. New Hampshire's DWS boasts its ability to produce practice-ready lawyers.<sup>88</sup> In fact, employers compete to hire graduates of DWS because they are "far better prepared to practice than their colleagues whose licensing was based on the traditional bar exam."<sup>89</sup> The program works because it requires students to complete immersive courses in pretrial advocacy, trial advocacy, negotiations, business transactions, client counseling, family law, conflict of laws, and a capstone course in advanced problem-solving and client counseling.<sup>90</sup> These courses all help develop the skills that lawyers regularly use.<sup>91</sup>

The success of DWS shows that such a model is highly effective. Because DWS has been in place since 2005, New Hampshire has procedures for evaluating students' performances in the program and determining the criteria for admittance to the state bar. As such, other states would have a model to follow, which would make implementing this type of program more efficient.

However, DWS has been conducted with a small cohort of people. Extrapolating it to larger jurisdictions may prove difficult and would likely bring issues. Also, implementing such a program may require many law

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<sup>88</sup> Chomsky, *supra* note 33, at 905.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

schools to alter their curriculum. This would be time-consuming and expensive, which would likely lead to push back from institutions. These obstacles do not make diploma privilege impossible but perhaps make it inferior to an apprenticeship model.

### *A New Bar?*

Because of the time, money, and resources it would take to adopt an alternative to the bar exam, it is worth considering that the bar exam may not need to be abandoned but modified. And, the NCBE seems willing to do so. The research conducted by the NextGen task force shows that there is a disconnect between the skills that are necessary to be a competent lawyer and what the current bar exam tests. NextGen is meant to bridge that gap.

Although the test is still in the developmental stages and there is no data on its efficacy, we do know that the new questions are designed to test an individual's ability to perform some of the more practical lawyering skills that are not tested on the UBE. Theoretically, the new exam should test more, if not all, of the MacCrate skills, which would address a significant critique of the current bar exam. However, NextGen does not currently purport to address any of the issues regarding the time constraint of the exam, which is another loudly voiced critique of the current bar exam. If the solution to the problem with the current bar exam is to modify it, both the issues of failing to test the necessary lawyering skills and the time constraint need to be addressed. For these reasons, NextGen may not be the best alternative.

### CONCLUSION

The traditional bar exam is not an accurate measure of lawyering skills; rather, it tests one's test-taking ability. The exam is unrepresentative of the practice of law in the way that it forces the test taker to choose "the most correct" answer for a narrow fact pattern in under two minutes. The exam also fails to test most of the fundamental lawyering skills identified by the NCBE.

Thus, bar admission practices are likely to change. NextGen has the potential to fix the problems with the current bar exam, but some states may follow Oregon's lead and abandon the test altogether in favor of an apprenticeship-style model. One thing is certain, the current bar exam cannot, in good conscience, continue to be used as an accurate measure of one's ability to become a competent lawyer.