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Fix or Fox: Where Do We Go from Here?

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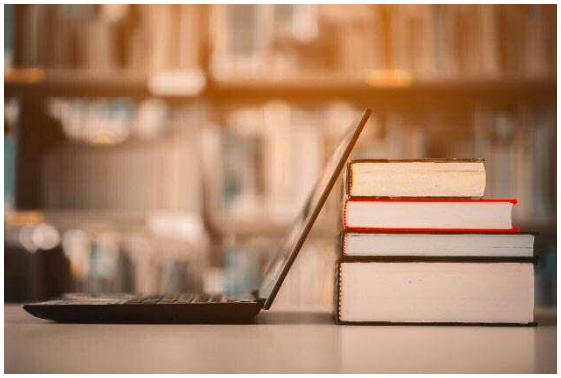
KANSAS BAR ASSOCIATION

Emerging Issues: The Bar Exam. Time for a Change?

Winter 2021/2022

Greetings from your YLS Publications Chairs! We hope all of you have had a great start to 2022. We have had the pleasure to meet some of you through our work with YLS and are grateful to those who have contributed toward our quarterly newsletter. In case you missed out on our Fall 2021 issue ("Resource Guide: Tips for 1st Year Lawyers"), you should be able to access it on the YLS Blog section of the KBA website: https://www.ksbar.org/blogpost/1958812/YLS-Newsletter.



The theme of our Winter 2021/2022 issue is "Emerging Issues: The Bar Exam. Time for a Change?" As most of you are aware, COVID-19 has sparked a renewed interest on whether the Bar Exam needs to change. We've selected a mix of opinion pieces, as well as a summary of recent developments with the Bar Exam. Additionally, in a couple weeks from now, you will receive a bonus article ("International Bar Trip!"), which consists of a Q&A series with law students and practicing attorneys from all over the world about their countries' attorney licensure processes.

We also have a new installment of our series Connecting Kansas. This issue we interviewed Clifford Lee, an attorney practicing in Southeast Kansas.

If you are interested in becoming involved in the discussion around the Bar Exam, we would be happy to help you find the right outlet. Happy reading!

Sunny Dharod and Nancy Musick
2021-2022 KBA YLS Publications Chair & Vice Chair

In this Edition:

Fix or Fox: Where Do We Go from Here?
By: Marsha Griggs

Recently the National Conference of Bar Examiners ("NCBE") announced that it will make sample questions from its proposed NextGen Bar Exam publicly available. NCBE is the entity that creates and sells all the questions used on the Uniform Bar Exam adopted in Kansas, Missouri, and thirty-six other states. In theory, the NextGen Exam is being developed in response to mounting critique that the bar exam is not a true measure of competence to practice law and claims that the exam disadvantages applicants based on socioeconomic status and race. But is the NextGen prototype a fix or a fox in the henhouse?

For years, I have urged members of the legal profession to pay attention to an important power imbalance in the licensure process that was driven by widespread adoption of the uniform exam. Directly put, the entity that controls the bar exam controls law licensure. A fact that state supreme courts were made dubiously aware of in 2020, when NCBE threatened to withhold provision of the exam questions to the jurisdictions it serviced. By 2023, at least 40 U.S. jurisdictions will administer a bar exam with no state control or input into the content or exam administration, save setting a cut score.

For most lawyers, the best thing about the bar exam is that it is over, and not having to ever take it again. Although uniformly dreaded by those who must take it, the bar exam is recognized as an imposed rite of passage into the legal profession.

> "[Most lawyers] do not have any particular affinity to the exam itself. But because the concept of licensure by examination is an indelible construct in the mentality of legal professionals, we cannot readily envision a path to practice without it. For lawyers, the bar exam is an institutional norm that they have internalized."

But young lawyers—for whom the sting of the bar exam and all that goes into bar preparation is a more recent memory—have been more vocal about their opposition to the inequities of the exam and its exclusionary history. The urgent push for licensure reform can be credited to an inclusivity-minded generation of law school graduates and young lawyers.

In the last 18 months, young lawyers and aspiring future lawyers have flooded social media outlets with the factual horrors of trying to: finance bar study; study during mandated lock-downs; study while balancing child-care duties; study with limited internet connectivity; study while working; study while the exam date, format, and mode of administration remained in constant flux; take a bar exam without bathroom breaks; take a bar exam while in labor; take a bar exam with artificial intelligence proctoring that does not recognize darker skin tones; take a bar exam without the use of printed exam materials or scratch paper; take a bar exam in a large assembly setting before COVID vaccines were available; and more.[1]

Social media was a principle, but not sole outlet for the bar reform movement. Nationwide a solidarity movement of law students and young lawyers mobilized to promote equity in the legal profession under the umbrella name of United4DiplomaPrivilege, and its successors DiplomaPrivilege4All and the National Association for Equity in the Legal Profession. These powerful future leaders organized satellite groups in multiple jurisdictions to petition the courts for diploma privilege at a time when taking the bar exam had become more uncertain than passing the bar exam.

The work of these young lawyers cannot be contained to pandemic times. No matter how unpalatable the notion of diploma privilege may be to state courts, state bar examiners, and seasoned attorneys who have a deep-rooted professional attachment to the gatekeeping function of the bar exam, the public is watching their response. States like Oregon, California, and Minnesota have launched commissions to evaluate other paths to licensure, like supervised practiced or clinical course requirements, that can serve as an alternative to and not a replacement for the traditional bar exam.

Sufficient data now exists to support past and present claims that the bar exam, in its current form is does not measure practice competencies. One would be naïve to view NCBE's push for a NextGen Exam as something other than a means to protect its stronghold in an unregulated market for attorney licensing exams. A pattern has arisen. NCBE creates or modifies an exam and promotes the sale of the exam. Scholars and practitioners

identify shortcomings of the exam. NCBE rebuffs criticisms of its product. Criticisms are substantiated. NCBE designs and promotes for sale a new or modified product that purports to remedy the very flaws that it previously denied.

The administration of the first NextGen Exam is years away. Time will tell if the pattern continues or not. If history is an indicator of future behavior, and it often is, the implementation of a new multistate performance test tracks with the pattern. In 1997, as a "fix" to years of complaints that the bar exam did not measure practice skills, NCBE added a new component to the bar exam: the Multistate Performance Test ("MPT"). Upon launch of the MPT, the National Center for Fair and Open Testing said:

> The MPT appears to be a positive addition to the Multistate Bar Exam, there is no evidence that any test either performance-based, essay, or multiple-choice accurately predicts the capability of a law school graduate to be a competent lawyer.

What assurance do we have that the NextGen exam will correct the shortcomings of its predecessor multistate exams? Why are our courts so willing to defer to a private, unregulated entity to determine who is and who is not fit to practice law? Six years ago, a former law dean made this harsh but righteous plea urging state courts and legal regulators to reign in NCBE control:

> For too long the unregulated monopoly of the testing industry has masqueraded as the self-appointed guardian of professional standards. In reality, the N.C.B.E. is . . . pressuring the states to consolidate its influence and expand its exclusive control…It is time for [us] to take back control of the future of the profession (which [we] know better than a testing organization) and overhaul the way we evaluate the readiness of graduates to serve [as] practicing lawyers.

Today, NCBE's reach and reign are even bigger, and the bar exam that determines who will and who will not practice law remains just as broken. So again I ask, the NextGen Bar Exam, is it a fix or a fox in the henhouse of our professional autonomy? If there is an answer to this question, it will likely be found in the voice of young lawyers.

Marsha Griggs is an associate professor at Washburn School of Law where she directs the academic enrichment and bar readiness program. Professor Griggs is a member of the Collaboratory on Legal Education and Licensing for Practice. She lends her voice to the national conversation about licensure reform and expanding access to the legal profession through her scholarship, experience, and advocacy. She chairs the Bar Advocacy Committee for the Association of Academic Support Educators, and she serves on the executive boards for the Society of American Law Teachers ("SALT"), Douglas County CASA, and the AALS Section for Academic Support.

Professor Griggs holds a Bachelors Degree from Northwestern University, a Masters in Public Policy from the University of Texas, and a J.D. from Notre Dame Law School. Admitted to practice in multiple jurisdictions, Professor Griggs practiced commercial litigation before law teaching and was inducted into the Texas Jury Verdicts Hall of Fame in 2014. In 2021, Professor Griggs received the AALS Trailblazer in Academic Support Award for her work and outspokenness about equity and status issues in legal education.

[1]In fairness, the Kansas Board of Law Examiners offered an in-person exam in July 2020, implanted social distancing protocols and gave applicants the option to test in September 2020. None of the horror stories cited herein occurred in Kansas and I am not aware of any complaints about the administration of the Kansas exam.