



NEVADA'S BAR EXAM:

BY RICHARD TRACHOK, ESQ.: BOARD OF BAR EXAMINERS CHAIR



The national decline in bar passage rates over the past few years has drawn attention to the bar examination process. There is no consensus as to the cause of the poorer performance by recent law graduates. The decline in bar passage rates has generated demands from some quarters to lower the standards, to adopt the Uniform Bar Exam (UBE) or to do both as means of increasing the pass rate. The Board of Bar Examiners, while concerned about the causes of the lower passage rates, is focused on maintaining high bar exam standards and protecting the public from unqualified practitioners.

As chair of the Board of Bar Examiners, I would like to outline how the board and the Nevada bar examination are structured. Our board is composed of 14 members, including the chair. The Nevada Supreme Court appoints the chair and seven members; the Board of Governors of the State Bar of Nevada appoints the other six members. Each member serves a three-year term, with no limits on the number of terms. Four current members are sitting district court judges, and the remaining members are experienced practitioners.

Eight board members write the Nevada law questions and answers for each bar exam from one of 14 subject areas as set forth in SCR 66. The chair decides on the specific topics assigned for a particular bar exam to maintain fairness and consistency. A ninth member grades the Multistate Practice Test, which is drafted by the National Conference of Bar Examiners (NCBE). Each board member writes the questions and grades the answers for two successive bar exams and sits out the third.

The board follows the best practices for the administration and grading of the bar exam. The grades are submitted to a nationally recognized expert, who performs statistical analysis to assure the Nevada bar exam is valid, reliable and consistent from year to year.

The board strives to be as inclusive as possible in filling vacancies in both grader and examiner positions. We have a fairly representative group serving as graders and board members, and we seek to increase geographic, racial and gender diversity on the board.

Given the importance and difficulty of our task, it is imperative that we minimize turnover on the board. The court has deemed it ill-advised to require term limits for board members. There is a long learning curve for developing the necessary skills and experience to effectively draft and grade bar exam questions. This experience and these skills have proven to be both helpful and necessary in carrying out our court-mandated functions.

Each board member attends our biannual three-day meeting, at which each exam question and a fully-briefed answer are critiqued by the full board. The board spends almost two full days of each meeting finalizing the questions. During the same meeting, the board, as a group, regrades all essay answers from those examinees receiving a composite score between 73 and 75 (passing requires a 75). This usually accounts for 20 percent of the examinees on any given bar exam. This important process encompasses the third day of the board's biannual meetings.



A LOOK BEHIND THE CURTAIN

The board structures the bar exam consistent with the three-prong approach followed by the NCBE. The three parts of the bar examination test applicants' general knowledge of the law (Multistate Bar Exam or MBE); assess applicants' "ability to use fundamental lawyering skills in a realistic situation" (Multistate Practice Test or MPT);¹ and test applicants' ability to communicate effectively in writing by analyzing hypothetical factual situations requiring a reasoned analysis (essays).²

The court has charged the board with protecting the public by licensing only those applicants who meet the minimum qualifications necessary to practice law in Nevada. To this end, the board prepares and provides a reasonable and fair bar examination process. The board has consistently and strenuously advocated for a rigorous exam, and has consistently opposed making the bar exam easier or lowering the passing score on the bar exam. Lowering our standards in order to make it easier to pass the bar benefits neither consumers of legal services nor members of the state bar.

While some groups have advocated for adoption of the UBE, we have opposed such a move, as it would relinquish responsibility for the exam itself to the NCBE, an organization over which neither the court nor the board has control. As long as we have highly-qualified members of the Nevada bench and bar willing to serve on the board, we do not believe that adopting the UBE is in Nevada's best interest. Rather, we believe it is important that Nevada legal experts prepare and grade the eight essay questions covering Nevada law to balance out the MBE and MPT, which are prepared by the NCBE.

All states have seen a precipitous drop in the mean MBE scores and

corresponding bar passage rates. This has coincided with a significant drop in the number of students taking the LSAT and applying to law school. During this same period, three new law schools were accredited by the ABA. These factors have placed tremendous pressure on law schools and the business of offering a legal education.

New York, which has adopted the UBE and uses an MBE score of 133 as the standard for establishing a passing score, experienced a 44 percent pass rate on the 2017 February bar exam. California, which like Nevada prepares its own essay questions, uses an MBE passing score of 144 (last year the court lowered Nevada's passing score from 140 to 138, while the California Supreme Court refused to lower its passing score of 144), and experienced a 35 percent pass rate. While New York has a higher pass rate than California, two things are clear: both pass rates are dismal, and neither the MBE passing score nor the UBE are the driving factors. More study is needed to determine the cause of these low pass rates.

It is important to differentiate between the role of the law schools and the board. Law schools are charged with educating law students in the law. The board is charged with ensuring that applicants possess the minimum qualifications to practice law in order to

protect the public. The board strongly believes that it is the law schools' responsibility to properly prepare its graduates for the study of law, including acquiring the educational background to pass the bar exam. Let's face it, the bar examination tests what the law schools teach, and is a measure of their success. Law schools that have seen a drop in their bar pass rates should review their

curricula to ensure that their students acquire the requisite skills to both pass the bar exam and enter the practice of law in the state of Nevada.

Further, law schools have a responsibility to support students who are struggling academically so those students can succeed both in law school and on the bar exam. Law schools make the decision to admit students and accept their tuition dollars, and it is up to them to prepare these students

to become successful attorneys.

We on the Board of Bar Examiners are continually looking at our process to make improvements and ensure fairness and relevancy. In furtherance of this goal, as chair, I have met with deans of several California law schools to better understand why the MBE scores across the country have experienced such a precipitous decline over the last two years. I have proposed, and the court has endorsed, launching a study in which the

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board would collaborate with UC Hastings College of the Law to gather data to help us determine whether the MBE is an effective tool to determine minimal competency and, if so, what the fairest and best cut score should be.

I, as chair, and members of my board are always available to work collaboratively with all parties to support the bar and its members. The members of the Board of Bar Examiners voluntarily spend 200-300 hours a year giving back to our profession with the highest levels of professionalism, dedication and competency. Our job is to protect the public while preparing a fair exam to determine minimal competency to practice law. It is the law schools' responsibility to assure that tuition-paying students receive a rigorous and comprehensive legal education that readies them for the academic challenges associated with the practice of law.

Working collaboratively, there is certainly much we can all do to make better lawyers in Nevada. **NL**

1. www.ncbex.org/exams/mpt/
2. www.ncbex.org/exams/mee/



RICHARD TRACHOK is Senior Counsel with McDonald Carano. He focuses his practice on regulatory and gaming law, as well as utility regulation and commercial law. Trachok has an extensive background in gaming law, particularly from the international perspective. Clients frequently turn to him for his understanding of the complexities of the licensing issues facing European companies, as well as his grasp of the unique aspects of European ownership structures, finances and culture. Trachok is currently a lecturer at the University of California, Berkeley School of Law.