

Nevada Bar Exam Study: The MBE - Predictor of What?



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Is the bar exam, and in particular the Multistate Bar Exam (MBE), a valid predictor of the skills and knowledge required to practice law? This is one of many questions U.S. bar examiners are, or should be, asking themselves.

For example, New York currently maintains a cut score of 133 on the MBE. In contrast, California's cut score on the MBE is currently 144. Do these differing cut scores presuppose that California's lawyers are more qualified or that New York's lawyers are less qualified to act as practicing attorneys? Where do Nevada lawyers fit in with the current MBE cut score of 138? What is the relationship between performance on the MBE and the minimum competence necessary to practice law?

As a licensing exam used to determine minimum competence to practice law, where should the cut score be set? Significant time and effort has been committed to develop the Nevada Bar Study.

These are the questions that the Nevada Board of Bar Examiners, State Bar of Nevada and Nevada Supreme Court, in conjunction with the University of California, Hastings College of the Law are seeking to answer with the Nevada Bar Study – a study to be conducted by AccessLex. The Nevada Bar Study seeks to determine what relationship, if any, exists between performance on the bar exam, more specifically the MBE, and the basic lawyering skills defining minimum competence.

The basic lawyering skills and knowledge to be evaluated in the Nevada Bar Study were first identified in the multiyear comprehensive empirical study done by Berkeley Law Professors Holmquist, Shultz, Zedeck and Oppenheimer in 2011 developing lawyering effectiveness factors. These

factors include: intellectual and cognitive factors, knowledge of the law, research, communications, planning and organizing, conflict resolution, client and business relations, working with others and character.

Unlike every other profession and trade, attorneys are not required to take part in any type of apprenticeship or residency program to help train them for the practice of law. The bar exam in our profession is the sole determiner of minimal competence. The exam may be a valid measure of what is taught in law schools but is it a valid measure of the knowledge and skills required to practice law?

While a well-structured residency/apprentice program would certainly act as the missing component of our current legal education, the cost and difficulty in developing and administering such a program in this country prevents its adoption. A relatively small state such as Nevada would lose out on potential out-of-state talent were it to implement such a requirement, not to mention the additional financial burden on law students already saddled with loans.



Suffice it to say, the bar exam must continue to act as the screening mechanism for law school graduates, protecting the public from those who lack the minimum competence to practice law. Law schools certainly contribute to this function. However, with the decrease in law school applications and the ever-increasing revenue demands, finding the right balance between admissions standards and an appropriate curriculum has been challenging for many law schools. Is the steady decline in mean MBE scores over the last five years telling us something about the current nature of legal education, the nature of today's students, the nature of the test, or perhaps a combination of these—or some other factors not understood or yet to be identified?

As the single “objective” testing measurement of acquired knowledge on the bar exam, the MBE has a high degree of reliability. Specifically, the MBE's scoring metrics are consistent from year to year. Of course, “objectivity” and “reliability” do not guarantee validity. All multiple-choice tests are “objective,” but this does not mean, for example, that passing the DMV's multiple-choice

driving test means you are a competent driver. Similarly, reliability refers to consistency from administration to administration; a test, like a clock, that is always 30 minutes slow, can be 100 percent reliable and 0 percent valid. Validity is the ultimate determiner of whether a test – such as the bar exam – is a useful measure of minimal competence.

Because the MBE has a measure of reliability, their ranges are used to scale the scores on the essay questions. As an objective measure, which also contains control questions that have appeared on previous exams, the MBE provides for a reliable comparison between exam cohorts. The mean MBE scores, therefore, drive overall bar passage rates across the country.

The goal of the Nevada Bar Study is to move beyond “reliability” and measure validity. Specifically, the study is designed to assess what relationship, if any, exists between performance as a beginning lawyer and performance on the MBE, performance on the essay questions (which approximates what we do as lawyers: analyze facts and write an intelligent solution to a problem) and performance in law school.

The Nevada Bar Study will seek participation from those Nevada lawyers who passed the bar exam within

the last two to five years. Each lawyer will receive a general explanation of the study, including the security measures in place to ensure confidentiality. The study questionnaire will request basic data on each lawyer such as demographics, work history as a lawyer, date of law school graduation and practice experience. In addition, each lawyer will be asked to identify

two supervisors and two peers who are in a position to evaluate the attorney's lawyering skills and knowledge.

The peers and supervisors will be asked to rate the attorney's performance on the skills and characteristics listed above. The survey itself will be conducted by AccessLex under the auspices of the court and Board of Bar Examiners. Security and confidentiality are of the utmost concern and a top priority for the study. AccessLex personnel will work with the Board of Bar Examiners to facilitate the transfer of data securely via Secure FTP or encrypted Box Enterprise transfer. Data will then be housed in a secure, password-protected file on the AccessLex network. The data will be accessible only by the senior research methodologist and will be encrypted. Only de-identified data will be accessed by researchers at AccessLex. Research records will be kept in protected files on a secure network, and only data that cannot be traced to an individual will be accessible by AccessLex.

Data transmitted to the research team by survey participants will necessarily include identifiable information about survey participants. However, in order to fully minimize the risks of accidental breach of confidentiality, state-of-the-art data security procedures will be employed. We understand that some of the data requested, such as background,

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academics and employment, is sensitive and/or intrusive. Participation in the study is voluntary, but all precautions will be undertaken to ensure protection of these data.

The primary benefits of this study will accrue to the legal profession and its clients. The study will illuminate whether the current bar exam predicts lawyering effectiveness and, if not, may help shape reforms in the licensing examination process.

There are approximately 300 lawyers in the target pool. A participation rate of 30-50 percent will ensure success of the survey. While this response rate is fairly high for a non-mandatory survey, given the nature of the study, the participation response rate should not be overly ambitious.

We anticipate commencing a “soft launch” of the survey on January 6, 2020. The first wave of the survey comprises the questionnaires and releases sent to the targeted group of attorneys. This should launch no later than February 10, 2020. The second wave should launch on March 10, 2020, and include the reviewing questions sent to the two peers and the first supervisor. Depending on the response rates, the third wave, which will include the review questions sent to the second supervisor, should launch on April 6, 2020, and be completed no later than May 15, 2020.

The data generated from the surveys will be validated and an initial analysis of the data will be performed. These results will be reviewed followed by a second round of analysis. We anticipate that the initial draft report should be completed in October 2020. The final report will be made available to each participant, the court and the bar at large. We are currently working with the court and Board of Continuing Education to allow for CLE credits for all participants.

In conclusion, the bar exam is the only licensing test used in the U.S. at this time to determine minimum competence to practice law. A combination of bar exam and a monitored apprenticeship program would provide the best assurance of minimal competence to practice law in order to protect the public. Unless or until this happens, the examiners in Nevada must make sure that we are using the most valid data possible in designing and administering the bar exam. Few will argue against the proposition that the written portion of the bar exam tests those skills that lawyers use every day. The unanswered question, and what this study attempts to address, is the relationship between the MBE and lawyering skills and knowledge. **NL**



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