

It's Time To Upgrade Our Attorney Licensure Rules

By **David Friedman** (August 12, 2021)

Last month, recent law school graduates across the country once again sat for the bar exam, the last gateway they face before entering the profession.



David Friedman

State bars contend that this rigorous exam tests the minimum competence of new lawyers.[1]

Law schools remain incentivized to educate students in the art and strategy of answering a battery of multiple choice questions, at the expense of spending more time teaching them how to interview clients, draft demand letters, negotiate contracts, write wills, cross-examine witnesses, or take depositions — in other words, teaching the skills required by the practice of law.

However, the bar exam does not serve the gateway purpose that many think it serves. A comprehensive 2020 study, published by the University of Denver's Institute for the Advancement of the American Legal System, shows that the bar exam simply does not test the skills that employers expect from new lawyers.[2] It therefore warrants replacement with practical curriculum, supervised training and skill observation.

But if we follow the logic of those who still fervently believe that there is no other pathway to assess the competence of law graduates, state bars should demand that all lawyers regularly retake the bar exam as a condition of licensure renewal.

Right now, the demonstrated faith in the bar exam is high.[3] Most state bars and state supreme courts continue to subscribe to the services of the National Conference of Bar Examiners, which churns out, in a normal year, two standardized bar exam tests for national use. State bars go to great lengths to proctor and grade these exams, in large part because the profession embraces this tradition and has mythologized its value to the public.

Amid a heated controversy last year over whether recent graduates should have been required to take the bar during the height of the COVID-19 pandemic,[4] the NCBE spent resources that could have been devoted to offer assistance to bar examiners and bar takers to address this emergency on promoting a poll.[5] The NCBE touted a survey revealing that 60% of the public supported an in-person bar exam for entry-level lawyers, even during a pandemic.[6]

The legal establishment pushed back on the notion that there was any other way to license lawyers except through the bar exam. According to an NCBE statement, Missouri Supreme Court Judge Zel Fischer asked rhetorically, "Could you imagine a campaign to allow doctors or commercial pilots or engineers to skip their licensing exams and begin operating or flying or building bridges?"[7]

That is a fair question. But if we accept the premise that the bar exam measures competence, why only limit testing to new lawyers? After all, commercial pilots are retested for their skills, judgment and competence with some regularity throughout their careers, which end with a mandatory retirement age.

Lawyers can practice indefinitely without any independent entity overseeing their competence. Indeed, the public only learns about lawyer incompetence and errors from state bars after the fact. Does that process protect the public?

If the rationale supporting a bar exam is that it protects the public from new lawyers by measuring competence, why can't the same instrument be used to protect the public from established, practicing lawyers?

Concededly, some quibble over whether the bar exam in its current form measures competence appropriately, and even the NCBE plans to implement significant changes to the bar exam in the next few years. But for those who believe in the traditional bar exam as a gatekeeper, why not use it as quality assurance for all lawyers? After all, experienced lawyers are, the data show together,[8] the ones who are disciplined more as they get deeper into their careers.

The real answer is that the bar exam, as currently constituted, needs to go because it actually does a poor job of measuring competence in the areas that clients need, whether for recent graduates at the beginning of their career or attorneys years into it.

If quality is the concern, state bars can direct resources toward regulating the 90% of lawyers who are well-established and who are more likely to encounter disciplinary trouble.

Is administering the bar exam to experienced lawyers the best instrument for achieving these ends? Those who defend the exam fiercely might think so, but I would challenge bar exam defenders to take the test themselves — today. If the exam measures competence, experienced lawyers should score extremely well on it, and if they don't, maybe they need to take a break.

Specifically, what should state bars do to ensure that new lawyers are ready for practice and able to serve the public? Some ideas are already in place or under consideration.

Wisconsin permits all successful graduates of its two law schools to join the bar without examination. A recent study by law professor Milan Markovic shows that "the complaint rate against Wisconsin attorneys is similar to that of other jurisdictions, and Wisconsin attorneys are charged with misconduct less often than attorneys in most other states." [9]

Further, alternative means for assuring competence for new lawyers are currently on the table before the Oregon Supreme Court, and they could serve as a national example.

Under the Oregon proposal,[10] law schools would be required to ensure that students have successfully completed an experiential learning curriculum. Instead of a two-day bar examination, portfolios of their work would be evaluated by the Oregon Board of Bar Examiners.

Instead of teaching skills needed to pass the bar exam, law schools would be incentivized to teach practice skills. The much briefer Multistate Professional Responsibility Exam, or MPRE,[11] would remain a requirement.

What could state bars do to ensure that experienced lawyers still retain their competence?

A recent study by law professor Rima Sirota deemed mandatory continuing legal education, or MCLE, a "failed experiment" in protecting the public from incompetent lawyers.[12] If MCLE time requirements are put aside, requiring a regular retake of a version of the MPRE

might serve the purpose of ensuring that lawyers have retained uniformly applicable knowledge about legal ethics.

Perhaps the exam could be extended to test lawyer knowledge of practice technology, too. Such testing would not only measure knowledge, but could test the executive function of lawyers and judges to ensure that they are still capable of sitting for a basic exam.

Currently, only new lawyers have to submit to a detailed background check of their character and fitness to practice law, but after passing that check, they never have one again. Reinstating a character and fitness test every five years would provide more recent information about whether an attorney has been acting with the highest ethical standards and demonstrating personal stability.

Another alternative would be to invest in the health of lawyers. Instead of sinking so many resources into testing, investing in wellness would serve the entire profession, which suffers disproportionately from concerning patterns such as drug use, depression and divorce.

Lawyers who face professional discipline often demonstrate that they were simultaneously facing challenges in their personal lives or with their health.[13] Perhaps normalizing the discussion of mental health and substance abuse in the profession would better serve consumers. That is, providing actual resources to help lawyers would both help lawyers and the public.

If (and when) the bar examination is eliminated, law schools will have to adjust their curriculum to ensure that education matches consumer needs while seeking to diversify the new lawyers they train.

The legal profession and legal education remain strongly rooted in a 20th century training and regulation model. Meanwhile, our society rapidly advances on every front. We update our phones, our vehicles and our homes.

It's now time to update and upgrade how we regulate attorney licensure and uphold the integrity of the profession. Or maybe it's time for all lawyers to take the bar exam again.

David A. Friedman is a professor and associate dean of strategic initiatives at Willamette University College of Law.

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[1] See Clearing the Bar: How to Set the Standard, Am. Bar Examiner, 6-20 (2001).

[2] Deborah Jones Merrit & Logan Cornett, Building a Better Bar: The Twelve Building Blocks of Lawyer Competence, Inst. for Advancement of the Am. Legal System (2020).

[3] See generally, Nat'l Conf. of Bar Examiners & Am. Bar Ass'n Section of Legal Ed. & Admissions to the Bar, Comprehensive Guide to Bar Admission Requirements (2021) (laying out the established requirements in all jurisdictions).

[4] See Nat'l Conf. of Bar Examiners, Bar Admissions During the COVID-19 Pandemic: Evaluating Options for the Class of 2020 (2020) (weighing options for bar administration during pandemic, while retaining commitment to administration); Valerie Strauss, Why this Pandemic is a Good Time to Stop Forcing Prospective Lawyers to Take Bar Exams, Wash. Post (Jul. 13, 2020).

[5] See Prime Group, Bar Exam Omnibus Survey (Sep. 2020), available on Nat'l Conf. Bar Examiners website.

[6] See Press Release, Nat'l Conf. of Bar Examiners, National Survey Finds Support for Bar Exam. (2020).

[7] Id.

[8] David Adam Friedman, Do We Need a Bar Exam... for Experienced Lawyers? (March 12, 2021). 12 U.C. Irvine L. Rev. _ (2022 forthcoming) at 11-15, Available at SSRN: <https://ssrn.com/abstract=3803623> or <http://dx.doi.org/10.2139/ssrn.3803623>; Kyle Rozema, Occupational Licensing and Legal Services: Evidence from Diploma Privileges and Lawyer Sanctions (April 9, 2021) at 49. Available at SSRN: <https://ssrn.com/abstract=3612481> or <http://dx.doi.org/10.2139/ssrn.3612481>.

[9] Markovic, Milan, Protecting the Guild or Protecting the Public? Bar Exams and the Diploma Privilege (August 7, 2021). Available at SSRN: <https://ssrn.com/abstract=3789235> or <http://dx.doi.org/10.2139/ssrn.3789235>.

[10] Letter from Joanna Perini-Abbott, Chair, Alternatives to the Exam Task Force, Oregon Board of Bar Examiners to Oregon State Board of Bar Examiners (Jun. 18, 2021), Available at <https://taskforces.osbar.org/files/Bar-Exam-Alternatives-TFReport.pdf>.

[11] See Nat'l Conf. Bar Examiners, Multistate Professional Responsibility Exam, <https://www.ncbex.org/exams/mpre/>.

[12] Rima Sirota, Can Continuing Legal Education Pass the Test? Empirical Lessons From the Medical World. (June 1, 2021). Notre Dame Journal of Law, Ethics and Public Policy, Forthcoming, Available at SSRN: <https://ssrn.com/abstract=3857997> or <http://dx.doi.org/10.2139/ssrn.3857997>.

[13] Christine Simmons, Law Firms Face Malpractice Risk over Substance Abuse, Poor Mental Health, NU Property Casualty 360 (Dec. 4, 2018) (original version in New York Law Journal).