

# **IN THE SUPREME COURT OF IOWA**

## **The Iowa Board of Law Examiners' Report to the Supreme Court of Iowa on the Process for Admission of Lawyers by Examination March 2015**

The Iowa Board of Law Examiners:

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## **Introduction.**

On September 5, 2014, the Iowa Supreme Court entered an order declining to adopt a diploma privilege for Drake University Law School and the University of Iowa College of Law. The court also charged the Iowa Board of Law Examiners with studying whether the Uniform Bar Examination (UBE) should be adopted and whether law students should be allowed to take the bar examination during their third year of studies (3L testing). The court finally directed the board to report on those issues and any other suggestions to improve the bar admissions system.

## **The Board seeks public comment.**

The board immediately proceeded in accordance with the court's directive by researching the two main issues.

After the initial research, the board prepared notices and attachments for use in seeking comment on the issues. The board sent individual, hard-copy notices to the Iowa State Bar Association and the law school deans at the University of Iowa, Drake University, and Creighton University. The board additionally sought comment from all active Iowa attorneys through mass email messages. The messages included information on the UBE and 3L testing along with a staff memorandum on the subjects, so all prospective respondents would have baseline information on the issues. The solicitation allowed roughly one month for responses.

The board received approximately 115 comments from lawyers, deans, professors, students, and the bar association. The vast majority of those who responded and discussed the issue favored adopting the UBE. A slight majority opposed allowing early testing by third-year students. Some respondents discussed whether the court should revert to an all Iowa essay examination, which was in effect prior to the adoption of the multistate bar

examination (MBE) for the February 1997 examination, or whether the court should return to incorporating Iowa essay questions into the bar exam.

Drake University's comments opposed 3L testing because it would disrupt their student's legal studies. Drake also opposed adoption of the UBE because "it would not be part of a comprehensive reform of bar admissions." Drake then suggested the court should reconsider the diploma privilege because it would address both the "timing" (delay between graduation and admission to the bar for successful applicants) and "coverage" (does not test on idiosyncratic points of Iowa law and procedure) problems.

Drake elaborated on the disruption that would be caused by 3L testing. It insists 3L testing would (1) disrupt the students' ability to satisfy non-credit graduation requirements, (2) require students to earn credits too quickly and make sequencing of studies and clinic participation "virtually impossible," and (3) further disrupt learning by limiting students to two semester hours during January and February. "The necessary pre-Bar hiatus on participating students engaging in clinical practice and internships will compromise the clinics' ability to represent clients and the third-parties' ability to efficiently use interns." (Drake Comment, page 6). Drake admits 3L testing addresses the timing problem, but determines it would not solve the coverage problem. Drake maintains 3L testing would disrupt the studies of those who do not opt to take the early exam as well.

Professor Vestal has supplemented Drake's comments by outlining how the Arizona plan would disrupt students by limiting their ability to take substantive third-year courses, preventing them from fulfilling sequences of courses, and disrupting the continuity of clinics and other experiential learning.

Drake opposes the UBE. It maintains the UBE addresses neither the timing nor the coverage problem. Drake suggests the UBE represents an unwarranted cession of authority to the NCBE and other jurisdictions. Drake instead asks the court to reconsider its unanimous recent rejection of the

diploma privilege. It maintains the privilege should be adopted because it solves both the timing and coverage issues.

Drake mentions the possibility of returning to an all-essay exam to address the timing and coverage issues, but concludes the cost of establishing the reliability of such an exam would be prohibitive. It then discusses supplementing the multistate test with an Iowa practice and procedure module, which would address the coverage problem but not the timing problem. Drake notes this method would pose the same type of implementation challenges as an all-Iowa essay test, but to a lesser extent.

Drake also raises the following other suggestions: (1) conditional licensure of students between taking the bar and admission/failure of the bar; (2) giving substantive topic-specific multistate components during law school (but ultimately decides it could not be implemented); and (3) supreme court oversight and approval of topic-by-topic law school exams in the substantive area of the multistate tests. Drake again notes the substantial implementation duties this would place on the court and the law schools.

The Iowa State Bar Association filed a comment adopting the comment presented by Drake.

The University of Iowa did not file an official comment. Dean Agrawal confirmed that she disseminated the request for comment to both the faculty and student body on receipt. She met with the faculty but no consensus was reached. The divide was especially great as to 3L testing. Dean Agrawal did express her personal view that the UBE should be adopted, because the portability of results opens the job market for both new lawyers and legal employers.

Creighton University did not file an official comment, but Dean Culhane filed personal comments. Dean Culhane noted pass rates have dropped with each administration of the UBE in Nebraska. She stated mobility was the biggest advantage of the UBE for students and joining the UBE should not require much training of graders for Iowa. She expressed concerns about the

following limitations of the UBE: (1) nonstandard passing scores, (2) temporal limits on score transfers, (3) additional character and fitness checks on transfer applications delay admissions, (4) transfer fees by the jurisdictions and NCBE, (5) additional state law components for some states, and (6) transferred MBE scores would not entitle an applicant to a UBE score. Dean Culhane finally suggested that if Iowa adopts the UBE, it should lower the passing score to 260 or at least keep the passing score at 266.

Dean Culhane thought the 3L testing program in Arizona plan might present “real opportunities to save time and money both in preparing for the bar and letting some students start post-graduation jobs months earlier than if they had to await July exam results.” She was concerned on the effect of curriculum changes on those students who don’t participate in 3L testing.

Dean Culhane finally suggested the possibility of incremental testing during law school, such as a mini-MBE for students after the first year. She acknowledged this type of exam would not be allowed under current UBE rules, but thought it might be worth seeking a future change in conjunction with other UBE jurisdictions. She also asked for law schools to receive more individually-focused information on their students’ performance on the bar exam.

### **Background Information on the UBE.**

The board met with representatives from the National Conference of Bar Examiners (NCBE) in the Judicial Branch Building on October 29, 2014. NCBE initially made a formal presentation on the UBE, discussing each of the component tests, the spread of the UBE, and the advantages of portability.

The UBE is a three-part bar examination administered under similar conditions in a number of jurisdictions. The UBE consists of the multistate bar examination (MBE), a 200-question multiple choice exam; the multistate essay examination (MEE), six essay questions; and the multistate performance test (MPT), two simulated lawyer performance tasks.

UBE jurisdictions agree to honor the bar exam scores from complete tests taken in other member jurisdictions, so long as the scores meet their individually-established passing score. So the UBE offers applicants the distinct advantage of being able to transfer their bar exam scores to other member jurisdictions without having to retake the bar examination. The applicants would still have to undergo character and fitness review in the receiving jurisdiction and meet any other conditions for admission. Roughly one-third of the UBE jurisdictions require the applicants to take a state-based CLE or an online tutorial or examination on the nuances of that state's law.

The UBE has been adopted in 15 states, and New York has recently put the concept out for public comment. The first UBEs were administered in Missouri and North Dakota in February 2011. Alaska gave its first UBE in July 2014. Kansas will give its first UBE exam in February 2016. The states contiguous to Iowa that give the UBE are Minnesota, Missouri, and Nebraska.

The group engaged in a detailed discussion of various UBE issues. The NCBE noted that Iowa already has the basic components for the UBE and is contiguous with several UBE states. NCBE advised against increasing our passing score at the same time as any adoption of the UBE. They were concerned that any decline in pass rates might be mistakenly attributed to the UBE rather than the actual increase in the cut score or other issues.

The board raised the issue of whether its automatic review system could be retained if the UBE is adopted. Under the current system, the lawyer board members and the three team leaders (experienced graders chosen by the board) each review the anonymous answers for their question of all applicants whose combined, scaled score falls within the range of 260 to 265 (passing is 266). The reviewers have the questions, scoring guide, all grading materials, plus "benchmark answers" – answers selected by the original graders that are considered representative for each raw score 1 through 6 from the grading session. The benchmark answers are intended to anchor the review session to the original calibrated grading.

The scores on applicant answers can either go up or down on review. Once the grades have been entered for all answers, the scores are totaled. The new raw total (if different from the original) is given the scaled score for that raw total from the original scaling results. So, if a raw total of 37 yielded a scaled score of 131 on the examination, a 37 on review will be assigned a scaled score of 131. The original grades for applicants who do not fall within the automatic review range are not re-scaled, so no one can go from passing to failing based on the reviews.

At the meeting, the NCBE said the existing system could be retained if the court chooses to adopt the UBE, although it expressed some reservations that the board was not reviewing scores above the passing line as well. While the board understands the method suggested by the NCBE might be more sound if the two types of grading (original team grading vs. automatic review) were indistinguishable, the board believes the original grading, which requires two calibrated graders to concur on a score under oversight of a board member or team leader, is more sound. As such, the board opposes a system in which a person who passed the original grading could be failed on automatic review. The board's research shows the vast majority of review or appeal systems around the country would not allow such a result.

Several weeks after the meeting, the NCBE discussed whether review systems like Iowa's should be allowed for UBE states, because the systems might cause the scores to be inflated. NCBE wondered whether all UBE states should grade all papers in a certain range both above and below the line. NCBE submitted the issue to a special UBE policy committee, but the committee has not made a recommendation. We have surveyed the UBE states and it appears many of them have somewhat similar review processes to Iowa's, and did not find any that switched applicants from passing to failing on review. However some of the UBE jurisdictions do not do reviews or appeals. Recent communications between NCBE and the board indicate NCBE is still

carefully reviewing the issue. So, while the automatic review system is considered acceptable now, it might well be subject to change at a future date.

### **Background information on 3L testing.**

The Court has also asked the Board to study whether to allow law students to take the February bar examination during their third year of law school. Georgia first allowed its law students to take the bar exam during the third year of law school through a rule change in April 1977. The practice was curtailed in 1994 when the Supreme Court of Georgia changed its rule to require graduation before taking the bar examination. The Georgia law schools and the Board of Bar Examiners led the charge to abolish the practice.

The Georgia court decided to end the practice because (1) Georgia was the only state allowing a 3L bar exam, (2) the practice resulted in severe disruption to the law school curriculum, (3) the practice required law students to compose schedules based on the bar exam, (4) students were missing educational experiences and clinical opportunities, (5) students were drained after the examination and had trouble returning to the law school routine, and (6) the Board thought bar exam performance would improve without the distraction of third-year courses. The actual change did not go into effect until after the February 1996 examination. A few other states, including Indiana, had dabbled with the concept as well, but none continued with 3L testing.

The 3L bar exam concept lay dormant until 2012. On January 5, 2012, three Arizona law schools filed a petition with the Arizona Supreme Court to allow students to sit for the bar examination in February of their third year, as long as they were expected to graduate within 120 days of the bar examination. The schools believed the plan would allow students to enter the practice early and without taking on additional debt between graduation and admission following the July bar exam. Finally, the students would be more practice-ready given the comprehensive examination followed by clinical practice.

The Arizona Supreme Court submitted questions to the proponents on August 31, 2012. As a result, Arizona and Arizona State drafted a narrower petition with agreed criteria as to who could take the exam.

On December 10, 2012, the Arizona Supreme Court amended Arizona Supreme Court Rule 34 to allow law students to take the bar examination during their third year of law school. Students would have to be in good standing at any ABA-approved school, expected to graduate within 120 days of the bar exam, enrolled in a maximum of two credit hours during January and February, with 8 or fewer hours needed to graduate at the time of the exam, and certified by the law schools to be academically prepared.

In addition, the applicant would not receive the bar exam score until proof of graduation was furnished. If the applicant did not graduate within the 120-day period, the applicant's exam score would be void. The pilot project was made effective January 1, 2013 until December 13, 2015. The law schools and the Arizona Attorney Regulation Advisory Committee were directed to file reports on the merits of the program by November 1, 2015.

For the February 2014 examination, Arizona had 37 testers from the three state law schools who took the February 2014 bar examination. Two schools had 100% pass rates and one had an 88% pass rate. The overall passing rate for February 2014 was 64%.

On January 7, 2015, the Arizona Supreme Court extended the pilot project through the February 2017 UBE. The order provides supplemental reports must be filed by June 30, 2016. Arizona Supreme Court Justice Rebecca Berch stated, "We extended the program because we think 2Ls need advance notice of whether the opportunity will exist in order to plan their schedules. Having had no negative reports and several good ones, we saw no reason not to extend." She noted that bar passage rates for 3L testers have been very high, and the court received anecdotal reports of 3L testing resulting in students getting jobs early.

On January 14, 2015, board member Keith Richardson met in person with Tom Williams, assistant dean of academic affairs, and Judy Stinson, associate dean of academic affairs, at Arizona State University – Sandra Day O'Connor College of Law (ASU). They talked about third-year testing, and the different approaches taken by the University of Arizona - James E. Rogers College of Law (Arizona) and ASU.

Richardson reports that ASU was initially concerned the project was not in their students' best interests, but they now support the concept. The deans indicated Arizona and ASU are taking different approaches to early testing. Arizona wants most of its students to test, while ASU does not think early testing is appropriate for all of their students. ASU had 12 test takers for the February 2014 exam, and would like to keep the number between 20 and 30 going forward. Oddly enough, the participants were in the lower 30 – 35% of the class.

The University of Arizona administers a qualifying test in October to determine which students should be allowed to test, but ASU does not. ASU instead requires its students to have successfully completed all core courses and the MPRE, submitted all character and fitness materials, avoided academic probation, and completed an interview with associate dean Stinson. Only one applicant was talked out of testing at ASU.

ASU students are not allowed to take any classes during January or February, when they are expected to focus on exam preparation. ASU does not offer a bar preparation course because there are plenty of commercial courses and it would be a drain on law school resources. After the exam, the students must take seven additional credits in research and writing, clinic, or transitioning to be an Arizona attorney.

Both ASU representatives believe the program has been a success and should be continued. They are talking to their first and second year students to generate more interest, while still attempting to keep the numbers below 30.

Board member Lora McCollom met with Associate Dean Kirsten Engel and Professor Rob Williams at the University of Arizona College of Law on February 5, 2015. Professor Williams explained that the concept of 3L testing “was delivered to us on a plate by Dean Miller.” Dean Miller taught at Emory University when Georgia allowed the 3L bar exam. Dean Miller discussed the idea with Arizona faculty members and appointed a study committee. Dean Engel and Professor Williams both served on that committee.

As part of the committee’s work, Professor Williams researched various educational theories. He soon learned that modern students (“millennials”) like to control their schedules as much as possible. The committee incorporated that information into the modified curriculum for 3L students. Even students who do not take the February bar like the block scheduling that emerged from the committee’s work, and the administration is considering changing the second semester to two quarters for all 3L students.

Arizona 3L students who want to take the February bar exam must take a Kaplan diagnostic test in October of their third year. The diagnostic test is basically a mini-MEE with questions on property, torts, contracts, and criminal law. The exam helps students identify their strengths and weaknesses in both black-letter law and their use of analytical skills in written answers. Faculty members then meet individually with the students and discuss their grades and test results. The faculty help each student develop a study plan for the bar exam. The diagnostic test is available for the other 3L students as well.

In order to be eligible for the February bar exam, a 3L student must have no more than ten units (credits) left to complete. There is no specific grade-point average requirement. In fact, Dean Engel suggested they would almost rather have students with lower GPAs take the bar exam in February due to the stronger support network available then. Professor Williams noted many of the students specifically plan their schedules to have nine units or less for the second semester of their third year anyway, because they only have to pay

part-time tuition. Also, the administrators have not identified any particular pattern of students who want to take the February bar.

During the month of January, eligible 3L students take a two-unit Professional Skills class that Professor Williams teaches. The class meets for four, three-hour sessions and incorporates video and distance-learning opportunities (webinars) as sanctioned by the ABA. The goal is to make students as practice-ready as possible -- it includes negotiation simulation, some client counseling, and personal wellness elements. The course ends on January 31 and the students then have the month of February to study for the bar exam.

Students may choose from multiple options to complete their remaining credits, including clinics, externships, and traditional classes. Basically, the second semester uses block scheduling rather than semester scheduling. All 3L students may take advantage of the block-scheduled classes. One of the most popular classes is titled "Advanced Professionalism and the Law." As a precursor to the class, the administrators polled faculty, colleagues, and externship supervisors and had them identify subjects they wish they would have learned in law school. They then incorporated those subjects, (billing, time management, trust accounts, law office management, self-care, etc.) into the class curriculum.

In preparing for 3L students to take the February bar, the law school had to adjust student schedules. They shifted some core classes to the second year and increased their summer course offerings so that students could take classes such as Evidence and Professional Responsibility over the summer. No faculty members were displaced and no courses were cancelled. Some faculty members had to revise their syllabi to create courses that can be completed in a quarter rather than a semester, but the faculty complaints have been minimal. Dean Engel also noted that there would likely be a strain on the curriculum if the number of 3L students taking the February bar exam increases, but said they will adjust for that if it happens. Dean Engel noted

that their externship program has “exploded” because the supervisors know they will get students there on a full-time basis, or close to it, for eight weeks rather than 15-20 hours per week for the entire semester.

Professor Williams and Dean Engel insist they did not feel pressured to declare the 3L program a success, because the program speaks for itself. In 2014 the University of Arizona had 24 students who took the February bar; of those, 21 passed and 19 of those who passed had jobs by graduation. Of the three that did not pass, one was at the top of the class, one was in the middle of the class, and one ranked lower.

Professor Williams stated that the only resistance they encountered was when their Board of Law Examiners expressed concern that the 3L students who took the February bar might not have enough time to get the necessary character & fitness documentation submitted. In 2014, they made some adjustments and did a better job of ensuring the students completed the necessary paperwork in a timely manner. He further stated that the pass rate and the employment rate “more than compensated” for any concerns expressed by their Board.

Dean Engel and Professor Williams concluded that while overall education has progressed with societal changes, law school education has not. Professor Williams said, “We need to put the profession first and bring law school into the twenty-first century.”

The Arizona Supreme Court has extended the test period for 3L students to take the February bar exam until 2017 so that they can gather further data. Both the pass rate and the employment rate for third-year testers have surpassed all expectations.

Members of the board and the board’s admissions director also discussed the 3L testing and UBE issues with Justice Rebecca Berch of the Arizona Supreme Court, who is also a member of the NCBE board of trustees, and Emily Holliday, the admissions director for Arizona, at various times. They both expressed satisfaction with the UBE and third-year testing. Holliday

indicated the board did two surveys of 3L-testing applicants. While some applicants requested more options in the curriculum, the satisfaction with the 3L testing was overwhelming. She also stated the pilot program did not require an additional admissions ceremony because they have monthly ceremonies and admission by written oath. Holliday stated implementation was basically trouble-free. She stressed that as numbers increase it will be important to have timely communications with the law schools for purposes of ensuring adequate exam seating.

The board discussed the issues on several occasions and gave careful consideration to the responses from Drake University Law School, the Iowa State Bar Association, the Dean of Creighton University Law School, and the Dean of the University of Iowa College of Law, and all comments filed. The board concluded that based on extensive research, its meeting with the NCBE, discussions with the principals involved with Arizona's and Georgia's third-year testing experiences, and all responses to its comprehensive solicitation, it had gathered enough information to provide the Iowa Supreme Court with an informed recommendation. The board notes in reaching this conclusion that it is not the decision maker, but instead is acting in response to the court's request for recommendations.

### **Board Recommendations.**

After careful consideration of all responses received and materials studied, the board makes the following recommendations:

#### **1. The Iowa Supreme Court should adopt the UBE.**

The Iowa Supreme Court should adopt the UBE. Iowa already meets most conditions of the UBE protocol. We have the same test components (MBE, MPT, and MEE) as the UBE does, we apply the same weights to each

part (50% MBE; 30% MEE; 20% MPT), and we grade the written portion of the exam using generally applicable legal principles. See Iowa Ct. R. 31.3(1)(b). We also have the NCBE scale our written scores to the MBE, and our combined, scaled scores are currently expressed as a whole number (266) on a 400-point scale. However, there are additional requirements we would have to meet to become a UBE jurisdiction

First, Iowa must agree to adopt the UBE and follow the conditions of use. So Iowa would have to accept all UBE scores that meet our passing score, even if the applicants did not pass in the state in which they took the exam. As noted above, these applicants would still have to pass our character and fitness review and meet any other conditions of admission. Second, our graders would have to follow the uniform grading guidelines including the weights attached to each part of the grading materials. While the graders follow these guidelines already, they are currently not bound to use the exact percentages for the various parts of the questions. Third, applicants would have to take all parts of the examination in one sitting to get a UBE score—they could not use an MBE score from a prior exam. Fourth, a score could not be changed after scores are released and still be considered a UBE score. Finally, the board would have to release total scores to passing applicants as well as failing applicants so they would know if their score is high enough to transfer to a certain UBE state.

The board does not believe that agreeing to apply the same grading weights as the grading model will have any significant effect on pass rates, and notes that Iowa graders participate in the grading workshop at which those final weights are established. Instead, the board understands that the reciprocal recognition of exam scores by the various UBE jurisdictions is legitimized by commonality of grading principles.

The board similarly does not find it problematic that applicants who meet our cut score can transfer in from a state in which they did not meet a higher cut score. Iowa has the ability to establish its own cut score with full knowledge of the cut scores of other UBE jurisdictions. If Iowa believes the

passing score should be the current 266, it shouldn't matter in which state that score is achieved – it's the same score on the same test graded in a similar manner. If Iowa finds the possibility of such transfers to be repugnant, the answer is to raise our cut score to a level commensurate with most UBE jurisdictions (currently 270), not to forego the UBE on such a basis. It should be noted that Iowa takers would be able to transfer a score from 260 to 265 to states such as Minnesota and Missouri with a 260 cut score if they did not want to retake the exam in Iowa. So, instead of having to wait another full exam cycle to attempt to get admitted, they could be admitted as attorneys in another UBE jurisdiction.

Finally, the board notes that while its automatic review system has preliminary approval, there may be changes among the UBE users group that would place additional requirements on review systems. The board is convinced any such changes, should they occur, will be reasonable and will allow adequate time to design a system that complies with the new criteria and provides fundamental fairness to Iowa applicants.

The board believes these potential impediments pale when compared to the advantages of the UBE. The main advantage lies in the portability of scores. Law students who take our bar exam will have better employment prospects after graduation.

An applicant who takes the Iowa exam and gets a high enough score would have the ability to immediately seek admission to the contiguous states of Missouri, Minnesota, and Nebraska without having to retake the same examination or wait until they are eligible for admission on motion. They can circulate resumes to various UBE states knowing that if they meet the required passing scores for those states, they can transfer in. For rural practitioners, especially near the borders, the ability to practice in multiple states would be a real boon to their ability to establish a viable practice. Larger jurisdictions such as Colorado, Arizona, and Washington are also available transfer options. In turn, Iowans who want to come home after residing in another jurisdiction,

but do not have sufficient practice to be admitted on motion, can transfer a UBE score instead of retaking the examination.

In addition, the UBE would benefit Iowa firms. The firms could bring in new lawyers more easily and could more readily spread their practice to other UBE states by having lawyers easily licensed in multiple jurisdictions. The Board finally notes the UBE was originally recommended to the Iowa Supreme Court by the Iowa State Bar Association's Blue Ribbon Committee, and drew almost universally supportive public comment in the diploma privilege debates.

### **Additional UBE recommendations.**

The board makes the following recommendations in case the UBE is adopted:

- a. The current combined, scaled passing score of 266 should be retained (see below for more details).
- b. The fee for transferring a UBE score from another UBE jurisdiction should be the same as that charged for applicants who seek admission to the Iowa Bar on motion.
- c. A UBE score should be accepted for up to five years from when the test was taken. The UBE score could be transferred for up to two years after the exam was taken without a showing of a period of practice. The score could be transferred for up to five years if it is accompanied by proof of at least two years of regular practice of law immediately prior to the date of filing of the application to transfer the UBE score. This will create a seamless admission policy bridging the gap between admission by examination and admission on motion. The board notes the ABA 20/20 commission has recommended that admission on motion be available to those who have regularly engaged in the practice of law for at least three of the last five years. The board urges the Court to consider whether Iowa should adopt a three-

- of-five standard in place of its current five-of-seven standard. If so, the board would recommend a UBE score be valid for three years instead of five. [The board notes a change to a three-of-five standard would require a statutory amendment. See Iowa Code § 602.10109].
- d. The court should no longer allow applicants to transfer or bank an MBE score. Currently, an applicant can transfer an MBE score obtained in another jurisdiction or retain one from an unsuccessful Iowa exam. Applicants who do so only have to take the essay and performance tests. As noted above, an applicant can only get a UBE score if all parts of the test are taken in the same sitting. The court could offer both UBE testing and Iowa-only admission for applicants who want to transfer or bank an MBE score. However, the board believes only the UBE should be given and banking or transfer of MBE scores should not be permitted. Allowing banking or transfer of MBE scores would create a separate tracking system for those admitted by examination, both for purposes of a particular exam and for future reporting.
  - e. Applicants who transfer in a UBE score must undergo a complete character and fitness investigation by the board of law examiners. Other jurisdictions report a minimum of sixty days is needed to perform character and fitness investigations on transfer applicants who have filed a relatively complete application. The use of NCBE character and fitness investigations at applicant expense should be an available option, at the lawyer's expense, in any matter in which substantial questions regarding the lawyer's character or fitness to practice law are implicated, but should not be required on all cases. The examination can be given to graduates with a J.D. or LL.B. from an ABA-Approved law school who intend to practice law in Iowa or in another UBE jurisdiction. Applicants who expect to graduate from such a school within 45 days of the first day of the exam would also

be allowed to test. See Iowa Ct. R. 31.8. Licensed Iowa attorneys should be able to take the examination for purposes of transferring to another UBE jurisdiction. If an Iowa attorney fails the UBE it would not affect the attorney's admission status in Iowa. The board should have the right to reject the application of any applicant who does not appear to be a bona fide candidate for admission.

**2. Until the law schools support the concept of 3L testing, the board cannot recommend allowing law students to take the examination during the third-year of law school.**

As noted above, a very slight majority of those who commented oppose allowing 3L testing. Most believe the testing would be too much of an intrusion on law school curriculum. The initial portion of the pilot project in Arizona appears to have gone well, with the third-year law students passing at a higher rate than the other February applicants. However, several comments urged Iowa to wait until Arizona completes a final assessment of the pilot project before reaching any conclusions. Creighton University is carefully reviewing 3L testing, Drake University and the Iowa State Bar Association oppose the concept, and Iowa has not formally taken a stand on the issue. Georgia appears to be reconsidering the issue.

The board is frankly divided on this issue as well. The board sees the value in allowing qualified students to take the examination so they can be licensed as soon as they graduate. However, some board members have misgivings as to the effect on 3L curriculum and the potential pressures placed on students to take the exam before they are ready. The board also notes that if the court adopts the UBE, Missouri would not accept scores achieved on 3L tests because it requires that the applicants must have graduated prior to taking the test. Mostly though, the entire board is firmly convinced that third-year testing has little chance of success without a commitment from our law

schools to make the process work. We think 3L testing did not work in Georgia or Indiana because the law schools did not support it, and it appears to be working in Arizona because their schools have made bold and progressive revisions to their curriculum in order to accommodate the testing and benefit their students.

Under these circumstances, the board cannot recommend the Iowa Supreme Court adopt 3L testing at this time. This truly is a law school issue; law school tuition has generated the student debt load, and law schools could help alleviate some student debt by allowing 3L testing. If a time comes when one or more of the law schools are willing to step up with a proposal to accomplish changes necessary to make 3L testing a success, then the court should give the matter serious consideration. It is likely that if one law school agrees to allow its students to test, the others may not be far behind.

### **Diploma Privilege.**

The board notes that Drake University and the bar association each have asked that the court reconsider its recent decision not to adopt a diploma privilege. The very order that charged the board with looking into the UBE and third-year testing clearly and unanimously rejected the diploma privilege. The diploma privilege is clearly not within the court's charge, so the board will not spend much time addressing an issue that has already been fully vetted and decided. However, to the extent the court seeks the board's opinion in light of the comments raised, the board opposes the diploma privilege for the many valid reasons contained in the majority of comments and the oral arguments presented on that issue.

The board is charged by the court rules with protecting the public; the public was overwhelmingly against adopting the privilege. The board believes the public is best served by requiring graduation from an ABA-approved law school, passing a comprehensive bar examination and the multistate

professional responsibility examination (MPRE), and undergoing a thorough character and fitness review. Although the Board believes the amount of student debt accrued from a law school education is a serious issue, it does not believe abandoning a bar examination can be justified by the incremental increased debt caused by the bar admission process.

All students enter law school in Iowa with the knowledge that they must prepare for and pass a bar examination to get admitted to the bar. The bar association's imputed cost of waiting for bar results varied significantly from the information garnered from the written comments and at the oral arguments on the diploma privilege. The board also believes the fact that applicants are required to pass a comprehensive examination graded on an anonymous basis is a needed check on law school admissions policies in difficult economic times and on third-year students who might otherwise “coast” into the practice of law. Finally, the board must comment on the “timing” and “coverage” issues raised in both the diploma privilege debate and the current comments.

The comments from Drake and the Iowa State Bar Association attempt to funnel debate by maintaining any admissions reform must satisfy twin pillars of “timing” and “coverage.” Of course, these litmus tests appear to be designed to favor the diploma privilege and reject the UBE, the very test these same organizations recently urged the court to adopt.

The board will first address the “timing” issue. While it is true that the pre-1997 all-essay exam allowed a quick turnover, the court adopted the MBE because the court was convinced that it was a valid and reliable test that significantly improved upon our existing, all essay examination. The Iowa Supreme Court was not alone in making this determination: 49 of 50 states now give the MBE, and the lone holdout is Louisiana, which is a civil law jurisdiction.

All of those states must give the MBE on the same day in February and July for test security reasons. Given that 49 states give their exam based on a single deadline, it is somewhat disingenuous to measure any delay in score

results by law school graduation rather than the nearly universal test administration dates. While the proponents of the diploma privilege try to paint the bar exam effect on Iowa students as dire – our students actually get their test results much earlier than the vast majority of applicants from other jurisdictions. For example, Chart 9 of the NCBE and the ABA Section of Legal Education and Admissions to the Bar’s *Comprehensive Guide to Bar Admission Requirements 2015* shows only eight states releasing scores earlier than Iowa for July examinations. Some of those would likely fall behind Iowa if the category ran to date of admission rather than score release. This is true even though the board now conducts an automatic review of applicant answers prior to scores being released. Because Iowa bar applicants get their results faster than most other applicants across the nation, the "timing" problem appears to be overstated.

Also, the board again notes it is clearly within the law schools’ purview to support 3L testing, which basically resolves the timing issue.

The other prong, “coverage,” suggests there must be an Iowa law component to the Iowa Bar Exam, and if an exam does not meet this “coverage” test, it is not valid. The UBE, and the current Iowa Bar Examination, test on general jurisdictional principles the students are taught in law schools. Applicants demonstrate their ability through multiple choice, essays, and performance testing. The three formats test different skills. Combined, they not only test on substantive, black-letter law, but also require the applicants to demonstrate they can spot issues and separate relevant and irrelevant facts, apply fundamental legal principles to fact patterns, communicate effectively in writing, reason to a logical conclusion, and perform lawyer-like tasks using a closed-universe library and client file in a realistic setting. The board believes the bar examination currently given does what it is supposed to do – it tests whether the applicant possesses the minimum competence to practice law.

It is not necessary that the peculiarities of Iowa law be presented to the students on a bar examination. Our applicants have graduated from ABA-

accredited law schools. These schools, especially those in and around Iowa, are free to teach as much or as little Iowa law as they desire. They are not required to “teach to the test.” Often, because they have a national student base and because Iowa has adopted a number of Uniform Acts, they do not choose to teach a lot of substantive Iowa law.

During the former diploma privilege debate, one criticism of the bar examination was that cramming for an examination was not the best way to learn material. If that’s the case, a general jurisdictional examination coupled with an Iowa specific component, such as a nuts and bolts CLE course or the online lectures and quizzes used in some UBE states, done when someone is not cramming, might be a better way to instill such knowledge. In fact, as noted below, the board believes law schools should be encouraged to adopt an Iowa practice and procedure course to benefit those students who intend to practice primarily in Iowa. The combination of a general jurisdictional examination that yields a portable score and an Iowa practice and procedure course is an intriguing possibility.

It also is not a flaw of a uniform exam that students sometimes will learn that not every Iowa law is the same as the general law of other jurisdictions. Applicants do not need to “unlearn” the Iowa law before taking the bar exam. There is nothing wrong with being able to identify the majority rule and then note that Iowa does something different. Many young lawyers will be faced with the prospect of practicing law in more than one jurisdiction. They will be responsible for knowing the general law in their areas of practice, and for ferreting out any differences from state to state. That is what their profession requires.

The entire premise of saying Iowa law must be learned through bar preparation is also flawed – law is not static and relying on the law you learned for a bar examination (or even in law school) would be something to do at one’s own peril. Instead, the bar exam tests whether the applicant, at this point in time, has basic, fundamental knowledge, and can reason, write, and reach

conclusions like a beginning lawyer. Presumably, entry-level Iowa practice CLEs going forward will have valuable materials to guide new attorneys on the peculiarities of Iowa law and procedure.

### **Other recommendations.**

The main additional issue the board considered is whether to recommend changing our cut score if the UBE is adopted. The most frequently-occurring cut score for UBE states is 270 (six states), with the highest score at 280 (two states) and the lowest at 260 (four states). One state has a 276 cut score and another has a 273. Our current cut score is 266, and the most recent UBE state, Kansas, also has a 266.

Dean Culhane from Creighton asks the board to recommend that the cut score either be lowered to 260, like Minnesota and Missouri, or stay at the current 266. She notes that pass rates in Nebraska (270) have gone down since the UBE was adopted and cites the lower pass rates nationwide on the July 2014 examination. Although it is true that our pass rate for July 2014 dipped back to near the Iowa historical average, other people have advocated for getting rid of the bar examination because recent pass rates are too high and not enough applicants are being excluded. (The board believes this view is skewed because it does not attribute appropriate value in requiring applicants to study for *and pass* a comprehensive examination) In addition, going to a lower cut score would just increase the number of people who could transfer into Iowa from other states with scores that would not pass the exam in those states. If anything, the board believes it makes sense at some point to increase the cut score to 270.

Hopefully, the uniform exam will someday have a uniform cut score so transfer decisions will be based solely on more important criteria. However, given the debate caused by the low passing rates throughout the country in July 2014, NCBE's recommendation that jurisdictions not raise the cut score

at the same time they adopt the UBE, and the fact that our graders would be following all NCBE grading guidelines for the first time if the UBE is adopted, the board thinks it would make sense to continue with our current cut score for the first few UBE iterations.

The board has reviewed a number of suggestions on other bar admission measures. Several suggestions have been made to let students take incremental tests during law school. The board can see some merit in such proposals, but for now a UBE score can only be obtained if the applicant takes the entire test in one test session. Because the board believes the UBE should be adopted, incremental testing is not a valid option or even available at this time. Incremental testing may be worth exploring at a future date, perhaps as a pilot project or in conjunction with other states.

The Blue Ribbon Committee of the Iowa State Bar Association suggested law schools could offer a two- or three- credit course in Iowa practice and procedure in connection with adopting the diploma privilege. This seemed like an excellent plan, especially for those concerned about Iowa law not being specifically covered on the bar examination. The board believes it makes perfect sense to encourage such a course without regard to the diploma privilege. The court should encourage law schools to offer such a course for the benefit of those students who plan to practice law in the state of Iowa.

The board does not believe temporary admission of applicants between the bar examination and score release should be permitted. The monitoring required for licensing and “unlicensing” of applicants over such a short period time would not be worth the benefit and would be extremely confusing to clients and the courts. As noted in the Supreme Court’s Staff Report on the Diploma Privilege, page 12, even in-state graduates sometimes do very poorly on the exam and cannot demonstrate minimum competence. The board does not believe it would be in the public's best interest to give applicants an interim license to practice law.

**Conclusion.**

The board thanks the court for granting it the opportunity to make recommendations on these important bar admissions issues. The board thanks everyone who took the time to file comments as well.

For all the reasons given above, the board recommends the court adopt the UBE at the earliest possible opportunity consistent with the court's schedule. The UBE is a proven examination and helps to ensure that new lawyers possess the minimum competence to practice law. The board believes the portability of scores offered by the UBE makes it the best test for prospective young lawyers in this state. Although the board believes the 3L testing concept might have merit, we are convinced it can only work if the law schools take the steps necessary to make it a success. Therefore the board does not recommend the adoption of 3L testing at this time.