

MINNESOTA BOARD OF LAW EXAMINERS
COMPREHENSIVE COMPETENCY STUDY

REPORT OF
WORKING GROUP 1- BAR EXAMINATION METHOD
MAY 9, 2022

Charge for Working Group 1 - Bar Examination Method

As a Uniform Bar Examination (UBE) jurisdiction, Minnesota is reviewing the recommendations put forth by the National Conference of Bar Examiners regarding the NextGen examination.

The tasks assigned to Group 1:

- Look at the changes that National Conference of Bar Examiners has made
- Look at those changes in light of Minnesota's history with bar examination
- Critique bar examination as a method of measuring competency
- Assess if Minnesota should adopt a "Minnesota-centric" component for the bar exam
- Define expectations of Study Group moving forward

Considerations by Group 1:

What is the history of bar exam component to attorney licensure in Minnesota? Are there bar examination options beyond the NextGen Exam?

How will the NextGen exam address racial disparities, and achieve the baseline criteria considered by the working groups?

Recommendations by Working Group 1:

Working Group 1 is in support of there being multiple pathways to licensure in Minnesota, and based on what is known of it thus far, recommends the Next- Gen Bar Exam as one pathway, though the exam presents concerns, which our Group's report will address.

Working Group 1 does not recommend the creation of a Minnesota-centric bar examination

Ongoing concerns of Working Group 1

- We do not yet know what the NextGen exam will really look like
- As of 2026, NextGen will be the only bar exam offered in Minnesota
- Statements about the fairness of the NextGen exam to all takers are not convincing

SUMMARY OF WORK PERFORMED

BACKGROUND

Minnesota has used a bar examination, in various forms, since 1891. Today, it uses the Uniform Bar Exam. The National Conference of Bar Examiners, a private company, designs and produces the Uniform Bar Exam. Founded in 1931, the NCBE develops tests, trains administrators and graders for the test, provides scoring for the test, and conducts character and fitness investigations, if requested. States that use the Uniform Bar Exam are dependent upon NCBE for the form and content of the test as well as how it is administered and graded.

In January 2021, the National Conference of Bar Examiners announced that, after three years of investigation, it would make changes to the Uniform Bar Exam in 2026. The NCBE views this activity as a routine, periodic review to reflect changes in environment and technology since the introduction of the Uniform Bar Exam. In September of 2021, the Minnesota Supreme Court designated the Minnesota Board of Law Examiners to lead an assessment of the changes and what the changes meant for Minnesota.

PROCESS

The Minnesota Board of Law Examiners formed a Comprehensive Competency Committee to study the existing and potential methods of determining if one is prepared to practice law in Minnesota. A key consideration was representation of Minnesota stakeholders in the process. Studying alternative methods to determine preparation was another paramount consideration.

The MBLEx created three study groups for the task:

Group 1: The Bar Exam Method

Group 2: The Experiential/Clinic Method Group 3: The Supervised Practice Method

This report concerns only The Bar Exam Method

PARTICIPANTS

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Shawne Monahan, MN Board of Law Examiners, Public Member

Also attending Study Group #1 sessions are: Tom Boyd, BLE Competency Committee Chair
Emily Eschweiler, Director of MBLE
Emily Corson, MBLE Bar Admission Administrator
Mariah Colvard, MBLE Administrative Assistant

ACTIVITIES

Group 1 held three sessions to prepare this report. Co-chairs and MBLE staff designed the sessions. All participants shared their views in each session. Sessions were recorded on zoom. Minutes were taken as well. Both are available for review.

Session 1 - March 3, 2022 - 11 am - 12 pm

Nine members of the study group plus the Competency Committee Chair and staff from the Minnesota Board of Law Examiners were in attendance via Zoom.

The main responsibility of Study Group 1 is to determine if the bar exam is still a viable option for Minnesota. The group will need to determine if the changes made by NCBE will help, hurt, or maintain the current structure of the bar examination model. It is important to understand the critiques that have been offered for the existing exam. The relationship of these issues is complicated.

Points that are being considered are whether Minnesota should remain a UBE state and whether state-specific questions should be incorporated into the examination.

The importance of ensuring equitable access to the bar as well as portability of test resulted were noted.

Operational questions such as how to identify persons/groups that may have useful information and how to interest them were discussed. The group decided to invite experts on the history of the bar exam as well as the new bar exam to address the next meeting.

Members of the group expressed a range of opinions as to the value of the new bar exam, the value of a bar exam at all, and what might be a better approach. While Study Group 1 shared important insights, the group must confine itself to consideration of the bar exam.

Session 2 - March 29, 2022 - 8:00 to 10:00 am

Nine members of the study group plus the Competency Committee Chair and staff from the Minnesota Board of Law Examiners were in attendance via Zoom. Working Group 1 invited three guest speakers to address the group.

Guest Speaker #1

Margaret Fuller Corneille, former Director of the Minnesota Board of Law Examiners, who served on the Board of Trustees for the National Conference of Bar Examiners as well as several of its committees. Ms. Corneille joined MBLE in 1987 and served until 2017.

Ms. Corneille gave a history of the bar examination in Minnesota based on her research on the Minutes of MBLE meetings dating back to 1920 and her own long experience with the Board. At the end of the 19th century, graduates of the University of Minnesota were admitted by diploma privilege. Law Office Study was another path to admission to the bar.

The process for admission with law office study continued to 1941 when an ABA requirement for a law degree was instituted in Minnesota. In 1980, Minnesota adopted the Multistate Bar Exam (MBE) which was produced by National Conference of Bar Examiners. In 2001, Minnesota adopted the Multistate Performance Test, once again developed by NCBE. The grading took place locally using the grading guidelines developed by NCBR. In 2014, Minnesota adopted the NCBE's Uniform Bar Examination.

There are three parts to the Uniform Bar Exam as it is used today: the Multistate Bar Examination (MBE) 50%, the Multistate Essay Examination (MEE) 30%, and the Multistate Performance Test (MPT) 20%.

The MBE. The Multistate Bar Examination (MBE) is a 200-question, multiple-choice exam administered over a six-hour period. The MBE is used to assess an examinee's ability to apply fundamental legal principles, exercise legal reasoning, and analyze fact patterns. The MBE component is 50% of the bar exam.

The MEE. The Multistate Essay Examination (MEE) consists of six 30-minute questions used to determine effective communication in writing, specifically the abilities to:

- Identify legal issues raised by real-life, factual scenarios
- Differentiate between relevant and non-relevant information
- Present a reasoned analysis of relevant information through clarity in writing and composition
- Demonstrate an understanding of the fundamental legal principles that are relevant to the issues tested

Unlike the MBE, which is graded and scored by the NCBE, the MEE is graded exclusively by the jurisdiction administering the bar examination. The MEE component is 30% of the bar exam. The Minnesota Board of Law Examiners employs approximately two dozen volunteers who must be trained, monitored, and evaluated for consistency in the grading process.

The MPT. The Multistate Performance Test (MPT) is the third component of the UBE and consists of two 90-minute sections to examine a candidate's ability to solve a fictional

client's problem. The test was designed to assess fundamental lawyer skills and determine if those skills are adequate regardless of which area of law one may elect to practice. The MPT is 20% of the bar exam.

A composite score is cumulated and a minimum passing score is set by the Minnesota Supreme Court.

Guest Speaker#2

Kellie Early, Chief Strategy Officer of the National Conference of Bar Examiners

Ms. Early presented an update on the NextGen Activities. Ms. Early announced that Content Scope Outlines were now available. This is the first step in delineating what topics will be tested and what lawyering skills will be assessed.

There will be no new additions to the exam regarding subjects tested. Based on practice analysis results, some subjects will not continue to be tested: family law, trust and estates, secured transactions and conflicts of law.

Legal research will receive new attention. It is not now robustly assessed in MPT. NCBE is placing more emphasis on research skills along with the understanding of foundational concepts.

Foundational Concepts are:

- Civil Procedure
- Contract Law
- Evidence
- Torts
- Business Associations
- Constitutional Law
- Criminal Law
- Real Property

The scope and implementation of the study have been guided by parameters of:

- frequency (how often it comes up in practice),
- universality (common to many practices),
- risk (risk of malpractice or poor client outcome),
- general familiarity (spot issues and working with legal resources), and detailed knowledge (knowing relevant detail of doctrine).

As a practical matter, the NCBE plans to phase out the current UBE and adopt and implement the NextGen exam in 2026. Any UBE jurisdiction, like Minnesota, will thus have a choice to make in the coming years. Realistically the current test instrument will no longer be available to use, so the choice will be to either:

- (1) adopt the NextGen exam as at least one instrument to assess competence,
- (2) switch to a test to be devised and implemented that is unique to Minnesota only, and incur the cost and challenges associated with being a singular jurisdiction as opposed to the ready "portability" of scores in multi-state jurisdictions,
- (3) augment the NextGen exam with some Minnesota-centric supplemental testing to be devised and implemented by Minnesota, or
- (4) eliminate any bar exam component and move to alternate pathways to admission only.

In her presentation, Margaret Corneille addressed the workability issues regarding a Minnesota centric exam, other than score portability issues, Peg stated she had believed it may lead to many issues.

- First, she noted the time and difficulty in researching the unique law of Minnesota so the Board can put together an exam on a semi-annual basis without repeating questions.
- Second, the staff needed to generate these questions along with training individuals to grade the questions would be significant.
- Third, the Board would potentially be undermining the ability of others to come to Minnesota and pass the bar exam.

Ms. Corneille mentioned one important reason to not test Minnesota specific law is the differences between Minnesota law and general law. The differences in law are the types of things that can be covered in continuing legal education courses and providers. The specifics of Minnesota law and other topics that are particularly important may be more appropriate for a CLE program.

Guest Speaker #3

Dr. Danette McKinley, Director of Diversity, Fairness, and Inclusion Research at National Conference of Bar Examiners

NCBE is rigorous in following test design that is fair. Even so, problems exist. In judging fairness of the test, the average MBE scores by race/ethnicity for July 2021 exams, and despite procedures in place, still shows group differences in the results.

- ▶ White examinees significantly outperform other groups across time. Race, ethnicity and gender are not factors that can be changed. Socio-economic factors and

opportunity for concentrated bar exam preparation may be factors affecting results that also cannot be controlled, but may be addressable in some fashion to aim towards equality of opportunity.

- ▶ Regarding cultural differences, Dr. McKinley noted two points;
 - (1) what students bring to law schools and
 - (2) what happens in law school

During law school, there may be a difference in emphasis on content that is on the bar exam. NCBE is rigorous in using psychometric procedures to support the reliability and validity of scores.

- ▶ Educational experiences vary from law school to law school, as do how students are supported, identified after 1L and how they progress through coursework from year 2 and 3.
- ▶ Currently, the NCBE is looking at curricular differences and emphasis on certain areas a student may want to go into versus others they do not want (required versus elective courses and how that plays out in bar success). The biggest concern is that the procedures that have been undertaken have not helped identify bias that is actionable.
- ▶ New methods are being sought to detect bias. Item review is not going to be enough, and there needs to be actionable research that can inform law schools and admissions administrators to best interpret those scores.

After the meeting, Co-chair Fluegel offered a synopsis of the changes expected in the NextGen bar Exam.

Guiding Objectives for NextGen Exam

- Exam should test fewer subjects and test less broadly and deeply within subjects covered
- Greater emphasis on lawyering skills
- Exam should remain affordable
- Fairness and accessibility must continue to be ensured for all candidates
- Benefit of score portability should be maintained

NextGen Exam structure.

- **Content.** Foundational Concepts & Principles and Foundational Skills
- **Structure and Format.** Integrated exam that assesses knowledge and skills holistically, with a mix of item types and formats
- **Frequency.** The exam will continue to be offered twice per year
- **Delivery Mode.** Computer-based, at test centers or on examinees' laptops at

- jurisdiction-managed sites.
 - **Scoring.** Compensatory scoring model that produces a single combined score for admission decisions.
 - **Timing.** Single-event, summative exam at or near the point of licensure
- NextGen exam Content: Foundational Skills and Associated Lawyering Tasks**

Foundational Skills Group 1: Issue Spotting and Analysis. Investigation and Evaluation

1. In a client matter, identify which Foundational Concepts and Principles are likely to affect the outcome of the matter.
2. In a client matter, identify which facts implicate which Foundational Concepts and Principles.
3. In a client matter, identify the applicable standards of review and/or burdens of proof that will apply to legal issues in the matter.
4. In a client matter, identify the strengths and weaknesses of the client's position and the opposing parties' positions based on the relevant legal rules and standards.
5. In a client matter that requires additional factual development, identify which facts need to be explored, and/or the best strategy for exploring those facts, in order to be able to evaluate the strengths and weaknesses of the client's position and the opposing parties' positions based on the relevant legal rules and standards.
6. In a client matter, identify gaps in information obtained, suggestions for improvement, and/or grounds for objection (if applicable) based on a transcript of another lawyer's interview, deposition, or examination of a fact witness.
7. Assess the probable outcome of a claim, motion, discovery matter, or objection based on the relevant legal rules and standards.

Foundational Skills Group 2: Client Counseling and Advising, Negotiation and Dispute Resolution. Client Relationship and Management

8. In a client matter, identify which claims to recommend bringing, which remedies to recommend seeking, which evidence to present, which arguments to make, and/or how to respond to arguments, based on the relevant legal rules and standards, and consistent with the client's objectives.
9. Given a transcript of another lawyer's interaction with a client, identify gaps in information obtained and/or suggestions for improving the lawyer's effectiveness.

10. In a client matter, list 2-3 points that favor your client's position and 2-3 points that favor the opposing party's position.

11. In a client matter, list 2-3 benefits and 2-3 drawbacks of two approaches to settling disputed issues, consistent with the client's objectives.

12. In a client matter, list 2-3 resolutions in which both sides of the dispute could potentially be satisfied.

13. In a client matter in which your client has 3-5 objectives, but where your experience suggests that only one of them is attainable, identify the one objective that you would recommend as the top priority.

14. In a client matter, identify or describe your client's BATNA (Best Alternative to a Negotiated Agreement) and a realistic "best case" outcome you would advise seeking through negotiation and/ or "worst case" outcome you would advise accepting, consistent with the BATNA and the client's objectives.

Legal Research

15. In a client matter that requires interpretation of a statute, rule, or constitutional provision, identify which words or elements in a provided excerpt seem legally significant and/or potentially ambiguous.

16. Given a collection of legal resources and excerpts from a client file, identify the most important legal and factual issues to be resolved and the relative weight that will likely be given to different resources/file materials by the court or other tribunal.

Legal Writing and Drafting

17. Draft the specified sections of a complaint or an answer to a complaint.

18. Draft the specified sections of an affidavit.

19. Draft or edit selected specified provisions of a contract.

20. Draft an email to a client, explaining the legal implications of a course of action, updating the client on the status of the client's matter, and/or providing advice on the next steps to be taken in the matter. (Note: This task will most often relate to a transactional matter.)

21. Draft the analysis section of an objective memorandum. (Note: This task will most often relate to a transactional or compliance matter.)

22. Draft the specified sections of a motion or brief.

23. Draft the specified sections of a mediation brief.

Session #3 - April 21, 2022 - 11:30 am to 1:30 pm

Eleven members of the study group plus the Competency Committee Chair and staff from the Minnesota Board of Law Examiners were in attendance via Zoom.

Jacquelynn Rothstein, Director of the Wisconsin Board of Law Examiners, gave a presentation on the use of Diploma Privilege in Wisconsin. At Wisconsin's two law schools, the University of Wisconsin Law School and Marquette University Law School, all students are required to take a 90-credit core curriculum. Graduating from the Wisconsin law schools, does not automatically guarantee admission to the bar. Students need to ensure they have taken the core curriculum and not everyone chooses to do that. If they do not meet graduation requirements including a 2.0 GPA, they are not eligible. If there are character and fitness issues keeping applicants from being eligible it will not be granted either. Law schools have a Wisconsin component to what they are teaching as well. There are two options if a student does not choose diploma privilege: Wisconsin bar exam and Proof of Practice via motion (show substantial practice of law for 3 of the previous 5 years).

For diploma privilege to work, all of the law schools need to be on board in terms of their standards for admission, curriculum, grading, how they move students through the school. One of the advantages they have in Wisconsin is that they have only two law schools so it is limited on where they can go. There is a clear understanding of what the coursework is and what is required. The Court knows the respective faculties and deans, and are quite comfortable with the students that enroll and graduate. Rothstein noted there is no difference in disciplinary matters as far as they can tell. Issues noted are more attributable to business acumen, interpersonal skills, financial pressures, etc. Rothstein pointed out that diploma privilege has been in effect for nearly 100 years in Wisconsin, if there were real problems they would have surfaced by now.

It should be noted that Diploma Privilege is being considered in depth by Study Group 2 - Experiential /Clinic Method. That group will report its findings.

The group moved on to discuss what recommendations should be made to the Comprehensive Competency Study. Four topics stood out for the members.

First, there appeared to be a lack of concern on the part of NextGen developers over racial disparities and how they will be addressed. Comments by NextGen presenters indicated that they aren't fixing something because it isn't broken. Members of the group felt NextGen developers were not recognizing the issues with the exam and not seeing what really needs to be fixed. Despite the extensive research, NextGen is still a standardized test. There was

concern that the group doesn't have enough information to understand if the differences with racial outcomes is the fault of the exam or something else, particularly law schools.

Second, members expressed concerns about the capacity of any standardized test to assess lawyering "abilities". Members agreed that law school itself does not necessarily prepare you for the practice of law and the bar exam doesn't accurately measure your ability to practice law. While NextGen promises to be more "practice-like," it is difficult to see how it will measure qualities such as professionalism. Moreover, to the extent that law schools do not specifically teach students how to take the bar exam, Minnesota law schools will likely have to evaluate whether to modify their educational programs to better prepare students for the NextGen exam.

Third, the monopolistic nature of NCBE and its control and domination of the field economically and otherwise is troubling. Competition does not exist. We are not choosing between NextGen and the Uniform Bar Exam or another measure. Suggestion was made that NextGen offer a free, on-line prep course for its exam.

Fourth, there is a lack of information about the administration of NextGen, particularly with the use of computer test centers and accommodations.

The purpose of conducting our Comprehensive Competency Study is to examine the effectiveness and fairness of the process to admit people to the practice of law in Minnesota. Study Group #1 - Bar Examination Method appreciates the thorough, years-long scientific study that has gone into NextGen, the scientific design of the test instrument itself, and the efforts to limit bias. A great number of listening sessions with stakeholders were conducted over the last few years. The group welcomes the NCBE plans to alter the current, stand-alone practical test by integrating some of the material into the subject matter testing.

Questions remain regarding the lack of concern over racial disparities and how it will be addressed in the creation of the NextGen Exam. While acknowledging that there seems to be racial disparity, based on limited evidence, for bar passage on race, a path to change that is not offered.

The consensus of the study group appeared to be:

We are handicapped by the fact that the NCBE has yet to fully articulate the precise nature of the instrument they plan to roll out in 2026,

Yet, it seems certain whatever NextGen turns out to be, the current UBE exam is going to disappear in about 2026

There does not seem to be movement toward Minnesota developing a test of its own devoting the time, effort, resources and rigor that NCBE has utilized for NextGen. A Minnesota specific CLE to acquaint applicants or new admittees with the nuances of Minnesota practice may be worthwhile.

Likewise, there seems to be little enthusiasm for a “Minnesota-centric” component to augment the NextGen version

Members agreed that, as a practical matter, if Minnesota wants a bar exam, the NextGen will be the only version available as of about 2026. The shortcomings inherent in a timed written exam, whether the current UBE or a NextGen version, will likely remain in any such timed written exam, regardless of its design.

CONCLUSION

Working Group 1 - Bar Examination Method decided to take the motion as unanimously agreed by our group and use that as the group's ultimate recommendation, subject to those concerns and advantages:

Working Group 1 is in support of there being multiple pathways to licensure in Minnesota, and based on what is known of it thus far, recommends the Next-Gen Bar Exam as one pathway, though the exam presents concerns, which our Group’s report addresses.

- **Review of essential criteria**

All working groups used the same list of criteria as the framework for their discussions.

Working Group One also employed them. While an obvious and inherent part of the foregoing analysis, the criteria are discussed specifically here. The criteria are as follows.

- 1. Ensure that members of the bar are worthy of public trust with regard to their professional competence.**

While a bar exam may judge test taking competence and some general retained knowledge, it does not measure character or integrity. It serves to assess a basic measure of competence, assuming it is designed to accurately assess an applicant’s knowledge of minimal core legal principles and – with the advent or expansion of the practical approach to testing in the NextGen exam – may also reassure the public about an applicant’s basic ability to apply such knowledge to certain legal tasks or problems.

The Committee, however, was troubled by the shared perception that any form of objective testing may not accurately assess those capacities for all test-takers, due to variations influenced by socio-economic limitations. The group's perception is that wealthier applicants could afford to devote more time to short-term test-taking preparation and review that may enhance their test performance without accurately reflecting character or competence of less financially secure applicants who may have to work to support themselves instead of studying for a bar exam.

The Committee did observe, however, that many professions use a test of some sort as a presumptive indicator of core skills.

2. **Evaluate applicant's ability to satisfy Essential Eligibility Requirements under Rule 5A of the Rules for Admission to the Bar, including an understanding of threshold knowledge in core subjects, an understanding of legal processes and sources of law; an ability to reason, recall complex factual information, and integrate that information with complex legal theories; the ability to determine the importance of the information to the overall client matter; and the ability to communicate with a high degree of clarity and organization.**

As noted above, if properly designed a bar exam achieves this goal to an extent, apart from the concerns noted above.

What the bar exam does not measure, however are other essential eligibility requirements, including the ability to interact effectively with clients; and the ability to conduct legal research, although the NextGen's approach are more practical testing appears an effort to achieve the latter.

3. **Account for diversity in the age, race, ethnicity, gender, geographic location, and practices of applicants and the clients who rely on Minnesota lawyers for their legal needs.**

As noted in topic 1 above, the Committee was genuinely concerned about the ability of a bar exam to fairly account for knowledge possessed by applicants with more limited financial means or other limitations. The NCBE's test evaluative efforts, however, suggest that NextGen will be designed with this goal specifically in mind, but whether it can yet be achieved remains unknown.

4. Ensure equal access to the practice of law and working to eliminate inequitable barriers to the practice of law on the basis of socio-economic status, race, gender, disability status, etc.

This concern about any form of bar exam was raised repeatedly in Committee meetings, and accounted for the hope that Minnesota may come to embrace multiple pathways to admission so that a more diverse bar could more readily be achieved.

5. Promote lawyer well-being.

Any form of bar exam is not designed to enhance well-being of applicants as it presents a barrier that engenders psychological, emotional, intellectual and financial pressures that can affect or exacerbate health concerns.

6. Evaluate feasibility in terms of scalability, flexibility, and costs and resources required for implementation: e.g., to applicants, law schools, administration, the bar, regulators, MBLE staff, etc.

The bar exam as promulgated by NCBE is designed with these parameters in mind and a considerable effort was devoted by the NCBE in developing a NextGen exam to these concerns. The Committee felt limited by time and resources to challenge or seek to duplicate these efforts.

A central concern of the Committee, however, was that NCBE has a complete monopoly of the testing and a large measure of preparatory studies for their exam and should be encouraged to reduce costs of applicants as much as possible.

7. Ability of law schools to implement, the flexibility of curriculum and any ABA-Accreditation concerns.

This is one of the advantages of the bar exam in that it has existed for such a lengthy period of time that – while not “teaching to the test” – law schools have developed structures and systems to assure basic bar preparation.

The Committee felt that ABA accredited schools – and particularly the three law schools in Minnesota – strive to provide the quality of legal education that should be sufficient to pass a bar exam.

8. Reliability of standards to determine meaningful, objective, and consistent results.

This is another attribute of the bar exam, as NCBE studies the science of test development and administration and has myriad data available. The Committee’s concern is that – as a monopoly – NCBE is largely judging its test instrument itself, but note that reassuringly NCBE has made data available for others to assess.

9. Available data regarding prior use of method/particular model.

This factor has been discussed above.

10. Any other considerations raised by key stakeholders

The Committee reached out earlier on and encouraged involvement and expression by stakeholders, but hopes that the public review of the group’s report will engender wider participation and comment.

Working Group 1 does not recommend the creation of a Minnesota-centric bar examination

Co-Chair Fluegel pointed out that the activities of our working group over the past few months are only the beginning of the Comprehensive Competency Study