Bar Examination Research Notes
Last updated October 15, 2007 (3:31pm)

Blue denotes careful reading and comments by WDH.

I. Bar Examination

A. Bar Support Programs


   a. Providing compelling evidence that Bar Support Program at University of Richmond Law School increased bar passage rates for bottom half of class during the 2001-04 time period;


B. Improvements or Alternatives to Bar Exam


   a. Listing out factors needed for an ideal exam, from the perspective of a psychometrian; upshot is that only the MBE fits majority of needs. Great Chart.


   a. Discussing “professionalism crisis” noted by Conference of Chief Justices. Quoting their report: Most lawyers get their first introduction to the basic concepts of legal ethics and professionalism during law school, but few students fully appreciate their importance or receive a sufficient grounding in practical legal skills for competent legal practice before being admitted to the profession. In addition to providing law students with substantive legal knowledge, law schools should ensure that students understand the importance of professionalism and have an adequate grasp of basic legal skills.” p. 7

   b. Competence, quoting CJC Report: “State bar examinations traditionally test bar applicants’ knowledge of substantive legal principles, but rarely require more than a superficial demonstration of the applicants’ understanding of legal ethics, professionalism, or basic practical skills. Thus, they fail to provide an effective measure of basic competence of new lawyers.” p. 7

   c. Comparative perspective: “The United States is virtually the only major country in world that gives an unlimited license to practice law to persons whose only preparation has been to sit in classrooms, take blue book exams, and write a few research papers.” p. 7.
   a. Discussing New Hampshire Clinical bar exam. Limited to high GPA students.
   b. **Genesis:** “The genesis for the idea is not new. More than a decade ago, a number of lawyers and judges started discussing ways to improve the performance of newly admitted New Hampshire lawyers, many of whom began their legal careers as sole practitioners. These lawyers had graduated from ABA-accredited law schools and passed the bar examination, but they often lacked the skills and knowledge necessary to practice law effectively. In an effort to remedy this problem, a committee was formed of New Hampshire lawyers and judges and Pierce Law faculty, which has been chaired by New Hampshire Supreme Court Justice Linda Dalianis since its inception; this committee spent the last two years working to design a “better bar exam,” one that would “bridge the gap” between what students do in their three years in law school and what they will do as practicing lawyers. As Justice Dalianis, who served as a trial court judge for more than 20 years, has remarked in her presentations to the New Hampshire Bar Association Board of Governors and Pierce Law faculty, “our goal has always been to make lawyers better.” p. 25


   a. **Testing Competency.** “Nearly everyone who has anything to do with bar examinations acknowledges that our current typical exam does not test all of the skills and knowledge necessary to competent lawyering. It does not assess, for example, whether a future lawyer can counsel a client. It does not evaluate the ability to do legal research, particularly electronic legal research. It certainly does not assess how a fledgling lawyer might examine a witness either before or at a trial. There are many justifications that are offered for these examination shortcomings. The cost of innovative testing technologies is extremely high. Fairness and objectivity are demanding to meet in any licensing examination that is taken by thousands of applicants. Reliability (i.e., consistency of the assessments) and validity (i.e., accuracy in measuring the targeted skills or knowledge) are critical criteria to be satisfied by any standardized test ... .” p. 20
   b. Discussing analogue to Medical Testing, p. 21

   a. Suggesting, based on Working Group meeting, that bar exam should test more subjects less broadly; “The examination is useful, I believe, primarily because it helps keep law schools honest in their evaluations of students. While the great
bulk of our graduates are well equipped to become lawyers, there are a few who are not, and the evaluation processes of law schools do not always screen them out.” p. 21;

b. “[T]he objective of the test is assess minimum competence in the areas of the law that new lawyers are likely to need to know, p. 25-26.

C. Psychometric Studies on the Bar Exam

   a. Distilling solution strategies from test-takers (Arizona) talk aloud narratives; finding that inferences from legal principles is the strategies clearly correlated with higher performance; not subgroup discussion.

   a. “The score that is most likely to provide useful, straightforward information is the MBE total scaled score. As the name implies, this number represents a scaled score that holds the same meaning over time (i.e., it is not affected by the performance of other examinees who sat for the exam, nor by the difficulty of the questions on the particular exam form). While a scaled score does not provide a breakdown of scores by topic, it does provide a good indication of how much the examinee needs to study in order to pass the next time.” p. 28;
   b. Average gain score from one administration to the next is +8 points; lowest scoring candidates generally experience the largest gain. p. 28-29;

   a. Noting that best predictor of bar passage is LGPA.

D. Debates on Bar Exam

   a. Clear statement by law professor that “competence matters” and bar exam “test[s] competency in the most basic and essential analytical skills required for the practice of law ... “ p. 35;
   b. “Of course, the bar exam does not measure a candidate’s ability ... to perform legal research, conduct factual investigations, communicate orally, counsel clients, and negotiate. .... These skills are rightfully measured by law schools.” p. 35;
   c. “I have come to this conclusion after five years of working with candidates who had failed the bar exam multiple times and who passed after we worked together. They passed because they learned to read carefully and actively. They passed
because they learned the rules with precision and specificity. They passed because they learned to write a well reasoned argument based on an analysis of the relevant issues and an application of the law to the facts. They passed because they learned that there were no tricks to be applied, only the law.” p. 35;

d. “The bar examination seeks only to test the fundamental skills that should have been learned in law school.” p. 35-36;

e. “[W]hen the exam requires the candidate to complete an assigned task on the MPT within a prescribed time, it acknowledges what we all know to be true: that lawyers work under time constraints and deadlines.” p. 36;

f. “[In working with students on essay questions] what I found perhaps most incomprehensible was that after three and sometimes four years of law school, and presumably after reading hundreds of cases, these candidates sounded nothing like lawyers. The language of Holmes, Cardozo, Brennan, and Blackmun had not made the slightest impression on them.” p. 37;

g. “In working with students in academic difficulty, I have learned that deficiencies in these areas are as typical of poorly performing law students as of those graduates who fail the bar exam. Both groups have the same weaknesses: the inability to identify the legal issues, the failure to separate relevant from irrelevant material, and the absence of a reasoned, organized analysis which demonstrates an understanding of the relevant legal principles. If these deficiencies are not corrected by the time students graduate, it should come as no surprise if they fail the bar exam.” p. 38 [and review MBE question to illustrate common mistakes by her students]

h. “One of the most serious misconceptions about the bar exam is that passing it depends on tricks and techniques. There are no tricks to be learned, only the law, as any retaker will unfortunately be able to tell you. This does not mean, however, that a candidate can afford to be unfamiliar with the exam itself. One must know what to expect.” p. 40

i. “Admittedly, bar review courses have come to play a role in the process. But the course will be insufficient for bar passage if the student comes to it without the fundamental skills that should have been acquired in law school. The course simply puts all the rules tested in the jurisdiction in a structured, cohesive package; it does not teach anyone how to analyze a question, write an essay, or think through a problem. It assumes that the candidate learned these skills in law school.” p. 41

E. Gender and Bar Exam


   a. Finding, from a study of 22,000 MBE test-takers, that “men outperform women on the MBE by about 5 points, which is about 1/3 of a standard deviation. ... This
results was not a complete surprise to me because I found similar results in some areas of medical testing. ... One possible explanation is that men are, in fact, more proficient than women in the knowledge and skills the MBE is designed to assess. ... [Women had slightly better UGPA but slightly lower LSATs]” p. 44;

b. “We found that men outperformed women in all six content areas of the MBE, but that the differences were lowest in Evidence and Real Property and highest in Constitutional Law and Torts” p. 45;

c. Suggesting that theory of differential stress would request longitudinal data involving several schools as “has not been undertaken in any field” p. 46.

F. Race and the Bar Exam


G. Pipeline Debate


a. Noting large disparity in pipeline and noting LSAC stats in Grutter Amicus Brief; Lots of graphics.

b. Disaggregated Bar Passage: “[D]ata from the Bar Passage Study show that the eventual bar passage rate for the full group of study participants was 94 percent. However, the rates for racial-ethnic subgroups varied from 96.7 percent among white bar examinees to 77.6 percent among African Americans.” p. 9 (quoting Wilder 2003).

c. System of preferences: “For years, law schools, and thus the bar, have operated on the edge of the small band of applicants who were qualified to enter law school, as defined primarily by their admissions scores. Often law schools have provided additional support for students whose LSATs might suggest that they would have difficulty in law school and eventually on the bar examination. But, as the preceding discussion indicates, these efforts have been insufficient.” p. 9

d. Fixing Pipeline: “Another approach involves efforts to secure and expand the pipeline, bringing forward a more qualified pool of applicants of all races and colors to law schools. This approach, obviously, requires taking the long view. Justice O’Connor, in her opinion in Grutter, offered 25 years as a reasonable time span to end affirmative action, really not much more time than for one generation of today’s first graders to move through 12 years of elementary and secondary education and four years of college. And it is this span that needs be considered, for students are lost to us at each step along the educational pipeline.” p. 10.

e. Mentoring Programs. Discussing BYU program; Georgetown; Cleveland State;
Tenure credit for Public Service. “3. All higher education institutions should commit themselves to review, and revise if appropriate, their current policies on promotion and tenure (including academic credit for student projects) in order to assure that recognition is provided for those working in and researching public education and public service agendas.” p. 16

H. Setting Standards, including Court Challenges


   a. What happened in Ohio. “About five years ago, the Supreme Court of Ohio substantially raised the cut score for the Ohio bar examination. The result, as expected, was a significant reduction in the bar pass rate. This change in the cut score has affected the quality of legal education in Ohio, positively in some respects and negatively in others.” p. 15

   b. Smaller classes and costs in screening. “The new Ohio cut score influenced Capital university law school, and other law schools in Ohio, to reduce the size of entering classes.” p. 15. Noting that it is hard to predict who will do well on the bar: “In years past, a significant number of Capital law graduates with lower undergraduate GPAs and LSAT scores successfully passed the bar exam and developed distinguished legal careers.” Today, they are getting screened out “because of the need to raise median GPAs and LSAT scores of incoming students to improve bar performance.” p. 15

   c. Higher attrition in law school is another strategy. p. 15.

   d. May discourage perspective and clinical offering, thus reducing quality of education. “The increase in the cut score has resulted in increased enrollment in courses covered by the bar exam and soft enrollment in clinical, skills, and perspective courses.” p. 15.


   a. “Reporting on many states changing their pass scores; noting opposing by all law school deans.


a. **Competency.** “Bar examinations are designed to make decisions about whether individuals are prepared for practice.” p. 6

b. Discussing test-centered (e.g., MBE) versus examinee-centered (e.g., essay) methods of setting standards. p. 7 Favors examinee-centered exams.

c. **Minimum standard per psychometricians:** “Current testing guidelines suggest that bar examiners should strive for a passing score that is ‘High enough to protect the public but not so high as to be unreasonably limiting’ and that ‘depend(s) on the knowledge and skills necessary for acceptable performance in the profession.’ by linking the passing score to accepted standards of practice in the legal profession, the standard can be justified as having a “rational connection with the applicant’s fitness or capacity to practice.”


a. **Competency.** “Almost all states use a standard that they believe will screen out the candidates who are not yet ‘minimally competent’ to practice. However, what constitutes minimum competency varies tremendously across states. to illustrate, Florida’s and New York’s passing rates would drop about 30 percentage points if they suddenly adopted Delaware’s standard, and California’s rate would increase about 35 percentage points if it used Minnesota’s or New Mexico’s standard.” p. 12-13

b. **Cut Scores and variation.** “Several factors may affect a state’s standard, including what it considers to be the level of proficiency that is necessary to begin practicing, whether the passing rate is publicly acceptable, and the expected effect on minority applicants. Candidate ability may matter too, and this varies greatly across states just as it does among law schools. Because of this variation, states with similar passing standards may have different passing rates and those with similar rates may have different passing standards. Hence, one cannot gauge a state’s standard from its passing rate. State policies regarding section weighting, rereading, rounding, and score banking and transfer also may affect standards as can the relationship between a state’s MBE and essay scores.” p. 13

c. **MBE Inflation and Cut Scores.** “At least some bar examiners recommended raising cut scores because of concerns about possible score inflation on the MBE. Inflation could occur if students are receiving more practice in taking multiple choice exams in law school or if bar exam preparation courses are able to raise MBE scores without a corresponding improvement in the candidates’ legal skills and knowledge. Such inflation would not be detected or corrected by the MBE’s equating process. Thus, some states may have raised passing scores just to maintain the same performance standards as they used in the past.” p. 13

d. **Dynamic reaction to change in cut scores.** “The states that raised passing scores have not experienced the drops in passing rates that might otherwise be projected, perhaps because higher standards motivate students to be better
prepared. For example, before Ohio raised its standard, its mean MBE score was well below the national average on every administration of the exam, but since it raised its standard, Ohio’s mean has always been at or above the national average.” p. 13

e. Discussing Klein’s method of standard-setting. p. 14


a. **Higher Cut Scores.** Reporting that mean MBE are higher in 1990s than 80s but noting that in response: “But now the bad news: rather than welcoming these diverse, talented applicants to the profession, more than a dozen states have raised the scores needed to pass their bar exams in the past ten years.3 these actions excluded from the profession individuals who were more competent—and more diverse4—than attorneys admitted during the previous decade. about one-third of exam takers from ABA-accredited law schools now fail the bar exam each year.5"

b. Arguing the current MBE requires higher competence than in years past. p. 11

c. **Competency.** “Bar exams protect the public from incompetent attorneys, but they also restrict competition and hamper the diversification of our profession. recent increases in passing scores have served the latter, ignoble ends without sufficient evidence that they were necessary to achieve the former, noble one.” p. 11

d. Noting low intercorrelation between essay exams in Ohio. p. 10


a. **History of standard-setting in Florida.** In late 1990s, Florida reevaluated its standards and created detailed benchmarks for the Pass/Fail standard; raising the score based on a minimum competency standard was challenged by many because of its effect on minority passage. Florida Sup Ct upheld the standard in a split decision. See 2003 WL 1339174 Amendment to the Rules of the Supreme Court Relating to Admission to the Bar.


a. Study that attempts to separate out interaction of cut scores, credentials, and law school attended on bar passage rates.

b. 

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II. Employment of Law School Education

A. Descriptive Studies


   a. **Consistency in Job Market**: Looking at the broad span of thirty years, however, what is most striking is that, despite the fluctuations, employment patterns and prospects have been remarkably consistent over time, and that picture is very different from the stereotype that many people hold of the legal marketplace. Starting salaries, of course, have changed dramatically over time, and the arrival of women and minorities in the field in large numbers has forever changed the landscape. Nevertheless, in the thirty years that NALP has been collecting data on the employment of new law school graduates, there is far more consistency than there is flux.” p. 28;

   b. **Private Practice**: “It should come as no surprise to anyone involved in legal education that the vast majority of law school graduates continue to enter private practice. More than half (57.8 percent) of all employed graduates from the class of 2003 took jobs in private practice. Since 1974, this figure has ranged from a low of 49.2 percent in 1975 to a high of 64.3 percent in 1988.”

   c. **Salaries**: “Because starting salaries are typically higher in larger law firms (and because large law firm hiring and salaries have been relatively flat in recent years), the median salary for members of the class of 2003 fell for the first time since 1992. The median salary was $55,000, compared to a median of $60,000 for the class of 2002. Similarly, the median salary for those entering private practice also fell for the first time since 1992, decreasing from $90,000 in 2002 to $80,000 in 2003.” p. 29;

   d. **Debt**: “According to data provided by the ABA, for the law school class that graduated in the spring of 2003, the average amount borrowed by public law school graduates was $45,763 (with a school high of $68,856 and a school low of $24,551), and the average amount borrowed by private law school graduates was $72,893 (with a school high of $103,639 and a school low of $13,952).” p. 30.

   e. **Diversity**: “According to the ABA, about one in five members of the class of 2003 were minorities, and nearly 50 percent were women. This distribution of graduates by race and gender has been relatively constant for the last six years. (By comparison, in 1984 fewer than 9 percent of law school graduates were minorities, and 37 percent were women.) Historically, however, relatively fewer women and minorities have entered private practice and more have entered government and public-interest organizations compared with men and nonminorities.” p. 30;

   f. **After the JD and Diversity**: “The situation for minorities and women in the practice of law is complex and nuanced, however, and the data snapshots
presented here do not tell the whole story. The NALP Foundation’s recently published AFTER THE JD: FIRST RESULTS OF A NATIONAL STUDY OF LEGAL CAREERS (2004), for instance, suggests that African American attorneys expressed the highest level of job satisfaction of all groups in their first several years of law practice, and in some settings, particularly in business and industry and in solo practice, reported higher salaries than other minorities or than their nonminority colleagues. Similarly, women in this study expressed significantly higher satisfaction with the substance of their work than their male counterparts.” P. 31-32.

g. **Geography:** “Not surprisingly, geographic factors continue to play a significant role in legal employment, and states and cities differ dramatically in the opportunities afforded to new law school graduates. From a few dozen jobs reported taken in the sparsely populated northern plains states to the over 5,300 jobs reported taken in New York and California combined, class of 2003 graduates obtained jobs in every state in the Union. New York City alone provided more than 2,800 jobs to new graduates. In New York and California, more than two-thirds of the jobs taken by new graduates were in private practice, while judicial clerkships accounted for only a small fraction of job opportunities in those two states.... On a national basis, about 78 percent of jobs were accepted by graduates who had attended law school in the same region. On a state-by-state basis, the percentage of employed graduates who obtained jobs in the states in which they went to law school ranged from more than 85 percent in Arkansas, Florida, Hawaii, South Carolina, and Texas, to less than 40 percent in Delaware, Iowa, New Hampshire, Vermont, and Virginia. Nationwide, the median rate at which states retained their graduates was 68 percent.” p. 32-33;

h. **Timing of Job Offers:** “While some employers—notably large law firms and judges hiring judicial clerks—extend offers before graduation, most other employers, including government, public-interest organizations, and smaller firms, do a substantial portion of their hiring after graduation. Overall, about 68 percent of offers made to the class of 2003 were received before graduation. For firms of more than 100 attorneys, the figure was even higher—93 percent. However, in very small firms of two to ten attorneys, almost half the jobs were obtained after graduation, and often not until after bar results. This pattern of hiring has been relatively constant over time, despite fluctuations in the strength of the economy.” p. 34

i. **Method of Obtaining Job.** “[M]ost jobs continue to be obtained by means other than fall on-campus interviews (OCI). In 2003, just under one-quarter of all jobs were obtained through the fall OCI process, and the vast majority of these jobs were with large law firms. For students seeking work in the government sector—such as judicial clerks in state court systems, in small firms, or in public interest—jobs continue to be found the old-fashioned way: as a result of self-initiated contacts with the employer, through job postings, or as the result of a referral. For most graduates seeking jobs outside of the large firm context,
III. Affirmative Action and Racial Preferences

A. At Bar Exam Level


   a. **Gatekeepers.** “As one of the two primary gatekeepers to the profession—the other being law schools—bar examiners and judges are understandably concerned about the character and fitness of the members of our profession. While legal ethics, legal education, and knowledge of the law are obviously core elements of lawyer competency and important measures of the professional health of the legal profession, other factors must be considered as well.” p. 18

   b. **Removing irrelevant barriers.** “Bar examiners and members of the judiciary cannot set specific percentages for members of identifiable groups to be admitted to the bar. But as gatekeepers to the legal profession, as community leaders, and as leaders within the legal profession, they have the responsibility to make certain that there are no artificial or unreasonable barriers that prevent people of color, women, or people with disabilities from gaining admission to the legal profession.” p. 18

   c. **Losing Diversity.** “[Noting paucity of blacks in his class at Boalt during early 1960s and noting] The relevance of my reflections on growing up in North Carolina, being a student at UC, Riverside, and attending law school? I believe the lesson is that unless we take concrete action to avoid it, we can once again become a profession that is disproportionately white. Statistical data indicate that women are now being admitted to law schools and the profession in numbers that approach their representation in the national population. Affirmative action is one of the tools that we have adopted and, for the near future, must maintain, to ensure that our profession is and continues to be diverse in the various ways that our nation is diverse.” p. 20.