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OPINION

Reforming the Bar Exam to Produce Better Lawyers

A recent overhaul of the test deserves a flunking grade. How about focusing on skills like factual investigation?

By **BEN BRATMAN**

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This week, thousands of aspiring lawyers—most of them recent law-school graduates—are undergoing at least 12 hours of testing in an effort to pass a bar exam and qualify for a law license. But this year's bar exam is unlike any before it. Effective with this week's test, the Multistate Bar Exam, a grueling six-hour, 200-question multiple-choice test that is part of the bar exam in almost every state, becomes even more arduous. It will now test an additional field of law: federal civil procedure, the seventh subject covered on the exam.

The addition will require MBE examinees to memorize even more content, in the form of numerous rules and case precedents. Does that help those examinees become better lawyers? Does it help the legal profession? Does it help the clients and the public that lawyers serve? No.

The bar exam is an important tool, a gatekeeper designed to allow through only those who are competent to serve clients. The exam is certainly due for reform. But for four reasons, this week's change is a regressive one—the wrong reform at the wrong time.

First, knowledge of any particular field of law is not what beginning lawyers need most. A 2013 National Conference of Bar Examiners survey of newly licensed lawyers in a variety of employment settings shows that at least 25 different skills and abilities are more important to their job success than knowledge of any specific body of law.

Lawyers develop specialized legal knowledge primarily through years of representing clients. When employers hire a junior lawyer fresh off the bar exam, they typically do not expect the new hire to be familiar with the areas of law relevant to pending client matters—even if, by some chance, those areas were tested on the bar exam. What they expect is that the new hire will know how to research that law and execute a variety of other basic lawyering skills, including legal analysis and writing.

PHOTO: CORBIS

Second, the change heightens the priority that examinees must place on memorizing law. The amount of material that has to be mastered for the MBE and state-law essay questions is so substantial that law-school graduates, many already swimming in debt, are all but compelled to pay for a commercial exam-preparation course. Students go bleary-eyed reading thick books full of outlines on tested subjects, and watching professors summarize a whole field of law in a few lengthy lectures. They madly memorize everything from the Rule Against Perpetuities to the elements of *res ipsa loquitur*, only to forget most of it shortly after the exam ends.



Third, adding even more emphasis on knowledge of law is inconsistent with recent positive trends in legal education. Law school is not about beaming knowledge of law into students' heads. Yes, students learn rules and case precedents in various fields of law, but law school is much more about gradually developing fundamental skills—most prominently, the ability to reason and communicate like a lawyer. Over the past few decades, law schools have paid more attention to skill development, offering students greater opportunities for experiential learning and more training in previously underaddressed skills such as client counseling, factual investigation, problem solving and negotiation.

Fourth, and perhaps most important, many fundamental skill sets could be tested on a modified bar exam in lieu of a significant chunk of the memorization-based testing. Indeed, some fundamental skills are already being tested as a small part of bar exams around the country. This is done through performance testing, the beauty of which is that it does not test recall of law but rather the ability to do things that lawyers do. Examinees receive a packet of source materials and are directed to draft a document, simulating a real-world assignment from a judge or senior attorney.

Performance tests came on the bar-exam scene in the 1990s, but they have remained limited—evaluating the same small range of legal-analysis skills as when first introduced. Performance testing should be expanded to evaluate the capacity of

examinees to strategize for a client, gather facts, research the law and write clearly. Also, more states should implement performance testing and count it more heavily in scoring. Currently, nearly 20% of states do not administer performance tests at all, and those that do weigh it as the least significant section in scoring.

Knowledge of law is not unimportant. But bar examinations are not the only or even the best means to ensure that newly admitted attorneys are familiar with a certain field of law. As a condition of licensure, a state could instead require that new members of the bar take a course on, for example, unique attributes of that state's law. The Missouri Board of Law Examiners has recently adopted this approach.

The bar exam needs reform, but not the latest kind, which simply adds another subject students must cram into their brains. What it needs is a more sensible balance between testing that primarily requires memorization and testing that requires performance of lawyering skills. That is the reform that will benefit examinees, the legal profession and the public.

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