

March 23, 2021

Sent via e-mail

Virginia Board of Bar Examiners
2201 West Broad Street
Suite 101
Richmond, VA 23220

Dear Members of the Board:

We, the undersigned deans of the law schools located in the Commonwealth of Virginia, are grateful for the opportunity to meet with members of the Board on multiple occasions over recent years to share our thoughts and concerns regarding the bar examination. At the last such meeting organized by Chief Justice Lemons last year, the Chief Justice suggested that the deans confer to see if we could come together on a proposal for improvement. We have done so.

We believe the time is right to pursue meaningful change to the manner in which our state determines whether an applicant to the state bar possesses sufficient competence to practice law.¹ Specifically, we unanimously recommend that Virginia join the prevailing national trend by adopting the Uniform Bar Examination (UBE) prepared by the National Conference of Bar Examiners (NCBE) as the basis upon which to assess professional competency to practice law.² However, given the unique features of Virginia procedure and the importance of that topic in the fields of civil and criminal litigation, we further recommend that our state continue to separately test Virginia procedure through a stand-alone component to be taken by applicants prior to admission.

Given the departure of this recommended approach from the longstanding status quo in our state, we provide a detailed justification for our recommendation below.

¹ The logistical difficulties of facilitating an in-person bar examination posed by the COVID-19 pandemic have generated renewed focus nationwide on the effectiveness of a traditional closed-book, time-constrained bar examination at achieving its stated goal. *See, e.g.*, Vikram David Amar, [What About the Bar Exam After the 2020 Dust Settles?](#) Verdict (Sept. 17, 2020) (“When the dust settles on the summer/fall 2020 bar exam cycle, many commentators and analysts will likely want to revisit why we have (indeed whether we need) bar exams for legal licensure, and (assume we retain bar exams) what such exams should look like going forward.”). Yet this issue is by no means new. The Institute for the Advancement of the American Legal System (IAALS) undertook a 2-year study to determine the core building blocks of competence as a legal professional and determined that the traditional bar examination offered an overall poor measure of minimum competence to practice law. *See* Institute for the Advancement of the American Legal System, [Building a Better Bar Exam: The Twelve Building Blocks of Minimum Competence](#) (Oct. 2020). While that study proposed significant changes to the manner of assessing minimal competence that we believe are worth further study and consideration in connection with the Board and other stakeholders in the legal profession, we propose a far more modest approach over the near term.

² Doing so would be consistent with the [2016 Resolution](#) of the Conference of Chief Justices Urging Consideration of Implementation of a Uniform Bar Exam.

1. **Responding to the Calls of the Legal Profession.** The legal profession consistently calls upon law schools to emphasize the development of professional skills and competencies that will enable graduates to more quickly transition to the practice of law. *See, e.g., [American Bar Association Task Force on the Future of Legal Education, Report and Recommendations](#) (2014); [Legal Education and Professional Development—An Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap](#) (1992).* Additionally, deans frequently field requests that law school provide curricular offerings on non-doctrinal subjects such as the business of the legal profession, individual well-being as a legal professional, professionalism, and the incorporation of technology into legal practice, to name a few. Responding to the calls of the legal profession in this manner requires law schools to make curricular trade-offs. However, for those of our students who sit for the bar examination in Virginia in particular, these trade-offs carry meaningful risk. By holding applicants responsible for having the specifics of 21 subjects of law (with some subjects containing multiple topics, such as the Uniform Commercial Code) at their immediate disposal, the existing bar exam in Virginia incentivizes the memorization of considerable legal doctrine over the development of other professional competencies.

In contrast, on the essay portion of the exam, the UBE tests five subjects (Business Associations, Conflict of Laws, Family Law, Secured Transactions, and Trusts and Estates) in addition to the seven topics test on the MBE portion of the exam (Civil Procedure, Constitutional Law, Contracts, Criminal Law and Procedure, Evidence, Real Property, and Torts). The subject-matter breadth of the UBE therefore provides an ample basis upon which to assess an applicant's knowledge of and facility with core legal principles in a manner sufficient to determine baseline competency to practice law. At the same time, the UBE's more focused topic list would allow law schools to responsibly emphasize the development of professional skills and competencies in the curriculum to better equip our graduates for the demands of the modern profession.

2. **The Preference for Performance-Based Assessment.** Our recommendation that Virginia adopt the UBE is not singularly based on the scope of the subjects tested on the essay portion of the exam. The UBE also devotes three hours, and 20% of the overall score on the exam, to the Multistate Performance Test (MPT). The MPT component of the exam generally requires the applicant to analyze a set of legal authorities (provided to the applicant as part of the exercise) in the context of a factual scenario, and to concisely communicate the product of that analysis.

As stated by the NCBE, the MPT is not intended to test doctrinal knowledge. Rather, this portion of the exam is "designed to evaluate certain fundamental skills lawyers are expected to demonstrate regardless of the area of law in which the skills are applied." We believe these exercises are equally if not more probative of an applicant's ability to practice law, given that few practitioners advise clients on the basis of the memorized understanding of a broad range of legal topics. The probative value of the MPT in testing the analytical skills of an entry-level lawyer perhaps explains why many jurisdictions which have not yet adopted the UBE in full nonetheless use one or both of the 90-minute MPT exercises as part of their exam process. Indeed, Virginia is one of just four jurisdictions nationwide that does not include a performance-based component as part of its bar examination. Commentators have called for an increased emphasis on performance-based

assessments in the bar examination process,³ and we believe the MPT is one of the primary advantages of the UBE.

3. Lawyer Well-Being. Much attention has appropriately been devoted of late to the stresses faced by members of the legal profession, and the effect that the pressures accompanying the practice of law can have on the well-being of attorneys. Of course, these pressures do not start once an individual receives her bar license. Rather, they certainly exist in law school. In that regard, one of the more anxiety-producing endeavors a law graduate faces is the bar examination and its accompanying intense period of preparation. Indeed, the current approach significantly favors those who have the financial means and support to singularly focus on preparation for the bar exam for roughly two months, with the aid of costly bar preparation courses. This approach does not advance the goals of broadening access to the legal profession to underrepresented minorities or to those individuals who represent the first in their families to attend college and law school.

While the licensing procedure inevitably will be demanding and therefore will generate a considerable degree of stress, it is worth exploring whether the bar exam can be made more manageable while serving its critical function. The narrower but still rigorous doctrinal scope of the UBE reduces the need to devote time to rote memorization of doctrinal law. Additionally, the NCBE produces a number of free study aids for applicants, including sample multi-state essay questions and sample analyses. The study aids render the UBE slightly less intimidating, but even incremental improvements on this front are meaningful.

4. Enhancing Employment Prospects. Adoption of the UBE also would benefit law students in their professional and career development. Given the continuing challenges in the legal job market, a significant percentage of law students remain in search of employment after graduation. This is especially the case in the public interest field, where offers for permanent employment are not extended unless and until an individual has passed the bar examination. In this prevailing landscape, students who have not secured post-graduate employment at the time of the bar application process must make a calculated gamble in applying to sit for a bar examination that only offers licensure in that state. However, if Virginia were to join the increasing number of states that have adopted the UBE, students could take the Virginia examination without having to foreclose the prospect of finding initial job opportunities in neighboring states – including all of the states bordering Virginia. In that case, the applicant could take her UBE score to that other jurisdiction to become licensed without the delay, time, and expense of sitting for yet another bar examination. Given the profession’s interest in seeing as many law graduates employed as possible, the broadening of initial job opportunities that would result from the adoption of the UBE is sufficient reason alone to adopt this approach. Members of the Virginia bar similarly would benefit by having access to a broader pool of law graduates—that is, those who took the bar in one of the majority of states that have adopted the UBE—from which to recruit.

³ See Institute for the Advancement of the American Legal System, *Building a Better Bar Exam: The Twelve Building Blocks of Minimum Competence*, Recommendation Three (“Eliminate essay questions from written exams and substitute more performance tests.”); see also Ben Bratman, *Looking Ahead: The Performance Test on the Bar Exam Post Covid-19*, Best Practices for Legal Education (Oct. 21, 2020) (noting that multiple commentators have highlighted the need to enhance the bar examination’s focus on the performance test).

5. Benefits to the Board of Bar Examiners. Adoption of the UBE would offer a host of benefits to the Virginia Board of Bar Examiners. Rather than devoting considerable time and energy to developing and vetting questions that test an applicant's knowledge of a given topic in a fair, accurate, and reliable manner, this labor-intensive exercise of question formation would be undertaken by the NCBE. The essay questions would be drafted by NCBE committees comprised of professors, judges, and practitioners that are constituted for this purpose. Furthermore, the UBE essay questions are vetted by external experts for validity and fairness, which will ensure the level of quality the Board of Bar Examiners has worked hard to achieve. The Board therefore would be provided more time to devote to grading the questions and determining the appropriate passing score – all matters that would remain within its province.

To the extent the degree of centralization brought about by adoption of the UBE is disconcerting, we recommend that Virginia continue to test the particulars of Virginia procedure through a stand-alone component. Indeed, many states that have adopted the UBE maintain a limited state-specific aspect to their licensing process, one that typically is administered outside of the primary bar examination process.⁴ Given the importance of Virginia procedure in the civil and criminal litigation fields and the peculiarities of this aspect of Virginia law, we believe that Virginia procedure would be an appropriate candidate for any state-specific component.

For these reasons, we believe the legal profession in Virginia, the law schools located in the Commonwealth, and the students seeking admission to the Virginia bar would be well served by our state joining the national trend in adopting the UBE as the basis for evaluating an individual's professional competence to practice law. While the UBE is not without its shortcomings and more significant changes to the licensure process are worthy of study and consideration, we believe adoption of the UBE would be a significant improvement.

We close by expressing our appreciation for the willingness of the Board of Bar Examiners to engage with us and prior deans of Virginia law schools. Additionally, we also wish to express our sincere appreciation for the dedication and professionalism with which the Board discharges its duties to the legal profession and to the public more broadly.

[Signature page follows]

⁴ For a list of state-specific augmentations to the UBE, see https://www.ncbex.org/assets/BarAdmissionGuide/CompGuide2020_021820_Online_Final.pdf.

Sincerely,

B. Keith Faulkner
Dean and Professor of Law
Liberty University School of Law



Risa Goluboff
Dean, Arnold H. Leon Professor of Law and
Professor of History
University of Virginia School of Law



Brant J. Hellwig
Dean and Professor of Law
Washington and Lee University School of Law



Mark D. Martin
Dean and Professor of Law
Regent Law School



Elizabeth A. McClanahan
President and Dean
Street Distinguished Professor of Law
Appalachian School of Law



Wendy C. Perdue
Dean and Professor of Law
University of Richmond School of Law



Kenneth C. Randall
Allison and Dorothy Rouse Dean
GMU Foundation Professor of Law
Antonin Scalia Law School
George Mason University



A. Benjamin Spencer
Dean & Chancellor Professor
William & Mary Law School



cc: The Honorable Donald W. Lemons, Chief Justice
The Honorable D. Arthur Kelsey, Justice
Supreme Court of Virginia