
SHOULD WE GET RID OF THE BAR EXAM?

FEBRUARY 27, 2023 | JOHN LANDE | 2 COMMENTS

It may be a weird time to suggest getting rid of bar exams considering that bar exams will soon include questions about client counseling and advising, negotiation and dispute resolution, and client relationship and management.

Inclusion of these subjects on the bar exam could lead to welcome changes in legal education to better prepare law students for legal practice. Law schools have strong interests in having their graduates pass the bar, so they are likely to require students to take courses that cover these subjects. This could lead to greater integration of dispute resolution in the curriculum, as suggested by the [LEAPS Project](#). More generally, it could renew law schools' interest in dispute resolution, which has been dwindling of late.

The problem is that bar exams generally don't fulfill their purpose of protecting the public and they create lots of problems, according to Texas A&M Professor Milan Markovic. They consume tremendous resources of the legal profession, law schools, and law students, diverting resources and attention from activities that are likely to be more effective and valuable.

In [Protecting the Guild or Protecting the Public? Bar Exams and the Diploma Privilege](#), he argues:

Despite jurisdictions' longstanding embrace of bar exams, critics have long questioned their utility. Since the content of bar exams overlaps with what has been taught in law school, they are arguably a useless extra expense. Bar exams also test general legal knowledge in an era of rampant attorney specialization and place inordinate emphasis on speed and memorization, skills upon which attorneys should rarely rely in practice.

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Bar exams are also major obstacles to diversifying the legal profession. Black, Hispanic, and Asian test takers have historically failed bar exams at higher rates than white takers, partly explaining why the legal profession remains white-dominated. Commentators have argued that, were bar exams subject to Title VII scrutiny, they

would be struck down because of their unproven validity and disparate impact on minority groups. (Footnotes omitted.)

Based on a study of lawyers in Wisconsin, which uses a “diploma privilege” to license lawyers instead of bar exams, he argues that law schools should use this approach. Here’s the abstract of his article:

The bar examination has long loomed over legal education. Although many states formerly admitted law school graduates into legal practice via the diploma privilege, Wisconsin is the only state that recognizes the privilege today. The bar exam is so central to the attorney admissions process that all but a handful of jurisdictions required it amidst a pandemic that turned bar exam administration into a life-or-death matter.

In this Article, I analyze the diploma privilege from a historical and empirical perspective. Whereas courts and regulators maintain that bar exams screen out incompetent practitioners, the legal profession formerly placed little emphasis on bar exams and viewed them as superfluous for graduates of accredited law schools. The organized bar turned against the diploma privilege as the legal profession began to diversify, and some states abolished the diploma privilege specifically to block Black law students from the profession. The notion that bar exams ensure a base level of competence is a relatively recent construct.

A few studies have suggested that attorneys who struggle on the bar exam are more likely to commit misconduct. However, drawing on cross-state attorney complaint and charge data as well as Wisconsin attorney disciplinary cases, I demonstrate that the bar exam requirement has no effect on attorney misconduct. The complaint rate against Wisconsin attorneys is similar to that of other jurisdictions, and Wisconsin attorneys are charged with misconduct less often than attorneys in most other states. Moreover, the rate of public discipline against Wisconsin attorneys who were admitted via the diploma privilege is the same as that of Wisconsin attorneys admitted via bar exams.

Bar exams as currently constituted do little to advance public protection. A carefully drafted and enacted diploma privilege would comply with the Constitution’s Dormant Commerce Clause and would incentivize law schools to better prepare students for practice. States also have more direct means to address attorney misconduct than relying on ex ante measures such as bar exams.

What do you think?

2 THOUGHTS ON “SHOULD WE GET RID OF THE BAR EXAM?”

★ John Lande

NOVEMBER 12, 2023 AT 2:26 PM

I recently exchanged emails with Debby Merritt, who is part of a group called [Collaboratory On Legal Education and Licensing for Practice](#) and was involved in the effort to persuade Oregon to adopt its new supervised practice path to licensing of lawyers mentioned in the comment below. She is keeping track of [efforts in other jurisdictions](#), including California, District of Columbia, Georgia, Massachusetts, Minnesota, Nevada, New Hampshire, Utah, and Washington.

She recently published [Enhancing the Validity and Fairness of Lawyer Licensing: Empirical Evidence Supporting Innovative Pathways](#) (with Andrea Anne Curcio and Eileen R. Kaufman) and [Client-Centered Legal Education and Licensing](#).

★ John Lande

NOVEMBER 10, 2023 AT 4:47 AM

The ABA Journal published an article, [Oregon Approves Alternative to Bar Exam](#). It states: “Starting in 2024, law graduates aiming to practice in Oregon can skip the bar exam and instead follow an alternative pathway to licensure. On Nov. 7, the Oregon Supreme Court unanimously approved implementation of the Supervised Practice Portfolio Examination, requiring graduates to complete 675 hours of work under the supervision of an experienced attorney and create a portfolio of legal work to be evaluated by the Oregon State Board of Bar Examiners.”

You might want to read this post from the pandemic era: [The Coronavirus Crisis Provides an Opportunity to Adopt Better Systems for Licensing Lawyers than the Bar Exam](#). It discusses an ABA Journal article entitled, [Bar Exam Does Little to Ensure Attorney Competence, Say Lawyers in Diploma Privilege State](#).

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