**Oregon State Bar**
**Admissions Task Force**
**Final Report**

## Part 1 - Introduction

### Introduction

In the summer of 2007, then Oregon State Bar President Albert A. Menashe appointed a task force to consider a variety of issues related to the process by which applicants to practice law in Oregon are examined and considered for admission. The task force conducted its study from September 2007 through July 2008. This constitutes the final report of the task force to the Oregon State Bar Board of Governors.

### Task Force participants

The following individuals were appointed to the task force and participated during the course of the task force study:

Albert A. Menashe, Chairperson - representative from OSB Board of Governors
Andrew M. Altschul – representative from Oregon Board of Bar Examiners
Senator Suzanne Bonamici – representative from the Oregon Legislature
Chief Justice Paul J. DeMuniz – Oregon Supreme Court
Jonathan P. Hill – public member representative from OSB Board of Governors
Justice Rives Kistler – Oregon Supreme Court
Robert H. Klonoff – Dean, Lewis & Clark Law School
Margie Paris – Dean, University of Oregon Law School
Robert B. Rocklin – representative from Oregon Board of Bar Examiners
Symeon D. Symeonides – Dean, Willamette University College of Law [1]

The task force was staffed by Jonathan P. Benson, Executive Director of the Oregon Board of Bar Examiners, and Jeffrey D. Sapiro, Oregon State Bar Regulatory Services Counsel.

### Charge of the Task Force

In a general sense, the task force was charged with evaluating the current method of bar examination and admission practices in Oregon, and exploring alternatives. More specifically, the task force deliberations focused on the following questions and issues:

[1] Kathy Graham, Associate Dean at Willamette University College of Law, was Dean Symeonides' designee for a significant part of the task force's deliberations.

- Whether the current law school curriculum and bar examination process is the best method of preparing law school graduates to be practicing lawyers and assessing their fitness to practice law;
- Whether additional emphasis on practical skills in law school education is appropriate;
- Whether the bar exam should be modified to test skills training or assess those abilities that more closely approximate those required to practice law;
- Whether the current bar examination in Oregon is screening out applicants who would make good lawyers if admitted, or passing applicants who are not competent to practice law;
- Whether the current bar examination in Oregon puts minority applicants at a disadvantage;
- Whether the existing mix of bar exam components, and the weighting given to those components, constitute the best assessment tool available;
- Whether serious consideration should be given to alternatives to the bar examination for admitting purposes, even to the point of eliminating the exam altogether;
- Whether the substantial debt incurred by law school students should be considered in any evaluation of the admissions process in Oregon.

**Task Force process**

The Admissions Task Force met monthly at Willamette University College of Law in Salem. Prior to each meeting, staff compiled and distributed available literature on specific topics of interest to the task force. At the direction of the task force, additional research was conducted and various statistical inquiries were made of other jurisdictions about examination procedures, components, weighting and grading. Input was solicited from experts, including Dr. Susan Case, Director of Testing for the National Conference of Bar Examiners, who participated in one of the task force meetings. The task force also requested and obtained certain statistical analysis from Chris Koch, Ph. D., the statistician for the Board of Bar Examiners. On a continuing basis, task force members discussed and debated the issues before them, ultimately voting on the recommendations found in this report.

## Part 2 - Consideration of law school curriculum

Early in its deliberations, the task force spent considerable time discussing the relationship between law school education and skills necessary to engage competently in the practice of law. It is generally accepted that law schools are not the "gatekeepers" for the practice of law; that is, law schools do not see their role as ensuring that law students have the necessary skills and abilities to be practitioners. The gatekeeping function is reserved to licensing authorities.

On the other hand, law schools have been under increasing pressure in recent years to enhance their clinical programs and practical skills offerings. This was a central theme in the 1992 ABA "Report of the Task Force on Law Schools and the Profession: Narrowing the Gap," (the MacCrate Report). More recently, two major studies have urged law schools to increase their commitment to preparing law students for law practice. The 2007 Carnegie Report urged legal educators to rethink existing curriculum and teaching methods to produce a more coherent and integrated initiation into a life in the law.[2] The "Best Practices for Legal Education," also from 2007, made sweeping recommendations for law schools to alter their curriculum to better prepare law students for practice.[3] At least one law school, Washington and Lee School of Law in Lexington, Virginia, recently overhauled its third year curriculum by replacing all academic classes with clinical and experiential learning.

Any effort to change law school curriculum must take into account certain practical considerations. Law school deans participating in the task force noted that the existing three year curriculum already is quite full, and that there is increasing pressure to add more doctrinal course offerings. Adding a significant practical skills component to the law school experience may require a fourth year, adding great expense for both the schools and the students. Even without a fourth year, clinical or skills-based courses are very resource-intensive.

Ultimately, the task force concluded that it would not recommend changes to the law school curriculum, in part because the bar has no authority over the law schools and in part because time is needed to see whether the recent recommendations for change in legal education take root. It may be advisable to revisit this topic in 3-4 years to gauge the impact of the *Carnegie* and *Best Practices* studies on the law schools, and whether experiments such as Washington and Lee's shift to experiential learning are deemed to be a success over time.

## Part 3 - Alternatives to examination model

The task force gave consideration to whether the bar admission function could be carried out without a form of examination as it presently exists. It is universally accepted that the evaluation of qualifications for admission is done to protect the public from practitioners who are not minimally competent to engage in the practice of law. However, other jurisdictions have utilized or experimented with admission models that do not include a traditional bar exam, and presumably have done so with the belief that they were not compromising public protection. The task force considered the following alternative models.

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[2] W. Sullivan, A. Colby, J. Wegner, L. Bond & L. Shulman, *Educating Lawyers: Preparation for the Profession of Law*, note 7, at 180 (Jossey Bass, 2007).

[3] R. Stuckey, *Best Practices for Legal Education* (CLEA 2007).

**Diploma privilege**

At least five jurisdictions[4] in the early 1980s admitted law school graduates through a "diploma privilege." Essentially, graduates of in-state law schools were eligible for admission in that state without further bar examination. The diploma privilege was an enticement for graduates to remain in state after law school and commit to a law practice there. Presumably, the admitting jurisdictions were comfortable that the requirements for graduation from the in-state law schools were a sufficient screening mechanism for competency.

Over time, the diploma privilege lost favor around the country such that Wisconsin now is the only state in which it is available to the graduates of that state's two law schools.[5] Material from those states that did away with the diploma privilege suggests that the licensing authorities or state supreme courts became concerned about whether the privilege offered sufficient public protection that admittees were competent to practice law. In the past era when new admittees typically worked under a mentor or in an apprentice-like environment, the diploma privilege apparently was acceptable. As those mentoring or training opportunities reduced in number and more law school graduates went into practice on their own, the jurisdictions decided a more rigorous screening mechanism was required and bar examinations replaced the diploma privilege.

Although there was a minority sentiment among task force members that a diploma privilege should be considered in Oregon, the majority concluded that the diploma privilege would amount to a delegation of the gatekeeper function to the law schools that is not desirable.

**Apprenticeships/articling**

The provinces of Canada, and other foreign jurisdictions including England, Scotland and South Africa require their law school graduates to complete a term of apprenticeship called "articling." This experience, typically 1-2 years in duration, places graduates in work settings in private law firms, governmental offices or other law office environments. The graduates work under the supervision of a mentor and within the confines of a formalized plan designed to provide the graduate with sufficient exposure to practical skills and experience. When the plan is completed to the satisfaction of the supervising lawyer and other qualifications are met, the graduate is "called to the bar." Note, however, that articling or apprenticeships found in foreign jurisdictions do not replace bar examinations. Passage of an exam or exams is part of the determination made in those countries whether an applicant should be called to the bar.

[4] Mississippi, Montana, South Dakota, West Virginia and Wisconsin.

[5] Wisconsin's diploma privilege has been challenged recently in federal court by out-of-state law school graduates alleging violations of the commerce clause in the U. S. Constitution. To date, these challenges have not been successful.

As attractive as apprenticeships are to those who believe law school graduates are ill-equipped to practice law immediately upon graduation, the task force ultimately did not recommend that such a program be adopted in Oregon. The principal reason is that the likely number of available apprenticeship opportunities, with mentors or supervisors trained and committed to such a program, would not be sufficient to accommodate the number of law school graduates. In this respect, the Canadian experience simply can't be duplicated in the U.S. The task force noted, for example, that the total number of law school graduates in Canada in 2006 was less than 3,000, while nearly 44,000 students graduated from United States law schools during this same period.

**Other alternatives**

Proposals have been made in Arizona and New York for programs that would grant a law school graduate admission without a bar examination if he or she commits to a term of public service. These proposals are in the planning stages and a long way from operational.

The Franklin Pierce Law Center, the only law school in New Hampshire, has instituted the "Daniel Webster Scholar Honors Program." Available to a limited number of law students each year, participants must achieve certain academic goals and complete various requirements in trial advocacy, negotiations, simulated business transactions and other practical skills experiences throughout the three years in school, demonstrating competence to judges, lawyers and the New Hampshire Bar Examiners along the way without the traditional bar examination. The first group of students from this program, limited to 13, graduated in 2008.

Having considered various alternatives to the traditional bar examination, but concluding that those alternatives were not likely candidates for the Oregon admissions process, the task force turned its attention to the components of the exam presently utilized in Oregon.

## Part 4 – Consideration of examination components

The Oregon bar examination consists of two exam days. Applicants take the Multistate Bar Exam (MBE) on one day. This is a multiple choice, 200 question exam drafted by the National Conference of Bar Examiners (NCBE). Subjects tested include contracts, torts, constitutional law, criminal law, evidence and real property. On the second day, applicants answer nine essay questions drafted by the Oregon Board of Bar Examiners on topics chosen from a lengthy list of subject areas set out in the Oregon admissions rules, and one Multistate Performance Test (MPT) question. The MPT question is also the product of the NCBE.

In order to be admitted in Oregon, applicants also must take and pass the Multistate Professional Responsibility Exam (MPRE). This, too, is a standardized multiple choice exam prepared by the NCBE, but it is not administered or graded by the

Oregon Board of Bar Examiners. MPRE results are reported to each jurisdiction in which an applicant seeks admission, and each jurisdiction sets its own passing score.

**MBE**

Of the various bar examination components, the MBE probably receives the most comment and criticism by applicants, academics and even bar examiners. Yet, the MBE presently is utilized in 48 states and the District of Columbia. The NCBE, which drafts and markets the exam, urges critics to separate myth from fact regarding the MBE, which the task force endeavored to do in its deliberations.

One of the criticisms of the MBE is that it is unreasonably difficult such that it is the obstacle to the admission of many otherwise qualified applicants. The belief is that applicants as a whole perform worse on the MBE in comparison to performance on other components of the bar examination. In fact, the national figures show a strong correlation between applicant performance on the MBE in relation to performance on other parts of the exam.

Another, often-heard criticism is that the MBE contains a cultural bias that disadvantages minorities. The task force spent considerable time discussing this assertion, and sought out statistics in Oregon and elsewhere that would shed light on whether it is accurate. The statistics reflect that minorities do not perform as well on the bar exam as non-minorities. However, analysis of nation-wide numbers reflects that a) minority performance on the MBE is similar to minority performance on other examination components, and b) there is a high correlation between minority performance on the bar examination and minority performance in undergraduate GPA, on the LSAT (pre-law school admission test) and in law school. Reasons for the differential between minority and non-minority performance in law school and on the bar examination are no doubt complex and beyond the ability of the task force to identify with any precision. However, there does not appear to be statistical support for the assertion that the MBE is any more of an obstacle to minority bar admission than other components of the bar examination.

The task force also considered the positive attributes of the MBE. First, the MBE is developed by the NCBE through a rigorous process undertaken by experts in the field. Second, multiple choice testing offers a breadth of coverage of subject areas which cannot be duplicated with essay or performance test questions. This improves the reliability of the exam. In addition, scoring of multiple choice questions is more objective and the scores can be scaled to adjust for changes in difficulty from exam to exam.

In summary, despite any lingering belief that a multiple choice examination is not the best tool to assess minimum competence to practice law, the task force concluded that there are valid reasons to retain the MBE as part of the Oregon bar examination.

**MPT**

The MPT is the newest component of those offered by the NCBE to testing jurisdictions, having been available for roughly ten years. Oregon began to use the MPT in 1998. With an MPT question, an applicant typically is provided a file, a library and an assignment. The file provides factual background for a simulated client matter (a deposition, pleadings, correspondence, or police reports, for example). The library may consist of statutes or case law. The assignment requires the test-taker to perform a lawyer-like task such as preparing a memo for a senior partner or a motion for summary judgment, based on the facts in the file and the law discerned from the library. The NCBE makes available two MPT questions for each bar examination administration, but the participating jurisdictions choose whether to use one or both. Thirty states plus the District of Columbia presently use the MPT. Oregon uses one MPT question for each bar exam.

The advantage of the MPT is that an applicant is placed in a situation that more closely approximates what he or she will be asked to do upon entry into the practice of law, and therefore the test can better assess whether the applicant is "practice-ready." In keeping with a belief that the bar examination should be testing skills and abilities that are more relevant to the practice of law, the task force decided to recommend that Oregon add a second MPT question to each bar exam administration.

There are implementation issues that need to be resolved. Adding a second MPT question (for which 90 minutes of exam time is allotted) will require either a) an extension of the exam beyond two days, or b) a reduction in one of the other exam components. The task force is not in favor of an extended exam. Instead, the task force recommends that the number of essay questions (*see,* discussion below) be reduced from nine to six for each exam. (The recommended time allotment for essay questions is 35 minutes each.) The second exam day, then, will consist of the six essay questions and the two MPT questions.

Further as to implementation, ample notice should be given to law schools and law students regarding this change to two MPT questions, so that students can structure their course of study with the change in mind. The task force suggests that full implementation of this recommendation occur in 2011, when the class entering law school in the fall of 2008, graduates and prepares for the bar exam.

The task force also encourages the Oregon Board of Bar Examiners to monitor over time applicant performance on the MPT and the impact on the bar exam passage rate of adding a second MPT question. Overall applicant performance on the MPT in Oregon was poor when this part of the exam was first adopted here. Law school curriculum was not geared toward this type of bar exam testing. Even though performance has improved as applicants have become more familiar with the MPT format and review courses have adapted their curriculum accordingly, there is a risk that a lower exam passage rate could

be an unintended consequence of adding a second MPT question, in which case further discussion about this change to the exam may be necessary.

**Essay/MEE**

Although the National Conference of Bar Examiners (NCBE) drafts and markets essay questions for use by testing jurisdictions (called the Multistate Essay Exam, or MEE), Oregon has not used MEE questions to date. Instead, the Oregon Board of Bar Examiners drafts and grades its own essay questions. Subject areas for the questions come from a list of subjects found in Rule for Admission 5.15. There are more subjects listed in the rule than questions needed for an exam, such that applicants do not know which subjects will be tested on any given exam administration. Only four of the potential subjects listed in the rule specify that they are Oregon-specific. As a result, there is overlap between many of the non-Oregon essay subjects and those subjects tested on the MBE.

Proposed Oregon essay questions go through several drafts as they are discussed at successive meetings of the BBX leading up to the exam. In addition, after an exam administration but before grading, the BBX circulates the essay questions and model answers to faculty at the three Oregon law schools and solicits comment. Faculty input is taken into account before the BBX adjusts and applies the final grading standards to the answers during the grading session.

The task force explored whether Oregon should consider using the MEE questions, and discontinue drafting its own essay questions. Reasons to use the MEE questions include their development by national experts, the substantial vetting of the questions by the NCBE, and the time and resources that could be saved if the BBX no longer was responsible for drafting essays. (The BBX would still be responsible for grading the answers to the MEE questions.) On the other hand, the number of potential MEE subjects is not as large as the subject list in Oregon Rule for Admission 5.15, and the MEE questions would not be written on Oregon-specific subjects.

Ultimately, the task force concluded that the benefits of using the MEE questions in Oregon outweigh any advantage from the "home grown" questions, and recommended that Oregon begin to utilize the MEE. In addition to the benefits mentioned above, there is potential for the overall quality of essay answers to improve over time as applicants focus their attention on the smaller number of subject areas covered by the MEE, rather than spreading study time thin over the larger number of subjects presently covered by the Oregon admissions rule.

Input from the Board of Bar Examiners regarding the recommendation to move to the MEE is favorable, although there are details that must be worked out regarding how the board will phase in this change to the bar exam. Ample notice must be given to the law schools and their students, in part because there are differences between the list of potential essay subjects currently used by the Board of Bar Examiners and those used by the MEE drafters, and students presently in Oregon law schools may have structured their

courses of study with the Oregon list in mind. The BBX also will need to participate in MEE training offered by the NCBE, and determine whether to direct applicants to answer one or more MEE questions by applying Oregon law. Whatever is done on an interim basis to phase in the use of MEE questions, it is anticipated that the change would be complete by the time students entering law school in the fall of 2008 are ready to take the Oregon bar examination in 2011.

## Part 5 – Weighting of exam components

### Present weight allocation

Presently, the various components of the Oregon bar examination are weighted for grading purposes as follows: MBE = 50%; nine essay questions = 37.5%; one MPT question = 12.5%. The task force discussed whether this allocation should be adjusted, perhaps placing less emphasis on the multiple choice MBE, and more on those components that emphasis writing (the essays) and performance testing (the MPT).

The task force gathered information from other jurisdictions regarding how exam components are weighted there. The task force also heard from Dr. Susan Case, Director of Testing at the NCBE. She opined and has written that a reduction in the weight given to the MBE below 50% makes for a statistically less valid and less reliable examination. Furthermore, the fact that the MBE takes up one day of a two day examination makes it hard to justify any significant reduction in the weight given to the MBE.

Adjustment to the weighting of the essay and MPT portions of the exam would be required if a second MPT question was added for each exam administration. Presently, one full day of the exam is spent on nine essay questions and one MPT question. A second MPT question would, of necessity, require a reduction in the number of essays, unless the overall length of the exam is expanded beyond two days. The task force does not recommend such an expansion. The time presently allocated to MPT and essay questions suggests that adding a second MPT question should be accompanied by a reduction of three essay questions. The second exam day, then, would consist of six essays and two MPT questions. (*See*, discussion above.)

Ultimately, the task force decided to recommend the following weight allocation, based on the assumption that a second MPT question will be added to the bar examination and that the number of essay questions will be reduced from nine to six:

MBE (multiple choice) = 50%
MEE (essay questions) = 30%
MPT (performance test) = 20%

## Part 6 – Scoring of exam

### Present scoring methodology

An applicant's overall score on an Oregon bar examination is a combination of scores for each exam component blended together in a formula computed by the BBX statistician. Raw scores are converted to standardized scaled scores, with the overall pass line set at 65.00 on a scale of 0 to 100. It is not necessary in Oregon that an applicant achieve a passing score on each testing component. An applicant who does quite poorly on the MBE, for example, can make up for that with a superior performance on the essays and MPT.

Although the NCBE grades the multiple choice MBE for the jurisdictions using that test, it is up to each jurisdiction to set its own passing or "cut" score for the MBE. Jurisdictions use cut scores ranging from 130 to 150. For many years, Oregon has used 142 as its MBE cut score (eventually standardized to the 65.00 scale referred to above). This was based on a determination of a prior Board of Bar Examiners that 142 was the score necessary to demonstrate minimum competence on the MBE topics.

Regarding the essay portion of the exam, each bar examiner sets his or her own grading scale for the essay question he or she drafted. The examiner also sets a preliminary pass line for the question, based on his or her assessment of what raw score an applicant must attain to demonstrate minimum competence on the subject tested. The full board then has input before the final pass line for each question is set. (Again, raw essay scores are then standardized to the 65.00 scale.)

MPT questions are graded on a 0-6 scale, and then standardized to the 65.00 scale.

In Oregon, pass rates for the bar exam have of course varied over the years, and the rates particularly differ when comparing first time test-takers to repeat takers, or when comparing the results from a February exam administration (when a higher percentage of applicants are repeat test-takers) to a July exam administration. In round numbers, however, pass rates have ranged from 58% to 75% in the last ten years. As an overall average during this period, 69% of applicants passed and 31% failed.

The task force considered whether Oregon sets too high a standard by using a 142 cut score for the MBE. Nation-wide statistics over the last five years indicate that only 53% of all test-takers achieved a scaled score of 142 or higher. This struck some members of the task force as a particularly low number. For that matter, Oregon's historic pass rate (see percentages above) struck these task force members as particularly low and not consistent with the input from the Oregon law school deans who suggested that only a very small percentage (approximately 5%) of their students are under-performers. It was noted that a substantially higher percentage (estimated at 90%) of graduates from medical school pass their board exams and become licensed physicians. Finally, the task force

noted that students are graduating from law school with substantial, even oppressive, debt from student loans. A failure to pass the bar exam has drastic consequences for these graduates. While this factor alone is insufficient reason to adjust the bar examination pass rate, it provides motivation to ensure that the bar exam is not an unreasonably or arbitrarily difficult obstacle to the pursuit of a career in the law in Oregon.

After substantial and spirited discussion, the task force concluded that the 142 MBE cut score is somewhat of an arbitrary number and may be too high as a measure of minimum competence. However, establishing a different number for a cut score that would be less arbitrary will require a more extensive, statistically-based study using experts in the field. Such a study is beyond the capabilities of the task force. Accordingly, the task force recommends that the Supreme Court, in consultation with the Board of Bar Examiners and other interested groups, and after review of budget considerations, commission a standard-setting study to determine an appropriate MBE cut score in Oregon. The task force notes that such a study has been done in one or more other jurisdictions such that Oregon may not have to "reinvent the wheel" in this process.

The task force further suggests that, as part of this standard-setting study, the study group investigate whether there is a statistically significant difference in the performance of applicants on each of the three component parts (MBE, MPT, essay) of the bar exam. If, for example, a significantly smaller percentage of applicants "pass" the MBE in comparison to performance on the essay or MPT portions of the exam, that disparity may inform the discussion about where to set the MBE cut score.

## Part 7 - Recommendations

In summary, the task force makes the following recommendations:

1. Oregon should continue to utilize the multiple choice component of the exam (the MBE), weighted at 50% of an applicant's total exam grade.

2. Oregon should utilize the Multistate Essay questions (the MEE) drafted by the National Conference of Bar Examiners, eliminating the need for the Oregon Board of Bar Examiners to draft its own essay questions. The task force would leave it to the BBX and ultimately the Oregon Supreme Court to determine how best to phase in use of the MEE, the timetable in which to do so, and whether to instruct applicants to answer one or more of the MEE questions using Oregon law.

3. The number of essay/MEE questions presented in each bar examination should be reduced from nine to six, with this portion of the exam weighted at 30% of an applicant's total exam grade.

4. Oregon should continue to use the Multistate Performance Test (the MPT), but use two MPT questions for each exam instead of one. The two MPT questions should be weighted at 20% of an applicant's total exam grade.

5. The Supreme Court, in consultation with the Board of Bar Examiners and other interested groups, should commission a standard-setting study to determine the appropriate cut score for the MBE in Oregon.

6. The changes to the Oregon bar examination recommended above, including any change to the MBE cut score, be ready for implementation in 2011.

The task force appreciated the opportunity to explore the various aspects of the bar exam and admission practices in Oregon, which are vitally important to the protection of consumers of legal services in this state. The task force will follow with great interest the future deliberations of its recommendations by the Board of Bar Examiners, the Board of Governors and the Oregon Supreme Court.

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