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THE NEW LAWYER SUPPLEMENT

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Is Two as good as Three?

By Don J. DeBenedictis

Even for top-flight law graduates and lawyers, making it through California's three-day-long bar exam is exhausting.

"It was horrible," said Robert Anderson IV, a professor at Pepperdine University School of Law.

Anderson - who has a law degree from New York University, a doctorate from Stanford University and now teaches a couple of subjects on the bar exam - said he remembers 13 years ago "how punishing it was to go back that third day."

But what if it didn't have to be? What if it were only two days long, as the bar exam is in most states?

That's the question right now before the State Bar's Committee of Bar Examiners: whether to lop off that last day of testing.

Currently, the California exam comprises six one-hour essay questions and two three-hour performance-test questions, plus the national multiple-choice test called the Multistate Bar Exam, or MBE.

The proposed restructuring of the test would get rid of one essay question and one performance test and trim the other performance test to 90 minutes. The remaining five essays and one shortened performance test would take up one exam day and the MBE would fill the second.

The committee could decide to move forward on the plan as soon as next month. If they do, the proposal next would go before the bar's governing Board of Trustees.

What's in it for the State Bar? Efficiency, according to Gayle E. Murphy, the bar's director of admissions.

"Efficiency is the watchword," she said. "It would be a more efficient exam if you get essentially the same results."

Yet there are those inside and outside legal education who think that can't be true, that you wouldn't get the same results. "It would make the exam less valid," said Dean E. Barbieri, formerly the State Bar's director of examinations and now dean of John F. Kennedy University College of Law in Pleasant Hill.

Opponents say California needs a very rigorous exam because of its many law schools without American Bar Association accreditation. They worry a revamped and shortened test would undervalue important skills such as writing, analysis and mental endurance in favor of fact memorization, all just to save money and bother.

"It would really reduce the scope of the exam," said Mario W. Mainero, who teaches Chapman University law students how to pass the bar.

But numerous studies by the educational statistics experts known as psychometricians, for both the State Bar and the National Conference of Bar Examiners, strongly indicate that pretty much the same people would pass and fail a two-day exam as do the three-day exam.

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For a December 2011 report, bar psychometric consultants Stephen P. Klein and Roger Bolus analyzed assorted variations of bar exam length and structure, using data from 10 years of California test results. They calculated that the current three-day exam and the proposed two-day exam would produce nearly identical "score reliability" and "pass/fail consistency" and would do so irrespective of the test-takers' gender or ethnicity.

"In short, California can implement a two day exam in a way that improves test quality, maintains existing pass/fail standards and does so without making it more difficult for minority applicants to pass," they concluded.

Trimming the exam by a third would also save "a significant amount of money" on hall rentals, proctors, graders and other expenses, Murphy said. And since applicant fees pay all exam costs, those fees could be held in check longer.

If all that's true, what's the point of clinging to the longer test, asked UCI School of Law Dean Erwin Chemerinsky. "Why put people through an additional day if it's not going to make any difference if they pass or not?" he said.

Nationally, the only states using a three-day exam besides California are South Carolina and Louisiana, according to the national conference. Six states have a 2½/2-day test. The other 41 states and the District of Columbia get it done in just two days.

Some lawyers who've taken both California's exam and a two-day exam elsewhere say the third day has scant value.

Like UCI's dean, Olivia G. St. Clair said lawyers in states with short tests are just as competent as California lawyers. A securities associate at Steptoe & Johnson LLP in Chicago, St. Clair passed Illinois' two-day exam in February 2010 and California's exam in July that year. "To me, it's immaterial to the quality of the profession if it's a two-day or a three-day exam."

Todd L. Friedman passed Oregon's two-day exam in 2011 and California's last July and now is a corporate associate at Stoel Rives LLP in Portland. To him, the third day of testing "had more to do with stamina than with preparation," he said. "I'm not sure that's the right basis" for evaluating would-be lawyers.

Former exam director Barbieri, who said a truncated test would be "less valid," agreed endurance is not "a core competency that needs to be tested."

But he does believe California should have a very difficult exam. "The length and breadth of the test are important," he said, "because so many people are on the cusp" between passing and failing.

Many people consider California's the most difficult bar exam. Length is one reason. Another is that its essay questions can cover any of 13 subjects plus chunks of the Uniform Commercial Code. The national multiple-choice MBE covers just six subjects, though it will add a seventh, civil procedure, in 2015.

According to most experts, though, the main reason California's exam is the hardest isn't the length or breadth but its required passing score.

An applicant needs to score 1,440 points to pass in California. Translated to the 200-point scoring scale used by the National Conference of Bar Examiners, that equals a "cut score" of 144. The only state with a higher cut score is Delaware, at 145. The national average is in the mid-130s.

Pepperdine's Anderson recently posted a blog item ranking state bar exams on difficulty, and he put California on top based strictly on its cut score, he said. He had to leave Delaware off his tabulation because of too few data points.

A shortened California bar exam would still be difficult, proponents say, because its cut score would stay the same. That's a logical leap some opponents "have difficulty getting their arms around," Murphy said.

But scoring isn't the whole story, according to Barbieri and some other critics. What also matters, he said, are the "core competencies" the exam tests, such as

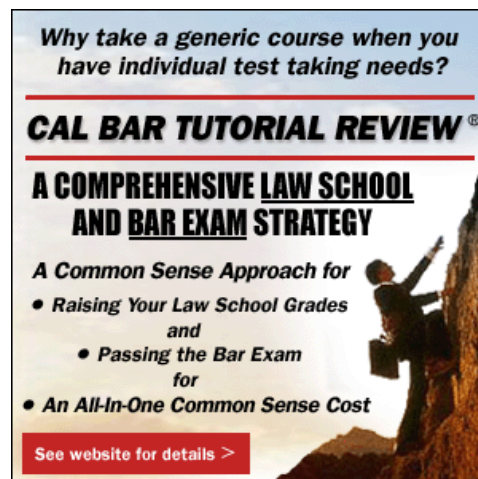


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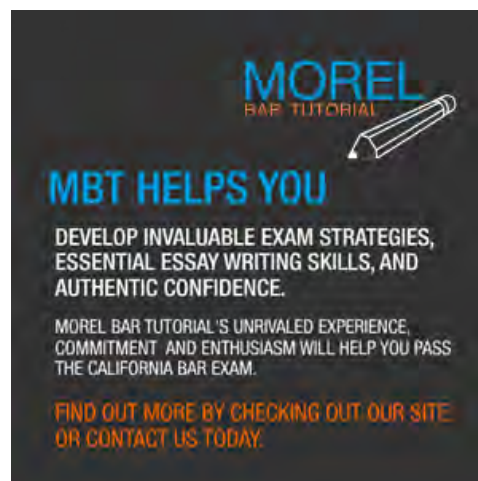
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(Image of a pencil)

writing and analytical skills - what psychometricians would include within the exam's "validity."

The biggest complaint these days from exam graders, law school professors, lawyers, judges and even clients is that young lawyers can't write, according to Barbieri. "They don't have the ability to express themselves in writing as they used to," he said.

For that reason, he argued the bar shouldn't abandon a full day of essay and performance tests. The change would have applicants spend six fewer hours analyzing and writing.

On the other hand, the number of essay-style questions would drop only from the current eight down to six, noted former Los Angeles Assistant District Attorney Patrick R. Dixon, a Committee of Bar Examiners veteran who left in September. "We'd still have 6½ hours of writing," he said.

With a full day of five essays and one performance test, "you could hardly ignore the importance of writing," said Erica Moeser, the head of the national conference.

But even that writing would be undervalued in the proposed exam structure, Barbieri and others said.

Currently, the six essay and two performance tests count for 65 percent of each applicant's score, while the MBE counts for 35 percent. Under the pending proposal, the writing and multiple-choice sections each would count for 50 percent.

That increased weighting of multiple-choice questions would increase the reliability of exam results from test to test, experts said.

Barbieri fears it also would short the testing of analytical skills. Moeser countered that MBE questions do demand analysis, not just facts.

But Barbieri and law school bar-exam professors like Chapman's Mainero and the University of San Francisco's Rodney O. Fong have a greater worry: What message does boosting the value of multiple choice questions over essays send to law schools?

"Would more law school professors use more multiple-choice tests?" Fong asked.

Similarly, opponents of change ask whether California's performance-test questions should be trimmed 75 percent at a time law schools and the State Bar itself are hunting for ways to improve graduates' practical lawyering skills.

Moeser countered that a 90-minute performance test, such as those her organization offers to states, is just as informative as a three-hour test.

After all, she said, "all a bar exam is in any event is a sampling of knowledge" at a particular time. Therefore, a properly constructed exam can be just as reliable and just as valid at two days as at three, she said.

In the final analysis, however, psychometrics, score weights and broader messages may not be the determinative factors. Changing California's bar exam is an emotional issue, said Pasadena lawyer John P. McNicholas III, who stepped down last year as chair of the Committee of Bar Examiners.

McNicholas used to be an opponent of shortening the exam but he was persuaded by the statistical studies. That won't work for everybody, he said.

"I hear a lot of people say, 'I took a three-day test, so they should too.'"

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