

**REPORT AND RECOMMENDATION OF THE  
ADVISORY COMMITTEE TO EXPLORE THE FEASIBILITY OF  
MARYLAND'S ADOPTION OF THE UNIFORM BAR EXAMINATION  
TO THE COURT OF APPEALS OF MARYLAND**

August 31, 2017

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## **I. Introduction**

In October of 2016, Chief Judge Mary Ellen Barbera of the Court of Appeals of Maryland appointed the Advisory Committee to Explore the Feasibility of Maryland's Adoption of the Uniform Bar Examination ("the Advisory Committee" or "the Committee").<sup>1</sup> The Advisory Committee was tasked with examining the Uniform Bar Examination ("the UBE") and making a recommendation as to whether Maryland should adopt the UBE and if so, whether a Maryland component should be incorporated.

The Advisory Committee formed five subcommittees to study the issues of portability, quality control, scoring, subject testing, and a Maryland component. In addition to meetings held by the subcommittees, the full Advisory Committee held four formal meetings. The Advisory Committee took a comprehensive approach to their study, which included reviewing materials from the National Conference of Bar Examiners ("NCBE") and reports from other jurisdictions that have adopted the UBE; interviewing by phone as many jurisdictions as possible that have not adopted the UBE;<sup>2</sup> meeting with Erica Moeser, then president and CEO of the NCBE; and employing psychometrician, Roger Bolus, Ph.D., to evaluate whether any disparate effects on examinees could result from adoption of the UBE.

A press release announcing a public hearing was issued in March of 2017 and sent to several media outlets, legal groups, and the Maryland State Bar Association. Additionally, letters were sent to the local and specialty bar organizations inviting them to testify at the hearing or submit written testimony. The public hearing was held on April 13, 2017. The Advisory Committee now presents its recommendation to the Court of Appeals.

## **II. Summary of Recommendation**

At the Advisory Committee's final meeting on May 17, 2017, Committee members voted (11-1) to recommend adoption of the UBE to the Court of Appeals. The consensus of the Committee was that the benefits of a uniform, portable, exam were significant, and outweighed all disadvantages including the absence of a Maryland-specific component—which can be addressed through a well-designed Maryland law supplement. The Committee has explored possible disadvantages of adopting the UBE, and believes that the disadvantages can be addressed and mitigated.

The Advisory Committee further recommends adoption of a Maryland law supplement to the examination. The Committee has investigated various options for training or testing examinees on Maryland law. Our analysis of these options is included in this report.

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<sup>1</sup> Jonathan A. Azrael, Esq., on behalf of the State Board of Law Examiners, wrote a letter on July 18, 2016 to Chief Judge Mary Ellen Barbera requesting that the Court of Appeals consider establishing a work group to study whether Maryland should adopt the Uniform Bar Examination.

<sup>2</sup> JaCina N. Stanton, Esq. conducted most of these interviews.

Finally, this report addresses some additional concerns should the Court decide to adopt the Uniform Bar Exam.

### **III. Maryland Bar Examination and the Uniform Bar Examination**

#### **A. Maryland Bar Examination**

Maryland's current bar exam consists of the following components: (1) the Multistate Performance Test ("MPT"), designed to test practical and lawyering skills; (2) a Maryland essay component, a ten question essay exam testing different areas of Maryland law; and (3) the Multistate Bar Examination ("MBE") a 200-question multiple-choice test. The Maryland exam allocates 58 percent weight to the Maryland essay component, 8.7 percent to the MPT (total weight of 67 percent for Written Test), and 33 percent to the MBE. The MPT and MBE are published by the NCBE. The State Board of Law Examiners ("SBLE") prepares the essay component, which includes at least one essay question on professional responsibility.

The purpose of the Maryland Bar Exam is set forth in Maryland Rule 19-206(b) which states that:

The purpose of the general bar examination is to enable applicants to demonstrate their capacity to achieve mastery of foundational legal doctrines, proficiency in fundamental legal skills, and competence in applying both to solve legal problems consistent with the highest ethical standards. It is the policy of the Court that no quota of successful applicants be set but that each applicant be judged for fitness to be a member of the Bar as demonstrated by the examination answers.

The consensus of the Committee is that this Rule means that the Maryland General Bar Examination seeks to separate those who have the minimum competence necessary to practice law in Maryland from those who do not.<sup>3</sup> Currently, applicants passing the Maryland Bar Exam are eligible to apply for admission in Maryland alone. To practice in another state, they must either pass that state's bar exam or, if there is reciprocity between the states, petition to waive in to the reciprocating state's bar.<sup>4</sup>

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<sup>3</sup> A similar view was expressed by the New York Advisory Committee on the Uniform Bar Examination in its final report: "The Committee views the bar examination essentially as a consumer protection measure intended to ensure, to the extent possible, that only those who have demonstrated minimum competence are permitted to bear the title of 'attorney-at-law' and to represent clients." NEW YORK ADVISORY COMMITTEE ON THE UNIFORM BAR EXAMINATION, FINAL REPORT TO CHIEF JUDGE JONATHAN LIPPMAN AND TO THE COURT OF APPEALS 34 (2015) [hereinafter "NEW YORK FINAL REPORT"].

<sup>4</sup> Maryland does not have reciprocity with any other state.

## **B. Uniform Bar Examination**

The Uniform Bar Exam is a uniformly administered, graded, and scored exam prepared by the National Conference of Bar Examiners. The UBE consists of three components: (1) the MBE; (2) the MPT; and (3) the Multistate Essay Examination (“MEE”). The weighting of the UBE, however, differs from that on the Maryland bar exam in that 50 percent is allocated to 200 MBE questions, 30 percent to the MEE’s six essay questions, and 20 percent to the MPT portion, which consists of two questions.

Erica Moeser, then president and CEO of the NCBE, gave a presentation to the Advisory Committee in which she explained the rigorous vetting process involved in the development of questions on the UBE. Ms. Moeser shared that writing UBE questions involves “a two year period for quality control.” Committees of law school professors draft questions on topics for which they have expertise. In addition to the professors, there is a “test editor/lawyer” on each committee. All questions are sent to “external reviewers for validity and fairness” and “pre-tests” are performed, the results of which are reviewed numerous times. The MPT has a drafting and editorial process that can take months. The MEE and the MPT questions “are reviewed by jurisdictions before each exam.” Ms. Moeser stated that one of the goals in drafting the UBE is to have “a test that would be well-crafted and thoughtfully crafted and that has far more quality control than most jurisdictions can bring to their local tests.”

The UBE has been adopted by 28 jurisdictions, including the District of Columbia and the Virgin Islands.

## **IV. Investigation and Analysis**

### **A. Adoption of the Uniform Bar Exam would benefit students, employers, and the general public.**

#### ***1. Benefit for Maryland law students and examinees***

One of the principal benefits of the UBE is so-called “portability,” that is, an individual’s score can be used to apply for admission to the bar of any UBE jurisdiction.<sup>5</sup>

Many examinees of the Maryland Bar exam are still searching for a job at the time they take the exam. A portable UBE score would allow the examinee to search for jobs outside the State of Maryland and accept those jobs without the prospect of taking a second bar exam—on its surface a self-evident improvement over our current system. Similarly, it would make it easier for individuals who took the UBE somewhere else to apply for employment here, thus enlarging the pool of potential applicants for Maryland jobs. The Committee sought to evaluate the

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<sup>5</sup> As discussed *infra*, each jurisdiction retains the freedom to set their passing score and other admission requirements, jurisdiction-specific law components, and the time available to transfer a score. Currently, this time ranges from two to five years.

attractiveness of this feature, and, although hard data proved somewhat elusive, we found supporting evidence.

The hard data came primarily from the National Conference of Bar Examiners. The following table shows UBE scores obtained and transferred over the last six years:

<b>Year</b>	<b>No. of UBE Exam Scores</b>	<b>No. of UBE Scores Transferred</b>
2011	1,453	54
2012	4,105	456
2013	6,071	1,013
2014	7,641	1,036
2015	7,537	957
2016	19,120	1,708

See NCBE, PRESENTATION TO THE ADVISORY COMMITTEE 13 (2017), attached as Appendix 1. We are mindful that a “transferred” score only reflects a request to the NCBE to submit the score to another jurisdiction—and not necessarily a successful admission, or that the candidate actually practiced in another state. Nevertheless, the significance of this data is that it shows that each year, a meaningful (but not large) percentage of UBE examinees have requested score transfers, and that the number is growing each year as more jurisdictions adopt the UBE.

Among the Committee members, a large majority believed strongly, based on their own experience, that the portability feature will be beneficial to young lawyers and the State in general. Judge Christopher Kehoe<sup>6</sup> expressed that many of his past law clerks have been interested in post-clerkship employment in neighboring jurisdictions as well as in Maryland. He believes that they would have had better experiences if their scores had been portable. Judge Sherrie Bailey concurred. Both Dean Donald Tobin and Dean Ronald Weich expressed the view that law students in general have a strong preference towards the UBE because they are so uncertain about where they will be living. Dean Tobin also opined that adoption of the UBE would likely have a positive effect on the rankings of Maryland law schools, as it would enhance employability of their students.

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<sup>6</sup> Judge Christopher B. Kehoe served on the Maryland State Board of Law Examiners for a number of years.

The Advisory Committee also solicited opinions from law students and young lawyers throughout the process, and there was a consensus that portability was a real and desired benefit. Portability can also benefit an already licensed attorney who is required to transfer to a different state for personal or employment reasons. The Advisory Committee heard from various attorneys who described having to move from one state to another. This often occurred because of a change in a spouse's employment—even just a change from D.C. to Maryland. One such example was given at the public hearing in testimony by Chris Jennison, Esq., who described moving to Maryland as a result of his wife's employment. Judge Bailey expressed similar concern based on the past experiences of her law clerks.

The ability to accept scores from other UBE jurisdictions may also benefit Maryland employers looking for competitive recruits. Committee member, Andrew Levy, a partner at Brown Goldstein and Levy, LLP, described examples of hiring and recruitment problems encountered in his law firm's recent expansion. Mr. Levy explained that many qualified out-of-state lawyers, who were interested in joining the firm, could not be hired because they would have first been required to sit for a second bar examination to practice in Maryland.

Finally, the Committee views the portability of the UBE as beneficial to the legal profession as a whole, as well as to the general public, in that highly qualified applicants are more likely to apply for—and accept jobs as—lawyers in Maryland. Lawyers today are increasingly expected to engage in multi-jurisdictional transactions and litigation, particularly lawyers practicing in areas where cross-border issues frequently arise, such as in the greater Washington, D.C. metropolitan area. There is both hard data and ample anecdotal evidence indicating that applicants prefer to take the bar exam in a UBE jurisdiction. This preference among applicants can be seen in the substantial drop in the number of Maryland examinees following the adoption of the UBE in neighboring Washington, D.C. Accounting for some of the decrease in the number of Maryland examinees are D.C. law students who previously would have chosen to take the Maryland exam.<sup>7</sup>

**2. *The UBE's essay examination is reliable and similar to Maryland's current essay examination.***

The Committee compared the subject matter of the current Maryland bar exam and the UBE—finding that both draw essay questions from a group of topics, many of which overlap. The following table shows the subjects tested by both examinations, as well as the subjects unique to either exam:

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<sup>7</sup> Renee Y. DeVigne, Esq., George Washington University of Law School, Dean of Student Academic Development, testified extensively at the public hearing, supporting this and other points.



<b>Subjects covered by both the UBE (MEE) and Maryland's exam</b>
Business Association /Agency Commercial Transactions Constitutional Law Contracts Criminal Law and Procedure Evidence Family Law Real Property Torts
<b>UBE Only</b>
Conflict of Laws Federal Civil Procedure Trusts and Estates
<b>Maryland Only</b>
Maryland Civil Procedure Professional Responsibility

As this table demonstrates, there is significant overlap of the subject matter on the UBE and Maryland essay examination. But if the UBE were adopted, students must prepare for three additional subject areas, and, without a Maryland supplement, there would be no testing on Maryland Civil Procedure or Professional Responsibility.

The Advisory Committee has compared essay questions from the MEE portion of the UBE and Maryland's current essay examination. Other than the above-noted differences in the subjects covered on each exam, the UBE essay questions are similar in form and substance to the Maryland essay examination questions. Maryland's State Board of Law Examiners takes great pride in its process of developing thoughtful essay questions for the current Maryland examination. The adoption of the UBE in Maryland would delegate this responsibility to the NCBE and its committees of professors and subject matter experts. Despite this delegation of responsibility, however, adoption of the UBE would not result in a significant change in the format or the quality of the essay questions administered.

The Committee believes that the UBE performs as well or better than Maryland's current exam under "reliability" and "validity" analyses, which are technical measures in statistics and testing science. Reliability is a concept of statistics that measures whether a test has random error

or will produce similar results on different testing options. The reliability of Maryland's examination and the UBE was investigated by Committee member, Jeffrey Shipley, who consulted with expert psychometrician, Roger Bolus, Ph.D. Dr. Bolus relayed that it is generally accepted in the field of statistics and testing that multiple-choice examinations are more reliable than essay testing. Accordingly, the UBE, which allocates 50 percent of the score to the 200-question multiple-choice MBE, is statistically more reliable than the current Maryland exam which allocates 58 percent of the score to ten essay questions.

## **B. Concerns about disparate impact of UBE**

One frequent concern regarding adoption of the UBE in non-UBE jurisdictions is the test's reliance on multiple-choice questions for 50 percent of the total score. Maryland allocates only 33 percent of the score to multiple-choice questions. Although there is currently no scholarly consensus on this issue, there is some evidence that female applicants perform better on essay examinations than on multiple-choice examinations. *See* ROGER BOLUS, RELIABILITY ESTIMATES FOR THE MARYLAND BAR EXAMINATION: COMPARISON UNDER ALTERNATIVE FORMATS 12 (2017), attached as Appendix 2. The question of whether minorities also perform better on essay questions than on multiple-choice questions was also raised. There is not sufficient data to determine impact on racial minorities. The primary reason for this lack of data is that neither the NCBE nor testing jurisdictions collect data on race, and there have not been wide-scale studies completed. There are, however, ongoing studies in some jurisdictions to determine whether the UBE and bar examinations in general have disparate passage rates for minority applicants. *See, e.g.*, NEW YORK FINAL REPORT 4. The Advisory Committee recommends that the SBLE continue to monitor these studies, and report to the Court of Appeals.

Maryland maintains records on test performance by gender. Accordingly, the Advisory Committee asked Dr. Bolus to perform a regression analysis to determine whether a shift in weighting of the examination could have a disproportionate impact on students by gender. He took existing data on passage rates and scores from previous years and analyzed whether a reweighting to 50 percent multiple-choice would affect passage rates. *See supra* BOLUS, attached as Appendix 2. Dr. Bolus concluded that conversion likely would lower the passage rate of females, indicating that "traditionally men perform slightly better on the MBE than women, while the opposite is true on the written portion of bar exams." *Id.* at 12. The Committee estimates the gender gap to be approximately three percent.<sup>8</sup> This exhibit is titled Summary of Simulated Decision Inconsistencies: 2011 to 2016.<sup>9</sup> *See also* NEW YORK FINAL REPORT 60 ("[W]omen score slightly lower than men on multiple choice questions . . .").

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<sup>8</sup> *See* JUDGE CHRISTOPHER KEHOE ET AL, REPORT RE: A POSSIBLE SOLUTION TO DISPARATE GENDER EFFECTS RESULTING FROM CHANGING TO THE UBE EXAMINATION (2017), Exhibit A, attached as Appendix 3.

<sup>9</sup> For example, in 2011, 799 women took the exam; 26 of them would, under the simulated UBE, go from initial passage to initial failing (3%). In contrast, in the same year, 728 men took the exam; 11 of them would go from initial passage to initial failing (1.5%). *See supra* KEHOE ET AL Exhibit A, attached as Appendix 3.

The Majority of the Advisory Committee recommends adoption of the UBE notwithstanding the increased weight given to multiple-choice questions, because of its significant other benefits. The Committee is also aware that any disadvantage will be mitigated by the regrade process that is part of the Board's normal procedure. Under this procedure, the Board takes a second look at any essays that were close to, but did not, receive a passing score. The general practice of the SBLE has been to increase the essay scores as a result of this process. Assuming, as Dr. Bolus suggested, that women score better on essay exams, the regrading would decrease any disparate effect. The calculations used regarding disparate impact did not take into account the regrading process.

To mitigate against any actual disparate impact, a subcommittee (Judge Kehoe, Mr. Shipley, Dean Weich) developed a proposal for a temporary "dual path," allowing the scores for bar examinees who fail under the UBE scoring to be recalculated using Maryland's traditional 2:1 weighting.<sup>10</sup> This reweighting would be designed to catch any student who would have passed under our existing model and treat their scores as passing despite our adoption of the UBE. This—perhaps temporary solution—would allow further study of the impact on examinees.<sup>11</sup>

**C. Adoption of the Uniform Bar Examination presents few other disadvantages.**

**1. *Maryland would retain control over quality of applicants***

As described above, adoption of the UBE would remove the responsibility to develop essay questions from the SBLE. Notably, though, Maryland has already delegated the design of the other portions of the exam (multiple-choice and "practice" portions) to the NCBE.

Importantly, Maryland would retain the ability to set the passing score. Passing scores vary greatly among UBE states, with the vast majority of states using a cut score of 266–270. *See Minimum Passing UBE Score by Jurisdiction*, NAT.'L CONFERENCE OF BAR EXAMINERS, <http://www.ncbex.org/exams/ube/score-portability/minimum-scores/> (last visited Aug. 29, 2017), attached as Appendix 5. Many mid-Atlantic and Northeastern states—D.C., New Jersey, Connecticut, and New York—have selected a score of 266.

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<sup>10</sup> This proposal was developed by Judge Kehoe, Mr. Shipley, and Dean Weich, who summarize their investigation and analysis in reports dated May 17, 2017 and June 26, 2017, which are attached as Appendices 3 and 4. This dual path proposal was developed after the Committee's final meeting, and, although a number of Committee members agree, no formal vote was taken on the issue.

<sup>11</sup> According to Jeffrey Shipley, the SBLE has the capability to design and implement this "dual path." He reports that the current contract between the NCBE and jurisdictions that administer the UBE does not prohibit a dual path to bar admission. During the study period, the SBLE and Court of Appeals (or its designee) can review local results regarding any ongoing gender gap, as well as national studies.

The Maryland SBLE would also perform the actual grading of the UBE essay examinations, according to a grading rubric supplied by the NCBE. It is important to note that Maryland would also control the “regrading” and (if adopted) dual path grading processes, which provide Maryland significant control in determining whether borderline scores should be admitted.

**2. *Costs for applicants***

Cognizant of the limited resources available to many bar applicants, the Committee considered whether adoption of the UBE would result in increased costs for applicants seeking admission to the Maryland Bar. Jeffrey Shipley advises that Maryland will pay \$114 per applicant for the UBE—compared to the \$80 that it currently pays. He explains, though, that the Board would likely not pass on this increase to the applicants—the application fees are set by the SBLE to be affordable, rather than to cover all expenses.

It is unclear how adoption of the UBE would affect the costs of bar preparation. It is possible that students would have more options for courses or study guides for the UBE, and that competition could result in lower prices.

**3. *Costs for State of Maryland***

The SBLE believes its budget is sufficient to absorb the increased cost described above, and sees no requirement for additional staff usage. As the use of State monies is outside the scope of the Committee’s work, we did not take this cost into consideration.

**4. *There is not substantial evidence to support concerns over market pressures from portability, and such concerns may be seen as protectionist.***

Opponents to the UBE in other states, and some in Maryland, have expressed concern that the UBE would result in increased competition by out-of-state lawyers. The Committee considered whether portability would have a negative effect of “flooding” the market and making job openings more competitive. The Committee was not presented with significant evidence that such flooding has occurred in other jurisdictions. Additionally, Committee members thought such an analysis would be inappropriate, and would amount to “protectionism” for the purpose of keeping qualified attorneys out of the bar to the detriment of the public, and contrary to the stated purpose of the Maryland General Bar Examination as set forth in Maryland Rule 19-206(b).

**D. *A Maryland-law supplement is desirable, and various options exist.***

The Advisory Committee devoted a significant amount of discussion to the value of a Maryland-law component and many questioned its utility. There was concern about imposing additional burdens on applicants by creating a third day of the bar exam. Many Committee members, cognizant of the significant burden on examinees, believe that the Maryland component should not be designed to cause increased burdens or obstacles (and possible failure of the exam). At the same time, many Committee members believed it was important to preserve the testing of Maryland subjects if the UBE is to be adopted. Nevertheless, the Committee discussed whether

any such component should be designed to be similar to the current Maryland exam, which requires considerable memorization of Maryland law, or whether it should be an online program requiring less memorization, and if so, how rigorous it should be.

We appointed a subcommittee, chaired by Judge Bailey, to study this issue. The subcommittee examined and evaluated the various formats utilized by the different states in administering their state law component to the UBE.

The subcommittee supported an online lecture and test format similar to the one currently used by Alabama's Board of Law Examiners. The Alabama course may be accessed online by applicants who watch the series of interactive lectures and complete "hurdle" multiple-choice questions based upon the information presented in the lecture. These multiple-choice questions must be answered correctly in order for the applicant to proceed through the course. Other states utilize an interactive online course similar to that of Alabama, though each differs in some respects in the format, areas of law covered, the time for completion of the course, and the manner in which course completion is verified.<sup>12</sup> See MARYLAND STATE COMPONENT SUBCOMMITTEE, DISCUSSION AND RECOMMENDATIONS REGARDING THE MD STATE COMPONENT (2017), attached as Appendix 6.

At its final meeting, the majority of the Advisory Committee voted to recommend inclusion of a Maryland component, to be taken online, that would not place an emphasis on memorization, but would ensure that new admittees are exposed to important distinctions and unique aspects of Maryland law.<sup>13</sup>

The Committee recognizes that this project will be quite a challenge and recommends that its creation involve the SBLE, law professors,<sup>14</sup> and practicing lawyers having expertise in particular subject matters.

The Committee's investigation also revealed that some other states purchase exam software for their multiple-choice local component, but we could not learn what other states pay for such software.

Currently, states that have adopted the UBE have taken the following approaches to incorporating a state-law component.

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<sup>12</sup> Arizona and South Carolina have adopted interactive online courses similar to Alabama's for their respective state law components. Hon. Cindy L. Martin, *et al.*, *UBE Jurisdiction-Specific Components: Seven Unique Approaches*, 85 THE BAR EXAMINER 37, 42 (Sept. 2016).

<sup>13</sup> This may be required only of individuals who actually choose to apply for admission in Maryland (not of every Maryland test-taker).

<sup>14</sup> Both Dean Tobin and Dean Weich encourage the use of law professors for such a project.

<b>State</b>	<b>State-law portion</b>
Alabama	Pre-admission component
Alaska	None
Arizona	Pre-admission component
Colorado	None
Connecticut	None
D.C.	Post-admission component
Idaho	Post-admission component
Iowa	None
Kansas	None
Maine	None
Massachusetts	Pre-admission component
Minnesota	None
Missouri	Pre-admission component
Montana	Pre-admission component
Nebraska	None
New Hampshire	Post-admission component
New Jersey	Post-admission component
New Mexico	Pre-admission component
New York	Pre-admission component
North Dakota	None
Oregon	Post-admission component
South Carolina	Pre-admission component
Utah	Post-admission component
Vermont	Post-admission component
Washington	Pre-admission component
West Virginia	Post-admission component
Wyoming	Post-admission component

See *UBE Jurisdiction-Specific Law Component Requirements*, NAT.'L CONFERENCE OF BAR EXAMINERS, <http://www.ncbex.org/exams/ube/score-portability/local-components/> (last visited Aug. 29, 2017).

**E. Other questions related to adoption.**

**1. *Timeline for adoption***

If the Court of Appeals decides to adopt the UBE, it should allow sufficient time for the SBLE, law schools, and potential applicants to adjust to the new exam. The following processes need to be completed: (1) creation of a Maryland-specific online course; (2) monitoring of any new information about disparate impact resulting from administration of the UBE; (3) adjustment by law schools to the new examination; (4) logistical adjustments by the State Board of Law Examiners; and (5) submission to the Rules Committee for the promulgation of amendments to Maryland Rules 19-201, *et. seq.* consistent with the Court's decision. For these reasons, the Advisory Committee recommends that any adoption of the UBE not be implemented before July 2019.

**2. *Passing score***

The Advisory Committee believes the passage score should be comparable to Maryland's current score.

Maryland's current score is roughly scaled as follows (approximately):

<b>Essay (x2)</b>	<b>MBE</b>	<b>Total</b>
135.3 (x2)	135.3	406

A shift to UBE would involve equal weighting of essay and MBE portions:

<b>Essay</b>	<b>MBE</b>	<b>Total</b>
135	135	270

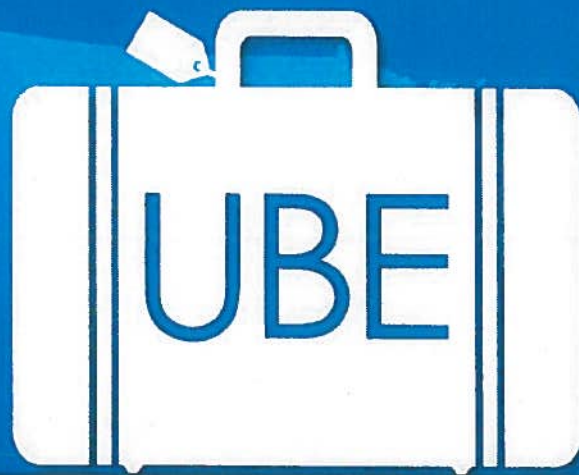
Jurisdictions that have adopted the UBE have set their passing scores between 260 and 280, with the majority of jurisdictions in between 266 and 270. D.C.'s passing score is 266. As previously indicated, the passing scores of UBE jurisdictions are shown on the diagram attached as Appendix 5. See *Minimum Passing UBE Score by Jurisdiction*, NAT.'L CONFERENCE OF BAR EXAMINERS, <http://www.ncbex.org/exams/ube/score-portability/minimum-scores/> (last visited Aug. 29, 2017).

## **V. Closing**

The Committee members wish to thank sincerely Chief Judge Mary Ellen Barbera and the Court of Appeals for the opportunity to study this important issue, and to present this recommendation to the Court. We were pleased with how thought-provoking and in-depth our investigation and discussions proved to be. The Committee also wishes to express its appreciation for the excellent work by JaCina N. Stanton, Esq., our staff counsel. We stand ready to answer questions from the Court, and undertake any additional investigation that the Court desires.



## **Appendix 1**



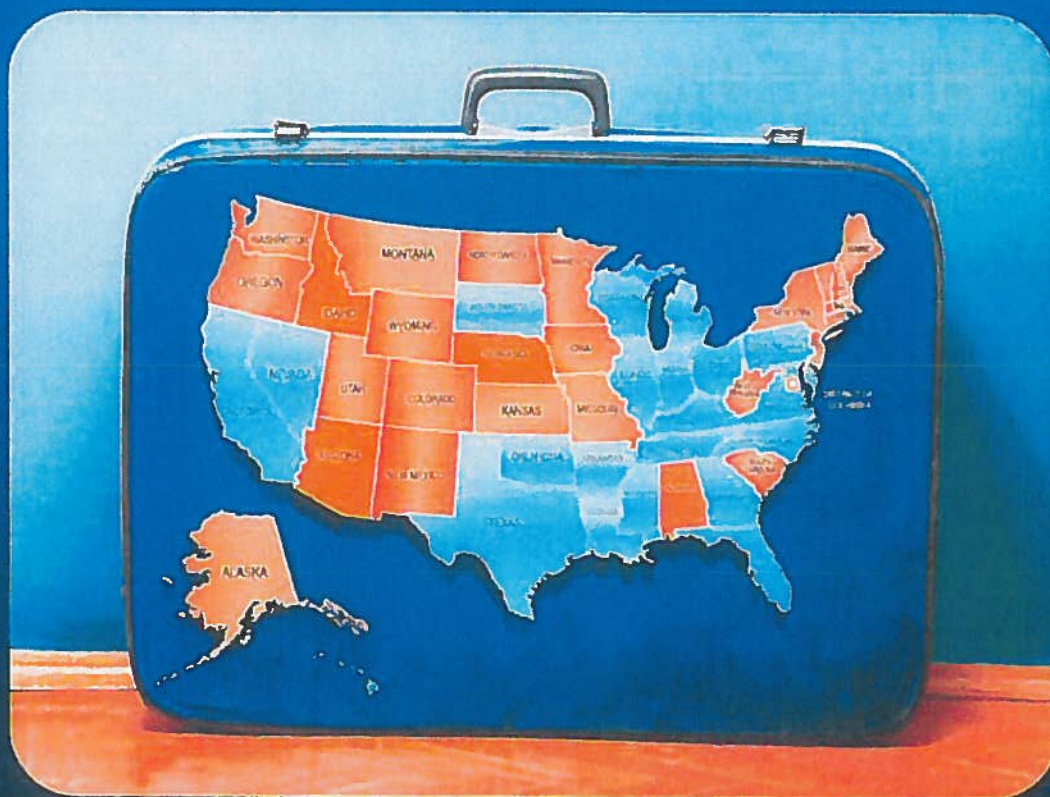
# THE UNIFORM BAR EXAM

March 1, 2017



National Conference of Bar Examiners

Applicants taking the UBE  
earn a portable score



# What is the UBE?

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- It is a uniformly administered, graded, and scored bar examination that results in a PORTABLE SCORE.
- UBE jurisdictions use the same multistate tests to assess the fundamental knowledge and skills needed to begin practice.





# Purpose of the UBE

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The UBE tests knowledge of general principles of law, legal analysis and reasoning, factual analysis, and communication skills.



# UBE Test Components

## Multistate Performance Test (MPT)

Two 90-minute items (3 hours)

**Content:** a simulated case file presented in a realistic setting and calling for the test candidate to demonstrate fundamental lawyering skills regardless of the area of law in which the task arises

## Multistate Essay Examination (MEE)

A common set of six 30-minute essays (3 hours)

**Subjects:** MBE topics plus Business Associations, Conflict of Laws, Family Law, UCC Art. 9 (Sec. Trans.), and Trusts & Estates


## Multistate Bar Examination (MBE)

200-question, multiple-choice exam (6 hours)

**Subjects:** Contracts, Constitutional Law, Criminal Law and Procedure, Evidence, Real Property, Torts, and Civil Procedure

# NCBE Test Development

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- Drafting Committees composed of law school professors from 30+ law schools and lawyers and judges from all over the country who are experts in the subjects
  - Each committee is staffed by a test editor/lawyer from NCBE
  - External reviewers for validity and fairness
  - Questions are pretested before used
  - MEE and MPT questions are reviewed by jurisdictions before each exam
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# UBE Schedule

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## Tuesday

- MPT (2 items, 3 hours)
- MEE (6 essays, 3 hours)

## Wednesday

- MBE A.M. session (3 hours)
  - MBE P.M. session (3 hours)
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# Current Maryland Schedule

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## Tuesday

- A.M. session = 1 MPT and 3 Maryland-drafted essays (3 hours)
- P.M. session = 7 Maryland-drafted essays (3 hours)

## Wednesday

- MBE A.M. session (3 hours)
- MBE P.M. session (3 hours)



# Maryland would

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- Decide eligibility requirements for admission
- Set its own passing score
- Grade the written portion of the exam
- Set the maximum age of incoming UBE scores it will accept
- Make character and fitness decisions
- Require a separate local component if it deems necessary



## Benefits to law students

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- Increases consistency in subjects tested on the bar exam across the country
  - Maximizes their job opportunities—scores that are failing in the testing jurisdiction are transferable to states with lower cut scores
  - Reduces actual costs and opportunity costs of preparing for and taking the bar exam in multiple jurisdictions
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# Benefits to the profession

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- Acknowledges a shared core of legal knowledge and lawyering skills
- Assures a high quality, uniform system of assessment of minimum competence
- Recognizes the reality of multi-jurisdictional or cross-border practice



# Growth of the UBE

Year	# of Jurisdictions Administering the UBE
2011	3
2012	6
2013	11
2014	14
2015	14
2016	20
2017	26*



# UBE Scores — The Data

(as of 2/28/17)

UBE Scores Earned	
2011	1,453
2012	4,105
2013	6,071
2014	7,641
2015	7,537
2016	19,120
<b>TOTAL</b>	<b>45,927</b>

UBE Scores Transferred	
2011	54
2012	456
2013	1,013
2014	1,036
2015	957
2016	1,708
<b>TOTAL</b>	<b>5,224</b>


## State-specific law

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- The UBE does **not** preclude the assessment of state-specific law
  - UBE jurisdictions may undertake the design and administration of their own state-specific components if they so wish
  - This can take many forms: online educational videos and online, open-book testing options are being used in several states
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# What are UBE jurisdictions doing?


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- **No state-specific law component (9):** AK, CO, CT, IA, KS, ME, MN, NE, ND
  - **Post-admission state-specific law component (9):** D.C., ID, NH, NJ, OR, UT, VT, WV, WY
  - **Live course (3):** MT, NM, SC
  - **Online course (3):** AL, AZ, NY
  - **Online open-book MCQ test (3):** MO, NY, WA
- 

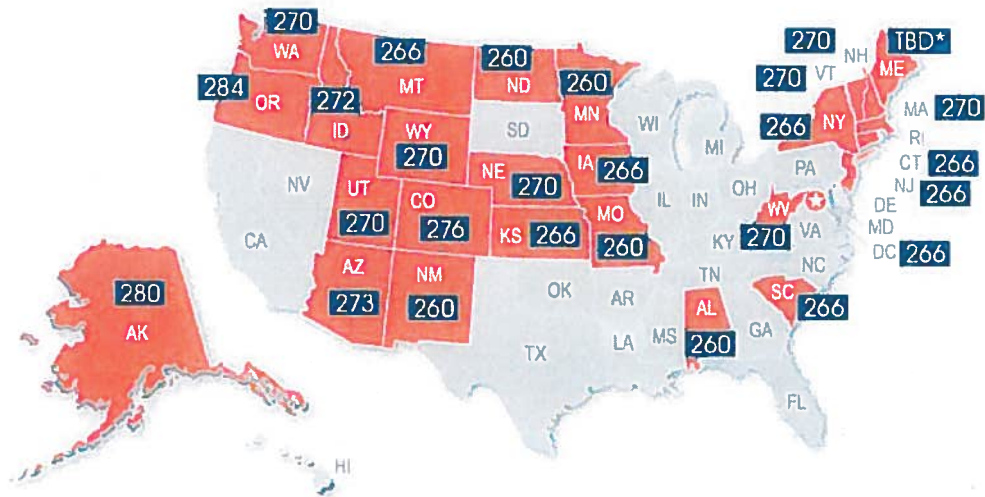


## Does the UBE affect pass rates?

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- No, if a jurisdiction is **scaling its essays to the MBE** prior to adopting the UBE and makes no change to its **passing score** or weighting, there is no reason to expect any change to pass rates.
  - Changes to the applicant pool in a jurisdiction may cause a change, positive or negative, to the pass rate.
- 

# Minimum passing UBE scores



<b>260</b> Alabama Minnesota Missouri New Mexico North Dakota	<b>266</b> Connecticut District of Columbia Iowa Kansas Montana New Jersey New York South Carolina	<b>270</b> Massachusetts Nebraska New Hampshire Utah Vermont Washington West Virginia Wyoming	<b>272</b> Idaho	<b>276</b> Colorado	<b>284</b> Oregon
			<b>273</b> Arizona	<b>280</b> Alaska	

A score that does not meet the minimum passing score in the testing jurisdiction may be portable to another jurisdiction if the score is at or above the level required in the receiving jurisdiction

\*The minimum passing UBE score in Maine has not been determined.



# QUESTIONS?



National Conference of Bar Examiners

## **Appendix 2**



2017

# Reliability Estimates for the Maryland Bar Examination:

## Comparisons under alternative formats

Reliability and other relevant statistics were calculated for the 2007 through 2016 July administrations and then compared to other test configurations/scoring rules which differed in terms of section weightings, and the number of essays and performance tasks

Roger Bolus, Ph.D.  
Research Solutions Group  
5/8/17



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## I. BACKGROUND

The Exam. The Maryland Bar Examination (MB) is administered twice a year in July and February. The examination is given over a two day period. On the first day applicants are required to complete a Written Test comprised of 10 essay questions prepared by the State Board of Law Examiners ("Board") and one Multistate Performance Test (MPT) developed by the National Conference of Bar Examiners (NCBE). During the 3 hour morning session, applicants answer the MPT and three essays, with recommendations to spend 90 minutes on the MPT and 25 minutes on each essay. In the 3 hour afternoon session, applicants answer the remaining 7 essays with a recommendation to spend 25 minutes on each question. The remaining time in the AM and PM sessions can be used at the applicants' discretion. On the second day, the 200 item multiple choice Multistate Bar Examination (MBE) is administered – 100 items in a 3 hour morning and afternoon session.

Grading and Scoring. All written questions are graded on a 0 to 6 scale (including the MPT) in a process managed by the State Board of Bar Examiners. The MPT is weighted by a factor of 1.5 and the scores are summed to form an applicant's Raw Total Written Score. The MBE is scored by the NCBE. Using IRT equating methods, the MBE raw score is scaled to adjust for differences in test difficulty over time and between different forms.

On each administration, the Raw Total Written Score is scaled to the current distribution of the MBE scores. This process controls for year-over-year differences in grader leniency and written question difficulty. The Scaled Total Written Score is given twice the weight as the MBE and then the two scores are added together to form the Total Scale Score (TSS). A TSS of 406 is required for passing. If the TSS falls in the range of 395 to 495, the written scores are regraded and a revised TSS is calculated.

## II. RESEARCH ISSUES

The Board is considering an alternative exam configuration. The primary model under consideration is the NCBE Uniform Bar Examination (UBE). The UBE differs from the current Maryland examination in that (a) 6 nationally common essays (MEE) are administered with a recommendation that each question be answered in roughly 30 minutes; as opposed to the 10 local MD essays at 25 minutes, (b) 2 MPTS are administered, each given 90 minutes, as opposed to the 1 MPT in the current MD configuration and (c) the Written Test and the MBE portions of the examination are equally weighted.<sup>1</sup>

Maryland is interested in understanding how a revised exam structure such as the UBE might impact results. Specifically, the question to be considered is as follows:

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<sup>1</sup> The psychometric theory behind the equal weighting is that (a) equal testing time has been allocated to both sections and (b) the MBE is traditionally a more reliable test section than the written section.

If the written portion of the examination changed and/or the written section was no longer given greater weighting than the MBE, to what degree would the:

1. Overall Maryland passing rate change?
2. Pass/fail status of individual test takers change?
3. Reliability of the examination be affected?

### III. METHODOLOGY

Model Description. While there is no way to perfectly predict the impact, it is possible to approximate this by simulating alternative structures and section weighting using historic Maryland results. Under this approach, alternative “simulated” examinations are created by using subsets of questions that closely align to the structure under consideration (in this case, the UBE). Raw written total scores are recalculated based on the alternative question set that is used, written scale scores are recalculated, a new Total Scale Score is computed applying the alternative weighting schema, and a new pass/fail status is determined using the 406 cut score.<sup>2</sup> For the current study, we proposed examining 5 alternative configurations and comparing them to the current examination structure. Figure 1 illustrates the alternative structures (i.e., models).

Figure 1

Alternative Examination Structures

Model #	Model Name	Essay Quests.	PT Quests.	PT Weight	Written Score Weight	MBE Score Weight
0	Current 2:1	1-10	1	1.5 x Essay	2	1
1	Current 1:1	1-10	1	1.5 x Essay	1	1
2A	UBE 2A 2:1	1-6	1, 2*	2 x Essay	2	1
2B	UBE 2B 2:1	5-10	1, 3*	2 x Essay	2	1
3A	UBE 3A 1:1	1-5	1, 2*	2 x Essay	1	1
3B	UBE 3B 1:1	6-10	1, 3*	2 x Essay	1	1

\* “PT” Questions 2 was simulated by averaging essay questions 6 and 7; “PT” Question 3 was simulated by averaging essay question 1 and 2.

Model 0 reflects the current examination structure and scoring while Model 1 reflects the current exam composition, but simulates a scoring in which the Written and MBE

<sup>2</sup> Since the simulations may result in cases going into regrade that never had a second reading, only first read scores are used to allow for direct comparisons.



sections are given equal weightings. Models 2A and 2B simulate the UBE structure of 6 essays and 2 MPTs. Because Maryland currently only gives 1 MPT, we estimated what a 2<sup>nd</sup> MPT might be by averaging 2 of the remaining essays<sup>3</sup>. Model A vs. B differed in the questions that were used. We created two versions to estimate decision consistency between alternative forms. Section weightings for Model 2 were 2 to 1, reflecting Maryland's current weighting schema. Model 3A and 3B were identical to 2A and 2B, with the exception of the section weighting. These latter models most closely reflect the actual UBE structure and scoring.

Study Data. Because results tend to vary from one examination to the next, we decided to utilize 10 separate July examinations administered between July 2007 and July 2016. For each model on each examination we calculated the following scores and statistics:

1. Average Scaled Written Score
2. Average Total Scaled Score
3. Percentage of applicants passing the examination (using a standard of 406)
4. Percentage of applicants having the same status as they had on the other models
5. The Written Score and Total Score reliability of the examination.

The reliabilities of the MBE portion of the examination for each of the 10 years were calculated and obtained from NCBE. Cronbach's Alpha was used to estimate the reliability of the Written Section which included the essays and the MPT with its respective weightings. The Total Test Score reliability was estimated using estimation procedures reported in Feldt (2004).

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<sup>3</sup> While two essays only reflect 50-60 minutes of testing (as opposed to 90 minutes), we did not want to create too much of an overlap of content with the current testing model on which we were making comparisons. We also acknowledge that the purpose and content of essay question is not the same as a performance task.

#### IV. RESULTS

Results of our analyses are presented in Tables 1 through 7. We present each table first with our interpretation of the results following each table. Each table is placed on a separate page and consistently color coded to help keep the alternative models clear.

Table 1

Means (Ave.) and Standard Deviations (Sd) of Total Scale Scores  
Under Alternative Examination Models  
July 2007 through July 2016

Year	Current Exam 2:1		Current Exam 1:1		UBE 1 2:1		UBE 2 2:1		UBE 1 1:1		UBE 2 1:1	
	Ave.	Sd	Ave.	Sd	Ave.	Sd	Ave.	Sd	Ave.	Sd	Ave.	Sd
2007	423	44	423	44	422	43	422	44	423	43	423	43
2008	434	42	435	42	435	42	435	42	435	41	435	41
2009	426	44	426	43	426	43	426	43	426	43	426	43
2010	427	43	427	43	427	42	427	43	427	42	427	42
2011	429	43	429	43	429	43	429	43	430	42	429	42
2012	428	41	428	40	428	41	428	40	428	40	428	40
2013	432	43	432	43	432	43	432	43	432	42	432	42
2014	421	42	422	41	421	41	421	41	422	40	422	40
2015	413	44	414	44	413	44	413	44	414	43	414	43
2016	413	46	414	46	413	46	413	46	414	45	414	46
Ave.	425	44	425	43	425	43	425	43	425	43	425	43

Table 1 illustrates the mean and standard deviation of the Total Scale scores under each model for each administration, separately, and averaged across all administrations. Inspection of the Table 1 shows that the overall average scale score and the standard deviation of those scale scores for each of the respective models did not vary. This occurs because all raw written scores, no matter how many essay or MPTs that are included, are always scaled to the MBE for that year. The recent downward trend in applicant performance is captured in each of the models as is the relatively consistent size of the score spread over the years (40-46 points). It is interesting to note that the size of that spread has gotten somewhat larger in recent years as the mean has decreased.

Table 2

Estimated Percentage of Applicants Passing  
Under Alternative Examination Models  
July 2007 through July 2016

Year	Current Exam 2:1	Current Exam 1:1	UBE 1 2:1	UBE 2 2:1	UBE 1 1:1	UBE 2 1:1
2007	66%	65%	68%	67%	67%	66%
2008	77%	77%	76%	76%	77%	77%
2009	68%	69%	69%	68%	69%	69%
2010	69%	69%	71%	70%	71%	70%
2011	71%	71%	73%	71%	72%	71%
2012	72%	72%	72%	72%	72%	71%
2013	72%	73%	73%	72%	74%	73%
2014	66%	66%	66%	67%	66%	66%
2015	57%	57%	57%	58%	57%	57%
2016	57%	56%	56%	57%	57%	57%
Ave.	68%	68%	68%	68%	68%	68%

Table 2 presents statistics on the percentage of applicants estimated to have passed the examination in each of the 10 years under each of the alternative examination structures<sup>4</sup>. Not unexpected because of the similarities in the mean and standard deviation of scores, the percent of applicants passing under any of the model varies by no more than 3% in a given year. The size of the difference in passing rates among the models remained consistent as the passing rates have come down over time. On average across the 10 years, there is no deviation in the percentage of applicants under any of the models. Thus, we can conclude that neither the configuration of the written section (in terms of the number of essays nor MPTs) nor weighting of the respective test sections is estimated to impact on the overall percentage of applicants passing the examination.

<sup>4</sup> Passing is defined as a score of 406 or greater and percentages are based on first read scores only.

While Table 2 presented data on the overall passing rates, Table 3 presents data comparing the consistency in pass/fail decisions between the current configuration and scoring model and the alternative structures. In other words, what percentage of applicants would be estimated to retain their same status on the examination if an alternative configuration or scoring model were applied?

**Table 3**

**A Comparison of Pass/Fail Decisions  
Between The Current Examination and  
Alternative Examination Models  
July 2007 through July 2016**

Year	Current Exam 1:1	UBE 1 2:1	UBE 2 2:1	UBE 1 1:1	UBE 2 1:1
2007	96%	93%	95%	93%	94%
2008	96%	94%	96%	93%	95%
2009	96%	93%	95%	94%	95%
2010	96%	93%	95%	94%	95%
2011	96%	93%	94%	94%	94%
2012	96%	94%	95%	94%	94%
2013	95%	92%	95%	92%	94%
2014	95%	92%	95%	92%	94%
2015	95%	94%	94%	93%	94%
2016	96%	92%	95%	92%	94%
Ave.	96%	93%	95%	93%	94%

Results in Table 3 show that on average all but 4% of applicants would have an identical pass/fail status if an equal weighting was given to the written and MBE sections (as opposed to the current 2:1 weighting). If the exam were given using a UBE-like structure and the weighting of the written and MBE sections was similar to the current exam, agreement rates drop to 93% and 95% (depending on test form). Agreement rates would be almost identical (93% and 94%) if the UBE exam structure was used and scoring applied equivalent section weighting. These latter set of agreement rates are what might be expected if Maryland were to go to the Uniform Bar Examination.

Table 4

**Estimated Decision Consistency  
Between Alternative UBE Structures  
Under Different Section Weighting Schemes  
July 2007 through July 2016**

Year	2:1 Weighting	1:1 Weighting	Difference
2007	92%	93%	1%
2008	93%	95%	2%
2009	92%	94%	2%
2010	91%	94%	3%
2011	91%	94%	3%
2012	93%	95%	2%
2013	91%	94%	3%
2014	91%	93%	2%
2015	91%	93%	2%
2016	90%	94%	4%
Ave.	92%	94%	2%

Alternative forms of an examination are often used. One form of reliability that is used is known as decision consistency. This statistic represents the percentage of applicants who would receive the same decision (i.e., pass or fail) were another form of the test given, or the same form given at another point in time. By comparing Forms A & B of the simulated tests, we can get an estimate of what the decision consistency of the UBE-like tests were administered. Table 4 contains these estimates for each of the 10 years, along with the average over those years.

The results in Table 4 show that while the decision consistencies are over 90% for all administrations under both weighting schemes, the models that apply equal weighting are consistently higher than those in when the written section is given more weight. The primary reason behind this finding is that decision consistency is directly related to score reliability. It is interesting to note that while the average difference between the two different models in decision consistency is 2%, the difference was largest in 2016 when the passing rate was at its 10 year low.



Finally, we look at the estimated overall test reliability of the Maryland Bar Examination under the alternative models in comparison to the reliability of current configuration and 2 to 1 weighting schema.<sup>5</sup>

**Table 5**  
**Comparison of Total Score Reliability**  
**Between the Current Exam Structure**  
**Under Different Section Weighting Schemes**  
**July 2007 through July 2016**

Year	Current Exam 2:1		Current Exam 1:1		Difference Total Score
	Written Score	Total Score	Written Score	Total Score	
2007	0.70	0.83	0.70	0.88	0.05
2008	0.66	0.81	0.66	0.87	0.06
2009	0.71	0.84	0.71	0.89	0.05
2010	0.68	0.82	0.68	0.88	0.06
2011	0.65	0.81	0.66	0.87	0.06
2012	0.66	0.80	0.66	0.86	0.06
2013	0.68	0.79	0.63	0.86	0.07
2014	0.62	0.78	0.62	0.86	0.07
2015	0.74	0.86	0.74	0.90	0.04
2016	0.71	0.84	0.71	0.89	0.05
Ave.	0.68	0.82	0.68	0.88	0.06

Table 5 first presents a comparison of how the score reliability of the current examination structure might change if the sections were equally weighted. While there is some difference of opinion, acceptable reliabilities for a high stakes test like a bar examination should be .80 or greater. Reliabilities above .85 are preferred.

Reliabilities of the Maryland Bar Examination have ranged between .78 and .86 between 2007 and 2016. The reliabilities of the Written sections over the same time period have ranged from .62 to .74. If during that period, equal weights were applied to the Written and MBE sections, the range of the Written section reliabilities would have remained the same, but the total examination reliability would have been estimated to range from .86 to .90. On average the increase would have been .06 reliability points. The reason for the difference is due to the fact that the reliability of the MBE is about 20 to 25 reliability points higher than the written section in Maryland.

<sup>5</sup> During the 10 year period, the reliability of the MBE ranged from .90 to .93.

Table 6

**Comparison of Total Score Reliability  
Between the Current Exam Structure  
and a UBE-Like Structure with Similar Section Weighting  
July 2007 through July 2016**

Year	Current Exam 2:1		UBE 2:1 *		Difference	
	Written Score	Total Score	Written Score	Total Score	Written Score	Total Score
2007	0.70	0.83	0.65	0.80	-0.05	-0.03
2008	0.66	0.81	0.60	0.77	-0.06	-0.04
2009	0.71	0.84	0.65	0.80	-0.06	-0.04
2010	0.68	0.82	0.63	0.79	-0.06	-0.04
2011	0.66	0.81	0.61	0.78	-0.05	-0.03
2012	0.66	0.80	0.64	0.79	-0.02	-0.01
2013	0.63	0.79	0.59	0.76	-0.05	-0.03
2014	0.62	0.78	0.58	0.75	-0.04	-0.03
2015	0.74	0.86	0.69	0.82	-0.05	-0.03
2016	0.71	0.84	0.67	0.82	-0.04	-0.03
<b>Ave.</b>	<b>0.68</b>	<b>0.82</b>	<b>0.63</b>	<b>0.79</b>	<b>-0.05</b>	<b>-0.03</b>

\* Average of Models 2A and 2B

Table 6 illustrates the estimated impact of using a UBE-Like test configuration while maintaining similar section weightings as the current exam. What we observe here is an average 5 reliability point decrease in the written section and an average 3 point decrease in the overall examination reliability. These estimated decreases are the effect of a shortening of the number of written test questions in the UBE-Like test<sup>6</sup>.

<sup>6</sup> Again, it is important to note that the second Performance Task in these models has been constructed based on two of Maryland's essay questions. If real 90 minute Performance Task data available was available, we would expect the written section reliability to be slightly higher.

Table 7

Comparison of Total Score Reliability  
Between the Current Exam Structure  
and the UBE Structure  
July 2007 through July 2016

Year	Current Exam 2:1		UBE 1:1 *		Difference	
	Written Score	Total Score	Written Score	Total Score	Written Score	Total Score
2007	0.70	0.83	0.65	0.86	-0.05	0.03
2008	0.66	0.81	0.60	0.85	-0.06	0.04
2009	0.71	0.84	0.65	0.87	-0.06	0.03
2010	0.68	0.82	0.63	0.86	-0.06	0.03
2011	0.66	0.81	0.61	0.85	-0.05	0.04
2012	0.66	0.80	0.64	0.86	-0.02	0.05
2013	0.63	0.79	0.59	0.84	-0.05	0.05
2014	0.62	0.78	0.58	0.84	-0.04	0.05
2015	0.74	0.86	0.69	0.88	-0.05	0.03
2016	0.71	0.84	0.67	0.88	-0.04	0.04
Ave.	0.68	0.82	0.63	0.86	-0.05	0.04

\* Average of Models 3A and 3B

Table 7 illustrates what might be expected in terms of test reliability in the event Maryland went to the Uniform Bar Examination. Similar to the results in Table 5, the reliability of the Written section of the examination would be expected to decrease somewhat, again due in part to the shortening of the number of written questions administered to the applicants. However, in terms of overall test reliability, the increased weighting of the MBE would more than compensate. The estimated total test reliabilities were quite consistent over the 10 year period, ranging from .84 to .88, averaging .86.



## V. SUMMARY & DISCUSSION

This study has attempted to illustrate what might occur to applicant passing rates, comparability in passing decisions, decision consistency and test reliability if Maryland were to adopt the Uniform Bar Examination. To make these estimates, scores from 10 historical exams were used to “construct” alternative test structures which simulated the UBE in terms of number of questions and scoring methodology. Additional test models were added that varied the test section weighting to illustrate the impact of scoring rules on the above statistics.

The analyses first showed that the overall total scale scores and the corresponding passing rates of any of the alternative models would have remained comparable. This finding is expected given that in scoring the Maryland Bar Examination, written scores are always scaled to the mean and standard deviation of the MBE for each administration. This assures that the overall distribution of scores will always be similar, independent of the structure of the written section and/or the weighting applied to the respective sections.

While the overall passing rates remained comparable, configuration of the written section of the exam and alternative section weighting did have a slight impact on which applicants passed and failed. This too would have been expected as some applicants tend to write better while others tend to perform better on multiple choice tests. For example, traditionally men perform slightly better on the MBE than women, while opposite is true on the written portion of bar exams. Table 3 showed about 4% of applicants over the 10 year period would have changed status had Maryland used equivalent weighting. Under a UBE-Like test structure about 6% would be expected to change, independent of how the sections were weighted.

When we attempted to simulate alternative forms of the UBE, the decision consistency between the forms were quite high. We did note that the decision consistency was highest under the equivalent section weighting scheme (94% vs 92%) which is the approach (by policy) used in states that have adopted the UBE.

Test reliability in a bar examination is a function of (a) the reliability of the respective sections, (b) the correlation between the sections, and (c) the weighting that is applied to the respective sections in the calculation of the total scores. Maryland currently has a policy in which the less reliable of the two sections is given twice the weighting as the more reliable section. However, in terms of overall test reliability (the focal point for this investigation), we documented that the reliability of the Maryland Bar Examination is generally at acceptable levels. In certain years when written score reliability dropped, Overall test reliability did fall below .80. Under an equivalent section weighting scheme the test reliability would have surpassed .85 for each of the 10 years. Table 6 illustrated that if Maryland had adopted a UBE testing methodology, all things held equal, overall test reliability (a) would have been improved in all years, and (b) would have surpassed the .85 criteria in all but a few years. Thus, either going to an equivalent weighting using the current test structure or adopting a UBE-like program would have yielded roughly similar results.

In terms of limitations of this study it should be noted that our analyses was limited by the fact that we needed to simulate a second Performance Task. By using the average of two of the essays, we created a score that came closer to an assessment that approximated the PT in terms of time allotted (60 minutes vs. 90 minutes), but acknowledge that an essay question is not a Performance Task. We saw no alternative given the available data. If anything, we believe that this might have lead to a slight underestimate of written score reliability in the alternative models.

This analysis also cannot account for what differences in preparation applicants might undergo if the examination had two Performance Tasks, and how that eventually might impact their performance. Also, it is also unclear as to how Maryland graders may react to grading Multistate Essays vs. locally constructed essays, or whether grader reliability has been stronger on essays than MPTs (i.e., there are two MPTs used in the UBE). We suspect that this would not be a significant issue. Finally we note that all analyses were based on first phase scoring only. Additional applicants do pass in regrade, but we doubt that the exam structure or scoring model would have a differential impact at regrade.

## REFERENCES

Feldt, L (2004) 'Estimating the reliability of a test battery composite or a test score based on weighted item scoring', *Measurement and Evaluation in Counseling and Development*, 37, pp. 184-190.

## **Appendix 3**

To: Hon. Sally D. Adkins  
From: Christopher Kehoe, Ronald Weich, and Jeffrey Shipley  
Re: A Possible Solution to Disparate Gender Effects Resulting From Changing to the UBE Examination  
Date: June 26, 2017

The purpose of this memorandum is (1) to update you regarding Mr. Shipley's analysis of the possible disparate gender effect that might result from changing the relative weights of the essay and multiple choice portions of the bar examination; and (2) suggest a possible solution that we believe merits consideration by the Court of Appeals and the Board of Law Examiners.

### **Background**

As you may recall, this subcommittee considered whether changing from the current format of the Maryland bar examination to the Uniform Bar Examination would affect the quality of lawyers admitted to the bar. The primary difference between the current Maryland bar exam and the UBE is the relative weighting of exam components. In Maryland's current exam, essay answers account for 67% of the total grade and the Multistate Bar Examination ("MBE") counts for 33%. In contrast, the UBE weights the essay and multiple-choice components equally.

As we related to the Committee in our May 17 report, Mr. Shipley arranged for the Board's psychometrician, Roger Bolus, Ph.D., to review the results for first-time takers in the July bar examinations for 2007 through 2016. Dr. Bolus concluded that changing to the UBE would not significantly affect the pass rate in Maryland. However, changing to the UBE might affect the pass/fail outcomes of up to 6–7% of first-time examinees. We stated that "this means that . . . between 75 and 85 applicants on a 1,250-taker exam would get a different initial test result."

Mr. Shipley's preliminary analysis of the results of one examination suggested that changing the relative weight of the exam components might disproportionately negatively affect female examinees.<sup>1</sup> However, Dr. Bolus stated that the majority of

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<sup>1</sup> This subcommittee's initial interest about this issue stemmed in large part from the testimony of Magistrate Hope Tipton at the Committee's public hearing. Magistrate Tipton also testified that some persons of color tend to fare worse on MBE multiple-choice questions than on essay questions. Because the State Board of Law Examiners does not record the ethnicity or cultural background of test takers, the Dr. Bolus and the Subcommittee were unable to examine Maryland test data to assess Magistrate Tipton's latter concern.

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the applicants whose initial results changed from “pass” to “fail” would be expected to end up in the range where their written test answers would automatically be regraded by the Board. Historically, a majority of applicants whose initial scores fell into the regrade range have passed the exam after regrade. You asked Mr. Shipley to examine the results of additional bar examinations. Mr. Shipley has completed his analysis for the July exams for years 2011–2016. The results of his efforts are set out on a table attached as Exhibit A to this memorandum.

### Discussion

Mr. Shipley has completed this analysis on the exam results for several additional years. The results can be summarized as follows:

- the percentage of examinees whose initial pass/fail results would be affected hovers around 6% for each exam;
- the percentage of test takers who would benefit from reweighting would exceed the percentage of those who are harmed in each test;
- the genders of examinees whose initial results would be affected approximately tracks the gender breakdown in the test population (52% women; 48% men);
- with the exception of one year, women would be more likely to have been hurt than helped by reweighting;<sup>2</sup> and
- without exception, men would have been more likely helped than hurt.

These conclusions are far from certain. There are possible weaknesses with our conclusions regarding disproportionate gender effect. Primarily, as Dr. Bolus acknowledged in his memorandum to the subcommittee, his analysis “was limited by the fact that we needed to simulate a second Performance Test,” by averaging the scores of two short essay questions, even though “an essay question is not a Performance Test.” Bolus Memorandum p. 13. Moreover, nearly all applicants who would move from pass to fail would fall into the range of scores that the Board regrades. Historically, a significant proportion of applicants whose exam answers are regraded pass the exam. Finally, it appears that reweighting the components of the exam will not affect the pass/fail outcomes for more than 90% of examinees.

Nonetheless, and even with the caveats summarized in the preceding paragraph, the subcommittee concludes that there is a substantial possibility that there would be a disparate, gender-based impact if Maryland adopts the UBE or if, for that matter,

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<sup>2</sup> The exception was the 2013 examination. Dr. Bolus estimated that reweighting that exam would have changed the results for 27 women from fail to pass and 24 women from pass to initial failure.

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Maryland decided to weigh the essay and multiple choice components of the bar exam equally for some other reason.

In our discussion earlier this month, Mr. Shipley and I agreed that, assuming the Court adopts the UBE, it would be desirable for the Board to track hypothetical performance on an exam that is weighted 67% essay/33% MBE. Doing so would give the Board much more reliable data on the effects of reweighting. Mr. Shipley believes that it would be easy for the Board to do this with its current software.

If the Board continues to track how applicants would performed under the current 2:1 weighting in favor of essay answers, it may be appropriate for Maryland to permit those who would have passed under the current weighting scheme to be admitted in Maryland even if their UBE score is less than Maryland's minimum passing score. (We will refer to this concept as the "dual path.") The Board could take this approach for a specific time period and then the Board and the Court of Appeals can decide whether to continue the practice based upon more reliable data.

Assuming, for purposes of analysis, that Maryland adopts the UBE and the Board sets the UBE passing score at 266<sup>3</sup> and retains the current passing score of 406, then scores could be reported to two hypothetical applicants as follows:

Maryland Score: 407 | Uniform Bar Examination Score 265

Maryland Score: 403 | Uniform Bar Examination Score: 267

Both applicants would be admitted to practice in Maryland.

With these concerns in mind, and with your approval, Mr. Shipley contacted Kellie Early, Chief Operating Officer of the National Conference of Bar Examiners. Ms. Early told Mr. Shipley that the current contract between the NCBE and jurisdictions that administer the UBE does not prohibit a dual path to bar admission as long as jurisdictions accept the UBE score as satisfying the minimum professional competence requirement for bar admission. She expressed two concerns as to a dual path approach.

*First*, the NCBE has concerns that treating the same exam paper as showing minimum professional competence under one standard (because the applicant received a score equal to or higher to 406 on the Maryland scale but less than 266 on the UBE scale) would erode the public perception of the validity of both standards.

We do not share this concern. As we described in our earlier report to the Committee, the essay and multiple choice components of a bar examination assess related, and to

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<sup>3</sup> Our choice of 266 as a UBE passing score is solely for purposes of illustration. The minimum UBE passing grade varies from 260 to 280.



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some extent overlapping, professional skills. Recognizing that those competencies can be demonstrated in different ways does not call the validity of the tests into question; rather it recognizes that people are different.

*Second*, the NCBE suggests that 50/50 weighting actually eliminates a structural advantage given to women by the 67/33 system in favor of placing equal weight on the relative strengths of both genders.

There appears to be a consensus that men tend to perform better on multiple choice questions than do women and that women tend to perform better on essay and essay-type questions. There isn't a consensus as to *why* this is the case.<sup>4</sup> Until the reasons for the performance differences are understood, we believe that it is premature to view relative weighting of exam components as conferring an advantage to one gender or the other.

### **Proposal**

We believe that the UBE Study Committee should recommend to the Court of Appeals that, if it decides to adopt the UBE for Maryland, the Court should consider implementing a dual path for demonstrating minimum professional competence for a specific period, e.g., five to seven years, so that the Court, the Board, and interested parties can further assess the issue of disparate effect.

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<sup>4</sup> See Exhibit B: "A Sample of Current Research on Performance on Multiple-Choice Tests."

Exhibit A

Summary of Simulated Decision Inconsistencies: 2011 to 2016

Simulated Exam Session (July)	All Takers	Simulated Takers Affected	Simulated Results: from Initial Fail to Initial Pass	Simulated Results: from Initial Pass to Initial Fail
<b>2011</b>				
Total	1527	91 (6% of all takers)	54 (60% of all affected)	37 (40% of all affected)
Female	799 (52%)	48 (6% of female takers)	22 (45% of affected Fs)	26 (55% of affected Fs)
Male	728 (48%)	43 (6% of male takers)	32 (74% of affected Ms)	11 (26% of affected Ms)
<b>2012</b>				
Total	1615	95 (6% of all takers)	48 (51% of all affected)	47 (49% of all affected)
Female	838 (52%)	57 (7% of female takers)	18 (32% of affected Fs)	39 (68% of affected Fs)
Male	777 (48%)	38 (5% of male takers)	30 (79% of affected Ms)	8 (21% of affected Ms)
<b>2013</b>				
Total	1544	91 (6% of all takers)	53 (58% of all affected)	38 (42% of all affected)
Female	796 (52%)	51 (6% of female takers)	27 (53% of affected Fs)	24 (47% of affected Fs)
Male	748 (48%)	40 (5% of male takers)	26 (65% of affected Ms)	14 (35% of affected Ms)
<b>2014</b>				
Total	1537	96 (6% of all takers)	56 (58% of all affected)	40 (42% of all affected)
Female	824 (54%)	47 (6% of female takers)	21 (44% of affected Fs)	26 (56% of affected Fs)
Male	713 (46%)	49 (7% of male takers)	35 (71% of affected Ms)	14 (39% of affected Ms)
<b>2015</b>				
Total	1316	75 (6% of all takers)	40 (53% of all affected)	35 (47% of all affected)
Female	679 (52%)	40 (6% of female takers)	17 (43% of affected Fs)	23 (57% of affected Fs)
Male	637 (48%)	35 (5% of male takers)	23 (66% of affected Ms)	12 (34% of affected Ms)
<b>2016</b>				
Total	1252	69 (6% of all takers)	37 (54% of all affected)	32 (46% of all affected)
Female	652 (52%)	42 (6% of female takers)	19 (45% of affected Fs)	23 (55% of affected Fs)
Male	600 (48%)	27 (5% of male takers)	18 (67% of affected Ms)	9 (33% of affected Ms)

F = Female Takers; M = Male Takers

## Exhibit B

### A Sample of Current Research on Performance on Multiple-Choice Tests

Katherine Baldiga, *Gender Differences in Willingness to Guess*, 60 MGMT. SCI. 434 (2014), available at [https://wapph.hks.harvard.edu/files/wapph/files/gender\\_differences\\_in\\_willingness\\_to\\_guess.pdf](https://wapph.hks.harvard.edu/files/wapph/files/gender_differences_in_willingness_to_guess.pdf).

**Abstract:**

We present the results of an experiment that explores whether women are less willing than men to guess on multiple-choice tests. Our test consists of practice questions from SAT II history tests; we vary whether a penalty is imposed for a wrong answer and the salience of the evaluative nature of the task. We find that when no penalty is assessed for a wrong answer, all test takers answer every question. But, when there is a penalty for wrong answers, women answer significantly fewer questions than men. We see no differences in knowledge of the material or confidence in the test takers, and differences in risk preferences explain less than half of the observed gap. Making the evaluative aspect of the test more salient does not impact the gender gap. We show that, conditional on their knowledge of the material, test takers who skip questions do significantly worse on our test.

Gershon Ben-Shakhar & Yakov Sinai, *Gender Differences in Multiple-Choice Tests: The Role of Differential Guessing Tendencies*, 28 J. EDUC. MEASUREMENT. 23 (1991), available at [https://www.jstor.org/stable/1434682?seq=1#page\\_scan\\_tab\\_contents](https://www.jstor.org/stable/1434682?seq=1#page_scan_tab_contents).

**From the abstract:**

"It was concluded that although gender differences in guessing tendencies are robust they account for only a small fraction of the observed gender differences in multiple-choice tests."

JOHN MAZZEO ET AL, COLLEGE BOARD REPORT NO. 92-7: SEX-RELATED PERFORMANCE DIFFERENCES ON CONSTRUCTED RESPONSE AND MULTIPLE CHOICE SECTIONS OF ADVANCED PLACEMENT EXAMINATIONS (1993), available at <https://research.collegeboard.org/sites/default/files/publications/2012/7/researchreport-1992-7-sex-differences-constructed-response-multiple-choice-sections-ap.pdf>.

**From the abstract:**

For the first study, analyses were carried out to evaluate the extent to which such differences could be attributed to differences in the score reliabilities associated with these two modes of assessment. For the second study, analyses of the multiple-choice

sections and follow-up descriptive analyses were conducted to assess the extent to which sex-related differences in multiple-choice scores could be attributed to the presence of differentially functioning items favoring males. For the third study, a set of exploratory analyses was undertaken to determine whether patterns of sex-related differences could be observed for different types of constructed-response questions.

The results of the first study provided little support for the "different-reliabilities" hypothesis. Across all exams and all ethnic groups, there were substantial differences between the scores of males and females even after taking into account differences in the reliabilities of the two sections. The results of the second study indicated that fairly small numbers of items exhibited substantial amounts of sex-related differential item functioning (DIF), and removing these items resulted in almost no reduction in the magnitude of sex-related differences on the multiple-choice sections. The results of the third study identified some consistent patterns across ethnic and racial groups regarding which questions females will perform best on, relative to males. However, taken as a whole, the results of the third study suggest that topic variability may have a greater effect than the variability associated with particular question types or broadly defined content areas.

SAMUEL A. LIVINGSTON & STACIE L. RUPP, ETS REPORT SERIES: PERFORMANCE OF MEN AND WOMEN ON MULTIPLE-CHOICE AND CONSTRUCTED RESPONSE TESTS FOR BEGINNING TEACHERS, ETS Report Series (Dec. 2004), *available at* <http://onlinelibrary.wiley.com/doi/10.1002/j.2333-8504.2004.tb01975.x/epdf>

The researchers found that across exams testing math, science, social studies, and English, men tended to outperform women on multiple-choice questions, while women either significantly or slightly outperformed men on the constructed response questions. The exception was for the Secondary School English exam, where men and women performed equally well on both types of questions.

In the Praxis program (and, presumably, in other testing applications), the decision to use MC tests, CR tests, or other types of tests is not simply a choice of response formats; it is a choice of which skills to measure. The results of our study imply that this choice, more often than not, will have an effect on the relative performance of men and women taking the test. In many academic subject areas, an economically motivated decision to use only multiple-choice questions can be expected to result in relatively lower performance by women taking the test.

## **Appendix 4**

To: Uniform Bar Examination Committee

From: Christopher Kehoe, Ronald Weich, and Jeffrey Shipley

Re: Pros and Cons of Changing the Relative Weighting of Written and MBE Scores on the Maryland Bar Exam

Date: May 17, 2017

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We make up the subcommittee tasked with addressing the following topic:

Maryland currently gives scoring on the written portion of the exam twice the weight it accords the multiple-choice portion. With the UBE, we would have to value them 50/50. The essay questions and performance questions test for different strengths than the multiple-choice questions. Would increasing the weight on the multiple-choice have a material impact on the quality of lawyers admitted?

Following the written report that we submitted for the April 13, 2017 meeting, we were directed to prepare a written report to include the pros and cons of the UBE as it pertains to subcommittee's subject matter for the May 17, 2017 meeting. In summary, we conclude:

**Pros:**

- (1) The content validity of the Maryland General Bar Examination will not be reduced and may be slightly enhanced.
- (2) The reliability of the Maryland General Bar Examination will be increased.
- (3) Based on a statistical analysis of recent Maryland General Bar Examination results, we believe that changing the relative weighting of test components to the UBE may affect pass/fail outcomes for about 6–7% of test-takers before any regrade process is applied. This should not significantly affect the quality of exam passers because the various components of the current Maryland exam and the UBE test the same competencies, and many of the affected applicants are likely to benefit from any policy on regrading.

**Cons:**

- (1) The UBE does not test applicants on professional responsibility or Maryland law and procedure.

**Additional Issues Beyond the Scope of the Subcommittee:**

- (1) As more and more jurisdictions adopt the UBE, we can expect the UBE to become the exam of choice for law school graduates because of the flexibility it offers them. Results from recent bar exams show that, after the District of Columbia adopted the UBE, the number of first time takers fell significantly in Maryland while first time takers in the District increased.
- (2) There is a concern that changing to the UBE, and thus changing the relative weight given to the Multistate Bar Examination as opposed to essay questions, might have a disparate impact on women and persons of color.

**1. A Narrow Meaning of “Quality”**

The Maryland General Bar Examination seeks to separate those who have the minimum competence to practice law in Maryland from those who do not. While unsuccessful applicants receive their exam score as a study aid, the exam results are officially reported only as pass/fail. For the purposes of this report, we

equate “quality” with “minimum competency” as demonstrated by achieving a passing score on the Maryland General Bar Examination.

## **2. What competencies do bar examinations test?**

The Maryland General Bar Examination is the examination administered to applicants who are recent law school graduates.<sup>1</sup> It consists of three components, short essay questions, one Multistate Performance Test (“MPT”) question, and the Multistate Bar Examination (“MBE”), which consists of multiple choice questions. The State Board of Law Examiners (“Board”) prepares the short essay questions and the National Conference of Bar Examiners (“NCBE”) prepares the MPT and the MBE.

In assessing the particular skills tested by each part of the examination, we have characterized skills “primary,” “secondary,” and “tertiary.” Demonstrating proficiency in the “primary” skill is the most significant factor in determining a bar exam grade; proficiency in the “secondary” skill is the next most important factor, etc. “clear and effective writing” does not mean proficiency in style and grammar but rather pulling the relevant facts from the fact pattern or file materials and setting them forth in an organized fashion.

The primary skills tested by short essay questions are issue identification and broad legal analysis. These skills are inextricably linked because it is impossible to spot issues raised by a fact pattern without knowledge of substantive law and it is difficult to engage in meaningful analysis without understanding the facts set out in the question. The analysis is “broad” because applicants have 25 minutes to answer each question. Clear and effective writing is a tertiary skill.

The primary skill tested by the Multistate Performance Test is the ability to write clearly and effectively. In the MPT, an applicant is asked to perform the assigned task and generate the work product requested based on the file materials provided by composing a piece of work product that effectively organizes and expresses the required analysis. The secondary skills are issue-spotting, and statutory and/or contract interpretation. These skills are a distant second because the issues are largely identified by the file and library materials provided as part of the question.

The Multistate Bar Examination tests knowledge from a broad range of substantive legal topics, but it is not merely an exercise in rote memorization. Success on the MBE requires the analytical ability to identify and weigh subtle differences in proposed answers to separate the better or best answer from a group of often very similar answers. Success requires an understanding of how the applicable rule applies to the facts to distinguish among the choices. Analysis is more important on the MBE than issue spotting because the issue is often identified by facts and the answer choices.

## **3. How the Current Maryland Bar Exam and the UBE Differ**

Under the current rules, each Maryland General Bar Examination consists of ten 25-minute short essay questions, which primarily focus on Maryland law, one 90-minute Multistate Performance Test question, and the Multistate Bar Examination, which consists of 200 multiple choice questions. In calculating scores,

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<sup>1</sup> Maryland has a separate examination for individuals who have practiced law in another U.S. jurisdiction for either at least ten years or five of the last ten years preceding their application to practice in Maryland. See Md. Rules 19-212–213.



the Board weighs scores as follows: 58% Maryland essays, 8.7% MPT (total weight of 67% for the Written Test), and 33% MBE.

Under the UBE scheme, the number of short essay questions (administered via the Multistate Essay Examination ("MEE")) is decreased to six, the number of MPTs is increased to two, and the MBE remains the same. The components are weighted differently however: 30% MEE, 20% MPTs (total of 50% written test) and 50% MBE.

The short essay questions prepared by the Board and those prepared by the National Conference of Bar Examiners for the MEE are very similar. MEE questions, however, identify the subject matter, i.e., torts, contracts, etc., raised in the question, while Maryland short essay questions do not.

Additionally, one or more of the short essay questions in a Maryland exam includes a professional responsibility issue. The UBE does not contain a professional responsibility component. Most jurisdictions in the United States require bar applicants to take the Multistate Professional Responsibility Examination ("MPRE"), which is separately administered by the National Conference of Bar Examiners, the organization that prepares the MPT, the MEE, and the MBE.<sup>2</sup> Of course, there must be an assessment of an applicant's grasp of legal ethics and other aspects of professional responsibility if Maryland adopts the UBE. How that assessment should be made lies outside of the scope of this Subcommittee's assignment.

Changing the test components, that is, reducing the number of short essay questions and increasing the MPT questions from one to two, and altering the relative weights of the essay and multiple choice portions of an exam may affect the validity and the reliability of the Maryland General Bar Examination. The Subcommittee's efforts have been focused on these issues.

#### 4. Validity

"Validity" is the extent to which a test is well-founded and corresponds accurately to the real world. In other words, a more valid test more accurately measures what it is intended to measure than a less valid test. Validity has two components:

"Content validity" is the extent to which test questions are relevant to the skills that the bar exam seeks to measure.

Content validity is currently a policy matter to be determined primarily by the Board. The Board sets the exam structure, selects the subject matters of the Maryland law essays, and drafts the short essays. The National Conference of Bar Examiners contributes to the content validity of the exam by selecting the subject matter and drafting the MBE test and the MPT questions. Adopting the UBE would shift the content validity function to the NCBE. To some extent, concerns about content validity might be addressed through any "Maryland component" that this Committee might recommend.

"Predictive validity" is the extent to which performance on the exam predicts the future behavior of the examinee. In our view, shifting to the UBE might result in a modest increase in the Bar exam's predictive validity. We base this observation on the fact that the UBE features two MPT items. Demonstrating an ability to generate coherent work product in the form of a research memorandum or other fact/law analysis

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<sup>2</sup> The MPRE is used by every jurisdiction in the United States other than Maryland, Wisconsin, and Puerto Rico.

based on a finite set of facts and law correlates to what many entry level attorneys actually do. Therefore increasing the weight of the MPT component from the current 8.7% to the UBE's 20% may increase the predictive validity of the Maryland General Bar Examination.

## **5. Reliability**

Reliability is the degree to which the overall exam and the individual exam components, the Multistate Bar Exam (MBE), the short essays, and the Multistate Performance Test (MPT), produce stable and consistent results. There are two aspects to "reliability":

(1) The components of a particular examination are stable and consistent when people who score well on one component score well on others. Another, and perhaps more relevant, way of expressing this concept is that a highly reliable exam is one in which no individual test component or question disproportionately affects who passes and who fails.

(2) Examinations, as a whole, are stable and consistent with one another when a group of test takers from one exam would receive essentially the same scores if they took a subsequent examination.

In general, reliability increases as the number of questions increases because the effect of success or failure on an individual question decreases. Reliability also varies based on the type of question at issues: multiple choice questions are inherently more reliable than written questions because there is a pre-determined right answer and there is no subjectivity to the grading.

## **6. Assessing Possible Changes In Reliability Through Simulation Studies**

With the Committee's blessing, the subcommittee requested that Roger Bolus, Ph.D., the psychometrician who currently provides score verification services for the Board, provide us with a psychometric analysis of the overall exam reliability of the current Maryland General Bar Examination scheme and to simulate the effect of altering the exam formulation and the scoring criteria in several ways. Dr. Bolus has performed the study, and presented his findings in a report that is attached as Exhibit A to this memorandum.

### **a. Study goals and formulation:**

The simulation was expected to test the following generalizations:

- One expects the reliability of the written portion of any bar exam to be significantly lower than the MBE, which is highly reliable.
- Maryland's current use of 2x weighting of the written portion of the exam is a policy decision of the Board and Court of Appeals, which is probably justified from a reliability standpoint by the fact that Maryland now has 11 test items in the written section.
- Reducing the essays, whether short essays or MPT essays, from 11 (Maryland's current test) to 8 (the UBE) would lower the reliability of the written portion, and would make the policy decision for 2x scoring more difficult to justify (due to placing more/too much weight on a less reliable component).
- Shifting the weight to 50% Written Test/50% MBE would compensate for the reduction in the number of essay items, and result in an overall reliability equal to or greater than the reliability of the current Maryland scheme (due to placing more weight on the more reliable portion of the exam).

### **b. Study Conclusions:**

### **(1) Changing to the UBE Will Not Appreciably Affect the Validity of Maryland Bar Exams**

Dr. Bolus used the raw written scores and the MBE scores of all July Maryland General Bar Examination takers from 2007 to 2016 to simulate the results that would have been achieved by those takers in three different scenarios: current exam format scored with UBE weighting (50/50); UBE format scored with Maryland weighting (67/33 weighting); UBE format scored with UBE weighting (50/50).

For all scenarios, the overall average scaled scores achieved by applicants and the standard deviations of scores (spread of scores across the curve) varied negligibly regardless of the formulation. For all scenarios, the pass rate did not vary by more than 2% regardless of formulation and the average pass rate over 10 years was identical for all formulations. These simulations suggest that changing the configuration and weighting of the exam from the current Maryland scheme to the UBE scheme would have had little effect on applicants' exam scores over the last ten July exams or on the pass rate for those exams.

Therefore, if those applicants who have passed the Maryland General Bar Examination in its current format have demonstrated the minimum competence to practice law in Maryland, we predict that those who pass a UBE exam will do the same.

### **(2) Changing to the UBE Will Modestly Increase the Reliability of Maryland Bar Exams**

Dr. Bolus states that "acceptable reliabilities for a high stakes test like a bar examination should be .80 or greater. Reliabilities of .85 or greater are preferred." The scale for reliability goes from 0.00 (much error, little reliability) to 1.00 (no error).

#### *i. The reliability of the current Maryland Bar Exam*

For the 10-year period from July 2007 to July 2016, the reliability of the essay portion of the Maryland General Bar Examination (one MPT plus ten Maryland essays) ranged in reliability from 0.62 to 0.74 with an average of 0.68. The written test, standing alone, falls below the reliability considered "acceptable" for a bar exam. Dr. Bolus next calculated the overall reliability of the 2007 through 2016 Maryland General Bar Examinations by factoring in the highly reliable MBE, which has ranged in reliability from 0.90 to 0.93 over the 10-year span.

Thus, the overall reliability of Maryland's exam has ranged from 0.78 to 0.86 over the past 10 years, with an average overall reliability of 0.82. Therefore, the average overall test has been "acceptable," but not "preferred."

#### *ii. Assessing the reliability of a UBE format*

Dr. Bolus recalculated the 2007 through 2016 results in a variety of ways. First, he rescored the current exam results (1 MPT + 10 Maryland Essays and the MBE) with a 50/50 weighting between the essay test and MBE. When the current essay test model is weighted 50/50 with the MBE, the essay test reliability stays the same, but the overall reliability of the exam improves significantly—from 0.86 to 0.90 with an average of 0.88. Most starkly, two sessions (July 2013 and July 2014) that were arguably "unacceptable" under the current scheme improve to the "preferred" range.

Next, Dr. Bolus used existing exam data to simulate two administrations of an exam formulated to match the UBE (6 short essay questions, 2 MPT items, and the MBE). He then calculated total exam scores, pass rates and reliability figures based on the current 2/1 weighting of the written section vs the MBE. Dr. Bolus

reports that using the UBE formulation and the current Maryland weighting, the overall test reliability ranged from 0.75 to 0.82 with an average of 0.79, which is slightly below the acceptable range. This supports the conclusion that reducing the number of written items and maintaining the 2/1 weighting would reduce the written test's reliability to a point that the 2/1 weighting is not justifiable.

Finally, Dr. Bolus used existing exam data to simulate two administrations of an exam formulated to match the UBE (6 short essay questions, 2 MPT items, and the MBE) and scored them using the UBE's 50/50 weighting. Again, as expected, the written score validity was reduced by lowering the number of test items, but the 50/50 weighting significantly raised the overall reliability. The range of reliability scores for the UBE-like tests were from 0.84 to 0.88 with the average reliability of 0.86 falling in the "preferred" range.

### **(3) Changing to the UBE will result in some decision inconsistency**

In addition to scores, pass rates, and reliability, Dr. Bolus also estimated the "decision consistency" between the current exam and scoring format and the alternative structures. Decision consistency refers to the percentage of applicants who would retain their pass/fail status if an alternative configuration or scoring model were applied. Again, using the existing data, Dr. Bolus calculates that, on average, 93% to 94% of applicants would receive the same pass/fail result under a UBE-like configuration and scoring model as they achieved on the Maryland General Bar Examination between 2007 and 2016. Since the average pass rates for each exam were identical regardless of the scheme and scoring model, one can assume that on average 3% to 3.5% percent of passers would fail and the same percentage of failers would pass.

In real numbers, this means that about between 75 and 85 applicants on a 1,250-taker exam would get a different initial test result. Half (+/- 40) would change from "fail" to "pass" and half (+/- 40) from "pass" to "fail." Since half of those with different results would move in each direction, this factor is generally neutral. Moreover, Dr. Bolus states that the majority of the applicants whose initial score would switch from "pass" to "fail" would be expected to end up in the range where their written test answers would automatically be re-graded by the Board. Historically, a majority of applicants whose initial grade scores fell into the regrade range have passed the exam after regrade. Thus, any regrade policy utilized by the Board would to some extent ameliorate the effect of any decision inconsistency between the current exam format and the UBE.<sup>3</sup>

### **(4) Possible Disparate Effects on Women and Persons of Color**

A concern has been expressed—both in professional literature reviewed for this study and in some of the testimony at the recent public hearing—that women and some persons of color tend to fare worse on bar exams in which the MBE features more prominently. *Testimony of Magistrate Hope Tipton*, UBE Committee's Open Hearing (April 13, 2017). Substantive review of the existence of gender and cultural biases on bar examinations is outside of the purview of this Subcommittee's assignment and outside the scope of its resources.

## **7. A Changing Exam Population May Affect the Quality of Legal Services in Maryland**

Finally, the subcommittee considered an issue that, while not directly fitting into our topic question, nonetheless merits comment. Historically, many applicants have taken advantage of the opportunity to take and pass the Maryland General Bar Examination, and then to waive into the Washington, D.C. Bar

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<sup>3</sup> Currently the Board regrades the essay answers of all applicants whose initial total exam scores fall within 10 points of passing. The initial raw score may be increased or left unchanged, but not reduced.

by transferring a qualifying MBE score. For many of these applicants, eventual D.C. admission was the goal, not merely a happy by-product of admission to Maryland.

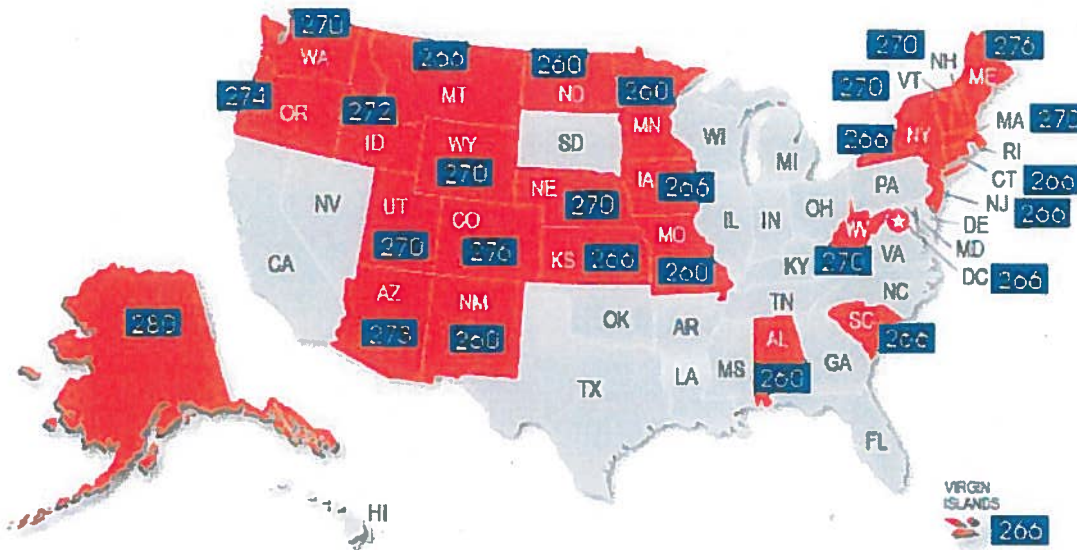
In July, 2016, the District of Columbia administered its first UBE exam. Anecdotally, the number of July 2016 Washington, D.C. takers more than doubled the level of any prior July exam, and the February 2017 DC Bar exam was reportedly more than tripled the size of any prior February DC exam. Maryland experienced a substantial drop in applicant numbers from July 2015 (1316) to July 2016 (1252) – a drop of about 5%. Because Maryland currently has no options for law admission without examination and no UBE, Maryland's current bar examination rule may act as a disincentive for applicants who opt to take the D.C. bar exam, or any other UBE examination, to practice in Maryland at any time in their careers.

## **Appendix 5**

# MINIMUM SCORES

## Minimum Passing UBE Score by Jurisdiction

This map shows UBE jurisdictions in orange and lists the minimum passing score for each jurisdiction. The same information is displayed in tabular format below the map.



Minimum Passing UBE Score	Jurisdiction
260	Alabama, Minnesota, Missouri, New Mexico, North Dakota
266	Connecticut, District of Columbia, Iowa, Kansas, Montana, New Jersey, New York, South Carolina, Virgin Islands
270	Massachusetts, Nebraska, New Hampshire, Utah, Vermont, Washington, West Virginia, Wyoming
272	Idaho



273	Arizona
274	Oregon
276	Colorado, Maine
280	Alaska

Since jurisdiction rules and policies change, you are strongly advised to consult the jurisdiction's bar admission agency (<http://www.ncbex.org/exams/ube/>) directly for the most current information.

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## **Appendix 6**

**The Court of Appeals of Maryland**  
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**Uniform Bar Exam (UBE) Sub-Committee Report: The Maryland State Component**

**DATE:** May 17, 2017

**TO:** The Honorable Sally D. Adkins, The Court of Appeals of Maryland

**FROM:** The UBE MD State Component Sub-Committee, Honorable Sherrie R. Bailey (Chair)

**RE:** Discussion and Recommendations Regarding the MD State Component

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## **INTRODUCTION**

The conceptualization of the UBE began over a decade ago through the work of the American Bar Association, the Association of American Law Schools, and the Conference of Chief Justices.<sup>1</sup> Missouri and North Dakota were the first states to adopt the UBE in 2010, with Missouri choosing to include a state component in their admissions process and North Dakota choosing not to include a component. Since that time, nearly thirty (30) states have chosen to adopt the UBE; nine (9) of the states opted to include a state law component as part of their admissions process.

This Sub-Committee was tasked with discussing the necessity of a component and its benefits and risks. After months of research, discussion, and a UBE public comments hearing, the Sub-Committee respectfully suggests that the Court adopt a Maryland Component as part of the Maryland Bar Admissions Process if the UBE is adopted for use in our state.

## **A. GOALS OF A MARYLAND STATE COMPONENT**

The primary goal of a Maryland State Component should be to ensure that all attorneys practicing in Maryland are aware of, and familiar with, key distinctions in Maryland law. This ensures that newly barred attorneys in the state of Maryland have the knowledge required to practice competently and diligently.

The secondary goal of a Maryland State Component should be to provide a comprehensive and accessible resource to newly barred attorneys. By designing a component that provides helpful material as the new attorney prepares to enter practice, the Maryland Component should become a “welcome tool” rather than an additional hurdle during the bar application process. Keeping these objectives in mind, the Sub-Committee discussed:

- (1) The necessity of a Maryland Component;
- (2) The Component’s format;

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<sup>1</sup> For a brief timeline on the development, introduction, and spread of the UBE, see *The UBE: Early Concept to the Present: A Timeline*, 85 THE BAR EXAMINER 8, 8 9 (Sept. 2016), [http://www.ncbex.org/pdfviewer/?file=%2Fassets%2Fmedia\\_files%2FBar-Examiner%2Farticles%2F2016%2FBE-UBETimeline-850316.pdf](http://www.ncbex.org/pdfviewer/?file=%2Fassets%2Fmedia_files%2FBar-Examiner%2Farticles%2F2016%2FBE-UBETimeline-850316.pdf).

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- (3) When the Component should be offered; and
- (4) What legal topics should be considered for inclusion if the Committee recommends a Maryland Component.

While the Sub-Committee came to a consensus on each of these four (4) critical questions, this Report will also discuss minority opinions to provide the Court with all relevant and constructive information.

**B. PROS AND CONS OF A MARYLAND STATE COMPONENT**

The following are the pros and cons of a Maryland Component discussed by the Sub-Committee:

**I. PROS**

**a. RESOURCES FOR YOUNG ATTORNEYS**

The Maryland Component would make critical information on Maryland distinctions readily available to practicing attorneys. After completing the course, the materials could remain available to assist a newly-barred attorney in their research. In Missouri, for example, anyone can access the State Component materials at any time.<sup>2</sup>

**b. AUTONOMY**

The Component could enable Maryland to retain some jurisdictional control over part of an exam that would otherwise be entirely nationalized. It also maintains the State Board of Law Examiner's ability to test new admittees on many of the same legal topics currently covered by the essay exam portion of the Maryland Bar Exam. Professional responsibility, for example, could be thoroughly tested on a state component, as it is not currently covered by the UBE. The adoption of a State Component may be preferable to relying solely on a nationalized exam, where no attention would be paid to distinctions in Maryland law.<sup>3</sup>

**c. DETERRING "FORUM" SHOPPERS**

Including a state component may also screen those who are truly interested in practicing law in Maryland versus those who may just be sitting for, or who are merely transmitting, their

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<sup>2</sup> The full outline for Missouri Law Distinctions is currently available on the Missouri Board of Law Examiners website: OFFICE OF STATE COURTS ADMINISTRATOR, SIGNIFICANT MISSOURI LAW DISTINCTIONS, <https://www.courts.mo.gov/file.jsp?id=40802>.

<sup>3</sup> Currently, the first day of the Maryland Bar Exam includes eleven (11) essays, ten (10) of which are created and administered by the State Board of Law Examiners. A ninety (90) minute Multistate Performance Test ("MPT") is a nationalized essay question also offered the first day. The Multistate Bar Examination ("MBE") is administered on the second day, and is a nationalized exam consisting of two hundred (200) multiple-choice questions. Under the UBE, the essay questions would all be determined by the National Conference of Bar Examiners ("NCBE").

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score to add Maryland to their “collection” of states for bar passage.<sup>4</sup> The hope is that this would ensure a higher quality and more competent practitioner in a nationalized system of test-taking.

## **II. CONS**

### **a. TIME & COST OF IMPLEMENTATION**

One of the primary concerns in adopting a state component would be the time and cost required for design and implementation. Sub-Committee members estimate that it would take at least eighteen (18) months to: (i) identify and examine different substantive areas of Maryland law for potential inclusion in the State Component; (ii) develop study materials and the chosen format for the State Component; and (iii) determine and implement the logistics necessary to facilitate administration of the State Component to recently new or prospective admittees. This would delay adoption of the UBE and may require additional funding for the State Board. Applicants would also be paying for another step in the application process.<sup>5</sup>

### **b. DETERRENCE**

There is some concern, however, that the State Component would actually serve as a deterrent to qualified applicants and newly barred attorneys otherwise interested in admission in Maryland. The Sub-Committee does not recommend a State Component that creates a significant additional burden thereby discouraging would-be applicants from applying for admission in Maryland.

### **c. RISKS**

Some questions remain unanswered. How would a state component impact applicants sitting for the UBE in our jurisdiction, if at all? What impact would the additional component have on low-income and minority applicants, especially if it requires extra money or travel time? These concerns, and others, were raised at the public comments meeting held on April 13, 2017, and many will have to remain unanswered moving forward. Should a State Component be adopted, many perceived risks can be addressed by designing a Maryland Component that is tailored to ameliorate or avoid those issues which have been identified as potential concerns.

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<sup>4</sup> It should be noted that the Sub-Committee does not have any substantive information suggesting that this would be an actual concern. In fact, the data collected by the NCBE on the number of UBE transfers since 2011 does not support the notion that large numbers of individuals transfer scores to other jurisdictions. See National Conference of Bar Examiners, *UBE Statistics*, 85 THE BAR EXAMINER 11, 15–17 (Sept. 2016).

<sup>5</sup> At the public comments hearing on April 13, 2017, significant concern was voiced regarding the cost of the UBE, and potentially a Maryland Component, with law school and the bar admissions process already being so cost-prohibitive for many. Importantly, however, adoption of the UBE also presents significant cost-savings that may outweigh the comparatively minor additional cost that may be required to complete an additional State Component. See Melissa Stanzione, *Jury Out on Uniform Bar Exam’s Effect on Minorities*, UNITED STATES LAW WEEK (Mar. 24, 2016) (noting that “UBE Pros” include the reduced monetary expenditure and “reduced time investment linked with taking the bar in multiple jurisdictions, enabling law graduates to earn income sooner.”).

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## **C. STATE COMPONENT MODELS**

### **I. OVERVIEW OF STATE MODELS**

Nine UBE jurisdictions currently have a state component.<sup>6</sup> Of those nine jurisdictions, only two jurisdictions, Montana and New Mexico, require in-person courses for admission. Seven require an online course covering state law distinctions. Each of these online courses provides the newly barred attorneys with outlines and other state law materials. The online course typically contains video lectures and questions pertaining to the material provided, and requires applicants to complete the course and/or obtain a certain score before they are admitted to practice in that state.

Before reviewing the pros and cons of the various current state component models, it is worthwhile to briefly discuss the nuances of the online formats currently being offered in six other states, as these models influenced the Sub-Committee's opinion as to whether to adopt a state component.<sup>7</sup>

### **II. FORMAT OF ONLINE STATE MODELS**

#### **a. THE ONLINE INTERACTIVE MODEL**

Alabama, Arizona, and South Carolina have very similar models, with a few minor differences. In all three jurisdictions, materials are provided to the applicants, who may access the course to watch the provided videos and complete "hurdle questions," in multiple-choice format, before proceeding. In Alabama, the applicants may access the course after a UBE transfer application is submitted and approved, and the course must be completed within twenty-five (25) months of passing the bar exam.<sup>8</sup> Arizona, however, requires that the certificate of completion for the course be submitted with the application for admission, which is a much shorter window of time for completion than Alabama.<sup>9</sup> Completion of the eleven (11) video modules is also a prerequisite for admission in South Carolina.<sup>10</sup> None of the models grade the applicants or require a "passing score."

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<sup>6</sup> Those jurisdictions are: Alabama, Arizona, Massachusetts, Missouri, Montana, New Mexico, New York, South Carolina, and Washington. Many states chose not to adopt a state component because the state already requires continuing legal education ("CLE") credits for its practitioners. While this was not necessarily a determining factor for the states (Alabama requires both CLE credits and a state component for example) this was a major consideration for some states who chose not to adopt a state component.

<sup>7</sup> Details on Massachusetts' state component have not yet been released.

<sup>8</sup> Hon. Cindy L. Martin, *et. al.*, *UBE Jurisdiction-Specific Components: Seven Unique Approaches*, 85 THE BAR EXAMINER 37, 42 (Sept. 2016), [http://www.ncbex.org/pdfviewer/?file=%2Fassets%2Fmedia\\_files%2FBar-Examiner%2Farticles%2F2016%2FBE-UBE-JurisdictionSpecific-850316.pdf](http://www.ncbex.org/pdfviewer/?file=%2Fassets%2Fmedia_files%2FBar-Examiner%2Farticles%2F2016%2FBE-UBE-JurisdictionSpecific-850316.pdf) (hereinafter "Specific Components").

<sup>9</sup> *Id.* at 44.

<sup>10</sup> The South Carolina Bar, *The South Carolina State Component of the Uniform Bar Examination*, <http://legacy.scbarex.org/CLE-Books/UBE> (last visited May 11, 2017) (hereinafter "South Carolina State Component").

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**b. THE ONLINE TEST MODEL**

Missouri was the first state to adopt the UBE in 2010, and had no representative model for developing a state component. This state's solution became the Missouri Educational Component Test (MECT), which provides students and newly barred attorneys with outlines in various subject matters and thirty-three (33) multiple choice questions based on the material.<sup>11</sup> Applicants must receive a 28/33, or 85%, and may retake the course as many times as necessary to achieve the passing score.<sup>12</sup> Applicants have one year to complete the MECT from the time of passing the UBE or transferring their qualifying score.<sup>13</sup>

Washington State followed suit with a similar model, providing access to resource materials and requiring applicants to take an open book online multiple-choice test based on those materials.<sup>14</sup> Like Missouri, applicants must achieve a specific number of correct answers, a 48/60, or 80%, with the additional limitation of receiving only four (4) hours to complete the exam.<sup>15</sup> Applicants may retake the test as many times as necessary to achieve a passing score, subject, however, to a waiting period between attempts. An applicant must wait 24 hours to retake the test after their first attempt, and 72 hours after any subsequent attempts.

**c. THE NEW YORK MODEL**

New York is the most unique jurisdiction with a state component; it requires applicants to take and pass a New York Law Course (NYLC) and then complete the online New York Law Exam (NYLE) before they are eligible to practice law. The NYLC is similar to the State Components in Alabama and Arizona; it requires applicants to view videotaped lectures and answer "hurdle questions" before proceeding forward with the module.<sup>16</sup>

After completing the NYLC, applicants must then take the NYLE, an online open book multiple choice exam offered only four (4) times per year.<sup>17</sup> A passing score would be a 30/50 (or 60%) and applicants must re-take both the NYLC and the NYLE if they do not pass the NYLE.<sup>18</sup>

**III. FEASIBILITY OF THE VARIOUS MODELS**

Based on the choices made by the other jurisdictions adopting a state component, the Sub-Committee discussed four (4) potential options for the State Component's formatting and the pros and cons of each:

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<sup>11</sup> Missouri Board of Law Examiners, *Missouri Educational Component*, <http://www.courts.mo.gov/page.jsp?id=325> (last visited May 11, 2017).

<sup>12</sup> *Id.*

<sup>13</sup> Specific Components, *supra*, at 39.

<sup>14</sup> *Id.* at 41.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 47.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 48.

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**a. THE IN-PERSON SEMINAR MODEL**

This model was quickly rejected. Due to the size of the Maryland applicant pool, the projected difficulties in finding the time and space for thousands of applicants, and the inconvenience to those who live out of state, this option was determined to be too impractical. New Mexico and Montana<sup>19</sup> use this model and are much smaller jurisdictions, which creates ease of access and is less burdensome on the state and the applicants.<sup>20</sup> Additionally, the burden of requiring applicants to appear for an in-person seminar violated one of the goals of developing a state component: to provide applicants with comprehensive and helpful material, rather than create an additional obstacle in the bar application process.

**b. THE ONLINE INTERACTIVE MODEL**

This was, overall, the most popular model. It combines the two goals of a Maryland Component: exposing applicants to distinctions in Maryland law, and providing them with important and helpful material without imposing a substantial burden. By creating a module with “hurdle” questions, the State Board can assess an applicant’s awareness of Maryland law distinctions, and provide resources that further competency in their chosen practice, while minimizing the additional time and cost.

**c. THE ONLINE TEST MODEL**

While this model had some support, it was ultimately less popular than the Online Interactive Model. Those in favor believe that requiring a “passing” score maintains the standard of minimum competency required for practitioners in Maryland, and ensures that those who are sitting for the exam are truly devoted to practicing law in Maryland. Those who opposed did so based on their preference for the online interactive model; they found this model preferable to a test or the in-person seminar.

**d. THE NEW YORK MODEL**

The New York model was also quickly rejected. The two-step component was perceived as burdensome, much like the Montana/New Mexico in-person model. Creating an additional test, offered at a limited time, and requiring multiple steps would add extra time and cost to the bar application process for both the applicant and the State Board.

The Sub-Committee most respectfully suggests that the Online Interactive Model is the most cost-effective, efficient, and least burdensome method of ensuring that newly barred attorneys are aware of Maryland law distinctions.

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<sup>19</sup> Montana is pursuing the development of an online test on the nuances of Montana law, to replace the current seminar model. Specific Components, *supra*, at 46.

<sup>20</sup> Similar considerations recently led Maryland to discontinue the mandatory, in-person professionalism course for new admittees in favor of an online course.



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**D. TIMING OF THE STATE COMPONENT**

Each jurisdiction that administers a state component has a different window of time for applicants to complete the component. The Sub-Committee identified, roughly, two (2) possibilities, with some variation, based on the models in the other states that administer a state component.

**I. OVERVIEW**

**a. PRE-ADMISSION MODELS**

There are two variations of this model: requiring applicants to complete the course before applying for admission, or permitting applicants to complete the course after applying but prior to admission. In Arizona, applicants receive a verification email after completing the Component, which is sent to the Arizona Admissions Office.<sup>21</sup> Applicants must then submit a certificate of completion with their application for admission before they are permitted to practice law in Arizona.<sup>22</sup>

New York and Washington permit applicants to complete the course after they apply, but prior to their admission. New York only offers the New York Law Course a few times a year, and it must be passed before an applicant's admission materials are forwarded for a character and fitness investigation.<sup>23</sup> Thus, their entire admissions process is halted until the exam is passed. Conversely, in South Carolina, applicants must file a complete application for admission into the state bar, before they may access the course.<sup>24</sup> In the first, completion is required to keep the application process moving, in the second, completion cannot occur until the application process is finished. In Washington, applicants may access the course component any time after submitting their applications, and applicants often take the course after the bar exam while they are waiting for their results.<sup>25</sup>

Montana and New Mexico are different; they are smaller jurisdictions and offer a state component seminar, as opposed to an online component model. In Montana, the seminar is offered the day after applicants complete the bar exam, and while applicants may delay attendance at the seminar, they are not admitted for practice until the seminar is completed.<sup>26</sup> Similarly, in New Mexico applicants are not permitted to practice until the seminar is completed, but applicants are commonly sworn in at the completion of the seminar for convenience, if they are pre-approved pending the seminar's completion.<sup>27</sup>

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<sup>21</sup> *Id.* at 44.

<sup>22</sup> *Id.*

<sup>23</sup> The New York State Board of Law Examiners, *NYLC & NYLE Course Materials and Sample Questions*, <https://www.nybarexam.org/Content/CourseMaterials.htm> (last visited May 11, 2017).

<sup>24</sup> South Carolina State Component, *supra*.

<sup>25</sup> Specific Components, *supra*, at 41.

<sup>26</sup> State Bar of Montana, *Admissions Information*, <http://www.montanabar.org/page/AdmissionInfo> (last visited May 11, 2017).

<sup>27</sup> Specific Components, *supra*, at 50.

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**b. POST-ADMISSION MODEL**

The post-admission model is less popular than the pre-admission model, with some states permitting applicants to begin practicing law before completing the state component.

**c. HYBRID MODEL**

One model that does not appear to be used by any of the states is a hybrid model, which requires completion of the course before admission, but within a designated window. In the pre-admission models, applicants must either complete the course prior to applying for admission or in the months after their application but prior to admission. In the post-admission model, applicants may complete the course before or after admission, with an even larger window of time for completion. South Carolina comes the closest to a hybrid model; permitting applicants to access and take the course only after completion of their application but prior to admission.

**II. PROS AND CONS OF THE VARIOUS MODELS**

**a. PRE-ADMISSION MODEL**

Offering a course that is available prior to submitting an application was not a very popular option. This option may decrease the applicant's stress, as they could take the exam during 3L as a law student, or at a convenient time during the application process. However, it may also permit just anyone to take the course and "forum shop" to determine whether they wanted to then apply for admission in Maryland.

Offering the course upon submission of the applicant's admission packet, but before passing the bar, was more popular, though still not the favorite option. It may solve the "forum shopping" concern, while still making it easier for 3Ls and applicants by giving them more time. Those opposed were still concerned that it would overburden the state's resources if applicants took the course this early because if they did not pass the bar exam, it would ultimately be more expensive for the applicants and for the State Board to expend those resources.

**b. POST-ADMISSION MODEL**

Permitting applicants a year or more to take the Maryland Component, either after admission or after passing the bar, was the least popular option within the Sub-Committee. Ensuring that applicants complete the component in a timely manner after they've otherwise completed the admissions process should be a priority. Requiring the State Board, or another entity, to track applicants would require expending effort and resources that could be more efficiently applied elsewhere. A possible solution proposed would be giving the State Board the ability to suspend the licenses of any attorneys who fail to complete the Component, much like the current process for attorneys who fail to complete their IOLTA forms.

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**c. HYBRID MODEL**

The most popular model was one where applicants would be afforded a brief window for taking the Component: after passing the bar, but prior to admission. Only those who successfully completed the UBE would have access to the Maryland Component, which would screen out those who were forum shopping or did not pass. It also allows the State Board to easily track applicant's completion of the course, as they are not permitted to practice law before first doing so. The downside, of course, is the limited window of time that applicants would have: as little as three weeks to complete the course.

The Sub-Committee most respectfully submits that offering the Maryland Component after bar passage and before admission to practice is the most efficient timeline for administering the Maryland Component.

**E. SUGGESTED LEGAL TOPICS (FOR CONSIDERATION)**

Finally, one of the most discussed aspects within the Sub-Committee has been the legal topics to be covered on the Component. When considering the goals of the Maryland Component, the topics selected are paramount to ensuring minimum competency of newly barred attorneys and exposing them to the most important distinctions in Maryland law.

Ultimately, the Sub-Committee determined that selecting the exact legal topics to be covered under the Component should be further explored, if the UBE is adopted and a Component implemented. The Sub-Committee thus developed a short list of suggested legal topics for inclusion on a Maryland Component and the significance of each topic.

**a. PROFESSIONAL RESPONSIBILITY**

Identified by the Sub-Committee, and by members of the bar that submitted feedback through the public comments hearing<sup>28</sup> as the single most important topic, professional responsibility should be a major focus with the adoption of a Maryland Component. Currently, the Maryland bar exam includes professional responsibility within the essays, but the UBE does not include professional responsibility on the essay portion nor the Multistate Bar Examination (MBE).<sup>29</sup> By including professional responsibility on the Maryland Component, the State Board could still test new admittees on competence, diligence, and fees, as well as IOLTA/Client Protection fund forms and navigating client trust and operating accounts. This would ensure that

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<sup>28</sup> In a survey sent to members of the Maryland State Bar Association ("MSBA") Litigation Section and Maryland Defense Counsel, members were not only hesitant to support the UBE without a Maryland Component, but expressed concern about the lack of professional ethics testing on the UBE.

<sup>29</sup> The Multistate Professional Responsibility Exam ("MPRE") is a multiple choice exam that tests applicants on Professional Responsibility, and consists of sixty (60) multiple choice questions. It is offered several times a year and required by 48/50 states for admission. Maryland is one of only two jurisdictions that does not require applicants to take the MPRE. The majority of local law students take the MPRE, because the jurisdictions surrounding Maryland require it. See NATIONAL CONFERENCE OF BAR EXAMINERS, *ET. AL.*, COMPREHENSIVE GUIDE TO BAR ADMISSIONS REQUIREMENTS 2017 26 (2017).

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the State Board retains autonomy in testing applicants on ethics, and assures current practitioners that their fellow attorneys received the same examination on ethics.

**b. CONTRIBUTORY NEGLIGENCE**

Only five (5) states still use a pure contributory negligence model: Alabama, District of Columbia, Maryland, North Carolina, and Virginia. Contributory negligence is one of the most fundamental distinctions in Maryland law. Although emphasized in state law schools in torts courses, admittees outside of these five jurisdictions would not necessarily be aware of Maryland's pure contributory negligence model. Providing further resources and materials to new admittees and including questions in the Maryland component on contributory negligence will help protect the public and ensure exposure to this fundamental principle.

**c. CIVIL AND CRIMINAL PROCEDURE NUANCES**

Civil procedure, like professional responsibility, is currently offered in the essay portion of the Maryland bar exam to highlight the differences between Maryland and Federal Procedure. Many members of the Sub-Committee believe it is important to carry-over civil procedure to the Maryland component as well for the same reasons. Criminal procedure was far less stressed, although worth mentioning because of the nuances in Maryland law as compared to federal law.

**d. EVIDENCE**

The Maryland Rules of Evidence vary in many respects from the Federal Rules of Evidence which are tested on the UBE. As a subject with broad relevance that transcends substantive areas of law, evidence is also recommended for inclusion in a Maryland Component.

**e. FAMILY LAW NUANCES**

Family law is yet another subject covered by the essays on the Maryland Bar Exam, which is not tested on the UBE. Due in large part to varying terminology and requirements for divorce, child custody, etc., among the states, this subject should be strongly considered for inclusion in the State Component.<sup>30</sup>

Torts, contracts, real property, administrative law, evidence, trusts/will/estates (and many more subjects) are all examples of topics covered by components in other states. Many of these topics were discussed and considered by Sub-Committee members in addition to the topics suggested.

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<sup>30</sup> Recently, for example, couples in Maryland may now obtain a divorce immediately by mutual consent, if the couple did not have children. See MD. CODE ANN. FAMILY LAW § 7-103(8) (West 2017).

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**F. PUBLIC COMMENTS**

During a public hearing held on April 13, 2017, the Advisory Committee heard testimony from the following stakeholders regarding the possible adoption of the UBE in Maryland: The Maryland Defense Counsel, Maryland State Bar Association (“MSBA”)-Litigation Section, MSBA-Council on Legal Education and Admission to the Bar, The Women’s Bar Association (“WBA”), Catholic University of America-Columbus School of Law (“CUA Law”); George Washington University (“GWU”) Law School, a former ABA Delegate from the 2016 Board of Governors-Law School Division, the Monumental City Bar Association, and a former U.S. Senator.

The MSBA Litigation Section chose to poll its members: fifteen hundred (1,500) members received a survey requesting their opinion on the adoption of the UBE in Maryland. Approximately ninety responded, and of those who responded, seventy three percent (73%) supported the adoption of the UBE. Approximately sixty six percent (66%) of those who supported the adoption of the UBE wanted the exam to be supplemented with Maryland specific content; additional testing, CLE, and various other educational requirements were proposed. Many who were against the UBE responded that their vote of “no” was based on *the lack of Maryland specific content*, particularly professional responsibility, in the UBE’s national form. The Maryland Defense Counsel also asked its four hundred fifty (450) members whether they wanted Maryland to adopt the UBE. Of the fifteen (15) Maryland Defense Counsel members who responded, seventy three percent (73%) supported the adoption of the UBE, with many including the qualification that the exam have a Maryland component.<sup>31</sup>

Professor Veryl Miles of CUA Law, former ABA Delegate Chris Jennison, Esquire, and former U.S. Senator Joseph Tydings all testified in support of the UBE and advocated in favor of state components, reasoning that the components vary widely from state-to-state which provide multiple formats for the Committee’s consideration. Renee DeVigne, Dean of Student Academic Development at GWU Law School, testified in favor of adding a Maryland Component that candidates must complete in advance of admission. Dean DeVigne also recommended that Maryland should, “model an online course and online exam after those that are administered in the states of Washington and New York and include the key Maryland Rules of Professional Responsibility in the essential elements of Maryland law that are tested on the state-specific component of the UBE.”

**CONCLUSION**

The Sub-Committee respectfully recommends that a state component be adopted. Despite the time and costs required to implement the Component, the benefits derived from retaining jurisdictional control over part of the exam and the resource the outlines and materials would provide to newly barred attorneys outweigh the risks.

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<sup>31</sup> As in the MSBA Litigation Section, those from the Maryland Defense Counsel who responded in the negative often cited their concern about a lack of a Maryland Component.