

Building a Twenty-First Century Bar Exam: How Can We Test for Minimum Competence?

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Introduction

Law practice is complex. Lawyers must juggle complicated rules of law, evolving facts, competing goals, and diverse personalities in their work. Professional judgment requires integrating all of these separate components. Licensing competent lawyers is equally complex. How can a 12-hour written exam separate minimally competent candidates from those who are incompetent? That is a daunting challenge. This handout offers ten best practices for creating an evidence-based exam to assess minimum competence. Appendix A lists some of the sources supporting these practices.

1. Define Minimum Competence. A valid licensing exam requires a clear definition of minimum competence to practice the profession. Older bar exams often failed to define minimum competence adequately, but recent research has begun to fill this gap. California is ahead of most states on this measure: it has an expert practice analysis (the *CAPA Study*) to guide its work. I recommend supplementing the findings in that study with the recommendations from a study I coauthored, *Building a Better Bar*. The latter study reports results from 50 focus groups (including eight held in California) that provide additional perspectives to the survey-based research in the *CAPA Study*.

These studies, like other research on lawyering competence, stress that skills are as important as knowledge in defining the minimum competence to practice law. AS the *CAPA Study* concluded, any bar exam should attempt to assess:

- Drafting and Writing
- Research and Investigation
- Issue Identification and Fact Gathering
- Counseling and Advising
- Litigation-Related Skills
- Communicating and Building Relationships with Clients

Assessing some of these competencies will require new formats and approaches. An evidence-based bar exam may look quite different than the current exam.

In addition to building on the above research, any definition of minimum competence should follow this key principle: currently licensed lawyers should be able to readily demonstrate that level of competence. If licensed lawyers cannot pass the bar exam without extensive study, then the exam is not testing minimum competence.

2. Reduce Testing Based on Memorization. The current bar exam requires candidates to recall thousands of legal rules from memory. Yet research dating back to 1973 (Schwartz, *The Relative Importance of Skills Used by Attorneys*) makes clear that attorneys—especially newly licensed ones—do not rely extensively on memorized rules. Instead, they know a series of “threshold concepts” (described in the next section) that allow them to identify legal issues and find the points of law they need. As lawyers develop experience in a practice area, they do assimilate many legal rules into memory. But this is not how new lawyers practice—and even experienced lawyers frequently check rules, desk books, and other sources for points of law.

Many practicing lawyers do not realize how many blackletter rules are tested on the current bar exam. Appendix B shows how these rules have multiplied in a single knowledge area over the last four decades. The law has grown exponentially since 1980, constantly increasing the number of rules that candidates must recall from memory.

The focus on memorization drives both the expense of the current exam and its disproportionate impact on racial/ethnic minorities, first-generation candidates, and other candidates from disadvantaged backgrounds. A recent study by the AccessLex Institute (*Analyzing First-Time Bar Exam Passage*) confirms that the current bar exam has become a test of resources. Candidates who enjoy higher household incomes and purchase expensive bar-preparation courses are significantly more likely to pass the exam than their peers. Conversely, test-takers who work for pay during the two months preceding the exam, possess less household income, and do not purchase commercial bar-prep courses are more likely to fail.

These relationships hold after controlling for candidates’ LSAT scores and the selectivity of the law schools they attended. Indeed, LSAT score is *not* a significant predictor of bar passage after controlling for these factors. Candidates who lack the resources to devote two months of full-time study to expensive bar prep courses struggle to master the memorization demanded by the current exam.

To reduce memorization, a bar exam should trim the number of tested rules and provide access to resources during the exam. The exam, in other words, should be at least partially open book. This approach also facilitates testing key competencies such as research and issue identification.

3. When Testing Knowledge, Focus on Threshold Concepts. Lawyers do not need to memorize extensive sets of blackletter rules, but they do need to know threshold concepts about many practice areas. These concepts allow lawyers to identify issues and find the rules they need to resolve a client problem. Threshold concepts are signals that lawyers recognize but that non-lawyers might not know; they also provide maps to larger content domains. The bar exam should test familiarization with threshold concepts, not recall of detailed rules. Here are two examples of threshold concepts v. detailed rules:

Threshold Concept	Detailed Rule
Although the US Constitution and state constitutions give litigants many rights, lawyers often must assert those rights within time limits specified by rule or statute.	In the federal courts, a civil litigant must demand a jury trial on an issue no later than 14 days after the last pleading related to that issue is filed. The demand must be in writing.

Threshold Concept	Detailed Rule
Statements made outside the courtroom are less reliable than those made in the courtroom. Statements made outside the courtroom are called “hearsay” and are admitted only if they fit within defined exceptions.	In the federal courts, a statement in a document that was prepared before January 1, 1998, and whose authenticity is established, is admissible under the “ancient documents” exception to the rules against hearsay.

4. Use Multiple Choice Questions Sparingly, If at All. Multiple-choice questions have become a staple of testing because they are easy to grade and allow sophisticated calculations of reliability. Those advantages, however, come with a heavy price: law practice is much more complex than any multiple-choice question. Indeed, we often want lawyers to push beyond the obvious answer and pursue more creative solutions for their clients. Multiple-choice questions are also particularly likely to elicit stereotype threat (and, thus, reduced performance) among test-takers of color.

Advances in scoring rubrics and the careful use of performance tests can give the bar exam a reasonable amount of reliability without the need for extensive multiple-choice questions. At most, multiple-choice questions should compose 25% of a bar exam—and those questions should be integrated within realistic lawyering tasks.

5. Replace Traditional Essay Questions with Performance Tests. California pioneered performance tests, and that format is widely recognized as the most realistic component of any bar exam. Traditional essay questions, in contrast, have become outdated. They do not assess issue identification, analysis, and writing competencies as authentically as performance tests do. And, to the extent examiners want to test recall of legal principles, essays are less effective than multiple-choice or short-answer questions. Essay questions, finally, are the least reliable portion of the current bar exam. Grading is often subjective, with low degrees of agreement among graders. Performance tests are more reliable because they more closely resemble actual legal work. Graders, therefore, have a more secure anchor for their grading.

6. Commit to Inclusivity and Fairness at Every Step. The widely regarded *Standards for Educational and Psychological Testing* recognize that fairness is as essential as validity and reliability when constructing a high-stakes examination. Test makers should use principles of universal design to create exams that “promote valid score interpretations . . . for the widest possible range of individuals and subgroups in the intended population.” (p. 63). Tests that require expensive preparation on top of graduate education do not meet this standard of fairness. Similarly, psychometric methods that gauge reliability based on the success of White test-takers do not meet contemporary principles of fairness. Testing formats and questions should be designed by diverse panels and fully vetted for issues, fact patterns, or triggers that might disadvantage subgroups.

Inclusivity should also govern the subject matter tested on an exam. Comment [5] to California’s Rule 1.0 of Professional Conduct states that “all lawyers are encouraged to devote professional time and resources . . . to ensure equal access to the system of justice,” and that “every lawyer should aspire to render at least fifty hours of pro bono publico legal services per year.” These statements suggest that minimum competence includes the ability to address matters typically encountered by pro bono clients. When

choosing among sub-topics for the bar exam, therefore, test makers should focus on skills and subjects that are particularly important when serving disadvantaged populations.

7. Be Transparent. Bar examiners should be transparent about how exam questions are drafted, who drafts those questions, how they are scored, and how demographic subgroups fare on the exam. California already leads other states in several aspects of transparency.

Contemporary principles of transparency also require examiners to publish detailed descriptions of the knowledge and skills that will be assessed on the exam. These descriptions should make clear what resources will be available to examinees and what rules (if any) must be recalled from memory. Descriptions should spell out the rules that must be recalled from memory. There is no reason to hide these rules: a lack of transparency feeds the commercial bar prep industry. Those companies make much of their money from identifying the rules tested on the bar exam and selling that information to test-takers. Transparency also assures that the rules tested on the exam remain current.

8. Provide Adequate Time for All Exam Components. Research demonstrates that entry-level law practice requires much less speed than the bar exam demands. New lawyers do not “shoot from the hip” as the bar exam requires. On the contrary, they exercise the diligence, care, and thoroughness that the Rules of Professional Conduct specify. New lawyers also compensate for their lack of experience by taking more time to resolve matters; this is why their billing rates are lower than those of more senior colleagues. All lawyers, finally, know the importance of responding to a client question with the words, “That’s a good question but I need to check on that. I’ll get back to you tomorrow.”

To set realistic time limits for exam components, bar examiners should pilot questions with licensed lawyers. No study of lawyer competence has identified speed as a key competency. Time limits, therefore, should be set to assure that all test-takers have an opportunity to demonstrate their minimum competence.

9. Set the Cut Score at a Level Practitioners Can Achieve. There are many ways to set a cut score, and California already has experience with standard setting. Indeed, California is far ahead of other states in using evidence-based processes to set a cut score. The California process, however, omitted one step that is critical when setting a cut score for a professional licensing exam: the standard setters should take the exam themselves, under realistic conditions. As noted above, currently licensed lawyers should be able to readily pass an exam of minimum competence. This is particularly important in a profession like law, where the profession has struggled to define minimum competence. To assure that the bar exam is a gateway to the profession, rather than a barrier to entry, standard setters must set a passing score that they and other licensed lawyers can readily achieve.

10. Document What Is Not Tested. While developing a written bar exam, you will identify areas of minimum competence that cannot be readily assessed on the exam. This is important knowledge to preserve. What competencies cannot be tested on the exam? How critical are they to entry-level practice? This information is important in determining whether to recognize additional pathways to licensure. Written exams have benefits, but they also have drawbacks. Documenting the shortfalls of a written exam will allow you to determine whether, on balance, alternative pathways are as effective as a written exam. There may be room for more than one pathway to licensure—and the knowledge gained in creating a written exam may illuminate promising alternatives.

Appendix A: Sources

AccessLex Institute, *Analyzing First-Time Bar Exam Passage on the UBE in New York State* (May 2021), available at <https://www.accesslex.org/NYBOLE>.

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Steven Foster, *Does the Multistate Bar Exam Validly Measure Attorney Competence?*, 82 OHIO ST. L.J. Online 31 (2021), available at https://kb.osu.edu/bitstream/handle/1811/92328/1/OSLJ_Online_V82_031.pdf.

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Deborah Jones Merritt & Logan Cornett, *Building a Better Bar: The Twelve Building Blocks of Minimum Competence* (Dec. 2020), available at <https://iaals.du.edu/publications/building-better-bar>.

Robert A.D. Schwartz, *The Relative Importance of Skills Used by Attorneys*, 3 GOLDEN GATE U. L. REV. 321 (1973).

State Bar of California, California Attorney Practice Analysis Working Group, *The Practice of Law in California: Findings from the California Attorney Practice Analysis and Implications for the California Bar Exam* (May 2020), available at <https://www.calbar.ca.gov/Portals/0/documents/reports/2020/California-Attorney-Practice-Analysis-Working-Group-Report.pdf>.

**Appendix B: Growth in Blackletter Rules of Law
1980-2020**

This table contrasts the growth of blackletter rules of law governing just one area of law (the constitutionality of warrantless searches) between 1980 and 2020. The rules established by the Supreme Court before 1980 tended to be general principles akin to threshold concepts. The rules established between 1980 and 2020 added many detailed refinements to those general principles. Test-takers in 1980 needed to recall from memory only the rules in the left-hand column. Today's test-takers must recall from memory all of those rules plus the ones in the right-hand column.

Fourth Amendment Rules Governing Warrantless Searches
As Established by the Supreme Court of the United States

By 1980	By 2020 (All 1980 Rules Plus These)
<ul style="list-style-type: none"> A search occurs when the government intrudes into an area where a person has a reasonable and justifiable expectation of privacy 	<ul style="list-style-type: none"> A physical intrusion into a constitutionally protected area to obtain information also constitutes a search. Putting a GPS device on a car and using the device to track the car constitutes a search.
<ul style="list-style-type: none"> The person asserting a Fourth Amendment right must have standing to do so; they must assert their own reasonable expectation of privacy. 	<ul style="list-style-type: none"> Individuals visiting an apartment for a few hours for business purposes do not have a reasonable expectation of privacy in the apartment.
	<ul style="list-style-type: none"> A co-conspirator does not have automatic standing to challenge the constitutionality of a search.
<ul style="list-style-type: none"> Individuals do not have a reasonable expectation of privacy in objects held out to the public, such as their handwriting. 	<ul style="list-style-type: none"> There is no expectation of privacy in the smell of one's luggage, but there is an expectation of privacy in the feel of that luggage.
	<ul style="list-style-type: none"> Dog sniffs during a traffic stop are unreasonable if the sniff extends the time of the stop.
	<ul style="list-style-type: none"> Although police may approach the entrance to a home, it is unconstitutional to have a dog sniff outside the home for contraband.
	<ul style="list-style-type: none"> Areas outside the "curtilage" of a dwelling are held out to the public and may be searched without a warrant. A barn may be outside the curtilage.
	<ul style="list-style-type: none"> Garbage left for collection outside the curtilage may be searched without a warrant.
	<ul style="list-style-type: none"> The police may fly over a field or yard, even at a low altitude, to observe activities with the naked eye. They may also take aerial photographs.

	<ul style="list-style-type: none"> But the use of thermal imaging from outside the curtilage to examine the interior of a home requires a warrant.
	<ul style="list-style-type: none"> A police officer may reach into an automobile to move papers in order to observe the vehicle's VIN
<ul style="list-style-type: none"> Police may conduct a warrantless search incident to an arrest, as long as the arrest itself is constitutionally valid. The searchable area corresponds to the arrestee's "wingspan." 	<ul style="list-style-type: none"> Police may not conduct a search incident to arrest if they merely issue a traffic citation.
	<ul style="list-style-type: none"> The "wingspan" rule applies even to the arrestee's home.
	<ul style="list-style-type: none"> Police may also make a "protective sweep" beyond the wingspan if they believe accomplices may be present.
	<ul style="list-style-type: none"> Police may inspect the physical aspects of a cell phone within the wingspan, but may not review the data without obtaining a warrant.
	<ul style="list-style-type: none"> After a valid arrest, police may search the arrestee's personal belongings before incarceration.
	<ul style="list-style-type: none"> When police make an arrest supported by probable cause to hold for a serious offense, they may take a warrantless cheek swab as part of the booking process and analyze the DNA.
<ul style="list-style-type: none"> When police arrest the occupant of a vehicle, they may search the entire vehicle without a warrant. 	<ul style="list-style-type: none"> Police may search the interior of a vehicle after arresting an occupant only if (a) the arrestee is unsecured and may still gain access to the vehicle's interior, or (b) the police reasonably believe that evidence of the offense for which the person was arrested may be found in the vehicle.
	<ul style="list-style-type: none"> Incident to a DUI arrest, police may administer a warrantless breath test but not a warrantless blood test.
	<ul style="list-style-type: none"> Police may search an entire vehicle that has been impounded. This includes closed containers within the vehicle.

The blackletter rules in this table are drawn from Barabri's *Outlines for Multistate* (2020). The rules governing warrantless searches include many more categories (such as the automobile exception, plain view doctrine, consent, stop and frisk, exigent circumstances, administrative searches, border searches, and wiretapping). The subrules in those categories have expanded in the same manner as the ones listed above.