

**AMERICAN BAR ASSOCIATION
NATIONAL NATIVE AMERICAN BAR ASSOCIATION
STATE BAR OF SOUTH DAKOTA**

RESOLUTION

1 RESOLVED, That the American Bar Association urges state, territorial, and tribal bar
2 admission authorities to consider the impact on minority applicants in deciding
3 whether to adopt the Uniform Bar Examination (“UBE”) in their jurisdiction, and to
4 measure or otherwise track the performance of underserved populations on the UBE
5 subsequent to its adoption;
6
7 FURTHER RESOLVED, That the American Bar Association urges state, territorial,
8 and tribal bar admission authorities to consider including subjects not included on the
9 UBE, particularly Indian Law in each state and territory with sizable American Indian
10 populations or trust land, when adopting the UBE in their jurisdiction.

REPORT

Introduction

The American Bar Association has long held that diversity of the legal profession is essential for the maintenance of our system of justice. Unfortunately, the pipeline to a diverse and inclusive legal profession is rife with barriers. One such prominent barrier is the bar exam. With the rise of the Uniform Bar Examination (UBE) across jurisdictions, it is essential that jurisdictions fully consider the effect of the UBE on minority and historically underserved candidates, as well as the effect on typically underserved and locally relevant legal topics.

I. Considering the Impact on Minority Students

A. Effect on Pipeline to the Legal Profession

While racial and ethnic minorities make up approximately 36% of the U.S. population, they make up less than 12% of the practicing attorneys in this country. The racial divide is only widening. It will be impossible to achieve true diversity at the current rate of matriculation into the profession. The pipeline into the legal profession is “leaking” at all points, from pre-kindergarten to the bar exam. Fewer and fewer minority students are enrolling in college or university, matriculating, or enrolling in law school. While the number of minority students matriculating from law school continues to rise, their numbers remain very small in relationship to their increasing numbers in the overall population. In response to these dire rates, ABA President Paulette Brown has identified diversity and inclusion within the legal profession as one of her key focal areas, including specifically pipeline projects to address the barriers facing diverse students. The ABA’s Council for Racial and Ethnic Diversity in the Educational Pipeline is specifically tasked with working to increase the number of diverse students who are on track to becoming lawyers.

B. The Minority Test-Gap: LSAT, MBE, and the UBE

Studies show that a test score gap between minority (especially Black students) and majority students begins as early as the fourth grade. This gap unfortunately continues throughout the student’s career. The LSAT is often used as predictor of success in law school. Racial minorities historically receive lower LSAT scores than their white counterparts, and the Law School Admission Council (makers and administrators of the LSAT) warn against over-reliance on numerical qualifiers alone. Indeed, the institutional environment of specific law schools as experienced by minority students leads to deviations from performance expectations as predicted by the LSAT. As early as 1974, the U.S. Supreme Court has questioned the continued use of the LSAT precisely because it is not race-neutral and produces racially disparate impacts. Recent research shows that minority examinees still have significant gaps in LSAT scores from their majority counterparts which cannot be attributed to individual qualifications, but the test itself.

Similar to the LSAT, bar passage rates for racially diverse law students are generally lower than whites, though the vast majority of all students who take the bar exam do

eventually pass. The oft-cited 1998 LSAC National Longitudinal Bar Passage Study found that 94.8% of all students eventually pass the bar. However, Blacks had the lowest bar passage rate at 77.6% while whites passed the bar exam at a 96.7% rate. More recently, in California, 73% of White first-time bar exam takers passed the July 2014 bar exam while only 59% of minority students passed. Only 42% of first-time Black takers passed. Also unfortunately notable is the low absolute number of graduates who took the exam. For the July 2014 California Bar Exam, the total reported number of first-time takers was 2,869 white persons, compared to 238 Blacks, 542 Hispanics, 739 Asians, and 380 other minorities. When transitioning from a state bar exam to the UBE, it is critical for state bar administrators to consider the racial disparities currently present, and how the UBE might affect those disparities.

The UBE, prepared and coordinated by the National Conference of Bar Examiners, is a uniformly administered and graded exam comprised of the Multistate Essay Examination (MEE), the Multistate Performance Test (MPT), and the Multistate Bar Examination (MBE). UBE scores can be transferred to other UBE jurisdictions. Therefore, the more states opt to offer the UBE over a state-specific exam, the more applicants that are offered mobility and are relieved of the temporal and financial burden of taking multiple exams. Unfortunately, because the UBE is only in its fifth year, we do not have the longitudinal data to fully understand the effect of the UBE on minority applicants.

The three components to the UBE are all weighted differently; the MBE is weighted 50%, the MEE 30%, and the MPT 20%. Most jurisdictions currently utilize the MBE as a component of their state bar exam. However, not all jurisdictions give such substantial weight to the MBE. For example, if California were to adopt the UBE, students in California, a minority-majority state, would see a significant increase in the importance of the MBE, as California currently weighs it as 35% of the total bar exam score.

Because the UBE places the most weight on the MBE, it is vitally important for states considering adopting the UBE to consider how the MBE emphasis might negatively impact minority students. The National Council of Bar Examiners acknowledges that racial minorities score lower on the MBE, but argues that

[r]esearch indicates that differences in mean scores between racial and ethnic groups correspond closely to differences in those groups' mean LSAT scores, law school grade point averages, and scores on other measures of ability to practice law, such as bar examination essay scores and performance test scores.

The NCBE essentially relinquishes its role in the systemic discrimination disadvantaging minority examinees' Law School Admission Test (LSAT) scores, bar exam scores, and law school G.P.A.'s. Nevertheless, there is a woeful lack of research concerning the test-gap in MBE scores between minority and majority examinees. Without further study, it is difficult, if not impossible, to understand how the MBE affects minority applicants.

In addition, states considering adopting the UBE should consider how the MBE interacts with the phenomenon known as "stereotype threat," the pressure that people feel when they fear that their performance could confirm a negative stereotype about their group. This pressure manifests itself in anxiety and distraction that interferes with intellectual functioning. A student need not believe the stereotype is accurate to be affected. He or

she need only be aware of the stereotype and care about performing well. Stereotype threat is

[o]ne of the most extensively studied topics in social psychology over the past two decades. In hundreds of studies, scientists have confirmed the existence of stereotype threat and have measured its magnitude, both in laboratory experiments and in the real world. Because of stereotype threat, standard assessments of academic performance underestimate the ability of students targeted by negative stereotypes by an average of 0.18 standard deviations, the equivalent of 62 points on the SAT.

Combating stereotype threat has been a particular concern of minority communities who have repeatedly called for attention to research that demonstrates that test scores can be adversely affected by candidates' unconscious reaction to widespread stereotypes disparaging the intellectual abilities of minority group members.

Considering the impact of the UBE on minority applicants is directly in line with existing ABA policy. In 2006, the ABA adopted Resolution #113, urging bar association and bar examiners to ensure that the bar examination does not result in disparate impact on bar passage rates of minority candidates. Also in 2006, the ABA supported the changes to Standards 210-212 concerning equal opportunity and diversity. In 2012, the ABA adopted policy to urge law school admissions test to provide accommodations that best ensure that the skills of the test-takers are measured, not their disabilities. Finally, Goal III of the ABA is to eliminate bias and enhance diversity. Considering the effects of the UBE on minority students, and tracking those effects subsequent to the implementation of the UBE both fall squarely within existing ABA policy, will assist in the realization of Goal III of the ABA, and will, most importantly, aid in strengthening the pipeline for minorities into the legal profession.

II. Considering the Impact of the UBE on Indian Law

The appeal of the UBE is its uniformity. Nevertheless, the UBE does not prohibit state bar examiners from testing or otherwise ensuring competency with respect to local law. This can take the form of online courses, webinars, CLE programs, or addendums to the exam itself. While the bar exam is not intended to require specialized knowledge, it is intended to ensure basic competency of its licensed attorneys, including the ability to at least recognize issues of law that are likely to arise within that jurisdiction.

With 567 federally recognized tribes, 426 tribal court systems, a \$30 billion-a-year gaming industry, and tribal natural resource extraction enterprises generating billions, Indian law is a burgeoning area in at least over twenty states. Indian Law is becoming increasingly relevant to every area of legal practice. So it was no surprise when states began to include Indian Law as part of their state bar examinations--a positive trend--since Indian law is a complex legal landscape, which warrants at least acknowledgment of new attorneys. In fact, Indian Law is so complicated, that many have advocated for simplifying changes; including the ABA, which has called for changes to criminal and civil jurisdiction in two recent resolutions.

However, in 2013, Washington stopped including Indian law on the essay portion of its bar exam, and opted to use the UBE essay subjects. In 2014, after adopting the UBE,

New Mexico eliminated Indian law from their bar exam. Arizona, despite the advocacy from their state bar association and presence of 22 federally recognized tribes within their borders, decided against adding Indian Law as a subject precisely because it was considering adopting the UBE.

The UBE and the testing of other relevant legal issues do not need to be mutually exclusive. For example, when the state of Washington adopted the UBE, it eliminated the use of their prior exam which included Federal Indian Law as an essay subject since 2004. However, Washington also developed the Washington Law Component as its own state-specific addition to the UBE which tests examinees on Indian Law. Washington enjoys all the benefits of administering the UBE while maintaining federal Indian law as a subject, to the benefit of all attorneys that wish to practice law in their state, which shares borders with 29 federally recognized tribes. Moreover, especially in the case of federal Indian law, the inclusion of the subject on the state bar exam directly effects whether the course is taught at ABA-approved law schools.

When adopting the UBE, the benefits of uniformity and increased mobility for its attorneys should not be considered to the exclusion of valuing essential legal areas that fall outside of the big six. This requested consideration also falls squarely within existing ABA policy. In 2011, the ABA adopted Resolution # 10B, urging law schools, firms, and CLE providers to provide the knowledge, skills, and values that are required of the successful modern lawyer. Bar administrators should similarly consider what subjects should be required for the successful modern lawyer.

III. Conclusion

The UBE offers uniformity, easing the burden on both bar administrators and on applicants. It also offers increased mobility, a critical need in a tightened legal market. However, the pipeline to the legal profession remains rife with barriers for minorities. The bar exam is a critical juncture in that pipeline. When considering adopting the UBE, these barriers must be acknowledged and assessed, especially when the legal profession remains to be one of the most under-represented professions in the country. Additionally, the blessings of the UBE's uniformity do not necessarily need to exclude state-specific legal areas of importance. This is especially important when it comes to federal Indian law, a topic historically not even offered in many law schools.

Respectfully submitted,



Linda Benally, President
National Native American Bar Association
February 2016

GENERAL INFORMATION FORM

Submitting Entity: National Native American Bar
Association Submitted By: Linda Benally, President

1. Summary of Resolution(s).

This resolution call for state, territorial, and tribal bar administrators, when considering the adoption of the Uniform Bar Exam (UBE), to consider the impact on underserved populations. The legal profession is unfortunately one of the least racially diverse professions in the country. Barriers exist all along the pipeline into the profession, including the bar exam, in which minorities disproportionately struggle. When considering whether to adopt the UBE, bar administrators should consider effects on the pipeline into the legal profession, and should track the performance of examinees if the UBE is adopted.

Secondly, this resolution call for bar administrators, when considering the adoption of the UBE, to nevertheless consider including supplemental topics of local importance on their bar exams. Specifically, jurisdictions with significant American Indian/Alaska Native populations should consider including Federal Indian law as a testable subject. As Federal Indian law becomes more and more of a prominent field, as it is institutionally complex, and because of its complexity attorneys should at least be able to identify when an Indian law issue has arisen, jurisdictions with significant Native populations should be expected to be familiar with its key elements.

2. Approval by Submitting Entity.

National Native American Bar Association: November 16, 2015

3. Has this or a similar resolution been submitted to the House or Board previously?

No. However, in this same term, the Law Students Division will be submitting Resolution #109, urging jurisdictions to adopt the UBE. This resolution is intended to coexist with proposed Resolution #109, such that if adopted, jurisdictions are encouraged to adopt the UBE, but should first consider the impact of the UBE on its minority applicants as well as locally-important subjects.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

- American Bar Association, *Resolution, Report, No. 10B* (2011) (urging law schools, firms, and CLE providers to provide the knowledge, skills, and values that are required of the successful modern lawyer).
This resolution will support the goal of Resolution 10B (2011), ensuring that jurisdictions thoughtfully considering the effects of the UBE when adopting, and that jurisdictions also include other locally relevant topics if need be to contribute to the creation of successful modern lawyers.
- American Bar Association, *Resolution, Report No. 113* (2006) (urging the

National Conference of Bar Examiners, the Law School Admission Council, and all state and territorial bar associations to ensure bar examinations and admission policies do not result in a disparate impact on minority candidates, and to support pre-law and other readiness programs).

This resolution would squarely support the goals of Resolution 113 (2006), prioritizing the consideration of pipeline into the legal profession for minority candidates specifically pertaining to the UBE.

- American Bar Association, *Resolution, Report No. 111* (2012) (urging law school admissions test to provide accommodations that best ensure that the skills of the test-takers are measured, not their disabilities.)
This resolution would support the spirit of this resolution by questioning and measuring whether the UBE effectively achieves its goal of ensuring the competency of incoming new lawyers, and not unnecessarily disproportionately impacting minority candidates.
- ABA, *Recommendation, Report No. 111A* (Feb. 2015) (adopting all of the recommendations contained in the Indian Law and Order Commission's 2013 report, except for the new circuit court provision of recommendation 1.2); and ABA, *Recommendation, Report No. 113* (Aug. 2015) (adopting key recommendations of the Attorney General's Advisory Committee on American Indian/Alaska Native Children Exposed to Violence report).
This recommendation would support the goals of both Resolutions 111A (Feb. 2015) and 113 (Aug. 2015), highlighting the complexity of Indian law and the need for attorneys to be well-versed in its complexities.

5. If this is a late report, what urgency exists which requires action at this meeting of the House? N/A
6. Status of Legislation. None.
7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

The National Native American Bar Association will work with the American Bar Association's Center for Racial and Ethnic Diversity, the National Conference of Bar Examiners, the Conference of Chief Justices and the ABA HOD members to disseminate official ABA policy to local bar examiners to encourage the tracking and studying of the impact of the UBE on underserved populations with the relevant jurisdictions.

8. Cost to the Association. N/A
9. Disclosure of Interest. None.
10. Referrals. Law Student Division, Law Practice Division, National Conference of Bar Examiners, Section of Legal Education, Senior Lawyers Division, TTIPS, NCBP and NABE, diversity entities including Diversity and Inclusion 360 Commission, and the

Conference of Chief Justices

11. Contact Name and Address Information.

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EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution call for state, territorial, and tribal bar administrators, when considering the adoption of the Uniform Bar Exam (UBE), to consider the impact on underserved populations. The legal profession is unfortunately one of the least racially diverse professions in the country. Barriers exist all along the pipeline into the profession, including the bar exam, in which minorities disproportionately struggle. When considering whether to adopt the UBE, bar administrators should consider effects on the pipeline into the legal profession, and should track the performance of examinees if the UBE is adopted.

Secondly, this resolution call for bar administrators, when considering the adoption of the UBE, to nevertheless consider including supplemental topics of local importance on their bar exams. Specifically, jurisdictions with significant American Indian/Alaska Native populations should consider including Federal Indian law as a testable subject. As Federal Indian law becomes more and more of a prominent field, as it is institutionally complex, and because of its complexity attorneys should at least be able to identify when an Indian law issue has arisen, jurisdictions with significant Native populations should be expected to be familiar with its key elements.

2. Summary of the Issue that the Resolution Addresses

The legal profession is unfortunately one of the least racially diverse professions in the country. Barriers exist all along the pipeline into the profession, from kindergarten to the bar exam. Minority candidates perform disproportionately poorly on the bar exam, including on the Multistate Bar Exam (MBE), a multiple choice portion of the exam adopted by most states. The Uniform Bar Exam (UBE) include the MBE, but gives it a considerably increased weight of 50%.

Secondly, the appeal of the UBE is its uniformity. The collateral effect of the exam is that subjects of local concern (but not necessarily national), are removed from the exam. Bar admission administrators should consider still including these subjects in addition to the UBE. This is especially critical when it pertains to Federal Indian Law. Lawyers within jurisdictions with significant American Indian/Alaska Native populations are more likely to encounter an Indian law issue and should at least be able to recognize it as such. However, states have been tending to remove Indian law from the bar exam rather than add it, and with its exclusion from the bar exam, so too is the subject excluded from law school curriculum.

3. Please Explain How the Proposed Policy Position will address the issue

This policy position will allow the ABA to speak on the ever-burgeoning topic of the UBE, as well as on the pipeline issues particular to the UBE.

4. Summary of Minority Views

Supporters of the UBE argue for the increased mobility and convenience that one uniform bar exam would offer new applicants, particular young lawyers. With one exam, attorneys would be more free to move about the country, and unburdened by the costs financially and temporally of multiple bar exams.

This resolution is not necessarily in conflict with supporters of the UBE, but merely calls for considerations of the effect of the UBE on minority candidates and local-subjects.