

THE MBE

MULTISTATE BAR EXAMINATION

A MILESTONE BIRTHDAY FOR THE MBE

by David R. Boyd

The Multistate Bar Examination turns 40 this year, having made its entrance into the world of bar admissions the year before I started law school. By the time of my 1976 bar examination, my home state of Alabama had adopted the MBE and there had been ample time for the dread of “The Multistate” to permeate the law schools. A few years later I became involved in bar examining, was invited to serve on a committee of the National Conference of Bar Examiners, and eventually was asked to join the MBE Committee, where I got to know the test from a different perspective.

I’ve now served on the Conference’s MBE Committee for most of the past 20 years, chairing it for 9 of those years, and have witnessed firsthand the MBE’s maturation from revolutionary start-up—as described by John Germany, who, along with Joe Covington, NCBE’s first Director of Testing, was one of the key figures in launching the MBE—into the powerful state-of-the-art licensing examination of today. (See page 26 for excerpts of Germany’s 1999 *Bar Examiner* article in which he remembers the early days of the MBE.) If John was present at the MBE’s creation, I am among those who can claim to have attended the MBE’s graduation ceremonies. And now I have the honor of helping to celebrate a milestone birthday.

The visionary founders of the MBE deserve enormous credit for the bold adventure undertaken in 1972. It may be, however, that they actually underestimated the long-term importance and value of their creation. From Germany’s article, one learns that the MBE was seen as a move toward a higher-quality test that could be easily scored and that would bring some much-needed “uniformity and objectivity” to the bar examination process. The MBE has lived up to this billing, to be sure, but its value has proven to be far greater.

Today the MBE is the undisputed anchor of almost every state’s bar examination. Only two states do not use it, and that number will drop when Washington comes aboard in July 2013. Almost without exception, jurisdictions take advantage of the opportunity to scale the scores of their examinations’ written components (Multistate Essay Examination, Multistate Performance Test, and/or state-specific written component) to the MBE, thereby allowing the MBE’s consistent level of difficulty across administrations—achieved through a sophisticated equating process—to stabilize the more subjective jurisdictional written-component test scores. As more jurisdictions adopt the Uniform Bar Examination (joining the 10 jurisdictions that have adopted the UBE as of publication of this article), the MBE will

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Editor's Note: The following is an excerpt from a November 1999 Bar Examiner article by John Germany, former chair of the Florida Board of Bar Examiners (1970–1971), former chair of NCBE (1974–1976), and chair of NCBE's Multistate Bar Examination Committee from 1976 to 1985. The article, titled "Joe Covington: A Remembrance," commemorated the late Joe Covington (1911–1993), a former dean of the University of Missouri–Columbia School of Law and NCBE's first Director of Testing (1972–1985). Covington and Germany, working with a group of influential bar examiners, were instrumental in the creation, launch, and growth of the MBE—a revolutionary concept in bar examining. In the following excerpt, Germany recalls the early days of the MBE.

[After Joe and I shared a class at Harvard Law School in 1947,] [o]ur paths crossed again when I attended a meeting of the National Conference of Bar Examiners in 1969 as a member of the newly formed NCBE Bar Examination Committee. Joe . . . was a member of a panel convened to discuss "A Uniform Bar Exam: National and Regional."

At that meeting, Joe made one of his first great contributions to the multistate bar exam by giving a name to our efforts to bring some uniformity and objectivity to the bar examination process. At the time, the states were fearful of a "national" bar exam which could cause them to lose their jurisdiction over the admitting process. Joe suggested we call our proposed examination a "multistate bar examination," and the name stuck . . .

The energy created by this committee was a sight to behold. All of us knew that we were breaking new ground which would change the testing process. Despite the fact that Florida had been using them for several years and New York had used them as a part of its examination for many years, multiple choice questions were still generally looked upon as an unacceptable way to test legal knowledge. With the mounting number of applicants, however, the grading of essay papers was becoming onerous, and the delay in announcing the results was becoming unacceptable to both the state courts and the examinees. The time was ripe for a new examining process where a multistate test could be prepared according to professional standards and graded in a matter of a few weeks, giving jurisdictions additional time to grade any essays.

The first MBE was given in February of 1972 . . . [and] was given by only 11 jurisdictions. The test, consisting of 200 questions, was developed under Joe's auspices. He appointed the members of the drafting committees who developed questions to be given on the five original subjects of the exam: Torts, Contracts, Real Property, Evidence[,] and Criminal Law. (The sixth subject, Constitutional Law, was later added to the test.) Recruiting these volunteers was a huge job that involved finding both law faculty and practitioners with expertise in the subject areas.

We involved the Educational Testing Service (ETS) early in the processes of developing and grading the MBE. With an examination of these proportions, we felt that it was important to involve testing professionals from the inception. (This function was later taken over by American College Testing, now ACT.)

This first MBE was given without a hiccup, and it then became incumbent on the NCBE Bar Examination Committee members to promote the test to additional jurisdictions . . .

In 1976, I became Chair of the Multistate Bar Examination Committee, and by this time developing the MBE had become the dominant activity of the National Conference

California's adoption of the examination was a coup that added thousands of examinees per exam. The major holdout continued to be New York. The New York Board of Law Examiners was reluctant to change its exam, which at the time consisted of both essay and multiple choice questions and which board members felt was working well.

Joe and I finally had a hearing before the judge of the Court of Appeals of the State of New York who was in charge of the New York examination. He met with us in New York City and we presented our case along with a member of the New York Board who argued against adopting the MBE. Sometime after this hearing, a decision was made to adopt the MBE, and the New York bar examiners, once on board, became advocates of the exam.

By the time New York joined the list of jurisdictions using the MBE, other jurisdictions had also begun to appreciate the advantages of administering this exam. The list was growing.

With the growing success of the exam, it became necessary to validate the exam to prove its testing ability. Joe selected a blue ribbon commission to complete the assessment. When this commission gave its stamp of approval, it became easier for the committee to sell the exam to the remaining jurisdictions. (Our efforts were successful, as today all but two jurisdictions have adopted the MBE.)

(The complete article is available on NCBE's website at http://www.ncbex.org/assets/media_files/Bar-Examiner/articles/1999/680499_RemembranceCovington.pdf.)



Joe Covington and John Germany

continue to anchor that multi-component examination for decades to come. As Germany reflected in his article, the founders of the MBE knew they were “breaking new ground which would change the testing process.” Forty years’ experience has proven the accuracy of their prediction, even if their new test has turned out to be even more dynamic than they imagined.

John Germany of Florida served as chair of the MBE Committee during the test’s infancy and early adolescence, turning the reins over to Sumner Bernstein of Maine in 1985, who was followed three years later by Doug Roche of Michigan. These veteran bar examiners ably shepherded the exam through the growing pains of the “teenage” years, watching the program continue to gain stature and momentum. Jane Peterson Smith, NCBE Director of Testing during the 1990s, was influential in the MBE’s being increasingly embraced nationwide and was an important contributor to the development of the MBE program generally. Greg Murphy of Montana, who became MBE Committee chair in 1994, not only guided the committee with great ability and dedication but was among those with the foresight to recognize that the future health and success of not only the MBE, but of the National Conference itself, demanded investment in better resources, from first-class physical facilities to in-house professional testing expertise. I followed Greg as chair, serving from 1999 to 2008, before giving way to the current chair, Franklin Harrison of Florida, whose wise stewardship has been evident as the MBE program has achieved national respect.

Although today’s MBE remains structurally almost identical to its ancestor of the 1970s, relying on 200 multiple-choice items divided among six (earlier five and soon, with the addition of Federal Civil Procedure, to be seven) basic areas of law, the

MBE has undergone changes over the years that have significantly improved it not only from a psychometric standpoint, but also in the perceptions of its users. Evolutionary during the test’s first three decades, these improvements accelerated as the century turned, when the National Conference made the decision to enhance its professional staff by the addition of doctoral-level testing and measurement professionals who would oversee test development and research, and interface on testing issues with the outside testing contractors used by the Conference at that time. I consider this decision, conceived and proposed to the NCBE Board of Trustees by NCBE President Erica Moeser, to be one of the most significant and forward-thinking decisions made in the 25 years during which I have been associated with the Conference.

Selected in 2001 to serve as Director of Testing was Dr. Susan Case, who had occupied a similar position with the National Board of Medical Examiners and who had extensive experience in test development and other aspects of high-stakes licensing examinations. Susan’s background and experience were a perfect fit at the right time. Coming aboard at about the same time was Dr. Michael Kane, a university professor and former senior research scientist for a national testing contractor. Mike became NCBE’s first Director of Research, a position from which he could not only study the MBE and NCBE’s other tests from a statistical perspective but also assist user jurisdictions in understanding and improving their local examinations and in maximizing the utility and benefits of NCBE’s tests.

These testing and measurement professionals, guided by President Moeser and assisted by an able staff, delivered as anticipated. Favored with new space and enhanced resources associated with the relocation of NCBE’s headquarters from Chicago

to Madison, Wisconsin, in 2000, they set about to simplify and improve test item formats, educate test drafting committees in item-writing techniques, improve the process by which items are reviewed by outside experts, introduce item pretesting, enhance test security, modernize the equating process, undertake a thorough review of MBE content specifications, establish a research agenda, develop online practice exams, and generally propel the MBE into the world of modern licensure testing.

The goal of bringing all aspects of the MBE program in-house—ending the historical relationships with outside testing organizations Educational Testing Service (ETS) and ACT—was begun in the fall of 2009 when the staff took over test development, and was realized in full by the time of the February 2012 administration. The entire MBE program, soup to nuts, is now managed from NCBE's Madison headquarters.

The chairs of the six behind-the-scenes but essential MBE drafting committees (each of these drafting committees addressing one of the six areas of law covered by the MBE) have embraced the advances in the MBE program in recent years and have worked closely with President Moeser, the testing staff, and the MBE Committee to improve items and adopt other measures to enhance test quality. The MBE drafting committees are composed of an average of five members, with academics, lawyers, and judges participating. The drafting committees have been stable and productive over the years, chaired by distinguished lawyers such as Professor John Reed, who headed the Evidence Committee from its inception until 2003 and continued to serve on the committee for four more years. The meeting of the “six chairs” with the MBE Committee each fall has become a tradition since its beginning some 17 years

ago; this full weekend of idea-sharing has contributed to measurable improvement in the MBE, which now regularly hits the high statistical marks that for years were merely aspirational.

Improvements to the examination continue still. Soon Federal Civil Procedure questions will be added, preliminary drafting sessions having already been held. The Conference is also conducting a content validity study designed to identify the knowledge, skills, and abilities required of entry-level lawyers, the results of which are currently being reviewed. This first-of-its-kind undertaking in the legal profession seems to confirm in large part the appropriateness of current MBE test content and may possibly identify additional subject matter to be tested on the MBE—or may suggest other knowledge and skills worthy of assessment and the means by which to test them.

Mike Kane has now retired from NCBE, accepting appointment in 2009 to the Samuel J. Messick Chair in Test Validity at ETS. Mike's successor is Dr. Mark Albanese, who holds a Ph.D. in statistics and measurement and joined NCBE from a faculty position at the University of Wisconsin. Susan Case remains closely involved with the MBE, constantly looking for ways to improve the exam, keep it current with the latest developments in licensure testing, and strengthen its reliability. And from her perch as President of NCBE, Erica Moeser is never far away from the action, recognizing—as we all do—that the MBE is truly the bell cow of the National Conference's herd of tests and that as the MBE goes, so goes bar examining in America.

Happy 40th birthday to the Multistate Bar Examination, and thanks to Joe Covington, John Germany, and the others on the team who birthed it! 🎂

My favorite MBE-related story involves a Chicago Cubs game at Wrigley Field some years ago. I had great seats down the first-base line for an early-season game coinciding with an NCBE seminar. Seated next to me was a young man who had just learned that he had passed the Illinois Bar Examination and who was celebrating the accomplishment with a buddy while enjoying a series of malt beverages.

The young man became smarter and smarter, eventually bragging to his companion that he'd survived that "blankety-blank" Multistate Bar Examination, which he proceeded to trash. Sensing an opportunity for fun, I told the new lawyer that I'd overheard his loud, uncomplimentary remarks about the bar exam and that, as chair of the MBE Committee, I was duty bound to report him to the Illinois character and fitness officials. He was just inebriated enough to fall for the gag. Suddenly silent and repentant, he was much relieved when I confessed after a few minutes that I had been pulling his leg.



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