

Preliminary Evaluation of the State Board of Law Examiners

Recommendations:	Waive from Full Evaluation Extend Termination Date to July 1, 2030 Consider Increasing Examination Fee within Statutory Cap
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Date Established:	1898
Most Recent Prior Evaluation:	Preliminary Evaluation, 2008 Extended termination date by 10 years to July 1, 2020 (enacted by Chapter 413 of 2008); recommended increased examination fee cap (Chapter 413 of 2008)
Composition:	7 members (each member must have been a lawyer for at least 5 years)
Regulated Entities:	Regulates admission to practice law in the State
Authorizing Statute:	Title 10, Business Occupations and Professions
Evaluation Completed by:	Jameson D. Lancaster, Department of Legislative Services, 2017

Overview of Regulatory Activity

The Board

The State Board of Law Examiners is responsible for administering bar examinations in the State of Maryland, investigating the legal competence and character and fitness of persons who seek a license to practice law in the courts of the State, and recommending to the Court of Appeals those candidates qualified for admission to the Maryland Bar. However, the board does not handle disciplinary matters related to attorneys. The Attorney Grievance Commission of Maryland, which is not subject to the Maryland Program Evaluation Act, is responsible for reviewing attorney conduct and overseeing attorney disciplinary matters.

Overview of the General Bar Examination

The Maryland General Bar Examination is a two-day test, consisting of one written test day and one multiple choice test day. The exam is administered twice annually, once in February and then again in July. With law school graduations typically taking place each May, the vast majority of individuals who take the bar examination do so during the July administration.

The written test is administered on the first day of the examination, with three hours allotted to a morning session and three hours allotted to an afternoon session. Test takers requesting and receiving accommodations under the Americans with Disabilities Act may be permitted to take the exam on an alternate schedule. The written test consists of 10 essay questions prepared by the board as well as a single Multistate Performance Test (MPT) question, which is published by the National Conference of Bar Examiners (NCBE). The board designs the test with each of the 10 essay questions carrying equal weight and with each question being graded on a relative range of 1 to 6 points. Scores of zero points are reserved for answers that are either blank or totally unresponsive to the essay questions. The MPT is weighted to be worth 1.5 times the value of a single essay question and is scored using the same 6-point rubric used to grade the other essay questions.

The multiple choice test, or Multistate Bar Examination (MBE), portion of the exam is administered on the second day of the examination, with 200 multiple choice questions divided between two three-hour testing sessions. The MBE is prepared by the NCBE and is administered by 48 other states and the District of Columbia.

Overview of the Out-of-State Attorney's Examination

Maryland provides attorneys from other jurisdictions who seek to become admitted to practice law in the State the option of taking an abbreviated bar examination known as the Out-of-State Attorney's Examination. Unlike many other jurisdictions, Maryland does not have reciprocity or comity with any other jurisdiction, which would allow an individual who is licensed to practice law in another jurisdiction to be admitted to practice law in Maryland without first taking Maryland's bar examination.

The Out-of-State Attorney's Examination is a three-hour, open-book essay examination prepared by the board and administered twice annually. The examination is available to be taken by individuals who have passed a written bar examination in another jurisdiction and have specified professional experience. Test takers are permitted to bring copies of the Maryland Rules as well as the Courts and Judicial Proceedings Article and Criminal Procedure Article of the Code of Maryland for reference during the examination. The board indicates that the examination is designed to test a candidate's knowledge of the Maryland Rules of Procedure governing practice and procedure in civil and criminal cases, the Maryland Rules of Professional Conduct, and provisions of the Courts and Judicial Proceedings and Criminal Procedure Articles of the Code of Maryland.

In order to be eligible to take the Out-of-State Attorney's Examination, an individual must have either a total of 10 years of professional experience or at least 5 years of professional experience in the 10 years immediately preceding the filing of an application to take the exam. The professional experience must have been full-time work as (1) a practitioner of law; (2) a teacher of law at an accredited law school; or (3) a judge of a court of record in a state.

Legislative Action in Response to Most Recent Sunset Evaluation

Since the 2008 preliminary evaluation, legislative action related to the State Board of Law Examiners has been limited to extending the board's termination date and authorizing an examination fee increase. Chapter 413 of 2008 increased the statutory cap on the bar examination fee from \$150 to \$250 in 2009 and then to \$400 beginning in 2010. The Court of Appeals, which is the entity responsible for setting the examination fee, has kept the fee set at \$250 since January of 2009. Chapter 413 also extended the termination date for the board from July 1, 2010, to July 1, 2020. A requirement that the Court of Appeals submit a follow-up report to relevant committees of the General Assembly on its plans to increase fees and generate revenues to cover its expenditures, as recommended by the sunset evaluation, was stricken from the bill.

The General Bar Examination

In the last five years, the number of exam takers taking the July administration of the bar exam has decreased with each administration, while the number of exam takers taking the February examination has remained relatively flat, as shown in **Appendix 1**. Since July 2013, pass rates for the exam have decreased slightly for July administrations. With the exception of the February 2017 exam administration, the pass rate for winter administrations has remained relatively flat. However, in February 2017, only 42% of test takers passed the exam, which was 11 percentage points lower than the February 2016 pass rate and 16 percentage points lower than the average pass rate for February exam administrations in the preceding five years.

Decline in Pass Rate for February 2017 General Bar Examination

The board attributes the lower pass rate in February 2017 to two possible factors. First, the board noted that NCBE has described a general decline in the “quality” of bar applicants as shown by a downward trend in the mean MBE score in recent years. Because NCBE is able to construct the MBE exam for each exam session in a manner that is of approximately equal difficulty, test takers of equal ability and having prepared for the exam to an equal extent should receive approximately equal scores across each administration of the exam. This being the case, the board indicated that the “decline in mean performance from session to session indicates a decline in the mean ability level of the testing population.” This decline in mean ability level may also explain the slight decrease in July exam pass rates as well.

The second possible reason for lower performance offered by the board was that a higher than usual number of test takers during the February 2017 bar exam had previously failed an earlier administration of the exam. For the February 2017 exam administration, approximately 62% of test takers were retaking the test for a second or subsequent time, whereas in the preceding five February exam administrations, an average of approximately 52% of exam test takers were retaking the exam. (See Appendix 1.) According to the board, the pass rate for retakers “routinely lags behind the pass rate for first-time takers.” The data provided by the board generally confirms this assessment, showing that pass rates have typically been lower for exam administrations in which a higher percentage of test takers were retaking the exam.

Overall Decline in Examination Takers

The decline in the number of exam takers correlates with data compiled by the Law School Admissions Council (LSAC) showing an overall decline in annual law school admissions, which began in 2011. As the number of law school applications and admissions has declined, the number of individuals taking the bar exam has also declined. More recent data from LSAC suggests that the historic year-to-year decline in law school admissions may be leveling off, but it is unclear if this is any indication that admissions will begin increasing in the near future.

Out-of-State Attorney’s Examination

Appendix 2 shows that between February 2012 and February 2017, an average of 92 individuals took the Out-of-State Attorney’s Examination at each administration of the test. **Appendix 3** shows that for each bar exam administration between February 2012 and February 2017, an average of 107 individuals with non-Maryland bar admissions took the General Bar Examination rather than the Out-of-State Attorney’s Examination. The board advises that the reason individuals with non-Maryland bar admissions take the General Bar Examination in lieu of the Out-of-State Attorney’s Examination is because they lack the requisite number of years of professional experience required to apply for the Out-of-State Attorney’s Examination.

Overall Decline in Exam Takers Resulting in Declining Revenues

The board is funded with State general funds through the Judiciary. Board revenues, which are primarily generated from bar application and examination fees, are credited to the general fund. The various fees collected by the board are set by the Court of Appeals. However, as noted above, the maximum examination fee that the court may set is capped by law at \$400. Following the 2008 fee cap increase to \$400, the Court of Appeals raised the examination fee from \$150 to \$250, where it has remained since. In addition to the examination fee, the board also charges bar applicants an application fee set by the Court of Appeals at \$225 for applications filed early and \$275 for applications filed on time. The Court of Appeals last increased the application fees in January 2009 by \$50.

Based on data provided by the board, **Appendix 4** summarizes the board's revenues and expenditures for the past five years. However, the board was unable to provide salary and benefit expenditures for board staff for the covered period because the Judiciary's budgeting and payroll systems do not track employees by department. Appendix 4 also shows significant decreases in special and technical expenditures from fiscal 2012 to 2013 and corresponding increases in contractual expenses at the same time. The board advises that these changes reflect a recategorization of board member and exam reviewer compensation from the special and technical expenses category to the contractual expenses category.

There is no statutory requirement that revenues generated by the board cover its expenditures, but Chapter 413 of 2008 stated the General Assembly's intent that the board's expenditures be covered by fees, to the extent possible. In recent years, however, the board's expenditures have remained relatively flat from year to year, while its revenues have continued to decrease, as shown in Appendix 4. This has resulted in a decreasing margin between the board's revenues and expenditures, and in fiscal 2017, the board's revenues fell slightly short of expenditures. The Department of Legislative Services (DLS) notes that if board staff compensation were included, board expenditures would far surpass current revenues.

From fiscal 2012 through the end of fiscal 2017, revenues fell an average of 7.7% each year, with the largest revenue decreases occurring in fiscal 2015 and 2017. These revenue decreases correspond with decreasing numbers of bar examination test takers, as discussed above. The board is aware of this issue, but indicated that it did not see any need at this time to increase fees, and that it is working to reduce costs and expenditures. Indeed, the board's fiscal history does indicate that the board has made progress towards spending cuts in many expenditure areas. Again, these spending trend data do not include board staff compensation, which has likely increased due to salary increases and increased costs of employee benefits over that time period. Notwithstanding, while fiscal 2017 revenues were able to cover approximately 99% of the board's expenditures (not including staff compensation), the continuing trend of decreasing revenues suggests the possibility of future and more significant gaps between revenues and expenditures if left unchecked.

Overall, **Appendix 5** shows that the fees charged by the board are in the low to mid-range when compared to fees charged by other mid-Atlantic states. The total cost of the bar application

is currently lower in Maryland than in all other states in the region with the exception of New York and the District of Columbia. Maryland's bar examination fee has been set at \$250 since January 2009. The current examination fee is set \$150 below the \$400 statutory cap set by the General Assembly following the most recent sunset evaluation of the board in 2008. At this level, the Court of Appeals has some flexibility for future increases should the need arise. With the recent history of declines in law school admissions, it seems likely that there will be a similar continuing decline in the number of individuals taking the bar, thereby putting further downward pressure on board revenues.

Potential Change to the Uniform Bar Examination

In October 2017, an advisory committee appointed by Chief Judge Mary Ellen Barbera of the Court of Appeals published a report regarding the feasibility of Maryland's adoption of the Uniform Bar Examination (UBE), a uniformly administered, graded, and scored exam prepared by NCBE and administered in 26 states and the District of Columbia. The advisory committee was tasked with evaluating the UBE and making a recommendation as to whether the State should adopt the examination in lieu of the current bar exam prepared by the Board of Bar Examiners. The advisory committee voted to recommend adoption, noting that one of the UBE's most significant features is the potential portability of exam scores, which would allow for individuals who had passed the UBE in one state to transfer their score to become admitted to practice law in other states offering the exam.

Adoption of the UBE Will Likely Result in Increased Costs to the Board

While the use of State monies was outside the official scope of the advisory committee's work, the committee's report noted that adoption of the UBE would result in a \$34 increase in cost per exam applicant compared to current costs. According to the report, the board does not believe that this cost would be passed on to applicants but could be absorbed by the board's existing budgetary resources. The rationale provided in the report is that "application fees are set by the [board] to be affordable, rather than to cover all expenses." In light of the continuing decrease in annual revenues, the board's ability to absorb those costs may be limited.

Conclusion and Recommendations

There is a continued need for regulation of admissions to the bar. DLS is satisfied that the board is appropriately vested with this authority and that it fulfills this function in a fair and efficient manner. Therefore, **DLS recommends that the Legislative Policy Committee waive the State Board of Law Examiners from full evaluation and that legislation be enacted to extend the board's termination date by 10 years to July 1, 2030.** The next preliminary evaluation would be conducted in 2027.

The board did not generate sufficient revenues to cover its expenditures in the most recent fiscal year; the gap would be even more pronounced if the board's staff costs were factored into

the calculation. While the 2017 gap was minimal, it does appear to be the latest development resulting from a continuing trend of falling revenues and relatively flat expenditures. Because of this, and because the board is not covering the cost of its own staff with current revenues, **DLS further recommends that the board consider raising fees to cover all of its expenses, including staff, especially if the court decides to adopt the UBE.**

The board's written response to this report and its recommendations is included in **Appendix 6.**

Appendix 1.
Number of Candidates Taking and Passing
the General Bar Exam in Maryland
February 2012 through February 2017

<u>Date of Exam</u>	<u>Number Taking</u>	<u>Number Passing</u>	<u>Pass Rate</u>	<u>Percent of Test Takers Retaking</u>
February 2012	562	308	55%	49%
July 2012	1,615	1,227	76%	12%
February 2013	597	374	63%	47%
July 2013	1,544	1,197	78%	13%
February 2014	567	342	60%	53%
July 2014	1,537	1,102	72%	12%
February 2015	607	358	59%	54%
July 2015	1,316	827	63%	15%
February 2016	616	325	53%	58%
July 2016	1,252	790	63%	18%
February 2017	560	233	42%	62%

Appendix 2.
Number of Candidates Taking and Passing
the Out-of-State Attorneys' Bar Exam in Maryland
February 2012 through February 2017

<u>Date of Exam</u>	<u>Number Taking</u>	<u>Number Passing</u>	<u>Pass Rate</u>
February 2012	89	74	83%
July 2012	98	88	90%
February 2013	101	88	87%
July 2013	113	86	76%
February 2014	87	67	77%
July 2014	104	99	95%
February 2015	78	65	83%
July 2015	101	90	89%
February 2016	73	66	90%
July 2016	78	69	88%
February 2017	86	76	88%

Appendix 3.
**Number of Candidates Previously Admitted to Practice in Another
Jurisdiction Taking the General Bar Exam in Maryland
February 2012 through February 2017**

<u>Date of Exam</u>	<u>Total Number Taking General Bar Exam</u>	<u>Number Taking General Bar Exam and Admitted in Another Jurisdiction</u>	<u>Percent Taking General Bar Exam and Admitted in Another Jurisdiction</u>
February 2012	562	101	18%
July 2012	1,615	125	8%
February 2013	597	102	17%
July 2013	1,544	138	9%
February 2014	567	107	19%
July 2014	1,537	129	8%
February 2015	607	117	19%
July 2015	1,316	79	6%
February 2016	616	100	16%
July 2016	1,252	87	7%
February 2017	560	93	17%

Appendix 4.
Fiscal History of the State Board of Law Examiners
Fiscal 2012 through 2017

	FY 2012	FY 2013	FY 2014	FY 2015	FY 2016	FY 2017
	<u>Actual</u>	<u>Actual</u>	<u>Actual</u>	<u>Actual</u>	<u>Actual</u>	<u>Actual</u>
General Fund Expenditures						
Salaries and Wages ¹	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
Special and Technical	409,040.00	99,450.00	63,990.00	78,795.00	59,985.00	36,072.60
Communications	13,444.04	7,213.80	7,235.15	7,217.22	5,873.71	6,599.33
Travel	9,504.17	5,774.85	9,338.68	4,514.51	4,065.92	5,806.27
Utilities	0.00	0.00	0.00	0.00	0.00	0.00
Vehicles	0.00	0.00	0.00	0.00	0.00	0.00
Contractual Services	339,126.90	762,318.13	738,795.30	852,826.79	851,127.34	809,139.91
Supplies and Materials	19,985.16	15,996.20	13,572.34	12,341.01	15,066.03	13,302.76
Equipment Replacement	0.00	0.00	0.00	0.00	0.00	0.00
Equipment Additional	7,460.00	4,219.83	0.00	0.00	0.00	0.00
Fixed Charges ²	45,677.20	3,293.02	80,690.29	2,652.55	1,293.82	1,360.82
Total Expenditures	\$844,237.47	\$898,265.83	\$913,621.76	\$958,347.08	\$937,411.82	\$872,281.69
General Fund Revenues						
Examination Fees	\$623,500.00	\$524,750.00	\$570,500.00	\$513,250.00	\$497,750.00	435,500.00
Character Update Fees	8,750.00	4,900.00	3,010.00	3,360.00	3,220.00	4,060.00
Out-of-state Attorney Fees	127,400.00	145,925.00	128,150.00	122,650.00	109,250.00	129,500.00
Application (Registration) Fees	525,575.00	426,125.00	457,425.00	388,620.00	355,025.00	284,375.00
Miscellaneous Fees	4,755.50	5,044.00	4,322.00	5,887.50	6,850.00	7,195.00
Total Revenues	\$1,289,980.50	\$1,197,624.00	\$1,163,407.00	\$1,033,747.50	\$972,095.00	\$860,630.00

	FY 2012	FY 2013	FY 2014	FY 2015	FY 2016	FY 2017
	<u>Actual</u>	<u>Actual</u>	<u>Actual</u>	<u>Actual</u>	<u>Actual</u>	<u>Actual</u>
Comparison: Revenues vs. Expenditures						
Revenues	\$1,289,980.50	\$1,197,624.00	\$1,163,407.00	\$1,033,747.50	\$972,095.00	\$860,630.00
Expenditures	\$844,237.47	\$898,265.83	\$913,621.76	\$958,347.08	\$937,411.82	\$872,281.69
Revenue Excess/(Deficit)	\$445,743.03	\$299,358.17	\$249,785.24	\$75,400.42	\$34,683.18	(\$11,651.69)
% Expenditures Covered	152.80%	133.33%	127.34%	107.87%	103.70%	98.66%

¹For fiscal years 2012 through 2017, the salaries and wages of the State Board of Law Examiners were not attributable to the board.

²In fiscal years 2012 and 2014, rent was attributed to the board as a fixed cost. Rent was not attributed as a cost to the board in any other fiscal year shown.

Source: State Board of Law Examiners

Appendix 5.
Bar Application Fees in the Mid-Atlantic Region
(Excluding Out-of-state attorney application fees)

<u>Jurisdiction</u>	<u>Examination Fee</u>	<u>Separate Registration/ Application Fee</u>	<u>Total Fee</u>
Maryland	\$250	\$225-\$275	\$475-\$525
Connecticut	\$800		\$800
Delaware	\$700-\$1,400		\$700-\$1,400
District of Columbia	\$114-\$324	\$110	\$224-\$434
New Jersey	\$675-\$1,200		\$675-\$1,200
New York	\$250		\$250
North Carolina	\$700-\$950		\$700-\$950
Pennsylvania	\$650-\$1,500		\$650-\$1,500
Virginia	\$375	\$175-\$475	\$550-\$850
West Virginia	\$500-\$700		\$500-\$700

Notes: Examination fee may be the only fee charged by some states. Fees can vary based on application timeliness. Fees do not include miscellaneous fees, fees for applicants who have received a law degree from a foreign country, or additional fees for computer-based testing, repeat examinations, or background investigations.

Source: Jurisdiction websites

Appendix 6.
Written Comments of the State Board of Law Examiners

MEMBERS OF THE BOARD
JONATHAN A. AZRAEL, CHAIRMAN
JOHN F. MUDD
MAURENE E. McNEIL
DAVID E. RALPH
MATTHEW T. MILLS
GREGORY H. GETTY
MAURA L. LYNCH



SECRETARY
JEFFREY C. SHIPLEY
DIRECTOR, CHARACTER & FITNESS
BARBARA L. GAVIN
CLERK TO THE BOARD
ROSE E. BERG

STATE BOARD OF LAW EXAMINERS

2011-F COMMERCE PARK DRIVE
ANNAPOLIS, MD 21401
(410) 260-3640
MARYLAND-RELAY SERVICE (TT/VOICE) 1-800-735-2258
www.mdcourts.gov

November 29, 2017

Michael C. Rubenstein
Principal Policy Analyst, Office of Policy Analysis
Department of Legislative Services
Legislative Services Building
90 State Circle
Annapolis, MD 21401

Re: State Board of Law Examiners' Response to Exposure Draft of Preliminary Review

Mr. Rubenstein:

The State Board of Law Examiners ("the Board") has completed its review of the exposure draft copy of the Office of Policy Analysis' preliminary evaluation. The Board's comments follow.

The Board believes it is too early to reach the conclusions stated in the exposure draft with regard to the potential impact of the adoption of the Uniform Bar Exam on Board revenues and expenses. (Exposure Draft, p. 6.) While the Board will have to purchase exam materials from the National Conference of Bar Examiners (NCBE) costing \$34 more than the current materials, that expense is not incurred for each individual who pays an exam fee because the Board only pays the NCBE for exam materials for each actual exam taker. Hence, the Board does not pay a materials charge for applicants who apply but then withdraw or are absent from the exam. Also, the switch to use of NCBE materials for the UBE will eliminate exam-related expenditures related to printing the exam questions. Further, while the Board has yet to set an application fee for UBE transfer applicants, those applicants will provide revenue with no concurrent exam-related expenditures. The fees charged to UBE transfer applicants in most current UBE jurisdictions match or exceed the fees charged to examination applicants. This "non-exam applicant" revenue stream may fundamentally alter the Board's revenue/expenditure ratio.

Finally, the Board notes that to follow the Office of Policy Analysis' recommendation that revenues be increased to cover attributed staff salary and benefits in addition to its operational costs (Exposure Draft, p. 7) is contrary to past practice. The Board's budget historically has not included staff salaries and benefits, as these are part of the general budget for the Judiciary, and have not been covered by application and exam fees. Moreover, to add staff salaries and benefits to revenues would require an immediate increase in application and exam fees by approximately 60% over their current levels, as well as regular increases thereafter. Maryland's current timely application and exam fees for a General Bar applicant total \$525. (Maryland charges the same application and exam fees to all General Bar applicants.) The average application and exam fees

for an applicant seeking a first bar admission in the mid-Atlantic region (CT, DC, DE, NC, NJ, NY, PA, and WV) is \$642. Should Maryland increase its timely application and exam fees for the General Bar Exam by 60%, the resulting fee would be \$840. Although a modest increase in fees may be warranted, the Board is particularly concerned about the impact of charging the highest application and exam fees in the region to recent law school graduates seeking a first bar admission.

The State Board of Law Examiners appreciates the efforts of the Office of Policy Analysis in compiling the Preliminary Evaluation. Should you have questions, please do not hesitate to contact us.

Sincerely yours,

STATE BOARD OF LAW EXAMINERS

Handwritten signature of Jonathan A. Azrael in blue ink, dated 1/21.

Jonathan A. Azrael, Chairman

Handwritten signature of Jeffrey C. Shipley in blue ink.

Jeffrey C. Shipley, Secretary

Cc: Chief Judge Mary Ellen Barbera
Pamela Q. Harris, State Court Administrator
All Board Members