

## MEMORANDUM

DATE: December 4, 2023  
TO: The Honorable Steven González, Chief Justice  
FROM: Renata de Carvalho Garcia, Chief Regulatory Counsel  
Terra Nevitt, Executive Director  
RE: Washington’s Adoption of NCBE NextGen Bar Exam

### EXECUTIVE SUMMARY

This memo outlines the development of the NextGen Bar Exam (NextGen) by the National Conference of Bar Examiners (NCBE) and discusses various factors the Court may want to consider in its evaluation of whether to adopt NextGen, and, if so, when.

According to NCBE materials and based upon the knowledge and expertise of WSBA staff responsible for administering the bar exam, we found:

- (i) NCBE has consistently provided a statistically valid and reliable bar exam with the UBE;<sup>1</sup>
- (ii) NCBE has undertaken a rigorous multi-year process to develop NextGen;
- (iii) NextGen appears to be an improvement over the UBE, involving similar doctrinal rigor but emphasizing practical lawyering skills in an integrated question format; and
- (iv) NCBE has demonstrated a commitment to minimize measurement bias for both the current bar exam and the NextGen Bar Exam.

Accordingly, considering our prior experience with the UBE and NCBE, and based upon the information outlined in this memo, the WSBA recommends the adoption of the NextGen Bar Exam and respectfully asks the Court to enter an order adopting the NextGen Bar Exam, effective July 2026.

### ADOPTION OF UBE IN WASHINGTON STATE

This Court adopted the UBE in July 2013. Prior to that WSBA developed and administered its own bar exam. The UBE provides numerous benefits when compared to pre-UBE practice in Washington, including: (i) test items drafted by committees of subject matter experts, including law professors, deans, judges and practicing attorneys from across the nation in a rigorous multi-year process for each item; (ii) statistical analysis ensuring that the test items “perform” in a valid and reliable way; (iii) the ability to ensure consistency over time by the statistical practice of “equating” scores—thereby ensuring that the items on one test are not harder or easier than the items given the following year; and (iv) portability—meaning the UBE score could be used by the applicant to gain bar admission in other states within the UBE compact. To date, nearly 250,000 UBE scores have been earned by bar applicants from the 41 UBE jurisdictions, and over 50,000

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<sup>1</sup> <https://thebarexaminer.ncbex.org/article/summer-2022/new-to-bar-admission>

of those scores have been transferred across jurisdictions in support of bar admission in other jurisdictions.

The UBE is currently comprised of three components: (i) the Multistate Essay Exam (MEE), consisting of six individual essay questions; (ii) the Multistate Performance Test (MPT), consisting of two longer, practical questions (draft a legal memo, draft a client letter, etc.); and (iii) the Multistate Bar Exam (MBE), consisting of 200 multiple choice questions. Methodologically, the UBE has consistently demonstrated a statistical reliability that equals or exceeds the reliability results achieved by other high-stakes licensing exams for professionals including doctors, certified public accountants, nurses, and pilots.

The NCBE strives to provide a bar exam that determines minimum competence in a manner that is fair, consistent, measurable, reliable, and scalable. Critics of the current UBE argue, among other things, that the test bears little resemblance to the actual practice of law and that the exam encourages rote memorization and focuses on esoteric doctrinal questions. We agree that there are serious concerns about the disparate impacts of standardized testing and that it is unclear what is the best mechanism for measuring competence to practice law. We also believe that the NextGen Bar Exam is an improvement over the existing bar exam, which is currently a core part of our admissions process and allows flexibility to applicants that may be seeking admission in multiple jurisdictions.

### **DEVELOPMENT OF THE NEXTGEN BAR EXAM**

In 2018, NCBE commissioned a comprehensive three-year study of the bar exam. After conducting listening sessions with hundreds of stakeholders from bar admission agencies, Supreme Courts, the legal academy, and attorneys from across the country, NCBE’s Testing Task Force (TTF) performed a nationwide practice analysis involving nearly 15,000 lawyers who provided data on the work performed by newly licensed lawyers and the knowledge and skills required for early-career competence.

Based on those results, the TTF made three overarching recommendations to evolve the UBE. **First**, the breadth of knowledge tested by the exam should be narrowed to include those knowledge areas that cross a wide range of practice areas—from litigation to transactional work—that newly licensed lawyers most commonly encounter. **Second**, the depth of knowledge assessed should be adjusted to more closely reflect the actual practice of law and the level of familiarity needed for competent practice by a newly licensed lawyer. **Third**, the TTF endorsed an integrated exam structure to assess legal knowledge and legal skills holistically, in a single practice-related examination. Based on those conclusions, the TTF recommended assessment of the following nine foundational concepts and seven foundational skills, utilizing the integrated exam structure.

#### **Foundational Concepts and Principles**

Civil Procedure  
Contract Law

#### **Foundational Skills**

Legal Research  
Legal Writing

Evidence  
Family Law<sup>2</sup>  
Torts  
Business Associations  
Constitutional Law  
Criminal Law  
Real Property

Issue Spotting and Analysis  
Investigation and Evaluation  
Client Counseling and Advising  
Negotiation and Dispute Resolution  
Client Relationship and Management

In January 2021, NCBE’s Board of Trustees approved the recommendations contained in the TTF’s Final Report and committed the organization to developing NextGen. NCBE recently released the final Content and Scope specifications defining what will be covered on the new exam, as well as examples of the new question types for integrated testing of knowledge and skills and an explanatory memo, all of which are available at the NextGen Bar Exam website ([nextgenbarexam.ncbex.org](http://nextgenbarexam.ncbex.org)). NCBE is currently establishing scoring processes and psychometric methods for equating/scaling scores, developing test administration policies and procedures, and developing study materials and sample test questions to help candidates prepare.

NCBE will launch the NextGen Bar Exam for its first administration in July 2026. This will be a phased-in launch, with both the current UBE and NextGen UBE offered through February 2028 (i.e., four bar exam administrations). This will allow jurisdictions some time to evaluate whether and when to adopt NextGen. However, due to the need for potential rule and/or statutory changes to adopt the new exam, and considering potential curriculum changes that law schools may also choose to make, many jurisdictions will make their decision about whether to adopt NextGen in advance of the first administration in 2026. The timing of this memo is prompted by the fact that law school students who are 1Ls today would be the first group of Washington graduates to take the NextGen Bar Exam if the Court elects to adopt NextGen for the first administration in July 2026 and students and law schools would benefit from having some certainty about what their admission process will look like.

As of the writing of this memorandum, Connecticut, Iowa, Maryland, Missouri, Oregon, and Wyoming have announced they intend to adopt the NextGen Bar Exam. Maryland, Missouri, and Oregon intend to first administer the exam in July 2026. Wyoming and Iowa intend to first administer the exam in July 2027. Connecticut has not yet finalized its first administration date.

### **FACTORS TO CONSIDER IN ADOPTING THE NEXTGEN BAR EXAM**

After extensive review and discussion, we offer the following factors for the Court to consider in its evaluation of whether to adopt the NextGen Bar Exam:

1. **Methodological Soundness and Rigor**

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<sup>2</sup> In October 2023, NCBE announced that Family Law would be added to the list of foundational concepts and principles starting with the July 2028 NextGen bar exam.

The eight-year process from the initiation of the TTF in 2018 through first administration of NextGen in 2026 was comprehensive in nature and rigorous in execution. We believe NextGen is a positive evolution of the current UBE.

The final Content and Scope specifications are the result of a multi-year vetting process in which, after preliminary outlines were published, NCBE received and considered nearly 400 individual comments from stakeholders including law school deans, faculty, and administrators; practicing attorneys; judges and justices; law students; and bar examiners and admissions staff. In addition to this public input and after more than two years of work, the final specifications have been through multiple rounds of scrutiny by NCBE's Content and Scope Committee, NCBE's Implementation and Steering Committee for NextGen, current members of NCBE's drafting committees, and NCBE's test editors and staff. The Content Scope NCBE has communicated an intent to continually review and evaluate outlines and provide ongoing opportunities for comments and feedback.

Similarly, the example test items are the result of a multi-phase pilot testing program in which more than 2,500 participants from 70 volunteer law schools took practice exams utilizing the new items, which were drafted by trained teams of law professors and deans, practicing attorneys, and judges. Following administration, the questions were then analyzed both psychometrically and by members of the drafting teams to ensure that they perform well as bar exam questions. It is our understanding that NCBE employs a process to minimize measurement bias in test questions including training exam question drafters, engaging in independent review as well as statistical analysis.<sup>3</sup>

As a result of this process of review and revision, we feel confident that the exam questions for NextGen will continue to match the rigor of the UBE, while using an integrated format that more closely resembles actual legal practice.

## 2. Effect on Law Schools

While knowledge areas tested on the NextGen Bar Exam generally mimic those tested on the current UBE, law schools may encourage 1L faculty to incorporate lawyering skills as they teach in doctrinal courses. This might include incorporating more problem-based learning into coursework as well as in-class discussions of NCBE's example multiple-choice questions, item set type exercises, and essay questions. 1L faculty might also be encouraged to engage with each other to explore how they can introduce students to the interdisciplinary nature of legal practice (e.g., noting when a case raises both contract and tort issues or contract and property issues).

For 2L and 3L courses, law schools are being encouraged to increase the offering of classes that include simulation exercises, as well as externships and clinical courses to build those practical skills. This is consistent with ABA Standards 303(a)(3), 303(b), and 304, which require that experiential learning be integrated into law school curricula.

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<sup>3</sup> <https://thebarexaminer.ncbex.org/article/spring-2023/the-next-generation-of-the-bar-exam-quarterly-update-3>

NCBE intends to continue its support of law schools by not only making NextGen practice materials available, but also by sharing ideas on how to incorporate more skills-based learning into doctrinal courses. NCBE also intends to work closely with academic support personnel at law schools to seek input and provide guidance.

### 3. Timing

As noted above, the first administration of NextGen is scheduled to occur in July 2026 and the UBE is currently scheduled to be phased out after the February 2028 administration. However, considering potential curricular changes at law schools, the need for changes to Washington's Admission and Practice Rules (discussed below), and the desire for certainty as law students proceed through law school and begin to prepare for the bar exam, many jurisdictions are expected to adopt NextGen prior to its first administration in 2026.

The decision about whether, and when, to adopt NextGen is entirely within the discretion of this Court. However, given the 18-month window between first administration of NextGen and sunset of the UBE, we are not in favor of a "wait and see" approach and we believe it will put graduating law students at a disadvantage if there is continued uncertainty about which exam they will face. Although the doctrinal topics will remain largely the same, the integrated format of the NextGen questions and focus on practical skills may be different than what was emphasized in their existing law school curriculum. We believe making the decision now will allow Washington State law schools to have an opportunity to adjust their curriculums if they wish.

### 4. Passing Score

Washington currently employs a scaled passing score of 270 on the UBE. Because NextGen is an assessment that measures some new areas and skills, it will be graded according to a new scale. If the Court adopts NextGen, it will need to determine what score on the new exam is required to pass. NCBE has stated that they intend to support jurisdictions in that decision in two different ways. **First**, NCBE will project current UBE scores onto the NextGen scale (and vice versa) to provide a suggested score that aligns with the current practice. **Second**, NCBE will conduct a national standard setting exercise, involving experts, to help determine at what score level an examinee might generally be considered minimally competent. Although not binding on any jurisdiction, this standard setting exercise will yield a consensus passing score and a reasonable range around that score, which jurisdictions can use as guidance in setting their own passing score. NCBE expects to have those results available by mid-2025, based on the results of further NextGen pretesting at the end of 2024.

### 5. Necessary Rule Changes

The WSBA is tasked by the Court under Rule 4 of the Admission and Practice Rules (APR) to administer the bar examination. Adoption of the NextGen Bar Exam by the Court now will

ensure the WSBA has sufficient time to prepare for the administration of the NextGen Bar Exam, including completing the following tasks:

- (i) Proposing necessary amendments to the APR such as identifying the bar exam for use in Washington, setting the minimum passing score for the NextGen Bar Exam, and resolving issues regarding comparability and acceptance of the current UBE with the NextGen bar exam regarding score portability and UBE score transfers.
- (ii) Making changes to policies and procedures. The NextGen Bar Exam will be a computer-based exam without paper booklets or answer sheets. Therefore, considerations need to be made regarding facilities, proctors, application fees, policies, procedures etc.
- (iii) Notifying bar exam candidates, law schools, and other stakeholders of the move to the NextGen Bar Exam. As outlined above, law-school students who are 1Ls today would be the first class to take the NextGen Bar Exam if adopted by the Court for administration in July 2026.

#### 6. Acceptance of UBE/NextGen Scores

If the Court decides to adopt NextGen, we recommend that the Court also decide that we continue to accept UBE scores from those jurisdictions that have not yet adopted NextGen. NCBE is recommending that jurisdictions accept such scores, utilizing NCBE's score concordance between the UBE and NextGen. If the Court elects not to adopt NextGen for one or more administrations we would similarly recommend that we accept transfer applicants that are seeking admission based on a NextGen score while Washington remains a UBE jurisdiction. NCBE will similarly recommend that jurisdictions accept such scores, utilizing NCBE's score concordance.

### CONCLUSION

We respectfully ask the Court to enter an order adopting the NextGen Bar Exam and indicating that we will continue to accept UBE scores for applicants seeking to transfer their scores for admission to the WSBA effective July 2026.