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Legal Education and NextGen: Recommendations for Transitioning to a New Assessment Model

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school exams are “closed book,” i.e., requiring the memorization of all sources of law, such as rules, cases, and statutes. There can be good reasons for this, particularly if a teacher determines it’s the best way for students to learn the material. As I mentioned above, some differences between education and practice are natural. I just think that “because you have to memorize sources for the bar exam” is an artificial reason, and many of us understandably fall under its sway. That’s why I think the NextGen approach will naturally nudge teachers toward exams that, where possible, will encourage students to use sources as lawyers do—by looking at them.

(It’s important to note, however, that the NextGen exam will not be fully “open book.” It will still require test takers to know a substantial amount of law, as detailed in the Content Scope Outlines. Nor does the current uniform exam entirely lack sources. The Multistate Performance Test, constituting

a fourth of the exam’s time and a fifth of its score, includes them. But the NextGen exam will use more sources throughout, resulting in greater realism overall.)

Third, I anticipate that the NextGen approach will help teachers and students draw more connections between courses. The practice of law regularly spans multiple fields. A lawyer defending a tort claim must also consider a client’s potential criminal liability and how settlement communications may be contractually binding. A lawyer drafting a document waiving liability must consider contract and tort law. And so on. The NextGen’s testing of several fields in a single question set will encourage making these connections early and often in law school courses.

Now, is all this rigorous enough from an educational perspective? I believe it is. The more that students work on realistic questions touching multiple fields—and the less time they spend on rote

memorization siloed by topic—the better prepared they’ll be for the challenges lawyers face today.

To end where I began: when I talk with students about becoming a great lawyer, great law student, and passing the bar exam the first time, I would love to emphasize that the differences among these goals are few. I think other teachers would, too. The NextGen bar exam—from my experience so far, and as reflected in the Content Scope Outlines—will move us toward that promise.



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Legal Education and NextGen: Recommendations for Transitioning to a New Assessment Model

BY **Wanda M. Temm**

One impact of the implementation of the NextGen bar exam that has yet to foster much discussion is its effect on assessment in legal education. Law school exams often model bar exam components, including Multistate Bar

Examination (MBE)-style multiple-choice questions and Multistate Essay Examination (MEE)-style essay questions. Some faculty prefer 60- or 90-minute essay questions, longer than those on the MEE. Some faculty use short-answer questions. Essay and multiple-choice

questions will still have a place in NextGen, of course; although the exact structure of these assessment tools is not set, NCBE’s release of sample questions brings some clarity. And we know that one day of 200 multiple-choice questions is not anticipated, but some MBE-style

FROM MY PERSPECTIVE

questions will be included. Faculty who rely heavily on MBE-style multiple-choice assessments and lengthy essay questions may need to lessen their emphasis on both. The component that NCBE has indicated will appear on the NextGen exam in almost their current form are Multistate Performance Test (MPT)-type items, although they will be redesigned to take a shorter length of time.

In addition, the NextGen bar exam will be an integrated exam; that is, foundational skills and doctrine will be assessed together. Moreover, more than one topic will be assessed from the same fact pattern. Currently, a faculty member does not combine a foundational skill assessment and more than one substantive topic into their assessments. That is not to say that law school assessments do not include any foundational skills as part of assessments. Issue Spotting and Analysis, a NextGen Foundational Skill, is an integral part of all legal analysis assessments in law school. But rarely would a fact investigation or arbitration question find its way into a doctrinal course's final exam.

Currently, law school assessments are based on memorized knowledge of the topic or a combination of memorized knowledge with the assistance of study aids during the exam as a professor allows. The student then must identify issues in a fact pattern in an essay, state the law for each issue, and apply the law to the relevant facts. In a multiple-choice question, the student also

must identify the central issue but then choose the response that most narrowly answers that issue. On the NextGen exam, students will not rely solely on memorized knowledge and may be given a statutory excerpt, a case excerpt, a federal rule of evidence or civil procedure, or a regulation and be expected to analyze the issues based on that particular law only. NCBE has indicated in its NextGen bar exam Content Scope Outlines which sub-topics will need to be memorized.

How the facts are presented will also change to better reflect real-life law practice. Students may be given a police report, a complaint, a deposition transcript, or other relevant documents and be expected to identify the legally significant facts to analyze their answer. For example, students might be given a contract, be expected to identify incorrect provisions, and then rewrite them.

Law students matriculating in fall 2023 and part-time students who have already matriculated will be the first to take the NextGen exam in July 2026. As the NextGen exam includes content from all first-year courses, law schools should immediately review their assessment tools and decide whether and how much to emulate NextGen-style questions. Some faculty and law schools may opt to make no changes based on pedagogical reasons. Others may wish to have their students become familiar with NextGen-style questions in their first-year final exams. Each law school will determine how much

emphasis should be placed on using NextGen-style assessments.

How can law schools and law faculty transition to such assessments? The reality is that developing valid and reliable assessment tools takes a tremendous amount of time. Just as a novice faculty member must learn about assessment, current faculty must also take on this challenge. If each 1L faculty member incorporates one NextGen-style assessment into their exams, that would be a significant accomplishment. Here are concrete steps to take given our current knowledge about the NextGen exam.

- Aim to include one foundational skill question from the Issue Spotting and Analysis set of questions on an essay. Ask students to “Identify which [two or three] facts are likely to be relevant to or dispositive of a legal issue” or “Identify the strengths and weaknesses of a client’s position or an opposing party’s position based on the relevant legal rules and standards.”
- Rather than include a lengthy fact summary, break the fact pattern into more than one section and ask short-answer questions for each. In Property, have facts that address delivery of a deed and then include the recording statute, add facts about another claimant to the property, and ask a question about whether that individual is a bona fide purchaser.
- Instead of a summary of the facts, provide a complaint and


its answer or a police report or other practical document. For example, provide the lity of an interrogation in Criminal Procedure and ask questions regarding waiving Miranda warning.

- Provide specific law for the student to analyze rather than having them rely on memorized knowledge. This is particularly critical for Criminal Law that will no longer include common law crimes. Start with a statutory excerpt with facts particular to that statute. Then add a different statute and ask questions about additional but related facts. One issue could be on the mens rea and another on an element of the crime.
- In upper-level courses, have law librarians at your school present on advanced research skills for the course's particular topic and require the students to complete a research exercise to demonstrate and practice their skills.
- Include a drafting assignment in addition to a final exam.

Students in Civil Procedure would draft a complaint. Students in Torts could draft a discovery plan. Students in Contracts could draft contract provisions.

- Include a foundational skills component as a module in a course and do an assessment. Include a client counseling exercise in Property on issues relating to purchasing property. Include a plea negotiation exercise in Criminal Law.
- Work with a colleague to develop questions to use on each other's exams that incorporate both topics. For example, Torts and Civil Procedure faculty could work together on a problem requiring fact investigation. From the same fact pattern, the Torts professor's question would focus on facts to support the elements of the Tort. The Civil Procedure professor would focus on facts to support the discovery of the action that would toll the statute of limitations or which affirmative

defenses to raise. The Civil Procedure professor could include the statute that states the limitation of the action and a case on tolling.

Changing how we assess our students in law school will be a challenge for each of us. We are used to providing our hypotheticals in a summary and having students rely on memorized law. Yet we know that attorneys do not just rely on memorized law. Including NextGen-style questions will frame legal analysis in a way that is more like real-life law practice. The possibilities are endless and limited only by our imaginations. 



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