Drafting the NextGen Bar Exam
Beth Donahue, JD
Director of Strategic Business Initiatives
National Conference of Bar Examiners

Jon Lee, JD
Associate Professor of Law
University of Maine School of Law
NCBE Distinguished Scholar in Residence
Foundational Skills

- Legal Research
- Legal Writing
- Issue Spotting and Analysis
- Investigation and Evaluation
- Client Counseling and Advising
- Negotiation and Dispute Resolution
- Client Relationship and Management
Components of the NextGen Bar Exam

Multiple-Choice Questions

Integrated Question Sets

Performance Tasks
New Format and Question Types

- **Multiple-Choice Questions**: ≈40%
- **Performance Tasks**: ≈33%
- **Integrated Question Sets**: ≈27%

Nine hours over 1.5 days
Integrated Question Sets

- **Counseling Sets**
  - One client-focused scenario
  - Collection of short-answer and multiple-choice questions

- **Drafting Sets**
  - One client-focused scenario
  - An editing or revising exercise based on a provided document
The initial scenario, raising issues of Criminal Law and Evidence, includes:

- A police report
- A statute governing assault and battery
- A short excerpt from a case interpreting the statute
Initial Prompts

**What fact** in the police report will be most helpful in proving the element of “knowingly”?

**List three avenues** you would pursue to gather other evidence relevant to the issue of “great bodily harm.”

**Multiple choice:** Will the police officer be permitted to testify in his own words about the victim’s description of the incident?
Scenario Continues

- A transcript of a law clerk’s interview of a witness is provided
- Examinee learns the resolution of several outstanding issues as the case unfolds
Later Prompts

Review the transcript of the witness interview and identify two mistakes the law clerk made.

Defense counsel has proposed a plea deal that would be very favorable to the defendant. List two concerns you would raise in response.
Drafting Set Example

- Legal Writing and Drafting
- Civil Procedure
- Contracts
- Issue Spotting and Analysis
- Client Counseling and Advising
Client Scenario

The scenario, raising issues of Contracts and Civil Procedure, includes:

- A transcript of a client interview (presenting a contract dispute)
- Sections of a complaint drafted by a student intern
- Two rules of civil procedure
Prompts

Identify factual and legal mistakes in the draft complaint.

Describe how to correct each mistake.
Question Set
Drafting Advice
## Levels of Change for Legal Educators

<table>
<thead>
<tr>
<th>LEVEL</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>0</strong></td>
<td>Don’t know, don’t care. <em>(Not here)</em></td>
</tr>
<tr>
<td><strong>1</strong></td>
<td>Interested, but happy with my courses as they are. Would rather not change much.</td>
</tr>
<tr>
<td><strong>2</strong></td>
<td>Would like to alter aspects of my course to the extent I like the direction of the new exam.</td>
</tr>
<tr>
<td><strong>3</strong></td>
<td>Need to alter aspects of my course. <em>(e.g., I teach bar readiness.)</em></td>
</tr>
</tbody>
</table>
Dance school owner purchases new building and enters into agreement with contractor to renovate it.

Agreement includes a liquidated damages clause in the event contractor does not meet deadline.

Due to delays, renovation not complete by deadline.

Dance school owner incurs storage costs, advertising expenses, loss of current customers, loss of higher profits from new location.

Dance school owner demands payment of liquidated damages, contractor refuses.
Discuss the rights and liabilities of the parties. The dance studio owner sues the contractor for breach of contract, seeking payment under the liquidated damages provision or, in the alternative, the actual damages the owner incurred. What is the likely result?
Add a lawyer-client relationship
   – “Your client owns a dance studio...”

Consider breaking “kitchen sink” tasks into multiple tasks, including pre-litigation tasks
   – “Your client has identified a contractor to renovate its new building and asks your advice on adding a clause . . . ”
Key Takeaway: Foundational Skills List

Drafters are using the foundational skills list from the NextGen Content Scope to develop questions.
LEVEL 2 ADAPTATION

- Provide a client interview transcript rather than summarizing the facts
  - “You had the following discussion with your client...”

- Consider including questions that go beyond doctrinal-focused tasks
  - Look at Group B, Group C, and Group D skills
Foundational Skills List

“How would you redraft the proposed contract provision?”

“Given your client’s needs and concerns, list two drawbacks of including the current contract provision.”
Avoid Hinging

An actual or perceived relationship between two questions such that an examinee, upon viewing the second question, reconsiders their answer to the first question.

Fixes:

- Different issues
- Different defendants
- Different claims
Consider including interdisciplinary questions that connect the scenario to multiple core courses

- “While your client is waiting for the contractor to complete the renovations for their new building, their current lease is ending . . . ”
Key Takeaway: Subject-Matter Outlines

Drafters are using the subject-matter outlines from the NextGen Content Scope to develop interdisciplinary question sets.
Interdisciplinary Benefits

- Help avoid hinging
- Help students make connections across courses
- Help students prepare for practice
- Opportunity for faculty collaboration?
How Much Memorization?

Detailed Knowledge ★
Know details of doctrine without consulting legal resources

Limited Scope
Spot issues and work efficiently with provided legal resources to perform analyses and evaluation tasks
Negligence

A. Duty of care to foreseeable and unforeseeable plaintiffs

1. Duty to control third persons★

2. Duty to act when previous actions exacerbate a risk of harm★

3. Duty of owners and occupiers of land

4. Duty to avoid unreasonable risk of causing emotional distress
Negligence

A. Duty of care to foreseeable and unforeseeable plaintiffs

1. Duty to control third persons ★

2. Duty to act when previous actions exacerbate a risk of harm ★

Examinees are expected to know and apply these duties without provided resources
Examinees should be able to recognize if these duties are relevant to the scenario without provided resources...

Negligence

A. Duty of care to foreseeable and unforeseeable plaintiffs

3. Duty of owners and occupiers of land
4. Duty to avoid unreasonable risk of causing emotional distress
Negligence

A. Duty of care to foreseeable and unforeseeable plaintiffs

3. Duty of owners and occupiers of land

4. Duty to avoid unreasonable risk of causing emotional distress

...and examinees should be able to apply these duties with provided resources
ADAPTATION

- Check all questions against starred/unstarred designations in the subject-matter outlines
  - Include additional source materials for unstarred topics in bar-prep materials
  - In final weeks of bar review, consider limiting memory retention exercises such as knowledge-based multiple-choice questions and flash cards to starred topics
Questions?
Thank you.