WILL THE NEXTGEN BAR TRULY TEST LEGAL RESEARCH? A CRITICAL EVALUATION OF SAMPLE QUESTIONS

ASHLEY ARRINGTON[1]

The upcoming transition from the Uniform Bar Exam to the NextGen Bar Exam will be significant, in large part due to the new, heavy emphasis on practical lawyering skills. Indeed, the percentage weight allotted to the not-yet-before-seen "foundational skills" portion of the NextGen exam is anticipated to be 50-60% of the exam.[2] Of the foundational skills to be tested, legal research stands to be the most heavily weighted skills area on the exam.[3] This weight is in part due to the NCBE's plans to test legal research as both a skills area and a knowledge area where skills are applied.[4]

While the National Committee of Bar Examiners places considerable importance on the distinction between knowledge and skills, a critical evaluation of the released sample questions for the NextGen Bar Exam not only fails to evince the presence of both knowledge and skills testing, but more importantly, an overall failure to effectively test legal research.[5]

---

[1] Ashley Arrington is the Head of Instruction and an Associate Librarian of Law at Texas Tech University School of Law. This essay is drawn from her presentation at the Western States Legal Writing Conference held at Seattle University School of Law in September 2024.

[2] *Final Report of the Testing Task Force*, Nat'l Conf. of Bar Exam'rs, 18 (Apr. 2021), https://nextgenbarexam.ncbex.org/wp-content/uploads/TTF-Final-Report-April-2021.pdf.

[3] *Id.* at 16.

[4] *Id.* at 16-17.

[5] This evaluation looks closely at the multiple-choice and integrated question sets that have been released. While the NCBE plans to also incorporate short answer questions and modified

Multiple Choice Questions

Let's look first at the four sample multiple-choice questions that attempt to test legal research. In three such questions, the call begins with, "Which of the following questions are most important for you to research . . . ?"[6] Two are then followed by "before advising the client?" and one "to determine the likelihood of success on a [specified motion]?"[7] The fourth question is similarly structured and asks, "Which of the following search term(s) would be the most likely to produce resources that will answer the client's questions?"[8] Each question is preceded by a hypothetical fact pattern that implicates various doctrinal topics and asks the examinee to identify which of those concepts are relevant. For example, in a contracts-focused question, the answer choices include accord and satisfaction, consideration, novation, and offer and acceptance.[9]

The words "research" and "search terms" are included in the questions above, yet use of the terms does not alone make those questions true research questions. In each of the multiple-choice questions that arguably attempts to test legal research—whether by way of knowledge or skills—the examinee is tasked with identifying the relevant doctrinal topics. Thus, the examinee in actuality is tested only on their knowledge of doctrinal concepts.

Integrated Question Sets

The sample integrated question sets are only slightly better. Of the first released integrated question set, three of the six questions are intended to test legal research. One asks the examinee to identify the facts providing the most support for a specified cause of action; another asks the examinee to list two claims they could bring on behalf of their

---

performance tasks, at present, it has provided little information regarding what those question types will look like.

[6] *Sample NextGen Bar Exam Multiple-Choice Questions*, Nat'l Conf. of Bar Exam'rs, https://nextgenbarexam.ncbex.org/multiple-choice-questions/.

[7] *Id.*

[8] *Id.*

[9] *Id.*

client.[10] The former begins its hypothetical with "After discussing your research with the client and assisting the client in setting goals . . ."; the latter example begins with "Your legal research since the client interview supports a [specified finding]."[11] Again, the word "research" is used, yet in both instances the examinee is informed that the research process has concluded. The examinee is not asked to demonstrate research knowledge or skills but instead to identify relevant doctrinal claims and then predict the likelihood of success for those claims.

The remaining of the initial set of integrated questions, after noting the omission of a definition within a statutory code section, asks the examinee to "advise the law clerk on two specific legal sources that are the most likely to provide a controlling definition" of a specified legal term.[12] Regrettably, this is the first and only instance in which examinees are asked to demonstrate some knowledge of legal sources.

The more recently released integrated question set, after providing various relevant excerpts, asks examinees to find five mistakes in a complaint, including mistakes of fact, substantive law, or violations of procedural rules.[13] It does not ask the examinee to identify any mistakes in the research process or sources used during such process. It also fails to ask how any of the identified mistakes impact the legal research process.

Performance Tasks

The revised, forthcoming performance task in the NextGen bar exam is intended to assess an examinee's research and written analytical skills.[14] Further, research-focused performance tasks "will consist of a series of multiple-choice and short answer questions followed by one extended-response question."[15] At present, we know little about what these embedded questions will look like; the single sample performance

---

[10] *Sample NextGen Bar Exam Integrated Question Sets*, Nat'l Conf. of Bar Exam'rs, https://nextgenbarexam.ncbex.org/integrated-question-sets/.

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Sample NextGen Bar Exam Performance Task*, Nat'l Conf. of Bar Exam'rs, https://nextgenbarexam.ncbex.org/performance-task/.

[15] *Id.*

task provided only a sample answer outline.[16] We do know that, as with past Multistate Performance Tasks, the examinee will be provided a file and library and not asked to conduct their own research. And, while examinees will be "expected to recognize when facts are inconsistent or missing or to identify sources of additional facts," there's no mention of additional research-related questions, such as recognition of how those facts might impact the research process.[17] Further, the sample answer outline makes no mention of legal research or sources.

The Failure to Test Research Knowledge and Skills

In looking at the released sample question types together, it is evident that such questions fail to make any real distinction between research knowledge and research skills. More problematically, the questions fail to truly and effectively test legal research by way of either knowledge or skills. In a comprehensive review of the available sample questions, just one question tests an examinee's knowledge of basic legal sources, and none truly evaluates an examinee's ability to conduct research—or illustrate competency of such—on their own.[18]

So, where do we go from here?[19] The solution, I believe, lies with a focus on legal research analysis. If we cannot ask examinees to demonstrate competency in conducting research themselves, we should ask them to demonstrate an understanding of the types of analysis involved throughout the legal research process. Without an understanding of the relevant analytical considerations, a newly licensed lawyer cannot be effective or efficient with legal research in practice. Below, I suggest some ways the released sample questions might be improved upon.

---

[16] At present, there are no embedded sample multiple-choice or short answer questions to be reviewed.

[17] *Sample NextGen Bar Exam Performance Task*, *supra* note 14.

[18] While an articulation of the research process could easily be incorporated as a knowledge question, there are currently no questions related to an examinee's knowledge of such process.[18]

[19] The NCBE was highly encouraged to incorporate a research database in the revised version of the exam, but ultimately decided not to do so. While we could certainly ask whether legal research skills can truly be tested without any research database, that is a question for another time. For now, we must assume that, as in line with current plans, the exam will omit any real or faux research database, and instead ask what can be done to improve the released sample questions.

Solution: Multiple Choice Questions

Looking back to the sample multiple choice questions, the most frequently used language, included in three of the four "research" questions is, "Which of the following legal topics are most important for you to research . . . ?" That prompt is followed by (i) "before advising the client?" or (ii) "to determine the likelihood of success on a [specified motion]?". Here, the use of "legal topics" should be replaced with "doctrinal concepts" and thus demonstrate a failure to test legal research. A simple modification of (i) or (ii), however, could resolve this issue and actually focus on research knowledge. Consider these modifications:

Which of the following legal topics . . .

- will require you to synthesize statutory law with relevant case law interpretations?
- would most benefit from in-depth research into both legislative history and judicial interpretation?
- requires an advanced research strategy involving both primary and secondary sources, such as case law, statutes, and scholarly discussion?
- would require evaluating conflicting court opinions to discern how different jurisdictions apply the same legal principles?
- demands a comprehensive research approach that includes codified law, administrative regulations, and case law?

With this revised language, rather than merely identifying the doctrinal concepts arising from a given set of facts, an examinee must demonstrate an understanding of the various types of analysis inherent in legal research. With these examples, for instance, the examinee must critically evaluate the hypothetical to identify not only which research issues are of concern but also which issues will require additional legislative, judicial, or policy analyses; expanded preliminary or issue analyses; or a more comprehensive research analysis involving multiple sources. The modified questions thus emphasize a more nuanced approach to legal research and encourage a deeper understanding of various primary and secondary sources.

With respect to the final sample multiple-choice question—"Which of the following search terms would be more likely to produce relevant sources?"—a focus on the actual search query would be more effective than asking an examinee to simply list two sources. Revised questions might include the following:

- Which of the following search queries would be the most effective?
- What steps can be taken to refine / narrow / expand the search query?
- What are some alternative search queries that could be used?
- How can we evaluate the effectiveness of different search queries?
- Compare the potential effectiveness of the following search queries.
- What are the best practices for optimizing a search query?
- What key components should be included in a search query?

Here, the revised questions expand the focus from merely choosing search terms—thus illustrating only recognition of the relevant doctrinal topics—to exploring the entire research process, including constructing, refining, and evaluating search queries. The revised questions also test legal research more effectively by assessing practical skills such as developing, modifying, and optimizing search queries. Moreover, they test legal research analysis by requiring deeper reasoning, such as comparing the effectiveness of search queries, evaluating search strategies, and analyzing how modifications impact search results.

Solution: Integrated Question Sets

Transitioning to the sample integrated questions, and specifically the question asking an examinee to list two claims they could bring on behalf of their client, as with the multiple-choice sample questions, this question calls merely for the identification of relevant doctrinal concepts given a provided fact pattern. Some improved questions might include the following:

1. For each claim, what is your research approach?
2. How does your research approach differ by claim, if at all?
3. Which issue do you anticipate being more difficult and/or requiring more extensive research, and why?

The first modified question tests legal research analysis by requiring an explanation of the research methodology used, which involves analyzing how different research approaches might be used to support each claim.

The second question tests an examinee's ability to adapt research strategies based on the nature of each claim. It incorporates analysis by requiring an evaluation of why different approaches might be necessary, thus asking the examinee to reflect on the nuances and complexities of each claim.

Finally, the third question asks the examinee to consider the complexity of various research tasks and analyze the relative difficulty of each claim, requiring them to reflect on the factors that influence both research scope and depth.

As a result of the above changes, each modified question requires a deeper analysis of research strategies and complexities, thus offering a more comprehensive evaluation of research skills and analytical thinking as compared to a simple listing of potential claims.

Moving next to the sample integrated question asking an examinee to "advise the law clerk on two specific sources that are most likely to provide a controlling definition," a revised question might instead ask the examinee to (i) identify and categorize distinct types of secondary sources, (ii) provide specific examples of each type of secondary source, (iii) explain how each source can contribute to an effective research approach, (iv) discuss potential challenges or limitations in using various secondary sources, or (v) suggest strategies for overcoming such challenges. These questions go well beyond the original sample question by assessing an examinee's ability to select and explain the use of relevant secondary sources, as well as their analytical skills in addressing potential challenges to the use of secondary sources.

With respect to the newly released integrated question set, which asks the examinee to find five mistakes in a complaint, the exam could instead ask this type of question: "Having identified mistakes of fact,

substantive law, and violations of procedural rules, how might each of these mistakes negatively impact or make more difficult your research process?"

This modified question is more effective in that it shifts the focus from merely identifying mistakes to understanding their implications on the research process. It requires the examinee to analyze how various mistakes—whether mistakes of fact, substantive law, or violations of procedural rules—affect the ability to conduct thorough and accurate legal research. Rather than simply identifying mistakes, the examinee must go a step further to analyze how such errors might impact the research process and results.

By integrating analysis into the released sample questions, the NCBE could more effectively test legal research, both as a knowledge area and skills area.

Conclusion

At present, the sample questions for the NextGen bar exam primarily assess doctrinal knowledge rather than true research skills. By shifting to questions that emphasize analytical skills, the exam could better capture the evaluative and decision-making processes essential for effective legal research. Additionally, a focus on analysis could improve knowledge questions simply asking examinees to identify legal sources. Instead of requiring only a list of sources, questions with an analytical component would prompt examinees to critically evaluate their research choices and consider the reasoning behind such choices.

While testing legal research skills without access to a database presents challenges, emphasizing analytical skills would allow for a more accurate and meaningful assessment of legal research and the critical thinking essential to legal research—skills that all newly licensed lawyers need to be successful in practice.