

To: BOARD OF BAR EXAMINERS
From: Sherry Hieber
Re: Four-attempt limit on the bar examination
Date: September 9, 2019

Attached is a letter from Eileen Fox seeking input from the Board of Bar Examiners regarding the four-attempt limit on the bar examination. Mary Tenn asked me to distribute this memo to the board in anticipation of a board meeting at which we will consider the issue and make recommendations to the court. The following explains the issue that came before the court, the current rules, and a history of the four-attempt limit in New Hampshire. Also included is information on bar exam attempt limits nationally.

1. Issue before the court.

In May 2019, my office received an application for admission by transferred UBE score from an applicant who had taken and failed the bar examination in New Hampshire four times. She then took the UBE exam in Maine and received a score that was passing in New Hampshire (270). She filed a motion with the court seeking a waiver of the four-attempt limit. The court denied her request in an opinion dated June 25, 2019, which contained no comment. The court requests that the board consider whether the four-attempt limit still makes sense considering New Hampshire's implementation of the UBE and other factors discussed below.

2. The current rules.

New Hampshire Supreme Court Rule 42(VIII)(c) provides that a person who has failed the exam four times is not permitted to retake the exam. Attempts in other UBE jurisdictions are counted toward the four attempts.

The four-attempt limit is incorporated into the admission by motion and admission by transferred UBE score rules (Rule 42(XI) and 42(X), respectively). The motion rule states that anyone who has failed the New Hampshire bar examination four times is prohibited from being admitted by motion without examination. NH Supreme Court Rule 42(XI)(f). Rule 42(X)(b) provides that an applicant by transferred UBE score must have earned the minimum score required by the board within no more than four attempts on the UBE.

1. New Hampshire history of the four-attempt limit.

In 1980 (and perhaps prior to that), New Hampshire Supreme Court Rule 42 required anyone who failed the exam twice to obtain permission from the court to retake the exam. The 1987 version added requirements that an applicant successfully complete a bar review course to obtain permission to take the exam a third or fourth time, and to make a "special showing" if the applicant sought to take the exam more than four times. My understanding is that the court was not satisfied with the standard used in considering these requests. Therefore, in 2002 the court adopted a four-attempt limit with an exception for those who had failed four times prior to 2002, allowing them to sit one more time. In 2012, the strict four-attempt limit was adopted.

2. National Perspective.

The 2019 NCBE Guide to Bar Admissions shows that 19 UBE jurisdictions have no limit on attempts, and 16 have limits between 3-6 attempts. In the Northeast, Massachusetts, Connecticut, Maine and New York do not have limits. Vermont allows 4 attempts and Rhode Island allows 5 attempts. In non-UBE jurisdictions, 17 have no limits, and 6 have limits between 3-6 attempts.

I surveyed jurisdictions asking questions that are relevant to our review of the four-attempt limit. I discovered the following information.

- a. Many jurisdictions that have limits allow waiver of the limit for “good cause” or if the applicant meets additional legal education requirements. (This was the kind of approach New Hampshire used to take – requiring special permission after two attempts – which the court found to be unworkable).
- b. Most UBE jurisdictions count attempts on the UBE in other UBE jurisdictions toward the limit (we do this also).
- c. Many jurisdictions allow an applicant to be admitted by transferred UBE score even if the person has failed in their jurisdiction for the maximum number of attempts (we do not).
- d. Most jurisdictions allow admission by motion without examination if someone fails for the maximum number of attempts but then is admitted in another jurisdiction and practices for the requisite time period (we do not).

I contacted the NCBE to see whether it has any data relevant to attempts on the bar examination. Doug Ripkey, the Deputy Director of Testing, shared with me a study they did in 2014, prior to widespread adoption of the UBE. The study demonstrated that fewer than 1% of examinees made more than 4 attempts on the bar exam. 85% took it one time; 9% two times; and 2.9% three times. [It may be worth noting that this study includes jurisdictions that limited attempts]. The study also showed that test takers from minority populations had a greater incidence of retakes. Based on the data, the NCBE concluded that there was a large gap of 20 percentage points between the pass rates of white and minority examinees on the first attempt, but the gap narrowed to 4 percentage points after the third attempt.

3. Policy considerations

A. The four-attempt limit on the bar examination.

The four-attempt limit encourages people who have failed the exam to develop new strategies to pass the exam. I spoke with one applicant who failed twice with abysmal scores, and then passed the third time with flying colors. He said that he had changed his bar review course, devoted himself to studying six hours a day, and used excel spreadsheets to track his progress. I know from speaking with those from jurisdictions with no limit that they have a handful of people who test year after year with little hope of passing the exam.

B. Admission by motion without examination.

Admission by motion without examination requires the applicant to have practiced law for five of the past seven years in a reciprocal jurisdiction, and to be in good standing. It serves to establish minimum competence through a mechanism other than the bar examination. New Hampshire's admission rule prohibits admission of anyone who has failed the UBE examination four times, even if the person becomes admitted in a reciprocal jurisdiction and successfully practices law there for at least five years. This seems like a harsh result, given that applicants who apply by motion may also have failed many times in their home jurisdiction (perhaps a jurisdiction with no attempt limit) but are eligible based on their successful practice experience. Similarly, applicants who pass in jurisdictions that have a lower cut score than New Hampshire (e.g. NY – 266) are admitted by motion after they have practiced for five years and we make no inquiry into their scores. Most UBE jurisdictions allow these admissions without regard to performance on the bar exam.

C. Admission by transferred UBE score.

Admission by transferred UBE score allows applicants who have tested in other UBE jurisdictions to be admitted if they obtain a passing score of 270 or better. Many UBE jurisdictions that have limits on bar exam attempts nonetheless accept transferred UBE scores from applicants if they achieve a passing score elsewhere. This policy would allow people who have demonstrated minimum competency by passing the exam to be admitted but would avoid the burden of unlimited testing in New Hampshire.

Having considered all of the information, Mary believes that one approach we could take is to retain the four-attempt limit to sit for the exam but allow admission on motion without examination and admission by transferred UBE score for those who may have failed the exam for the maximum number of attempts, but who have demonstrated their competence by meeting the practice requirement, or by obtaining a passing UBE score in another UBE jurisdiction. Mary appreciates your consideration of these issues in anticipation of a meeting which we will be scheduling shortly. Thank you.