

AMERICAN BAR ASSOCIATION
MARYLAND STATE BAR ASSOCIATION
SECTION OF REAL PROPERTY TRUST AND ESTATE LAW
REPORT TO THE HOUSE OF DELEGATES
RESOLUTION

1 RESOLVED, That the American Bar Association urges the National Conference of Bar
2 Examiners to include Trust and Estate Law as a Foundational Concept and Principle on
3 the NextGen bar exam; and
4

5 FURTHER RESOLVED, That the American Bar Association urges state, territorial, and
6 tribal bar admission authorities to consider, when adopting the NextGen bar exam, adding
7 to their bar exams subjects such as Trust and Estate Law, that are not covered as a
8 Foundational Concepts and Principles in the NextGen bar exam.

REPORT

Introduction

The NextGen bar exam has been adopted by the National Conference of Board Examiners (NCBE) and is set to begin testing July 2026. Significantly, this new bar exam excludes trust and estate law as a Foundational Concept and Principle.¹ Trust and estate law is listed as one of the top four legal needs facing consumers in the Martindale-Avvo Understanding the Legal Consumer 2022 survey.² Estate planning accounts for 11.2% of all consumer needs.³ It is likely that consumer use of trust and estate planning services would be greater if not for a shortage of attorneys in this area and barriers to access, especially among historically marginalized demographic communities and in rural and “legal desert” communities, all of which are only exacerbated by the removal of trust and estate law from the bar exam.

The decision to remove this area of law is based largely on a survey of newly licensed lawyers and their supervisors. Unfortunately, the survey provides disproportionate representation for sectors of the legal industry where trust and estate law is not traditionally practiced. Even with disproportionate representation, trust and estate law ranks higher in the survey than other areas chosen for inclusion on the NextGen bar exam.

As discussed below, the removal of trust and estate law from the minimum competencies required to practice law will negatively affect students’ desire to learn and work in this practice area and will reinforce the perception that access to justice is not available to the average consumer in the United States. Therefore, this Resolution urges the NCBE to return trust and estate law to the bar exam.

Background

We all need lawyers competent in trust and estate law. It is a universal legal need. It’s personal. It’s marriage, the birth of a child, the rearing and education of children, aging, sickness, incapacity, death, and grieving and recovering. It’s peace of mind at the end of life, taking care of your loved ones when you’re gone, and caring for orphaned children. It impacts every ethnic, cultural, and economic walk of life. It connects to almost every other kind of law: business planning; bankruptcy; domestic relations; and tax law. It’s

¹ A Foundational Concept and Principle is a substantive area of the law for which examinees are required to prepare and develop a base of knowledge in advance of the exam. This is as opposed to a performance task or integrated question set, which are skills-testing components of the exam for which examinees are provided with all the substantive information needed to answer the question, meaning the examinee will not need any prior knowledge or study in that area of the law.

² Understanding the Legal Consumer 2022: How Prospective Clients Decide Who to Hire, p. 2 (<https://www.martindale-avvo.com/wp-content/uploads/Understanding-the-Legal-Consumer-2022.pdf>)

³ Most Common Legal Needs in North America 2022, published by Raphael Bohne Sept. 4, 2024 (<https://www.statista.com/statistics/1266026/most-common-legal-needs-north-america/#:~:text=Family%20planning%20or%20child%20custody,in%20North%20America%20in%202022,12.>)

preserving the family farm and business, protecting family members who are incapacitated, vulnerable, or addicted. It's giving to charity, managing retirement assets, and avoiding fights that destroy families. Not surprisingly, it's one of the top four areas of consumer legal need,⁴ and it must be a minimum skill we expect for all new attorneys.

Members of the ABA's Real Property Trusts and Estates Law Section can attest that a common refrain within our industry is that taking a law school course in trusts and estates is often what first sparks one's interest in the subject (as opposed to the other way around: an interest in the subject leading one to enroll in the course). Particularly when a student has not had any life experience interacting with trusts, intergenerational transfer and preservation of wealth, or probate, the course itself is often one's first exposure to these concepts. In the NextGen Bar era, students seeking elective courses based on what will be tested substantively on the bar exam will now no longer have that incentive to enroll in the course. Law schools looking for cost-saving measures may, in turn, eliminate this elective subject as it experiences a downturn in enrollment. The end result of such a game of dominoes would be generations of lawyers that lack basic understanding of something that impacts literally everyone's life, and a broad swath of diverse students who would otherwise have developed an interest in this area of the law will simply never be exposed to it. Over time, this would mean fewer lawyers practicing in this area of the law and a lack of access to important legal services we all need. We already have a dangerous shortage of estate planning lawyers. This will make it worse, and the bar exam will have failed to protect the public.

Black and Hispanic families are less likely to have an estate plan or receive an inheritance.⁵ Reducing the racial gap in inheritances could have a positive long-term effect on lifetime asset accumulation for generations and reduce the racial wealth gap.⁶ In addition, the family home, which is often the primary source of family wealth, is more likely to either be sold or divided into small pieces across multiple family members and generations in Black and Hispanic communities, resulting in a much higher likelihood of sale, oftentimes against the majority of the family's wishes.⁷ Estate planning attorneys can work with clients to significantly reduce this problem. Conversely, lack of access to estate planning perpetuates systemic racial inequities in home ownership: Without estate planning, the family home is often sold to pay for probate costs and medical benefit recovery. The loss of family home value also has a depressing effect on access to borrowing to start small businesses. Nearly thirty percent of white families report having received an inheritance or gift, compared to about ten percent of Black families, seven

⁴ Understanding the Legal Consumer 2022: How Prospective Clients Decide Who to Hire, at p. 2

⁵ Mattlin, Ben, "Minorities Less Likely to Have an Estate Plan, Boston College Study Says," *Financial Advisor*, September 1, 2023 (federalreserve.gov)

⁶ For a gripping, if chilling, history of the racial wealth gap, its relationship to tax policy, and its dynastic impact on families, see Dorothy A. Brown, *The Whiteness of Wealth: How the Tax System Impoverishes Black Americans--and How We Can Fix It* (2021).

⁷ See, e.g., Thomas W. Mitchell, *Historic Partition Law Reform: A Game Changer for Heirs' Property Owners*, 65 (Cassandra J. Gaither, Ann Carpenter, Tracy Lloyd McCurdy, & Sara Toering eds., 2019). Available at: <https://scholarship.law.tamu.edu/facscholar/1327>.

percent of Hispanic families, and eighteen percent of other families.⁸ These statistics point to the need for greater access, not less, to attorneys who practice estate planning, especially in Black and Hispanic communities. NCBE's decision to eliminate wills, trusts, and future interests from the NextGen Bar Exam will decrease the availability and delivery of critical estate planning services to diverse communities. Even among white families, only slightly more than one-third have an estate plan. Ensuring property, especially the family home, passes as intended (rather than as "heirs property" where value is lost) crosses racial and ethnic lines. While the loss of family home value disproportionately affects Black families, it is estimated that one-half of "heirs property" is owned by non-Black families.

If one were to pick the absolute worst possible time to undermine wills and trusts, it would be right now. The "Great Wealth Transfer" -- the intergenerational transfer of the largest accumulation of wealth in the world's history -- a tsunami of American wealth -- has already started. Baby boomers and the silent generation will bequeath a total of \$84.4 trillion in assets before 2045,⁹ with \$72.6 trillion going directly to their heirs and \$11.9 trillion being donated to charities.¹⁰ Baby boomers will make \$53 trillion in transfers.¹¹ Of the 73 million baby boomers, the youngest are turning 60. The oldest boomers are nearing 80. Born in midcentury as U.S. birthrates surged in tandem with an enormous leap in prosperity after the Depression and World War II, boomers are now beginning to die in larger numbers, along with Americans over 80. It is simply unacceptable that the bar exam would leave society without attorneys qualified to ensure that this wealth is transferred between generations in an orderly and efficient manner. Without competent attorneys, the Great Wealth Transfer is a potentially destructive force that will wreak havoc on the court system and multiple generations of families.

Estate planning and probate work is often performed by solo and small/general practice attorneys rather than large urban firms. In fact, solo and small firms make up a significant share of private practitioners who commonly focus on consumer practice areas such as wills, trusts, and probate. Foundational knowledge in trusts and estates is critical for these attorneys, who are commonly expected to prepare estate plans for their clients. Solo, small practice, and general practice attorneys also provide services in rural and "legal desert" areas, where local attorneys are scarce, and lawyers who specialize in other areas of the law are regularly asked to prepare wills and advise clients about their estate plans. These points are documented in national access-to-justice studies and profession profiles.¹²

⁸ Bhutta, Neil, "Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances," The Federal Reserve, September 28, 2020 (federalreserve.gov)

⁹ Smith, Talmon Joseph, "The Greatest Wealth Transfer in History Is Here, With Familiar (Rich) Winners," *The New York Times*, May 14, 2023 (nytimes.com)

¹⁰ Cerulli Anticipates \$84 Trillion in Wealth Transfers Through 2045, Cerulli Associates, January 20, 2022 (<https://www.cerulli.com/press-releases/cerulli-anticipates-84-trillion-in-wealth-transfers-through-2045>)

¹¹ *Id.*

¹² See ABA, *Profile of the Legal Profession (2023–24)* (showing the prevalence of solo and small-firm practice and their concentration in consumer practice areas); Legal Services Corporation, *The Justice Gap* (documenting rural unmet civil legal needs and attorney shortages); LR Pruitt, *Legal Deserts: A Multi-State Perspective on Rural Access*, Harv. L. & Pol'y Rev. (surveying attorney shortages in rural counties); and

In the United States, small businesses are responsible for employing almost half of the private-sector workforce. Private businesses drive innovation and technological advancements, invest in research and development, leading to the creation of new products, services, and processes that can improve efficiency and competitiveness, and are a significant source of tax revenues. Private businesses also foster entrepreneurship, enabling individuals to create wealth and employment opportunities. Business owners turn to estate planning attorneys to plan for the succession of their businesses; this protects the strength of this vital sector of the economy.

For many people, the most important asset is the family home. Families rely on estate planning advice to transfer clear title to their homes, often by will, and ensure that the home is given to family members who can preserve the family home and its value. Lack of access to competent estate planning services for homeowners can cause family fights about ownership and use, forced sale of the family home, clouds on title, difficulty with property expenses and upkeep, and expensive and time-consuming partition suits.

The nature of property is rapidly evolving. New assets, like cryptocurrency and non-fungible tokens, have just recently emerged and carry with them novel and complex questions about their retention, ownership, and transfer. Tax-advantaged assets, like qualified small business stock and qualified opportunity zone investments, require competent advice to be properly transferred during lifetime and death. Estate planning attorneys provide the advice needed to protect against the loss of value of these and other emerging forms of property.

Seniors and individuals with special needs face unique challenges when confronting incapacity, avoiding abuse, and getting access to essential care delivered through the Medicaid-funded system. Trust and estate law is the foundational knowledge for legal services that navigate the complexities of asset protection, guardianship, and specialized estate planning for our most vulnerable citizens – with stakes as high as ensuring access to life-saving government benefits and protecting seniors from the societal epidemic of elder financial abuse. The bar exam should require lawyers to have at least the basic knowledge of how to address the pressing concerns that reside at the intersection of aging, disability, financial exploitation, public benefits, and the needs of vulnerable citizens. As of 2022, there were approximately 58 million Americans aged 65 and older, and this number is projected to reach 82 million by 2050 and account for roughly 22% of the total population.¹³ People aged 85 and older represent the most rapidly expanding segment within this group. These demographics heighten the need for legal services, especially in the face of the alarming prevalence of Alzheimer's Disease. Alzheimer's Disease currently affects almost 7 million Americans, with that number expected to nearly

Thomson Reuters, *2021 State of Small Law Firms* (noting estate planning/probate as a core—and growing—solo/small-firm practice area).

¹³ 2023 National Population Projections Tables: Main Series, United States Census Bureau, Table 2: Projected Population by Age Group and Sex (census.gov)

double by 2050.¹⁴ With a profound impact on the healthcare landscape, legal competency and services in the areas of estate and incapacity planning are pivotal.

Estate planning and fiduciary litigation services, built on foundational knowledge in trust and estate law, are central to the effort to prevent, combat, and remedy the societal scourge of elder financial abuse. Over ten percent of elder Americans experience abuse each year. Older adults in the U.S. lose billions of dollars every year to perpetrators of financial exploitation. Financial abuse of the elder population is dramatically underreported, with an estimated 90% of cases going unreported.¹⁵ The Federal Bureau of Investigation reported 88,262 elder victims in 2022 totaling \$3.1 billion in losses, an 84% increase in losses from 2021.¹⁶ A True Link Financial report estimated the annual costs to be much higher, with \$16.99 billion lost to financial exploitation, \$12.76 billion lost to criminal fraud, and \$6.67 billion lost to caregivers or professional providers.¹⁷ The severe financial loss is not the only harm done, with financial exploitation of the elder population increasing, incidents of skipped medical care, reduced nutritional intake, depression, anxiety, and loss of independence.¹⁸

More than 70 million American adults, more than 1 in 4 of the nation's population, reported to be living with a disability.¹⁹ This is in addition to the one in six children aged 3 to 17 who have a developmental disability,²⁰ and the one in 36 children who have been diagnosed with autism spectrum disorder.²¹ As more individuals are diagnosed with developmental disabilities while life expectancies for this population continue to rise, the need for competent legal counsel takes on added urgency as does the need for a clear understanding of the interplay between aging and disability-related issues in accessing care. Lawyers must understand the concept of incapacity and the implications for decision-making. It is crucial for seniors and individuals with disabilities who may face challenges in making informed choices to have counsel who understand protective mechanisms that can be established, which can have a profound impact on extending individual autonomy. Estate planning and fiduciary litigation attorneys, with foundational knowledge in trust and estate law, provide the essential services to assist families in making decisions for those unable to do so themselves, and to individuals who are planning for that eventuality. These lawyers create plans to secure the financial well-being

¹⁴ Alzheimer's Disease Facts and Figures, Alzheimer's Association (<https://www.alz.org/alzheimers-dementia/facts-figures>)

¹⁵ The True Link Report on Elder Financial Abuse 2015, p. 4 (<http://documents.truelinkfinancial.com/True-Link-Report-On-Elder-Financial-Abuse-012815.pdf>)

¹⁶ Federal Bureau of Investigation Elder Fraud Report 2022, pp. 3, 5 (https://www.ic3.gov/AnnualReport/Reports/2022_IC3ElderFraudReport.pdf)

¹⁷ The True Link Report on Elder Financial Abuse 2015, at p. 1

¹⁸ *Id.*, at p. 18

¹⁹ CDC Data Shows Over 70 Million U.S. Adults Reported Having a Disability, Centers for Disease Control and Prevention News Release, July 16, 2024 (<https://www.cdc.gov/media/releases/2024/s0716-Adult-disability.html>)

²⁰ Developmental Disabilities, Environmental Public Health Tracking, Centers for Disease Control and Prevention (<https://www.cdc.gov/environmental-health-tracking/php/data-research/developmental-disabilities.html>)

²¹ Data and Statistics on Autism Spectrum Disorder, Autism Spectrum Disorder (ASD), Centers for Disease Control and Prevention (<https://www.cdc.gov/autism/data-research/index.html>)

of individuals with disabilities, preserve eligibility for government benefits and employment training programs, and enhance the quality of life for those with special needs. The bar exam must test trust and estate law as a Foundational Concept area so as not to cause a shortage of attorneys who can assist society's most vulnerable persons with the advice they need to plan for incapacity, deal with it when it arrives, ensure access to life saving governmental benefits, and protect them from abuse.

The dynamic of the modern family is increasingly unique and evolving. These changes reflect societal changes and represent the evolution of the family unit. From same-sex couples, mixed race couples, and single-parent families, to cohabitating couples who forego marriage or parenthood, today's family unit often breaks away from the traditional concept of what constitutes a "family." Poverty has a uniquely destructive effect on the LGBTQ+ community. When a family member dies without a will, the applicable state intestacy statutes – which vary widely and are often antiquated – fail to account for the makeup of the modern family and exacerbate the poverty problem in the LGBTQ+ community. Basic attorney competence in trust and estate law is a necessary tool in addressing these challenges and the needs of the modern family.

Estate planning services are crucial to individuals seeking to build families using assisted reproductive technology, which accounts for approximately two percent of all U.S. births.²² Despite the sharp increase in the use of assisted reproductive technology, state law has failed to keep pace with advances in reproductive science, leading to unintended results. Children who are born from donated sperm or eggs and are, therefore, not genetically related to one or both of their intended parents, may be unintentionally excluded as heirs. Only a few states have updated their laws to include children born to gestational carriers as children of their intended parents. Individuals who have cryopreserved sperm, eggs, or embryos also need estate planning advice to provide for the possibility of posthumously conceived children and for the disposition and use of cryopreserved material following their deaths. Assisted reproductive technology significantly impacts family building in the LGBTQ+ community, as well as for individuals undergoing cancer treatment that may impact fertility, and military servicemembers who may face fertility issues following deployment. Assisted reproductive technology is not, however, limited to those communities, with the World Health Organization identifying infertility as a global health problem affecting an estimated one in six people during their lifetime.²³

Americans are incredibly philanthropic and the United States is consistently ranked as one of the most generous countries in the world. Americans give almost \$500 billion to charities each year, most of that coming from individuals.²⁴ Wills and trusts are a central part of American philanthropy: In 2022, Americans gave \$45.60 billion to charity through bequests in their wills and trusts.²⁵ Basic competence in wills and trusts is essential to

²² Assisted Reproductive Technology (ART) Data, Centers for Disease Control and Prevention (https://nccd.cdc.gov/drh_art/rdPage.aspx?rdReport=DRH_ART.ClinicInfo&rdRequestForward=True&ClinicID=9999&ShowNational=1)

²³ 1 in 6 People Globally Affected by Infertility: WHO, World Health Organization News Release, April 4, 2023 (<https://www.who.int/news/item/04-04-2023-1-in-6-people-globally-affected-by-infertility>)

²⁴ Giving USA 2023: The Annual Report on Philanthropy for the Year 2022

²⁵ *Id.*

American charitable giving, much of which is accomplished through wills and trusts. Competent legal advice ensures that charitable giving goals are carried out as intended both during life and at death, increases the size and frequency of charitable gifts, involves younger generations in giving, and provides charities with essential guidance on good governance and compliance with trust and tax laws. Philanthropic Americans need competent legal assistance so they can keep helping the neediest and most vulnerable folks here and across the world.

More than a million probate and estate cases are filed in state courts every year. The Great Wealth Transfer, the nation's aging population, increasing rates of dementia, and the epidemic of elder financial abuse are pouring seemingly limitless fuel to the already roaring fire of fiduciary litigation in state and federal courts. By way of one example, the Florida reported a 50% increase in probate court filings in 2021 over the prior ten years, with one out of every five Florida circuit court filings being in the probate division.²⁶ Attorneys and judges with foundational knowledge in wills and trusts are critical to the efficient operations of the American legal system and preventing these powerful forces from wreaking havoc on families and court systems. The National College of Probate Judges ("NCPJ") is the only national organization exclusively dedicated to improving probate law and the probate courts. The NCPJ has asked that wills and trusts be tested as foundational knowledge areas on bar exams because family and probate jurisprudence constitute a large percentage of legal services lawyers provide to American citizens, it is vitally important that all lawyers have a basic understanding of probate jurisprudence, and American citizens have an expectation of competent legal counsel in the areas of probate jurisprudence. The NCPJ felt so strongly about its view that it submitted a unanimous Resolution to NCBE to restore wills and trusts as foundational knowledge areas on the NextGen Bar Exam. The NCPJ noted that, as probate judges, they "have seen firsthand the harm to individuals who are not competently and effectively represented, with such cases expected to increase exponentially, considering the lack of training which will come to pass were subjects of probate jurisprudence taken away from the exam." The NCPJ's concerns about the need for competent legal representation in will and probate matters are supported by malpractice statistics. Over the past ten years, the estates, trusts, and probate practice areas have been the source of approximately 10% of all malpractice claims.²⁷ Further, for the third consecutive year, insurers surveyed saw the largest numbers of malpractice claims related to trusts and estates.²⁸ One Ames & Gough officer observed that "[w]e're seeing the largest generational transfer of wealth in history, so in terms of sheer volume alone it's not surprising that Trust & Estate has become a significant source of lawsuits."²⁹ Among legal malpractice errors, the survey

²⁶ Florida Office of the State Courts Administrator FY 2021-22 Statistical Reference Guide, p. 6-1 (<https://www.flcourts.gov/content/download/858897/file/2021-22-srg-chapter-6-probate-20230127.pdf>)

²⁷ ABA Releases Data Study Analyzing Trends in Legal Malpractice Claims from 2016 to 2019, American Bar Association, September 28, 2020 (<https://www.americanbar.org/news/abanews/aba-news-archives/2020/09/aba-releases-data-study-analyzing-trends-in-legal-malpractice-cl/>)

²⁸ U.S. Legal Malpractice Claims Unremitting as Law Firms Grapple with Economic Woes, Social Inflation, Attorney Migration, Ames & Gough News Release, May 18, 2023 (<https://amesgough.com/news-release-most-lawyers-professional-liability-insurers-report-paying-multimillion-dollar-claims/>)

²⁹ *Id.*

reported that “failure to know or properly apply the law” was one of the top causes of malpractice claims.³⁰

Wills and trusts are central to top areas of employment opportunity for newly admitted attorneys. Estate planning, trusts, and guardianships (sometimes organized under the incomplete moniker of “elder law”) are consistently ranked in the highest growth legal practice areas. Many trust and estate attorneys have been working nonstop since the pandemic, are being forced to turn away new clients, and are struggling to hire additional talent to meet the enormous and growing need for services.³¹ Big law firms are recognizing the demand for estate planning services and the practice area is returning to larger law firms.³² The American trusts and estates industry (trusts, estates, and agency accounts administered on behalf of beneficiaries) accounts for \$257 billion in revenue, almost 26,000 employees, and 4 million businesses, with industry growth in demand for fiduciary services powered by the aging American population, the effect of the pandemic, and increasing wealth.³³ Foundational knowledge in trust and estate law is also critical to lawyers serving rural communities. Rural communities are often “legal deserts” that suffer a severe lack of access to attorneys for fundamental legal services including drafting a will. Fifty-two U.S. counties have no lawyers, another 182 have only one or two lawyers, and 40% of all counties and county-equivalents in the United States have fewer than one lawyer for every 1,000 residents.³⁴ For rural communities, the few attorneys available to provide advice must be able to provide competent estate planning advice. In view of these powerful dynamics and the profound needs of the American legal system, it is unconscionable for a bar exam to cause a reduction in foundational legal competence and knowledge in wills and trusts.

NCBE responded to concerns about dropping wills and trusts by saying that from 2026 to 2028 there will be trust and estates concepts on every NextGen bar exam in a performance task and maybe also in integrated question sets. The problem is that for subjects included only on the foundational skills part of the Exam, examinees are provided with all the substantive information needed to answer the question, meaning the examinee will not need any prior knowledge or study in that area of the law to answer the question. When students are told, regrettably correctly, that they do not need any prior knowledge of wills and trusts to pass the NextGen Bar Exam, many simply will not take the courses. NCBE’s representations that foundational skills area inclusion will cause law students to elect study in wills and trusts is simply not correct. The NextGen Bar Exam will result in law schools producing generations of lawyers with no knowledge in an area of the law that is central to the lives of most people. Further, it is possible that some states

³⁰ *Id.*

³¹ Han, Yoonji and Cuccinello, Hayley, “Estate Lawyers are Working Around the Clock 7 Days a Week and Turning Away Clients as the Ultra-Rich Worry about their Money and Mortality,” *Business Insider*, June 7, 2021 (businessinsider.com)

³² Packel, Dan, “Trusts & Estates Work is Risk for Big Law. But It’s on the Rise.” May 18, 2022 (law.com).

³³ Trusts & Estates in the US – Market Research Report (2014-2029), IBIS World, last updated April 2024 (<https://www.ibisworld.com/united-states/industry/trusts-estates/1343/>)

³⁴ New ABA Profile of the Legal Profession Report Shines Light on Legal Deserts, Law School Debt, American Bar Association, September 28, 2020 (<https://www.americanbar.org/news/abanews/aba-news-archives/2020/07/new-aba-profile-of-the-legal-profession-report-shines-light-on-l/>)

adopting the NextGen Bar Exam will not use the foundational skills component of the Exam at all, which will wholly exclude wills and trusts from the exam. Relegation to merely the foundational skills area also signals incorrectly to law students and law schools that wills and trusts, which are certainly “foundational” to the lives of all Americans, are no longer needed to serve clients competently.

This is not speculation, it’s already happening. Law schools are already tailoring their curriculum to prepare students for NCBE’s new test. If NCBE doesn’t reverse course, legal education and lawyer competence in wills and trusts are in serious jeopardy and at least, so far, NCBE does not seem concerned with this.

This is not just a problem for wealthy families. This is everyone. This is rural communities with severe lack of estate planning services that live in what’s called legal deserts. This is protecting and passing on people’s biggest asset, their home. This is about aging with dignity and safety. This is about protecting the more than 60 million Americans 18% of the nation’s population who are living with a disability and who need help with decision-making and getting access to care. This is about reducing the wealth gap and inheritance gap for Black and Hispanic families to address the systemic issues preventing families from building up wealth and economic power. Lack of access to estate planning aggravates systemic racial inequity; more estate planning competence in Black and Hispanic communities can address this issue. This is for parents having children with reproductive technology. This is about facilitating the building of the modern American family in all its new forms and supporting the LGBTQ community. This is not an us versus them issue that people can choose to ignore. It’s just us. It’s all of us together.

NextGen Development

The NextGen bar exam is based on the recommendations of the Testing Task Force (TTF) appointed by the NCBE. The TTF’s purpose is to “ensure that the bar examination continues to assess the minimum competencies required of newly licensed lawyers in an evolving legal profession, and to determine how those competencies should be assessed.”³⁵

The work of the TTF consisted of three phases: (1) listening sessions; (2) 2019 Practice Analysis; and (3) test content and design.³⁶ The listening sessions focused on the current bar exam and ideas for where to take it in the future.³⁷ Phase 2, the 2019 Practice Analysis, is a survey developed by the TTF (Phase 2 Survey). Phase 3 consisted of two committees: (1) the Blueprint Development Committee to decide the content of the exam;

³⁵ Final Report of the Testing Task Force, April 2021, p. 1 (<https://nextgenbarexam.ncbex.org/themencode-pdf-viewer/?file=https://nextgenbarexam.ncbex.org/wp-content/uploads/TTF-Final-Report-April-2021.pdf#zoom=auto&pagemode=none>)

³⁶ *Id.*, at p. 2

³⁷ Testing Task Force Phase 2 Report, March 2020, p. 1 (https://nextgenbarexam.ncbex.org/themencode-pdf-viewer/?file=https://nextgenbarexam.ncbex.org/wp-content/uploads/TestingTaskForce_Phase_2_Report_031020.pdf#zoom=auto&pagemode=none)

and (2) the Test Design Committee to determine how to test the content.³⁸ Phase 2 and the Blueprint Development Committee of Phase 3 are the portions of the TFF’s process relevant to this Resolution.

Phase 2, the 2019 Practice Analysis

The Phase 2 Survey (“the Survey”) is intended “to provide empirical data on the job activities of newly licensed attorneys”.³⁹ Participants consisted of attorneys who practiced 3 years or less and attorneys who supervised attorneys with less than 3 years of practice. The TFF disqualified anyone who did not fit into one of these two categories.⁴⁰

Due to the nature of state-based attorney licensing and the lack of a centralized database of attorneys, the TFF had to allow any eligible attorney to complete the Survey (as opposed to presenting the Survey to a randomized sample).⁴¹ To help ensure the Survey is representative of the U.S. attorney population, the TFF compared the results to the 2019 ABA Profile of the Legal Profession (ABA Profile).⁴² The Testing Task Force Phase 2 Report concludes, “It can be seen from these demographic comparisons that the practice analysis survey respondents generally were representative of the population of U.S. lawyers based on the ABA Profile”⁴³

But the data tells a different story. Table A.2 of the TFF’s Phase 2 Report shows the primary practice setting for the respondents to Survey.⁴⁴ The only data remotely comparable in the ABA Profile is a table showing Law School Graduate Employment Outcomes 10 months after Graduation.⁴⁵ Admittedly comparable nationwide data on the primary practice setting for attorneys is difficult to obtain.

To provide a further comparison, this Report includes data from the 2022 Annual Report of the Illinois Attorney Registration and Disciplinary Committee (IL ARDC Report)⁴⁶ and the National Association for Law Placement’s (NALP) “Jobs & JDs: Employment for the Class of 2022” report (Jobs & JDs)⁴⁷. Similar to the ABA Profile, Jobs & JDs measures the employment 10 months after graduation. The IL ARDC Report contains the primary practice setting for all active attorneys practicing in Illinois.⁴⁸ The following table compares the four sets of data:

³⁸ Phase 3 Report of the Testing Task Force, November 2020, p. 1 (<https://nextgenbarexam.ncbex.org/themencode-pdf-viewer/?file=https://nextgenbarexam.ncbex.org/wp-content/uploads/TFF-Phase-3-Report-110420.pdf#zoom=auto&pagemode=none>)

³⁹ Testing Task Force Phase 2 Report, at p. 1

⁴⁰ *Id.*, at p. 3

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*, at p. 14

⁴⁴ *Id.*, at p. 37

⁴⁵ ABA Profile of the Legal Profession, p. 86

⁴⁶ 2022 Annual Report of the Illinois Attorney Registration and Disciplinary Committee, April 2022 (<https://www.iardc.org/Files/AnnualReports/AnnualReport2022.pdf>)

⁴⁷ Jobs and JDs: Employment for the class of 2022, October 2023, p. 5 (<https://www.nalp.org/uploads/Classof2022SelectedFindingsReport.pdf>)

⁴⁸ *Id.*, at p. 45

Practice Setting	Phase 2 Survey	ABA Profile – 10 Months After Graduation⁴⁹	NALP Jobs & JDs (2022)	IL ARDC Report
Solo Practitioner	14.4%	1.1%	--	17.1%
In-House / Business	13.9%	11.5%	9.8%	15.5%
Private Law Firm	43.9%	46.6%	58.0%	49.3%
Legal Services/Public Interest ⁵⁰	7.1%	6.3%	10.6%	6.2%
Judicial (including Clerkship)	3.8%	9.8%	10.1%	--
Government	16.9%	12.1%	11.4%	11.9% ⁵¹

Notably when comparing the Survey to the other sources of data, attorneys whose primary practice setting is government are overrepresented and attorneys in private law firms are underrepresented. While the TFF discusses demographic comparisons to the ABA Profile, no mention is made of the 2.7% difference in attorneys in private law firms or the 4.8% difference in attorneys in government settings between the Survey and the ABA Profile shown in the table above.⁵² And the differences in these two practice settings increases significantly when comparing the Survey to the NALP Jobs & JDs and the Illinois ARDC Report.

These differences in practice settings have real consequences on the data collected. For example, 21.7% of respondents reported practicing administrative law making it the 4th most common practice area.⁵³ By comparison, the ABA released its 2022 Practice Forward Report where only 4% of respondents reported administrative law as the area of law where they spend most of time practicing.⁵⁴ We believe this surge in attorneys

⁴⁹ The ABA Profile lists 7.3% of attorneys unemployed 10 months after graduation.

⁵⁰ Legal Services/Public Interest includes academia/education from the ABA Profile, NALP Jobs & JDs, and IL ARDC Report and an “other” category from the IL ARDC Report

⁵¹ The IL ARDC Report combines Government and Judicial into one category.

⁵² Testing Task Force Phase 2 Report, at pp. 13-15

⁵³ *Id.*, at p. 41

⁵⁴ 2022 Practice Forward Report: Where Does the Legal Profession go from Here?, p. 7 (<https://www.americanbar.org/content/dam/aba/administrative/law-practice-division/practice-forward/2022-practice-forward-report.pdf>). Admittedly, there are significant differences between the practice area selection in these two studies. First, the Phase 2 Survey encouraged respondents to select practice areas where the respondents spent at least 5% of their time. As a result, the average respondent selected 4.6 practice areas. The 2022 Practice Forward Report required respondents to select only one practice area. Second, the 2022 Practice Forward Report includes civil litigation as a practice area. The Phase 2 Survey

practicing in administrative law in the Survey is the result of the overrepresentation of government attorneys.

The Survey also shows 15.1% of respondents reported practicing in trust and estate law.⁵⁵ The TFF readily recognizes that trust and estate law is among “the types of service likely to be needed by the typical consumer and areas that are also common to lawyers in small or solo practices.”⁵⁶ Because the Phase 2 Survey underrepresents attorneys in private practice who are more likely than attorneys in government settings to work directly with consumers, the 15.1% reported for trust and estate law in the Phase 2 Survey does not accurately reflect the percentage of attorneys throughout the United States who practice in this area.

Phase 3, Blueprint Development Committee

In Phase 3, the TFF enlisted a panel of 17 practicing lawyers from a variety of practice areas referred to as the Blueprint Development Committee (BDC). The BDC determined the knowledge and skills to include in the NextGen bar exam.⁵⁷ Before beginning, the BDC reviewed the primary purpose of the bar exam: “To protect the public by helping to ensure that those who are newly licensed possess the minimum knowledge and skills to perform activities typically required of an entry-level lawyer.”⁵⁸

To complete their task, the BDC is claimed to have relied heavily on the Survey.⁵⁹ For the knowledge content of the exam, the BDC began with a list of 25 knowledge areas and narrowed them to 11 areas to include on the exam. In addition to the content chosen outright, 6 other knowledge areas were subsumed into the 11 that were chosen.⁶⁰ Although trust and estate law tied family law for the 11th most common practice area in the Survey (despite concerns about the demographics of the survey mentioned above),⁶¹ trust and estate law was not among the 17 knowledge areas incorporated in the bar exam.⁶²

As stated above, the goal of the bar exam is to protect the public.⁶³ Trust and estate law affects 100% of the population. Literally everyone dies. The public expects attorneys to have a minimum level of knowledge in this practice area. Not testing it is a disservice to the public and to entry-level lawyers. It reinforces the stereotype that access to justice is not intended for most people, and the legal system is not testing entry-level attorneys to ensure they have the knowledge and skills to provide the services most people need.

actively avoided litigation as a practice area because it is impossible to distinguish a litigation matter from the area of law being litigated.

⁵⁵ Testing Task Force Phase 2 Report, at p. 41

⁵⁶ *Id.*, at p. 33

⁵⁷ Phase 3 Report of the Testing Task Force, at p. 2

⁵⁸ *Id.*

⁵⁹ *Id.*, at pp. 2-3

⁶⁰ *Id.* p. 18

⁶¹ Testing Task Force Phase 2 Report, at p. 41

⁶² Phase 3 Report of the Testing Task Force, at p. 18

⁶³ *Id.*, at p. 2

Instead, it gives the appearance that the NextGen bar exam is testing to ensure those who can hire the most lawyers have access to entry-level lawyers that understand their businesses' contractual and litigation needs. The enduring and resilient truth is that, since the outset of American academic legal study and today more than at any prior time in our history, the bar exam must ensure that lawyers are competent in the areas of trust and estate law - to serve all citizens and protect the public, including some of its most vulnerable people, protect homes, businesses, farms, and wealth, foster a diverse and inclusive society, support charities, and ensure access to justice. The legal services that are central to the lives of Americans should not be relegated to second-tier status, and left to disastrous do-it-yourself forms, private equity-backed technology, or – worse yet – being unavailable entirely. The bar exam cannot ensure that newly licensed attorneys possess the minimum knowledge and skills to perform activities typically required of an entry-level lawyer without testing trust and estate law as a Foundational Concept area. States should require testing of examinees in the areas of trust and estate law until NCBE restores it as a Foundational Concept area.

Summary

The ABA House of Delegates should adopt this Resolution urging the NCBE to include trust and estate law on the bar exam. The demographics of the lawyers surveyed in the Phase 2 Survey do not reflect the practice setting of most lawyers in the United States. The exclusion of trust and estate law as a Foundational Concept area is not supported by the results of the Survey, and it negatively portrays the legal profession as not intended to meet the needs of the general population.

Respectfully submitted,

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